



Registration Decision

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	6 September 2019

Claim accepted for registration

I have decided that the claim in the Kurtijar People application satisfies all of the conditions in ss 190B–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 pursuant to ss 190–190D of the Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.

¹ A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Reasons for Decision

CASES CITED

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33 (*Akiba*)
Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
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*)
Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (*Lawson*)
Martin v Native Title Registrar [2001] FCA 16 (*Martin*)
Members of the Yorta 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*)
State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)
Stock v Native Title Registrar [2013] 1290 (*Stock*)
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. This is an amended application filed on behalf of the Kurtjar People native title claim group (claim group). It covers approximately 12,159 square kilometres of land and waters in the Gulf of Carpentaria, surrounding Yagoona and northeast of Normanton.
2. The application was last amended on 23 March 2018. On 24 July 2018, I accepted it for registration pursuant to s 190A(6), with the effect that it remained in an entry on the Register of Native Title Claims. The area subject of the amended application before me has been reduced, however it does not include any areas that have not previously been claimed in the original application.
3. The Registrar of the Federal Court (the Court) gave a copy of this amended application and accompanying affidavits to the Native Title Registrar (Registrar) on 7 August 2019 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.²

Registration conditions

4. Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended

² Section 190A(1).

applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.

5. I am satisfied that neither s 190A(1A) nor s 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 include a change to the description of the native title claim group which I do not consider to be an amendment of a type contemplated in s 190A(6A). It follows that that provision does not apply.
6. I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

Information considered

7. 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’.
8. I have had regard to information in the application. I have also had regard to documents that the applicant has directed me to in Attachment F, as the factual basis in support of the claim. I note that these documents were provided directly to the Registrar on 12 July 2018 in relation to the previous application of the registration test to the application. They include:
 - Anthropological Connection Report on Kurtijar People and Country by Dr Richard Martin dated 17 August 2017 (Martin Report);
 - Archival Research Report by Dr Hilda Maclean dated 28 October 2016 (Maclean Report);
 - Kurtijar Research Report by Jonathan Richards dated 2017 (Richards Report);
 - Affidavit of [name removed] affirmed 7 September 2017;
 - Affidavit of [name removed] affirmed 6 September 2017;
 - Affidavit of [name removed] affirmed 6 September 2017;
 - Affidavit of [name removed] affirmed 4 September 2017;
 - Affidavit of [name removed] affirmed 4 August 2017;
 - Affidavit of [name removed] affirmed 4 August 2017;
 - Affidavit of [name removed] affirmed 3 August 2017;

- Affidavit of [name removed] affirmed 3 August 2017;
 - Affidavit of [name removed] affirmed 2 August 2017;
 - Affidavit of [name removed] affirmed 13 July 2017;
 - Affidavit of [name removed] affirmed 12 July 2017;
 - Affidavit of [name removed] affirmed 11 July 2017;
 - Affidavit of [name removed] affirmed 30 March 2017;
 - Affidavit of [name removed] affirmed 3 March 2017; and
 - Affidavit of [name removed] affirmed 26 May 2015.
9. I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.³
10. The state government has not provided any submissions in relation to the application of the registration test.⁴
11. 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 13 August 2019 (the geospatial assessment).

Procedural fairness

12. On 15 August 2019, I wrote to the state government advising of receipt of the amended application and that should it wish to make any submissions, it should do so by 29 August 2019. No submissions were received from the state government. 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.
14. A metes and bounds description of the external boundary of the application area appears at Attachment B. It references the centerlines of waterways, the boundaries of land parcels, coordinate points, and to the boundaries of native title determinations, Kowanyama People Part D (QUD6119/1998) and Tagalaka People #2 (QUD6020/2001).
15. A map showing the external boundary appears at Attachment C. It has been prepared by the Tribunal's Geospatial Services and is dated 16 July 2019. The map includes:

³ Section 190A(3)(b).

⁴ Section 190A(3)(c).

- the application area depicted with bold dark-blue outline, identified with Federal Court file number and Tribunal file number;
 - tenure, labelled with lot on plan and pastoral lease name;
 - major roads, settlements and watercourses, labelled with name;
 - scalebar, coordinate grid and location diagram;
 - notes relating to the source, currency and datum of data use to prepare the map.
16. The geospatial assessment provides that the map and description are consistent and identify the agreement area with reasonable certainty. Having considered the information before me about the external boundary of the area, I agree with the assessment.
17. Schedule B uses general exclusion clauses to describe those areas within the external boundary that are not covered by the application. In my view, this approach to describing excluded areas is not problematic in the application satisfying this condition. This is on the basis that, with the necessary research into the tenure history of the application area, I am satisfied these areas could be identified with reasonable certainty.
18. Section 190B(2) is met.

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

19. I am satisfied the claim meets the requirements of s 190B(3) as the application describes the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group.
20. A description of the persons comprising the native title claim group, pursuant to s 190B(3)(b) appears at Schedule A of the application. It states that the ‘native title claim group on whose behalf the claim is made is the Kurtijar people’ and that the ‘Kurtijar People are all the descendants of the following people...’ This is followed by a list of 15 named apical ancestor individuals, couples or what I understand to be sibling groups. The concluding sentence of the description explains that ‘descendants’ includes ‘those individuals who have been adopted by the Kurtijar People.’
21. The use of the apical ancestor model to describe the persons comprising a native title claim group is well-accepted by the Court.⁵ From the description, it is my understanding that any person who is a biological descendant, or a descendant by way of adoption, of one of the named apical ancestors, will qualify for group membership. While applying these criteria to certain individuals will necessarily require some factual inquiry and research, I do not consider this fatal to the requirement at this condition being met.⁶ Named apical ancestors provides an objective starting point from which to commence this inquiry.

⁵ *WA v NTR* at [64]-[69].

