



## Registration Decision

<b>Application name</b>	Ronald McKellar & Ors on behalf of the Kunja People and State of Queensland & Ors (Kunja People)
<b>Name of applicant</b>	Ronald McKellar, Maureen McKellar, Gertrude Darrigo, June Derrick, Rhyannon Meredith, Stephen Howarth, John Barker, Diane Dawn Edwards, Edward McKellar, Julie Fox
<b>Federal Court of Australia No.</b>	QUD598/2015
<b>NNTT No.</b>	QC2015/008
<b>Date of Decision</b>	20 September 2019

### Claim accepted for registration

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

Katy Woods<sup>2</sup>

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

<sup>2</sup> Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.

## Reasons for Decision

### Cases Cited

*Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 (*Yarmirr*)  
*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 FC*)  
*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)  
*Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)  
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)  
*Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith*)  
*Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 (*Kanak*)  
*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*)  
*Moran v Minister for Land & Water Conservation for New South Wales* [1999] FCA 1637 (*Moran*)  
*Mundraby v Queensland* [2006] FCA 436 (*Mundraby*)  
*Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*)  
*Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*)  
*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)  
*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*)  
*Ward v Northern Territory* [2002] FCA 171 (*Ward v Northern Territory*)  
*Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*)  
*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)  
*Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward HC*)

### Background

- [1] The claim in this application is made on behalf of the Kunja People native title claim group (claim group). It covers land and waters around the Warrego River in southern Queensland.
- [2] This claim was first made on 17 July 2015. It was first accepted for registration and entered onto the Register of Native Title Claims (Register) on 19 November 2015. It has remained on the Register since that time, having been amended once previously in 2018. The amended application before me was filed on 15 August 2019 and on the same day was given to the Native Title Registrar (Registrar) by the Registrar of the Federal Court (Court) pursuant to s 64(4).
- [3] The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. The amendments to the application are greater than the changes prescribed by s 190A(6A), so that provision does not apply. Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

## Information considered

- [4] I have considered the information in the application and the additional information provided by the applicant, as outlined below.<sup>3</sup>
- [5] I have considered information contained in geospatial assessments and overlap analyses of the area covered by the application prepared by the Tribunal's Geospatial Services dated 20 August 2019 and 3 September 2019 (geospatial report) and information available in the Tribunal's geospatial database in relation to locations mentioned in the application.<sup>4</sup>
- [6] There is no information before me obtained as a result of any searches conducted by the Registrar of state or Commonwealth interest registers,<sup>5</sup> and the Queensland government (state) has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.<sup>6</sup>

## Procedural fairness

- [7] On 23 August 2019, a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the state advising that I would be considering the information in the application in my decision, and should the state wish to supply any information or make any submissions, it should do so by 30 August 2019.
- [8] On 4 September 2019, the senior officer provided my preliminary assessment of the amended application to the representative of the applicant, which outlined my preliminary views as to deficiencies in the amended application which may impact the claim's ability to be registered.
- [9] On 10 September 2019, the applicant provided the following documents for my consideration (additional material):
- (a) Covering email from [name removed], 10 September 2019;
  - (b) Affidavit of [name removed], sworn 11 July 2019 (lawyer's affidavit);
  - (c) Further affidavit of [name removed], sworn 25 July 2019 (lawyer's further affidavit); and
  - (d) 'Notes on Kunja decision making' report by [name removed], 9 July 2015 (anthropologist's report).
- [10] On 11 September 2019, the senior officer wrote to the representative of the relevant minister to advise that I would be considering the additional material when making my decision, and any comment the state may wish to make should be provided by 18 September 2019. No response was received from the state.
- [11] This concluded the procedural fairness process.

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

<sup>4</sup> Section 190A(3)(c).

<sup>5</sup> Section 190A(3)(b).

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

## Section 190C: conditions about procedures and other matters

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

[12] To meet s 190C(2), the Registrar must be satisfied 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. I am not required to undertake a merit assessment of the material at this condition.<sup>7</sup> I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

[13] The application contains the details specified in s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A, Schedule A, s 62 affidavits filed with application	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

[14] The application contains the information specified in s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B; Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F, Attachment 'F and M'	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

[15] To meet s 190C(3), the Registrar 'must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application'.<sup>8</sup> To be a 'previous application':

- (a) the application must overlap the current application in whole or part;
- (b) there must be an entry for the claim in the previous application on the Register when the current application was made; and

<sup>7</sup> *Doepel* [16], [35]–[39].

<sup>8</sup> Emphasis in original.

(c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[16] The geospatial report states and my own searches confirm there are no applications which overlap the current application, as required by s 190C(3)(a). Therefore, there are no applications which meet the definition of a 'previous application' under s 190C(3). This means that the issue of common claimants does not arise and s 190C(3) is met.

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

[17] To meet s 190C(4), the Registrar must be satisfied:

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or
- (b) 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.

[18] Schedule R(2) of the application states: '[t]he applicant is a member of the native title claim group and is authorised to make this application and deal with matters arising in relation to it, by all the other persons in the native title claim group'. In light of this statement, and as no certificate accompanies the application, I understand I must assess the application against the requirements of s 190C(4)(b).

### **What is required to meet s 190C(4)(b)?**

[19] Section 190C(4)(b) requires two issues to be addressed:

- (a) that the applicant be a member of the native title claim group; and
- (b) that the applicant 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.

[20] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirement in s 190C(4)(b) has been met, and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[21] Therefore, in order to satisfy s 190C(4)(b), an application must also satisfy s 190C(5).

[22] The information before me which is relevant to this condition is found in:

- (a) Schedule R to the application;
- (b) The s 62 affidavits from the members of the applicant which accompany the application (s 62 affidavits);
- (c) The lawyer's affidavit and lawyer's further affidavit; and
- (d) The anthropologist's report.

***Does the application satisfy s 190C(5)?***

[23] I consider the statement in Schedule R(2), extracted above, is sufficient for the purposes of s 190C(5)(a).

[24] The s 62 affidavits each state that the deponent is a Kunja person and a member of the claim group, and outlines the process by which the members of the applicant were authorised at a meeting on 25 May 2019, in accordance with the Kunja People's traditional decision making process.

[25] I note French J's comment that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.'<sup>9</sup> I therefore consider that the information contained in the s 62 affidavits is sufficient for the purposes of s 190C(5)(b).

***Does the application meet s 190C(4)(b)?***

*Is the applicant a member of the native title claim group?*

[26] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group. As discussed above, the persons who comprise the applicant depose in their affidavits that they are members of the claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the members of the applicant are all members of the claim group.

*Is the applicant authorised to make the application by all the other persons in the native title claim group?*

[27] In order to determine whether the applicant is authorised to make the application, it is necessary to identify the decision-making process utilised by the claim group. Section 251B identifies two distinct decision-making processes by which an applicant can be authorised: a process which is mandated by traditional laws and customs, or one which has been agreed to and adopted by the claim group. Where a process of decision-making exists under the traditional laws and customs of the claim group, s 251B(a) mandates that process 'must' be used.

[28] Section 190C(4)(b) also requires information to show that the claim group have authorised the applicant such that I can be satisfied of the 'fact of authorisation'.<sup>10</sup> I have summarised the information before me which I consider is relevant to this condition below.

