



## Registration Decision

<b>Application name</b>	Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application
<b>Name of applicant</b>	Elaine Ohlsen, Grace Gordon, John Shipp, Raymond Thompson, Danielle Flakelar-Carney, Jaye Lee Snowden, Peter Harris, Pearl Harris, Josephine (Josie) Winsor, Phillip Sullivan, Daniella Chedzey, Dennis Rankmore, David Clarke
<b>Federal Court of Australia No.</b>	NSD38/2019
<b>NNTT No.</b>	NC2012/001
<b>Date of Decision</b>	19 April 2024

### Claim accepted for registration

I have decided that the claim in the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application satisfies all of 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 entered on the Register of Native Title Claims.

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

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

# Reasons for Decision

## CASES CITED

*Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215; (2012) 297 ALR 660 ('Anderson')

*Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625 ('Aplin')

*Burrabungba on behalf of the Wangan and Jagalingou People v Queensland* [2017] FCA 373 ('Burrabungba')

*Butchulla People v State of Queensland* [2006] FCA 1063; (2006) 154 FCR 233 ('Butchulla')

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

*Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469; (2008) 173 FCR 150 ('Fesl')

*Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177; (2019) 273 FCR 350 ('Warrie')

*Griffiths v Northern Territory of Australia* [2007] FCAFC 178; (2007) 165 FCR 391 ('Griffiths')

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

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

*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572; (2009) 182 FCR 63 ('Gudjala 2009')

*Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31; (2007) 238 ALR 1 ('Harrington-Smith')

*Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 ('Lawson')

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

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

*Noble v Mundraby, Murgha, Harris and Garling* [2005] FCAFC 212 ('Noble')

*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135; (2005) 145 FCR 442 ('Alyawarr')

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

*Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26; (2010) 266 ALR 537 ('Sampi FC')

*Strickland v Native Title Registrar* [1999] FCA 1530; (1999) 168 ALR 242 ('Strickland')

*Ward v Northern Territory* [2002] FCA 171 ('Ward')

*Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 ('Weribone')

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

*Western Australia v Strickland* [2000] FCA 652; (2000) 99 FCR 33 ('Strickland FC')

*Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 ('Ward HC')

*Wiri People v Native Title Registrar* [2008] FCA 574; (2008) 168 FCR 187 ('Wiri People')

## Background

- [1] This decision relates to an amended application filed on behalf of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application native title claim group ('claim group') for a determination of native title. It covers land and waters of approximately 95,045 square kilometres in New South Wales, encompassing the area roughly from Ivanhoe to just south of Bourke to Coonamble and Nyngan.
- [2] The original application was filed on 14 March 2012 and was entered on the Register of Native Title Claims on 12 April 2012. It has remained registered since that date. On 19 December 2023 orders were made in the Federal Court ('Court') to replace the applicant pursuant to s 66B of the Act and granting leave to amend the application. The amended application was then filed on 16 January 2024. The Registrar of the Court gave a copy of the amended application and accompanying affidavits to the Native Title Registrar ('Registrar') on 20 February 2024 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.<sup>2</sup>

## Preliminary considerations

### *Does the registration test apply to the amended application?*

- [3] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which the Act refers to as dealing mainly with the merits of the claim) and s 190C (which the Act refers to as dealing with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [4] Section 190A(1A) provides for exemption from the registration test for certain applications amended under s 87A. As the granting of leave by the Court to amend the application was not made pursuant to s 87A, I am satisfied that s 190A(1A) does not apply to the amended application.
- [5] Section 190A(6A) sets out the conditions under which the Registrar must accept an amended application for registration without testing under ss 190B and 190C. The amendments that have been made to this amended application include the following:
- amending the composition of the persons who jointly comprise the applicant;
  - amending the details relating to the authorisation of the applicant, including by replacing Schedule R, including a new Attachment R and inserting the conditions placed on the authorisation;
  - amending the description of the native title claim group;
  - minor amendments to Schedules F and L;

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<sup>2</sup> Section 190A(1).

- replacing the affidavits provided for the purpose of s 62 with those of the persons comprising the newly authorised applicant; and
  - other minor and consequential amendments.
- [6] I am satisfied that 190A(6A) does not apply because the amended application includes amendments that do not meet the conditions set out at s 190A(6A)(d)(i)–(v). As such, the amended application must be assessed under each of the provisions of ss 190B and 190C (‘registration test’).
- [7] I note that while this matter has been under consideration for the purpose of the registration test, seven notices were given in accordance with s 29 in relation to an act affecting land or waters within the area covered by the amended application. The notification date on each of these notices is 28 March 2024. As such, under s 190A(2) the Registrar must use their best endeavours to complete the registration test of this amended application within 4 months after the notification date specified in the notice.
- [8] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

#### *Procedural fairness*

- [9] The following steps were taken in order to ensure that all relevant parties were afforded procedural fairness in the making of this registration test decision:
- On 4 March 2024 a Senior Officer of the Tribunal wrote to the applicant to confirm that the amended application would be assessed against each of the conditions of the registration test and invited the applicant to provide any further material that it sought to rely upon by 18 March 2024;
  - Also on 4 March 2024, a Senior Officer wrote to the State of New South Wales (‘State’) to confirm that the amended application would be assessed against each of the conditions of the registration test and that should the State wish to provide any submissions in relation to the registration test, they should do so by 18 March 2024;
  - On 18 March 2024 the applicant provided a letter containing its submissions in relation to the registration test (‘applicant’s submissions’). On 19 March 2024 the applicant provided a document titled ‘Applicant’s Additional Information provided 19 March 2024 in relation to the Amended Application (NSD38/ 2019)’. The applicant identified this material as confidential in nature because it contains personal and culturally sensitive information;
  - On 19 March 2024 the State was informed that the Tribunal had received the applicant’s submissions and additional material and that given their confidential nature, the State was required to enter into a confidentiality undertaking by 26 March 2024 in order to receive copies of that material;<sup>3</sup>

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<sup>3</sup> *WA v NTR* [38].

- The State did not enter into the confidentiality undertaking or provide any submissions, and did not respond to the letters of 4 or 19 March 2024.

[10] This concluded the procedural fairness process.

### *Information considered*

[11] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.

[12] I have had regard to the amended application and the applicant’s submissions and additional information provided on 19 March 2024.

[13] I have also considered it appropriate<sup>4</sup> to have regard to the original registration test decision dated 12 April 2012 (‘original registration decision’) and a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services dated 27 February 2024 (‘geospatial assessment’).

[14] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.<sup>5</sup>

[15] The State has not provided any information or submissions in relation to the application of the registration test that I must have regard to in accordance with s 190A(3)(c).

## **Section 190C: conditions about procedural and other matters — conditions met**

### **Sections 190C(2) and ss 61 and 62: registration conditions about procedural and other matters – condition met**

[16] I have examined the amended application and for the reasons set out below, I am satisfied that it contains all details and other information and is accompanied by affidavits and other documents as required by ss 61 and 62.

[17] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–62. This condition does not require any merit assessment of the material to be undertaken, however it does seek ‘...to ensure that the application contains “all details” required by s 61...’.<sup>6</sup> As such, in my view s 190C(2) requires consideration of whether the application contains the required material and whether such material is sufficient to enable the Registrar to form an opinion about whether the claim satisfies all of the conditions in ss 190B and 190C.<sup>7</sup>

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

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

<sup>6</sup> *Doepel* [35].

<sup>7</sup> See also s 190D(3)(b).

## Section 61 – native title applications

### Section 61(1): persons who may make an application

- [18] Section 61(1) provides that only persons included in and authorised by the native title claim group may make a native title determination application for the particular native title claimed.
- [19] Thirteen persons comprising the applicant are named in the amended application. A description of the native title claim group is included at Schedule A. Attachment E states that the claimed native title rights and interests are held in accordance with the traditional laws and customs of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People. Each of the persons comprising the applicant has deposed an affidavit for the purposes of s 62 and these are annexed to the amended application ('s 62 affidavits'). The s 62 affidavits indicate that each deponent is a member of the native title claim group and is authorised to make the application by the persons in the native title claim group.<sup>8</sup>
- [20] From the material contained in Schedule A, Attachment E and the s 62 affidavits, I am satisfied that the amended application meets the requirements of ss 61(1) and 190C(2).
- [21] I note that s 61(2) provides that the persons authorised to make the native title determination application are jointly the applicant and none of the other members of the native title claim group is the applicant. I am satisfied that there is nothing in the amended application or other material that I have considered that would suggest otherwise.

### Section 61(3): applicant's name and address for service

- [22] Section 61(3) requires an application to state the name and address for service of the applicant. The names of each of the persons comprising the applicant are stated in the amended application and Part B includes the applicant's address for service. As such, I am satisfied that this requirement is met.

### Section 61(4): applications authorised by persons

- [23] Section 61(4) requires a native title determination application authorised by persons in a native title claim group to name or describe the persons in that claim group so that it can be ascertained whether any particular person is one of those persons.
- [24] Section 61(4) was considered in *Gudjala 2007*, where Dowsett J emphasised the procedural nature of the exercise undertaken by a delegate under s 190C(2) regarding the details and information required by ss 61 and 62 in contrast to the merits exercise undertaken pursuant to s 190B(3).<sup>9</sup>
- [25] Schedule A of the amended application contains a description of the native title claim group as those Aboriginal persons descended from 57 named apical ancestors, and who identify as and are recognised by other members of the claim group as a Ngemba, Ngiyampaa, Wangaaypuwan or Wayilwan person. I am satisfied that Schedule A of the amended application meets the requirements of ss 61(4) and 190C(2) because Schedule A contains a

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<sup>8</sup> Affidavits annexed to the amended application for the purpose of s 62, [1], [5].

<sup>9</sup> *Gudjala 2007* [31]–[32].

description of the native title claim group that is sufficiently clear so that it can be ascertained whether any particular person is one of those persons.<sup>10</sup>

**Section 61(5): prescribed form filed in the Federal Court**

[26] Section 61(5) provides that the application must be filed in the Court in a manner as prescribed and be accompanied by any prescribed fee. In my view, these are matters for the Court however I note that the amended application is made in the prescribed Form 1 and was accepted for filing by the Court on 16 January 2024.