⁶ *Ibid.*

22. I note that there is no explanation of the rules around adoption, and what is required in order for a person to satisfy this criteria, however, I consider that by asking the biological descendants of the named ancestors about the laws and customs providing for adoption, these adopted descendants could be known.⁷
23. Section 190B(3)(b) is met.

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

24. I am satisfied the description in Schedule E is sufficient for me to clearly understand and identify the itemised rights as ‘native title rights and interests.’
25. The description required at s 190B(4) is one that is clear and easily understood.⁸ I understand that I am to have regard to the definition of ‘native title rights and interests’ in s 223(1) in considering whether the claimed rights and interests have meaning as native title rights and interests.⁹ I note, however, that I do not consider it my role here to undertake an assessment of whether each individual right or interest satisfies the requirements of that definition. My view is that that is a more appropriate task for the corresponding merit condition at s 190B(6) regarding whether the rights can be established on a prima facie basis.
26. The description of the rights and interests claimed by the native title claim group appears in Schedule E. Paragraph (a) states that the ‘Kurtijar People claim the right to possession, occupation, use and enjoyment of the land and waters covered by the Application area’. While this appears to be a claim to a right of exclusive possession, paragraph (c) of the description states ‘[t]he native title rights and interests referred to in paragraphs (a) and (b) do not confer possession, occupation, use or enjoyment of the lands and waters covered by the Application to the exclusion of all others.’ Consequently, I understand that no claim is made in the application area to a right of exclusive possession.
27. Paragraph (b) of Schedule E contains a list of non-exclusive rights, and also a right ‘to conduct activities necessary to give effect to them’.
28. Paragraph (d) of Schedule E sets out a number of qualifications on the rights claimed, including that they are subject to and exercisable in accordance with the laws of the Commonwealth and the State of Queensland, and the traditional laws and customs of the Kurtijar People.
29. I have considered the description before me and in my view it is clear and easily understood, and the rights described have meaning as native title rights and interests. I have read the contents of the Schedule together, including the stated qualifications and am satisfied there are no inherent or explicit contradictions.¹⁰
30. Section 190B(4) is met.

⁷ See *Aplin* at [256].

⁸ *Doepel* at [99] and [123].

⁹ *Doepel* at [99].

¹⁰ *Doepel* at [123].

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

31. 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 ss 190B(5)(a)–(c).
32. For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is a 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 laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests; and
 - (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.
33. 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’.¹¹
34. 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’.¹²
35. 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.¹³
36. The factual basis material is contained in Schedules G and M, Attachment F and in the additional material listed above at ‘Information considered’.

The requirements of section 190B(5)(a)

37. To meet the requirement at 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, to satisfy this requirement:
 - 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;¹⁴

¹¹ *Doepel* at [16]–[17]; *Gudjala 2008* at [83] and [92].

¹² *Gudjala 2008* at [92].

¹³ *Gudjala 2007* at [39].

¹⁴ *Gudjala 2007* at [52].

- 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;¹⁵ and
- the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.¹⁶

Is there a sufficient factual basis for the requirement at s 190B(5)(a)?

38. The factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of the group had, an association with the application area.
39. As explained above, the additional material largely comprising the factual basis in support of the claim is, in fact, the same additional material provided to the Registrar for the purposes of registration testing the previous Kurtijar application. Yet, as also explained above in 'Background', the area of this amended application has been changed, that is, reduced. On that basis, I understand references to the 'claim area' or 'area under claim' in the reports and affidavits is, in fact, a reference to a slightly larger area than the one subject of the application before me. I have considered the additional material having regard to this, to ensure it supports an association with the present application area.
40. Attachment F explains that Kurtijar is the name of both a language and people of south west Cape York. It states that the application area has historically been mapped as the territory of the Kurtijar People, and refers to various historical and ethnographical material from the late 1890s, as sources that support this assertion.¹⁷ Settlement in the region is said to have taken place in the late 1860s.¹⁸
41. The Martin Report includes a discussion of these historical sources.¹⁹ Referring to the work of ethnographers such as R. H. Mathews, R. Lauristan Sharp, Norman Tindale and Arthur Capell, the author concludes that the area 'has historically been mapped as the territory of the Kurtijar people as well as the territories of several other Aboriginal language groups such as the Walangama and Rib in the east and the 'Kunjen' (or Olkol-Olkola, Oykangand, and Ogh Undjan peoples) in the north.'²⁰
42. The Martin Report also discusses the views and knowledge of claimants today about the boundaries of their traditional country. The author refers to field work with members of the claim group who generally identified Kurtijar country as lying between the Norman River (in the south) and the Staaten River (in the north), with the inland extent more approximately marked.²¹ In summarising this discussion, the author states that the Kurtijar traditional boundaries 'relate to a variety of factors, including the processes of legitimate change and

¹⁵ *Gudjala 2007* at [51] and [52].

¹⁶ See *Martin* at [23]–[26], affirmed in *Corunna* at [35]–[39] and [42]–[44].

¹⁷ At [1.1] and [1.7].

¹⁸ At [2.1].

¹⁹ At [144]–[163].

²⁰ At [163].