**Decision-making process**

[29] The anthropologist's report provides that the decision making process of the Kunja People as follows:

1. Decisions are made collectively by the relevant group of people for the matter under consideration; that is, decision making is context specific and participatory.
2. Decisions are made after due consideration of information relating to the matter.
3. People with seniority and/or relevant knowledge are deferred to, though the final decision is one made by the group.

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<sup>9</sup> *Strickland* [57].

<sup>10</sup> *Doepel* [78].

4. The decision making process is geared to reaching a consensus.
5. As well as recognising eldership and knowledge, the decision making process also recognises social organisational divisions of lineage defined 'families', and allows for their representation.
6. There are a handful of individuals who generally lead decision making discussions.
7. The decision making process allows for representation based upon geographical distribution of Kunja people, particularly between those resident in Bourke and elsewhere in New South Wales, and those based in Cunnamulla and Queensland.<sup>11</sup>

[30] This traditional decision making process is affirmed by the members of the applicant in their s 62 affidavits, and is also recorded in the meeting minutes annexed to the lawyer's affidavit as the process which was confirmed by the attendees at the meeting on 25 May 2019 and under which the applicant was authorised.<sup>12</sup>

[31] The lawyer's affidavit also explains that the decision making process used at the meeting on 25 May 2019 was the same as that which was used by the group at meetings on 4 February 2018 and 13 June 2015.<sup>13</sup> Annexed to the lawyer's affidavit is a summary of outcomes for those previous meetings, and I can see that the same process was confirmed and then utilised by the claim group on each occasion.<sup>14</sup>

[32] The anthropologist's report provides that, in addition to the steps above, two particular features of Kunja decision making which he has noted are:

- (a) A vote, shown by a 'show of hands or similar signal', indicates the confirmation of a consensus agreement reached at the end of a discussion about the matter under consideration; and
- (b) Decisions are made by the decision makers present at the time, without the need for the presence of all members of the group or representation of all 'lineage families'.<sup>15</sup>

[33] The anthropologist's report cites early ethnographic sources to support the ongoing existence of the Kunja traditional decision making process since at least early settlement. He cites the descriptions provided by Roth in 1906, Mathews in 1907 and McKellar during the 'Tinnenburra years' (circa 1870s–1930s) of the decision making process used in and around the Kunja claim area. I note in particular the description from Mathews in relation to a decision by a 'headman' to undertake an initiation ceremony:

The headman does not take this step on his own responsibility, but after due consultation with the elders of his people. [The council of initiated men and knowledge holders together set] the day for when the novices will be taken away for the purposes of initiation.<sup>16</sup>

[34] The anthropologist's report explains that, among Kunja people today, claim group members may hold leadership positions similar to that of the 'headman' described by Mathews, and that such leaders will justify a particular position based on the fact that it is what their elders want, or would have wanted, in the case of deceased elders. In this way the authority of the

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<sup>11</sup> Anthropologist's report [1].

<sup>12</sup> Lawyer's affidavit, annexure MEW-08 (meeting minutes) [7], [14].

<sup>13</sup> Lawyer's affidavit [17]–[18].

<sup>14</sup> Lawyers affidavit, annexure MEW-06

<sup>15</sup> Anthropologist's report [2].

<sup>16</sup> Ibid [17]–[18].

elders is deferred to.<sup>17</sup> The anthropologist's report further explains that the authority of elders and leaders 'depends on the continuing confidence and assent of the *jural public*'.<sup>18</sup>

- [35] With regard to the steps in the decision making process, the anthropologist's report describes the distinction between a final decision, to which everyone feels bound, and the steps or process of getting to that position. He explains that the decision is only made once a consensus is reached, and that consensus is not the same as unanimity. The author states: '[t]o reach consensus... it is not necessary that everyone agree, nor that everyone directly participates'. He further explains:

What is necessary is that everyone should have the opportunity to participate and that those that do, who become the effective decision-makers, are able to judge that the likelihood of any "overt disagreement" or publicly aired dissent is sufficiently small, or has been sufficiently addressed in meetings and the like, that the decision will stick and is "implementable".<sup>19</sup>

- [36] The anthropologist's report states that the process is participatory, just as it was described by the early observers over a century ago.<sup>20</sup> He explains 'participatory' as follows:

...while elders may have authority, even the responsibility, to make a decision, this may often be ultimate in nature, exercised only at the end of a deliberative process which may involve a wider cross-section of the community. In this sense, the "assembly of elders" and "camp councils" which Roth describes are analogous to the "meetings" of today...<sup>21</sup>

- [37] The author further explains that particular people's absence will not generally be sufficient to prevent a decision being made, so long as they have had the opportunity to participate, as extracted above.<sup>22</sup>

#### **Notice of authorisation meeting**

- [38] The lawyer's affidavit provides that Queensland South Native Title Services (QSNTS) gave notice of the authorisation meeting held on 25 May 2019 in the following ways:

- (a) Public notice in the *Koori Mail* on 24 April 2019;
- (b) Public notice in the *Courier Mail* on 27 April 2019;
- (c) Personal notice by mail to 110 claim group members on 26 April 2019;
- (d) Personal notice by text message to 71 claim group members on 21 May 2019, 51 of which were successfully delivered;
- (e) Personal notice by telephone to 92 claim group members between 4–21 May 2019, 34 of whom were contacted successfully;
- (f) Public notice on the QSNTS website from 24 April 2019;
- (g) Public notice on the QSNTS Facebook page from 23 April 2019.<sup>23</sup>

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<sup>17</sup> Ibid [39]–[42].

<sup>18</sup> Ibid [46], original emphasis.

<sup>19</sup> Ibid [29]–[33].

<sup>20</sup> Ibid [35].

<sup>21</sup> Ibid.

<sup>22</sup> Ibid [34].

<sup>23</sup> Ibid [9]–[12].

- [39] Annexed to the lawyer's affidavit are copies of the various forms of the notice, including the public notice published in the two newspapers; the letter sent to the claim group members and screenshots from QSNTS's website and Facebook page.
- [40] The lawyer's further affidavit explains that QSNTS mailed the notice to all the descendants of apical ancestor Flora Maranoa for whom QSNTS held records, being a total of four people. The affidavit also states that QSNTS had phone numbers for three of those persons and all three were contacted by phone. Two of those members were left messages of the details of the authorisation meeting, and one advised by phone that he would not be able to attend.<sup>24</sup> I understand the information about these specific notifications has been provided because no descendants of this ancestor attended the authorisation meeting, which I will discuss further below.
- [41] The public notice is titled 'Kunja People Native Title Authorisation Meeting'. It includes the date, venue and time of the authorisation meeting and lists the apical ancestors for the claim group, which accords with those listed in Schedule A to the application. The stated purpose of the meeting includes consideration of 'whether or not to authorise a new applicant for the Kunja Claim to replace the current applicant, in accordance with section 251B and section 66B of the *Native Title Act 1993 (Cth)*'. The notice includes a map of the claim area with the towns of Wyandra, Eulo, Cunnamulla and Tego labelled. Two contact phone numbers are included, one of which is a freecall number.
- [42] The notice also includes the details of an Information Session scheduled for 24 May 2019 at the same venue as the authorisation meeting, 'to provide relevant information about matters to be discussed at the authorisation meeting so that informed decisions can be made'.

