

Test for Registration

Application name	Warrabinga-Wiradjuri #7
Name of applicant	Wendy Lewis, Mavis Agnew, Martin de Launey
Application made	29 May 2017
Federal Court of Australia No.	NSD857/2017
Date of Decision	1 September 2017
Decision	Claim accepted for registration

I have decided that the claim in the Warrabinga-Wiradjuri #7 application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth)¹. It follows that the claim must be accepted for registration² and entered on the Register of Native Title Claims.³

Radhika Prasad, Acting Practice Manager

Delegate of the Native Title Registrar.

¹ All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless I state otherwise.

² Section 190A(6) of the Act.

³ Section 190(1).

Cases cited

Anderson on behalf of the Numbahjng Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (Anderson)

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

Evans v Native Title Registrar [2004] FCA 1070 (Evans)

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

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

Gudjala People #2 v Native Title Registrar [2008] FCAFC 157 (Gudjala FC)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (Gudjala 2009)

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5) [2003] FCA 218 (Harrington-Smith (No 5))

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (Harrington-Smith (No 9))

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

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

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

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

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

Risk v National Native Title Tribunal [2000] FCA 1589 (Risk)

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

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

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

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

Wiri People v Native Title Registrar [2008] FCA 574 (Wiri People)

Background

[1] The claimant application has been made on behalf of the members of the Warrabinga-Wiradjuri People who are connected to the area covered by the application. I have reached the view that the claim in the application must be accepted for registration and this document sets out my reasons.

[2] The application was made on 29 May 2017 when it was filed in the Federal Court of Australia (the Court) and a copy was given to the Native Title Registrar (the Registrar) pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] As the application has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[4] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions in ss 190B and 190C and therefore it must be accepted for registration.⁴ Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

[5] In reaching this decision, I have considered s 190A(3) which directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- the additional material provided by the applicant on 8 June 2017;
- the geospatial assessment prepared by the Tribunal's Geospatial Services on 28 August 2017; and
- the results of my own searches using the Tribunal's registers and mapping database.

Section 190C

Registration: conditions about procedural and other matters

190C(2) Information etc. Required by sections 61 and 62

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

What is required to meet this condition?

[7] In coming to the above conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2).⁵ Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[8] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of ss 61(2) and (5), as those subsections either impose no obligations of this nature in relation to the application or are already tested where required by those parts of ss 61 and 62.

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

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

Applications that may be made: s 61(1)

⁴ Section 190A(6).

⁵ *Doepel* at [16], [35] – [37] and [39].

[10] Schedule A of the application provides a description of the native title claim group and the s 62 affidavits indicate that the persons comprising the applicant are included in the native title claim group.⁶ There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

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

Applications authorised by persons: s 61(4)

[12] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

Affidavits in prescribed form: s 62(1)(a)

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

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

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

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

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

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

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

[17] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Attachment E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

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

Activities: s 62(2)(f)

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

⁶ At [6].

Other applications: s 62(2)(g)

[20] Schedule H includes details of two applications that have been made in relation to the whole of the area covered by the application and that seek a determination of native title.

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

[21] Schedule HA indicates that the applicant is not aware of any notifications under paragraph 24MD(6B)(c) that have been given and that relate to the whole or part of the application area.

[22] Attachment I contains the details of notices issued under s 29 that have been given and that relate to the whole or part of the application area.

190C(3) No previous overlapping claim group

[23] As indicated in my reasons below, the application **satisfies** the condition of s 190C(3).

[24] In my view, this condition requires that the Registrar be satisfied that there are no common claimants where there is a previous application that comes within the terms of subsections (a) to (c).⁷

[25] Although the text of this provision reads in the past tense, I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 provides that the 'Registrar must be satisfied that no member of the claim group for the application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test [emphasis added]'.⁸ The explanatory memorandum further discusses the general discouragement of overlapping claims by members of the same claim group and encouragement of consolidation of such multiple claims into one application.⁹

[26] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[27] I also note that in assessing this requirement, I am able to address information which does not form part of the application.¹⁰

[28] The geospatial assessment does not identify a previous application that covered the whole or part of the area covered by the current application that falls within the terms of subsection (a) to (c) of 190C(3).

⁷ *Strickland FC* at [9].

⁸ At 29.25.

⁹ At 35.38.

¹⁰ *Doepel* at [16].

[29] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application.

[30] I am therefore satisfied that there is no previous application to which ss 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s 190C(3) further.

190C(4) Identity of claimed native title holders

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

What is required to meet this condition?

[32] I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition of s 190C(4) to be satisfied.

[33] Schedule R indicates that the application has not been certified. I must therefore consider whether the requirements of s 190C(4)(b) are met.

