



Registration Decision

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| Application name | Kurtijar People |
| Name of applicant | Joseph Rainbow, Irene Pascoe, Shirley McPherson |
| Federal Court of Australia No. | QUD483/2015 |
| NNTT No. | QC2015/006 |
| Date of Decision | 24 July 2018 |

Claim accepted for registration

I have decided that the claim in the Kurtijar People 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.

Heidi Evans

*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

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

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

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

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

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*)

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

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

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

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*)

BACKGROUND

- [1] The application was filed on behalf of the Kurtijar People native title claim group. It covers approximately 15,000 square kilometres north east of Normanton in the Gulf of Carpentaria.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 23 March 2018 pursuant to s 64(4) of the Act.
- [3] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application are beyond the changes prescribed by s 190A(6A), therefore that provision does not apply.
- [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.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁴
- [5] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

³ See 190A(6).

⁴ See 190A(6B).

Information considered

- [6] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.
- [7] I have had regard to information in the application. I have also had regard to additional material provided by the applicant directly to the Registrar on 12 July 2018. That additional material consisted of:
- Affidavit of [Name deleted] affirmed 7 September 2017 - filed 18/09/2017;
 - Affidavit of [Name deleted] affirmed 6 September 2017 - filed 18/09/2017;
 - Affidavit of [Name deleted] affirmed 6 September 2017 - filed 18/09/2017;
 - Affidavit of [Name deleted] affirmed 4 September 2017 filed 18/09/2017;
 - Affidavit of [Name deleted] affirmed 4 August 2017 - filed 14/08/2017;
 - Affidavit of [Name deleted] affirmed 4 August 2017 - filed 17/08/2017;
 - Affidavit of [Name deleted] affirmed 3 August 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 3 August 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 2 August 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 13 July 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 12 July 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 11 July 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 30 March 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 3 March 2017 – filed 17/08/17;
 - Affidavit of [Name deleted] affirmed 26 May 2015 – filed 17/08/17;
 - Kurtijar Connection Report by [Name deleted] - dated 17/08/17;
 - Archival Research Report by [Name deleted] – dated 28/10/16; and
 - Kurtijar Research Report by [Name deleted] - dated 2017.
- [8] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁵
- [9] The State has not provided any submissions in relation to the application of the registration test.⁶
- [10] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 27 March 2018 (the geospatial report).

Procedural fairness

⁵ See s 190A(3)(b).

⁶ See s 190A(3)(c).

- [11] On 4 April 2018, the Practice Leader wrote to the State of Queensland (the State) inviting the State to make any submissions by 20 April 2018. Also on 4 April 2018, the Tribunal’s practice leader for the matter received confirmation that the State had no comments or submissions to make in relation to the application.
- [12] On 12 July 2018, the applicant provided directly to the Registrar for the purposes of the registration test, the materials outlined above. Also on 12 July 2018, the State was invited to make comment on those materials as relevant to the registration testing of the amended claim. On 13 July 2018, the State confirmed it did not wish to comment on the material. This concluded the procedural fairness processes.

Merits of the claim (s 190B) – Conditions met

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

- [13] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

What is required to meet this condition?

- [14] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides certainty about:
- (a) the external boundary of the area where native title rights and interests are claimed; and
 - (b) any areas within the external boundary over which no claim is made.⁷

Does the information about the external boundary meet this condition?

- [15] Attachment B provides a metes and bounds description of the external boundary of the application area which has been prepared by the Tribunal’s Geospatial Services, dated 11 October 2017. The description references land parcels, the High Water Mark, native title determination applications, creeks and rivers and coordinate points. A map, also prepared by the Tribunal’s Geospatial Services (dated 5 October 2017) which shows the external boundary of the area is contained in Attachment C. It shows the boundary depicted in bold blue outline, selected topographic features, land tenure and includes a scalebar, legend, locality diagram, coordinate grid and notes relating to the source, currency and datum of data used to prepare the map. The geospatial report provides that the map and description are consistent and identify the application area with reasonable certainty. Having considered the information before me in Attachments B and C, I agree with the report.

Does the information about excluded areas meet this condition?

⁷ *Doepel* at [122].

[16] Schedule B describes excluded areas using general exclusion clauses. In my view there is nothing problematic in the application adopting this approach to describing excluded areas for the purposes of s 190B(2).⁸

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

[17] I am satisfied the claim meets the requirements of s 190B(3). Attachment A provides a sufficiently clear description of the persons who comprise the native title claim group.

What is required to meet this condition?

[18] For the application to meet the requirements of s 190B(3), the Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[19] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’: whether the claim has been made on behalf of the correct native title claim group is not relevant.⁹

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

[20] A description of the persons who comprise the native title claim group is contained in Schedule A. It provides that the Kurtijar People are ‘all the descendants of the following people: [list of 31 named apical ancestors], who identify and are identified by other Kurtijar People as belonging to the Kurtijar People according to Kurtijar traditional law and custom.’ The description also states that: “Descendants” for the purposes of this description include those individuals who have been adopted by the Kurtijar People.’

[21] My understanding of the description is that there are three criteria that must be satisfied in order for an individual to qualify as a member of the native title claim group. Firstly, they must be a descendant of one of the ancestors or ancestor couples named. Secondly, they must self-identify as Kurtijar, and thirdly, they must be identified as belonging to the Kurtijar People claim group by other Kurtijar persons according to Kurtijar traditional law and custom.

[22] While determining who the members of the group are would require further research or factual inquiry, I do not consider that this results in the description being unclear for the purposes of s 190B(3).¹⁰ The first criterion of biological descent or descent by adoption, in my view, provides an objective starting point for such an inquiry. I am satisfied, by starting with one individual and applying that first criterion, with some research, it could be determined who the descendants were. Applying the second criterion would involve questioning those persons as to whether they identify as Kurtijar, and then, applying the third criterion would involve questioning other Kurtijar People about whether the particular individual belonged to the Kurtijar People pursuant to Kurtijar traditional law and custom.