#### **Conduct of authorisation meeting**

- [43] The lawyer's affidavit provides the following information about the conduct of the authorisation meeting:
- (a) It was attended by 28 members of the Kunja People claim group;
  - (b) Attendees were registered according to their relevant apical ancestor and given a green arm band;
  - (c) Advice was provided regarding the requirements of s 251B;
  - (d) A resolution was passed by consensus confirming the traditional process of decision making process for making decisions at the meeting, which reflects that which I have extracted above;
  - (e) Two members of the applicant advised that they were 'stepping down as Applicant';
  - (f) Non-Kunja people left the room to allow the family groups to convene and discuss changing the applicant members;
  - (g) After approximately one and a half hours, the meeting reconvened and the outcome of the decisions made by the claim group were reported back by a Kunja elder, specifically that the claim group had decided by consensus that:

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<sup>24</sup> Lawyer's further affidavit [6]–[9].

1. the eight remaining members of the applicant would continue as Applicant; and
2. Edward McKellar and Julie Fox were nominated and endorsed as the new members of the applicant;

(h) The resolution to authorise the new applicant (Resolution 9) was then passed by consensus.<sup>25</sup>

### *Consideration*

- [44] I note Wilcox J's comment that 'a person who wishes to rely on a decision by a representative or other collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body's authority to make decisions binding the members of the group, and that the body has authorised the making of the application'.<sup>26</sup> In my view, the information in the anthropologist's report sufficiently describes the existence of such a body of persons under customary law and explains how meeting participants today make up that body. I consider there is sufficient information to show how the body comes together to discuss a specific matter, consider acceptance of decision by the broader 'jural public' (that is, absent claim group members), show deference to the views of elders, and reach consensus, before a final decision is made.
- [45] I consider the material before me to be clear and consistent about the existence of a decision-making process of the claim group which was utilised in the early years of settlement and on recent occasions prior to the authorisation meeting. There is detailed information about the utilisation of this same process by the claim group in their decision to authorise the applicant to make this application, such that I am satisfied that the claim group used the decision making process mandated by their traditional laws and customs, in accordance with the requirements of s 251B(a).
- [46] I consider the notice of the meeting was sufficiently clear as to enable the details and purpose of the meeting to be understood. I also consider the notice of the meeting to be broad and comprehensive in its reach, using various media and a mix of personal and public notices in the weeks leading up to the authorisation meeting. I note the information in the lawyer's further affidavit about the steps taken to notify the few members who are descendants of one of the apical ancestors. In my view, the fact that none of the descendants of that ancestor were able to attend the meeting does not detract from the sufficiency of the notice.
- [47] I consider the lawyer's affidavit provides sufficient detail of the conduct of the authorisation meeting, including the resolutions passed. Details of the registration of attendees, appointment of facilitator and minute taker are provided. The resolution to authorise the applicant was made using a process which accords with the steps in the traditionally-mandated decision making process: general discussion in family groups until consensus was reached, prior to a final decision being made. I do not consider that the absence of descendants of a particular ancestor invalidates the decision to authorise the applicant. This is because I am satisfied those claim group members received adequate notice of the meeting,

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<sup>25</sup> Lawyer's affidavit [14], Annexure MEW-08 (meeting minutes) [6]–[14].

<sup>26</sup> *Moran* [34].

and in light of the information in the anthropologist's report that the participation of all members of the group is not required by the group's traditional decision making process.

[48] I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward v Northern Territory*, the substance of which His Honour held must be addressed:

Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?<sup>27</sup>

[49] In my view, there is sufficient information to address the substance of those questions, such that I can be satisfied of the 'fact of authorisation', particularly given the level of detail provided in the lawyer's affidavit and the anthropologist's report.<sup>28</sup> It follows that I am satisfied that the applicant 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.

## Conclusion

[50] As I consider the requirements of s 190C(5) and s 190C(4) are met, including that the material addresses s 251B(a), I am satisfied s 190C(4) is met.

## Section 190B: conditions about merits of the claim

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

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

[52] I understand the questions for this condition are whether the information and map provide certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed;
- and
- (b) any areas within the external boundary over which no claim is made.<sup>29</sup>

### Does the information about the external boundary meet this condition?

[53] Schedule B refers to Attachment B, which contains a description of the external boundary referring to native title determinations, state borders, land parcels, topographic features including waterways, and coordinate points shown to six decimal places referencing GDA94.<sup>30</sup>

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<sup>27</sup> *Ward v Northern Territory* [25]–[26].

<sup>28</sup> *Doepel* [78].

<sup>29</sup> *Doepel* [122].

<sup>30</sup> Geocentric Datum of Australia 1994.

[54] Schedule C refers to Attachment C, which contains a copy of a map titled 'QUD598/2015 KUNJA PEOPLE – Native Title Determination Application – (May 2019)', prepared by QSNTS and dated 28 May 2019. It includes:

- (a) The external boundary depicted by a bold dark blue dashed outline;
- (b) The 'Areas Subject to Claim' depicted by a dark blue outline with a light blue fill as indicated in the legend;
- (c) Topographic black and white background image with place names labelled;
- (d) Scalebar, northpoint and coordinate grid; and
- (e) Notes relating to the source, currency and datum of data used to prepare the map.

[55] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

### Does the information about excluded areas meet this condition?

[56] Schedule B states that the application does not cover any area where a previous exclusive possession act was done; or any other area where native title has been extinguished, except where any extinguishment is required to be disregarded by force of ss 47–47B.

[57] I note French J's comment with regard to such exclusion clauses, that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.<sup>31</sup> Following this reasoning, I am satisfied the areas affected by the general exclusions can be ascertained at the appropriate time.

[58] Attachment B specifically excludes any land or waters subject to the Kooma People #4 Part A determination (QUD504/2011) and the Budjiti People determination (QUD53/2007). It also specifically excludes waters covered by any previous exclusive possession act.

[59] In my view, the specific exclusions are clear from the description in Attachment B.

### Conclusion

[60] As I consider that both the external boundary and the excluded areas of the application can be identified from the map and description with reasonable certainty, I am satisfied that s 190B(2) is met.

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

[61] To meet s 190B(3), the Registrar must be satisfied that:

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

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<sup>31</sup> *Strickland* [55].

[62] I understand I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’ at this condition.<sup>32</sup>

[63] Schedule A states:

The Kunja People are the descendants of:

1. Killamunda (including her children, Margaret Turner (Granny McKellar), Annie/Nannie Widgell and Jack Brennan);
2. Flora Maranoa;
3. Maria Major (including her children, Jack Oliffe, Ron Wyman, Walter Wyman and Lila Lynett); and
4. Jimmy Nyngan,

in accordance with Kunja traditional laws and customs.  
 (“the native title claim group”)

[64] It follows from this description that s 190B(3)(b) is applicable. I am therefore required to be satisfied that the persons in the claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

### Is the description sufficient to ascertain the members of the claim group?

[65] From the above description, I understand an individual is a member the claim group by virtue of being a descendant of one of the named ancestors. The Court has previously held that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).<sup>33</sup> I consider that requiring a person to show descent from an identified ancestor provides a clear starting point to commence an inquiry about whether a person is a member of the claim group. I consider that factual enquiries would lead to the identification of the people who meet this criterion. The description does not specify whether ‘descendants’ is limited to biological descendants or includes descendants by adoption, but refers to the traditional laws and customs of the claim group, which are further outlined in Attachment ‘F and M’ to the application. I consider it is by that ‘set of rules or principles’ that it can be ascertained whether a person is a member of the claim group.<sup>34</sup> In reaching this view I have also considered the judicial guidance that is appropriate to construe the requirements of the Native Title Act beneficially.<sup>35</sup>

### Conclusion

[66] I am satisfied the application describes the persons in the claim group sufficiently clearly such that it can be ascertained whether any particular person is a member of the group as required by s 190B(3)(b). This means s 190B(3) is met.

