National Native Title Tribunal

Registration Decision

Application name	Debbie Hansen & Ors on behalf of the Upurli Upurli Nguratja Native Title Claim Group and State of Western Australia (**Upurli Upurli Nguratja**)
Name of applicant	Debbie Hansen, Jacinta Paul, Michael David Tucker, Jarman Jamieson, Debbie Carmody, Thelma O'Loughlin, Beverley Sambo, Darrell Graham, Jocelyn Forrest, Lance Ingomar and Nancy Donegan
Federal Court of Australia No.	WAD281/2020
NNTT No.	WC2020/004
Date of Decision	22 January 2021

Claim accepted for registration

I have decided the claim in the Upurli Upurli Nguratja 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.

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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.

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

Reasons for Decision

Cases cited

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (***Warrie***)
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***)
Harkin on behalf of the Nanatadjarra People v State of Western Australia (No 2) [2021] FCA 3 (***Nanatadjarra People***)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538; [2002] HCA 58 (***Yorta Yorta***)
Northern Land Council v Quall [2020] HCA 33 (***Quall HCA***)
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (***Doepel***)
Sampi v State of Western Australia [2005] FCA 777 (***Sampi***)
Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26 (***Sampi FC***)
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 Registrar, National Native Title Tribunal [1999] FCA 1732 (***Ward v Registrar***)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (***WA v NTR***)
Western Australia and Northern Territory v Lane (1995) 59 FCR 332; [1995] FCA 1484 (***Lane***)

Background

[1] This application is made on behalf of the Upurli Upurli Nguratja native title claim group (**claim group**). It covers an area of approximately 26,692 square kilometres in the south east of Western Australia (**application area**).

[2] This application was filed on 2 December 2020 in the Federal Court of Australia (**Court**) and on 4 December 2020 the Court gave a copy to the Native Title Registrar (**Registrar**), pursuant to s 63. This referral triggered the Registrar's duty to consider the claim in the application under s 190A(1). Pursuant to s 190A(6), if the claim meets all the conditions in ss 190B–190C (**registration test**), it must be accepted for registration and entered onto the Register of Native Title Claims (**Register**).

[3] A number of s 29 notices have been issued over the application area. Section 190A(2)(f) requires that I use my best endeavours to finish testing the application before the end of four months of the notification date of the relevant s 29 notice. As a s 29 notice was issued over the application area on 23 September 2020, in accordance with s 190A(2)(f), I must use my best endeavours to finish testing the application for registration before the end of four months of that date, that is, before 23 January 2021.

[4] For the reasons below, I consider the claim in the application meets all the conditions of the registration test. Attachment A contains the information which will be included in the Register.

Procedural fairness

[5] On 7 December 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the Western Australian government (**State**), advising that any information the State wished to supply should be received by 14 December 2020.

[6] Also on 7 December 2020, the senior officer wrote to the applicant's representative to advise that any additional information the applicant wished to supply should be provided by 14 December 2020.

[7] Also on 7 December 2020, the applicant's representative wrote to the senior officer requesting an extension of time to provide submissions. I considered the request and decided a short extension was reasonable, based on the information from the applicant's representative about the very remote locations at which the claim group members reside and the difficulty that presented in terms of obtaining information from them for the purposes of the registration test. Therefore, on 8 December 2020, the senior officer wrote to the applicant's representative to advise I had granted the extension and any additional information should be provided by 11 January 2021.

[8] On 7 January 2021, the applicant's representative provided the following documents in support of the application (**additional material**):

(a) 'Applicant's Submissions on the Application of the Registration Test on native title determination application WAD 281 of 2020', Malcolm O'Dell, 7 January 2021 (**applicant's submissions**);

(b) 'Upurli Upurli Nguratja Registration Test Anthropological Report for the Upurli Upurli Nguratja Native Title Claim, Dr Scott Cane and Nadisha Senasinghe, 6 January 2021 (**anthropology report**);

(c) Affidavit of Thelma Mary O'Loughlin, 17 December 2020 (**Claimant 1 affidavit**); and

(d) Affidavit of Debbie Hansen, 6 January 2021 (**Claimant 2 affidavit**).

[9] On 7 January 2021, the senior officer provided copies of the additional material to the State's representative and advised that any comment on the additional material or submissions on the registration test should be received by 18 January 2021.

[10] No comments or submissions were received from the State and so this concluded the procedural fairness process.

Information considered

[11] In accordance with s 190A(3)(a), I have considered the information in the application and the additional material from the applicant, as outlined above.

[12] There is no information before me from searches of State, Territory or Commonwealth interest registers obtained by the Registrar under s 190A(3)(b).

[13] Section 190A(3) also provides that the Registrar may have regard to such other information considered appropriate. Pursuant to that provision, I have considered:

(a) information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 9 December 2020 (**geospatial report**);

(b) information in the Tribunal's geospatial database; and

(c) information in the Register.

Section 190C: conditions about procedures and other matters

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

[14] 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.[2] I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group has authorised the applicant	Part A(2), Attachment A, s 62 affidavits	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A, Attachment A	Met

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits	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	Schedule C, Attachment C	Met
s 62(2)(c)	Searches	Schedule D, 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	Schedules F, Attachment F	Met
s 62(2)(f)	Activities	Schedule G, Attachments F and G	Met
s 62(2)(g)	Other applications	Schedule H	Met
S 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA, Attachment I	Met

[2] *Doepel* [16], [35]–[39].

s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

Conclusion

[17] As the application contains all of the prescribed details and other information, as required by ss 61–2, I am satisfied s 190C(2) is met.

