



Registration Decision

Application name	Gumbaynggirr People #4
Name of applicant	Brett Tibbett, Lesley Taylor, Clive Ahoy, Vincent Cook, Ronald Moran, Roberta Skinner, Vicky Cameron, Gary Brown, Irene Laurie
Federal Court of Australia No.	NSD2284/2017
NNTT No.	NC2017/008
Date of Decision	2 February 2018

Claim accepted for registration

I have decided that the claim in the Gumbaynggirr People #4 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 sections 190, 190A, 190B, 190C, 190D of the Native Title Act 1993 (Cth) 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*)

Evans v Native Title Registrar [2004] FCA 1070 (*Evans*)

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*)

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (*Harrington-Smith (No 9)*)

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (*Lawson*)

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*)

Risk v National Native Title Tribunal [2000] FCA 1589 (*Risk*)

Sampi v State of Western Australia [2005] FCA 777 (*Sampi*)

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*)

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

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

Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

BACKGROUND

- [1] The application was filed on behalf of the Gumbaynggirr native title claim group. It covers three parcels of land and waters around Dalmorton in New South Wales.
- [2] The Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 22 December 2017 pursuant to s 63 of the Act.
- [3] The application has been made in response to two notices issued in relation to the grant of tenements (EL8118 and EL8273) in accordance with s 29 of the Act with a notification date of

4 October 2017. The application was filed within the three month timeframe over the area affected by the future act notices 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 4 February 2018.³

- [4] 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.⁴ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁵
- [5] 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.⁶

Information considered

[6] 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 12 January 2018;
- the geospatial assessment prepared by the Tribunal's Geospatial Services on 17 January 2018; and
- 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)

[7] 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?

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

³ See s 190A(2)

⁴ See 190A(6).

⁵ See 190A(6B).

⁶ Section 190A(6).

⁷ *Doepel* at [16], [35] – [37] and [39].

[9] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of 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?

[10] 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)

[11] 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.⁸ 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)

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

Applications authorised by persons: s 61(4)

[13] 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)

[14] 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). I note that one of the persons comprising the applicant is deceased, and therefore no affidavit has been provided by this person, but I note that it was authorised by the native title claim group that in these circumstances, the remaining persons shall proceed as the applicant.⁹ This approach in the remaining persons acting as the applicant has been accepted by the Court.¹⁰

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)

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

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

⁸ At [1].

⁹ Attachment R(6) at [29].

¹⁰ See for instance *Doolan* at [57], [59] and [60].

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

- [17] Schedule D indicates that no searches have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application of which the applicant is aware.

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

- [18] 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.

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

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

Activities: s 62(2)(f)

- [20] Schedule 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)

- [21] Schedule H provides that there are no other 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 determination of compensation in relation to native title of which NTSCORP is aware.

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

- [22] Schedule HA indicates that 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 application area.
- [23] Schedule I and Attachment I provide details of two notices issued under s 29 that have been given and that relate to the whole or part of the application area.

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

- [24] As indicated in my reasons below, the application satisfies the condition of s 190C(3).
- [25] 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).¹¹
- [26] 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

¹¹ *Strickland FC* at [9].

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]’.¹² 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.¹³

- [27] 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.
- [28] I also note that in assessing this requirement, I am able to address information which does not form part of the application.¹⁴
- [29] 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).
- [30] 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.
- [31] 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)

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

What is required to meet this condition?

- [33] 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.
- [34] Schedule R indicates that the application has not been certified. I must therefore consider whether the requirements of s 190C(4)(b) are met.

Does the application contain the information specified in s 190C(5)?

- [35] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b). Section 190C(5) provides that the application must include a statement to the effect that the requirement set

¹² At 29.25.

¹³ At 35.38.

¹⁴ *Doepel* at [16].

out in s 190C(4)(b) has been met and briefly set out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

[36] In my view, Schedule R includes a statement to the effect that the requirement in s 190C(4)(b) has been met and a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met.¹⁵ I assess whether the material provided addresses those requirements below.

[37] I note that the following statement is made in Schedule R of the application:

- (a) The individuals who jointly comprise the applicant are members of the Native Title Claim Group and were authorised to make the application and to deal with all matters arising in relation to it at a meeting of the Native Title Claim Group held on 23 October 2017 at Valla Beach, New South Wales.
- (b) The grounds upon which the Registrar should consider this statement to be correct are:
 - (i) The meeting held on 23 October 2017 at Valla Beach followed a process of consultation with members of the Native Title Claim Group by officers of NTSCORP LTD and by Native Title Claim Group members themselves.
 - (ii) Notice of the meeting held on 23 October 2017 at Valla Beach was provided to members of the Native Title Claim Group by correspondence, fax and telephone contact by officers of NTSCORP LTD and communicated between claim group members. Public notice was also given through an advertisement placed NTSCORP in the Koori Mail [sic].

[38] In my view, the above constitutes a statement to the effect that the requirement in s 190C(4)(b) has been met and a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met. I assess whether the material provided addresses those requirements below.

What is required to meet the condition at s 190C(4)(b)?

[39] I understand that:

- s 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which ‘clearly ... involves some inquiry through the material available ... to see if the necessary authorisation has been given’;¹⁶
- this condition requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group;¹⁷
- this condition is not ‘to be met by formulaic statements in or in support of applications’;¹⁸
- pursuant to s 251B, if there is a traditionally mandated decision making process, then that process must be followed to authorise the applicant, otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group.¹⁹

¹⁵ At [1] – [3].