Does the application contain the information specified in s 190C(5)?

[34] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b). Section 190C(5) provides that the application must include a statement to the effect that the requirement set out in s 190C(4)(b) has been met and briefly set out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

[35] In my view, Attachment R includes a statement to the effect that the requirement in s 190C(4)(b) has been met and a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met.¹¹ I assess whether the material provided addresses those requirements below.

What is required to meet the condition at s 190C(4)(b)?

[36] I understand that:

- s 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which 'clearly ... involves some inquiry through the material available ... to see if the necessary authorisation has been given';¹²
- this condition requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group;¹³
- this condition is not 'to be met by formulaic statements in or in support of applications';¹⁴
- a claim group is not permitted to choose between the two processes described in s 251B, if there is a traditionally mandated process, then that process must be followed to

¹¹ At [1] – [3].

¹² *Doepel* at [78].

¹³ *Wiri People* at [21], [29] and [35]; see also *Risk* at [60].

¹⁴ *Strickland* at [57].

authorise the applicant otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group.¹⁵

What information has been provided in support of this condition?

[37] Attachment R provides the following information about the authorisation meeting:

- A meeting of the native title claim group was held at Charbon, New South Wales on 26 November 2016.¹⁶
- The persons comprising the applicant were authorised to make and deal with matters arising in relation to the application by the native title claim group at the meeting pursuant to a decision making process which was unanimously agreed to and adopted by the members of the claim group present.¹⁷
- The decision making process involved decisions being made by majority vote on a show of hands.¹⁸
- Notice of the meeting was published in the 'LAND' Newspaper, Sydney Morning Herald and the Koori Mail in November 2016.¹⁹ The notice was also posted to 59 members of the claim group and emailed to 7 members of the claim group.²⁰
- The notice included information about the purpose, date, time and place of the meeting, map of the proposed application area, who is entitled to attend and participate in the meeting and who to contact for further information or assistance to attend the meeting.

[38] Additional facts about the authorisation meeting was provided by the applicant on 8 June 2017. For instance, the affidavit of a lawyer from Blackshield Lawyers affirmed 10 April 2017, provides further details of the above information as well as the following additional facts:

- The notice of the meeting was also posted on a Wiradjuri Facebook page.²¹
- 23 members of the claim group attended the meeting.²² The meeting proceeded without any descendants of apical ancestor Aaron present and it was resolved that those present were competent to make decisions on behalf of the claim group and authorise the claim on behalf of the group.²³
- It was resolved that the claim group did not have a mandatory process of decision making pursuant to traditional laws and customs.²⁴ Subsequent resolutions were carried unanimously.²⁵

¹⁵ *Harrington-Smith (No 9)*; see also *Evans* at [7].

¹⁶ At [3].

¹⁷ At [3].

¹⁸ At [4].

¹⁹ At [5].

²⁰ At [6].

²¹ At [3].

²² At [4] and Annexure 'SB2'.

²³ At [7] and Annexure 'SB3'.

²⁴ At [6] and Annexure 'SB3'.

²⁵ Annexure 'SB3'.

- It was resolved, following a lengthy discussion between the members who attended, that the application would be made over the proposed application area but excluding overlaps with any current applications made on behalf of the claim group.²⁶

[39] The affidavits of the persons comprising the applicant and the letter from Blackshield Lawyers dated 17 April 2017 provide further details confirming the above information, including that the decision making process used at the meeting was unanimously agreed to and adopted by the members of the claim group present.²⁷

Have the requirements of s 190C(4)(b) been met?

[40] I note that the first limb of s 190C(4)(b) requires that all the persons comprising the applicant must be members of the native title claim group.

[41] In each of their affidavits, the persons who jointly comprise the applicant depose that they are members of the native title claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

[42] In respect of the second limb of s 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified.²⁸

[43] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. Attachment R, the affidavit of the lawyer from Blackshield Lawyers and the affidavits of the persons comprising the applicant indicate that the claim group does not have a decision making process that is traditionally mandated and therefore an agreed and adopted process was used during the authorisation meeting. Given this information, I have considered the applicant's material in light of the requirements of s 251B(b).

[44] In particular, I understand that the 'effect of the section is to give the word "all" [in s 190C(4)(b)] a more limited meaning than it might otherwise have' and that it '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'.²⁹

[45] I also understand that the following questions are required to be addressed about the authorisation process although it is not required they be answered in any formal way as long as the substance of these questions are addressed:

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

²⁶ At [8] and Annexure 'SB3'.

²⁷ Affidavits of the persons comprising the applicant at [5].