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

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

(a) the application must overlap the current application in whole or part;

(b) there must be an entry for the claim in the previous application on the Register when the current application was made; and

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

[19] Schedule H states the application is overlapped by the application of WC2017/003 Nanatadjarra People (**Nanatadjarra**). The geospatial report and my own searches confirm this overlap, however there was no entry for the claim in the Nanatadjarra application on the Register when the current application was made on 2 December 2020 and it was dismissed by the Court on 18 January 2021.[3] Therefore, the Nanatadjarra application is not a 'previous application' for the purposes of s 190C(3) and I do not need to consider whether there are common claimants between the two applications.

Conclusion

[20] As there are no relevant 'previous applications', I am satisfied that no person included in the claim group was a member of a native title claim group for any previous application, and so s 190C(3) is met.

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

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

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify it; or

(b) the applicant is a member of the 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 claim group.

[22] Schedule R(1) states the application has been certified and refers to the certificate in Attachment R. I therefore understand I must assess the application against the requirements of s 190C(4)(a), and in particular that:

(a) the certificate identifies the relevant representative body;

[3] *Nanatadjarra People* [1].

(b) the representative body has the power under Part 11 to issue the certification; and

(c) the certificate meets the requirements of s 203BE(4).[4]

Is the relevant representative body identified?

[23] Central Desert Native Title Services Limited (**CDNTS**) has provided the certificate, which is dated 27 November 2020 and signed by the Chief Executive Officer (**CEO**), 'under delegation from the board' of CDNTS. The geospatial report and the current data in the Tribunal's national map of Representative Aboriginal and Torres Strait Island Body areas confirm that CDNTS performs the functions of a representative body for the area covered by the application, pursuant to s 203FE(1). I am therefore satisfied the certificate identifies the relevant representative body. I have addressed the issue of the CEO signing the certification under a delegation separately below.

Does the representative body have the power to issue the certification?

[24] As CDNTS is funded to perform all of the functions of a representative body, pursuant to s 203FE, it can perform all of the functions listed in Part 11, including, relevantly, the certification functions in s 203BE. I am therefore satisfied CDNTS has the power under Part 11 to issue the certification.

Does the certificate meet the requirements of s 203BE(4)?

[25] I have considered each of the requirements of s 203BE(4) in turn below.

Section 203BE(4)(a) – statements

[26] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[27] Section 203BE(2)(a)–(b) prohibits a representative body from certifying an application unless it is of the opinion that:

(a) all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[28] As the certificate contains these required statements in paragraph 2, I am satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

[29] Section 203BE(4)(b) requires a representative body to briefly set out its reasons for being of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[30] In paragraph 3, the certificate sets out the CDNTS's reasons for its opinion that ss 203BE(2)(a)–(b) are met, which includes the following information:

[4] *Doepel* [80]–[81].

(a) CDNTS have provided legal and anthropological services within or near the application area since 2017;

(b) The decision by the claim group to authorise the applicant to make the application and to deal with matters arising in relation to it was made in accordance with their traditional decision-making processes; and

(c) staff and consultants who worked with the claim group made all reasonable efforts to ascertain and identify all the members of the claim group.

[31] As the certificate sets out the reasons for the CNDTS's opinion that ss 203BE(2)(a)–(b) are met, I am satisfied s 203BE(4)(b) is met.

Section 203BE(4)(c) – overlapping applications

[32] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3).

[33] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

(a) achieve agreement relating to native title between the persons in respect of whom the applications are, or would be, made; and

(b) minimise the number of applications covering the land or waters.

[34] Paragraph 5 states that CDNTS is not aware of any other application which covers the application area. This statement contradicts the information provided in Schedule H, that the application area is also covered by the Nanatadjarra application, as I have discussed above at s 190C(3). The certificate does not state what efforts CDNTS made to achieve agreement between the overlapping applications. However, s 203BE(3) provides that a failure by the representative body to comply with the provision does not invalidate the certification. I therefore consider the anomaly in the information about the overlapping application and failure to otherwise address the requirements of s 203BE(3) does not affect the certificate's validity.

Certification by the CEO

[35] I understand that CDNTS is incorporated under the *Corporations Act 2001* (Cth). The majority of the High Court in *Quall HCA* observed that 'a certification function performed by a representative body that is a company incorporated under the *Corporations Act* might in practice fall to be performed through its chief executive officer'.[5] The High Court in that case was primarily considering the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), where the majority held there was 'no impediment' to the delegation of the functions of a representative body under that legislation 'or under another Commonwealth Act if delegation of that function can be characterised as something "necessary or convenient to be done for or in connexion with the performance" of that function'.[6] Conversely, the minority held that

[5] *Quall HCA* [48].
[6] Ibid [63].

'where a representative body was a company incorporated under the *Corporations Act* the representative body could perform many, if not all, of its important functions by agents, including its managing director or CEO'.[7]

[36] Applying the reasoning from *Quall HCA*, I understand that the CEO of CDNTS can perform the certification functions of CDNTS, either under an instrument of delegation or as an agent. As noted above, the certificate states that the CEO has provided the certification under a delegation from the board of CDNTS. Noting the earlier judicial guidance that s 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body', I do not consider that it is appropriate for me to make further enquiries as to the nature or extent of that delegation, or determine whether the CEO was instead acting as an agent of CDNTS.[8] In my view, the information in the certificate is sufficient for me to be satisfied of the fact of certification, and can therefore proceed to decide whether the application meets the requirements of s 190C(4).