²¹ At [134].

completed succession'.²² He further states 'the historical and ethnographic record and my fieldwork enquiries with [Kurtijar] and other Aboriginal people indicate that the areas under claim are Kurtijar country.'²³

43. Regarding an association of the apical ancestors of the group with the area, the Martin Report sets out information about each of the apical ancestors, such as where they were born or from, where they worked, who they married, and/or what language they spoke.²⁴ From my consideration of this material, I understand that all of these persons were associated with some part of the application area, or a location in the immediate vicinity of the area, and/or were persons associated with the Kurtijar language group.
44. For example, regarding apical ancestor Kangaroo, the Martin Report explains that he was born around 1875 or before around the Gilbert River, possibly on Delta Downs Station, and that he worked on Macaroni Station in the claim area around 1896, at Delta Downs Station around 1900, and at Inkerman Station around 1915.²⁵ The author concludes that 'Kangaroo appears to have spent his whole life in and around the claim area.'²⁶
45. From the dates included in the information about the apical ancestors, it is my understanding that they were generally persons who were present in and around the application area at the time settlement was taking place, or at least in the decade or so following. In light of this, and the information before me about the claim area being supported by the historical record as Kurtijar country, I consider the factual basis sufficient in supporting an association of the predecessors of the group with the area at the time of settlement.
46. I consider the factual basis also speaks to an association of the group with the area since that time. The Martin Report talks about the children of the apical ancestors and the places with which they were associated. For example, it's explained that the son of apical ancestor Kangaroo and his wife Polly, [name removed], was born on the Staaten River, which runs along the northern boundary of the application area, in approximately 1915.²⁷
47. The Martin Report states that Kurtijar People have maintained a strong physical presence across the claim area since settlement.²⁸ It discusses the way predecessors of the group were involved in cattle mustering across the application area throughout the late 1800s and in the 1900s,²⁹ while Attachment F refers to the congregation of Kurtijar People at the Reserve at Normanton, just west of the application area, which allowed them to remain in their traditional country.³⁰
48. The affidavits sworn by members of the claim group provide further information supporting this association with the area over the period since settlement. Claimants talk about what

²² At [143].

²³ Ibid.

²⁴ At [165]-[212].

²⁵ At [182].

²⁶ At [183].

²⁷ At [179].

²⁸ At [385].

²⁹ At [394].

³⁰ At [3.3] and [3.4].

they were taught about their country by their predecessors, namely their parents, grandparents and other old people, that is, persons who were born and lived in the area during that period. For example, one claimant explains:

My dad was [name removed] and he was born at Myra Vale. He was Kurtijar. His father was [name removed]. He was Kurtijar too. He lived to be an old man. Granddad [name removed] was like a king of the Kurtijar.

[name removed] was a ringer and he was riding horses still when I was a boy. [name removed] taught me how to ride a horse, how to break horses in and how to track cattle in the bush. [name removed] spoke Kurtijar and he told me about my family.

[name removed]'s mother was [name removed]. She was Kurtijar. Her parents were Jimmy and Minny. [name removed] was a jillaroo and she was old when I knew her. [name removed] had a sister, [name removed] and two brothers, [name removed] and [name removed].³¹

49. He says elsewhere:

[name removed] 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 I should go see it for myself. That's why, later on, I went to Miranda Downs to work.³²

50. In light of this information about how predecessors of the claimants spent time on the application area, and passed on knowledge of that country to the claimants as they were growing up, I consider the factual basis sufficient to support an assertion that the predecessors of the group had an association with the application area over the period since settlement.

51. The affidavits also provide significant detail regarding an association of the members of the claim group today with the area. For example, one claimant explains:

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

[...]

I have been hunting and fishing on Van Rook with my uncles –[names removed]. They know the places to hunt and fish from when they were there as young men.³³

52. In my view, this detail about the way claimants continue to visit places within the application area and use the resources of the area, is information providing a sufficient factual basis to support an association presently of the group with the area.

53. I note at s 190B(5)(a), the association must be shown to be with the entirety of the area. There is a considerable amount of material before me, which provides substantial detail regarding

³¹ Affidavit of [name removed] affirmed 13 July 2017, at [4]–[6].

³² At [22].

³³ Affidavit of [name removed] affirmed 30 March 2017, at [9], [10], [12].

the asserted association. It is clear from the material that the members of the group and their predecessors, including at settlement, have occupied and been present in and around the land and waters of the application area. Not only does the material speak of an association with the relevant pastoral stations comprising the application area (such as Van Rook, Dorunda, and Miranda Downs), but it also names creeks, waterholes, corroboree and bora sites, and camp grounds with which there is and was an association.

54. It follows from the discussion above that I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

The requirements of s 190B(5)(b)

55. 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 in *Yorta Yorta*.³⁴
56. According to the High Court’s decision in *Yorta Yorta*, a law or custom is ‘traditional’ where:
- (a) it ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’;³⁵
 - (b) the origins of the content of the law or custom concerned can be found in the normative rules of a society³⁶ which existed before the assertion of sovereignty by the Crown;³⁷
 - (c) the normative system has had a ‘continuous existence and vitality since sovereignty’;³⁸ and
 - (d) the relevant society’s descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.³⁹
57. 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.’⁴⁰ His Honour held that a ‘starting point must be identification of an indigenous society at the time of sovereignty’,⁴¹ and concluded that a sufficient factual basis must also establish a link between the native title claim group described in the application and the area covered by the application, which involves

³⁴ *Gudjala 2007* at [26] and [62]–[66].

³⁵ *Yorta Yorta* at [46].

³⁶ 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].

³⁷ *Yorta Yorta* at [46].

³⁸ *Yorta Yorta* at [47].

³⁹ *Yorta Yorta* at [87].

⁴⁰ At [63].

⁴¹ At [66].

'identifying some link between the apical ancestors and any society identified at sovereignty.'⁴²

58. I understand that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).⁴³

Is there a sufficient factual basis for the requirement at s 190B(5)(b)?

59. I am satisfied the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claim to native title.
60. As above, the starting point at this condition is the identification of a society of people living in the area around the time of settlement, who are bound by the common observance of normative laws and customs.⁴⁴ Attachment F explains that at the time of sovereignty, Kurtijar people formed part of a broader regional society sharing laws and customs, which spread across a geographical area bounded by the Leichardt River in the west, and the Staaten River in the north.⁴⁵ Its inland extent was marked by the neighbouring Mayi language group whose territory was south of the claim area, and the head waters of the Gilbert River around modern-day Georgetown in the east.⁴⁶ Attachment F further explains that Kurtijar people historically spoke Kurtijar language, and that this was part of the 'Norman Pama' family of languages spoken in the general vicinity of the mouth of the Norman River.⁴⁷
61. The Martin Report includes a summary of the author's findings regarding the laws and customs of the society at sovereignty.⁴⁸ He lists various laws and customs supported by the historical and ethnographic material, including:
- the existence of patrilineal and patrilocal groups or clans;
 - association of these clans with particular tracts of land or estates;
 - title to an estate through reference to mythology and Dreaming and the belief that creative beings in the 'ancient past lived in the same environment, travelling through it, alter[ing] it, sometimes merging with it'⁴⁹ – totems were symbols or 'tags' for these mythological events and denoted ownership of estate or country areas;

⁴² 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.)