*Section 62(1), (1A) and (2): information etc. in relation to certain applications; claimant applications*

**Section 62(1)(a) and (1A): affidavits containing specified details**

[27] Section 62(1)(a) requires a claimant application to be accompanied by an affidavit sworn by the applicant stating each of the matters mentioned in sub-s (1A). The amended application is accompanied by 13 s 62 affidavits deposed by each of the 13 persons comprising the applicant. These affidavits are in substantially identical terms, and include statements to the effect that:

- the deponent is a member of the native title claim group through their descent from a specified apical ancestor or ancestors named in Schedule A of the application;
- the deponent believes that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the application;
- the deponent believes that none of the area covered by the application is also covered by an approved determination of native title;
- the deponent believes that all of the statements made in the application are true;
- the deponent is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it;
- the basis on which the deponent is authorised is as a member of the native title claim group authorised at a meeting of the native title claim group held on 25 and 26 November 2023 in Cobar, New South Wales following a public notification by NTSCORP Limited;
- there is no decision-making process under traditional laws and customs that must be complied with and the authorisation occurred through a process of decision-making agreed to and adopted at the claim group meeting; and
- three conditions were imposed on the applicant that relate to the making of the amended application, including that the applicant must act in accordance with the resolutions of the claim group, and these conditions have been satisfied as a result of the resolutions made at the claim group meeting.

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<sup>10</sup> Section 61(4)(b).

[28] I am satisfied that the amended application satisfies the requirements of ss 62(1A) and 190C(2) because each of the s 62 affidavits accompanying the amended application contains the required statements addressing the matters listed at s 62(1A)(a)–(g).

**Section 62(1)(d): s 47C agreement**

[29] Section 62(1)(d) applies where an agreement has been entered into under s 47C and requires a copy of any relevant agreement to accompany the application. Paragraph 2 of Schedule L of the amended application indicates that there is no applicant agreement under s 47C in relation to the area covered by the amended application. As such, s 62(1)(d) has no application, and this requirement need not be assessed.

**Section 62(2)(a) and (b): information about the boundaries of the area and any areas within those boundaries that are not covered by the application**

[30] Section 62(2)(a) requires that the application contain information that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application to be identified.

[31] Paragraph A of Schedule B of the amended application refers to the description of the area covered by the amended application contained at Attachment B. Attachment B contains a written description of the external boundaries of the area. Paragraph B of Schedule B then provides a description of those areas within the external boundaries that are not covered by the amended application.

[32] Section 62(2)(b) requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Attachment C includes a map showing the external boundaries of the amended application.

[33] I note that Schedule S confirms that the area covered by the amended application has not been amended, and this is confirmed in the geospatial assessment.

[34] As such, I am satisfied that the amended application meets the requirements of ss 62(2)(a)–(b) and 190C(2).

**Section 62(2)(c): searches of any non-native title interests**

[35] Section 62(2)(c) requires that the application include details and results of searches of any non-native title rights and interests covered by the application. Schedule D of the amended application confirms that no searches have been conducted, and as such this requirement is met.

**Section 62(2)(d): description of native title rights and interests**

[36] Section 62(2)(d) requires an application to contain a description of the native title rights claimed in relation to particular land or waters. This description must not consist merely of a statement that the native title rights and interests are all that may exist or have not been extinguished. Schedule E of the amended application refers to Attachment E, which contains a detailed description of the native title rights and interests claimed in relation to the amended application.



[37] I am satisfied that Schedule E of the application meets the requirements of ss 62(2)(d) and 190C(2).

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

[38] Section 62(2)(e) requires an application to contain a general description of the factual basis on which it is asserted that the native title rights and interests are claimed to exist. Schedule F refers to Attachment F of the amended application. Attachment F contains a document setting out a general description of the relevant factual basis as well as 14 affidavits of members of the claim group setting out the basis for the native title rights and interests that are claimed in Attachment E and the traditional laws and customs from which these are derived.

[39] I am satisfied that Schedule F and the documents provided at Attachment F of the amended application meet the requirements of ss 62(2)(e) and 190C(2).

**Section 62(2)(f): activities in relation to the land and waters**

[40] Section 62(2)(f) requires that if the native title claim group currently carry on any activities in relation to the land or waters claimed, details of those activities must be included in the application.

[41] Schedule G of the amended application lists the activities currently being undertaken by members of the claim group in the application area. Schedule G also refers to the documents at Attachment F for further examples.

[42] I am satisfied that Schedule G and the documents at Attachment F of the amended application meet the requirements of ss 62(2)(f) and 190C(2).

**Section 62(2)(g): other applications**

[43] Section 62(2)(g) requires an application to include details of any other court applications seeking a determination of native title or native title compensation over any of the area covered by the application. Schedule H of the amended application states that the area covered by the amended application is not covered by any other current applications. Schedule H also includes a list of historical applications which have previously been filed over part of the area but have since been dismissed or discontinued. I note that one matter is listed in Schedule H as ‘pre-combination’ (Mutthi-Mutthi People) and I note that this matter has also been dismissed.<sup>11</sup> Schedule H notes that there have been no determinations of native title over the area covered by the amended application.

[44] I am satisfied that Schedule H of the application meets the requirements of ss 62(2)(g) and 190C(2).

**Section 62(2)(ga): future act notices**

[45] Section 62(2)(ga) requires the application include details of any s 24MD(6B)(c) notifications relevant to the claim area. Schedule HA of the amended application indicates that the

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<sup>11</sup> The application was combined with the Muthi Muthi People #1 (NSD6079/1998) by orders dated 8 September 2000 (see registration test decision in NC2000/003 dated 8 September 2000) and was dismissed on 1 September 2005 (orders of Stone J in NSD6079/1998 dated 1 September 2005).

applicant is not aware of any notices given in accordance with s 24MD(6B)(c) that relate to the area covered by the amended application.

[46] I am satisfied that Schedule HA of the application meets the requirements of ss 62(2)(ga) and 190C(2).

#### **Section 62(2)(h): s 29 notices**

[47] Section 62(2)(h) requires that the application include details of any s 29 notifications relevant to the claim area of which the applicant is aware. Schedule I of the amended application provides a list of s 29 notices taken from a geospatial assessment and overlap analysis provided by the Tribunal dated 5 December 2023.

[48] I note that the further seven s 29 notices issued in relation to the claim area referred to above were issued after the amended application was filed.

[49] I am satisfied that Schedule I of the application meets the requirements of ss 62(2)(h) and 190(2).

#### **Section 62(2)(i): conditions under s 251BA**

[50] Section 62(2)(i) requires the application include details of any conditions under s 251BA on the authority of the applicant to make the application and to deal with matters arising in relation to it.

[51] Schedule IA of the amended application contains details of the conditions imposed on the authority of the applicant for the purposes of s 251BA. The information at Schedule IA is a complete list of the conditions under s 251BA, from which the relevant conditions on the authority to make the amended application have been extracted at paragraph 8 of the s 62 affidavits.

[52] I am satisfied that Attachment IA of the amended application meets the requirements of ss 62(2)(i) and 190C(2).

#### *Conclusion on s 190C(2)*

[53] For the above reasons, I am satisfied that the amended application contains all of the details and other information, and is accompanied by any affidavit or other document, as required by ss 61–62. As such the condition at s 190C(2) is met.

#### **Section 190C(3): no previous overlapping claim groups – condition met**

[54] Section 190C(3) requires the Registrar to be satisfied that ‘no person included in the native title claim group for the application ... was a member of the native title claim group for any previous application’.<sup>12</sup>

[55] The condition at s 190C(3) only arises where there is a previous application that meets the criteria set out in sub-s (a)–(c). These criteria are that any previous application covers at least

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<sup>12</sup> Noting that this should be read in the present tense: Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25].

some of the same area and was accepted for registration under s 190A and on the Register of Native Title Claims.

[56] The geospatial assessment and my own searches of the Tribunal's mapping database indicate that there is no previous application overlapping any of the area covered by the amended application that meets the criteria set out in s 190C(3)(a)–(c).

[57] As there are no previous applications that meet the description of sub-ss (a)–(c), s 190(3) does not require further consideration.

### Section 190C(4): identity of claimed native title holders – condition met

[58] Under s 190C(4) the Registrar must be satisfied that either a certificate under s 203BE has been issued by the relevant representative Aboriginal/Torres Strait Islander body,<sup>13</sup> or the requirements in subsection (4AA) are met.<sup>14</sup> As Schedule R confirms that the amended application is not certified, in accordance with s 190C(4)(b), I must proceed to consider the requirements at s 190C(4AA).

#### *Sections 190C(4)(b) and (4AA): identity of claimed native title holders*

##### *Section 190C(4AA)(a): member authorised by native title claim group to be the applicant*

[59] Section 190C(4AA)(a) requires the applicant to be a member of the native title claim group and further requires that the applicant is authorised to make the application, and deal with all matters arising in relation to it, by all the other persons in the native title claim group.<sup>15</sup> As such, it is necessary to identify whether:

- the persons comprising the applicant are members of the native title claim group;
- the applicant is 'authorised' in accordance with the requirements in s 251B; and
- that such authorisation was given by 'all the other persons' in the native title claim group.

[60] Having regard to the authorities concerning authorisation of the applicant, my understanding is that consideration of the provisions at s 190C(4)(b) and (4AA)(a):

- requires the Registrar to be satisfied 'of the fact of authorisation by all members of the native title claim group';<sup>16</sup>
- requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant;<sup>17</sup>
- is not 'to be met by formulaic statements in or in support of applications';<sup>18</sup>

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<sup>13</sup> Section 190C(4)(a).

<sup>14</sup> Section 190C(4)(b).

<sup>15</sup> The word 'authorise' is defined in s 251B: Note to s 190C(4AA).

<sup>16</sup> *Doepel* [78].

<sup>17</sup> *Wiri People* [29].

<sup>18</sup> *Strickland* [57].

- does not permit a claim group to choose between the two decision-making processes set out in s 251B, as where there is a traditionally mandated process, that process must be followed to authorise the applicant, and where there is no mandated traditional process, the process must be that which has been agreed and adopted by the native title claim group.<sup>19</sup>

[61] The first limb of s 190C(4AA)(a) requires that ‘the applicant is a member of the native title claim group’. Schedule A of the amended application provides that membership of the claim group is derived by descent from one of the 57 named apical ancestors. As indicated in paragraph 27 above, each of the persons comprising the applicant has sworn an affidavit stating that they believe all statements made in the application are true and that they are a member of the native title claim group, including by reference to the apical ancestor or ancestors from which they are a descendant.<sup>20</sup> Having regard to Schedule A and the contents of the s 62 affidavits, I am satisfied that each person comprising the applicant is a member of the native title claim group.

[62] The second limb of s 190C(4AA)(a) requires 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’. In my view, the second limb requires consideration of s 251B, which sets out the relevant definition of the word ‘authorise’.

*Section 251B: authorising the making of applications*

[63] As s 251B contains multiple requirements, it is convenient to identify and address each requirement separately:

- ‘...all the persons in a native title claim group...’
- ‘...authorise ... persons to make a native title determination application ... and to deal with matters arising in relation to it, if’:
  - (a) where there is a traditional decision-making process to be complied with by the native title claim group, that process has been used to authorise the person or persons to make the native title determination application; or
  - (b) where there is no traditional decision-making process applicable, the persons in the native title claim group authorise the person or persons to make the application in accordance with a process of decision-making agreed to and adopted by the native title group.