⁸ *Strickland* at [50] to [55].

⁹ *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

¹⁰ *WA v NTR* at [67].

[23] In undertaking this process of research and inquiry, I am satisfied it could be ascertained whether any particular person is a member of the Kurtijar People native title claim group.

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

[24] I am satisfied the description in Attachment E is sufficient for me to clearly understand and identify the itemised rights as ‘native title rights and interests.’

What is required to meet this condition?

[25] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the application’s description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term ‘native title rights and interests’ in s 223 of the Act.¹¹

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

[26] The description of the native title rights and interests claimed by the Kurtijar People in Schedule E contains four paragraphs. The first paragraph includes a claim to a right of exclusive possession. The second paragraph sets out 15 rights claimed where exclusive native title cannot be recognised. The third and fourth paragraphs set out qualifications or limitations on the exercise of the rights and interests claimed.

[27] In my view, the description is clear and easily understood. I have had regard to the definition of ‘native title rights and interests’ in s 223(1), and consider the rights described have meaning as native title rights.

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

[28] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is a sufficient factual basis for the three assertions of subsections 190B(5)(a), (b) and (c).

What is needed to meet this condition?

[29] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
- (b) that there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
- (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

¹¹ *Doepel* at [99] and [123].

- [30] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.¹²
- [31] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.¹³
- [32] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.¹⁴
- [33] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) and accompanying the original application that they believe the statements contained in the application to be true, I have accepted the asserted facts as true.¹⁵
- [34] The factual basis material appears in Attachment F, Schedules G and M, and in the additional material supplied by the applicant on 12 July 2018.

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

- [35] To meet s 190B(5)(a), the factual basis must support the assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area'. Generally on what is needed for the 'association' assertion:
- (a) it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;¹⁶
 - (b) it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;¹⁷ and
 - (c) the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.¹⁸

Is the factual basis sufficient to support the association assertion?

- [36] The factual basis is sufficient to support the assertion regarding an association of the group and its predecessors with the application area, at s 190B(5)(a). The material is at a significant level of detail, and contains information addressing an association of the group that is specific

¹² *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

¹³ *Gudjala 2008* at [92].

¹⁴ *Gudjala 2007* at [39].

¹⁵ *Gudjala 2008* at [91] to [92].

¹⁶ *Gudjala 2007* at [52].

¹⁷ *Gudjala 2007* at [51] and [52].

¹⁸ *Corunna* at [35]-[39] and [42-44].

to the land and waters of the application area, and to the members of the claim group and their predecessors.

- [37] Attachment F contains a broad outline of the factual basis in support of the claim, including an outline of facts addressing the assertion that the members of the claim group and their predecessors have, and had, an association with the land and waters of the application area.
- [38] Regarding an association of the predecessors of the group with the area, Attachment F provides that at sovereignty, the Kurtijar people (speakers of the Kurtijar language) formed part of a broader regional society that spread across an area bounded by the Leichardt River in the west and the Staaten River in the north, the neighbouring Mayi language group in the south, and the headwaters of the Gilbert River in the east.
- [39] Footnotes in Attachment F refer to the Kurtijar Connection Report by [Name deleted] (the Connection Report) as containing further details. The Connection Report explains that since the 1890s, which I understand to be the early stages of settlement in the area,¹⁹ various researchers and ethnographers have associated the Kurtijar People with the application area. This includes Matthews in 1899, Sharp in 1939, Tindale in 1940 and Capell in 1964, among others. The information contained in the Connection Report is detailed and sets out the findings of these researchers regarding the boundaries of the Kurtijar People's traditional country. Having considered that information, I consider it supports an assertion that the Kurtijar People were associated with the application area at settlement in the region.
- [40] The Connection Report also sets out information addressing an association of each of the apical ancestors of the claim group with the application area. For example, it provides that apical ancestor Kangaroo, listed in the claim group description with his five wives [Name deleted], [Name deleted], [Name deleted], [Name deleted] and [Name deleted], was born around 1875 on the Gilbert River, and at various stages from 1896 to 1915, worked at Delta Downs Station, Macaroni Station and Inkerman. One of his children was born on the Staaten River. Having considered this information in the Connection Report about each of the apical ancestors, I am satisfied the factual basis material supports an assertion that they were persons associated with the application area generally around the early settlement period.
- [41] Attachment F states that since sovereignty, or European settlement, despite the impacts of colonisation, the Kurtijar People have maintained a physical presence across the claim area including through working or residing on cattle stations in the area, including Delta Downs Station and the historical pastoral holdings it now covers.²⁰ In their affidavits, claimants speak of their parents and 'old people' engaging in this work and their lives on the stations. One elderly claimant says:

I lived at Myra Vale station until I was fourteen. [Name deleted] I was the station owner then.

Back then, Myra Vale was very different. These days there is only a big shed there. When I was a kid, there was a homestead, places for the ringers to live and lots of Kurtijar people lived there, mainly in humpies. It was like a village.

[...]

¹⁹ Attachment F states that first contact between Indigenous groups of the area and Europeans occurred in the 1860s, at [2.1].

²⁰ At [3.2] to [3.4].