⁴³ See also *Stock* at [64] where His Honour held that 'it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists'.

⁴⁴ *Gudjala 2007* at [65] and [66].

⁴⁵ At [1.5].

⁴⁶ *Ibid.*

⁴⁷ At [1.4].

⁴⁸ Executive Summary at [3].

⁴⁹ *Ibid.*

- conception beliefs or the finding of ‘baby spirits’ in places – a system known as ‘conception filiation’ in the anthropological literature;
- a complementary system of inheritance through filiation with parents and grandparents and various other means of acquiring rights in the claim area, including by gift or transfer, and personal name association, with senior people being recognised as stewards of this process;
- conduct of different ceremonies in the claim area, including male initiation and ‘increase’ or control rites;
- routine rituals, such as introducing a person to supernatural forces in the landscape to protect them from harm;
- an incidental, personal knowledge of the land and its significant places.⁵⁰

62. In light of this information, I consider the factual basis sufficient in supporting a society in occupation of the area at settlement, acknowledging and observing normative laws and customs.

63. The factual basis material at s 190B(5)(b) must also explain the link between the claim group and the claim area, which may involve identifying a link between the apical ancestors listed in the description of the claim group in Schedule A, and the society at settlement. I consider Attachment F addresses this connection. It states that ‘[t]he Kurtijar people are a group of families descended from the apical ancestors identified in Schedule A’, and who are depicted in the Kurtijar genealogies.⁵¹ As discussed in my reasons above at s 190B(5)(a), information about each of these ancestors is given in the Martin Report, which indicates that they were persons present in the application area around the time of settlement in the late 1860s, or in the decade or so following. It is my understanding, therefore, that the material asserts the apical ancestors to have been members of, or persons later born into, the asserted society at settlement.

64. Turning then to the matter of traditional laws and customs, that is, whether the laws and customs acknowledged and observed by the claim group today are rooted in those of the society at settlement.

65. I note that traditional laws and customs are also those that have been passed down from generation to generation by word of mouth and common observance.⁵² The affidavits give numerous examples of the way that this has occurred across previous generations. One claimant says:

I was told by the old people that there is a bora (initiation) ground (23) at 10 Mile Waterhole (24), between the Development Road and Walker Creek. It is on the way to where we go fishing. We always went around it and still today no tree will ever grow on that ground. I still don’t go there.

⁵⁰ Martin Report, Executive Summary at [3].

⁵¹ At [1.2]

⁵² *Yorta Yorta* at [46].

Old [name removed] told me that they used to let the boys wash in Walker Creek after they had gone through the law at that bora ground.⁵³

66. And another claimant explains:

[name removed] told me that [dingo dreaming] story. [name removed] also told me that there is a dingo story dreaming place north of Wyaaba Creek, just east of the Development Road (88). That dingo passes through there on its way to Kowanyama mob country. It's a thick area with paperbark all around it. There is *minya* (animals) or *nuaanchin* (crocodile) all around there.⁵⁴

67. From this type of information before me, I understand that there is a strong pattern of intergenerational transfer of knowledge about laws and customs relating to country.

68. I note that these two examples address the passing on of knowledge of laws and customs that the Martin Report identifies as being part of the system of laws and customs of the group at sovereignty. That is, the Martin Report refers to ceremonies held by the Kurtijar people at sovereignty, including initiation ceremonies, and refers to dreaming stories which underpin a totemic system giving rights of particular families to estate areas within Kurtijar country. From these claimants' statements, therefore, I understand that these aspects of the laws and customs of the society at sovereignty, or European settlement, continue to be upheld or observed by the members of the group today.

69. There are multiple other examples within the affidavits, which in my view support an assertion of laws and customs rooted in those of the society at settlement. For example, one claimant describes a number of rituals that are performed in order to appease spiritual forces in the landscape:

When we go fishing at a water hole in our country, we always call out to the spirits of the old people. If we do not do this, we will not catch a fish. If we cook the fish, we will always leave some fish for the spirits of the old people.

[...]

There are two sorts of smoking ceremonies.

There is a special grass which can be used for smoking babies. A fire is made using the grass and the mother of the baby will sit the baby on her knee. The smoke stops the baby from growing up greedy. [name removed] has done this with our grandkids.

There was a different smoking ceremony to chase spirits away from houses. If somebody dies, we can block up the house. We then use smoke from ironwood to smoke out the house and this will chase the spirit away.⁵⁵

70. Another claimant explains how certain families are associated with particular areas within Kurtijar country:

⁵³ Affidavit of [name removed] affirmed 12 July 2017, at [75].

⁵⁴ Affidavit of [name removed] affirmed 4 August 2017, at [43].

⁵⁵ Affidavit of [name removed] affirmed 3 March 2017, at [16]-[20].

[name removed] told me that Miranda Downs and Vanrook stations are important parts of Kurtijar country for the [names removed] families. Families for old Macaroni station are the [names removed] and [name removed]'s brothers, [name removed] and [name removed]. [name removed] family (through [name removed]) country is Vanrook, Macaroni, Miranda Downs, Gilbert River – from the fresh water to the salt water.