Conclusion

[37] As the certificate identifies the relevant representative body, the representative body has the power under Part 11 to issue the certification, and the certificate meets the requirements of s 203BE(4), the requirements of s 190C(4)(a) are satisfied and I do not need to consider the application against the requirements of s 190C(4)(b). This means s 190C(4) is met.

Section 190B: merit conditions

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

[38] 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.

[39] I understand the questions for this condition are whether:

(a) the information and map provide certainty about the external boundary of the application area; and
(b) the information enables identification of any areas within the external boundary over which no claim is made.[9]

Does the information about the external boundary meet this condition?

[40] Schedule B refers to Attachment B, which contains a written description of the application area (**written description**). The written description describes the external boundary using metes and bounds, referring to coordinate points identified by longitude and latitude to six

[7] Ibid [93].
[8] *Doepel* [78], [80]–[82].
[9] Section 62(2)(a)–(b); *Doepel* [122].

decimal places and the boundaries of pastoral leases and native title determination applications.

[41] Schedule C refers to Attachment C, which contains a map titled 'West Nullarbor' and dated 23 November 2020 (**map**). The map depicts the external boundary of the application area with bold blue outline and includes a scale bar and coordinate grid.

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

Does the information about excluded areas meet this condition?

[43] Schedule B lists areas which are excluded from the application in general terms, such as areas subject to previous exclusive possession acts. Schedule B also states that the applicant seeks to apply ss 47–47B, which provide for the extinguishment of native title to be disregarded in particular circumstances. I understand it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application, so I am satisfied the areas affected by the general exclusion clauses can be ascertained at the appropriate time.[10]

[44] Attachment B specifically excludes the following native title determination applications from the application area:

(a) WAD460/2018 Nangaanya-ku (WC2018/019); and

(b) WAD186/2017 Maduwongga (WC2017/001).

[45] Attachment B also specifically excludes the following native title determinations:

(a) WAD472/2019 Untiri Pulka (WCD2020/006); and

(b) WAD6020/1998 Ngadju (WCD2014/004).

[46] In my view, the specific exclusions are clear from Attachment B.

Conclusion

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

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

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

(a) the persons in the 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.

[10] *Strickland* [55].

[49] My consideration at this condition is limited to information in the application.[11]

[50] Schedule A refers to Attachment A, which states:

> 1. The native title claim group comprises those Aboriginal people who hold in common the body of traditional law and culture governing the area the subject of the claim and who:
>
> (a) are descended from the following people, and who in terms of traditional law and custom, are associated with the area covered by the application: [list of ancestors].

[51] It follows from the above description that s 190B(3)(b) is applicable. Where a claim group description is used, I am not required or permitted to be satisfied about the correctness of the description.[12] My task at this condition is limited to whether I can 'be satisfied as to the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group'.[13] In other words, I must be satisfied that the description is sufficient to ascertain whether any particular person is a member of the claim group.

[52] From the above description I understand that in order for an individual to be a member of the claim group they must be a descendant of one of the named ancestors and be associated with the application area, pursuant to the traditional laws and customs of the claim group.

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

[53] The Court has held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).[14] I consider that requiring a person to show descent from an identified ancestor provides a clear objective starting point from which to commence enquiries about whether a person is a member of the claim group.

[54] The claim group description does not specify whether adopted persons are members of the claim group, however I note within the description the reference to the claim group's traditional laws and customs. In my view, the traditional laws and customs would provide the appropriate 'set of rules or principles' which could be applied to ascertain whether an adopted person meets this option for membership, and could also be applied to ascertain whether a person has the requisite association with the application area.[15]

Conclusion

[55] 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

[56] 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. My

[11] *Doepel* [16].
[12] *Wakaman* [34].
[13] Ibid.
[14] *WA v NTR* [67].
[15] *Ward v Registrar* [25].

consideration at this condition does not go beyond what is in the application.[16] While the claimed rights may or may not be native title rights and interests in accordance with the definition found in s 223, I consider that assessment is part of the task at s 190B(6), where I must decide whether the claimed rights are established as native title rights on a prima facie basis. I understand my task at this condition is limited to determining whether the claimed rights and interests can be understood and have meaning.[17]

Is the description sufficient to identify the claimed rights and interests?

[57] From paragraph 1 of Schedule E, I understand that exclusive possession is claimed in areas where there has been no extinguishment or where previous extinguishment may be disregarded. From paragraph 2, I understand that in areas where exclusive possession cannot be recognised, four non-exclusive rights are claimed. Reading Schedule E as a whole, I consider that the claimed rights are clear and can be understood.

Conclusion

[58] 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

[59] To meet s 190B(5), the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist, is sufficient to support the following assertions:

(a) that the claim group have, and the predecessors of those persons had, an association with the application area; and

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group that give rise to the claim to native title rights and interests; and

(c) that the claim group have continued to hold the native title in accordance with those traditional laws and customs.

[60] I understand my task is limited to assessing whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determining whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[18]

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

[61] As discussed above, Schedule E sets out the rights and interests claimed in the application area by the claim group. Attachment F provides an outline of the factual basis of the claim. Attachment G lists the activities in which members of the claim group engage on the application area. The applicant's submissions, anthropology report and the affidavits of

[16] *Doepel* [16].
[17] Ibid [99].
[18] Ibid [16]–[17]; *Gudjala 2008* [83], [92].

Claimant 1 and Claimant 2 more specifically address the factual basis of the claim and so my reasons below will focus on the information in those documents.