[Name deleted] [his grandfather] told me that he had worked at Miranda Downs as a ringer before I was born. He knew a lot about that country and told me that I should go and see it for myself. That's why, later on, I went to Miranda Downs to work.²¹

- [42] The information provided by claimants about the association of the Kurtijar People with the area over the period since settlement is detailed, and refers to numerous locations throughout the application area. In addition to addressing an association of the elders of the claimants with the area, it also speaks to an association of the claim group today with the area. For example, one claimant says:

I go fishing every now and then at Duck Creek and at the mouth of the Smithburne. I let the spirits of the old people know that I am there to go fishing. I sing out to them.

I always leave a couple of fish behind and thank the old people for the good luck. I leave a couple of cooked fish behind.

We also hunt pig and wallaby out on Delta Country.

I have been hunting and fishing on Van Rook with my uncles – [Name deleted], [Name deleted], [Name deleted]. They know the places to hunt and fish from when they were there as young men. But most hunting is on Delta.²²

- [43] Further to this, it is clear from the material that the members of the claim group have been passed knowledge about the boundaries of their country by their elders, and that this knowledge aligns with the boundaries of the application area.²³ In light of this material, I consider the factual basis supports an association of the group with the area over the period since sovereignty and today.

- [44] The association must be shown to be with the entirety of the application area. As explained above, the material before me is of a significant level of detail, and contains numerous place names. Using the Tribunal's geospatial database and the map at Attachment C of the application, I have considered the location of these places with reference to the boundary of the application area. It is my view that these places are geographically spread across the extent of the application area, such that I can consider the association asserted to be with the entirety of the area subject of the amended application.

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

- [45] To meet s 190B(5)(b), the factual basis must support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'. The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of 'native title rights and interests' within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007* by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court of Australia in *Yorta Yorta*.²⁴

- [46] According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

²¹ Affidavit of [Name deleted] at [18] to [22].

²² Affidavit of [Name deleted] at [9] to [12].

²³ See the Connection Report at [134]; Attachment F at [2.4].

²⁴ *Gudjala 2007* at [26] and [62] – [66].

- (a) it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice';²⁵
- (b) the origins of the content of the law or custom concerned can be found in the normative rules of a society²⁶ which existed before the assertion of sovereignty by the Crown;²⁷
- (c) the normative system has had a 'continuous existence and vitality since sovereignty';²⁸
- (d) the relevant society's descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.²⁹

[47] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group 'have their source in a pre-sovereignty society and have been observed since that time by a continuing society'. Dowsett J held that a 'starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860'. His Honour concluded that a sufficient factual basis must also establish the link between the native title claim group described in the application and the area covered by the application, which involves 'identifying some link between the apical ancestors and any society identified at sovereignty.'³⁰

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

[48] The starting point at s 190B(5)(b) is the identification of a society of people living in the application area at sovereignty or European settlement, bound by common observance and acknowledgement of normative laws and customs. By normative, I understand that the laws and customs prescribe particular modes of behavior for the members of the relevant society.

[49] Addressing this society, Attachment F states that at the time of sovereignty, 'Kurtijar people formed part of a broader regional society encompassing a body of persons across the region united in and by their acknowledgement and observance of traditional laws and customs. Attachment F explains that the Kurtijar people historically spoke the Kurtijar language which is a member of the 'Norman Pama' family of languages spoken in the general vicinity of the mouth of the Norman River. The Connection Report provides that the regional society also included the language groups Kukatj and Kutharn, Walangama, Rib, Tagalaka and possibly other groups.³¹

[50] Attachment F explains that first substantive contact with Europeans in the area occurred in the late 1860s, however through their involvement in the pastoral industry, Kurtijar People were able to maintain their system of laws and customs during this settlement period. The

²⁵ At [46].

²⁶ The term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta* at [49].

²⁷ At [46].

²⁸ At [47].

²⁹ At [87].

³⁰ See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not disagree with his Honour's assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala 2008* at [96] (1850–1860 is the time of European settlement of the Gudjala application area).

³¹ At [104].

Connection Report contains more detail regarding this system, and the laws and customs acknowledged and observed by the society at settlement. In particular, the Connection Report provides a review or summary of the historical and ethnographic sources from the application area and surrounding region that speak to the laws and customs of the Kurtijar people at settlement. From these sources, the Connection Report describes the following features (among others) of the system of laws and customs acknowledged and observed by the Kurtijar people at settlement:

- the existence of patri-clans, that is, localised estate-holding by family groups within the broader country of the Kurtijar;
- the association of these patri-clans with spiritual or totemic entities;³²
- an understanding of 'title' to a localised estate that refers to a mythology or Dreaming belief where creative beings in the ancient past lived in the same environment, travelling through it, altering it, sometimes merging with it, or leaving power in particular centres or sites;³³
- a shared, intertribal institution of initiation involving arm tying and scarification;³⁴
- differing levels of rights in estates or tracts of land, whereby only the 'owners' or 'stewards' possessed the area-based knowledge of spiritual and practical dangers in country;³⁵
- ceremonies relating to historical enactment, where the activities of ancestral beings were performed and/or reproduced;³⁶
- ceremonies involving increase rites, connected with totemic species, which controlled the use and interaction with sites and the resources in those places;³⁷
- practices surrounding control of supernatural forces in the landscape, to avoid danger and harm from those forces.³⁸

[51] In light of this information before me, I consider the factual basis sufficient in addressing a society in the area at settlement, acknowledging and observing normative laws and customs.

[52] I note that the factual basis must address a link between the claim group and the claim area, which may involve establishing a link between the apical ancestors by which the group is described, and the society at settlement. Attachment F provides that the Kurtijar people 'are a group of families descended from the apical ancestors identified in Schedule A'.³⁹ The Connection Report sets out information relating to each of those apical ancestors, including the dates around which they were associated with the application area.⁴⁰ From this information, I understand that the apical ancestors were persons who spoke and identified as

³² For example at [286] and [301].

³³ At [298].