²⁸ *Doepel* at [78]; *Wiri People* at [21], [29] and [35].

²⁹ *Lawson* at [25].

decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?³⁰

[46] In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meeting. It indicates that all reasonable steps were taken to advise members of the native title claim group of the authorisation meeting, which included by public notice, letters, emails and social media, and the notice indicates that the claim group members were advised of the date, time, place and purpose of the meeting. The information also shows that the persons who were present at the meeting were given a reasonable opportunity to participate in the decision making process. In my view, the conduct of the meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was inclusive allowing those present an opportunity to participate and have their votes count. For instance, the claim group members who were present were able to participate through discussion and vote by show of hands. The facts indicate that the persons who attended the meeting were sufficient to make decisions on behalf of the claim group. The resolutions were carried unanimously, including the authorisation of the persons comprising the current applicant to make the application and to deal with matters arising in relation to it.

Decision

[47] In my view, the process adopted ensured that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it. It follows that, I am satisfied that the condition of s 190C(4)(b) is met.

Section 190B

Registration: conditions about merits of the claim

[48] The application satisfies the condition of s 190B, because it meets the requirements of ss 190B(2)-(9), as set out in the reasons below.

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

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

What is needed to meet this condition?

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

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

[51] Attachment B has been prepared by the Tribunal's geospatial services on 10 May 2017 and describes the application area by metes and bounds referencing topographic features, parish boundaries, cadastral parcels and geographic coordinates. That Attachment specifically excludes NSD818/2011 Mudgee Local Aboriginal Land Council native title determination and NSD2308/2011 Gomeroi People and NSD1680/2013 Plains Clan of the Wonnarua People native title determination applications. Schedule B also lists some general exclusions and specifically excludes NSD543/2013

³⁰ *Ward* at [24], cited in *Lawson* at [26].

Warrabinga-Wiradjuri #2, NSD443/2016 Warrabinga Wiradjuri #4 and NSD1786/2016 Warrabinga Wiradjuri #6 native title determination applications.

[52] Attachment C is a copy of a map titled 'Native Title Determination Application – Warrabinga Wiradjuri Core Country Claim' prepared by the Tribunal's geospatial services on 19 December 2016. The map includes the application area depicted by a bold outline, topographic background, commencement point, scalebar, coordinate grid, locality map, legend, and notes relating to the source, currency and datum of data used to prepare the map.

Decision

[53] The geospatial assessment includes a note that the written description and map of the application area are consistent and identify the application area with reasonable certainty, however the exclusions referred at [4] and [5] of Schedule B are not excluded from the map.

[54] Section 62(2)(b) provides that the map required to be contained in the application is a map showing the boundaries of the area covered by the application. That provision does not require the map to show any areas within those boundaries that are not covered by the application. I note that the Courts have indicated that there is no requirement to show the boundaries of the excluded areas, therefore I am of the view the map at Attachment C is not required to show the areas referred at [4] and [5] of Schedule B that have been excluded from the application area.³¹

[55] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

190B(3) Identification of the native title claim group

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

What is needed to meet this condition?

[57] I must be satisfied that either the persons in the native title claim group are named in the application (s 190B(3)(a)) or described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s 190B(3)(b)).

[58] When assessing the requirements of this provision, I understand that:

- I am required to address only the content of the application;³²
- section 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification',³³
- 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',³⁴
- to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, '[i]t may be necessary, on occasions, to engage

³¹ See for instance *Harrington-Smith (No 5)* at [7].

³² *Doepel* at [51] and *Gudjala 2007* at [30].

³³ *Gudjala 2007* at [33].

³⁴ *Gudjala 2007* at [34].

in some factual inquiry when ascertaining whether any particular person is in the group as described'.³⁵

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

[59] Schedule A describes the native title claim group as comprising persons who are descendants of five apical ancestors.

[60] It follows from the description above that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. I am of the view that the description is to be read as a discrete whole.³⁶

[61] 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).³⁷

[62] I consider that describing membership this way provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the claim group.

Decision

[63] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

190B(4) Identification of claimed native title

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

What is needed to meet this condition?

[65] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning.³⁸

[66] The description referred to in s 190B(4), and as required by s 62(2)(d) to be contained in the application, is 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law'.

[67] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. While undertaking this task, I consider that a description of a native

³⁵ *WA v NTR* at [67].

³⁶ *Gudjala 2007* at [34].

³⁷ *WA v NTR* at [67].

³⁸ *Doepel* at [91], [92], [95], [98] to [101] and [123].

title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)'.³⁹

[68] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.⁴⁰

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

[69] Attachment E contains a description of the claimed native title rights and interests. I am satisfied that they are understandable and have meaning.