[name removed] spoke Kurtijar for Lotus Vale and all along the Smithburne River to Macaroni Island on the [name removed] family side. Uncle [name removed] told me that. I can speak for that country too.⁵⁶

71. In my view, these examples support laws and customs today that are rooted in those of the society at settlement. Claimants explain how their parents, grandparents and other old people taught them about the laws and customs relating to their traditional country, and the beliefs and practices they maintain and observe today based on the information passed down to them. It is clear from the above examples that the laws and customs acknowledged and observed by the group presently, mirror the aspects of the system of laws and customs of the Kurtijar society at settlement, identified in the Martin Report. In this way, I consider the material speaks to traditional laws and customs that have their source in the laws and customs of the society at settlement.
72. In light of this, I am satisfied the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title.
73. Section 190B(5)(b) is met.

The requirements of s 190B(5)(c)

74. 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.' In order for a delegate to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses the following matters outlined by Dowsett J in *Gudjala 2007*:

- 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; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.⁵⁷

Is there a sufficient factual basis for the requirement at s 190C(5)(c)?

75. I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title rights and interests in accordance with traditional laws and customs.

⁵⁶ Affidavit of [name removed] affirmed 4 August 2017, at [20]-[21].

⁵⁷ *Gudjala 2007* at [82].

76. I have already set out above at s 190B(5)(b), the reasons for which I consider the factual basis sufficient to support an assertion of a society at settlement in the area, acknowledging and observing traditional laws and customs from which the current laws and customs are derived.
77. As to whether there has been continuity in the observance of those traditional laws and customs, over the period since sovereignty, Attachment F explains that there has been some adaptation of laws and customs over that period. One example given is the way the patrilineal and patrilocal clan system has moved towards a 'cognatic mode of reckoning connections to country which emphasizes family group connections to sub-areas within Kurtijar country'.⁵⁸ In my view, however, these adaptations do not affect the way present laws and customs are shown to be derived from those of the society at settlement.
78. From the material, it is clear that members of the group and their predecessors, including back to settlement, have maintained a strong presence in their traditional country, through gaining employment on the pastoral stations covering the application area. I understand that this presence in the area allowed them to acknowledge and observe their traditional laws and customs without substantial interruption.
79. In addition to this, in their affidavits, all of the claimants share the knowledge they have of their predecessors, in the 'old days', acknowledging and observing particular laws and customs in their country. For example, one claimant says:
- Old people told me about dreaming times. They told me stories about the old days. We used to sit around campfires when we were kids and they told us these stories. This was a long time ago. They told me that in the old days, when they had to have a meeting, there was a stick they would carve on to tell other people about the meeting. I know that sometimes the meetings were held with the Kowanyama mob – the stick would be taken to them and then our people would go and camp on the southern side of the Staaten River and a meeting would take place.⁵⁹
80. In my view, this supports the way in which there has been continuity of laws and customs across the period since settlement. Further statements by claimants point to ways in which laws and customs are acknowledged and observed today, such as taking young children out on country and teaching them about the stories, spirits and rituals associated with that country. One claimant summarises this as follows:
- What I was taught by my old people, I teach the same to my children and grandchildren. They understand the laws and our family is strong.⁶⁰
81. In light of this information before me, I consider the factual basis sufficient to support a system of traditional laws and customs that has had a continuous existence and vitality⁶¹ since settlement.
82. Section 190C(5)(c) is met.

⁵⁸ At [3.1].

⁵⁹ Affidavit of [name removed] affirmed 4 September 2017, at [16].

⁶⁰ Affidavit of [name removed] affirmed 4 August 2017, at [37].

⁶¹ See *Yorta Yorta* at [47].

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

83. 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).
84. Regarding the first two rights set out below at [86] and [90], Schedule E states ‘without limiting the generality of [those two rights]’, and then sets out another 11 rights and interests. They are:
- (a) the right to hunt on, and gather natural resources from, the area;
 - (b) the right to fish in the area;
 - (c) the right to take and use water on the area;
 - (d) the right to live on the area;
 - (e) the right to camp, and for that purpose to erect shelters and other structures, on the area;
 - (f) the right to light fires on the area for cultural, spiritual or domestic purposes, including cooking;
 - (g) the right to conduct and to participate in cultural and religious activities, practices and ceremonies, including the conduct of burials, on the area;
 - (h) the right to conduct and to participate in meetings on the area;
 - (i) the right to teach the physical, cultural and spiritual attributes of places and areas of importance under traditional laws and customs on the area;
 - (j) the right to maintain and to protect from physical harm or desecration, places and areas of importance or significance under traditional laws and customs on the area; and
 - (k) the right to share and exchange the natural resources from the area.
85. From the description in Schedule E, I understand that these rights are, in fact, sub-rights, captured by the scope of the first two rights below. I have turned my mind to these sub-rights in considering the material, and whether it allows for the two rights to be established on a prima facie basis.

Non-exclusive right to access, remain on, traverse and to use the area

86. An example of the material that I consider speaks to a right of this nature is in the following statement of a claim group member:

I met [name removed] in the early 1970s. He was head stockman at Miranda Downs at that time.

[name removed] worked at Stirling in 1972 and Miranda Downs in 1973. I was with him in those early years. [name removed] was about 2 years old at the time. [name removed] was head stockman on Stirling and Miranda by then. I also remember [name removed] was at Miranda and Glencoe. He was my brother-in-law because he married my cousin’s sister, [name removed].

After we were married in 1973, [name removed] worked out on Delta. I stayed in town to look after the kids so they could go to school.