³⁴ At [310] to [313].

³⁵ At [302] and [303].

³⁶ At [315] and [317].

³⁷ At [318].

³⁸ At [332].

³⁹ At [1.2].

⁴⁰ For example, the Connection Report provides at [182] that [Name deleted] was born in 1875; at [201], that [Name deleted] was born in the early 1880s; and at [210] that [Name deleted] was born in the 1880s.

Kurtijar and who were present in the area in the period shortly following initial settlement of the region in the late 1860s. I accept, therefore, that the material asserts the apical ancestors to have been members of the society at settlement, or persons who were born into that society in the decade or so that followed.

[53] The factual basis material contains considerable detail of the laws and customs acknowledged and observed by the claim group presently. Having considered that material, my view is that the factual basis material speaks to laws and customs of the Kurtijar people that are traditional, namely, that are rooted in the laws and customs of the society at settlement.

[54] Firstly, I note that the affidavits sworn by claimants give numerous examples of the way in which knowledge of laws and customs has been passed down through the generations to the members of the group. For example, one claimant says:

If a tree was marked with a stone axe, old people would say don't touch the tree. This was showing respect for our ancestors who had used the tree or walked that way in the past. Shell middens are salt water mussel shells in a pile which had been put there by ancestors. They are trade marks of where the ancestors had been and what food they had eaten. We do not interfere with or camp around these areas.⁴¹

[55] And another claimant says:

When I was younger, older Kurtijar men told me about Kurtijar country and what I had to do there. [Name deleted], [Name deleted] and my father were important people in my life. They told me things about Kurtijar country. [Name deleted] was my father's brother. I called [Name deleted] my grandfather.⁴²

[56] In addition to this, the laws and customs acknowledged and observed by the claim group today, as described by claimants in their affidavits, include those acknowledged and observed by the Kurtijar society at settlement as discussed in the Connection Report (and set out above).

[57] For example, one claimant describes how today he observes particular practices to manage supernatural forces in the application area believed to bring about harm:

I was told to be careful around waterholes. [Name deleted] said I couldn't go to some places without a lawman to warm me up. If I went there on my own and went into the water, I wouldn't be able to straighten myself up. I would be stuck; all bent over and would have to wait for a *laakinchargh* to come along. I was told that could happen at Milkarr. That's a waterhole on Walker's Creek.⁴³

[58] Another claimant explains how family groups have primary rights in tracts of land at a local level within the broader application area:

Different Kurtijar families are closer to different parts of Kurtijar country. Going right back, our families have always been close to places on our country, but they moved around too. Some people will know more about a place than others because their ancestors have passed down their knowledge and the stories about that country to them.⁴⁴

[59] Another claimant explains the operation of totems and dreamings in her everyday life:

⁴¹ Affidavit of [Name deleted] at [14].

⁴² Affidavit of [Name deleted] at [5].

⁴³ Affidavit of [Name deleted] at [24].

⁴⁴ Affidavit of [Name deleted] at [147].

You can get your totem from your father's side. You don't kill your totem. I told my kids they can't hurt a black cockatoo.

I can't hurt a peewee (kalkirdol or bhenawong) because it's my dreaming. [Name deleted] is my bush name old people gave me.⁴⁵

[60] From these and other examples in the material before me, I consider the factual basis sufficient in supporting laws and customs today that reflect and are rooted in those of the Kurtijar society at settlement. The material also clearly addresses the way in which these laws and customs have been handed down through the generations to the members of the claim group. It follows that I consider the factual basis sufficient to support an assertion of traditional laws and customs acknowledged and observed by the claim group, that give rise to their claim to native title in the application area.

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

[61] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.'

[62] The case law indicates the following matters must be addressed by the factual basis at this condition of the registration test:

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.⁴⁶

Is the factual basis sufficient to support the continuity assertion?

[63] I have explained above at s 190B(5)(b) the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at settlement in the application area acknowledging and observing laws and customs from which the present laws and customs were derived. It is also my view, however, that the factual basis is sufficient to support an assertion that those laws and customs have been acknowledged and observed by the generations since the society at settlement in a continuous manner, and without substantial interruption. It follows that I consider the factual basis sufficient to support the assertion at s 190B(5)(c) that the Kurtijar people have continued to hold their native title in accordance with traditional laws and customs.

[64] One reason for which I have formed this view is that the factual basis material clearly explains the way in which the members of the claim group and their predecessors over the period since settlement, have maintained a physical presence on the area, namely through their engagement in the pastoral industry. It is clear that most of the claim group members and their predecessors were born on or in the vicinity of the application area, and spent or have spent a considerable part of their lives residing in the area, including on reserves and

⁴⁵ Affidavit of [Name deleted] at [65] and [66].

⁴⁶ *Gudjala 2007* at [82].

outstations connected to pastoral properties within the application area. The material asserts that this continual occupation of the area has enabled the Kurtijar people to acknowledge and observe the laws and customs of their ancestors prior to sovereignty without any significant interruption.⁴⁷

[65] Another reason for which I have formed the view the material is sufficient for the purposes of s 190B(5)(c) is due to the detail it gives about claimants' knowledge of the preceding generations, including back to settlement times, and the way in which those persons acknowledged and observed Kurtijar laws and customs on the application area.

