



National  
Native Title  
Tribunal

## Registration Decision

<b>Application name</b>	Kunja People
<b>Name of applicant</b>	Ronald McKellar, Maureen McKellar, Gertrude Darrigo, June Derrick, Rhyannon Meredith, Stephen Howarth, John Barker, John Elvis Bird, Diane Dawn Edwards, Malcolm John Mitchell
<b>Federal Court of Australia No.</b>	QUD598/2015
<b>NNTT No.</b>	QC2015/008
<b>Date of Decision</b>	3 July 2018

### Claim accepted for registration

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

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Radhika Prasad

*Delegate of the Native Title Registrar*<sup>2</sup>

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

<sup>2</sup> 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*)

*Banjima People v State of Western Australia* [2015] FCAFC 84 (*Banjima*)

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

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

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

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

*Gudjala People # 2 v Native Title Registrar* (2008) 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 5)* [2003] FCA 218 (*Harrington-Smith (No 5)*)

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

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

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

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

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

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

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

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

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

*Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803 (*Warrie*)

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

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

## BACKGROUND

- [1] The application was filed on behalf of the Kunja People native title claim group. It covers land and waters around the Warrego River in southern Queensland.
- [2] The original application was made on 17 July 2015 when it was filed in the Federal Court of Australia (the Court). The application was amended on 13 April 2018, refiled on 16 April 2018 due to technical issues, and a copy was given to the Native Title Registrar (the Registrar) pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the amended application under s 190A of the Act.

- [3] As the amendments to the application include changes to the factual basis and certification of the application, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.
- [4] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions in ss 190B and 190C and therefore it must be accepted for registration.<sup>3</sup> Attachment A contains information that will be included in the Register of Native Title Claims (the Register).
- [5] In reaching this decision, I have considered s 190A(3) which directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant are the primary sources of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:
- the information contained in the application and accompanying documents;
  - additional information provided by the applicant on 26 April 2018;
  - the geospatial assessment prepared by the Tribunal's Geospatial Services on 26 April 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)

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

#### ***What is required to meet this condition?***

- [7] In coming to the above conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2).<sup>4</sup> Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).
- [8] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not 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.

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<sup>3</sup> Section 190A(6).

<sup>4</sup> *Doepel* at [16], [35] – [37] and [39].

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

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

*Applications that may be made: s 61(1)*

- [10] Schedule A of the application provides a description of the native title claim group and the s 62 affidavits indicates that the persons comprising the applicant are included in the native title claim group.<sup>5</sup> There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

*Applicant's name and address for service: s 61(3)*

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

*Applications authorised by persons: s 61(4)*

- [12] I consider that 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)*

- [13] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain the statements required by s 62(1)(a)(i) to (v), including stating the basis on which the applicant is authorised as mentioned in subsection (iv).

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

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

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

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

- [16] Schedule D states that no searches have been carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

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

- [17] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Schedule E. The description 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.

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<sup>5</sup> At [2].

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

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

*Activities: s 62(2)(f)*

- [19] Schedule G contains a list of the activities currently undertaken by members of the claim group on the land and waters of the application area.

*Other applications: s 62(2)(g)*

- [20] Schedule H states that the applicant is not aware of any other applications that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title.

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

- [21] Schedule HA states that the applicant is not aware of any notifications given under paragraph 24MD(6B)(c) that relate to the whole or part of the area.
- [22] Schedule I states that the applicant is not aware of any notices given under s 29 that relate to the whole or part of the application area.

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

- [23] As indicated in my reasons below, the application satisfies the condition of s 190C(3).
- [24] In my view, this condition requires that the Registrar be satisfied that there are no common claimants where there is a previous application that comes within the terms of subsections (a) to (c).<sup>6</sup>
- [25] Although the text of this provision reads in the past tense, I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 provides that the ‘Registrar must be satisfied that no member of the claim group for the application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].’<sup>7</sup> 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.<sup>8</sup>
- [26] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is

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<sup>6</sup> *Strickland FC* at [9].

<sup>7</sup> At 29.25.

<sup>8</sup> At 35.38.

applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

- [27] I also note that in assessing this requirement, I am able to address information which does not form part of the application.<sup>9</sup>
- [28] The geospatial assessment does not identify a previous application that covered the whole or part of the area covered by the current application.
- [29] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application.
- [30] I am therefore satisfied that there is no previous application to which ss 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s 190C(3) further.

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

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

#### ***What is required to meet this condition?***

- [32] I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition of s 190C(4) to be satisfied.
- [33] Attachment R contains the certificate of the representative body. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.
- [34] Section 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body'.<sup>10</sup> I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.
- [35] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)'.<sup>11</sup>

#### ***Has the application been certified?***

##### ***Does the certifying body have the power to certify?***

- [36] Attachment R is titled 'Amended Certification of Native Title Determination Application – QUD598/2015 Ronald McKellar & Ors on behalf of the Kunja People'. It is signed by the Chief Executive Officer of the Queensland South Native Title Services Limited (QSNTS) on 23 February 2018.
- [37] The certificate states that QSNTS is a body funded under s 203FE of the Act for the purpose of performing the functions of a representative body. The certificate also provides that the application has been certified pursuant to ss 203BE and 203FEA of the Act.<sup>12</sup>

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<sup>9</sup> *Doepel* at [16].

<sup>10</sup> *Doepel* at [72], [78], and [80] – [82]; see also *Wakaman* at [32].

<sup>11</sup> *Doepel* at [80].