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

[67] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered ‘native title rights and interests’ in accordance with s 223 as I consider that is part of the task at s 190B(6), where I

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<sup>32</sup> *Wakaman* [34].

<sup>33</sup> *WA v NTR* [67].

<sup>34</sup> *Ward v Registrar* [25].

<sup>35</sup> *Strickland* [55].

must decide whether each of the claimed rights is established on a prima facie basis. I note that my consideration of this condition is confined to information found in the application.<sup>36</sup>

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

### ***Exclusive Possession***

[68] From the description in paragraph 1 of Schedule E, I understand that exclusive possession is claimed in any areas covered by the application where there has been no prior extinguishment, or where any such extinguishment must be disregarded, such as areas where ss 47–47B apply. I understand that a broad claim to exclusive possession such as this one does not offend s 190B(4).<sup>37</sup>

### ***Non-exclusive rights***

[69] From the description in paragraph 2, I understand that the listed non-exclusive rights are claimed in any areas where exclusive possession cannot be claimed. The non-exclusive rights form an exhaustive list, and in my view there is no inherent or explicit contradiction within the description.<sup>38</sup>

## Conclusion

[70] I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

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

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

[72] I understand my task is to 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’.<sup>39</sup>

## What is required to meet s 190B(5)(a)?

[73] To meet s 190B(5)(a), the factual basis must be sufficient to show:

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<sup>36</sup> *Doepel* [16].

<sup>37</sup> *Strickland* [60].

<sup>38</sup> *Doepel* [123].

<sup>39</sup> *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

- (a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement;<sup>40</sup>
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';<sup>41</sup> and
- (c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.<sup>42</sup>

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

[74] Schedule F refers to Attachment 'F and M', which is a document titled 'General Description of Native Title Rights and Interests Claimed'. I will refer to this document as 'Attachment F'. There is also information relevant to this condition in the following documents which form part of the filed application:

- (a) Witness Statement of [name removed] (Claimant 1);
- (b) Witness Statement of [name removed] (Claimant 2);
- (c) Affidavit of [name removed] (Claimant 3);
- (d) Affidavit of [name removed] (Claimant 4);
- (e) Affidavit of [name removed] (Claimant 5);
- (f) Affidavit of [name removed] (Claimant 6); and
- (g) Affidavit of [name removed] (Claimant 7).

*Association of the predecessors of the claim group with the claim area*

[75] Attachment F provides:

- (a) Evidence suggests that the region of the claim has been continuously occupied for at least 1300 years;<sup>43</sup>
- (b) First European contact occurred in the claim area around 1846-7 with the arrival of the explorers Thomas Mitchell and Edmund Kennedy;<sup>44</sup>
- (c) Settlement occurred between the 1850s and 1870s;<sup>45</sup>
- (d) The towns of Charleville, Cunnamulla and Enngonia were established in the late 1860s;<sup>46</sup>
- (e) Aboriginal people were observed leading a traditional lifestyle in the bush and away from pastoral stations as late as the 1870s;<sup>47</sup>
- (f) Early ethnographic accounts of the Kunja people can be found in:

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<sup>40</sup> *Gudjala 2007* [52].

<sup>41</sup> *Ibid.*

<sup>42</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>43</sup> Attachment F, [4].

<sup>44</sup> *Ibid* [5]–[6].

<sup>45</sup> *Ibid* [7]–[8].

<sup>46</sup> *Ibid* [7].

<sup>47</sup> *Ibid.*

1. Edward Curr, 1886;
  2. R.H Mathews and his correspondent James E Miller, 1895-98;
  3. Caroline Tennant Kelly, 1934; and
  4. Norman Tindale, 1940 (and 1974);<sup>48</sup>
- (g) Police officer Miller in his correspondence of 1895-98 to Mathews, described Aboriginal people speaking the Kunja language in an area abutting the Muruwari north west of Goodooga (in New South Wales), and at Tinnenburra;<sup>49</sup>
  - (h) Tennant Kelly recorded in her Cherbourg field note, information from an informant who placed the Kunja 'beyond Eulo running to Cunnamulla and east of the Paroo [River]';<sup>50</sup>
  - (i) Tindale interviewed a number of Kunja people on his 1938-9 expedition, whose places of association were described variously as 'Kunja tribe of Charleville to Cunnamulla', Kunja of Claverton', and 'Kunja of Warrego River near Cunnamulla [sic]';<sup>51</sup>
  - (j) Apical ancestor Killamunda and her daughter, born in 1871, spent most of their lives at Tinnenburra;<sup>52</sup>
  - (k) Apical ancestor Flora Maranoa was born at Cunnamulla around 1883 and died in 1941;<sup>53</sup>
  - (l) Two of the children of apical ancestor Maria Major were born in 1893 at Claverton and at Coongoola in 1889 respectively, according to Tindale;<sup>54</sup>
  - (m) King Jimmy Nyngan is estimated to have been born between 1858 and 1869. He is remembered for having performed the last initiation ceremonies at Maranoa Waterhole, lived all of his adult life at Tinnenburra and was buried there in 1934.<sup>55</sup>
- [76] Current claim group members describe in their statements and affidavits the association of their predecessors with locations in and around the claim area, including:
- (a) Claimant 1's father was born at Tinnenburra, probably in the late 1800s, and both Claimant 1's parents were Kunja people who worked on Tinnenburra station;<sup>56</sup>
  - (b) Claimant 1 remembers the 'old people' getting together on Tinnenburra station for corroborees;<sup>57</sup>
  - (c) Claimant 2 lists some of the old people he remembers being at Tinnenburra while he was a child in the 1920s, including apical ancestors Jimmy Nyngan, Annie Widgell and Jack Brennan;<sup>58</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid [11].

<sup>50</sup> Ibid [12].

<sup>51</sup> Ibid [13].

<sup>52</sup> Ibid [19].

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Witness statement of Claimant 1, [5], [7].

<sup>57</sup> Ibid [12].

<sup>58</sup> Witness statement of Claimant 2, [10].