¹⁶ *Doepel* at [78].

¹⁷ *Wiri People* at [21], [29] and [35]; see also *Risk* at [60].

¹⁸ *Strickland* at [57].

¹⁹ *Harrington-Smith (No 9)*; see also *Evans* at [7].

What information has been provided in support of this condition?

[40] In addition to Schedule R, further authorisation material is contained in Attachments R(1) to R(6).

[41] Attachment R(6) provides the following information about the authorisation meeting:

- A meeting of the native title claim group was held on 23 October 2017 at Valla Beach, New South Wales.²⁰
- The notice of the meeting contained information about the date, time and location of the meeting, a map showing the proposed application area and agenda for the meeting, and invited the Gumbaynggirr and any other person claiming to hold native title rights and interests in the claim area to attend the meeting.²¹
- The meeting notice was sent by registered post to all Gumbaynggirr people, consisting of about 360 members, for whom NTSCORP had a postal address.²²
- The meeting notice was published in the Koori Mail on 4 October 2017.²³
- Numerous NTSCORP staff made and received a number of telephone calls to and from members of the native title claim group in preparation for the meeting.²⁴
- NTSCORP provided assistance to Gumbaynggirr to attend the meeting, including providing accommodation costs of invitees not residing in the local area and travelling long distances, mileage payments for the travel costs of persons travelling certain distances, and cost of meals.²⁵
- NTSCORP staff chaired the meeting, provided advice, made presentations to the group and assisted with logistical arrangements.²⁶ A senior research anthropologist from NTSCORP also attended the meeting.
- Attendance records taken by NTSCORP staff indicate that 62 people attended.²⁷
- Resolutions were put to and discussed by those in attendance. It was resolved by majority that an agreed and adopted decision making process should be used during the meeting, as there was no particular process of decision making under traditional laws and customs that must be complied with, and all decisions were made using that process.²⁸ This decision making process involved, among other things, general discussion of the issues guided by people who are culturally associated with the claim area, a clearly worded motion reflecting the general consensus being read to the meeting, the motion moved

²⁰ At [6].

²¹ At [7] and Annexure 'JT-1'.

²² At [8] – [10].

²³ At [11] and Annexure 'JT-2'.

²⁴ At [12].

²⁵ At [13] – [14].

²⁶ At [16].

²⁷ At [17].

²⁸ At [25].

and seconded by members of the claim group, decision then made by members of the claim group by a show of hands, and decisions made by majority vote and being binding.

- The resolutions passed included:
 - There was sufficient notice of the meeting and there was sufficient representation at the meeting of the traditional owners of the proposed claim.²⁹ Those in attendance were representative of members of their family who were unable to attend, and their families and elders were aware of the meeting and were consulted about the issues for discussion. The people in attendance represented the views of their elders and those who could not attend.
 - The name of the claim group for the proposed claim and the claim group description.³⁰
 - Identification of the claim area.³¹
 - The native title rights and interests that would be claimed in the application.³²
 - Authorisation of the persons comprising the applicant to make the application and to deal with matters arising in relation to it.³³

[42] Attachments R(1) to R(5) provide further details confirming the above information.

Have the requirements of s 190C(4)(b) been met?

[43] I note that the first limb of s 190C(4)(b) requires that all the persons comprising the applicant must be members of the native title claim group.

[44] In each of their affidavits, the persons who jointly comprise the applicant depose that they are members of the native title claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

[45] In respect of the second limb of s 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified.³⁴

[46] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. Attachment R(6) and the affidavits of the persons comprising the applicant indicate that the claim group does not have a decision making process that is traditionally mandated and therefore an agreed and adopted process was used during the authorisation meeting. Given this information, I have considered the applicant's material in light of the requirements of s 251B(b).

[47] In particular, I understand that the 'effect of the section is to give the word "all" [in s 190C(4)(b)] a more limited meaning than it might otherwise have' and that it 'is sufficient if a

²⁹ At [24].

³⁰ At [26] – [27].

³¹ At [27].

³² At [28].

³³ At [29].

³⁴ *Doepel* at [78]; *Wiri People* at [21], [29] and [35].

decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process'.³⁵

[48] I also understand that the following questions are required to be addressed about the authorisation process although it is not required they be answered in any formal way as long as the substance of these questions are addressed:

Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?³⁶

[49] In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meeting. It indicates that all reasonable steps were taken to advise members of the native title claim group of the authorisation meeting, which included by public notice, letters and telephone calls, and the notice indicates that the claim group members were advised of the date, time, place and purpose of the meeting. The information also shows that the persons who were present at the meeting were given a reasonable opportunity to participate in the decision making process. In my view, the conduct of the meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was inclusive allowing those present an opportunity to participate and have their votes count. For instance, the claim group members who were present were able to participate through discussion and vote by a show of hands. The facts indicate that the persons who attended the meeting were sufficient to make decisions on behalf of the claim group. The resolutions were passed, including the authorisation of the persons comprising the current applicant to make the application and to deal with matters arising in relation to it.

Decision

[50] In my view, the process adopted ensured that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it. It follows that I am satisfied that the condition of s 190C(4)(b) is met.