- [38] If a body is funded under s 203FE to perform the functions, including the certification in s 203BE of a representative body over an area, then that body will have the power to certify an application under Part 11.
- [39] The geospatial assessment identifies QSNTS to be the only representative body for the area covered by the application.
- [40] Having regard to the above information, I am satisfied that QSNTS was the relevant s 203FE funded body for the application area and that it was within its power to issue the certification.

*Have the requirements of s 203BE been met?*

- [41] To meet the requirements of this condition, the certification must comply with the provisions of s 203BE(4)(a) to (c). For the reasons that follow, I find that these requirements are met and I am therefore satisfied that the claim meets the requirements of s 190C(4)(a).
- [42] The certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.<sup>13</sup>
- [43] The certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion, specifically the following information:
  - QSNTS has engaged expert anthropologists to undertake substantial research and prepare reports in relation to the application area and surrounding region;
  - Such expert material has been relied upon in relation to the identification and description of persons in the native title claim group as shown in Schedule A;
  - Following the authorisation meeting of 13 June 2015, QSNTS convened two further authorisation meetings on behalf of the Kunja People on 4 February 2018 at Cunnamulla;
  - The first of the meetings on 4 February, as notified, was for the Kunja People to consider a proposed amendment to the external boundary of the Kunja People's application filed in July 2015;
  - The purpose of the second meeting, as notified, was for the Kunja People to consider the continuing authority of the current applicant or whether to consider a replacement applicant;
  - Notices of the meetings were placed in the Koori Mail on 5 January 2018 and the Courier Mail on 10 January 2018;
  - The public notice was placed on the QSNTS website on 9 January 2018 and QSNTS' Facebook page on 9 January 2018;
  - On 22 December 2017, QSNTS posted notification and legal advice letters to those Kunja People for whom QSNTS held complete address details;
  - On 23 January 2018, QSNTS posted notification letters enclosing an information package about the authorisation meetings to those Kunja People for whom QSNTS held complete address details;

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

<sup>13</sup> At [6].

- On 29 January 2018, QSNTS sent a bulk SMS text message, reminding of the authorisation meetings, to those Kunja People for whom QSNTS held a mobile phone number;
- The authorisation meetings were reasonably attended by members of the Kunja People, and attendance records and outcomes were kept for each meeting by QSNTS staff who attended the meetings;
- Consistent with decisions from previous authorisation meetings, the claim group resolved by consensus that the Kunja People have a traditional decision making process that would be used, and was used, in the meetings;
- The traditional decision making process involves:
  - decision being made collectively by relevant people;
  - due consideration of information about the matter;
  - deferring to people with seniority and/or relevant knowledge;
  - reaching a consensus;
  - representation by various means;
  - handful of individuals who will generally lead decision-making discussion.
- QSNTS is satisfied that through the holding of the meetings all necessary steps and processes have been followed in accordance with the requirements of the Act, the decision making processes and the instructions of the native title claim group.<sup>14</sup>

- [44] Subsection 203BE(4)(c) applies where the application area is covered by an overlapping application for determination of native title.
- [45] I do not consider that any application currently overlaps the application area.<sup>15</sup> Accordingly, in my view, the requirements of s 203BE(3) are not applicable to the area covered by this application.

#### ***Decision***

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

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<sup>14</sup> At [7].

<sup>15</sup> See my reasons at s 190C(3).

## Merits of the claim (s 190B)

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

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

#### ***What is needed to meet this condition?***

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

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

- [49] Attachment B is entitled 'QUD598/2015 – Kunja People (As amended) and has been prepared by QSNTS on 16 January 2018. It describes the application area by metes and bounds referring to native title determinations, state borders, land parcels, topographic features and geographic coordinates. That Attachment further contains a non-exclusive list of land parcels and waterways that are subject to the claim and specifically excludes two native title determinations. Schedule B lists some general exclusions.
- [50] Attachment C is a copy of a map titled 'Kunja People – Native Title Determination Application (As Amended)' prepared by QSNTS on 30 January 2018. The map includes the application area depicted by a bold outline, areas subject to the claim with a coloured fill, topographic features, north point, scalebar, coordinate grid and notes relating to the source, currency and datum of data used to prepare the map.

#### ***Decision***

- [51] The geospatial assessment states that the application area has been amended and reduced. The assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.
- [52] 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)

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

#### ***What is needed to meet this condition?***

- [54] 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)).
- [55] When assessing the requirements of this provision, I understand that:

- I am required to address only the content of the application;<sup>16</sup>
- 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’;<sup>17</sup>
- 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’;<sup>18</sup>
- 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’.<sup>19</sup>

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

- [56] Schedule A describes the native title claim group as being the descendants of a list of apical ancestors in accordance with Kunja traditional laws and custom.
- [57] 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.
- [58] The approach of identifying members of the native title claim group as descendants of named people has been accepted by the Court as satisfying the requirements of s 190B(3)(b).<sup>20</sup>
- [59] I consider that describing membership this way provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the claim group. With some factual inquiry, I am of the view it will be possible to identify members of the claim group.

***Decision***

- [60] 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).

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<sup>16</sup> *Doepel* at [51] and *Gudjala* 2007 at [30].

<sup>17</sup> *Gudjala* 2007 at [33].

<sup>18</sup> *Gudjala* 2007 at [34].

<sup>19</sup> *WA v NTR* at [67].

<sup>20</sup> *WA v NTR* at [67].