- (d) Claimant 3's mother was born at Moonjaree in 1871 and her grandmother, apical ancestor Killamunda is remembered as being born in the same area, at Moonjaree Crossing, in the north west of the claim area;<sup>59</sup>
- (e) Claimant 5 recalls staying with her aunties, grandmother and other family at Eulo, on the western boundary of the claim area, where her family would speak to each other in the Kunja language;<sup>60</sup>
- (f) Claimant 6's mother was a Kunja woman born at Tinnenburra, probably in the 1920s, but the family was later moved to Bourke, approximately 120 kilometres south of the claim area.<sup>61</sup>

[77] Claimants also describe the boundaries of Kunja country, as they were taught by their predecessors, as follows:

- (a) Claimant 3 describes 'Kunja country' as extending 130 miles (209 kms) north of Tinnenburra homestead to 80 miles (128 kms) south of Cunnamulla (30 miles [48 kms] south of the NSW border). The western boundary extends to 'this side' of the river at Eulo and the eastern boundary about 30 miles from Cunnamulla. Claimant 3 also explains that Cunnamulla used to be part of Tinnenburra station;<sup>62</sup>
- (b) Claimant 7 states that the boundary of Kunja country extends 'over the border for 20 odd mile [32 kms]' into New South Wales, 'right over here pretty close to Eulo and then 4 mile [6.4 kms] out of Wyandra'. He states that the eastern boundary follows the Widgegoara Creek, which is a branch of the Warrego River.<sup>63</sup>

*Association of the current claim group with the claim area*

[78] With regard to the association of the current claim group, the claimants provide the following information:

- (a) Claimant 1 deposes that he was born in the bush at Tinnenburra station, in the claim area, in 1933;<sup>64</sup>
- (b) Claimant 2 deposes that he was born in Quilpie, to the north west of the claim area, in 1924 and his family moved back to Tinnenburra soon after, where his father had been born;<sup>65</sup>
- (c) Claimant 3 deposes that he was born on Tinnenburra Station, 30 miles from the homestead, in 1925;<sup>66</sup>
- (d) Claimant 4 deposes that she was born at Cunnamulla in 1950, where she still lived at the time of swearing her affidavit in 1999;<sup>67</sup>

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<sup>59</sup> Affidavit of Claimant 3, [3].

<sup>60</sup> Affidavit of Claimant 5, [4].

<sup>61</sup> Affidavit of Claimant 6, [7]–[9].

<sup>62</sup> Affidavit of Claimant 3, [4].

<sup>63</sup> Affidavit of Claimant 7, [66].

<sup>64</sup> Witness statement of Claimant 1, [2], [9].

<sup>65</sup> Witness statement of Claimant 2, [2], [8].

<sup>66</sup> Affidavit of Claimant 3, [2].

<sup>67</sup> Affidavit of Claimant 4, [2].

- (e) Claimants 3, 4 and 7 name and describe an initiation site in the claim area, access to which is restricted to men;<sup>68</sup>
- (f) Claimant 5 deposes that she was born at Cunnamulla in 1952, at which time her siblings, mother and grandmother were living in at the Aboriginal Camping Reserve to the south of the town, and her father was out working;<sup>69</sup>
- (g) Claimant 5 and others recall being taught about a powerful serpent called the Moonagutta (variously spelled) which lives in deep waterholes in the Warrego River and various creeks, the story of which they have passed onto their children;<sup>70</sup>
- (h) Claimant 6 went on a number of trips around Kunja country with her mother before she passed away, including to a waterhole in the Cuttaburra channels where they fished in the traditional manner, and to campsites and burial sites on Tinnenburra station;<sup>71</sup>
- (i) Claimant 7 describes how he and his family stayed with his uncle and aunty, who had a hut at the top camp at Cunnamulla during the 1970s, but the main camp for Aboriginal people at Cunnamulla was Yumba, the bottom camp;<sup>72</sup>
- (j) Claimant 7 describes how he would help his mother, who was a site warden, record and clean up sites in the claim area, including burial sites, and that Claimant 7 has done a similar job as a ranger since 1992;<sup>73</sup>
- (k) Claimant 7 describes two big gumtrees near Tuen Creek in the claim area, where the Kunja elder who told him the story could remember seeing old women making traditional nets for fishing. Claimant 7 recounts the story of how the trees are associated with a story about the Kunja kinship rules.<sup>74</sup>

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

[79] I understand that in assessing the factual basis for the purposes of s 190B(5)(a), I am not obliged to accept very broad statements which have no geographical particularity.<sup>75</sup> I do not consider this application is of that nature. In my view, the information before me describes in a sufficient level of detail the association of the claim group with the claim area, both at the time of settlement and since that time. I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

*Does the application support an association between the claim group at sovereignty and since that time?*

[80] Using information available from the Tribunal's geospatial database I can see that locations mentioned in the claimants' statements and affidavits are spread across and around the areas which are claimed. I note the references to Eulo and the Paroo River in the west, Wyandra in the north, Widgegoara Creek in the east, and Bourke to the south. I also note the numerous

<sup>68</sup> Affidavit of Claimant 3, [13], affidavit of Claimant 4, [12], affidavit of Claimant 7, [81].

<sup>69</sup> Affidavit of Claimant 5, [3].

<sup>70</sup> Affidavit of Claimant 5, [13], affidavit of Claimant 7, [87]–[88].

<sup>71</sup> Affidavit of Claimant 6, [32]–[33], [39].

<sup>72</sup> Affidavit of Claimant 7, [12].

<sup>73</sup> Affidavit of Claimant 7, [16]–[20].

<sup>74</sup> Affidavit of Claimant 7, [89]–[90].

<sup>75</sup> *Martin* [25].

references to the underlying pastoral station of Tinnenburra, and to the former station, and now town, of Cunnamulla, which lies in the centre of the claim area.

- [81] I understand that settlement in the claim area occurred much later than the acquisition of British sovereignty in 1788, as it was not until the 1850s-1870s that the area was settled by pastoralists. Several of the apical ancestors are asserted to have been born before or in the very early years of settlement. Claimant 2 also lists a number of 'old people' from his childhood in the 1920s, and I can infer from the date and description that those old people were born prior to or during the settlement period. It is asserted that apical ancestor Killamunda was associated with the same part of the claim area as her daughter, who was born at the time of settlement in 1871. This would mean that apical ancestor was associated with a particular part of the claim area prior to settlement. In my view, the other apical ancestors who were born around the time of settlement also likely had the same association with the claim area as their parents and grandparents, who would have been alive around the time of sovereignty. In making this retrospective inference I have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith*, and of French J in *Kanak* on construing the Native Title Act beneficially.<sup>76</sup>

*Does the application support an association between the claim group and the area currently?*

- [82] In my view, the factual basis is sufficient to support the assertion that the claim group currently has an association with the claim area. In forming this view I have considered the information about the physical and spiritual connection to the claim area which current claim group members describe. For example, the claimants describe in detail the parts of the claim area where they were born, grew up, work, visit and/or continue to live. There are descriptions of the sacred initiation site and of the locations of the Moonagutta serpent in the affidavits of younger claim group members that reflect those of the members of the older generation. While older claimants describe their work on the stations of the claim area, members of the younger generations have sustained their association with Kunja country through work as well, such as obtaining employment as rangers. Current claimants describe learning from their predecessors at locations around Kunja country, and describe how they continue to observe aspects of their culture on Kunja country, including camping, fishing and caring for important sites.