[66] For example, one elderly claimant recalls [Name deleted] , who married the daughter of apical ancestor [Name deleted] :

[Name deleted] married a Kurtijar woman. Her name was [Name deleted]. She is [Name deleted] grandmother. They used to work on Lotus Vale and Myra Vale when I was a lad. [Name deleted] was a ringer when I was working on Lotus Vale. He was old when I was there. They talked the same language as me, Kurtijar. He knew the Kurtijar stories.⁴⁸

[67] And another elderly claimant shares knowledge of her grandparents and elders in the following way:

My mother was born at a camp called Fish Hole, which is on Delta. Her father, [Name deleted] , was born there too. Her mother's maiden name was [Name deleted], but she went by her married name of [Name deleted]. [Name deleted] taught me Kurtijar language and how to survive out bush. Mum told me that Long fella Toby was [Name deleted] older brother. [Name deleted] used to call her his small sister. [Name deleted] mother and father died before I was born. [Name deleted] was born on a camp further down near the coast at Macanoni Island.

[Name deleted] and [Name deleted] were Kurtijar people. They lived at the camp at Fish Hole, had their kids there and lived most of their lives there.⁴⁹

[68] Noting that claimants possess this knowledge of how the generations since the apical ancestors have acknowledged and observed Kurtijar laws and customs in relation to the application area since the apical ancestors around the time of settlement, I consider the factual basis sufficient in supporting an assertion that the claim group have continued to hold their native title in accordance with traditional laws and customs.

Prima facie case – s 190B(6): condition met

[69] I consider that all 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 required to meet this condition?

[70] For the application to meet the requirements of s 190B(6), the Registrar 'must consider that, prima facie, at least some of the native title rights and interests claimed can be established.' I note the following comments by Mansfield J in relation to this condition:

(a) it requires some measure of the material available in support of the claim;⁵⁰

⁴⁷ See for example Attachment F at [3.2] to [3.5].

⁴⁸ Affidavit of [Name deleted] at [244].

⁴⁹ Affidavit of [Name deleted] at [7] to [8].

⁵⁰ *Doepel* at [126].

- (b) although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);⁵¹
- (c) s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.⁵²

[71] Mansfield J found that the use of the words ‘prima facie’ in s 190B(6) means that ‘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’.

[72] Noting the definition of ‘native title rights and interests’ in s 223(1) of the Act, in order for me to consider a right or interest prima facie established, it must be shown to be a right or interest that is:

- (a) possessed under the traditional laws and customs of the native title claim group;⁵³
- (b) a right or interest in relation to the land or waters of the application area;⁵⁴ and
- (c) not extinguished in relation to the entirety of the application area.⁵⁵

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

Exclusive possession

[73] The nature of a native title right to exclusive possession was discussed in *Western Australia v Ward* [2002] HCA 28 (*Ward*), where the High Court held that:

A core concept of traditional law and custom [is] the right to be asked permission and to ‘speak for country’. It is the rights under traditional law and custom to be asked permission and to ‘speak for country’ that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.⁵⁶

[74] Since *Ward*, there have been a number of cases that have also considered the substance of such a right. From these cases, the following principles have emerged:

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others;⁵⁷
- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom;⁵⁸
- the material must speak to how, pursuant to their laws and customs, the group is able to ‘exclude from their country people not of their community’, acting as ‘gatekeepers for the purpose of preventing harm and avoiding injury to country.’⁵⁹

[75] In my view, the material does speak to a right of exclusive possession. In their affidavits, claimants talk in detail about the requirement for visitors to Kurtijar country to seek the

⁵¹ *Doepel* at [127].

⁵² *Doepel* at [132].

⁵³ Section 223(1)(a).

⁵⁴ Section 223(1)(b).

⁵⁵ Section 223(1)(c).

⁵⁶ At [88].

⁵⁷ *Sampi* at [1072].

⁵⁸ *Griffiths* at [71].

⁵⁹ *Griffiths* at [127].

permission of the right families or elders before they access an area. For example, one claimant explains:

If someone comes onto Kurtijar country without permission, they won't know about the country and the dangerous things in it. They might go onto poison ground and disturb the spirits there. They might do the wrong thing and hurt the country or a special place. They could end up sick or crippled up. If they get permission, we can look after them and the country – tell them where they can go and where not to go or protect them by warning them.

It's wrong if they don't ask.⁶⁰

[76] From this type of information, I consider the material addresses the way in which this practice stems from a belief that those with the full knowledge of country and the supernatural forces within the landscape are the people with the authority to 'police' an area, as they can ensure others do not suffer harm by failing to adhere to the correct protocols in accessing that country. A further example of the material that speaks to this belief is the following statement by a claimant:

Kurtijar people who grew up in a place and who know the country and its stories belong to that place. That makes you an elder for a place. It's about knowing the place and where you can and can't go. Elders have respect from their family. Elders should be asked about their places. They can say you can't go to that place.⁶¹

[77] In light of this material, I consider a right of exclusive possession established on a prima facie basis.

Right to access, remain on, traverse and use the area

[78] Throughout their affidavits claimants explain how they and their predecessors have spent time on the application area, living at outstations on pastoral properties and working in the pastoral industry. An example of this type of information is the following statement from an elderly claimant:

[Name deleted] and I have spent a lot of our lives on Delta Downs, but now we live in Normanton.

My son, [Name deleted], is the manager of Delta Downs Station.

I worked also on Van Rook and Stirling Stations. I spent most of my life working on the stations in Kurtijar country.

When I was a young fella, we went to Macaroni Station because my parents worked there as well.

I had an older brother called [Name deleted], who worked on Stirling.⁶²

[79] As above, my view is the material is sufficient to allow me to consider a right of exclusive possession established on a prima facie basis. It follows that the material is also sufficient to allow me to consider this right established on a prima facie basis, as accessing, remaining on, traversing and using an area are all rights that fall within the scope of exclusive rights to country.

⁶⁰ Affidavit of [Name deleted] at [198] and [199].

⁶¹ Affidavit of [Name deleted] at [59].

⁶² Affidavit of [Name deleted] at [7] to [11].