[64] As regards ‘all the persons in a native title claim group’, I note the comments of Stone J in *Lawson* that ‘the effect of the section is to give the word “all” a more limited meaning’, that it does not require a unanimous vote and ‘[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process’.<sup>21</sup> As such, in my view I must assess whether all the persons in the

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<sup>19</sup> *Harrington-Smith* [1230].

<sup>20</sup> Form 1, s 62 affidavits [1], [4].

<sup>21</sup> *Lawson* [25]. See also *Butchulla* [33].

native title claim group were provided with an opportunity to attend and participate in the relevant authorisation meeting of 25 and 26 November 2023.

[65] In considering whether a reasonable opportunity to participate was given, Stone J was prepared to accept, in the absence of contrary evidence, that those who did not participate chose not to be involved in the decision-making process.<sup>22</sup>

[66] In *Weribone*, Rares J held that a notice for an authorisation meeting ‘must be sufficient to enable the persons to whom it is addressed ... to judge for themselves whether to attend the meeting and vote for or against a proposal’ and that ‘fair notice of the business to be dealt with at the meeting’ must be given.<sup>23</sup>

[67] As regards ‘...authorise...persons to make a native title determination application...and to deal with matters arising in relation to it’, I must assess whether the application was ‘authorised’ under s 251B. In *Ward*, O’Loughlin J listed a number of questions relating to the authorisation process which were required to be addressed. The questions identified by O’Loughlin J, which do not need to be answered in any formal way, but the substance of the questions should be addressed,<sup>24</sup> are:

Who convened it and why was it convened? To whom was notice given and why 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>25</sup>

[68] In *Noble*, the Full Court stated:

Section 251B does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question. The section accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision even if other procedures are normally used for other decisions. Nor does s 251B require a formal agreement to the process adopted for the making of a particular decision. Agreement within the contemplation of s 251B may be proved by the conduct of the parties. There was evidence in this case that the claim group conducted itself at the meeting on the basis that it agreed to a vote by the members of the group to determine the question of authorisation. All persons present voted in favour of the motion. Nobody is recorded as leaving the meeting or refusing to vote or in any other way conducting to indicate dissent from the course adopted. There was thus evidence from the conduct of the claim group on which the primary judge could base his conclusion that the requirements of s 251B were satisfied.<sup>26</sup>

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<sup>22</sup> *Ibid* [27].

<sup>23</sup> *Weribone* [40], [41]; see also *Burragubba* [31].

<sup>24</sup> *Ward* [24]–[25].

<sup>25</sup> *Ward* [24], cited with approval in *Lawson* [26].

<sup>26</sup> *Noble* [18].

[69] In *Fesl*, Logan J considered the meaning and effect of s 251B as dealt with in the above passage from the Full Court in *Noble*, and stated the following principles distilled from the authorities concerning s 251B:

- (a) the effect of the s 251B is to give the word ‘all’ in, materially, the table which appears below s 61(1) a more limited meaning than it might otherwise have;
- (b) in those cases where there is no relevant traditional decision-making process, s 251B does not mandate any one particular decision-making process, only that it be one that is agreed to and adopted by the persons in the native title claim group or compensation group;
- (c) “agreed to and adopted by” imports the giving to all of those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process;
- (d) unanimous decision-making is not mandated;
- (e) agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement.<sup>27</sup>

**Information provided in support of s 190C(4AA): s 190C(5)**

[70] Section 190C(5) provides that the Registrar cannot be satisfied that an uncertified application meets the requirements of s 190C(4) unless the application<sup>28</sup> contains statements to the effect that the requirements in sub-s (4AA) have been met and briefly sets out the grounds upon which the Registrar should consider that the conditions have been met (but need not include brief grounds relating to conditions under s 251BA where none are imposed).

[71] In *Strickland*, French J (as his Honour then was) stated that s 190C(5):

*requires no more than a statement that the requirement of authorisation referred to in s 190C(4)(b) has been met. It is also required briefly to set out the grounds on which the Registrar should consider that it has been met. The insertion of the word "briefly" at the beginning of par 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.*<sup>29</sup>

[72] I consider that paragraphs (a) and (b) of Schedule R contain statements that meet the description of s 190C(5)(a), and paragraph (c) contains the brief grounds required by s 190C(5)(b). In addition, the s 62 affidavits each depose that the individuals comprising the applicant are members of the native title claim group and have been authorised, and set out the process of decision-making and information about the conditions on authority under s 251BA. In my view these affidavits also contain statements to the effect that the requirements of s 190C(4AA) have been met. In addition, the affidavit of Matilda Vaughan, Senior Solicitor at NTSCORP Limited (the legal representatives for the applicant), affirmed on 8 December 2023 included at Attachment R also contains further information relevant to the grounds on which the applicant asserts that s 190C(4) has been met.

[73] As such, I am satisfied that the amended application contains the statements and brief grounds required by s 190C(5). Having concluded that the specific requirement of s 190C(5) is

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<sup>27</sup> *Fesl* [71].

<sup>28</sup> *Doepel* [16], [78].

<sup>29</sup> *Strickland* [57].

met, I will proceed to consider whether the amended application meets the requirement of s 190C(4)(b). I note that this requires ‘some inquiry through the material available to the Registrar to see if the necessary authorisation has been given’.<sup>30</sup>

[74] The material available that relates to the authorisation of the applicant given at meetings conducted on 24 to 26 November 2023 is contained at Schedule R of the amended application and the affidavit of Matilda Vaughan affirmed on 8 December 2023 contained at Attachment R. This material includes the following information:

- The authorisation process was conducted over two authorisation meetings held in Cobar:
  - the first, on 24 November 2023, was a meeting of the members of the original native title claim group (descendants of 45 apical ancestors) at which the applicant was authorised to amend the native title claim group (to include the additional 12 apical ancestors) (‘authorisation meeting 1’); and
  - the second, on 25 and 26 November 2023, was a meeting of the newly described native title claim group (descendants of 57 apical ancestors) at which the native title claim group was amended and a new applicant was authorised to make the amended application (‘authorisation meeting 2’).<sup>31</sup>
- These meetings were preceded by ‘a process of consultation with members of the native title claim group by officers of NTSCORP Limited and by native title claim group members themselves’.<sup>32</sup>
- NTSCORP maintain a mailing list of Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People that has been compiled over ‘many years’ directly from persons who assert native title rights and interests in the relevant area, including through previous meetings, workshops and land summits, as well as through anthropological and historical research and genealogical checks.<sup>33</sup>
- In the week of 23 October 2023 the notice for authorisation meeting 1 was sent to the current claim group members on the mailing list (381 individuals) and was published in the *Koori Mail* on 1 November 2023.<sup>34</sup> This notice indicated that the first meeting was open to all members of the previous claim group and listed the relevant 45 apical ancestors, and set out the details and purpose of the first meeting (to discuss and make a decision on the proposed amendments to the claim group description).<sup>35</sup>
- The notice for authorisation meeting 2 was also sent to those Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan on NTSCORP’s mailing list in the week of 23 October 2023, including to all the descendants of the additional 12 apical ancestors with

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<sup>30</sup> *Doepel* [78].

<sup>31</sup> Attachment R, affidavit of Matilda Vaughan dated 8 December 2023.

<sup>32</sup> Form 1, Schedule R [(c)(i)].

<sup>33</sup> Form 1, Attachment R, affidavit of Matilda Vaughan dated 8 December 2023 [5]–[6].

<sup>34</sup> *Ibid* [3], [7]–[8]. See also Form 1, Schedule R [(c)(ii)].

<sup>35</sup> *Ibid*, Annexures MRV-1 and MRV-2.

postal addresses recorded on the mailing list.<sup>36</sup> The inclusion of the persons known as descendants of the additional ancestors was based on the relevant anthropological and historical research and genealogy checks.<sup>37</sup> Notice of authorisation meeting 2 was sent to a total of 427 individuals.<sup>38</sup> The notice was also published in the *Koori Mail* on 1 November 2023.<sup>39</sup> This meeting notice invited all persons in the expanded Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan claim group (listing all 57 apical ancestors), as well as any other Aboriginal person who asserted native title rights and interests in the area.<sup>40</sup>

- I note that none of the meeting notices contained a map of the area covered by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People claim, however they each contained a description of the area, as follows:

The area that is the subject of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People native title determination application is bounded by the towns of Brewarrina, Bourke, Coonamble, Gulargambone, Warren, Nyngan, Hillston, Mossgiel and Ivanhoe, approximately from the Barwon River in the north, to the Lachlan River in the south, the Castlereagh River in the east and Ivanhoe in the west.<sup>41</sup>

- Each notice included the NTSCORP contact details, including a freecall number, and indicated that remote attendance by phone or videoconference was available.<sup>42</sup> In addition, NTSCORP offered assistance in the form of accommodation, travel and meal costs, and this was taken up by over 50 people.<sup>43</sup> One person was also provided with data and mobile credit to attend remotely.<sup>44</sup>
- Registration for both authorisation meetings was managed by NTSCORP staff members with access to the relevant genealogical database.<sup>45</sup> Each attendee was required to sign a register and have their identity verified as a member of the relevant claim group, with relevant persons receiving a green wrist band (observers received a yellow wrist band and were informed that they could not participate in decision-making).<sup>46</sup>
- Including the online attendances, 64 persons attended authorisation meeting 1, and 72 and 65 persons attended the first and second days respectively of authorisation meeting 2.<sup>47</sup> Online attendances were managed by NTSCORP in a similar way to in-person attendees to ensure that attendances were verified.<sup>48</sup>

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<sup>36</sup> Ibid [11]–[16]. See also Form 1, Schedule R [(c)(ii)].

<sup>37</sup> Form 1, Attachment R, affidavit of Matilda Vaughan dated 8 December 2023 [14].

<sup>38</sup> Ibid [16].

<sup>39</sup> Ibid [17].

<sup>40</sup> Ibid, Annexure MRV-4.

<sup>41</sup> Ibid, Annexure MRV-1–MRV-4.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid [20]–[21].

<sup>44</sup> Ibid [24].

<sup>45</sup> Ibid [26]–[29], [37]–[39], [48].

<sup>46</sup> Ibid [31]–[33], [41]–[43], [50]–[52].

<sup>47</sup> Ibid [35], [45], [54], [61].

<sup>48</sup> Ibid [55]–[60].