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

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

(a) the claim group and their predecessors have had an association with the application area since sovereignty or European settlement;[19]

(b) the whole claim group has an association with the application area, although it is not a requirement that all members have such an association at all times;[20] and

(c) there is an association with the whole application area, rather than an association with only part of it or only 'very broad statements', with no 'geographical particularity'.[21]

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

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

[63] Attachment F states that in addition to the claim group's ongoing physical presence on the application area, the claim group is spiritually associated with the application area through certain *tjukurrpa* stories, which manifest at locations across the application area and give rise to particular cultural responsibilities.[22]

[64] The anthropology report details these *tjukurrpa* stories and explains how they are connected to features of the application area including rockholes, landforms and particular types of vegetation.[23] The report explains how these narratives give rise to normative laws, for example a *tjukurrpa* story linked to the north of the application area sets down the rules for the claim group's kinship system.[24] The report also includes a map of the application area with the relevant *tjukurrpa* locations identified, including sites associated with the Seven Sisters story near to both the northern and southern boundaries, and other sites near the eastern and western boundaries, and scattered throughout the central region.[25]

[65] The anthropology report explains that the apical ancestors include initiated and senior religious spokespeople who held extensive knowledge of the *tjukurrpa* for the application area.[26] The report provides a short biography of each of the apical ancestors, including their estimated date of birth and their association with the application area as well as that of their descendants.[27] For example, apical ancestor Minnie Nimbud was born at Cundeelee, near the centre of the application area, in the early 1900s.[28] Many of her children were born on the application area, including Bobby Barton at Karonie in 1938, who is also named as an apical

[19] *Gudjala 2007* [52].
[20] Ibid.
[21] *Martin* [26]; *Corunna* [39], [45].
[22] Attachment F [2]–[4].
[23] Anthropology report [4.28].
[24] Ibid.
[25] Ibid, Figure 2.
[26] Ibid [4.32].
[27] Ibid [5.4]–[5.57].
[28] Ibid [5.8].

ancestor.[29] Bobby gained significant cultural knowledge of the area of his birth in the south west part of the application area and passed that knowledge to his descendants, who are members of the current claim group.[30] Apical ancestor Roy St. Clair/Sinclair was recorded by Birdsell as being born before 1917 and was recorded in the application area at Karonie in the 1930s and at Cundeelee with his wife and children in the 1950s.[31] His children are remembered as being 'born bush' in and around the application area, including one at a rock hole near Karonie and another close to Coonana on the southern boundary.[32] Apical ancestor Karntu was also born near Karonie and her father is associated with a particular rockhole outside the application area to the east.[33] Apical ancestor Mary Paul was born at Cook Railway Siding, to the east of the application and was recorded by Birdsell as living at Cundeelee in 1953.[34] Mary's brother, apical ancestor Robbie Franks was born in the area of the Spinifex People determination, outside the application area to the north east, and was also recorded at Cundeelee in 1953.[35]

[66] Claimant 1 in her affidavit explains that her mother was born at Karonie in 1918 and grew up there with her older brother and sister, until they were removed to Mt Margaret Mission, outside the application area to the north, near Laverton.[36] Claimant 1's maternal grandmother was born in the Nangaanya-ku application area (adjacent to the application area to the north) in 1889, but moved south to Karonie as a young girl 'and stayed there all her life', along with her sister.[37]

[67] The anthropology report provides the names of claim group members buried on the application area and identifies the location of these burials, including at places around Cundeelee and Queen Victoria Spring Nature Reserve in the centre of the application area and at Coonana and Zanthus along the southern boundary.[38] Claimant 2 explains that it is her responsibility to look after particular burial sites.[39]

[68] The applicant's submissions and the anthropology report provide that European settlement occurred progressively across the application area during the period 1920–1950, with the establishment of Karonie Station in the 1920s and Cundeelee Mission in 1950.[40]

Association of the current claim group with the application area

[69] The applicant's submissions explain that there has not been an ongoing physical presence maintained by the claim group in the application area since 2013, when the community of Coonana was closed.[41] The submissions explain that since the closure, claim group members have maintained their physical association through regular visits to the application area for

[29] Ibid.
[30] Ibid.
[31] Ibid [5.9].
[32] Ibid [5.10].
[33] Ibid [5.5].
[34] Ibid [5.7].
[35] Ibid.
[36] Claimant 1 affidavit [20]–[21], [34].
[37] Ibid [22], [35].
[38] Anthropology report [4.33–4.36].
[39] Claimant 2 affidavit [30].
[40] Applicant's submissions [36]; anthropology report [3.2]-[3.3].
[41] Applicant's submissions [45].

camping, hunting, gathering, making artifacts, protecting significant sites and teaching the younger generations about the *tjukurrpa*.[42]

[70] Claimant 1 recalls participating in a ceremony at a law ground near Cundeelee when she was about 16 years old, stating that she 'had to dance and sing when the men came out of the bush'.[43] Claimant 1 outlines her knowledge of the *tjukurrpa* stories, including those associated with the application area.[44] She explains how the Seven Sisters story manifests at particular places in the application area and that it is a 'ladies dreaming', 'handed down from grandmother to mother to daughter'.[45] She also explains how other women in the claim group know these stories as they 'sit at camp during law time' in the application area.[46]

[71] Claimant 1 also explains how her predecessors' association gives rise to her rights in the application area, stating '[t]hat's my country because it is my ancestors' country…. [t]hat is why we go there all the time and show our kids all the places and camp there and everything because it's our home'.[47] She states that she takes her family to the application area about four or five times a year as they live approximately one hour's drive away, and that while on country they teach the children to hunt kangaroo and make damper on a fire.[48]