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

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

### ***What is needed to meet this condition?***

- [62] 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.<sup>21</sup>
- [63] 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’.
- [64] 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)’.<sup>22</sup>
- [65] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.<sup>23</sup>

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

- [66] Schedule E contains a description of the claimed native title rights and interests. I am satisfied that they are understandable and have meaning.
- [67] 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?***

- [68] 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.<sup>24</sup>
- [69] 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

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<sup>21</sup> *Doepel* at [91], [92], [95], [98] to [101] and [123].

<sup>22</sup> *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.

<sup>23</sup> *Doepel* at [16].

<sup>24</sup> *Doepel* at [17] and *Gudjala FC* at [57], [83] and [91].

particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material.<sup>25</sup>

- [70] 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.<sup>26</sup>
- [71] 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).
- [72] The factual basis material is contained in Attachment F&M and the witness statements and affidavits of the claimants that accompany the application.
- [73] 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)?***

- [74] 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';<sup>27</sup>
  - that the predecessors of the group were associated with the area over the period since sovereignty;<sup>28</sup> 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'.<sup>29</sup>

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

- [75] 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 centred around the Warrego River, which flows through the northern and southern regions, extending from the Queensland state border, west of Tego in the south to Wyandra in the north and Widgeegoara Creek in the northeast.<sup>30</sup>
  - Evidence indicates pre-sovereignty Aboriginal occupation for at least 1300 years within the region in which the Kunja are located.<sup>31</sup>
  - Effective sovereignty in the application area occurred around 1846-7.<sup>32</sup>
  - The first European explorers observed Aboriginal people living, camping, moving about, hunting and burning country along the Warrego River.<sup>33</sup>

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<sup>25</sup> *Gudjala FC* at [92].

<sup>26</sup> *Gudjala 2009* at [28] and [29] and *Anderson* at [43] and [48].

<sup>27</sup> *Gudjala 2007* at [52].

<sup>28</sup> *Gudjala 2007* at [52].

<sup>29</sup> *Martin* at [26]; see also *Corunna* at [39] and [45].

<sup>30</sup> Attachment F&M at [1].

<sup>31</sup> At [4]

<sup>32</sup> At [5].

- Despite an expansion of the pastoral frontier through the 1850s to the early 1900s which involved confrontation with the Europeans and assimilation and absorption into settled country, some Aboriginal people were still observed to deliberately lead a more traditional lifestyle and Aboriginal camps grew on a number of pastoral properties.<sup>34</sup> This occurred well into the early 20th century over Kunja country.
- Ethnographic sources, linguistic work and accounts of the ‘old people’ who were parents and grandparents of the current claimants associate the Kunja people to the application area, including with the northern, southern and central regions.<sup>35</sup>
- The factual basis contains the following information about the apical ancestors identified in Schedule A and their descendants:
  - Kitty Killamunda’s descent group is the largest in the native title claim group.<sup>36</sup> She was born in the mid-western region where there are big ceremonial grounds for the Kunja People.<sup>37</sup> She had two daughters and one son.<sup>38</sup> Her daughters spent most of their lives around the southern region of the claim area. One of her daughters was born around 1870 in the mid-western region and lived there as a young girl. She was a fluent speaker of the Kunja language.<sup>39</sup> She died in 1971 in the central region. Kitty and her daughter taught her daughter’s youngest son the traditional ways and her daughter taught him Kunja language. Her daughter’s family hunted, fished and camped on country, such as on the rivers in the central and southern regions, and he learnt how to track and hunt bush food, how to cook, where the good fishing holes were and how to make nets, and to gather bush resources for food and medicine.<sup>40</sup> Her daughter’s son speaks of an initiation site in the southern region.<sup>41</sup> He was married in 1947 and his family lived in the central region in 1964.<sup>42</sup> Many of Kitty’s descendants have remained and lived in the central region. Many of her descendants can demonstrate enduring connections to the claim area and wider region, having worked in the pastoral industry as drovers and in public works. Kitty Killamunda’s other daughter worked in the southern region.
  - Flora Maranoa was born in in the central region in about 1883. Her mother was from in and around the northern region. Her descendants continue to participate in decision making and travel to country for that purpose.<sup>43</sup>
  - Ethnographic sources record Maria Major of being from the Warrego River near the central region.<sup>44</sup> The records of the birthplaces of her children, three sons and one daughter, indicate that she spent her adult life on stations along the Warrego between

<sup>33</sup> At [6].

<sup>34</sup> At [7].

<sup>35</sup> At [8] – [13].

<sup>36</sup> At [19].

<sup>37</sup> Affidavit of 1 October 1999 at [3].

<sup>38</sup> Attachment F&M at 19].

<sup>39</sup> Affidavit of 1 October 1999 at [6].

<sup>40</sup> At [7] – [11].

<sup>41</sup> At [13].

<sup>42</sup> At [15].

<sup>43</sup> Attachment F&M at [19].

<sup>44</sup> At [19].

the northern and central regions of the claim area. She may have died in 1919 in the northern region. Her oldest son was born in the 1880s in the northern region and ethnographic sources refer to him as being from the northern to the central region. Her second son was also born in the 1880s in the northern region. Her youngest son was born in the 1890s in the northern region. Maria's daughter was born in the central region and was married in the mid-northern region in 1922. Descendants of Maria continue to participate in decision making and attend Kunja meetings within the claim area.