³⁵ *Lawson* at [25].

³⁶ *Ward* at [24], cited in *Lawson* at [26].

Merits of the claim (s 190B)

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

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

What is needed to meet this condition?

[52] 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?

[53] Schedule B describes the application area as those lands and waters which are subject to Exploration Licence 8188 and Exploration Licence 8373. That schedule also lists some general exclusions.

[54] Attachment C is a copy of a map prepared by the Tribunal's geospatial services. The map includes the application area depicted by a bold outline, Old Glen Innes Grafton Road, Township of Dalmorton, scalebar, coordinates, and notes relating to the source and datum of data used to prepare the map.

Decision

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

[56] 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)

[57] 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)).

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

- I am required to address only the content of the application;³⁷
- 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',³⁸
- 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';³⁹

³⁷ *Doepel* at [51] and *Gudjala 2007* at [30].

³⁸ *Gudjala 2007* at [33].

- 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'.⁴⁰

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

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

- persons who are biological descendants of a list of apical ancestors;
- persons who have been adopted into the families of those persons and the biological descendants of such adopted persons; and
- persons who have otherwise been incorporated, or who are direct descendants of a person who has been otherwise incorporated, as a member of the claim group and who identify as and are accepted as a Gumbaynggirr person, in accordance with traditional laws and customs.

[60] 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.

Consideration

[61] Although there are a number of elements to the claim group description, I am of the view that this description is to be read as a discrete whole.⁴¹

[62] I will discuss each criteria 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.

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

Descent

[64] I understand the first criterion to include those persons who are the biological descendants of the apical ancestors listed. Describing a claim group in this manner is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b).⁴²

[65] I consider that requiring a member to show biological descent from an identified ancestor provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group.

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

Adoption

³⁹ *Gudjala 2007* at [34].

⁴⁰ *WA v NTR* at [67].

⁴¹ *Gudjala 2007* at [34].

⁴² See *WA v NTR* at [67].

[67] In respect of membership by adoption, I note that the Court has accepted the approach of identifying members of the native title claim group by biological descendants, *including by adoption*, of named people without any qualification indicating whether the method of adoption of persons was according to traditional laws and customs.⁴³ I note Attachment A provides the rules by which a person can be part of the Gumbaynggirr claim group by way of adoption.

[68] In light of the above, I am of the view that the description of this criterion is sufficient to ascertain, after some factual inquiry, the persons who are the adopted descendants of the apical ancestors.

Incorporation

[69] Attachment A provides the rules or objective test by which a person can be incorporated into the Gumbaynggirr native title claim group.

[70] 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.⁴⁴ The Court 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'.⁴⁵ The High Court in *Yorta Yorta* found that the existence of a society depended upon mutual recognition within the group. 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'.⁴⁶

[71] Attachment T(1) is the native title determination, *Phyball on behalf of the Gumbaynggirr People v Attorney-General of NSW* [2014] FCA 851 and Attachment T(2) is the native title determination, *Kelly on behalf of the Gumbaynggirr People v Attorney-General of NSW* [2017] FCA 1459, where the consent determination orders note the same claim group description as in this application.

[72] In light of this, and that objective points of reference have been provided, I am satisfied this part of the description is described sufficiently clearly in order to ascertain whether any particular person is a member of the group.

Conclusion

[73] 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).

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

⁴³ At [67].

⁴⁴ *Aplin* at [256] and [260].

⁴⁵ At [256].

⁴⁶ At [45].

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

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

What is needed to meet this condition?

[76] 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.⁴⁷

[77] 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’.

[78] 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)’.⁴⁸

[79] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.⁴⁹

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

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

[81] 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.

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

What is needed to meet this condition?

[82] 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.⁵⁰

[83] 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

⁴⁷ *Doepel* at [91], [92], [95], [98] to [101] and [123].

⁴⁸ *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.

⁴⁹ *Doepel* at [16].

⁵⁰ *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.⁵¹

[84] 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.⁵²

[85] 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).

[86] The factual basis material is contained in Attachment F and the additional material provided, including a historical summary prepared by NTSCORP senior historian (historical summary), anthropological outline prepared by NTSCORP senior research anthropologist (anthropological outline) and an affidavit of a Gumbaynggirr woman dated 19 December 2017 (affidavit of 19 December 2017).

[87] 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)?

[88] 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';⁵³
- that the predecessors of the group were associated with the area over the period since sovereignty;⁵⁴ 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'.⁵⁵

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

[89] 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 vicinity of the town of Dalmorton, on the mid-coast of New South Wales and consists of three areas of land of approximately 29 square kilometres.⁵⁶ Anthropological opinion is that the traditional Aboriginal owners of the application area are the Gumbaynggirr.⁵⁷
- Archaeological records indicate that Aboriginal occupation of the general region of the application area goes back several thousand years.⁵⁸ The region is located within an ecological zone used and occupied by Aboriginal people for thousands of years.⁵⁹

⁵¹ *Gudjala FC* at [92].

⁵² *Gudjala 2009* at [28] and [29] and *Anderson* at [43] and [48].

⁵³ *Gudjala 2007* at [52].

⁵⁴ *Gudjala 2007* at [52].

⁵⁵ *Martin* at [26]; see also *Corunna* at [39] and [45].

⁵⁶ Anthropological outline at [22].