Family could go out to the stations on weekends if the husband worked there. [name removed] and I would take the kids and grandkids out to places like Delta. We would go fishing on Fitzmaurice Creek and the Gilbert River and at Fish Hole. We would take my sister [name removed] with us. [name removed]'s husband, [name removed], worked out at Delta as well. [name removed] would come too sometimes. Her husband [name removed] worked on Delta then too. We'd catch jew fish, bream, yabbies and turtle.⁶²

87. And also this statement from another claimant:

There is an old Kurtijar burial ground on the other side of the Norman river. I remember after the 1974 flood there were some bones exposed and the police needed to put them in the cemetery. We did not know whose bones they were. We could not identify them. I think Kurtijar boundaries were caught in two worlds when we were growing up. By this I mean there were the pastoral properties and our land. We did not mark our boundaries with fences of barbed wire. So far as I knew the boundary of Kurtijar country was the Norman River to the Staaten River. Our boundaries were marked by trees and rivers. When I was growing up I was told about these boundaries. Native Title was not heard of back then. Now I have to remember back to what I had been told. Our elders were our library and our teachers. The bush was our classroom. Going inland our country goes around Velock's waterhole. Pelican creek is part of our country.⁶³

88. Throughout the affidavits affirmed by members of the claim group, in addition to the above, there are numerous statements about the way in which members of the group and their predecessors were born on, have occupied and lived in, and worked on pastoral properties within, the application area. I note the material demonstrates that claimants have been passed knowledge about their right to remain in the area by their parents and grandparents, on the basis that it is the country of their ancestors, which has also been passed down to them.

89. In light of this information before me, I consider the right established on a prima facie basis.

Non-exclusive right to access natural resources in those areas and to take, use, share and exchange those natural resources for any purpose

90. An example of the material that I consider speaks to a right of this nature is in the following statement of a claim group member:

I remember one time when [name removed] killed a crocodile in the Gilbert River, he dug a hole in the ground and made a big fire with tea tree bark. They used a tomahawk to break the ti-tree bark. They'd put ti-tree leaves first and then put the pieces of crocodile on it. Put that in and then chuck another lot of ti-tree leaf on top till it was covered. We call that a bush oven. It cooked real nice and clean. The smell made me very hungry. I said to mum, "Can I get a piece" She said, "No, you're not allowed to eat. That's big people tucker." The custom was that the older people ate

⁶² Affidavit of [name removed] affirmed 2 August 2017, at [30]-[33].

⁶³ Affidavit of [name removed] affirmed 26 May 2015, at [22].

first. Anyway, I did not take any notice. I went and got a piece of tail. I didn't get into trouble, because Grandmother [name removed] stuck up for me. It was lovely.⁶⁴

91. Another example is where a claim group member says:

We use what is on our country; animals and the plants, sugar bag, water, wood and stone.

[...]

My mother and my Nanna told me about the cattle bush. If you have a sore or feel sick you can boil up the leaves and drink it as a tea or put the tea on the sores.⁶⁵

92. Elsewhere, another claimant explains:

The old people told me that Kurtijar would trade with the Gkuthaarn and the Kukatj at points along the Norman River. Things like food, spears, boomerangs. Our sugarbag was sought after.⁶⁶

93. While the right is framed in broad terms, that is, to take and use resources for 'any purpose', the material gives a wide range of examples of the purposes to which resources have been and continue to be put by the members of the claim group and their predecessors. There is nothing in the material before me to suggest that there are purposes for which resources are taken and cannot be used, and I understand that the right to take and use resources is inherently related to the understanding of claim group members that they are effectively the owners of the application area, and subsequently, its resources.

94. In addition to this, I note that the Court has been prepared to recognise a right to take resources for any purpose.⁶⁷

95. Therefore, I consider the right established on a prima facie basis.

Non-exclusive right to be accompanied onto the area by non-native title holders

96. Schedule E explains that these people include those who are one of the following:

- (a) spouses, partners or parents of native title holders, together with their children and grandchildren;
- (b) people required under traditional laws and customs for the performance of cultural activities, practices or ceremonies; and
- (c) people requested by the native title holders to assist in, observe or record cultural activities, practices or ceremonies.

97. An example of the material that I consider speaks to a right of this nature is in the following statement of a claim group member:

My wife was Gkuthaarn. Because she married me, she could use Kurtijar country and help us out. She helped us get Delta back.⁶⁸

⁶⁴ Affidavit of [name removed] affirmed 12 July 2017, at [108].

⁶⁵ Affidavit of [name removed] affirmed 6 September 2017, at [49] and [53].

⁶⁶ Affidavit of [name removed] affirmed 3 August 2017, at [116].

⁶⁷ See *Akiba* at [39], [68] and [75].

98. Elsewhere within the material there are statements about the way members of the claim group have undertaken activities to ensure protection of their country, such as conservation programs and ranger programs.⁶⁹ I consider I can infer that these activities would necessarily require non-claim group members to accompany the Kurtijar people onto their country, for training or recording culture or other related purposes.

99. In light of this information before me, I consider the right established on a prima facie basis.

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

100. 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. Having considered the material before me, I am satisfied that [name removed] has a traditional physical connection with some part of the application area.

101. 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 and therefore evidentiary material is required;⁷⁰
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the application area;⁷¹
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;⁷²
- the material may need to address an actual presence on the area.⁷³

102. In light of the wording of the condition, I have focused my attention on one member of the native title claim group, being [name removed]. The material provides the following information about Mr [name removed]:

- he was born on 23 June 1939 in Georgetown, south east of the application area;⁷⁴
- his father was a stockman and took the family with him to work at stations including Vanrook and Miranda Downs stations;⁷⁵
- he spent most of his early years on Vanrook station;⁷⁶
- while living on the stations, he received rations, but also survived on bush foods from his country;⁷⁷

⁶⁸ Affidavit of [name removed] affirmed 4 September 2017, at [68].

⁶⁹ See affidavit of [name removed] affirmed 7 September 2017, at [59].

⁷⁰ *Doepel* at [18].

⁷¹ *Ibid.*

⁷² *Gudjala 2007* at [89].

⁷³ *Yorta Yorta* at [184].

⁷⁴ Affidavit of [name removed] affirmed 4 September 2017, at [5].

⁷⁵ At [11].

⁷⁶ At [11].

⁷⁷ At [12].