- Alexandra Crowe, senior anthropologist at NTSCORP, was present at both the authorisation meetings and provided a presentation at the first authorisation meeting on ‘her expert opinion, research and consultations’ in relation to the claim group description.<sup>49</sup> At authorisation meeting 2, attendees discussed whether Ms Crowe was required to give a further presentation and it was agreed that this was not required.<sup>50</sup>
- At each of the authorisation meetings, the proposed resolutions were read out and displayed on a video screen (and a shared screen for online attendees), explained by the NTSCORP staff present and then discussed by the attendees, with opportunities for questions to be posed and answered.<sup>51</sup> Votes were counted in person by NTSCORP staff (persons with green wrist bands only were eligible to vote) and online by those attendees stating their votes.<sup>52</sup>
- The following relevant resolutions were passed at authorisation meeting 1:
  - sufficient notice of the meeting was given and attendees were sufficiently representative of the claim group (original 45 apical ancestors) and attendees represent the views of their family members or Elders that could not attend (resolution 2);<sup>53</sup>
  - there is no traditional decision-making process that must be complied with, and a decision-making process was agreed and adopted (proposed decisions to be discussed, with a clearly worded motion being read out to the attendees, moved and seconded, and then voted on by show of hands or stated (online attendees) with a majority vote carrying the motion (resolution 3);<sup>54</sup> and
  - amending the claim group description to include the additional 12 apical ancestors (resolution 4).<sup>55</sup>
- The following relevant resolutions were passed at authorisation meeting 2:
  - sufficient notice of the meeting was given and attendees were sufficiently representative of the claim group (newly expanded 57 apical ancestors) and attendees represent the views of their family members or Elders that could not attend (resolution 1);<sup>56</sup>
  - there is no traditional decision-making process that must be complied with, and a decision-making process was agreed and adopted (proposed decisions to be discussed, with a clearly worded motion being read out to the attendees, moved and seconded, and then voted on by show of hands or

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<sup>49</sup> Ibid [63], [82] and [78].

<sup>50</sup> Ibid [96].

<sup>51</sup> Ibid [69]–[70], [88]–[89].

<sup>52</sup> Ibid [71]–[73], [90]–[92].

<sup>53</sup> Ibid [75].

<sup>54</sup> Ibid [76].

<sup>55</sup> Ibid [80].

<sup>56</sup> Ibid [93].

stated (online attendees) with a majority vote carrying the motion (resolution 2);<sup>57</sup>

- authorising the applicant to amend the claim group description to include the additional 12 apical ancestors (resolution 3);<sup>58</sup>
- the application is to be referred to as the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People native title determination application (I note it was previously the 'Ngemba/Ngiyampaa People') (resolution 5);<sup>59</sup>
- authorising each of the 13 persons comprising the applicant to make the application and deal with matters arising in relation to it, subject to conditions (resolutions 6 and 7);<sup>60</sup> and
- directing the applicant to amend the claim to reflect the amended native title claim group and conditions imposed on the applicant's authority (resolution 8).<sup>61</sup>

#### **Has the applicant been authorised: ss 190C(4AA)(a) and 251B?**

[75] I am satisfied that the material contained in the amended application summarised above contains information addressing the necessary elements of 'authorisation' as defined by s 251B for the purpose of meeting the condition for uncertified applications at s 190C(4)(b) and (4AA).

[76] In my view, the material demonstrates that the notices provided a reasonable opportunity for members of the claim group to participate and fair notice of the business to be conducted at the meeting.<sup>62</sup> The notice was sent to a large number of Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People on the NTSCORP mailing list and published in a special interest Aboriginal and Torres Strait Islander newspaper. The notice was also sent to known descendants of the additional 12 apical ancestors who were proposed to be added into the claim group description. The notice clearly set out the purpose of the authorisation meetings as well as the relevant agenda. In my view, it would have been preferable for the notice to have included a map of the claim area, however as there has been no amendment to the claim area, I consider that the written description was sufficient to enable persons to consider whether they have an interest in the relevant area.

[77] I also consider that the material addresses the substance of the questions referred to in *Ward*. Registrations to attend the claim group meeting were verified by staff members of NTSCORP, including a senior anthropologist and against the genealogical database. An attendance register was completed and online registrations were carefully managed. The authorisation meetings were relatively well attended. The proposed resolutions were read out at the

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<sup>57</sup> Ibid [94].

<sup>58</sup> Ibid [97].

<sup>59</sup> Ibid [98].

<sup>60</sup> Ibid [100]–[101].

<sup>61</sup> Ibid [102].

<sup>62</sup> *Lawson* [20], *Weribone* [41].

meeting and votes taken and recorded in accordance with the agreed and adopted decision-making process. Many of the resolutions were passed unanimously or by significant majority.

[78] I am satisfied that the applicant has been 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 within the meaning of s 190C(4AA)(a).

*Section 190C(4AA)(b): s 251BA conditions*

[79] The last limb of s 190C(4AA) requires that if there are any conditions under s 251BA on the authority that relate to the making of the application, they have been satisfied.

[80] Each of the s 62 affidavits depose the following in relation to the conditions under s 251BA:

8. The native title claim group have imposed the following conditions on the applicant that relate to the making of the application:
  - (a) the applicant must not amend, resolve, have listed for trial or discontinue the application without first obtaining a resolution of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People specifically authorising it to do so;
  - (b) the applicant must not attempt to terminate the services of NTSCORP Limited as a solicitor acting on behalf of the applicant / Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People in relation to the application and any future acts arising in relation to it, or engage another solicitor for those purposes, without first obtaining a resolution of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People specifically authorising it to do so;
  - (c) the applicant must do all things necessary to implement the resolutions and decisions of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People and must not act inconsistently with those resolutions and decisions.

(together, the **Amendment Condition**)

9. The Amendment Condition has been satisfied in relation to making of this amended application as a result of resolutions made by the native title claim group at [authorisation meeting 2].<sup>63</sup>

[81] I note that the above conditions at sub-paragraphs (a) to (c) referred to as the Amendment Condition have been extracted from sub-paragraphs (c), (e) and (a) respectively of resolution 6 made at the second authorisation meeting.<sup>64</sup>

[82] I have reviewed the other conditions set out in the resolutions of authorisation meeting 2.<sup>65</sup> These also include conditions such as that the persons who comprise the applicant are not to 'act in any way which is for personal benefit or in the pursuit of a personal interest', non-disclosure of confidential information and provision of a process for making decisions of the applicant.<sup>66</sup> In my view and having regard to the nature of the conditions and the material contained in the application which demonstrates that the amended application has been

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<sup>63</sup> See also Form 1, Attachment R, affidavit of Matilda Vaughan dated 8 December 2023 [105]–[107].

<sup>64</sup> Form 1, Attachment R, affidavit of Matilda Vaughan dated 8 December 2023 [100].

<sup>65</sup> Ibid [100]–[101].

<sup>66</sup> Ibid.

made following resolutions passed by the native title claim group, I am satisfied that the relevant conditions imposed under s 251BA have been satisfied.

[83] As such, I am satisfied that the requirements of s 190C(4AA)(b)(ii) have been met.

## **Section 190B: conditions about merits of the claim – conditions met**

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

[84] Section 190B(2) requires the Registrar to be satisfied that the written information and map contained in the application are sufficient to identify, with reasonable certainty, the land and waters in relation to which the native title rights and interests are claimed.

[85] Schedule B of the amended application refers to Attachment B, which comprises a metes and bounds description produced by the Tribunal's Geospatial Services dated 19 August 2011, defining the boundary of the application, referring to road reserves, rivers and creeks, the eastern boundary of NSD6084/98 Barkandji Traditional Owners 8 (NC1997/32), cadastral boundaries and GDA94 geographic coordinate points.

[86] Item B of Schedule B defines general exclusions, and specifically excludes the 'the lands and waters covered by the Barkandji Peoples native title determination application'.

[87] Schedule C of the amended application refers to Attachment C, which comprises a map depicting the external boundaries of the area and including labelled roads creeks and rivers, conservation areas towns and localities, the adjoining native title determination application, northpoint, legend, locality map and GDA94 one degree coordinate grid as well as notes relating to the source, currency and datum of data used to prepare the map.

[88] I note that the Barkandji Peoples native title determination application has since been determined (NCD2015/001, NCD2017/001).

[89] The geospatial assessment concludes that the written description and map are consistent and identify the claim area with reasonable certainty. The geospatial assessment also notes that the external boundary description is the original description prepared in 2011 and is based on spatial data that has since been significantly updated. The geospatial assessment suggests that the external boundary description be updated to refer to current spatial data. In my view, for the purpose of my assessment under s 190B(2), I am satisfied that the written description and map contained in the amended application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters. This requirement is met.

### **Section 190B(3): identification of the native title claim group – condition met**

[90] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,<sup>67</sup> or that persons in that group are described

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<sup>67</sup> Section 190B(3)(a).

sufficiently clearly so that it can be ascertained whether any particular person is in that group.<sup>68</sup>

[91] When assessing the requirements under s 190B(3), I understand that:

- I am required to address only the content of the application;<sup>69</sup>
- ‘only ... the members of the claim group are required to be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;<sup>70</sup>
- where a claim group description contains a number of paragraphs, the paragraphs should be read ‘as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open’;<sup>71</sup> and
- to determine whether the conditions or rules specified in the application have a sufficiently clear description of the native title claim group, ‘[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described’.<sup>72</sup>

[92] The description of the native title claim group is contained at Schedule A, as follows:

The Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People native title claim group comprises those Aboriginal persons who are:

- (a) the descendants of the following apical ancestors:  
[57 named apical ancestors]
- (b) identify as a Ngemba, Ngiyampaa, Wangaaypuwan or Wayilwan person; and
- (c) are recognised as a Ngemba, Ngiyampaa, Wangaaypuwan or Wayilwan person by Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People in accordance with their traditional law and custom.

[93] I note that Schedule A reflects resolution 3 passed at authorisation meeting 2.<sup>73</sup>

[94] I consider that the description of the native title claim group at Schedule A comprises three elements, descent from a named apical ancestor, self-identification as a member of the native title claim group and recognition by other members of the claim group in accordance with traditional laws and customs.

[95] The approach of identifying members of the native title claim group by descendants of named people has been accepted by the Court as satisfying the requirements of s 190B(3)(b).<sup>74</sup> In my view requiring a member to show descent from an identified ancestor provides a clear starting

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<sup>68</sup> Section 190B(3)(b).

<sup>69</sup> *Doepel* [51]; *Gudjala 2007* [30].

<sup>70</sup> *Gudjala 2007* [33].

<sup>71</sup> *Gudjala 2007* [34].

<sup>72</sup> *WA v NTR* [67].

<sup>73</sup> Form 1, Attachment R, affidavit of Matilda Vaughan dated 8 December 2023 [97].

<sup>74</sup> *WA v NTR* [67].

or external reference point and that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group.