⁵⁷ At [28].

⁵⁸ At [25].

- The historical material indicates that the Gumbaynggirr people have occupied the application area and its vicinity since the arrival of Europeans in the 1840s through to the mid-1950s.⁶⁰ The Aboriginals resisted the presence of Europeans and competed with them for the scarce resources, such as water. Resistance subdued after the police presence disbanded in 1859.⁶¹ The historical material also suggests the ongoing practice of rights and interests, including the right to fish, hunt and conduct ceremonies in and around the application area.
- A camp on Dalmorton station in 1872 was populated with Aboriginal people who came from near the northern boundary.⁶²
- Aboriginal people from around the application area participated in ceremonies in the late 19th century.⁶³ For instance, people from the area attended an initiation ceremony held south of the application area in 1870.
- Several Aboriginal reserves were created around the application area in the early 1900s, including one near the southeastern region, another near the northeastern region and another near the eastern region.⁶⁴ Many residents engaged in fishing to obtain food. Residents at the reserve near the eastern region included families descended from apical ancestors Fred and Mary Briggs, John ‘Jack’ Long, Bidy, Walter Smith and Stella Jane Davis, Billy Lardner Jnr, Clara Skinner, Mick McDougall, Mary Jane Ferguson, Charles Layton and Elizabeth ‘Kitty’ Campbell/Cameron (known as Elizabeth Blakeney).⁶⁵ Residents at the reserve near the northeastern region include families descended from apical ancestors Nobby Neville and Emily Sutton, Fred Hookey, Sylvie Craig, Dave Ballangarry, Fanny Purapine and Susan (mother of Charles Jarrett Snr), parents of Charlie Whitton and Lucy Larrigo (nee Whitton), Lucy Flanders and Elizabeth ‘Kitty’ Campbell/Cameron (known as Elizabeth Blakeney), Darby Kelly, Rose Taylor and father of Maggie Kelly’s mother Bidy.⁶⁶
- The descendants continued to live at Dalmorton in the 1920s, with some claimants living there and getting married near the northeastern region.⁶⁷
- Of relevance to the association of some of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
 - Apical ancestor King Bobby and his family camped at a station near the southwestern boundary for many years, some time prior to the 1880s or 1890s.⁶⁸ He was born around 1808 and died near the southwestern region around 1910. One of his sons was born in or around the eastern boundary of the application area in about 1866.⁶⁹ Another son

⁵⁹ At [26].

⁶⁰ Historical summary at [14].

⁶¹ At [4].

⁶² At [5].

⁶³ At [7].

⁶⁴ At [8] and [10].

⁶⁵ At [9].

⁶⁶ At [10].

⁶⁷ At [12].

⁶⁸ Anthropological outline at [154].

⁶⁹ Historical summary at [4].

lived and worked at a pastoral station located proximate to the southwestern boundary.⁷⁰ His grandson worked as a tracker around the eastern region in 1912.

- Apical ancestor Jane Gard/Maskey was born near the northeastern region in 1857 and died near the eastern region in 1928.⁷¹ She lived and worked near the northwestern boundary of the application area from the late 1870s.⁷² One of her daughters was born at Dalmorton in about 1880 and was married near the northeastern region.⁷³ Her other children also married near the northeastern region. The family sometimes went hunting near the northwestern region.⁷⁴
- Davy Cowling and Maggie Buchanan lived around the northeastern region in 1895.⁷⁵
- Fred Briggs was possibly born near the eastern region around 1867 and was employed as a tracker near the southeastern region in 1932.⁷⁶ He had knowledge of sacred sites around the eastern region.⁷⁷
- John 'Jack' Long was born near the eastern region around 1850.⁷⁸ After settlement he remained in and worked in the area. He was also buried in that region. His granddaughter continued to be connected to the area and had extensive knowledge of its spiritual geography.⁷⁹ Through his granddaughter, his descendants continue to be associated with this area.
- Apical ancestor Charles Layton was from near the eastern region and was born in that area in about 1862.⁸⁰ He was a ceremonial boss and used ceremonial trails linking to other parts of Gumbaynggirr country.⁸¹
- Elizabeth 'Kitty' Campbell/Cameron (known as Elizabeth Blakeney) was from near the northeastern region and was associated with totemic increase sites in that area.⁸²
- Mary Jan Ferguson was from the area near the eastern region and was born around 1840.⁸³
- Billy Lardner Jnr was born near the eastern region around 1859 and his son was also born there in around 1879.⁸⁴

⁷⁰ At [5].

⁷¹ Anthropological outline at [165].

⁷² Historical summary at [5].

⁷³ Historical summary at [5] and Anthropological outline at [165].

⁷⁴ Historical summary at [5].

⁷⁵ At [11].

⁷⁶ Anthropological outline at [131] and historical summary at [13].

⁷⁷ Anthropological outline at [131].

⁷⁸ At [128].

⁷⁹ At [127].

⁸⁰ At [136].

⁸¹ At [137].

⁸² At [143].

⁸³ At [150].

⁸⁴ At [151].