- Jimmy Nyngan was one of the last 'kings' of Kunja who wore a kingplate.<sup>45</sup> He performed the last initiation ceremonies for boys near the southern region. He lived at a camp in the southern region and was very strict in maintaining tribal law. He may have been born near the southern region around the 1850s and 1860s. He lived most of his life in the southern region. He died and was buried in the southern region in 1934. He is believed to not have any living descendants.
- Some of the current claimants continue to live on or nearby the application area, such as within the central region.<sup>46</sup> Many of these families regularly fish, hunt and collect resources along and around the Warrego River and other watercourses within the application area. Other claimants who do not live in or near the application area regularly visit for traditional purposes to continue to confirm their spiritual, cultural and physical ties to the application area. One claimant says his father was born in the southern region and both his parents worked at the stations there.<sup>47</sup> His parents were married in 1964 in the central region.<sup>48</sup> He and his brothers and sisters were also born in the southern region.<sup>49</sup> While living in the southern region as a young boy, he learnt to cook bush tucker from his mother and the old people.<sup>50</sup> They would show him what bush foods to eat and he has now shown the younger generation how to look for these bush foods. He would take his sons hunting for kangaroos, emus and sand goannas and taught them how to collect bush foods.<sup>51</sup> He speaks of being told about a story of a Dreaming being that lives in the river that flows through the application area and another river around the southern region.<sup>52</sup> In addition, his mother and other old people told him about his totem.<sup>53</sup>
- The native title claim group acknowledge and observe laws of affiliation by which membership of the group passes from generation to generation, and validates anew for each generation the possession of Kunja country, sites, rites, rights and language.<sup>54</sup> Rights to land and rights to own and use the resources of the land and Kunja cultural institutions such as language and ritual are determined by a belief in the mythological era.

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<sup>45</sup> At [19].

<sup>46</sup> At [20].

<sup>47</sup> Witness statement of 17 July 2011 at [5] – [7].

<sup>48</sup> At [4].

<sup>49</sup> At [8] – [9].

<sup>50</sup> At [14].

<sup>51</sup> At [19].

<sup>52</sup> At [2] and [22] – [23].

<sup>53</sup> At [27] – [28].

<sup>54</sup> At [22].

***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?*

- [76] 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’<sup>55</sup>. 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)’.<sup>56</sup> I consider that these principles are relevant in assessing the sufficiency of the claimants’ factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the Kunja People 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 traditional land and waters including knowledge of Dreaming places, initiation sites, ceremonial grounds and those associated with other spirits.

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

- [77] 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.<sup>57</sup> The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of effective sovereignty, which occurred around 1846-7. For instance, the daughter of Kitty Killamunda was born in 1870, which from my recounting of the history indicates that Kitty was born around 1840. Her descendants continue to be born, marry, reside, access, work and use the application area.
- [78] 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 a Dreaming being and the rivers it inhabits, the presence of other spiritual beings within the application area as well as other sacred places. They also have knowledge of the associated stories. This knowledge is passed on to them by their immediate predecessors, which I understand is so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the native title claim group have with the application area.

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<sup>55</sup> *Gudjala 2007* at [40].

<sup>56</sup> At [39].

<sup>57</sup> *Gudjala 2007* at [51].

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

- [79] 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.
- [80] The factual basis indicates that apical ancestor Kitty Killamunda was born in the mid-western region, where there are big ceremonial grounds. One of her daughters was born in the mid-western region and lived there as a young girl. Her daughter's family hunted, fished and camped on country around the central and southern regions. She died in the central region. Kitty's grandson and his family lived in the central region. Many of her descendants have lived in the central region. Apical ancestor Flora's mother was from around the northern region and she was born in the central region. Maria Major spent her adult life on stations between the northern and central regions of the application area where her children were born. Jimmy Nyngan lived at a camp, died and was buried in the southern region. He was likely to have been born in the southern region. He also performed the last initiation ceremonies near that region where there are initiation sites. There are also big ceremonial grounds in the mid-western region. The claimants also believe that a Dreaming being lives in the river that flows through the application area and another river around the southern region. The current claimants continue to live within the application area and regularly perform traditional practices such as fishing, hunting, and collecting resources along the Warrego River which flows from the northern to the southern regions of the claim area, as well as other watercourses within the application area.
- [81] 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'.<sup>58</sup> 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***

- [82] 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)?***

- [83] 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'.<sup>59</sup>
- [84] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

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<sup>58</sup> See *Gudjala 2007* at [52].

<sup>59</sup> See *Gudjala 2007* at [26] and [62] to [66].

- ‘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 laws and customs;<sup>60</sup>
- 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’;<sup>61</sup>
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;<sup>62</sup>
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.<sup>63</sup>

[85] I note that in *Gudjala 2009*, Dowsett J also discussed some of the factors that may guide the Registrar, or her delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrates the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;<sup>64</sup>
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;<sup>65</sup> 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).<sup>66</sup>

#### ***What information has been provided in relation to the society?***

[86] The identification of a pre-sovereignty society or a society that existed prior to effective sovereignty 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:

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<sup>60</sup> At [46] and [49]

<sup>61</sup> At [47]

<sup>62</sup> At [46] and [79]

<sup>63</sup> At [87].

<sup>64</sup> At [37] and [52]

<sup>65</sup> At [40].

<sup>66</sup> At [29], [54] and [69]

- The native title claim group, and its regional neighbours including the Budjiti, Kooma and Mardigan, belong to a broader regional society which is determined by the body of regional laws and customs that define and regulate native title rights and interests across parts of the Queensland-NSW border region.<sup>67</sup>
- Each landholding group derives its identity, laws and customs, and territorial rights and interests from the system of traditional laws and customs of the wider regional society.<sup>68</sup> Therefore, each group have common cosmological, kinship, moiety/section and land tenure systems. However, there is a difference in the practice of laws and customs between the groups of the area.
- The landholding groups of this society have distinct territories over which the groups have exclusive ownership, occupancy and social identification, which is known and recognised by their neighbours.<sup>69</sup>
- The groups of the pre-sovereignty society also have significant cultural and social commonality.<sup>70</sup> However, the regional system also supports and validates distinct language-tribe identity, such as Kunja, and the role of the tribe as the landholding entity, membership of which is the basis of an individuals' connection to country.