[96] In my view, whether a person self-identifies as a Ngemba, Ngiyampaa, Wangaaypuwan or Wayilwan person may be ascertained through inquiries of the relevant person in question.

[97] In relation to recognition by other members of the claim group, I note that group acceptance has been previously held by the Court as ‘inherent in the nature of a society’.<sup>75</sup> In *Sampi FC*, the Full Court noted that:

in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people who are bound by the one set of laws and customs or normative system.<sup>76</sup>

[98] Attachment F sets out information relating to the traditional laws and customs of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People, and I consider that it is by reference to these laws and customs that those persons are required to be recognised under when applying the description of the claim group at Schedule A.

[99] I am satisfied that the description of the claim group is sufficiently clear such that it can be ascertained whether a particular person is a member of the claim group as required by s 190B(3).

#### Section 190B(4): identification of claimed native title – condition met

[100] Section 190B(4) requires the Registrar to be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.<sup>77</sup>

[101] The description required by s 62(2)(d) is:

a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

[102] In *Doepel*, Mansfield J noted that the description of the native title rights and interests must be understandable, have meaning and be without contradiction.<sup>78</sup> I understand that my task pursuant to s 190B(4) is to identify whether the rights and interests claimed are ‘readily identifiable’. I note that a description of a native title right or interest that is broadly asserted

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<sup>75</sup> *Aplin* [260]; *Yorta Yorta* [108].

<sup>76</sup> *Sampi FC* [45].

<sup>77</sup> *Doepel* [16].

<sup>78</sup> *Doepel* [99], [123].

'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)'.<sup>79</sup>

[103] Schedule E of the amended application refers to Attachment E, which claims exclusive rights to possession, use occupation and enjoyment of the lands and waters over which such a claim can be recognised.<sup>80</sup> Where an exclusive claim cannot be recognised, Attachment E then lists 19 claimed non-exclusive rights and interests.<sup>81</sup> The native title rights and interests are expressed as being subject to the laws of the State and the Commonwealth and rights conferred upon persons pursuant to those laws, as well as to the traditional laws and customs of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People.<sup>82</sup>

[104] I consider that the description of the claimed native title rights and interests is clear and readily identifiable and without contradiction. As such I am satisfied that the requirements of s 190B(4) have been met.

[105] I note that I consider below whether the factual basis material is sufficient to establish the existence of these claimed rights and interests on a prima facie basis under my consideration of the condition at s 190B(6).

### Section 190B(5): factual basis for claimed native title – condition met

[106] Section 190B(5) requires the Registrar to be satisfied that the factual basis for the claimed native title rights and interests is sufficient to 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 the claim 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.

[107] In *Doepel*, Mansfield J stated that the task under s 190B(5):

requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests... The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.<sup>83</sup>

[108] As such, when assessing the requirements of this condition I understand that I must treat the asserted facts as true and assess whether they are sufficient to support each of the relevant assertions.

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<sup>79</sup> *Strickland* [60]; *Strickland FC* [85]–[87].

<sup>80</sup> Form 1, Attachment E [1].

<sup>81</sup> *Ibid* [2].

<sup>82</sup> *Ibid* [4].

<sup>83</sup> *Doepel* [17]; *Gudjala FC* [57], [83].

[109] Relevant to the task under s 190B(5) is the guidance provided by the Full Court in *Gudjala FC* in respect of the details required under s 62(2)(e)(i) to (iii) ‘general description of the factual basis on which it is asserted that the native title rights and interests claimed exist...’:

The fact that the detail specified by s 62(2)(e) is described as “a general description of the factual basis” is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.<sup>84</sup>

[110] In *Gudjala 2009*, Dowsett J further clarified the task under s 190B(5) as follows:

In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group’s relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.<sup>85</sup>

[111] From the above, it is my understanding that although the material provided by the applicant need not provide evidence to make out each claim, it must nevertheless provide sufficient factual details to enable a ‘genuine assessment’ of the factual basis for the assertions set out in ss 190B(5)(a) to (c) and at a minimum provide ‘an outline of the facts of the case’.<sup>86</sup>

[112] It is convenient to assess each assertion under s 190B(5)(a) to (c) in turn below.

*Section 190B(5)(a): the association of the native title claim group and their predecessors with the area*

[113] I understand that s 190B(5)(a) requires sufficient factual material to support the following assertions:

- there is an ‘association between the whole group and the area’, although not ‘all members must have such association at all times’;<sup>87</sup>
- the predecessors of the group were associated with the area over the period since sovereignty;<sup>88</sup>

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<sup>84</sup> *Gudjala FC* [92].

<sup>85</sup> *Gudjala 2009* [29]; *Anderson* [43], [47]–[48].

<sup>86</sup> *Gudjala 2009* [29].

<sup>87</sup> *Gudjala 2007* [52].



- there is an association with the entire claim area, rather than an association with part of it or ‘very broad statements’, which for instance have no ‘geographical particularity’;<sup>89</sup> and
- the identified claim group (and not some other group) hold the identified rights and interests (and not some other rights and interests).<sup>90</sup>

### **Predecessors’ association with the claim area**

[114] Attachment F states that in the claim area prior to 26 January 1788, ‘the ancestors of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People ... were in occupation of an area which includes the land and waters subject to this application’ and ‘had rights and interests in relation to’ this area.<sup>91</sup> The factual basis material refers to the ‘material evidence of physical association and connections’ with the claim area by these ancestors, which is ‘illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation’, including ‘artefacts, fragments, and traditional occupancy sites’ as well as through ‘traditional stories told about the formation of significant sites’ within the claim area.<sup>92</sup>

[115] As noted in the applicant’s submissions, the list of apical ancestors at Schedule A includes information pertaining to the birthplace of most of the apical ancestors and that this indicates that the ‘overwhelming majority’ of the apical ancestors were born on the claim area.<sup>93</sup> These locations include on the Barwon River, Brewarrina, Cobar, Colane, Gundabooka, Big Willandra, Marfield, Roto, Keewong, Nyngan, Mossgiel, Trida, Coronga Peak, on the Macquarie River, Warren, Buttabone, Ivanhoe, Walgett, Charlton Station on the Bogan River and Ginghet.

[116] The list of apical ancestors at Schedule A also records the birth years for many of the apical ancestors. These range from 1827 (Richard King) to 1883 (Francis ‘Tracker’ Williams). In addition, the applicant’s submissions state that:

The amended application identifies named ancestors who were Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan people living at and around the time of effective sovereignty and who, in turn, were descendants of Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan people who had been living at and before the acquisition of sovereignty in 1788.<sup>94</sup>

[117] Although the factual basis material that is before me does not provide historical evidence in relation to the early European settlement in the area, I note that in the original registration decision, the delegate also had regard to an expert report of senior anthropologist James William Rose and biographies of the apical ancestors prepared by Dr Michael Bennet.<sup>95</sup> The delegate noted that this material placed earliest European contact with Aboriginal persons in the claim area as occurring in the 1850s.<sup>96</sup>

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<sup>88</sup> Ibid.

<sup>89</sup> *Martin* [26]; see also *Corunna* [45].

<sup>90</sup> *Gudjala 2007* [39].

<sup>91</sup> Form 1, Attachment F [1], [4].

<sup>92</sup> Form 1, Attachment F [10].

<sup>93</sup> Applicant’s submissions dated 18 March 2024, page 3 [19].

<sup>94</sup> Applicant’s submissions dated 18 March 2024, page 2 [12].

<sup>95</sup> Ngemba/Ngiyampaa People NC2012/001 (registration test decision dated 12 April 2012), page 5.

<sup>96</sup> Ibid, pages 22 and 24.

[118] The material before me also includes the document titled 'Applicant's Additional Information provided 19 March 2024 in relation to the Amended Application (NSD38/ 2019)', which sets out genealogical information identifying the descendants of each of the 14 members of the claim group who have deposed affidavits at Attachment F. This information confirms that each of these persons are descendants from the apical ancestors listed in the description of the claim group at Schedule A, including one of the additional 12 apical ancestors that was not included in the original claim group description.

[119] The affidavits of members of the claim group contained at Attachment F provide examples of the association that the predecessors of the claim group have with the area, for example Ms Elaine Ohlsen describes her grandfather holding corroborees,<sup>97</sup> and Mr Peter Harris describes his grandfather making clap sticks and boomerangs at places on the claim area.<sup>98</sup> The affidavits also include stories relating to some of the named apical ancestors, for example [claim group member 11] deposes that her grandfather was Francis 'Tracker' Williams, who got his nickname because he was a 'black tracker with the police'.<sup>99</sup> [Claim group member 11] deposes that Francis 'Tracker' Williams

was born in Gundabooka but he never liked it, because he saw his parents get shot at Gundabooka. His grandmother hid him in Gundabooka mountain and that's how he survived. It's funny because later on in his life, the police reared him up and gave him the name Williams. Williams was not his Aboriginal name.<sup>100</sup>

[120] As a further example of the association of the predecessors of the claim group with the area, [claim group member 12] describes the importance of the Byrock rock pools which were designated a significant Aboriginal site in 2008:

We always knew it was special. Grandfather always said the rock pools were our territory. He and the old people used to spend a lot of time there when they were in Byrock. It was a special dreaming place and they would go there and sit. They would go between Gundabooka and the rock holes at Byrock. People from Brewarrina say it was an important place for them too.<sup>101</sup>

[121] Further, the original registration decision noted that the senior anthropologist report set out that '[t]here exists a single community of indigenous people referring to themselves as the Ngemba/Ngiyampaa, Wangaaypuwan and Wayilwan People that occupies the current claim', and that Dr Bennett's 'comprehensive geographic and genealogical model ... incorporates over 3240 descendants of 45 apical ancestors [which] clearly shows systematic intermarriage among families distributed throughout the claim area and the maintenance of strong localised connection from one generation to the next'.<sup>102</sup>

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<sup>97</sup> Form 1, Attachment F(1) Affidavit of Elaine Ohlsen affirmed 1 June 2023 [25].

<sup>98</sup> Form 1, Attachment F(2) Affidavit of Peter Harris affirmed 1 June 2023 [16].

<sup>99</sup> Form 1, Attachment F(11) Affidavit of [claim group member 11] affirmed 22 November 2011 [3], [8].

<sup>100</sup> Ibid [7]. See also Form 1, Attachment F(12) Affidavit of [claim group member 12] affirmed 22 November 2011 [7].

<sup>101</sup> Form 1, Attachment F(12) Affidavit of [claim group member 12] affirmed 22 November 2011 [14].

<sup>102</sup> Ngemba/Ngiyampaa People NC2012/001 (registration test decision dated 12 April 2012), pages 21–22.