- Current members of the Gumbaynggirr People are genealogically descended, either biologically or through adoption or incorporation, from the apical ancestors identified in Schedule A.⁸⁵
- The claimants continue to use and occupy the application area.⁸⁶ Current claim members continue to visit sacred sites around the central and eastern regions.⁸⁷ They continue to camp at the river that runs near the central and southern regions where they hunt, fish and catch freshwater turtle, catfish and perch.⁸⁸ The claim members also camp, hunt and fish at another river that runs through near the northern and central regions.⁸⁹
- Members of the claim group continue to have a spiritual association with the application area and have knowledge of totemic increase sites and initiation grounds near the application area, including around the eastern region.⁹⁰ The continued acknowledgement of these sites dictates where current claimants camp on country in order to stay away from men's and women's sites and areas inhabited by malevolent spirits.⁹¹ The claimants continue to have knowledge of Dreaming stories and of areas associated with those stories, such as near the southern region and another near the northwestern region.⁹²
- Knowledge of traditional laws and customs are passed from generation to generation through traditional modes of oral transmission, teaching, observation and common practice.⁹³

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?

[90] 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'⁹⁴. 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)'.⁹⁵ 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, being both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of their

⁸⁵ At [168].

⁸⁶ At [32].

⁸⁷ Affidavit of 19 December 2017 at [14], [16] and [21].

⁸⁸ At [39] and [42].

⁸⁹ Attachment F at [42] – [43].

⁹⁰ Anthropological outline at [29] and affidavit of 19 December 2017 at [23].

⁹¹ Anthropological outline at [30] – [31].

⁹² Attachment F at [7] and affidavit of 19 December 2017 at [9].

⁹³ See for instance Anthropological outline at [87].

⁹⁴ *Gudjala 2007* at [40].

⁹⁵ At [39].

traditional land and waters including sacred sites, such as those associated with dreamings, totemic increase sites and initiations grounds.

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

[91] 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.⁹⁶ The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of European contact, which I understand to have occurred in the 1840s. For instance, apical ancestor King Bobby was born around 1808 and one of his sons was born around the eastern boundary of the application area in the 1860s. He and his family camped near the southwestern boundary for many years to the late 1800s and he died near the application area around 1910. John 'Jack' Long was born near the eastern region around 1850. After settlement, he remained and worked in the area and is also buried in this region. His granddaughter continued to be connected to the area and had extensive knowledge of its spiritual geography. Through his granddaughter, his descendants continue to be associated with this area. The descendants of the other apical ancestors have continued to remain associated with the application area and continue to use and occupy the land, and to camp, hunt and fish in and around the application area.

[92] The factual basis is also sufficient to support the assertion that the native title claim group have a spiritual association with the application area and is sufficient to show the history of that association. The native title claim group have knowledge of the dreaming stories and the associated sites as well as other sacred places, such as totemic increase sites and initiation grounds, in and around the application area. The claimants are taught traditional laws and customs from their immediate predecessors through oral transmission and other traditional teaching so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the native title claim group have with the application area.

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

[93] 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. I note that the application area is not very large. Apical ancestors Billy Lardner Jnr and his son, Fred Briggs, John 'Jack' Long and Charles Layton were born around the eastern region and Mary Jan Ferguson was from there. John 'Jack' Long was also buried around the eastern region. King Bobby died near the southwestern region and one of his sons worked there. Ancestors Jane Gard/Maskey was born around the northeastern region and some of her children were married there. Davy Cowling and Maggie Buchanan lived around this area and Elizabeth 'Kitty' Campbell/Cameron (known as Elizabeth Blakeney) was from there. Jane Gard/Maskey worked near the northwestern region and her family went hunting in this area. Fred Briggs was employed as a tracker near the southeastern region. Current claimants continue to acknowledge totemic increase sites and initiation grounds such as around the eastern region and have knowledge of areas associated with the dreaming

⁹⁶ *Gudjala 2007* at [51].

stories, such as near the southern region and the northwestern region. Current claimants continue to visit sacred sites near the central and eastern regions and camp and fish at the rivers that run near the northern, central and southern regions.

[94] 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’.⁹⁷ 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

[95] 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)?

[96] 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’.⁹⁸

[97] 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;⁹⁹
- 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’;¹⁰⁰
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;¹⁰¹
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.¹⁰²

[98] 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:

⁹⁷ See *Gudjala 2007* at [52].

⁹⁸ See *Gudjala 2007* at [26] and [62] to [66].

⁹⁹ At [46] and [49]

¹⁰⁰ At [47]

¹⁰¹ At [46] and [79]

¹⁰² At [87].

- 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;¹⁰³
- 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;¹⁰⁴ 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).¹⁰⁵

What information has been provided in relation to the society?

[99] 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:

- Since sovereignty, there existed a society formed by Gumbaynggirr-speaking clan groups who held rights in and had responsibilities for a distinct territory which included the area subject to the application.¹⁰⁶ The society was distinct from neighbouring societies by reference to linguistic and social factors, such as their traditional laws and customs, social organisation and kinship, local organisation as well as belief in mythology and ceremonial life.¹⁰⁷
- Members of this society acknowledged and observed a common system of kinship and social organisation, which was matrilineal in principle and included principles of classificatory kinship, the division of society into four named sections and marriage rules.¹⁰⁸ Descent was also matrilineal in principle, however this was influenced by several factors such as place of birth and residence of individuals and their parents and the tribal/linguistic identification of each parent.¹⁰⁹
- The members of the society observed a common system of local organisation where Gumbaynggirr persons acquired rights and interests in their father's country.¹¹⁰ A person typically acquired primary rights in their father's local clan area. The relationship to land was both economic and spiritual, where spiritualisation of country included belief in the

¹⁰³ At [37] and [52]

¹⁰⁴ At [40].