[72] Claimant 2 was born in Cundeelee in 1967 and lived and worked there until her first child was born in 1985, at which time they moved to Coonana.[49] At Coonana, she and her husband camped with the 'old people', and through the 1990s moved across the application area to Tjuntjuntjara, outside the application area to the northeast, because of the availability of water there.[50] She explains that she is connected to Cundeelee because she was born there and that it is her siblings' country too by virtue of their birth, their parents being 'bush people' who were brought in to the Cundeelee mission.[51] She recalls walking around the application area to hunt and gather food, at Cundeelee and also Coonana.[52]

[73] Claimant 2 explains that she spent time on the application area 'with the old ladies' and that she learnt from her aunties and sisters, including the Seven Sisters stories and its sacred manifestations at places in the application area.[53] She also explains how her son is now responsible for particular places in the application area, as a result of his initiation in 2004.[54]

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

[74] 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.[55] In my view, the information before me describes in a sufficient level of detail the association of the

[42] Ibid [46], [48].
[43] Claimant 1 affidavit [72].
[44] Ibid [24]–[30].
[45] Ibid [28].
[46] Ibid.
[47] Ibid [31].
[48] Ibid [43]–[46].
[49] Claimant 2 affidavit [7]–[11].
[50] Ibid [12].
[51] Ibid [15]–[18].
[52] Ibid [29], [33].
[53] Ibid [20]–[21], [26].
[54] Ibid [27].
[55] *Martin* [25].

claim group with the application area, both at the time of European settlement, which occurred relatively recently, and since that time. I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

[75] In considering the factual basis of this claim I note the application area is a particularly remote and marginal area of desert. From the map in Attachment C and the Tribunal's geospatial database, I can see that the majority of the application area is made up of unallocated Crown land and reserves, and contains no towns or major roads. Pastoral leases, including Karonie Station, cover only a small percentage of the area and the Trans-Australian Railway runs along the southern border, beside which Coonana and Zanthus are located. I note the comments in *Strickland*, that '[t]he requirements of the registration test are stringent. It is not necessary to elevate them to the impossible'.[56] I also note the comments in *Lane*, that the Registrar's statutory obligations should be performed with a degree of flexibility consistent with the beneficial nature of the legislation.[57] I have therefore assessed the sufficiency of the factual basis by taking into account the particular features of this application, and applying this judicial guidance.

Is the factual basis sufficient to support an association between the predecessors of the claim group and the application area since sovereignty?

[76] According to the material before me, many of the apical ancestors of the claim group were alive before and at the time sustained European contact began in the 1920s, and lived, had children and were buried in the application area. It appears that the parents and grandparents of the current claim group were born in the early decades of settlement. In these circumstances an inference of continuity can more easily be made. In my view, the ancestors who were alive at the time of settlement likely had a similar association with the application area as their own predecessors did in the pre-settlement era, including at the time of sovereignty.

[77] The anthropology report outlines the association each apical ancestor had with the application area and I also note the information from Claimants 1 and 2 about their parents' and grandparents' association with the application area, which appears to have been sustained despite the period of removals to missions. They describe how their predecessors lived on the application area, camped, hunted and gathered food, participated in ceremonies and handed down the *tjukurrpa* stories. In my view, the factual basis is sufficient to support an association between the predecessors of the claim group and the application area since sovereignty.

Is the factual basis sufficient to support an association between the claim group and the application area currently?

[78] The affidavits of Claimants 1 and 2 provide examples of the association that the current claim group have with the application area. Although there are no longer any permanent communities on the application area, I consider the physical association is maintained through regular visits. The claimants describe how they and other claim group members travel to the

[56] *Strickland* [55].
[57] *Lane* [9].

application area where they camp, hunt and gather food and teach the younger generations. I note those teachings include the *tjukurrpa* stories, the knowledge of which I consider demonstrates an ongoing spiritual association with the application area. In my view the factual basis is sufficient to support an association between the current claim group and the application area.

Is the factual basis sufficient to support an association, both past and present, with the whole application area?

[79] It appears that the predecessors maintained a spiritual association with the application area through their knowledge of the *tjukurrpa* stories, which have been passed down to the current claimants and which they have in turn taught to the younger generations. From the map included in the anthropology report, I can see that locations associated with *tjukurrpa* stories are located across the length and breadth of the application area. Similarly, there appear to be burial sites located across the application area to which the claimants feel an ongoing spiritual connection and obligation to protect. In addition to this spiritual association, I note the information from Claimants 1 and 2 about time spent in their childhood travelling across the application area with their families and camping with the 'old people' and how they continue to visit the application area today. In my view, the factual basis is sufficient to support an association, both past and present, with the whole application area.

Conclusion - s 190B(5)(a)

[80] I consider the information before me is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the application area. I am also satisfied there is sufficient factual basis to support an assertion of an association of the claim group to the whole application area. This means s 190B(5)(a) is met.

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

[81] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that gives 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.

[82] 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:

> [I]t 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*;
>
> [T]he 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.[58]

[83] In *Warrie*, the Full Court held that:

> Where a rule, or practice or behaviour in relation to the identified land and waters arises from traditional law, and has normative content, then it can be capable of satisfying para (a) of s 223(1);
>
> *[A] claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character*, there is no further gloss or overarching requirement, and no further rigidity. The Native Title Act in terms does not require establishment of some overarching "society" that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.[59]

[84] In *Gudjala 2009*, Dowsett J held 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.[60]

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

(a) a link between the pre-sovereignty society, the apical ancestors and the claim group in the application area; and

(b) the continued observance of normative rules by the successive generations of the 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 at s 190B(5)(b)?