- he was taught about the resources available in the area by the old Kurtijar men at the station, and also about Kurtijar ‘rules and stories’, including dreamtime stories;⁷⁸
- he remembers big corroborees, for example on Lotus Vale station, where Kurtijar people from other stations would travel across to participate;⁷⁹
- during one corroboree time at Lotus Vale, some of the old men took him and other young men out on the Smithburne River where they speared a crocodile;⁸⁰
- he knows of important Kurtijar sites within the application area, such as burial sites and bora grounds.⁸¹

103. From this information, I understand that Mr [name removed] has spent a considerable part of his life living in the application area, namely at Vanrook station, Lotus Vale station and Miranda Downs station. It is clear, therefore, that he has a physical connection with some part of the application area.

104. In my view, the material supports this physical connection as being one held pursuant to the traditional laws and customs of the Kurtijar people. This is on the basis that Mr [name removed] talks about the way he was passed down knowledge of his country by the old people, including knowledge about dreaming stories and significant sites. He also speaks of being involved in ceremonies on his traditional country.

105. I note that in my reasons above at s 190B(5)(b), I discussed the way the factual basis supported a system of traditional laws and customs which involved rights and interests accruing based on an underlying mythology and associated dreaming stories. I also discussed the aspect of traditional laws and customs involving the conduct of ceremony. Therefore, in light of the information given about Mr [name removed] in the material, set out above, I am satisfied he has a traditional physical connection with some part of the application area.

106. Section 190B(7) is met.

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

107. In my view the application does not offend any of the provisions of ss 61A(1)–(3) and therefore the application does not satisfy the condition of s 190B(8):

Requirement	Information addressing requirement	Result
Section 61A(1) No native title determination application if approved determination of native title	Geospatial assessment	Met

⁷⁸ At [14] and [16].

⁷⁹ At [17].

⁸⁰ At [20].

⁸¹ At [48]-[50].

Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B	Met
Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule E, paragraph (c)	Met – comments below

Section 61A(3)

108. Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply.
109. Paragraph (a) of Schedule E, which describes the rights and interests claimed, states that '[t]he Kurtijar People claim the right to possession, occupation, use and enjoyment of the land and waters covered by the Application.' While this appears to suggest a claim to a right of exclusive possession, paragraph (c) of that same schedule states '[t]he native title rights and interests referred to in paragraphs (a) and (b) do not confer possession, occupation, use or enjoyment of the lands and waters covered by the Application to the exclusion of all others.' In light of this statement in Schedule E, I understand that there is no claim being made to exclusive possession of any part of the application area and consequently, this requirement is met.

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

110. In my view the application does not offend any of the provisions of ss 190B(9)(a)–(c) and therefore the application meets the condition of s 190B(9):

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B	Met

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

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

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

112. 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 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.⁸²

Section 61

113. The application contains the details specified in s 61.

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

Section 62

114. The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Accompanying application	Met
s 62(2)(a)	Information about the boundaries of the area	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)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

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

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

⁸² *Doepel* at [16], [35]–[39].

116. It is only where there is an application meeting all three criteria set out in ss 190C(3)(a), (b) and (c), that is, a 'previous application', that the requirement to consider the possibility of common claimants between that application and the one before me arises.⁸³
117. The geospatial assessment provides that there is one application that appears on the Register of Native Title Claims that overlaps the current application, being the Kurtijar People application (QUD483/2015; QC2015/006). I note that this is the very application before me, which has been amended since the entry that currently appears on the Register.
118. With reference to the terms of the provision, and the focus on common claimants between overlapping claim groups, my view is that it is not the purpose of s 190C(3) to prevent registration of amended claims. It is instead aimed at preventing multiple claims to native title rights and interests by persons who are members of *competing* claim groups, not the same claim group. I consider that this view is supported by the fact that where my decision is to register this amended application, the existing entry that appears on the Register will be deleted. Consequently, I do not consider there is any overlapping application for the purposes of this condition.
119. Section 190C(3) is met.

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

120. I am satisfied that the requirements set out in s 190C(4)(b) are met.
121. 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.⁸⁴ 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.⁸⁵
122. Schedule R refers to a statement at Attachment R detailing the matters set out in Part 2 of Schedule R, which is about authorisation. It is my understanding, therefore, that the application is not certified, and it is the requirements in s 190C(4)(b) that apply.
123. Where an application is not certified, s 190C(5) imposes further requirements. That is, the application must contain a statement that the requirement in s 190C(4)(b) has been met (s 190C(5)(a)), and also contain brief information providing the grounds upon which the Registrar should consider that the requirement has, in fact, been met (s 190C(5)(b)).
124. Having considered the information in Attachment R, I am satisfied that it contains the statement and information required by s 190C(5), and that the requirement is met.
125. Turning then, to the requirements of s 190C(4)(b). That is, whether I am satisfied the applicant is a member of the native title claim group and is authorised to make the application, and deal

⁸³ *Strickland FC* at [9].

⁸⁴ See ss 190C(4)(a).

⁸⁵ See ss 190C(4)(b).

with matters arising in relation to it by all the other persons in the native title claim group. I note that I must be 'satisfied of the fact of authorisation',⁸⁶ and that the requirement is 'fundamental to the legitimacy of native title determination applications',⁸⁷ such that it cannot be met by 'formulaic'⁸⁸ or general statements.