¹⁰⁵ At [29], [54] and [69]

¹⁰⁶ Anthropological outline at [35] – [36].

¹⁰⁷ At [51].

¹⁰⁸ At [37] – [38] and [41] – [42].

¹⁰⁹ At [41].

¹¹⁰ At [39] – [40].

presence of ancestral spirits and various other protective and malevolent spirits and creatures in the environment and the presence of totemic increase centres on a clan group's estate.¹¹¹ Local organisation was based on maintaining the relationship between the local clan group and the totem site on its estate.¹¹² Spiritual connection to the estate and economic benefit through the productivity of country were maintained by the performance of increase rituals at the totemic sites by members of the local clan group or other knowledgeable persons. Marriage allowed people outside the local clan group, and even outside Gumbaynggirr country, to acquire responsibilities and rights in a particular tract of country.¹¹³

- The Gumbaynggirr shared a common set of laws and customs, a language and an identity based on the common creation myth.¹¹⁴ They maintained a rich ceremonial life which had many functions including maintaining knowledge and authority and also creating links to neighbouring tribes who participated in major initiation ceremonies held in each other's country.¹¹⁵ Ceremonial life played an important role in the initiation of clever men who attained a high ritual status, were believed to have supernatural powers and who played an important role in the transmission of knowledge and maintenance of law and order.¹¹⁶
- The members of this society remain connected to country through ongoing observation and transmission of the body of beliefs, mythologies, and laws and customs.¹¹⁷

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

[100] The factual basis contains the following relevant information about the traditional laws and customs acknowledged and observed by the native title claim group.

[101] The native title claim group continue to observe a kinship system like their predecessors did at settlement.¹¹⁸ The Gumbaynggirr still follow the principles of traditional marriage rules by not 'marrying close', in particular marriage to first and second cousins are prohibited.¹¹⁹

[102] Current claimants follow a system of local organisation based on descent from ancestors belonging to the original clans as well as factors such as long term residence, the acquisition of knowledge of country and spiritual responsibilities.¹²⁰ The Gumbaynggirr have evolved from the clans present at settlement to the current cognatic Gumbaynggirr group, however certain families continue to have strong associations to certain parts of Gumbaynggirr country.¹²¹ The parent that is followed for the purpose of attachment to country depends on factors including birth place, residence and the acquisition of cultural knowledge, particularly the spiritual content of country.¹²²

¹¹¹ At [43].

¹¹² At [44].

¹¹³ At [45] – [46].

¹¹⁴ At [50].

¹¹⁵ At [48].

¹¹⁶ At [49].

¹¹⁷ At [52].

¹¹⁸ At [55].

¹¹⁹ At [68].

¹²⁰ At [56].

¹²¹ At [56] – [58] and [62].

¹²² At [66].

Some individuals maintain multiple attachments to country of their ancestors in accordance with the laws and customs at settlement.

[103] The Gumbaynggirr continue to have a spiritual connection to country and have knowledge of the creation myth. Current members continue to believe that ancestral spirits and various protective and malevolent creatures inhabit the landscape and interact with the living.¹²³ Most members identify with and call on a number of totemic species as protectors and messengers.¹²⁴ The current claimants continue to have knowledge about traditional ceremonies and continue to believe that illness can be healed by supernatural means using the powers handed down by ancestors.¹²⁵

[104] Current claimants can speak Gumbaynggirr language or have knowledge of some Gumbaynggirr words.¹²⁶ They continue to hunt, fish, and gather resources on Gumbaynggirr country to get bush medicine and make items such as spears.¹²⁷ They also speak of following rituals such as in relation to food taboos.¹²⁸

[105] Knowledge of traditional laws and customs have been passed from generation to generation through observation, experience and being told by senior Gumbaynggirr people about the appropriate behaviour and protocols associated with traditional activities.¹²⁹

[106] 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?

[107] In my view, the factual basis identifies a relevant pre-sovereignty society in the application area, which consisted of the predecessors of the native title claim group. The factual basis indicates that the society had distinct linguistic and social factors, including their traditional laws and customs, social organisation and kinship, local organisation and territory to the neighbouring groups. The members observed a kinship system, the division of society into four named sections and had marriage rules. They observed a system of local organisation where a person acquired rights and interests in their father's country and primary rights in their father's local clan area. The members had a spiritual relationship to country including through belief in creation of sites and presence of spirits on country.

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

[108] In my view, the factual basis demonstrates that some of the ancestors were living within the application area, or were amongst the generation born to those who were living within the application area, at the time of European settlement. In this sense, I understand that the information supports the assertion that some of the apical ancestors were either born or living in

¹²³ At [70].

¹²⁴ At [69].

¹²⁵ At [71] – [72].

¹²⁶ At [61].

¹²⁷ At [77] and [82] and Attachment F at [29] and [41].

¹²⁸ Affidavit of 19 December 2017 at [32].

¹²⁹ Anthropological outline at [87].

and around the application area around the time of European settlement.¹³⁰ From the factual basis, I understand the current claim members are descendants of these ancestors.