[70] I have considered the description of the native title rights and interests claimed and find that the rights and interests are sufficient to fall within the scope of s 223 and are readily identifiable as native title rights and interests.

190B(5) Factual basis for claimed native title

What is needed to meet this condition?

[71] While assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified.⁴¹

[72] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material.⁴²

[73] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim.⁴³

[74] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[75] The factual basis material is contained in Attachment F and the additional information provided by the applicant on 8 June 2017, including the affidavit of claimant affirmed 23 March 2017 and the letter from Blackshield Lawyers dated 17 April 2017.

[76] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

What is needed to provide a sufficient factual basis for s 190B(5)(a)?

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

- that there is 'an association between the whole group and the area', although not 'all members must have such association at all times';⁴⁴

³⁹ *Strickland* at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

⁴⁰ *Doepel* at [16].

⁴¹ *Doepel* at [17] and *Gudjala FC* at [57], [83] and [91].

⁴² *Gudjala FC* at [92].

⁴³ *Gudjala 2009* at [28] and [29] and *Anderson* at [43] and [48].

- that the predecessors of the group were associated with the area over the period since sovereignty;⁴⁵ and
- that there is an association with the entire claim area, rather than an association with part of it or ‘very broad statements’, which for instance have no ‘geographical particularity’.⁴⁶

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

[78] The factual basis contains relevant information about the association of members of the native title claim group, and that of their predecessors, with the application area, including the following:

- The application area is located between the Talbragar and Goulburn Rivers in the north and the Blue Mountain National Park in the south.
- Effective settlement of Warrabinga-Wiradjuri country occurred in the 1820s.⁴⁷
- Markers of the boundary of country from pre-contact times that were made by the ancestors of the claim group can be found in the northern region.⁴⁸ Ceremonies such as marriages took place in the southern region prior to contact.⁴⁹
- After settlement, the predecessors and the descendants of the native title claim group lived and worked within their country.⁵⁰ They were able to continue to visit places of significance within their country, hunt, gather and use the resources and transmit the laws and customs relating to land to each successive generation.
- The factual basis includes information about some of the apical ancestors identified in Schedule A and their descendants. For instance, apical ancestors Peggy and Jimmy Lambert were full-blooded Aboriginal people from the central region of the application area.⁵¹ Jimmy Lambert was born around 1809 in the western region and Peggy Lambert was born around 1816.⁵² Jimmy Lambert worked in the eastern region.⁵³ They were married in the southern region.⁵⁴ Their daughter was born at a station in the central region and lived in that area after she was married.⁵⁵ She lived and worked in the application area for her whole life. Peggy and Jimmy Lambert’s grandson was born around 1865 and he travelled throughout the application area, living at different locations.⁵⁶ His daughter was born within the central region in 1901 and she lived in the central and southern regions of the application area.⁵⁷ One of Peggy and Jimmy Lambert’s great great-grandsons was born in the southern region

⁴⁴ *Gudjala* 2007 at [52].

⁴⁵ *Gudjala* 2007 at [52].

⁴⁶ *Martin* at [26]; see also *Corunna* at [39] and [45].

⁴⁷ Attachment F at [5].

⁴⁸ Affidavit of 23 March 2017 at [34].

⁴⁹ At [59].

⁵⁰ Attachment at [6].

⁵¹ Affidavit of 23 March 2017 at [7].

⁵² At [7] and [48].

⁵³ At [51].

⁵⁴ At [62].

⁵⁵ At [8].

⁵⁶ At [9].

⁵⁷ At [10].

around 1926 and he grew up in the central and southern regions of the application area.⁵⁸ One of his daughters has lived in the northern and central regions.⁵⁹ One of his granddaughters has lived in the western and northern regions.⁶⁰ One of his great-grandsons is working within the northern region.⁶¹ Peggy and Jimmy Lambert's great-great-grandchildren were taken by their grandmother, father and aunts and uncles to the application area, particularly around the central region, where they would walk, visit and check on sites and teach about the country.⁶² They were shown the boundaries of country and taught about important places and the historical or mythological stories connected with them.⁶³