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

- [87] The factual basis contains the following relevant information about the traditional laws and customs of the native title claim group.
- [88] The members of the Kunja People continue to believe in the laws from the mythological era which sets out the stories of the Aboriginal cosmology in the region. This cosmology populated the land with man and species, and acculturated it with language, sites and rituals and which pass these creations to the group who hold them as their own.<sup>71</sup> The laws from the mythological era are contained in narratives shared with other groups in the region. The laws of the mythological era sets out all important aspects of Kunja life and society, including rights to land, rights to own and use the resources of that land and Kunja cultural institutions, such as language and ritual. This belief has been passed down in family and kindred circles, and therefore the claimants continue to have knowledge of myths and associated sites, and their relationship to country continues to be influenced by their spiritual beliefs including knowledge of stories from the mythological era and the recognition of the creation beings and the spirits of their ancestors in their country.<sup>72</sup> The claimants continue to also believe in totems which connect them to the land and say that they inherit their totem from their mother and that one cannot eat their own totem.<sup>73</sup>
- [89] The native title claim group continue to follow a landholding system where the group's possession of its country, sites, rites, rights and language are passed from a parent to a child

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<sup>67</sup> Attachment F&M at [14].

<sup>68</sup> At [15].

<sup>69</sup> At [15].

<sup>70</sup> At [15]

<sup>71</sup> At [22].

<sup>72</sup> At [24].

<sup>73</sup> At [24] and Witness Statement of 17 July 2011 at [27] – [28].

based on the laws of filiation.<sup>74</sup> The rights and interests of members of the claim group arise from their descent from an ancestor with rights and interests in the application area.<sup>75</sup> An individual's connection to land is mediated by their membership of the group, which may be said to belong to the land, namely collective possession of the land through the relationship between a group and its country or territory.<sup>76</sup> This establishes an individual's identity and provides entitlement to share with other members the natural, social and cultural resources handed down from the creation beings. There is continued active engagement of the rules where a member is incorporated into the group and all that the group is entitled to or to do on country. In this regard, the claimants through their birthright are entitled to identify as Kunja, have the authority to speak for Kunja country, and do all that they can within the bounds of traditional laws and customs on country, such as moving about on country, camping, fishing, hunting, accessing bush resources, performing ceremony, being buried on country, looking after and protecting country.<sup>77</sup>

- [90] The Kunja People acknowledge and observe the law that the group owns the rights to country, which is laid down by the actions of the creative heroes of the mythological era.<sup>78</sup> The current claimants believe the land is owned by the claim group and that decisions about the land ought to be made by the group while still deferring to those who have knowledge about the country and to the elders.<sup>79</sup>
- [91] The current claimants observe laws regulating who can speak for country, namely that a person would only assert rights over their own country, should not claim or make decisions about country belonging to another group, and should only be guided by senior owners when on country.<sup>80</sup> They believe that outsiders, including from neighbouring groups, should seek permission if they wish to access Kunja country and if permission is granted by an elder, the outsider needs to be respectful and not leave rubbish behind.<sup>81</sup> In this way, access to country is controlled to protect sites from being damaged. They also believe that the spiritual presence on country protect the Kunja People and look after the country for them, so if people are not introduced to country properly and do the wrong things, they are punished by them.
- [92] As traditional owners of country, the Kunja People maintain knowledge of significant sites on their country and access and care for these sites.<sup>82</sup> The laws relating to caring for country also involve maintaining the traditional resources of the country which were the base of the traditional economy for the predecessors and continues to be valued by the current claimants including by ritual and practical means. Knowledge about country is taught by parents to their

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<sup>74</sup> Attachment F&M at [22].

<sup>75</sup> At [18].

<sup>76</sup> At [22].

<sup>77</sup> At [25]; see also witness statements and affidavits of the claimants.

<sup>78</sup> Attachment F&M at [33].

<sup>79</sup> At [34].

<sup>80</sup> At [26].

<sup>81</sup> At [27].

<sup>82</sup> At [29] – [30].

children including knowledge about traditional food sources and what is required to maintain them.<sup>83</sup>

- [93] The current claimants continue to perform other traditional practices on country including, camping, hunting, fishing, gathering bush food and medicine. They are also told about sites that have spiritual presence and have knowledge of ceremonial grounds and initiation sites.<sup>84</sup> The claimants have knowledge of traditional burial rites and still use smoking at funerals and at other times to cleanse and soothe the spirits.<sup>85</sup> The claim group members also believe that particular birds bring messages and signs, such as about a death.<sup>86</sup>
- [94] 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?*

- [95] My understanding of the factual basis material is that the pre-sovereignty society encompasses a wide area of land around the Queensland – NSW state border which is held at a localised level by various groups, including the Kunja People. I understand that the landholding groups of this society had distinct territories over which the groups have exclusive ownership, occupancy and social identification and that is recognised by their neighbours. The groups derive its identity, laws and customs and rights and interests from the system of traditional laws and customs of the wider regional society. The groups have common cosmological, kinship, moiety/section and land tenure systems and cultural and social commonality but each group have distinct identities, roles as the landholding entity, membership which provides the basis for connection to country and distinct practice of laws and customs.
- [96] The factual basis indicates that the Kunja country is situated within this society and their traditional laws and customs are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the members of the native title claim group are based on regionally held and practiced laws and customs. Relevant to this proposition, I note the observations of the Court that:
  - [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added].<sup>87</sup>
- [97] The factual basis reveals that the laws and customs currently observed and acknowledged by the claim group are based on, amongst other things, spiritual beliefs and observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current Kunja members of the native title claim group through the preceding generations.