Right to access natural resources and to take, use, share and exchange those resources for any purpose

[80] Again, the material sets out in detail the way in which claimants and their predecessors have accessed and used natural resources from the application area. The material also speaks to various purposes for which these resources are accessed, including sustenance, making artefacts, ceremonial purposes, medicine and for sharing and exchanging.

[81] An example of this type of information is the following statement by a claimant:

[Name deleted] would always share his food among the families. If he caught a groper, he would cut it up and share it with all the families on the Reserve, especially the old people. That's the proper Kurtijar way.⁶³

[82] Elsewhere, another claimant says:

Because I am Kurtijar, I can go out on Kurtijar country. I can fish and camp. I can get fruit like berries, wild passionfruit, wild apple on the sand ridges, white and red apple around the rivers. I can eat the nut from the pandanus tree. I can get bush medicine like gutta-percha and cotton tree bark and boil them up and have a bath in it to cure sores. I can get sugarbag. I can take water when I need it.⁶⁴

[83] From these statements, I consider it clear that the right to take and use the natural resources of the application area is held pursuant to the traditional laws and customs of the group. In light of the material of this type before me, I consider the right established on a prima facie basis.

[84] Following these two rights in Schedule E is a statement that 'without limiting the generality of subparagraphs (i) and (ii) above...' followed by a list of twelve specific rights and interests. In my view, these rights and interests all fall within the scope of the two non-exclusive rights considered above. I am also satisfied the material speaks to all twelve of these specific rights. Consequently, I consider them, prima facie, established.

Right to be accompanied onto the area by non-native title holders

[85] The description of this right in Schedule E explains that the non-native title holders include spouses, partners and parents of native title holders, people required under law and custom for the performance of ceremonies, and people who assist in or record cultural activities and practices. The material gives a number of examples of the way in which claimants and their predecessors have been accompanied onto the application area by such persons. One example is where a claimant explains:

My wife is Gunggandji. I have adopted her kids [Name deleted], [Name deleted], [Name deleted], [Name deleted] and [Name deleted]. They grew up with me; on Kurtijar country. They still call me dad. They can follow me Kurtijar side. They are known and have been accepted by Kurtijar, so they can follow me. But they can't go two ways.⁶⁵

[86] And he further shares his knowledge of non-native title holders accessing Kurtijar country for trade and ceremony:

⁶³ Affidavit of [Name deleted] at [85].

⁶⁴ Affidavit of [Name deleted] at [61].

⁶⁵ Affidavit of [Name deleted] at [87].

Near Pandanus Creek, in what is now the Staaten River National Park, Kurtijar once traded with the mob from the [Name deleted] side. There are big lagoons through there where people would stay for quite a while. My Dad and [Name deleted] told me stories about these trading routes. There are shell middens and campsites on both sides of the creek up there.⁶⁶

[87] In light of this material, which speaks to the presence of non-native title holders on the application area and how this has occurred pursuant to Kurtijar laws and customs, I consider the right established on a prima facie basis.

Physical connection – s 190B(7): condition met

[88] I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

What is required to meet this condition?

[89] For the application to meet the requirements of s 190B(7), the Registrar ‘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’.⁶⁷

[90] The following principles have emerged from the case law about what is required at s 190B(7):

- the material must satisfy the delegate of particular facts, therefore evidentiary material is required; and
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;⁶⁸
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;⁶⁹
- the material may need to address an actual presence on the area.⁷⁰

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

[91] As the focus of this condition is upon one member of the claim group, I have set out below information from the application and materials that speaks to the physical connection of one claim group member with the area, being [Name deleted].

[92] In his affidavit, [Name deleted] provides that he:

- was born under a tree at Myra Vale Station in 1947;⁷¹
- lives on Delta Downs Station;⁷²
- has taken trips out onto his traditional country with an anthropologist to ‘write down’ Kurtijar stories;⁷³

⁶⁶ Affidavit of [Name deleted] at [119].

⁶⁷ See s 190B(7)(a).

⁶⁸ *Doepel* at [17].

⁶⁹ *Gudjala 2007* at [89].

⁷⁰ *Yorta Yorta* at [184].

⁷¹ At [3].

⁷² At [13].

⁷³ At [15].

- grew up at Myra Vale station until he was 14;⁷⁴
- observed corroborees on Myra Vale station as a young child;⁷⁵
- learnt Kurtijar stories and about secret places on Kurtijar country such as initiation sites, and Kurtijar law, from older Kurtijar men;⁷⁶
- has a special role based on his knowledge of certain places in Kurtijar country – visitors must stay with him when accessing those places so he can protect them from the spirits of the old people;⁷⁷
- learnt from the old people about different resources from the bush and how they could be used;⁷⁸
- worked at various pastoral properties on Kurtijar country.⁷⁹

[93] From this information, I am satisfied that [Name deleted] has a physical connection with parts of the application area. It is clear that he has spent almost the entirety of his life on his traditional country. I am also satisfied that the material speaks to [Name deleted] connection with the area as being one that is traditional.

[94] At s 190B(5)(b) above, I have explained how the factual basis supports an assertion of traditional laws and customs where knowledge of those laws and customs, and of country, is and has been passed down through the generations of Kurtijar People to the members of the claim group today. From the statements in [Name deleted] affidavit, it is clear that all of his knowledge of the application area and associated Kurtijar laws and customs was passed to him by his elders while spending time on his country.

[95] I have also explained at s 190B(5)(b) above, that the system of traditional laws and customs asserted, and supported by the factual basis material, involves certain families and elders having particular connections to particular areas within Kurtijar country, and the knowledge those persons hold of the spiritual forces and dangers within that localised estate. In my view, this aspect of the system of traditional laws and customs of the Kurtijar People can be seen in the way [Name deleted] talks about the places within the application area he has a particular connection to, and the knowledge he possesses of the spiritual forces within those places.