- Many current members of the claim group live within the application area and most of the remainder regularly visit country.⁶⁴ They regularly camp, hunt, fish and use the natural resources at places throughout the application area.⁶⁵ For instance, the claimants speak of hunting goanna and kangaroos in or near the northern region, camp at the cliffs and caves and take natural resources in the northern region, dig water at springs in the eastern region, and camp and hunt in the southern region.⁶⁶
- The claimants continue to walk throughout the application area to travel through and monitor country exercising their right and responsibility as landowners to care for their country under Wiradjuri law.⁶⁷ They continue to protect important sites within the application area pursuant to their obligation as the owners of the application area.⁶⁸ Sacred sites that the current claimants protect, and their predecessors protected, are located in the northern, western, eastern, central and southern regions of the application area.⁶⁹ These sacred places include artefacts, art sites, massacre sites, ceremonial places and bora grounds.⁷⁰
- The claimants regularly organise cultural camps within the application area where senior members of the claim group teach cultural practices.⁷¹ The claim members learn about significant places and what their ancestors did at those places, how to make boomerangs, firesticks and clapsticks, how to sew possum skins together using sinew from wallabies, learn language, and are oriented to country.⁷² They are also shown how to go fishing for yabbies.

⁵⁸ At [11].

⁵⁹ At [18].

⁶⁰ At [20].

⁶¹ At [23].

⁶² At [13].

⁶³ At [15] and [17].

⁶⁴ Attachment F at [8] and letter dated 17 April 2017 at 3.

⁶⁵ Attachment F at [10] and [13].

⁶⁶ Affidavit of 23 March 2017 at [36], [45] – [46], [51] and [65].

⁶⁷ Attachment F at [11].

⁶⁸ At [12] and affidavit of 23 March 2017 at [32].

⁶⁹ Affidavit of 23 March 2017 at [32], [38] – [39], [42] – [43], [50], [53] – [54], [56] – [59] and [62].

⁷⁰ See also letter dated 17 April 2017.

⁷¹ Attachment F at [9].

⁷² Letter dated 17 April 2017 at 3.

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

Is there a sufficient factual basis relating to the relationship members of the claim group have in common in connection with the land?

[79] For the purposes of this condition, I understand that the Registrar is required ‘to address the relationship which all members claim to have in common in connection with the relevant land’⁷³. In my view, this criterion should be considered in conjunction with his Honour’s statement that the ‘alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)’ — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimant’s factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the native title claim group have with their country. The factual basis reflects the knowledge claim group members have of their traditional land and waters including important places such as those associated with mythological and historical stories, art sites, artefacts, ceremonial grounds and massacre sites.

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

[80] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area.⁷⁴ The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of European settlement, which I understand from the factual basis to have occurred in the 1820s. For instance, Jimmy Lambert was born around 1809 and Peggy Lambert around 1816. They were married in the application area and worked there. Their daughter was born in the application area and lived and worked there her whole life. Other descendants, including current claimants, of these ancestors continue to be born, reside, access, work, use natural resources, hunt, fish, monitor and look after the application area.

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

[81] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area.

[82] The factual basis speaks of markers in the northern regions which were from pre-contact times and traditional ceremonial grounds in the southern region. Apical ancestor Jimmy Lambert was born in the western region and worked in the eastern region. Peggy and Jimmy Lambert were said to be from the central region and were married in the southern region. Their daughter was born in the central region and lived there after she was married. Her granddaughter was born in the central region and lived in the central and southern regions. Other descendants of Peggy and Jimmy Lambert have been born in the southern region and have lived and/or worked in the northern, central and western regions. The claimants continue to travel across the application area and visit

⁷³ *Gudjala 2007* at [40].

⁷⁴ *Gudjala 2007* at [51].

and maintain important sites, which are located in the northern, western, eastern, central and southern regions of the application area.

[83] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area'.⁷⁵ In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

Decision

[84] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

What is needed to provide a sufficient factual basis for s 190B(5)(b)?

[85] The definition of 'native title rights and interests' in s 223(1)(a) provides that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word 'traditional'.⁷⁶

[86] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs;⁷⁷
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty';⁷⁸
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;⁷⁹
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.⁸⁰

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

⁷⁵ *Gudjala 2007* at [52].

⁷⁶ *Gudjala 2007* at [26] and [62] to [66].

⁷⁷ At [46] and [49]

⁷⁸ At [47]

⁷⁹ At [46] and [79]

⁸⁰ At [87].

- that the factual basis demonstrates the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;⁸¹
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;⁸² and
- that the factual basis contains an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).⁸³

What information has been provided in relation to the society?

[88] The identification of a pre-sovereignty society or a society that existed prior to effective European settlement of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The Wiradjuri Nation consists of several land-holding groups, including the Wiradjuri-Warrabinga, who are interlinked through regional kin networks and who held rights to speak in particular areas within Wiradjuri country, including the application area.⁸⁴
- The members of this society are united in and by their acknowledgement and observance of a set of laws and customs, such as holding rights in land and waters, the use and exploitation of resources and the protection of sites of significance by particular groups in relation to the areas they are connected with.⁸⁵
- The Warrabinga-Wiradjuri people belong to a number of claim groups sharing the same dialect and membership required identification with their specific territory as well as acknowledgement and observance of the laws and customs of the wider society.⁸⁶ Members collectively held specific rights and interests claimed in the application area in accordance with laws and customs. These laws and customs included rights to country inherited through cognatic descent.