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

[109] 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 members continue to follow a system of social organisation and kinship which governs marriage.

[110] The native title claim group observe a landholding system which is based on descent and factors such as long term residence, acquisition of knowledge of country and spiritual responsibilities. Family groups have traditional connections to certain areas within the wider Gumbaynggirr country and some individuals maintain multiple attachments to country of their ancestors in accordance with their laws and customs.

[111] The factual basis contains some information which speaks to the way the members of the claim group continue to perform traditional practices such as hunting, fishing and gathering natural resources for various, practices such as making spears. The claimants also continue to have knowledge of Gumbaynggirr words and follow rituals such as in relation to food taboos. 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.

[112] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants continue to have knowledge of dreaming stories and the associated sites and they also speak of ancestral spirits and various protective and malevolent creatures that inhabit their country and interact with the living. They identify with and call on totemic species as protectors and messengers. At certain places on country, they call out to the ancestors and other spirits to let them know of their presence and intentions. They also call out to their ancestors and protective totems to look after them on country and to increase food species.

[113] 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 word of mouth, observation and experience, 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 myths, Gumbaynggirr words, how to make spears and have knowledge of food protocols. 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 from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of European settlement.

Decision

¹³⁰ See *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above.

[114] 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)?

[115] 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.

[116] 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.¹³¹ 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.

[117] 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'.¹³²

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

[118] 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.

[119] The factual basis states that knowledge of traditional laws and customs has been passed from generation to generation through observation, experience and by being told by their local senior Gumbaynggirr people about the appropriate behaviour and protocols associated with traditional activities such as camping and fishing.¹³³

[120] 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.

¹³¹ *Martin* at [29].

¹³² *Gudjala 2009* at [33].

¹³³ Anthropological outline at [87].

Decision

[121] 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)

[122] 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?

[123] 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'.¹³⁴ 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'.¹³⁵

[124] I note that this section is one that permits consideration of material that is beyond the parameters of the application.¹³⁶

[125] 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).¹³⁷ 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.

[126] 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.¹³⁸

[127] 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'.¹³⁹ I also note that the phrase 'in relation to' is 'of wide import'.¹⁴⁰ 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.'

[128] 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).

¹³⁴ *Doepel* at [135].

¹³⁵ *Doepel* at [126], [127] and [132].

¹³⁶ *Doepel* at [16].

¹³⁷ *Gudjala* 2007 at [85].

¹³⁸ *Yorta Yorta* at [86] and *Gudjala* 2007 at [86].

¹³⁹ *Ward HC* per Kirby J at [577].

¹⁴⁰ *Alyawarr* at [93].

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

1. *The Gumbaynggirr People claim the following non-exclusive rights and interests, including the right to conduct activities necessary to give effect to them, in relation to [the] Application area:*

(a) the right to maintain and to protect from physical harm or desecration, places and areas of importance or significance under traditional laws and customs;

[130] The claim group members speak of their responsibility to look after country and make sure country does not get damaged.¹⁴¹

[131] It is my view that the factual basis material prima facie establishes that this right is possessed under the traditional laws and customs of the native title claim group.

(b) the right to access, to remain on, traverse and to use;

(c) the right to access natural resources in those areas and to take, use, share and exchange those natural resources for any purpose; and

(d) without limiting the generality of (a), (b) and (c) above:

(i) the right to hunt on, and gather natural resources from, those areas;

(ii) the right to fish in those areas;

(iii) the right to take and use water from those areas;

(iv) the right to live on those areas;

(v) the right to camp, and for that purpose to erect shelters and other structures, on those areas;

(vi) the right to light fires on those areas for domestic purposes;

(x) the right to share and exchange the natural resources on those areas; and

(xi) the right to manage the natural resources of those areas;

[132] The factual basis indicates that the claimants continue to access their country to live, camp, visit and travel over country.¹⁴² They continue to hunt kangaroos, birds, pademelons and any other animal present on the application area.¹⁴³ They gather honey and eggs and fish for mullet, perch and other river fish within the application area. The claimants take and use water to soak leaves for medicinal purposes and they light fires to cook food like kangaroos or for smoking to cleanse their body.¹⁴⁴ The claimants speak of sharing and trading food with neighbouring groups.¹⁴⁵

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

¹⁴¹ Attachment F at [16] and [18].

¹⁴² Anthropological outline at [88].

¹⁴³ At [77].

¹⁴⁴ Attachment F at [19], [29] and [34].

¹⁴⁵ At [17]

(d)(vii) the right to conduct and to participate in cultural and religious activities, practices and ceremonies, including the conduct of burials, on those areas;

(viii) the right to conduct and to participate in meetings on those areas;

(ix) the right to teach the physical, cultural and spiritual attributes of places and areas of importance under traditional laws and customs on those areas;

(e) the right to be accompanied on to those areas by persons who, though not native title holders, are:

(i) spouses, partners or parents of native title holders, together with their children and grandchildren;

(ii) people required under traditional laws and customs for the performance of cultural activities, practices or ceremonies; and

(iii) people requested by the native title holders to assist in, observe or record cultural activities, practices or ceremonies.

[134] The factual basis indicates that the claim members continue to perform smoking ceremonies to cleanse their bodies, and have knowledge of myths and associated sacred sites as well as other significant sites such as totemic increase sites and initiation grounds which they learn about from their predecessors.¹⁴⁶ The asserted facts also indicate that the claimants take people, such as national parks staff to see sacred sites on country.¹⁴⁷ They also take their family to country to visit, camp, hunt and fish.