[86] The applicant's submissions provide that the claim group are members of the society known as the Western Desert Cultural Bloc (**WDCB**).[61] The anthropology report states that the WDCB was the relevant society for the application area at the time of sovereignty, which has been found to be the relevant society in all the native title determinations surrounding the application area.[62] Attachment F asserts that the predecessors of the claim group were members of the WDCB and acknowledged and observed its laws and customs, and that the current claim group members are their biologically and/or socially recognised descendants.[63]

[87] The applicant's submissions state that the claim group members continue to acknowledge and observe the rules set down by the *tjukurrpa*, being the spiritual basis of the claim group's traditional laws and customs.[64] These include laws associated with proper access to and conduct on country, burials, kinship and marriage, ceremony, hunting and food preparation.[65]

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[58] *Yorta Yorta* [46]–[47], emphasis added.
[59] *Warrie* [105], [107], emphasis added.
[60] *Gudjala 2009* [40].
[61] Applicant's submissions [9].
[62] Anthropology report [4.1]–[4.5].
[63] Attachment F [20]–[22].
[64] Applicant's submissions [63].
[65] Ibid.

The claim group members were taught the *tjukurrpa* by their predecessors, including several of the apical ancestors, and continue to teach it to the younger generations.[66]

[88] The opinion of the anthropologists is that in the application area '[t]he observance of, and adherence to, Western Desert tenurial laws and customs has… been orthodox, continuous and retained normative force since effective sovereignty'.[67] In support of this assertion, the report explains how the claim group members continue to follow the traditional laws of land tenure, including 'fixed protocols relating to management prescriptions, access conditions, permissions and reciprocations and result in punishment (shaming, exclusion, physical and metaphysical harm) as a consequence of transgression'.[68] It also explains that the normative laws, including the tenurial system, are established by the *tjukurrpa* and have been continually adhered to since before sovereignty.[69] One claimant explains the *tjukurrpa*'s operation in this regard as follows:

> *Tjukurrpa* also tells you where you can and can't go, so it is important to know those songs or else you might go somewhere you are not supposed to which will get you in trouble. There are some places that only [particular men] are allowed to go to, women or kids would be punished if they went to those places. It's men's business.[70]

[89] The anthropology report explains that it is knowledge of the *tjukurrpa* stories which gives rise to particular rights and interests, with increased knowledge through ritual participation leading to the right to determine how country is managed.[71] It is therefore the most senior claim group members who have the most knowledge of the *tjukurrpa* and are the decision makers for the application area under the claim group's laws and customs.[72]

[90] The anthropology report asserts that these laws and customs continue to be transmitted to the younger generations through visits to country, initiation and other ceremonies.[73] One claimant explains how she and her sister take their daughters onto country to teach them the gender-specific knowledge of the Seven Sisters story and the associated places, in addition to the skills of camping and hunting.[74] Another claimant explains that this knowledge has been passed down to her in a similar fashion, stating 'I tell my kids everything about the old people and what they told me, where they been and where they lived, all those kinds of things. Taught them about bush food too'.[75]

[91] Claimant 1 explains that she is limited in what she can say about a certain *tjukurrpa* story connected to the application area because the knowledge is gender-specific and can only be told to women, 'otherwise, we could get sick'.[76] Similarly, she has not been told the men's

[66] Ibid [67]–[68]. See also anthropology report [4.24].
[67] Anthropology report [3.5].
[68] Ibid [4.13].
[69] Ibid [4.24].
[70] Ibid [4.25].
[71] Ibid[4.29]–[4.30].
[72] Ibid [4.31].
[73] Ibid [4.25].
[74] Ibid.
[75] Ibid.
[76] Claimant 1 affidavit [29].

tjukurrpa, explaining '[t]hey tell us where not to go but we do not know those stories. We keep our family safe by not going there'.[77]

[92] Claimant 1 states that while on country with her children and grandchildren, they use their customary cooking methods – '[i]t has to be cooked the traditional way' and '[a]fter you cook it, there are rules about who gets which part of the kangaroo'.[78] She explains that she was taught these rules from her parents and that her mother had in turn learnt from her grandmother.[79]

[93] Claimant 1 also explains how the claim group continues to follow the kinship system and that her parents married the 'right way', as did she.[80] She explains that a wrong way marriage 'brought shame' and that she has taught her children about the kinship system, not only in relation to marriage but also the rules of social organisation such as the appropriate seating arrangements at funerals.[81] Claimant 2 similarly explains the significance of the kinship system that her children and grandchildren all have 'skin names' which 'means we do things the proper cultural way'.[82]

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

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

[94] The material before me asserts that the pre-sovereignty society for the application area was the WDCB and that the predecessors of the claim group were members of that society who observed the WDCB laws and customs, which materialise from belief in the *tjukurrpa*. I understand that it is possible for a claim group to be members of a broader society, without all the members of that society being members of the claim group. The Full Court has made the 'coarse analogy' between such a pre-sovereignty society and the society of Australia whose various members also observe their local and state-based laws.[83] In my view, the current application is similarly analogous – the claim group are members of the WDBC and follow the relevant laws and customs as manifested through the *tjukurrpa* relevant to the application area. I therefore consider the material addresses the identity of the relevant pre-sovereignty society, sufficient for the purposes of s 190B(5)(b).

[95] As discussed, above, barely a generation appears to separate the apical ancestors from the senior members of the current claim group. The apical ancestors are understood to have been born around the time of settlement, and they would have lived with claim group members who were born before sustained European contact occurred. I understand from the material that the current claim group are the biological and socially-recognised descendants of the apical ancestors. I am therefore of the view that the factual basis sufficiently addresses the link between the pre-sovereignty society, the apical ancestors and the claim group.