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

[89] The factual basis contains the following relevant information about the traditional laws and customs of the native title claim group.

⁸¹ At [37] and [52]

⁸² At [40].

⁸³ At [29], [54] and [69]

⁸⁴ Attachment F at [1].

⁸⁵ At [1].

⁸⁶ At [4].

[90] The current claimants continue to follow a landholding system where rights in land are based on filiation to a parent or a grandparent who also held rights in that land.⁸⁷ In particular, by identifying oneself as a member of a landholding entity on the basis of descent from a parent or grandparent who also identified as a member of the landholding entity, a claimant is able to hold rights in land. In areas where few family groups survived, those families assumed rights and responsibilities for the whole of the area within the application area pursuant to traditional laws and customs observed within the wider society.⁸⁸ Through active kin-networks, the claimants maintain knowledge of each other as persons holding rights in relation to their country under the laws and customs of the Wiradjuri Nation.⁸⁹ Claimants continue to travel through and monitor country, exercising their right and responsibility as landowners caring for their country.⁹⁰

[91] Members of the claim group follow a system of kinship which provides strict rules on relationship between members.⁹¹

[92] The claimants continue to observe laws and customs which provide that all resources, including 'mobile resources' such as kangaroos, within the territory of a landholding group within Wiradjuri country, are the property of that group.⁹²

[93] Members of the claim group continue to visit places of significance, monitoring country, hunt, gather and use the resources of the country and acknowledge and observe rules relating to such use.⁹³ For instance, the claimants continue to follow rules about hunting such as what times of the year particular animals may be taken and how what is caught must be shared within the relevant group. They also observe rules such as only hunting the males of certain species, only taking as much as is needed, only certain water creatures can be eaten as well as certain cooking practices.⁹⁴ One claimant speaks of being shown by her grandmother where the poisonous berries on country were and showed how to crush them and spread them on the water to stun fish so they were easy to grab.⁹⁵ She shows her great-grandchildren how to fish, how to find artefacts and what they are used for, and the names of the birds and lizards.⁹⁶ The claimants know how to dig out springs and soaks to liberate water and know how to make baskets and eel traps using bull-reeds.⁹⁷ The claim group members continue to use natural resources for medicine.⁹⁸

[94] Members of landholding groups continue to follow a system where permission is required to use resources within each other's country.⁹⁹

[95] The traditional laws and customs are passed down the generations through their immediate predecessors. Cultural camps are regularly organised where senior members of the claim group teach cultural practices to the younger generation and other adults who want to reaffirm their

⁸⁷ At [3].

⁸⁸ At [5].

⁸⁹ At [6].

⁹⁰ At [11].

⁹¹ Affidavit of 23 March 2017 at [33].

⁹² Attachment F at [3].

⁹³ At [3], [6], [10] and [13].

⁹⁴ Affidavit of 23 March 2017 at [27].

⁹⁵ At [16].

⁹⁶ At [25].

⁹⁷ At [29] – [30].

⁹⁸ At [31].

⁹⁹ Attachment F at [3].

identity as landowners, as they were taught by their elders.¹⁰⁰ One claimant says that her grandmother and her father would take her and her siblings to country and teach them about country while visiting and checking on sites.¹⁰¹ They were taught by word of mouth and through practical instruction such as showing how to manufacture twine from the sinews of a wallaby.¹⁰² They were told where their country was and were shown the boundaries. They were taught and shown the important places and were told the historical or mythological stories connected with them.¹⁰³

[96] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

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

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

[97] My understanding of the factual basis material is that the pre-sovereignty society, being the Wiradjuri Nation society, encompasses a wide area of land which is held at a localised level by various groups, including the Warrabinga-Wiradjuri People. I understand that these landholding groups are linked through regional kin networks but have distinct territorial domains, the boundaries of which are recognised by the other groups.

[98] In my view, the factual basis indicates that the Warrabinga-Wiradjuri country is situated within this society and their traditional laws and customs are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the members of the native title claim group are based on regionally held and practiced laws and customs. Relevant to this proposition, the Courts have said that '[i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added]'.¹⁰⁴

[99] The factual basis reveals that the laws and customs currently observed and acknowledged by the claim group are based on, amongst other things, common principles of kinship and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current members of the native title claim group through the preceding generations.