[96] It follows that I am satisfied [Name deleted] connection with the application area is in accordance with Kurtijar traditional laws and customs.

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

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

| Requirement | Information addressing requirement | Result |
|--|------------------------------------|--------|
| s 61A(1) no native title determination | Geospatial report | Met |

⁷⁴ At [18].

⁷⁵ At [26].

⁷⁶ At [39] and [65].

⁷⁷ At [84] to [86].

⁷⁸ At [204] and [208].

⁷⁹ At [36] to [48].

| | | |
|---|-----------------------------------|-----|
| application if approved determination of native title | | |
| s 61A(2) claimant application not to be made covering previous exclusive possession over areas | Schedule B | Met |
| s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas | Schedule E, paragraph (a) and (b) | Met |

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

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

| Requirement | Information addressing requirement | Result |
|---|------------------------------------|--------|
| (a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown | Schedule Q | Met |
| (b) exclusive possession is not claimed over all or part of waters in an offshore place | Schedule P | Met |
| (c) native title rights and/or interests in the application area have otherwise been extinguished | Schedule B, paragraph (iii) | Met |

Procedural and other matters (s 190C)—Conditions met

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

[99] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

What is required to meet this condition?

[100] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken.⁸⁰

Subsection 61

[101] The application contains the details specified in s 61.

| Section | Details | Form 1 | Result |
|---------|--------------------------|------------|--------|
| s 61(1) | Native title claim group | Schedule A | Met |

⁸⁰ *Doepel* at [16] and also at [35] to [39].

| Section | Details | Form 1 | Result |
|---------|--|------------|--------|
| s 61(3) | Name and address for service | Part B | Met |
| s 61(4) | Native title claim group named/described | Schedule A | Met |

Subsection 62

[102] The application contains the details specified in s 62.

| Section | Details | Form 1 | Result |
|-------------|--|-----------------------------|--------|
| s 62(1)(a) | Affidavits in prescribed form | Attached to Form 1 | Met |
| s 62(2)(a) | Information about the boundaries of the area | Schedule B and Attachment B | Met |
| s 62(2)(b) | Map of external boundaries of the area | Attachment C | Met |
| s 62(2)(c) | Searches | Attachment D | Met |
| s 62(2)(d) | Description of native title rights and interests | Schedule E | Met |
| s 62(2)(e) | Description of factual basis | Attachment F | Met |
| s 62(2)(f) | Activities | Schedule G | Met |
| s 62(2)(g) | Other applications | Schedule H | Met |
| s 62(2)(ga) | Notices under s 24MD(6B)(c) | Attachment HA | Met |
| s 62(2)(h) | Notices under s 29 | Schedule I | Met |

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

[103] I am satisfied that no person included in the native title claim group for this application is also a member of the native title claim group for any previous overlapping application.

What is required to meet this condition?

[104] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**⁸¹) was a member of a native title claim group for any previous application’. To be a ‘previous application’:

- (a) the application must overlap the current application in whole or part;
- (b) there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[105] It is only where all three criteria are satisfied that the requirement for me to consider the possibility of common claimants arises.⁸²

What does the geospatial report say?

[106] The geospatial report provides that there is one application on the Register of Native Title Claims that overlaps the entirety of the application area. This is the Kurtijar People application, the very same application I am considering for registration. From my own searches of the Tribunal’s databases, I am aware that the originating Kurtijar People

⁸¹ *Emphasis in original.*

⁸² *Strickland FC* at [9].

application was entered onto the Register on 15 April 2016, and has remained on the Register since that time.

[107] While this means that the Kurtijar application meets the criteria of a ‘previous application’ for the purposes of s 190C(3), I do not consider that the intention of the provision was to prevent the further acceptance for registration of amended applications due to the existence of the underlying registered claim. Further, I consider the previous application and the current application to be one and the same. In line with this, I note that where the current application is accepted for registration, the record relating to the previous application will cease to exist, such that there will no longer be a ‘previous application’.

[108] It is my view, therefore, that there is no previous application in relation to the current application area for the purposes of s 190C(3).

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

[109] I am satisfied that the requirements set out in s 190C(4)(b) are met.

What is required to meet this condition?

[110] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions.⁸³ If the application has not been certified, the Registrar must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.⁸⁴

[111] Schedule R provides that the application is not certified. It is necessary, therefore, to consider if the application meets the requirements set out in s 190C(4)(b). That is, whether the applicant is a member of the native title claim group and is authorised by all the other persons in the group to make the application and deal with matters arising in relation to it. I must also consider the requirements as set out in s 190C(5). That is, that the application itself includes a statement to the effect that the requirement of paragraph 4(b) has been met and briefly sets out the grounds on which the Registrar should consider that it has been met.

[112] In *Doepel*, Mansfield J discusses the interaction between s 190C(4)(b) and s 190C(5) and how the Registrar is to be satisfied as to these conditions of the registration test:

In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). The interactions of s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given⁸⁵.

[113] Schedule R refers to Attachment R. Having considered the information in Attachment R, I am satisfied it includes the statements required by s 190C(5)(a) and the further brief statement required by s 190C(5)(b).

⁸³ See subsection 190C(4)(a).

⁸⁴ See subsection 190C(4)(b).

⁸⁵ *Doepel* at [78].