126. Attachment R provides the following information about the authorisation of the applicant by the members of the native title claim group:

- The authorisation of the applicant to make the amended application involved two meetings, both of which took place in Normanton on 3 July 2019.
- Notice of the two proposed meetings was given in the Mount Isa North West Star on 18 June 2019.
- A copy of the notice was also placed at five public venues around Normanton.
- A notice in the same terms was mailed to all known members of the claim group.
- The notice invited all members of the current native title claim group to attend the first meeting, and set out a description of those persons.
- The notice explained the purpose of Meeting 1 would be for the members of the claim group to consider whether to amend the claim group description based on fresh research undertaken by an anthropologist, and the proposed amended description was set out in the notice.
- Following this information about Meeting 1, a note provided that: 'The proposed amendment to the description of the Kurtijar Claim Group does not remove or exclude any current members of the Kurtijar Claim Group. Dr Martin will explain whether the amended description increases the people eligible to be members of the Kurtijar claim group.'
- Information about Meeting 2 is given in the notice, including that it would only proceed if Meeting 1 involved a resolution to amend the claim group description, and that the persons invited would be those satisfying the proposed amended description as set out in the notice.
- The purpose of Meeting 2 was stated to include authorisation of the applicant, and consideration and possible authorisation of a reduction in the application area and changes to the rights and interests claimed.
- Prior to the commencement of Meeting 1, a registration process took place, where attendees identified the ancestor/s from whom they were descended – in total 19 persons attended Meeting 1.

⁸⁶ *Doepel* at [78].

⁸⁷ *Strickland* at [57].

⁸⁸ *Ibid.*

- At Meeting 1, those present resolved there was no decision-making process mandated by their laws and customs for making decisions of this kind, and agreed to adopt a process involving majority vote to make decisions.
- The outcome of Meeting 1 was that the members of the claim group resolved to amend the claim group description in accordance with the proposed description that had appeared in the notice.
- Meeting 2 immediately followed Meeting 1 and was attended by '[t]he members of the newly constituted native title claim group'.
- Those in attendance at Meeting 2 resolved to adopt the same decision-making process as had been used at Meeting 1 for the purposes of making decisions at Meeting 2.
- Using this process, the persons in attendance resolved that they were sufficiently representative of the newly constituted claim group.
- In addition, the group resolved to authorise the three applicant persons to be the applicant to make the amended application and deal with all matters arising in relation to it.

127. Following s 190C(4)(b) in the Act is a note referring to the definition of 'authorise' in s 251B. 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;⁸⁹ or

(b) in any other case, by an agreed or adopted process in relation to authorising things of that kind.⁹⁰

128. In light of this note, I consider the material must speak to the decision-making process used by the group to authorise the applicant to make the application.

129. From the material before me, it is clear that the group used an agreed to and adopted process for the purposes of authorising the applicant, whereby resolutions were read out to the group, moved and seconded by persons present and then a vote taken by show of hands where a majority carried the vote. I note that prior to adopting this process, a resolution was passed that there was no process mandated by the traditional laws and customs of the claim group which had to be used for this type of decision. The information about both meetings shows that those persons in attendance proceeded to make decisions using the agreed to and adopted process, including the decision to authorise the applicant to make the amended application and deal with all matters arising in relation to it. In this way, I consider the material sufficiently addresses the matters prescribed by s 251B.

⁸⁹ Section 251B(a).

⁹⁰ Section 251B(b).

130. Where it is an agreed to and adopted decision-making process at a meeting of members of the native title claim group that is the basis of the applicant's authority to make the application, there is no requirement for all of the members of the group to be involved in the decision-making process. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate.⁹¹
131. As above, notice regarding the two meetings was given publicly and personally, to all known members of the claim group. I understand this to be members of the claim group as previously described. The material does not include the details of the information given by the anthropologist at the meeting as to whether the newly constituted group in fact included additional persons, however it is clear that no persons who were previously members of the group became excluded by way of the amendment to the group description.
132. In my view, the public notice given of the meetings, at least two weeks prior to the meetings, through the newspaper advert and postings at local venues, was sufficient notice for anyone who was not captured by the previous claim group description but fell into the proposed description to make arrangements to attend and participate in the decision-making process. I note that the public notice set out both the previous and the proposed description, and clearly explained the purpose of, and who was to attend each of the meetings.
133. While it is clear that there was a registration process prior to the commencement of Meeting 1, and information is given about the number of persons in attendance at Meeting 1, I do not have before me information about those processes occurring prior to the commencement of Meeting 2. However, noting the information within the notice that the proposed group was potentially a larger group of persons, but not less persons than the existing claim group, I consider there was no need to monitor and exclude persons who had attended Meeting 1 from attending Meeting 2. While it is not made explicit, my understanding is that it was the same persons who attended Meeting 2 as had attended Meeting 1. There is nothing to suggest additional persons came to Meeting 2, however as above, I consider that there was sufficient notice given to any potential additional persons such that they were given every reasonable opportunity to attend if they chose to do so.
134. In addition, I note that at Meeting 2, the persons in attendance resolved that sufficient notice of Meeting 2 had been given, and that those in attendance were sufficiently representative of the newly constituted native title claim group.
135. In light of this, I consider the members of the newly constituted claim group, that is, the claim group described in Schedule A of the application before me, were given every reasonable opportunity to attend the meeting and participate in the decision-making process to authorise the applicant.
136. Attachment R and Annexure 1 to Attachment R give various details of the meeting at which the applicant was authorised by all the persons in the native title claim group to make the amended application and deal with all matters arising in relation to it. This includes information about how the meeting was notified, who convened it, what matters were

⁹¹ *Lawson* at [25].

discussed, and the resolutions passed by the persons in attendance. In my view, this information addresses the substance of the questions posed by O'Loughlin J in *Ward*, where His Honour found the material before him about the asserted meeting 'wholly deficient.'⁹²

137. The material explains the way the newly constituted claim group used an agreed to and adopted decision-making process to authorise the three named applicant persons to make the amended application and deal with matters arising in relation to it. There is nothing before me to indicate there was any dissent or conflict regarding the way in which the two meetings proceeded.
138. It follows that I am satisfied of the fact of authorisation by all the persons in the native title claim group.
139. As each applicant person, in their affidavit affirmed pursuant to s 62(1)(a) that accompanies the application, deposes that they are a member of the native title claim group, I am also satisfied that the applicant is a member of the group.
140. The requirement at s 190C(4)(b) is met.

End of reasons

⁹² *Ward* at [24]-[25].