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

[100] In my view, the factual basis demonstrates that some of the ancestors were living within the application area, or were among the generation born to those who were living within the application area, at the time of effective European settlement. In this sense, I understand that the information supports the assertion that the apical ancestors were born into the claim group of the Wiradjuri

¹⁰⁰ At [9].

¹⁰¹ Affidavit of 23 March 2017 at [13].

¹⁰² At [14].

¹⁰³ At [15] and [17].

¹⁰⁴ *Harrington-Smith (No 5)* at [53].

Nation that existed at and prior to European settlement.¹⁰⁵ From the factual basis, I understand the current claim members are the descendants of these ancestors.¹⁰⁶

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

[101] I am of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The claim group members continue to follow a system of kinship which provides rules regarding relationships established within the claim group.

[102] The native title claim group observe a landholding system where rights to land are based on filiation to a parent or grandparent who also held rights in that land, in particular through identification as a member of the claim group. The claimants continue to use resources, visit, monitor and protect places in their country.

[103] The factual basis contains some information which speaks to the way the members of the claim group continue to perform traditional practices such as camping, hunting, fishing, gathering resources for bush medicine or make traditional items like baskets or eel traps. This in my view demonstrates that the laws and customs currently observed are relatively unchanged from those acknowledged and observed by their predecessors, and that they have been passed down the generations to the claimants today.

[104] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have a spiritual relationship to country and continue to have knowledge of mythological stories and know the location of the associated sites. They also have knowledge of important places within their country.

[105] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by oral teaching and practical instruction, to the current members of the claim group, and have been acknowledged by them without substantial interruption. The asserted facts state, for instance, that claimants have knowledge of important places and hunting and fishing protocols, and continue to camp and gather natural resources. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations, the apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of effective European settlement.

Decision

[106] I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(b).

¹⁰⁵ See *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above.

¹⁰⁶ Schedule A.

What is needed to provide a sufficient factual basis for s 190B(5)(c)?

[107] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[108] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.¹⁰⁷ In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[109] I also understand that if the claimant's factual basis relied upon the drawing of inferences, that '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'.¹⁰⁸

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

[110] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[111] The factual basis states that laws and customs which were acknowledged by the native title claim group prior to sovereignty have been handed down from one generation to the next by word of mouth and practical instruction in an unbroken chain through to the present day.¹⁰⁹ Each generation of the Wiradjuri Nation people has acknowledged and observed those laws and customs. Senior members of the claim group teach cultural practices in the same manner they were taught by their elders.¹¹⁰

[112] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

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

Decision

[113] I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(c).

¹⁰⁷ *Martin* at [29].

¹⁰⁸ *Gudjala 2009* at [33].

¹⁰⁹ Attachment F at [2].

¹¹⁰ At [9].

190B(6) Prima facie case

[114] As set out below, I consider that some of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

What is needed to meet this condition?

[115] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be prima facie established. Thus, 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.¹¹¹ Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'.¹¹²

[116] I note that this section is one that permits consideration of material that is beyond the parameters of the application.¹¹³

[117] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1).¹¹⁴ I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

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

[118] I also understand that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group.¹¹⁵

[119] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters'.¹¹⁶ I also note that the phrase 'in relation to' is 'of wide import'.¹¹⁷ Having examined the native title rights and interests set out in Attachment E of the application they are, prima facie, rights or interests 'in relation to land or waters.'

[120] I also note that I consider that Schedule B of the application sufficiently addresses any issue of extinguishment, for the purpose of the test at s 190B(6).

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

¹¹¹ *Doepel* at [135].

¹¹² *Doepel* at [126], [127] and [132].

¹¹³ *Doepel* at [16].

¹¹⁴ *Gudjala* 2007 at [85].

¹¹⁵ *Yorta Yorta* at [86] and *Gudjala* 2007 at [86]

¹¹⁶ *Ward HC* per Kirby J at [577].

¹¹⁷ *Alyawarr* at [93].

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

2. *The right possessed under traditional law and customs is properly interpreted as, and the native title right recognised by the common law of Australia, is the right of possession, occupation, use and enjoyment of land and waters as against the whole world.*

[122] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]'.¹¹⁸ The High Court further noted that the expression, collectively, conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'.¹¹⁹

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

the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added].¹²⁰

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

[i]f control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair". It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the 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.¹²¹

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

[126] The factual basis is such that it is asserted that at the time of effective European settlement, there existed an association between the Warrabinga-Wiradjuri People and its land and waters.¹²²

[127] The factual basis provides that the Warrabinga-Wiradjuri people maintain the traditional right to exclude all others from the application area. The claim group continue to follow an ancestral landholding system where rights to country are transferred by cognatic descent through a parent or

¹¹⁸ At [93].