[122] The original registration decision also referred to previous ethnographic and anthropological research:

Between 1866 and 2005, dozens of scholarly texts have been compiled, supporting the association of the claim group with the claim area, including unpublished field journals of ethnographers and anthropologists Robert Mathews, Adolphus Elkin, Alfred Radcliffe-Brown, Norman Tindale and Ronald and Catherine [Berndt], which record consultations with numerous deceased members of the claim group as well as apical ancestors forming part of the claimant group description during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>103</sup>

[123] In my view, the material in the original registration decision together with the information in Schedule A (which includes information relating to the dates and places of birth of most of the additional 12 apical ancestors included in the amended application) and Attachment F, indicates that the predecessors of the native title claim group had an association with the claim area.

#### **Native title claim group association with the claim area**

[124] Attachment F states that the current members of the claim group are descendants of those persons who occupied the claim group and had rights and interests in the area prior to 26 January 1788.<sup>104</sup>

[125] The applicant's submissions refer to both the physical association that the native title claim group have with the area, as demonstrated by the rights exercised in using the resources of the area and living and granting permission for others to access the claim area, as well as the spiritual association demonstrated through religious and spiritual practices and maintenance and protection of significant sites on the claim area.<sup>105</sup> The applicant's submissions also refer to the affidavits contained at Attachment F of the amended application, with selected material relevant to the factual basis that is asserted to support the condition at s 190B(5)(a).<sup>106</sup>

[126] The affidavits of members of the claim group contained at Attachment F are replete with examples of their continuing association with the claim area. For example, Ms Ohlsen describes her association with the Cobar and Mt Hope region, where she and her family would 'collect quondongs, snotty gobblers, wild oranges, wild bananas and yams'.<sup>107</sup> Ms Ohlsen also describes that:

12. From July to August is the season for collecting emu eggs. That's about the time when they usually lay their eggs unless something like the drought mucks them up. The traditional way to tell if the emus are laying is to look up into the Milky Way at night. Usually there is an outline of an emu in the middle of the stars, but come July or August his legs disappear which is about the time she starts to lay.

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<sup>103</sup> Ibid, page 22.

<sup>104</sup> Form 1, Attachment F [1], [4]–[5].

<sup>105</sup> Applicant's submissions dated 18 March 2024, pages 2–3 [14]–[15].

<sup>106</sup> Applicant's submissions dated 18 March 2024, Annexure A.

<sup>107</sup> Form 1, Attachment F(1) Affidavit of Elaine Ohlsen affirmed 1 June 2023 [11].

13. When collecting emu eggs it was always best to leave a single egg behind. If you did you could be assured the next year the emu would be found laying in the same place. That's the habit that [we] have as local Ngiyampaa people.<sup>108</sup>

[127] There are other examples, such as that [claim group member 4] describes how he would go hunting, fishing and collecting bush foods around Murrin Bridge and the Lachlan River and how his uncles and aunts taught him how to track and hunt kangaroos and emus (*ngoodie*).<sup>109</sup>

[128] Members of the claim group have also been involved in protecting sites on the claim area through giving advice on Aboriginal sites and artefacts at Lake Cargelligo and cultural heritage for Lachlan Shire Council,<sup>110</sup> and also site clearances along the Macquarie River to identify 'scar trees or bush tucker plants or campfire sites'.<sup>111</sup> Members of the claim group also describe how they are often asked to conduct Welcomes to Country on the claim area.<sup>112</sup>

[129] From the above information, I consider that the factual basis material is sufficient to enable a 'genuine assessment' of the factual basis for the assertions that members of the claim group have an ongoing association with the claim area. In my view the factual basis material provides sufficient geographical particularity, to support the assertion of an association between the whole group and the whole area since sovereignty.<sup>113</sup> I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(a).

*Section 190B(5)(b): traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests*

[130] Section 190B(5)(b) requires the factual basis material to be sufficient to support the assertion of the existence of the traditional laws and customs giving rise to the native title rights and interests claimed. The definition of 'native title rights and interests' in s 223(1)(a) provides that those rights and interests must be 'possessed under the traditional laws acknowledged by, and traditional customs observed' by the native title holders.

[131] In *Yorta Yorta*, the High Court observed that laws and customs are 'traditional' where:

- 'the origins and content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to the assertion of British sovereignty,<sup>114</sup> where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;<sup>115</sup>

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<sup>108</sup> Form 1, Attachment F(1) Affidavit of Elaine Ohlsen affirmed 1 June 2023 [12]–[13].

<sup>109</sup> Form 1, Attachment F(4) Affidavit of [claim group member 4] affirmed 3 November 2011 [9]–[11].

<sup>110</sup> Form 1, Attachment F(4) Affidavit of [claim group member 4] affirmed 3 November 2011 [23].

<sup>111</sup> Form 1, Attachment F(8) Affidavit of [claim group member 8] affirmed 11 November 2011 [17].

<sup>112</sup> Form 1, Attachment F(11) Affidavit of [claim group member 11] affirmed 22 November 2011 [11].

<sup>113</sup> *Gudjala 2007* [52].

<sup>114</sup> *Yorta Yorta* [46].

<sup>115</sup> *Ibid* [49].

- the normative system under which those traditional rights and interests are possessed is one which ‘has had a continuous existence and vitality since sovereignty’;<sup>116</sup>
- the laws and customs have been passed from generation to generation, and must be rooted in the traditional laws and customs that existed pre-sovereignty;<sup>117</sup>
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.<sup>118</sup>

[132] Justice Dowsett discussed some of the factors that may guide the Registrar in assessing the factual basis in *Gudjala 2009*, including that:

- it is necessary for the factual basis material to identify the relevant pre-sovereignty society of persons who acknowledged and observed the laws and customs;<sup>119</sup>
- where the basis for membership of the claim group is descent from named ancestors, the factual basis material must demonstrate some relationship between the ancestors and the pre-sovereignty society from which the laws and customs are derived;<sup>120</sup> and
- the factual basis material must provide an explanation, beyond a mere assertion, of how the current laws and customs of the claim group are traditional and derived from the pre-sovereignty society.<sup>121</sup>

[133] I also note the observations of the Full Court in *Warrie*, that although

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’, the Act 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.<sup>122</sup>

[134] The factual basis material refers to the language spoken by the predecessors of the claim group, being ‘Ngiyampaa’, which is alternately spelt as ‘Ngemba’, comprising two linguistic variants known as ‘Wayilwan’ and ‘Wangaaypuwan’.<sup>123</sup> The affidavits of members of the claim group at Attachment F demonstrate that the Ngiyampaa language has been maintained by the claim group.<sup>124</sup>

[135] The material at Attachment F states that the native title claim group ‘exercised a system of traditional law and custom inextricably connected to the topographic, ecological, cultural and

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<sup>116</sup> Ibid [47].

<sup>117</sup> Ibid [46], [79].

<sup>118</sup> Ibid [87].

<sup>119</sup> *Gudjala 2009* [37], [52].

<sup>120</sup> Ibid [40].

<sup>121</sup> Ibid [29], [54].

<sup>122</sup> *Warrie* [107]; see also *Alyawarr* [78].

<sup>123</sup> Form 1, Attachment F [2].

<sup>124</sup> Form 1, Attachment F(2) Affidavit of Peter Harris affirmed 1 June 2023 [10]; Attachment F(3) Affidavit of [claim group member 4] affirmed 3 November 2011 [5]; Attachment F(10) Affidavit of [claim group member 10] affirmed 11 November 2011 [9]–[10], [12]–[13]; Attachment F(13) Affidavit of [claim group member 13] affirmed 22 November 2011 [15].

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religious values vested in the Application Area', and that the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People are the 'owners of the land and waters' of the claim area in accordance with these traditional laws and customs.<sup>125</sup> The information at Attachment F notes that although the laws and customs have 'undergone some change since non-Indigenous settlement', the claim group have maintained the traditional laws and customs that existed in the pre-sovereignty society.<sup>126</sup> Attachment F then states that the laws and customs observed and acknowledged by the native title claim group are

based on the traditional laws and customs of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People who were present on and connected to the land and waters of the Application Area by those laws and customs at the time when British sovereignty was proclaimed.<sup>127</sup>

[136] Although these statements in Attachment F are at a high level of generality, further information is provided in the amended application. The normative system of traditional laws and customs are described as including a kinship system comprising of recognition of ancestors and patterns of descent, rights to land and waters derived from familial ties and affiliation with totemic beings, and recognition of individual or group connection to Country.<sup>128</sup> The normative system also includes 'laws relating to land tenure and traditional usage of land and waters'.<sup>129</sup> Attachment F refers to laws and customs relating to marriage, burial, transmission of traditional knowledge, religious and spiritual beliefs and the maintenance of religious and spiritual connections in the claim area, including resources, ceremonies and the custodianship of sanctions, prohibitions and responsibilities relating to land and waters.<sup>130</sup> Attachment F states that the traditional laws and customs relating to the land tenure system includes:

- (a) Fulfilment of spiritual obligations with regard to the land and waters;
- (b) The observation of restrictions imposed by gender, age and ritual experience;
- (c) The observation of restrictions imposed by the presence of sites of significance on the land and waters;
- (d) The observation of restrictions imposed by the presence of Dreamings on the land and waters;
- (e) The observation of restrictions imposed by the need to conserve natural resources.<sup>131</sup>

[137] The affidavits of members of the claim group provide further examples of the traditional laws and customs of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People. The importance of maintaining the traditional system of affiliation with totemic beings is described by Ms Ohlsen:

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<sup>125</sup> Form 1, Attachment F [3], [8].

<sup>126</sup> Form 1, Attachment F [12].

<sup>127</sup> Form 1, Attachment F [13]–[14].

<sup>128</sup> Form 1, Attachment F [16]–[17].

<sup>129</sup> Ibid.

<sup>130</sup> Form 1, Attachment F [18].

<sup>131</sup> Form 1, Attachment F [19].