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<sup>83</sup> At [31] – [32].

<sup>84</sup> At [19].

<sup>85</sup> Affidavit of [name deleted] dated 14 June 2015 at [39] and [56].

<sup>86</sup> At [57] – [58].

<sup>87</sup> *Harrington-Smith (No 5)* at [53].

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

[98] In my view, the factual basis demonstrates that some of the ancestors were living within the application area such as Kitty Killamunda, or were amongst the generation born to those who were living within the application area, at the time of effective sovereignty. In this sense, I understand that the information supports the assertion that the predecessors of apical ancestors were either born or living in and around the application area around the time of effective sovereignty. 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?*

[99] 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 native title claim group continue to observe a landholding system where the group’s possession of its country, sites, rites, rights and language are passed from a parent to a child. By having rights on country, the claim group members can speak for country, permit or restrict access to country by others and protect sites from damage on country.

[100] The factual basis contains some information which speaks to the way the members of the claim group continue to perform traditional practices such as camping, hunting, fishing and gathering of natural resources for bush food and medicine.

[101] 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 the laws and stories of the mythological era in the region by which the land was populated by man and species and which established language, sites and rituals. These laws set out all important aspects of Kunja life and society, including rights to land, rights to own and use the resources of that land and Kunja cultural institutions, such as language and ritual. This belief, laws and knowledge of myths and associated sites are passed down in families and kindred circles and therefore the Kunja relationship to country continues to be influenced by their spiritual beliefs. The claimants have knowledge of other spiritual presence on country, the messages and signs from particular birds, and continue to have knowledge of totems and the related rules. 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.

[102] 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, from parents, grandparents and other ‘old people’, by word of mouth, teaching and common practice, to the current members of the claim group, and have been acknowledged by them without substantial interruption. The asserted facts state, for instance, that claimants have knowledge of spiritual, ancestral and Dreaming beings at particular places, they know how and where to hunt, fish and gather resources on country, know their totems and associated rules, perform smoking ceremonies at funerals and other times to cleanse and soothe the spirits, and they continue to speak for and care for country. The factual basis indicates that apical ancestor Kitty Killamunda and her daughter taught her daughter’s son the

traditional ways. I therefore infer that the other apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are ‘traditional’ in the *Yorta Yorta* sense as they derive from a society that existed at the time of effective sovereignty.

#### ***Decision***

[103] 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)?***

[104] 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.

[105] 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.<sup>88</sup> 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.

[106] I also understand that if the claimants’ factual basis relied upon the drawing of inferences, that ‘[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity’.<sup>89</sup>

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

[107] 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.

[108] The factual basis states that knowledge of traditional laws and customs has been passed from generation to generation by telling stories, teaching and common practice and continues today among the current generation who are members of the claim group. For instance, one claimant says that his father used to take the children ‘out walking in the scrub’ where they would ‘get a lot of roo’s [sic]’ and he taught them about hunting emu eggs.<sup>90</sup> Through his father and other old people, he learnt about plants and where to find them for food and medicine, how to track certain animals, how to find water, which animals would be going to the water source, hunting techniques and significant sites.<sup>91</sup> His parents taught him stories about Dreaming beings and other spiritual beliefs, and the old people told him stories about other spiritual beings.<sup>92</sup>

[109] 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:

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<sup>88</sup> *Martin* at [29].

<sup>89</sup> *Gudjala 2009* at [33].

<sup>90</sup> Affidavit of [name deleted] dated 14 June 2015 at [97] – [98].

<sup>91</sup> At [16], [18], [27] and [82].

<sup>92</sup> At [84], [88] – [89] and [91].

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of the native title claim group in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

**Decision**

[110] 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)**

[111] 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?**

[112] 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'.<sup>93</sup> 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'.<sup>94</sup>

[113] I note that this section is one that permits consideration of material that is beyond the parameters of the application.<sup>95</sup>

[114] 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).<sup>96</sup> 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.

[115] 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 they are possessed pursuant to the traditional laws and customs of the native title claim group.<sup>97</sup>

[116] 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'.<sup>98</sup> I also note

<sup>93</sup> *Doepel* at [135].

<sup>94</sup> *Doepel* at [126], [127] and [132].

<sup>95</sup> *Doepel* at [16].

<sup>96</sup> *Gudjala* 2007 at [85].

<sup>97</sup> *Yorta Yorta* at [86] and *Gudjala* 2007 at [86]

that the phrase ‘in relation to’ is ‘of wide import’.<sup>99</sup> 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.’

[117] 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).

[118] Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

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

*1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title and / or where ss 47, 47A, 47B or 238 apply), the Kunja People claim the right to possess, occupy, use and enjoy the lands and waters covered by the application (the application area) as against the whole world.*

[119] The majority of the High Court in *Ward HC* considered that ‘[t]he expression “possession, occupation, use and enjoyment ... to the exclusion of all others” is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]’.<sup>100</sup> The High Court further noted that the expression, collectively, conveys ‘the assertion of rights of control over the land’, which necessarily flow ‘from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country’.<sup>101</sup>

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

the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added].<sup>102</sup>

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

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

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<sup>98</sup> *Ward HC* per Kirby J at [577].