¹¹⁹ At [93].

¹²⁰ At [71].

¹²¹ At [127].

¹²² See my reasons at s 190B(5)(a).

grandparent who also hold rights in land.¹²³ Only members of the group have the right to speak in their country and have the right to occupy it, use it and exclude others from it.¹²⁴ Outsiders require permission before coming onto country.¹²⁵ The claimants believe if their country is accessed and used without their permission by outsiders, or if outsiders refuse to stop accessing or using country when requested, then those outsiders will get sick or die.¹²⁶ One claimant speaks of an instance where outsiders accessed their country and who refused to leave when requested to do so, one of those persons were hurt and the claim members believe it was the spirits punishing that person for his behaviour.¹²⁷

[128] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a 'spiritual affair' with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury and from country harming others. Members of the claim group have rights to country on the basis of cognatic ties and therefore are able to speak for country. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

[129] I consider that this right is prima facie established.

5. The (non-exclusive) rights to:

(a) have access to, remain on and use the land and waters;

(b) access and take the resources of the land and waters; and

(c) protect places, areas and things of traditional significance on the land and waters

[130] The factual basis indicates that the current claimants continue to regularly access country, including living, working, camping, hunting, fishing, collecting natural resources, and travelling over the application area.¹²⁸

[131] The asserted facts also indicate that the claimants are actively concerned with protecting important sites pursuant to their obligations as owners of the application area.¹²⁹

[132] It is my view that the factual basis material prima facie establishes that these rights are possessed under the traditional laws and customs of the native title claim group.

190B(7) Physical connection

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

What is needed to meet this condition?

[134] This condition requires that I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the

¹²³ Attachment F at [3].

¹²⁴ At [1] and affidavit of 23 March 2017 at [68].

¹²⁵ Affidavit of 23 March 2017 at [69].

¹²⁶ At [68].

¹²⁷ At [70].

¹²⁸ See for instance Attachment F at [9] – [13] and affidavit of 23 March 2017.

¹²⁹ At [12].

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.

[135] The Courts have observed that it ‘seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.¹³⁰ In interpreting connection in the ‘traditional’ sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that ‘the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... “traditional” in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty’.¹³¹

[136] I consider that for the purposes of s 190B(7), I must be satisfied of a particular fact or facts, from the material provided, that at least one member of the claim group has or had the necessary traditional *physical* association with the application area.¹³²

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

[137] I refer to the information above in relation to s 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the native title claim group acknowledge and observe the traditional laws and customs of the pre-sovereignty society.

[138] The factual basis contains relevant information that describe a traditional physical association of the claim group with the application area, including travelling, living, working, camping, hunting, fishing and performing other practices within the application area and surrounding country.¹³³

[139] Given the above, and considering all of the information provided with the application, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area.

190B(8) No failure to comply with s 61A

[140] Section 190B(8) requires that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

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

[142] As set out in my reasons below, in my view the application does not offend any of the provisions of ss 61A(1), (2) and (3) and therefore the application satisfies the condition of s 190B(8).

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

[143] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal’s mapping database

¹³⁰ *Gudjala* 2009 at [84].

¹³¹ At [86].

¹³² *Doepel* at [18].

¹³³ See for instance Attachment F at [9] – [13] and affidavit of 23 March 2017.

confirm this. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

Claimant application not to be made covering previous exclusive possession over areas (s 61A(2))

[144] Schedule B indicates that areas subject to a previous exclusive possession act are excluded from the application.¹³⁴

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

[145] Attachment E states that exclusive possession is not claimed in relation to any area subject to valid previous non-exclusive possession acts.¹³⁵

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

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

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

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

[148] Schedule Q provides that the applicant does not make a claim for ownership of minerals, petroleum or gas which are wholly owned by the Crown.

Exclusive possession is not claimed over all or part of waters in an offshore place (s 190B(9)(b))

[149] Schedule P states that the applicant does not make a claim for exclusive possession of any offshore place.

Native title rights and/or interests in the application area have otherwise been extinguished (s 190B(9)(c))

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

End of reasons

¹³⁴ At [2].

¹³⁵ At [3].

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Warrabinga-Wiradjuri #7
NNTT file no.	NC2017/001
Federal Court of Australia file no.	NSD857/2017

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

29 May 2017

Date application entered on Register:

1 September 2017

Applicant:

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

Applicant's address for service:

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

Area covered by application:

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

Persons claiming to hold native title:

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

Registered native title rights and interests:

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

End of document