- [114] Attachment R provides that there were two authorisation meetings in relation to the claim, the second held immediately following the first, on Wednesday 1 November 2017 in Normanton. Both meetings were notified publicly by the Carpentaria Land Council (the representative body for the area) in the Mount Isa North West Star on three dates in October. A copy of the notice was also distributed to known members of the claim group by post, and displayed on notice boards at various community locations throughout Normanton.
- [115] The purpose of the first meeting, as notified, was for ‘the native title claim group to decide whether the description of the native title claim group in the Application should be amended’. The notice explained that where the decision of the group was to amend the claim group description, a second meeting would immediately follow, the purpose of which was for the group (as amended by the first meeting) to confirm the continuing authority of the applicant persons to make the application and deal with matters arising in relation to it, to authorise other members of the group to be the applicant, and to consider whether to amend the native title rights and interests claimed by the group. Attachment R confirms that at the first meeting, the attendees resolved to amend the description of the group, resulting in the convening of the second meeting that day.
- [116] A copy of the notice is annexed to Attachment R. It includes a description of the claim group as it stood prior to the meetings, and also the proposed amended claim group description. Under a heading ‘Who should attend?’, the notice states that ‘all members of the native title claim group to the Kurtijar Claim ... (as it is currently described)’ are invited to attend both meetings. Beneath the proposed description is a note which states: ‘The proposed amendment to the description of the Kurtijar Claim Group does not remove or exclude any current members of the Kurtijar Claim Group. It better describes the Kurtijar Claim Group having regard to [Name deleted] research.’
- [117] From this information included in the notice, it is my understanding that the persons who were invited to the first meeting, personally and publicly, were the members of the Kurtijar claim group as it stood prior to the decision of the group at that first meeting on 1 November 2017 to amend the description, but that the persons captured by that former description, and by the amended description of the group are, in fact, the same people. That is, the persons invited to each meeting were the same persons, described in different ways.
- [118] Despite the wording of s 190C(4)(b), there is no requirement that *all* the persons in the native title claim group be involved in making a decision regarding authorisation. It is sufficient if a decision is made once those persons are given every reasonable opportunity to participate.⁸⁶ The meeting was widely notified, both publicly and personally, in the area where the application is situated, and in an area I understand is relevant to and appropriate for the members of the native title claim group. This notice was given approximately two weeks prior to the meetings, and clearly set out the purpose of the meetings, such that I consider any person reading the notice could make an informed decision as to whether their attendance was required, and make arrangements to attend. Therefore, I am satisfied that all the persons in the native title claim group were given every reasonable opportunity to attend the meetings on 1 November 2017.

⁸⁶ *Lawson* at [25].

[119] Noting the reference to the definition of ‘authorise’ in s 251B that follows s 190C(4)(b), I consider that the material must address that definition. Section 251B provides that an applicant’s authority from the rest of the native title claim group to make an application must be given in one of two ways:

- (a) in accordance with any traditional process mandated for authorising ‘things of this kind’ (i.e. authorising an applicant to make a native title determination application), where one exists (in accordance with s 251B(a)); or
- (b) in any other case, by an agreed or adopted process in relation to authorising things of that kind (in accordance with s 251B(b)).

[120] Attachment R explains that at the first meeting, those in attendance resolved that there was ‘no particular process of decision making under traditional laws and customs that must be complied with by the Kurtijar People native title claim group’, and accordingly the group agreed to and adopted a process involving a vote by show of hands where a majority carries the resolution.

[121] Attachment R sets out the process in detail, and explains that the decision to adopt this process was made unanimously by the group at the commencement of the first meeting, and again, unanimously confirmed at the commencement of the second meeting. I consider, therefore, that the material addresses the requirement of s 251B.

[122] Regarding the way in which the meetings were conducted, I am satisfied the material contains sufficient detail to allow me to be satisfied of the fact of authorisation. Attachment R explains that prior to the commencement of the first meeting, a register of attendees was taken, including their relationship with their respective apical ancestor. 22 persons attended. Following this, the group resolved to adopt the decision making process described above, and resolved to amend the claim group description in accordance with new research. This decision of the group was made following a detailed presentation about, and summary of, the research. At the second meeting, Attachment R explains that following the group confirming the decision making process, those in attendance resolved to authorise the three applicant persons to make the application and deal with all matters arising in relation to it.

[123] I have before me a copy of the notice which provides that it was Carpentaria Land Council who notified and convened the meetings on behalf of the applicant for the Kurtijar People claim. There is no information indicating that there was any dissent or disagreement about the way in which the meeting was conducted, and it is clear that some, and possibly all, the resolutions were passed unanimously by those in attendance.

[124] In *Ward*, O’Loughlin J posed a number of hypothetical questions in relation to authorisation material before His Honour that was ‘wholly deficient’, and found that the material must address at least the substance of those questions:⁸⁷

... Who convened it and why was it convened? To whom was notice given and how 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

⁸⁷ *Ward* at [24] and [25].

decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?⁸⁸

[125] Having considered the material before me about authorisation of the amended application, I am satisfied that it addresses the substance of these questions, and is sufficient to allow me to be satisfied that the applicant is a member of the native title claim group and has been authorised to make the application and to deal with all matters arising in relation to it by all the persons in the group.

End of reasons

⁸⁸ At [24].

Attachment A

Information to be included on the Register of Native Title Claims

| | |
|--------------------------------|-----------------|
| Application name | Kurtijar People |
| NNTT No. | QC2015/006 |
| Federal Court of Australia No. | QUD483/2015 |

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:

18 June 2015

Date application entered on Register:

15 April 2016

Applicant:

[as per the Schedule of Native Title Applications]

Applicant's address for service:

[as per the Schedule of Native Title Applications]

Area covered by application:

[as per the Schedule of Native Title Applications]

Persons claiming to hold native title:

[as per the Schedule of Native Title Applications]

Registered native title rights and interests:

[as per the Schedule of Native Title Applications]

Heidi Evans

24 July 2018

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.