17. I can eat pretty much everything except my totem, the black kangaroo. That's definitely off the menu. I get very spooky feeling about the black kangaroo when I see it. It's a spiritual feeling whereas I feel ok with the red kangaroo and that includes eating him.
18. I remember in the old days, Grandfather Biggs would talk about who could marry who and it had a lot to do with your totems. You couldn't marry your own totem or some of the other related animals. By way of example, he would say black duck could not marry possum.<sup>132</sup>

[138] Mr Phillip Sullivan deposes that his identity as a Ngemba/Ngiyampaa man was given to him by the 'creator' and that he has a responsibility to look after country,<sup>133</sup> for example by looking after the fish traps and rock art at Brewarrina and Gundabooka.<sup>134</sup> [Claim group member 6] also describes the importance of cleaning up a camp the way she was taught by the old people in order to respect the land.<sup>135</sup>

[139] [Claim group member 9] describes the spiritual beliefs passed down from her father:

Dad told us about his uncle down in Quambone. Dad told us that a bird came and was sitting, singing in a tree. Dad said he'd shanghai it, you know, kill it with a shanghai. The uncle said, "*no that bird's come for me*". He died a couple of days later. The birds can sing you back home or sing you to death.<sup>136</sup>

[140] The affidavits also describe the traditional laws and customs relating to hunting, for example the 'traditional beliefs surrounding the preparation of an emu' by cooking it in a hole in such a way as to respect the food.<sup>137</sup> [Claim group member 13] describes that:

The way you track and hunt down a porcupine is that you follow the scratch marks. The porcupine trail shows scratches moving in both directions, we follow it by seeing where the scratch marks were the freshest. Mum was really good at following their trail and she taught us how.<sup>138</sup>

[141] The affidavits also describe the use of traditional bush medicine, such as the bark of a white box or yellow box tree to treat the flu or goanna oil for arthritis.<sup>139</sup>

[142] The importance of maintaining respect for particular places is also demonstrated in the affidavits, such as the need to avoid travelling through Mt Manara at night because there is a *gunkie* there,<sup>140</sup> and the importance of ceremonial sites for conducting men's business.<sup>141</sup> A further example of this is explained by [claim group member 13], who describes that '[t]here

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<sup>132</sup> Form 1, Attachment F(1) Affidavit of Elaine Ohlsen affirmed 1 June 2023 [17]–[18].

<sup>133</sup> Form 1, Attachment F(3) Affidavit of Phillip Sullivan affirmed 21 February 2012 [7]–[8].

<sup>134</sup> Ibid [23]–[25].

<sup>135</sup> Form 1, Attachment F(6) Affidavit of [claim group member 6] affirmed 3 November 2011 [16].

<sup>136</sup> Form 1, Attachment F(9) Affidavit of [claim group member 9] affirmed 11 November 2011 [10].

<sup>137</sup> Form 1, Attachment F(1) Affidavit of Elaine Ohlsen affirmed 1 June 2023 [15]–[16]. See also in relation to traditional methods of cooking a kangaroo (*kirrpalya*), Attachment F(6) Affidavit of [claim group member 6] affirmed 3 November 2011 [12].

<sup>138</sup> Form 1, Attachment F(13) Affidavit of [claim group member 13] affirmed 22 November 2011 [10], and paragraphs [11]–[12] then describe the traditional cooking methods for the porcupine.

<sup>139</sup> Form 1, Attachment F(7) Affidavit of [claim group member 7] affirmed 22 November 2011 [16], [19].

<sup>140</sup> Form 1, Attachment F(2) Affidavit of Peter Harris affirmed 1 June 2023 [15].

<sup>141</sup> Form 1, Attachment F(3) Affidavit of Phillip Sullivan affirmed 21 February 2012 [21]–[22].

were some places we were always told not to go, like birthing places like the one at Mt Grenfell'.<sup>142</sup>

[143] Other ceremonies are also described in the affidavits of members of the claim group, for example [claim group member 6] describes funeral practices:

Years ago when anyone dies, we used to be in mourning for about a week. We would smoke ourselves every night for a week, inside the house as well as all around the outside of the house. Everyone used to do it. You'd make a tin bucket of gum leaves and burn them. We would cover the windows and dressing table glass with blankets so no one could see in or out. It would be like that for a week. Then we would have the funeral, and then we would smoke ourselves for another week after that to hunt the spirits away. Our elders were taught that by their parents.<sup>143</sup>

[144] [Claim group member 9] describes her work in returning bones and remains from the University of Sydney back to the claim area, where a smoking ceremony was held to keep the spirits away, because it is important for remains to be 'laid to rest on their own country'.<sup>144</sup>

[145] The affidavits of members of the claim group also describe traditional punishment methods used in the 'old days, when we would sort it out ourselves', in which '[t]hey would spear someone in the leg or banish them from the tribe'.<sup>145</sup>

[146] I also note that the original registration decision refers to the material in the senior anthropologist report, which reviewed the historical ethnographic and anthropological material which described the 'system of regulating marriage and descent and the transmission of rights' which 'comprises a means of allocating individuals a range of choices of marriage partner and partly through these choices, also allocates rights in particular areas of land'.<sup>146</sup> In my view, this is supported in the affidavits of the claim group members at Attachment F, as set out above.

[147] I am satisfied that the factual material outlined above is sufficient to enable a genuine assessment of whether there exist traditional laws acknowledged by and traditional customs observed by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People that give rise to the claim to native title rights and interests. Having regard to the information above, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b).

*Section 190B(5)(c): the native title claim group have continued to hold the native title in accordance with those traditional laws and customs*

[148] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the native title claim group continues to hold native title in accordance with traditional laws and customs. The traditional laws and customs referred to in s 190B(c) are those referred to under s 190B(5)(b).<sup>147</sup>

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<sup>142</sup> Form 1, Attachment F(13) Affidavit of [claim group member 13] affirmed 22 November 2011 [6].

<sup>143</sup> Form 1, Attachment F(6) Affidavit of [claim group member 6] affirmed 3 November 2011 [24].

<sup>144</sup> Form 1, Attachment F(9) Affidavit of [claim group member 9] affirmed 11 November 2011 [13].

<sup>145</sup> Form 1, Attachment F(14) Affidavit of [claim group member 14] affirmed 21 February 2012 [14].

<sup>146</sup> Ngemba/Ngiyampaa People NC2012/001 (registration test decision dated 12 April 2012), page 24.

<sup>147</sup> *Martin* [29].



[149] I understand that continuity may be inferred where there is '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs'.<sup>148</sup>

[150] Attachment F states as follows:

6. From prior to 26 January 1788 to the present day, the Native Title Claim Group and their ancestors have continuously been present on, used and enjoyed the Application Area, in accordance with the laws acknowledged, and the customs observed, by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People.
7. The Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People maintain a system of laws and customs which has existed since prior to 26 January 1788 to the present day.
- ...
15. Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan laws and customs have been transmitted and continue to be transmitted to members of the Native Title Claim Group by the intergenerational transfer of knowledge.
- ...
21. From prior to 26 January 1788 to the present day, the Native Title Claim Group and their ancestors have continuously occupied, been present on, used and enjoyed the Application Area, in accordance with the laws acknowledged, and the customs observed, by the Native Title Claim Group.<sup>149</sup>

[151] Although these are statements at a high level of generality, the factual basis material provides further examples in support. In particular, the affidavits of claim group members at Attachment F detail the way traditional laws and customs have been maintained and passed on from the Elders to the younger generations. An example of this is that Ms Ohlsen deposes to raising her family around the Cobar and Mt Hope region:

9. We camped while we hunted through the region, and our children always accompanied us on those trips. We always travelled as a family and it was the best way to teach them to hunt as my elders had done when I was a child.
10. On those cold, winter nights there was never any need to carry around heavy bedding as we would camp the traditional way by breaking of the loose branches and leaves from a Wilga tree and place them on the ground for insulation. You could make your bed on top of that and with a fire burning nearby it was enough to keep you warm and snug.<sup>150</sup>

[152] [Claim group member 6] similarly describes how her 'elders would take us out camping around Booberoi Creek and other places on the Lachlan River and teach us to hunt for kangaroo, emu and other traditional foods', and that she now teaches her grandchildren.<sup>151</sup>

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<sup>148</sup> *Gudjala 2009* [33].

<sup>149</sup> Form 1, Attachment F [6]–[7], [15], [21].

<sup>150</sup> Form 1, Attachment F(1) Affidavit of Elaine Ohlsen affirmed 1 June 2023 [9].

<sup>151</sup> Form 1, Attachment F(6) Affidavit of [claim group member 6] affirmed 3 November 2011 [6]–[9].

Another member of the claim group describes how his uncle taught him how to make boomerangs using the red gum root and fire to bend it into the right shape.<sup>152</sup>

[153] Other examples from the affidavits at Attachment F include how Mr Harris was taught to hunt and identify bush tucker by his uncles and father,<sup>153</sup> and now he shows his grandchildren so that ‘when they grow up they will realise the value of what I have taught them’.<sup>154</sup> Another example is that [claim group member 6] describes taking her grandchildren camping to ‘show them how we were taught to do things when we were growing up’.<sup>155</sup>

[154] In my view, the factual basis material contains sufficient detail relating to the transmission of traditional laws and customs from generation to generation to enable a genuine assessment of the extent to which the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People have continued to hold the native title in accordance with those traditional laws and customs. Having regard to the information above, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(c).

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

### *Native title rights and interests prima facie established*

[155] Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.<sup>156</sup>

[156] In undertaking the assessment of the condition at s 190B(6), I understand that I may consider material additional to the application.<sup>157</sup> As a ‘more onerous test [is] to be applied to the individual rights and interests claimed’ than under s 190B(5),<sup>158</sup> I consider that the task involves some weighing of the factual basis for the claimed rights and interests. It follows that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.<sup>159</sup>

[157] According to Dowsett J in *Gudjala 2007*, s 190B(6) is to be considered having regard to the definition of ‘native title rights and interests’ in s 223(1).<sup>160</sup> As such, I must consider whether, on a prima facie basis, the claimed native title rights and interests:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

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<sup>152</sup> Form 1, Attachment F(5) Affidavit of [claim group member 5] affirmed 3 November 2011 [11].

<sup>153</sup> Form 1, Attachment F(2) Affidavit of Peter Harris affirmed 1 June 2023 [24].

<sup>154</sup> *Ibid* [37].

<sup>155</sup> Form 1, Attachment F(6) Affidavit of [claim group member 6] affirmed 3 November 2011 [9].

<sup>156</sup> Section 186(1)(g) of the Act requires the Register of Native Title Claims to include a description of the native title rights and interests that, in applying s 190B(6), could be established on a prima facie basis.

<sup>157</sup> *Ibid* [16].

<sup>158</sup> *Doepel* [127], [132].

<sup>159</sup> *Yorta Yorta* [86]; *Gudjala 2007* [86].

<sup>160</sup> *Gudjala 2007* [85]–[87].

[158] Justice Kirby observed in *Ward HC* that ‘for a native title right to be recognised under the [Act], the critical threshold question is whether it is a right or interest “in relation to” land or waters’.<sup>161</sup> The term “in relation to” is here to be given a ‘wide import’.<sup>162</sup>

[159] Schedule E of the amended application refers to Attachment E. I note that aside from minor amendments to refer to the ‘Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People’ instead of the ‘Ngemba/Ngiyampaa People’, the claimed native title rights and interests have not been amended. In my view all of these claimed rights and interests are ‘in relation to’ lands or waters.