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[77] Ibid [30].
[78] Ibid [47].
[79] Ibid [48].
[80] Ibid [60]–[62].
[81] Ibid [63]–[64].
[82] Claimant 2 affdavit [35].
[83] *Sampi FC* [69].

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

[96] The material before me contains examples of laws and customs which were observed prior to sustained European contact and which continue to be observed by the claim group today. These include knowledge of the *tjukurrpa* which traverse the area, the stories of which set down the laws and customs pertaining to different aspects of traditional life, such as the tenure and kinship systems. The material explains how rights to the application area are obtained through knowledge of the *tjukurrpa* and that this knowledge has been handed down to the current claim group from their predecessors. Claimants 1 and 2 explain not only that they know the relevant *tjukurrpa* stories, but they continue to adhere to its tenets, demonstrated for example in their statements about the importance of kinship rules and laws restricting access to parts of the application area.

[97] As discussed above at s 190B(5)(a), the anthropology report sets out the association of each of the apical ancestors with the application area. Current claimants assert that they were taught the *tjukurrpa* from their predecessors, many of whom would have lived with, and been taught by the apical ancestors. I understand from the material that it is knowledge of the *tjukurrpa* which gives rise to rights and interests in the application area, and that there has been transmission of the *tjukurrpa* and observance of its laws through the generations of the claim group since before the time of settlement. According to the material, the current claimants know the *tjukurrpa* stories and the consequences of transgression, for example, that sickness can result from unlawful access to country.

[98] The affidavits of Claimants 1 and 2 provide examples of the claimants and their families engaging in various practices on the application area, such as hunting and gathering. These too appear to be observed in accordance with laws and customs set down by the the *tjukurrpa* and were taught to the current claim group by their predecessors. In my view, the information about the hunting, preparation and portioning of kangaroo which the claim group observe in accordance with rules taught to them by their predecessors, is one such example.

[99] In my view, there is sufficient information about how the laws and customs have been acknowledged and observed by successive generations of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.[84]

Conclusion – s 190B(5)(b)

[100] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the application area. I am satisfied there is a link between the pre-sovereignty society in the application 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 claim group. This means s 190B(5)(b) is met.

[84] *Yorta Yorta* [46]–[47].

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

[101] 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.[85] 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.[86]

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

[102] As summarised above at ss 190B(5)(a)–(b), I consider the factual basis demonstrates an ongoing association with the application area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. The material provides that current claim group members continue to access the application area and teach their children and grandchildren the stories associated with the *tjukurrpa* as well as traditional skills of hunting and gathering, which they themselves were taught by their predecessors. Despite no longer permanently living on the application area, the material asserts that the claimants continue to observe their traditional laws and customs, including adherence to the kinship system which determines marriage and social relations. With regard to the application area, the claimants hold knowledge of and continue to observe the normative laws associated with it, for example by avoiding areas which the *tjukurrpa* mandates must not be accessed, and are teaching these rules to their descendants.

Conclusion – s 190B(5)(c)

[103] 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 the application area in accordance with traditional laws and customs since sovereignty. This is because the material before me demonstrates that claimants possess knowledge about how the previous generations acknowledged and observed their laws and customs in relation to the application area since the time of sustained European contact, so as to permit an inference that the claim group is a 'modern manifestation' of the pre-sovereignty society.[87] As I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, s 190B(5)(c) is met.

Conclusion

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

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

[105] 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. As discussed above at s 190B(5)(b),

[85] *Gudjala 2009* [29].
[86] *Gudjala 2007* [82].
[87] *Gudjala 2009* [31].

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 claim group.

[106] The Court has held that 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'.[88] I therefore understand my task is limited to considering whether there is probative factual material which supports the existence of the claimed rights and interests. As long as some rights can be prima facie established, the requirements of s 190B(6) will be met.[89] Only those rights and interests I consider are established prima facie will be entered on the Register.[90]

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

1. In those areas where native title has not previously been extinguished, or where any previous extinguishment may be disregarded by operation of sections 61A(4), 47, 47A or 47B of the *Native Title Act 1993* (Cth), the nature and extent of the native title rights and interests claimed in the application are the right to possession, occupation, use and enjoyment of those areas to the exclusion of all others.

[107] I understand that the above claimed right is one of exclusive possession, and for such claims, there is significant judicial guidance. I note in particular the comments in *Ward HC*, that:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.[91]

[108] In *Sampi*, French J held:

> [T]he right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.[92]

[109] The Full Court held in *Griffiths FC:*

> If 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".[93]

[110] The applicant's submissions state that for members of the WDCB, including members of the claim group, the right to speak for country and protect areas is a fundamental aspect of land ownership.[94] I understand from the anthropology report that the rules pertaining to land tenure originate in the *tjukurrpa* and have been observed by the claim group in relation to the

[88] *Doepel* [132], [135].
[89] Ibid [16].
[90] Section 186(1)(g).
[91] *Ward HC* [88].
[92] *Sampi* [1072].
[93] *Griffiths FC* [127].
[94] Applicant's submissions [75].

application area since before the time of settlement.[95] Claimant 1 explains that there are consequences for transgressing the laws of access to country and that particular places should be avoided.[96] Claimant 2 explains how her son has responsibility to protect certain parts of the application area now that he is an initiated man.[97] Claimant 2 has her own responsibilities to look after particular burial sites.[98] Claimant 2 states that if 'outsiders' want to go to the application area 'they need to come to talk to the traditional owners… Get permission to make sure it's okay for them to come into my country'.[99]

[111] As discussed above at ss 190B(5)(b)–(c), I consider the laws and customs of the claim group have been handed down from their predecessors and continuously observed since before the time of settlement in the application area. In my view, there is sufficient information in the material to show how the right of exclusive possession manifests in the application area in accordance with those traditional laws and customs. Claimants assert that they have responsibility to protect certain parts of the application area, based on their observance of the laws of the *tjukurrpa*, and negative consequences are believed to befall transgressors. In my view, the information before me accords with the judicial guidance about the right of exclusive possession outlined in *Ward HC*, *Sampi*, and *Griffiths FC*, extracted above. I therefore consider that the right of exclusive possession is prima facie established.