*Does the application support an association, both past and present, with the whole area claimed?*

- [83] I understand the task of the Registrar at s 190B(5)(a) is limited to assessing whether the factual basis is sufficient to support the assertion that the claim group have, and their predecessors had, an association over the whole area of the claim.<sup>77</sup> It is not a requirement that the whole of the claim group have an association at all times with the whole of the claim area.
- [84] In my view, there is sufficient information in the application to support an association by the claim group, past and present, with the whole of the area claimed. I note the references, both historical and recent, to the communities and townships which are spread across the Kunja People's claim area in all directions, as well as to the underlying pastoral stations and to the

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<sup>76</sup> *Harrington-Smith* [294]–[296], *Kanak* [73].

<sup>77</sup> *Corunna* [31].

waterways which traverse the claim area, including the Paroo and Warrego Rivers, and Cuttaburra and Widgegoara Creeks, and the claim group's spiritual association with particular waterholes within those rivers and creeks.

**Conclusion - s 190B(5)(a)**

[85] In my view, the information before me is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the claim area. This is because the material demonstrates sufficient geographical particularity to locations where claim group members and their predecessors were born, lived, worked and were buried. I am satisfied there is sufficient factual basis to support an assertion of a physical association of the claim group to the whole claim area. Based on the detailed information about the spiritual narratives of the Moonagutta serpent, which claim group members attach to particular waterholes in Kunja country, and other spiritual narratives which are described in the affidavit material, I am also satisfied there is a sufficient factual basis to support an assertion of a spiritual association. This means s 190B(5)(a) is met.

**What is required to meet s 190B(5)(b)?**

[86] To meet s 190B(5)(b), the factual basis must be sufficient to support an 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. 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the *traditional laws acknowledged*, and *traditional customs observed*,' by the native title holders.<sup>78</sup> Applying the approach of Dowsett J in *Gudjala 2007*, I have interpreted s 190B(5)(b) in light of the judicial consideration of the meaning of those same words in s 223(1)(a).<sup>79</sup>

[87] In *Yorta Yorta*, the plurality of the High Court held that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. The High Court further held that in the context of the Native Title Act, 'traditional' also carries two other elements, namely:

...it conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs*;

...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*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.<sup>80</sup>

[88] In *Gudjala 2009*, Dowsett J provided further guidance to the Registrar in assessing the asserted factual basis, including that if descent from named ancestors is the basis of membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.<sup>81</sup>

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<sup>78</sup> Emphasis added.

<sup>79</sup> *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.

<sup>80</sup> *Yorta Yorta* [46]–[47], emphasis added.

<sup>81</sup> *Gudjala 2009* [40].

[89] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of:

- (a) a society which existed at sovereignty in the claim area, the members of which were united through their observance of normative rules;
- (b) a link between the pre-sovereignty society, the apical ancestors and the claim group; and
- (c) the continued observance of normative rules through the generations down to the current claim group, such that the normative rules can be described as ‘traditional laws and customs’.

***What information has been provided in support of the assertion of a society at settlement?***

[90] Attachment F provides:

- (a) The Kunja and their neighbours form a regional society;<sup>82</sup>
- (b) The Kunja are a distinct landholding group within that regional society;<sup>83</sup>
- (c) Each landholding group derives its identity from laws and customs embedded in institutions of cosmology, kinship and land tenure, as well as its specific language, in this case the Kunja language;<sup>84</sup>
- (d) Membership of the land holding group, and thus rights and interests in Kunja country, arise as a result of descent from a forebear with those same rights and interests.<sup>85</sup>

***What information has been provided in support of the assertion of traditional laws and customs?***

[91] Attachment F provides:

- (a) The historical record (as outlined in s 190B(5)(a) above), identifies ‘Kunja’ as the ‘language-tribe identity’ of the people living in the claim area at the time of settlement;
- (b) There are ‘essential laws’ which regulate rights and interests in land in the claim area, namely:
  - 1. Laws that emanate from the mythological era which set out the cosmological creation stories and all important aspects of Kunja life and society;
  - 2. Laws of filiation by which membership of the group passes from parent to child; and
  - 3. Laws of collective possession of the land through the relationship between a group and the country allocated to it in the mythological era.<sup>86</sup>
- (c) Transgression in pre-colonial times would have been met with sanctions supported and enforced by the jural public of the tribe as well as of neighbouring tribes;<sup>87</sup>

[92] The claimants provide the following examples of Kunja laws and customs:

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<sup>82</sup> Attachment F, [14].

<sup>83</sup> Ibid [15].

<sup>84</sup> Ibid.

<sup>85</sup> Ibid [18].

<sup>86</sup> Ibid [22].

<sup>87</sup> Ibid [23].

(a) Relationship between Kunja identity and rights and interests in land:

1. Claimant 1 states that his mother told him that Tinnenburra was their country because it was Kunja country, and that Kunja people are the Aboriginal people that come from the area covered by Cunnamulla and Tinnenburra station;<sup>88</sup>
2. Claimant 2 explains that he is Kunja because his parents are Kunja, and that even though his family moved to Bourke, they remain Kunja;<sup>89</sup>
3. Claimant 6 explains how she inherited her Kunja identity and rights to Kunja country through her mother, and that her children and grandchildren inherited and have been taught about their Kunja identity;<sup>90</sup>
4. Claimant 7 explains how his father, a Kunja elder born in the 1920s, did not need to seek anyone's permission when he went out on Kunja country, and that he would get angry if he was not consulted about changes such as new roads or fences;<sup>91</sup>

(b) Kinship rules:

1. Claimant 1 describes the rules for respecting one's elders including appropriate conduct and forms of address, which he was taught and which he in turn has taught to the young people;<sup>92</sup>
2. Claimants 3 and 6 describe the relationship between kinship rules and totems, explaining that it is prohibited to marry someone of the same 'meat', for example a person whose totem is the bilby cannot marry someone whose totem is also the bilby;<sup>93</sup>
3. Claimant 6 states that she was told when she was growing up that Kunja people were interconnected with neighbouring groups, including the Barkandji to the south and the Budjiti to the west;<sup>94</sup>

(c) Totem affiliation:

1. Claimant 1 describes how he got his totem, the bilby, from his mother, and so he is prohibited from eating bilby meat;<sup>95</sup>
2. Claimants 2 and 6 similarly describe the prohibition on eating one's totem;<sup>96</sup>

(d) Spiritual beliefs connected to country:

1. Claimant 1 recalls the old people telling him the story of the Moonagutta and that an old Kunja man told him 'don't ever swim in this river boy, that Old snake will pull you under';<sup>97</sup>

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<sup>88</sup> Witness statement of Claimant 1 [24].

<sup>89</sup> Witness statement of Claimant 2, [16], [19].

<sup>90</sup> Affidavit of Claimant 6, [1], [5]–[6].

<sup>91</sup> Affidavit of Claimant 7, [73], [79].

<sup>92</sup> Witness statement of Claimant 1, [30].

<sup>93</sup> Affidavit of Claimant 3, [12], affidavit of Claimant 6, [50]–[52].

<sup>94</sup> Affidavit of Claimant 6 [20].

<sup>95</sup> Witness statement of Claimant 1, [27]–[28].

<sup>96</sup> Witness statement of Claimant 2, [20], affidavit of Claimant 6, [49].