[160] The original registration decision found that all of the claimed native title rights and interests could be prima facie established,<sup>163</sup> although I note that the delegate also had additional information before her including the senior anthropologist report. I have set out my consideration of the claimed rights and interests below.

*Exclusive rights to possession, occupation, use and enjoyment of the lands and waters*

[161] Paragraph 1 of Schedule E claims that ‘[w]here exclusive native title can be recognised’, the ‘Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales’.

[162] I note the comments of the High Court in *Ward HC*, that exclusive rights are ‘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’.<sup>164</sup>

[163] In *Griffiths*, the Full Court held:

It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is “their country”. 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’. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.<sup>165</sup>

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<sup>161</sup> *Ward HC* [577].

<sup>162</sup> *Alyawarr* [93].

<sup>163</sup> Ngemba/Ngiyampaa People NC2012/001 (registration test decision dated 12 April 2012), page 32.

<sup>164</sup> *Ward HC* [88].

<sup>165</sup> *Griffiths* [127].

[164] In *Sampi*, French J noted that:

The 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.<sup>166</sup>

[165] The original registration decision summarises the opinions set out in the report of the senior anthropologist, including that:

- the traditional laws and customs of the claim group is functionally identical to that practiced by the same group at the time of sovereignty and the ongoing existence and vitality of this system continues to give rise the rights claimed by the claim group in relation to the claim area;
- the traditional laws and customs of the Ngemba/Ngiyampaa People comprise of a system for regulating among themselves and other Aboriginal groups access to, use of natural resources contained within, and information concerning, their traditional lands which is traditional in nature;
- the use of natural resources exercised by the Ngemba/Ngiyampaa People over their traditional lands and waters is traditional in nature and includes hunting, gathering of food and water and manufacturing traditional implements and artefacts; and
- the transmission of information practiced by the Ngemba/Ngiyampaa People in relation to their traditional lands and waters includes information concerning the distribution and proper use of natural resources such as plants, animals, water, materials used for the production of traditional implements and artefacts, and sites of traditional significance such as art sites, camp sites, artefact scatters and sacred sites which is traditional in nature. This information is transmitted from one generation of the claim group to the next according to principles of kinship, seniority, honour and trust. These principles are an accurate reflection of those prevailing and exercised at the time of contact and have been handed down through successive generations of the claim group.<sup>167</sup>

[166] The applicant's submissions state that in accordance with their traditional laws and customs, the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People are 'permitted as of right to live on and use the resources of the Claim Area and to permit (or deny) others to do the same'.<sup>168</sup>

[167] There is some support for this in the affidavits at Attachment F, for example Mr Harris refers to the spiritual feeling that ties him to Canelago and that 'Ngiyampaa people speak for that country and care for that land'.<sup>169</sup> Similarly, Mr Sullivan deposes that 'when it comes to looking after country it is the people who have connection to that country, who speak for country. Ngemba/Ngiyampaa People'.<sup>170</sup> The importance of having the correct people speaking for country is also described by [claim group member 9]:

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<sup>166</sup> *Sampi* [1072].

<sup>167</sup> Ngemba/Ngiyampaa People NC2012/001 (registration test decision dated 12 April 2012), page 28.

<sup>168</sup> Applicant's submissions, pages 2–3 [14].

<sup>169</sup> Form 1, Attachment F(2) Affidavit of Peter Harris affirmed 1 June 2023 [40].

<sup>170</sup> *Ibid*, Attachment F(3) Affidavit of Phillip Sullivan affirmed 21 February 2012 [41].

When the Shire Council took over the Jack Towney Hostel which had been owned by the Gilgandra Local Aboriginal Land Council, the Council had to put in cultural awareness programs. They got someone from Cowra to take that course, but it should have been someone from here, talking about their own country. I found it degrading to listen to him coming from outside. I have people who are from this country, who know the country speaking about these things.<sup>171</sup>

[168] I also note the statements in Attachment F that refer to the laws and customs of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People as including '[r]ecognition of sanctions and prohibitions relating to access to land and waters, and their custodianship'.<sup>172</sup>

[169] In my view, although the affidavits at Attachment F do not provide a substantial amount of detail relating to traditional laws and customs that grant the right to deny others access to or use the resources of the claim area, there is some material demonstrating the exercise of rights to 'speak for country' as described in *Ward HC* and *Sampi*. I also note that there was no amendment made to Attachment E and there is no material before me to suggest that the claimed exclusive rights currently on the Register of Native Title Claims cannot be prima facie established. Having regard to the material in the amended application, as well as the applicant's submissions and the summary of the senior anthropologist report from the original registration decision, I am satisfied that the factual basis material demonstrates that the claimed exclusive rights and interests can be prima facie established.

#### *Non-exclusive rights and interests*

[170] Attachment E lists the following 19 claimed non-exclusive rights and interests:

- (a) the right to access the application area;
- (b) the right to use and enjoy the application area;
- (c) the right to move about the application area;
- (d) the right to camp on the application area;
- (e) the right to erect shelters and other structures on the application area;
- (f) the right to live being to enter and remain on the application area;
- (g) the right to hold meetings on the application area;
- (h) the right to hunt on the application area;
- (i) the right to fish in the application area;
- (j) the right to have access to and use the natural water resources of the application area;
- (k) the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments);
- (l) the right to share and exchange resources derived from the land and waters within the application area;
- (m) the right to participate in cultural and spiritual activities on the application area;

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<sup>171</sup> Ibid, Attachment F(9) Affidavit of [claim group member 9] affirmed 11 November 2011 [15].

<sup>172</sup> Form 1, Attachment F [18].

- (n) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;
- (o) the right to conduct ceremonies on the application area;
- (p) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;
- (q) the right to speak for and make non-exclusive decisions about the application area [in] accordance with traditional laws and customs;
- (r) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and
- (s) the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

[171] In my view the factual basis material, in particular the affidavits of members of the claim group at Attachment F contains many examples of the exercise of these rights and interests in accordance with the traditional laws and customs of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People. I refer to the material set out in my above consideration of the condition at s 190B(5), which sets out a number of examples of these rights and interests. The activities carried out by members of the claim group set out at Schedule G also demonstrate the continuing exercise of these rights and interests.

[172] Having regard to this material, and in the absence of any material to the contrary, I am satisfied that the requirements of s 190B(6) are met in respect of the each of the claimed non-exclusive rights and interests in Attachment E.

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

[173] Section 190B(7) requires the Registrar to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[174] The courts have observed that the traditional physical connection under s 190B(7) ‘must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.<sup>173</sup> ‘Traditional’ as that term is used under s 223 of the Act, was considered by the members of the joint judgment in *Yorta Yorta* who noted that:

the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... “traditional” in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.<sup>174</sup>

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<sup>173</sup> *Gudjala 2009* [84].

<sup>174</sup> *Yorta Yorta* [86].

[175] In *Doepel*, Mansfield J stated that the task of the Registrar under s 190B(7), requires ‘some measure of substantive (as distinct from procedural) quality control upon the application, if it is to be accepted for registration’.<sup>175</sup>

[176] Having regard to these authorities, I understand that I must be satisfied that the material provides a factual basis from which I can establish that at least one member of the claim group has or had the necessary ‘traditional’ physical association with the application area.

[177] I refer to my reasons and conclusions regarding the requirements of s 190B(5) and s 190B(6). I consider that in particular the affidavits of members of the claim group at Attachment F contain many examples of their traditional physical connection with the lands and waters in the claim area. These are also listed at Attachment M of the amended application. The traditional physical connection to Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Country set out in this material is highlighted in the affidavit of Ms Ohlsen, who describes taking her grandchildren to sites within the claim area where ‘we tell the kids the stories about us being *karul*, meaning Stone, Country people, because they are special to us, they connect us to Country’.<sup>176</sup>

[178] I am satisfied that the amended application establishes that at least one member of the claim group currently has and has had a traditional physical connection with the lands and waters of the claim area.

[179] Having regard to the above information, I am satisfied that the amended application meets the requirements of s 190B(7).

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

[180] Section 190B(8) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that the application should not have been made because it does not comply with s 61A.

[181] Section 61A restricts the making of a native title determination application over areas where there has been a previous native title determination/s, where a previous exclusive possession act was done in relation to the area or from claiming certain native title rights and interests where a previous non-exclusive possession act was done in relation to an area.

[182] Paragraph 3 of each of the s 62 affidavits state that none of the claim area is covered by an approved determination of native title. This is confirmed in the geospatial assessment and my own searches of the Tribunal’s database.

[183] Paragraph (B)(1) of Schedule B of the amended application confirms that the application does not cover any areas where a previous exclusive possession act was done.

[184] Paragraph (B)(4) of Schedule B confirms that exclusive rights and interests are not claimed over areas where there has been a previous non-exclusive possession act, subject to the operation of various provisions including ss 47, 47A and 47B.

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<sup>175</sup> *Doepel* [18].

<sup>176</sup> Form 1, Attachment F(1) Affidavit of Elaine Ohlsen affirmed 1 June 2023 [27].

[185] In the absence of evidence to the contrary, I am satisfied that the information contained in the s 62 affidavits, the geospatial assessment and Schedule B of the amended application meet the requirements of s 190B(8).

### Section 190B(9): no extinguishment etc. of claimed native title – condition met

[186] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that claimed native title rights and interests include claims to ownership of minerals, petroleum or gas wholly owned by the Crown, exclusive rights to waters in an offshore place or extinguished native title rights and interests (except where such extinguishment can be disregarded under certain provisions of the Act).<sup>177</sup>

[187] Schedules Q and P to the application do not include claims under s 190B(9)(a) and (b) to minerals, petroleum or gas or to any waters in an offshore place.

[188] Paragraph B(7) of Schedule B of the amended application confirms that the application does not cover any areas where native title rights and interests have otherwise been extinguished.

[189] In the absence of evidence to the contrary, I am satisfied that Schedules B, Q and P of the amended application meet the requirements under s 190B(9).

*End of reasons*

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<sup>177</sup> See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.



## Attachment A

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

Application name	Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application
NNTT No.	NC2012/001
Federal Court of Australia No.	NSD38/2019

#### 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:

14 March 2012

#### Date application entered on Register:

12 April 2012

#### Applicant:

Elaine Ohlsen, Grace Gordon, John Shipp, Raymond Thompson, Danielle Flakelar-Carney, Jaye Lee Snowden, Peter Harris, Pearl Harris, Josephine (Josie) Winsor, Phillip Sullivan, Daniella Chedzey, Dennis Rankmore, David Clarke

#### Applicant's address for service:

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REDFERN NSW 2016

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#### Conditions on Applicant's authority

[As per the Schedule]

#### Area covered by application:

[As per the Schedule]

**Persons claiming to hold native title:**

[As per the Schedule]

**Registered native title rights and interests:**

[As per the Schedule]

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

19 April 2024