2. In all other areas, the native title rights and interests claimed in the application are the right to:
(a) access, remain in and use the application area;
(b) access, take and use the resources of the application area for any purpose;
(c) engage in spiritual and cultural activities in the application area; and
(d) maintain and protect areas, sites and places of significance on the application area,
In so far as those rights and interests do not confer possession, occupation, use and enjoyment of the lands and waters covered by the application to the exclusion of all others.

[112] There are numerous examples in the material before me of claim group members, past and present, accessing and using the application area for various purposes, some of which I have summarised at s 190B(5) above. The anthropology report details the apical ancestors' use of the application area and that of their families.[100] For example, apical ancestor Ungala is recalled for her use of 'healing sands' in the vicinity of the Queen Victoria Reserve.[101] Claimants 1 and 2 describe how they and their families continue to access the application area and use its resources.[102] For example, Claimant 1 describes how claim group members use kangaroo, quandong, honey and other bush foods, collected and prepared in the manner taught by their predecessors.[103] She also explains the use of particular flowers to make bush medicines.[104] The claimants explain their engagement and that of other claim group members

[95] Anthropology report [4.14], [4.25].
[96] Claimant 1 affidavit [30].
[97] Claimant 2 affidavit [27].
[98] Ibid [30].
[99] Ibid [24].
[100] Anthropology report [5.4]–[5.57].
[101] Ibid [5.17].
[102] Claimant 1 affidavit [41]–[57]; Claimant 2 affidavit [29]–[34].
[103] Claimant 1 affidavit [49].
[104] Ibid [50].

in spiritual and cultural activities in the application area, including initiation ceremonies.[105] The apical ancestors are also recalled as participating in ceremonies on the application area, such as Juwi, who attended ceremonies at both Cundeelee and Karonie as a senior initiated man.[106] As discussed above in relation to the claimed right to exclusive possession, the claimants also continue to protect places of significance in the application area, including burial sites and places associated with particular *tjukurrpa* stories.[107]

Conclusion

[113] I am satisfied the application contains sufficient information about all of the rights claimed, such that they can be said to be established on a prima facie basis. I am also satisfied the claimed rights can be considered 'native title rights and interests'. This is because there is information in the application to show how those rights were observed by previous generations and are currently observed. 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.

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

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

(a) currently has or previously had a traditional physical connection with any part of the application area; or

(b) previously had and would reasonably have been expected currently to have such a connection but for things done, other than the creation of an interest in relation to the application area.

[115] At this condition I understand that the task of the Registrar is confined to consideration of the relationship of at least one member of the claim group with some part of the application area, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.[108]

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

[116] Based on the material before me, I consider at least one claim group member currently has or had a physical connection to the application area. There is sufficient information to demonstrate how the members of the claim group continue to access the application area to hunt, collect food and other resources, and teach their descendants the relevant *tjukurrpa* stories.

[105] Claimant 1 affidavit [72].
[106] Anthropology report [5.19].
[107] Claimant 2 affidavit [27], [30].
[108] *Doepel* [18]; *Gudjala 2009* [84].

[117] I also consider the claim group members' connection is 'traditional' in the sense required by s 190B(7). As 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 application area is in accordance with those traditional laws and customs.

Conclusion

[118] I am satisfied at least one member of the native title claim group currently has a traditional physical connection with a part of the application 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

[119] I am satisfied the application complies with ss 61A(1)–(3):

Section	Requirement	Information addressing requirement	Result
s 61A(1)	No native title determination application if approved determination of native title	The geospatial report states and my own searches confirm that there are no approved determinations of native title in the application area.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, paragraph (4)(c)–(d) states any area in relation to which a previous exclusive possession act has been done, is excluded from the application.	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) provides that exclusive possession is only claimed in areas where there has been no extinguishment or where extinguishment can be disregarded.	Met

Conclusion

[120] I am satisfied the requirements of s 190B(8) are met.

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

[121] Section 190B(9) states that the application must not disclose, and the Registrar must not otherwise be aware that the claimed native title extends to cover the situations described in ss 190B(9)(a)–(c), as summarised in the table below.

Section	Requirement	Information addressing requirement	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q provides that no claim to minerals, petroleum or gas wholly owned by the Crown is made.	Met

s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states 'Nil' and so I understand no claim of exclusive possession of any offshore places is made.	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 4(e) states any area where native title rights and interests have otherwise been wholly extinguished are excluded from the application area.	Met

Conclusion

[122] I am satisfied the requirements of s 190B(9) are met.

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Upurli Upurli Nguratja
NNTT No.	WC2020/004
Federal Court of Australia No.	WAD281/2020
Date of decision	22 January 2021

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:

As per Schedule

Date application entered on Register:

22 January 2021

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 Schedule

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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.

22 January 2021