2. Claimant 2 describes the story of the Moonagutta and states 'I stayed away from there and I never swam in the big water holes';<sup>98</sup>
3. Claimant 6 states that she has taught her children not to go swimming after dark or by themselves because of the Moonagutta;<sup>99</sup>

(e) Ceremonial practices:

1. Claimant 1 recalls the old people gathering together for a corroboree at Tinnenburra in the 1930s, and states 'I have seen some of the younger people today dance like those old people did on Tinnenburra';<sup>100</sup>
2. Claimant 2 similarly recalls corroborees at Tinnenburra and states '[t]hey used to paint the young boys and teach us how to dance. I danced with them sometimes';<sup>101</sup>
3. Claimants 3 and 4 describe the prohibition on women and children entering specific initiation sites in the claim area;<sup>102</sup>
4. Claimant 7 recalls his mother and other relatives undertaking smoking ceremonies to remove spirits from houses, and describes how he smokes waterholes when a non-Kunja person accompanies him on a fishing trip, to get rid of any bad spirits from the water.<sup>103</sup>

***Is the factual basis sufficient to support the assertion of s 190B(5)(b)?***

*Does the factual basis address the identity of a pre-sovereignty society for the area?*

[93] I consider there is sufficient information in the application to support the existence of a regional society in the early years of settlement which included the claim area. The factual basis material asserts that in and around the claim area this society was identifiable through common observance of cosmologically-derived laws pertaining to land and filiation, and that specific to the claim area the society was further identifiable through use of the Kunja language. In my view, the factual basis material is sufficient to support that assertion. I also consider it reasonable to infer this society existed at sovereignty and was not substantially changed between sovereignty and settlement in the 1850s, in the absence of any information before me to the contrary.

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

[94] As discussed above at s 190B(5)(a), I consider the factual basis shows that many of the apical ancestors were born in or around the claim area around the time of settlement and lived in the area in the early decades of settlement. As the apical ancestors were born around settlement, I consider I can infer their parents and grandparents were part of the society in the claim area at that time. It follows that it is reasonable to infer there is a link between the

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<sup>97</sup> Witness statement of Claimant 1, [20].

<sup>98</sup> Witness statement of Claimant 2, [15].

<sup>99</sup> Affidavit of Claimant 6 [34].

<sup>100</sup> Witness statement of Claimant 1, [12].

<sup>101</sup> Witness statement of Claimant 2, [11].

<sup>102</sup> Affidavit of Claimant 3, [13], affidavit of Claimant 4, [12].

<sup>103</sup> Affidavit of Claimant 7 [53], [59].

pre-sovereignty society and the apical ancestors. I understand from the material that the current claim group members are descendants of the apical ancestors, thus demonstrating the requisite link between them.

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

[95] I consider the material before me demonstrates how the laws and customs have been passed down to, and observed by, successive generations of the claim group in the claim area. For example, the understanding of inheritance of rights to country is reflected across the generations, with the older claim group members asserting that they were taught these laws by their elders, some of whom were alive at the time of settlement. The belief in the Moonagutta serpent, its association with particular waterholes and the prescription to avoid those places appears to have been observed since at least settlement, as recorded by the early ethnographers and affirmed in the affidavits of the current claimants. Overall, I consider the detailed accounts from claimants about their totemic associations, the acquisition of rights to country through one's predecessors and rules relating to marriage and kinship, reflect those ascribed to the claim group at the time of settlement and in the subsequent decades.

[96] In my view, there is sufficient information in the application about how the laws and customs were acknowledged and observed by the apical ancestors, the intervening generations and the current members of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.<sup>104</sup> This is because there are examples provided about the observation of the various laws and customs by successive generations of the claim area. In my view there is also sufficient information about how the laws and customs have been passed down to the members of the current claim group by their predecessors, through teaching, oral transmission and common practice. For example, the prohibition on swimming in particular waterholes because of the potentially dangerous consequences is reflected in the witness statements of claim group members who were taught by Kunja people who were alive at settlement, as well as in the affidavits of younger claimants in more recent times. I consider there is sufficient information to show that the predecessors of the current claim group acquired their knowledge of the laws and customs in much the same way as they passed it on to their descendants, thus supporting the assertion that the laws and customs are 'traditional'.

### **Conclusion – s 190B(5)(b)**

[97] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the claim area, as asserted at Attachment F. I am satisfied there is a link between the pre-sovereignty society in the claim area, the apical ancestors and the current members of the claim group. I am also satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group. This means s 190B(5)(b) is met.

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<sup>104</sup> *Yorta Yorta* [46]–[47].

## What is required to meet s 190B(5)(c)?

[98] 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>105</sup> It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.<sup>106</sup>

### ***Is the factual basis sufficient to support the assertion of the continuity of traditional laws and customs?***

[99] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the claim area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. The application provide examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through oral transmission and common practice. The continuing observance of the rules relating to descent-based rights to land, kinship and totemic affiliations provide examples which I consider are relevant to s 190B(5)(c). In my view, there are sufficient examples in the information before me of how laws and customs have been observed by the claim group, substantially uninterrupted, since at least settlement in the claim area.

### ***Conclusion – s 190B(5)(c)***

[100] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the claim area. This is because the material before me demonstrates that claimants possess knowledge about how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the claim area around the time of settlement, so as to permit an inference that the claim group is a ‘modern manifestation’ of the pre-sovereignty society in the claim area.<sup>107</sup> I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

## Conclusion

[101] As I consider the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the three assertions of ss 190B(5)(a)–(c), I am satisfied s 190B(5) is met.

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

[102] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a ‘native title right or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group.

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<sup>105</sup> *Gudjala 2009* [29].

<sup>106</sup> *Gudjala 2007* [82].

<sup>107</sup> *Gudjala 2009* [31].

[103] I note the following judicial guidance about s 190B(6):

- (a) it requires some measure of the material available in support of the claim;<sup>108</sup>
- (b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;<sup>109</sup> and
- (c) the words ‘prima facie’ mean ‘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>110</sup>

[104] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register.<sup>111</sup> I have grouped rights together in my consideration below where it is convenient to do so.

***Which of the claimed native title rights and interests are 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 or where ss 47, 47A or 47B apply), the Kunja People claim the right to possess, occupy, use and enjoy the land and traditional waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group*

[105] I consider the comments in *Yarmirr* are relevant to my assessment of the prima facie existence of this right. Namely, that a claimed right of exclusive possession is not required to be supported by ‘some enforceable means of excluding from its enjoyment those who are not its holders’; and that an inquiry into how a right is observed ‘seems directed more to identifying practices that are regarded as socially acceptable’.<sup>112</sup>

[106] Further, I note the Full Court’s observations in *Griffiths FC* 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.<sup>113</sup>

[107] As discussed above at s 190B(5)(b), Claimant 7 explains how his father, a Kunja elder born in the 1920s, didn’t need to seek anyone’s permission when he went out on Kunja country, and that he would get angry if he was not consulted about changes such as new roads or fences;<sup>114</sup>

[108] Attachment F provides further examples of the claimants’ understanding of their exclusive right to Kunja country:

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<sup>108</sup> *Doepel* [126].

<sup>109</sup> *Ibid* [132].

<sup>110</sup> *Ibid* [135].

<sup>111</sup> Section 186(1)(g).

<sup>112</sup> *Yarmirr* [16].

<sup>113</sup> *Griffiths* [127].

<sup>114</sup> Affidavit of Claimant 7, [73], [79].