[135] I consider these rights are prima facie established under Gumbaynggirr traditional laws and customs.

Physical connection – s 190B(7)

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

What is needed to meet this condition?

[137] 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.

[138] 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’.¹⁴⁸ 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’.¹⁴⁹

¹⁴⁶ Attachment F at [19 and Anthropological outline at [78].

¹⁴⁷ Affidavit of 19 December 2017 at [14].

¹⁴⁸ *Gudjala 2009* at [84].

¹⁴⁹ At [86].

[139] 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.¹⁵⁰

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

[140] 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.

[141] The factual basis contains relevant information that describe a traditional physical association of members of the claim group with the application area, including travelling over country, visiting sites, camping, hunting, fishing and performing other practices within the application area and surrounding country.¹⁵¹

[142] 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)

[143] 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.

[144] 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.

[145] 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).

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

[146] Schedule B of the application excludes any areas subject to an approved determination of native title. 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))

[147] Schedule B indicates that areas subject to a previous exclusive possession act are excluded from the application.¹⁵²

¹⁵⁰ *Doepel* at [18].

¹⁵¹ See for instance Attachment F at [30] – [43].

¹⁵² At [2].

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

[148] Schedule E states that the native title rights and interests claimed do not confer possession, occupation, use or enjoyment of the lands and waters of the application area to the exclusion of all others.¹⁵³

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

[149] 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).

[150] 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))

[151] Schedule Q provides that the applicant does not claim ownership of 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))

[152] Schedule P states that the applicant does not make a claim for exclusive possession of all or part of an offshore place.

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

[153] 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

¹⁵³ At [2].

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Gumbaynggirr People #4
NNTT No.	NC2017/008
Federal Court of Australia No.	NSD2284/2017

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:

22 December 2017

Date application entered on Register:

2 February 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 follows:

1. Area covered by application

Those lands and waters are the areas which are subject to Exploration Licence 8118 and Exploration Licence 8273, located about 53km WSW of Grafton in the Dalmorton vicinity, within the Clarence Valley Council Local Government area.

2. Subject to (3) and (4) below, the areas of land and waters within the boundaries referred to in (1) above that are not covered by the application are:

(a) Any area that is, or was, subject to any of the following acts as defined in the Native Title Act 1993 (Cth) or Native Title (New South Wales) Act 1994 (NSW):

i. Category A past act

ii. Category A intermediate period act

iii. Category B past act that is wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests

iv. Category B intermediate period act that is wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests

v. previous exclusive possession act

(b) Any other area in relation to which native title rights and interest have otherwise been wholly extinguished

(c) Any area for which there is an approved determination of native title, as defined in the Native Title Act.

3. Notwithstanding anything contained elsewhere in this application, the area covered by the application includes any area in relation to which the non-extinguishment principle (as defined in section 238 of the Native Title Act) applies, including any area to which section 47, 47A or 47B of the Native Title Act applies. Particulars of these areas will be provided prior to the hearing but any area as may be listed in Schedule L is included in the area covered by the application.

4. Where there is any discrepancy between the map provided at Attachment C and the written description contained in this schedule and in Attachment B [sic], the latter prevail.

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:

1. The Gumbaynggirr People claim the following non-exclusive rights and interests, including the right to conduct activities necessary to give effect to them, in relation to Application area [sic]:

(a) the right to maintain and to protect from physical harm or desecration, places and areas of importance or significance under traditional laws and customs;

(b) the right to access, to remain on, traverse and to use;

(c) the right to access natural resources in those areas and to take, use, share and exchange those natural resources for any purpose; and

(d) without limiting the generality of (a), (b) and (c) above:

(i) the right to hunt on, and gather natural resources from, those areas;

(ii) the right to fish in those areas;

(iii) the right to take and use water from those areas;

(iv) the right to live on those areas;

(v) the right to camp, and for that purpose to erect shelters and other structures, on those areas;

(vi) the right to light fires on those areas for domestic purposes;

(vii) the right to conduct and to participate in cultural and religious activities, practices and ceremonies, including the conduct of burials, on those areas;

(viii) the right to conduct and to participate in meetings on those areas;

(ix) the right to teach the physical, cultural and spiritual attributes of places and areas of importance under traditional laws and customs on those areas;

(x) the right to share and exchange the natural resources on those areas; and

(xi) the right to manage the natural resources of those areas;

(e) the right to be accompanied on to those areas by persons who, though not native title holders, are:

(i) spouses, partners or parents of native title holders, together with their children and grandchildren;

(ii) people required under traditional laws and customs for the performance of cultural activities, practices or ceremonies; and

(iii) people requested by the native title holders to assist in, observe or record cultural activities, practices or ceremonies.

2. The native title rights and interests referred to in paragraph 1 do not confer possession, occupation, use or enjoyment of the lands and waters of the application area to the exclusion of all others.

3. The native title rights and interests are subject to and exercisable in accordance with:

(a) the laws of the State of New South Wales and the Commonwealth of Australia including the common law;

(b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of New South Wales; and

(c) the traditional laws acknowledged and traditional customs observed by the Gumbaynggirr People.

End of document