<sup>99</sup> *Alyawarr* at [93].

<sup>100</sup> At [93].

<sup>101</sup> At [93].

<sup>102</sup> At [71].

gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.<sup>103</sup>

[122] In *Banjima People*, the Full Court found that:

The identification of a traditional law or custom that a stranger to country seek permission to enter or risk suffering spiritually detrimental consequences if he or she enters without such permission can have important consequences. The law or custom so identified can establish among, not just the ancestors of the claim group, but also the neighbouring pre-sovereignty indigenous peoples, whose lands and waters were whose and where the common boundaries lay. That is, such an identification can establish that the consequences of unauthorised entry by a person into the country of another group were recognised and acknowledged traditionally as a normative and effective sanction. Of course, before the super-imposition of European law, the custodians of a particular country could, and did, also use force to protect that country. However, the recognition by indigenous strangers to country of the law and custom of seeking permission to enter was and is a demonstration of the normative effect of, as best the common law can characterise it, an effectual right in the custodians of exclusive possession of their country as between them and indigenous strangers. The evidence of the continued observance of such a law and custom by both the Banjima People and other indigenous peoples that the primary judge accepted justified his Honour's finding.<sup>104</sup>

[123] Referring to the comments of the Full Court in *Banjima People*, Rares J in *Warrie* observed that:

Recognition of a law or custom of one indigenous people by another indigenous people in relation to seeking permission to enter, or conduct activities (such as hunting) on, land or waters, and the spiritual or other purpose or consequence of seeking or failing to have that permission, can demonstrate the normative effect of the law or custom.<sup>105</sup>

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

[125] The factual basis indicates that the Kunja system of spiritual belief in the mythological era continues to function as the generative force of traditional laws and customs in relation to Kunja rights and interests in country, including laws regulating who can speak for, access and use country, and laws about collective ownership and authority of elders and people of knowledge.<sup>106</sup> The members of the native title claim group obtain rights and interests in relation to country through descent which gives them the authority to speak for country and use country within the bounds of their traditional laws and customs.<sup>107</sup> Through their right to speak for country, the Kunja People assert rights over their country and require outsiders to obtain permission before entering and using their country.<sup>108</sup> This requirement to seek permission is not only about being respectful, but due to the belief that the ancestral and

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<sup>103</sup> At [127].

<sup>104</sup> At [40].

<sup>105</sup> At [44].

<sup>106</sup> Attachment F&M at [24].

<sup>107</sup> At [25].

<sup>108</sup> At [26] – [28].

spiritual forces present on country will punish and cause harm.<sup>109</sup> This law and custom has continuously been acknowledged and observed by the Kunja People since sovereignty.

- [126] Current claimants speak of Aboriginal people from other groups seeking permission before going on and accessing their country.<sup>110</sup> In particular, a claimant who lives within the application area is consulted when other groups want to visit and she ‘keeps an eye on things and makes the decision about whether visitors can access’ country.<sup>111</sup> The oldest and most knowledgeable often make these decisions about country and the claimants speak of the importance to keep the elders informed as they can provide guidance. The claimants say the ‘mob’ strongly believes that the Dreaming beings and spiritual guides on country protect the Kunja People and look after the country for them. The claimants speak of the ancestors watching everyone on country and what happens on the land, and therefore the claimants talk to the land and the old people when they are on country. They were taught to do this by their predecessors and they have passed this on to their children and grandchildren. They say that if people do something wrong, such as remove things from country, ‘bad things happen to them as punishment’.<sup>112</sup> In particular, negative consequences flow, such as not catching any fish or death, if people are not introduced to country, do the wrong things and are disrespectful to the land and the ancestors.
- [127] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a ‘spiritual affair’ with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury and from country harming others. Members of the claim group have rights to country on the basis of descent and therefore are able to speak for that country and use country in accordance with traditional laws and customs. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

- [128] I consider that this right is *prima facie* established.

*2. Over areas where a claim to exclusive possession cannot be recognised, the Kunja People claim the following rights and interests:*

- (a) *the right to access and be present on the application area;*
- (b) *the right to camp on the application area;*
- (c) *the right to erect shelters on the application area;*
- (d) *the right to live on the application area;*
- (e) *the right to move about on the application area;*
- (f) *the right to hold meetings on the application area;*
- (g) *the right to hunt on the application area;*

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<sup>109</sup> At [28].

<sup>110</sup> At [27].

<sup>111</sup> At [27].

<sup>112</sup> At [28].

*(h) the right to take, use and keep the natural resources, including waters, on the application area;*

*(i) the right to fish on the application area;*

[129] The factual basis indicates that the predecessors, including the apical ancestors, accessed, were present on, lived in camps, travelled over, held ceremonies, worked, hunted, fished and used the natural resources of the application area.<sup>113</sup>

[130] The current claimants speak of being born, married, growing up, working and living in the application area.<sup>114</sup> They say they hunt, fish and camp on country, and learn how to track and hunt, how to collect bush food and medicine, cook bush tucker, locations of good fishing holes and how to make nets.<sup>115</sup>

[131] 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.