- (a) 'If Aboriginal people from another mob came to Kunja country, as the traditional owners we expect them to ring us up and ask for permission';
- (b) 'If people do the wrong thing... bad things will happen to them as punishment...';
- (c) '[My mother] can't go to Bourke and talk about country because she's on someone else's country there and it will make her sick, you can't talk on other's tribal land';<sup>115</sup>

[109] As discussed above at s 190B(5)(b), the laws and customs of the Kunja people are asserted to materialise from, and continue to have force through, the cosmological beliefs of the mythological era. The material states that the traditional laws and customs include laws pertaining to country, such as the regulation of access and speaking for country. From the information in the application, I understand that the right to regulate access comes not only from the filial inheritance of such rights, but is also based on the belief that spiritual forces are present on the country and can punish those who transgress the laws. I consider there is sufficient information in the application to show that Kunja people, past and present, have exercised a right to exclude people from their country and to 'speak for country' in accordance with their traditional laws and customs.

[110] I therefore consider this right is prima facie established.

*2. Over areas where a claim to exclusive possession cannot be recognised, the claim group 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*
- (g) the right to hunt on the application area*
- (h) the right to take, use and keep natural resources, including waters, on the application area*
- (i) the right to fish on the application area*

[111] There are multiple examples in the application, some which I have extracted at ss 190B(5)(a)–(b) above, of claimants past and present living on and accessing various parts of the claim area.<sup>116</sup> There are descriptions of the Aboriginal camps on the pastoral stations in the claim area and claimants camping during visits to country and while droving.<sup>117</sup>

[112] With regard to the rights to hunt, fish and use the natural resources, the claimants speak of learning about how to hunt and cook kangaroo, goanna and emu from their predecessors, and how they continue these practices today.<sup>118</sup> Claimants describe fishing with specially smoked

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<sup>115</sup> Attachment F, [27].

<sup>116</sup> See for example the witness statement of Claimant 1, [9]–[15]; affidavit of Claimant 6, [25].

<sup>117</sup> Affidavit of Claimant 5, [3].

<sup>118</sup> See for example the witness statement of Claimant 2, [22]–[26].

lines and diving for mussels.<sup>119</sup> Claimants also describe particular natural resources which can be used as medicine.<sup>120</sup>

[113] In my view there is sufficient information to establish these rights on a prima facie basis.

*(f) the right to hold meetings on the application area*

*(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*

[114] There is information in the application about initiation ceremonies, corroborees and gatherings of Kunja people.<sup>121</sup> There are descriptions of other cultural activities, such as smoking ceremonies being carried out by claimants to expel spirits and also at funerals.<sup>122</sup> There is information about burial practices and specific burial sites in the claim area, which the claim group members continue to maintain and protect, along with wells and other sites of importance.<sup>123</sup>

[115] I therefore consider these rights are prima facie established.

***Which of the claimed native title rights and interests are not established on a prima facie basis?***

*(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*

[116] I note the majority's comment in *Ward HC* that where 'native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms'.<sup>124</sup>

[117] However, in *De Rose*, O'Loughlin J recognised a non-exclusive right to make decisions about access to an area by Aboriginal people who were bound by the traditional laws and customs of the native title holders.<sup>125</sup> In a later consent determination, the Court recognised the non-exclusive right to make decisions about access by Aboriginal people who are governed by the claim group's traditional laws and customs.<sup>126</sup> I therefore understand that the Court may be willing to uphold such non-exclusive rights in circumstances where those rights are qualified as being held against persons who are bound by the traditional laws and customs of the claim group. The right to control access claimed in this matter appears to be qualified in this way, however, I consider there is insufficient information in the application to support the

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<sup>119</sup> Affidavit of Claimant 6, [69]–[73]; affidavit of Claimant 7, [40]–[41].

<sup>120</sup> Affidavit of Claimant 3, [11]; affidavit of Claimant 7, [44]–[45].

<sup>121</sup> Attachment F, [19]; witness statement of Claimant 1, [12]; affidavit of Claimant 6, [29].

<sup>122</sup> Affidavit of Claimant 6, [33], [56].

<sup>123</sup> Affidavit of Claimant 6, [10]; affidavit of Claimant 7, [18]–[19], [53]–[60].

<sup>124</sup> *Ward HC* [51].

<sup>125</sup> *De Rose* [125].

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

existence of a non-exclusive right of this nature, as distinct from the claimed right of exclusive possession, or an explanation of how it operates under the traditional laws and customs of the claim group.

[118] I therefore consider this right is not prima facie established.

## Conclusion

[119] I am satisfied the application contains sufficient information about all but one of the rights claimed, such that they can be said to be established on a prima facie basis. I am also satisfied those claimed rights which are established prima facie can be considered 'native title rights and interests'. This is because there is information in the application to show how those rights were observed in the early years of settlement as well as in recent times. Additionally, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

## Traditional physical connection – s 190B(7): condition met

[120] To meet s 190B(7), the Registrar must be satisfied at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- (b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[121] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.<sup>127</sup>

### ***Is there evidence that at least one member of the claim group has or had a traditional physical connection?***

[122] Based on the information before me, I consider at least one claim group member currently has or had a traditional physical connection to the land and waters covered by the application. The information provided by the claimants in their statements and affidavits about living in the claim area, caring for burial sites, using its natural resources such as animals, fish and plants for food and medicine, demonstrates there is a physical connection to the claim area.

[123] I also consider the claim group members' connection with the claim area is 'traditional' in the sense required by s 190B(7). As discussed at s 190B(5)(b), I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, it follows that I am satisfied the current claim group members' connection with the claim area is in accordance with those traditional laws and customs.

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<sup>127</sup> *Doepel* [18], *Gudjala 2009* [84].

## Conclusion

[124] I am therefore satisfied at least one member of the native title claim group currently has or had a traditional physical connection with a part of the claim area as required by s 190B(7)(a), and so s 190B(7) is met.

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

[125] In my view the application complies with the provisions of ss 61A(1)–(3) and therefore satisfies the condition of s 190B(8):

Section	Requirement	Information	Result
s 61A(1)	No native title determination application is approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, paragraph 1 states that the application does not cover any area where a previous exclusive possession act was done.	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E paragraph 1 states that exclusive possession is only claimed where it can be recognised, such as areas where there has been no prior extinguishment of native title and where ss 47–47B and s 238 apply. It follows that no claim to exclusive possession is made in previous non-exclusive possession act areas.	Met

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

[126] In my view the application meets the requirements of s 190B(9):

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that the applicant does not claim any minerals, petroleum or gas wholly owned by the Crown.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that no claim of exclusive possession is made in relation to any offshore place.	Met

s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Schedule B paragraph 2 states that the application does not cover areas where native title has been extinguished. There is no information in the application that discloses to me that native title rights and interests in the claim area have otherwise been extinguished.	Met
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*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
Date of Registration Decision	20 September 2019

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

In accordance with ss 186, 190A(1) 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:

15 August 2019

#### Date application entered on Register:

20 September 2019

#### Applicant:

As per Schedule

#### Applicant's address for service:

As per Schedule

#### Area covered by application:

As per Schedule

#### Persons claiming to hold native title:

As per Schedule

#### Registered native title rights and interests:

As per Register

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Katy Woods

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.