*(j) the right to conduct ceremonies on the application area;*

*(k) the right to conduct burials on the application area;*

*(l) the right to participate in cultural activities on the application area;*

*(m) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;*

[132] The factual basis provides that apical ancestor Jimmy Nyngan had tribal markings and performed initiation ceremonies in the application area.<sup>116</sup> The claimants continue to believe in the mythological era and that the Dreaming beings, ancestral spirits and other spirits inhabit their country.<sup>117</sup> They continue to speak to the spirits on country out of respect and to let the spirits know they are coming and why they are coming.<sup>118</sup> They believe that there are negative consequences that flow if the wrong things are done on country. They also have knowledge of their totems, which is inherited from their mother, and they continue to follow the practice of not eating their totem.<sup>119</sup>

[133] The members of the claim group speak of a special place in the application area where burials were undertaken.<sup>120</sup> They have knowledge of traditional burial rites.<sup>121</sup> The claimants still use smoking at funerals, but they also use smoking to cleanse and soothe the spirits.<sup>122</sup>

[134] The claimants continue to follow the law relating to caring for country, which involves protecting and maintaining a knowledge of significant sites through visitation and protecting against damage.<sup>123</sup>

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<sup>113</sup> At [6] – [7].

<sup>114</sup> At [17] and [19], affidavit of 1 October 1999 at [15] and witness statement of 17 July 2011 at [4] – [7].

<sup>115</sup> Affidavit of 1 October 1999 at [7] – [11] and witness statement of 17 July 2011 at [14] and [19].

<sup>116</sup> Attachment F&M at [19].

<sup>117</sup> At [22].

<sup>118</sup> At [27].

<sup>119</sup> At [24] and Witness Statement of 17 July 2011 at [27] – [28].

<sup>120</sup> Affidavit of [name deleted] dated 14 June 2015 at [10].

<sup>121</sup> At [39].

<sup>122</sup> At [56].

<sup>123</sup> At [29] – [32].

[135] These rights are *prima facie* established pursuant to traditional laws and customs of the claim group.

***Which rights cannot be *prima facie* established?***

*(2)(n) the right to control access to, and use of, the application area by other Aboriginal People or Torres Strait Islanders who seek access to or use of the lands and waters in accordance with traditional laws and customs*

[136] The way this right is expressed, in my view, exerts a degree of control indicating a level of exclusivity. I therefore consider that the case law in relation to this right is closely linked to that involving ‘the right to determine use and enjoyment’ of land. The High Court expressed concern in *Ward HC* of non-exclusive rights expressed in exclusive terms and stated that ‘without a right [as against the whole world to possession of land], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put’.<sup>124</sup>

[137] In *De Rose*, however, O’Loughlin J recognised the non-exclusive right to make decisions about access to the application area for Aboriginal people who were *bound* by the traditional laws and customs of the native title holders.<sup>125</sup> His Honour, however, did not make a subsequent determination of native title. In a subsequent consent determination, the Court recognised the non-exclusive right to ‘make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by Aboriginal people who are *governed* by the traditional laws acknowledged, and traditional customs observed by, the native title holders [emphasis added]’.<sup>126</sup> I also note that in another consent determination, the Full Federal Court held that ‘there is a clear distinction between a right to control access ... and a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs. The continued existence of the former right is incompatible with a pastoral lease entitling the pastoral lessee to determine who has access to the land; the latter right is not’.<sup>127</sup>

[138] In light of the case law cited above, I consider that there is willingness for courts to uphold such non-exclusive rights in situations where those rights are qualified to be against persons who are bound by the laws and customs of the native title holders. The right being claimed here appears to be qualified or limited this way although it is not worded as being in accordance with the traditional laws and customs of the claim group. In my view, the asserted facts do not sufficiently explain how the native title claim group controls the access and use of the application area by other Aboriginal people who are bound by the traditional laws and customs of the claim group.

[139] In my opinion, therefore, this right cannot be *prima facie* established under the traditional laws and customs of the native title claim group.

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<sup>124</sup> At [52].

<sup>125</sup> At [553].

<sup>126</sup> *Mundrabby* at [3(c)(ii)].

<sup>127</sup> *NT v Ward* at [27].

## Physical connection – s 190B(7)

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

### **What is needed to meet this condition?**

- [141] 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.
- [142] 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’.<sup>128</sup> 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’.<sup>129</sup>
- [143] 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.<sup>130</sup>

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

- [144] 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.
- [145] The factual basis contains relevant information that describe a traditional physical association of the claim group with the application area including hunting, fishing, camping, gathering resources of the application area for bush food and medicine, speaking to spirits on country, and caring for country.<sup>131</sup>
- [146] 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)

- [147] 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).
- [148] 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

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<sup>128</sup> *Gudjala 2009* at [84].

<sup>129</sup> At [86].

<sup>130</sup> *Doepel* at [18].

<sup>131</sup> Schedule M and see also Attachment F&M.

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.

- [149] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

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

- [150] 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))*

- [151] Schedule B states that any area where a previous exclusive possession act was done are excluded from the application.

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

- [152] Schedules B and E indicate that exclusive possession is not claimed over areas that are subject to valid previous non-exclusive possession acts done by the Commonwealth or State of Queensland.

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

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

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

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

- [155] Schedule Q provides that no claim is made by the native title claim group of 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))*

- [156] Schedule P states that no claim is made by the native title claim group of 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))*

- [157] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished.

*End of reasons*

## **Attachment A**

### **Information to be included on the Register of Native Title Claims**

Application name	Kunja People
NNTT No.	QC2015/008
Federal Court of Australia No.	QUD598/2015

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

#### **Section 186(1): Mandatory information**

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:**

17 July 2015

#### **Date application entered on Register:**

19 November 2015

#### **Applicant:**

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

#### **Applicant's address for service:**

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

#### **Area covered by application:**

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

#### **Persons claiming to hold native title:**

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

#### **Registered native title rights and interests:**

As appears on the extract from the Schedule of Native Title Applications except remove the right at (2)(n)