Registration test decision

|  |  |
| --- | --- |
| Application name | Warrabinga-Wiradjuri People |
| Name of applicant | Wendy Lewis, Mavis Agnew, Martin de Launey |
| State/territory/region | New South Wales |
| NNTT file no. | NC11/4 |
| Federal Court of Australia file no. | NSD1000/11 |
| Date application made | 22 June 2011 |
| Date of Decision | 21 July 2011 |
|  |  |
| Name of delegate | Susan Walsh |

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

|  |  |
| --- | --- |
|  | **Date of reasons:** 8 August 2011 |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Susan Walsh

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the Native Title Act 1993 (Cwlth) under an i**nstrument of delegation dated** 1 July 2011 and made **pursuant to s. 99 of the Act.**

Reasons for decision

Table of contents

[Introduction 3](#_Toc300569802)

[Registration test 3](#_Toc300569803)

[Application overview 3](#_Toc300569804)

[Procedural and other conditions: s. 190C 7](#_Toc300569805)

[Subsection 190C(2) Information etc. required by ss. 61 and 62 7](#_Toc300569806)

[Subsection 190C(3) No common claimants in previous overlapping applications 11](#_Toc300569807)

[Subsection 190C(4) Authorisation/certification 14](#_Toc300569808)

[Merit conditions: s. 190B 25](#_Toc300569809)

[Subsection 190B(2) Identification of area subject to native title 25](#_Toc300569810)

[Subsection 190B(3) Identification of the native title claim group 26](#_Toc300569811)

[Subsection 190B(4) Native title rights and interests identifiable 26](#_Toc300569812)

[Subsection 190B(5) Factual basis for claimed native title 28](#_Toc300569813)

[Subsection 190B(6) Prima facie case 46](#_Toc300569814)

[Subsection 190B(7) Traditional physical connection 48](#_Toc300569815)

[Subsection 190B(8) No failure to comply with s. 61A 49](#_Toc300569816)

[Subsection 190B(9) No extinguishment etc. of claimed native title 50](#_Toc300569817)

[Attachment A: Details of previous North East Wiradjuri People claims 52](#_Toc300569818)

Introduction

This document sets out my reasons, as the delegate for the Native Title Registrar (the Registrar), for the decision to accept the Warrabinga-Wiradjuri claimant application (the Warrabinga-Wiradjuri application) for registration pursuant to s. 190A of the *Native Title Act 1993* Cwlth (the Act), commonly called the ‘registration test’.

Note: All references in these reasons to legislative sections refer to the the Act, as currently in force, unless otherwise specified.

Registration test

The statutory scheme for applying the registration test is found in ss. 190A to 190D. The combined effect of ss. 190A(6) and (6B) is that:

I must accept the claim for registration if it satisfies all of the registration test conditions outlined ss. 190B and 190C; and

I must not accept the application for registration if the claim does not satisfy any one or more of the conditions in ss. 190B and 190C.

Neither s. 190A(1A) nor s. 190A(6A) apply to the claim in the application as it has never before been considered for registration and is not on the Register of Native Title Claims.

I have decided for the reasons that follow that the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C.

Application overview

Registration test triggered

The Warrabinga-Wiradjuri application was filed in the Federal Court (the Court) on 22 June 2011 by Wendy Lewis, Mavis Agnew and Martin de Launey as the applicant for a native title claim group described as the descendants of the six apical ancestors named in Schedule A of the application.

On 23 June 2011, the Registrar of the Court gave a copy of the application and accompanying documents it to the Registrar pursuant to s. 63 of the Act. Pursuant to s. 190A(1), this event has triggered the Registrar’s duty to consider the claim made in the application for registration.

Using best endeavours to finish registration test by end of s. 29 notices

The Warrabinga-Wiradjuri application has been made in response to four mining tenement application notices pursuant to s. 29 (MLA376, MLA392, MLA393 and EL7517) which entirely cover the application area, all with a notification day of 24 March 2011—the relevant details are provided in Attachment I of the application. The combined area of the application is located north-west of Sydney around Portland and Cullen Bullen.

Pursuant to s. 190A(2), the Registrar must use best endeavours to finish considering the claim for registration by the end of four months after the notification day (Sunday 24 July 2011). To comply with this timeframe, I made my decision on Thursday 21 July 2011 and now provide this statement of reasons.

Two other applications made in response to the s. 29 notices

Another two claimant applications have been made in response to the four s. 29 notices covering the Warrabinga-Wiradjuri application—these are NSD953/11 Wiray-dyuraa Ngumbaay-dyil and NSD955/11 Wiray-dyuraa Maying-gu applications—which I shall call the NSD953/11 and NSD955/11 applications. The NSD953/11 application covers mining tenement application MLA 376 and NSD955/11 covers mining tenement applications MLA 392, MLA393 and EL7517.

NSD953/11 and NSD955/11 were filed in the Federal Court a few days before the Warrabinga-Wiradjuri application, on 17 June 2011, by William (Bill) Allen, Joe Bung, Stephen Riley and John Brasher as the applicant for a native title claim group described as the Wiradjuri people of the Bathurst/Lithgow/Mudgee district, being the biological descendants of four apical ancestors (none of whom are identified as the apical ancestors for the Warrabinga-Wiradjuri claim group).

It appears to me that the Warrabinga-Wiradjuri claim on the one hand and the NSD953/11 and NSD955/11 claim on the other hand reject each other’s claims and assert that it is they, under the traditional laws and customs of the relevant normative system in this part of New South Wales called ‘Wiradjuri’, who are the correct native title claim group for the area collectively covered by the four mining tenement applications.

The NSD953/11 and NSD955/11 applications were accepted for registration by another delegate of the Registrar on 19 July 2011.

Information I have considered and procedural fairness

Section 190A(3)(a) provides that I *must* to have regard to information contained in the Warrabinga-Wiradjuri application and in any other documents provided by the Warrabinga-Wiradjuri applicant, and I have considered such information.

On 30 June 2011, the applicant provided me with a series of additional affidavits and a submission from their legal representative in relation to the authorisation condition of s. 190C(4).

There is no information before me of the kind discussed in subparagraphs 190A(3)(b) and (c).

Section 190A(3) provides finally that I *may* have regard to such other information, as I consider appropriate. A range of other information is before me that is relevant to my consideration of the Warrabinga-Wiradjuri application.

I am aware that there is an ongoing dispute dating back to at least 2009 between the Warrabinga-Wiradjuri applicant and the NSD953/11 and NSD955/11 applicant and this is the subject of ongoing litigation, most recently discussed in a decision by Jacobson J in *Allen, in the matter of North East Wiradjuri Co Limited (Administrators Appointed)* [2010] FCA 1248 (5 November 2010).

I have received submissions from the NSD953/11 and NSD955/11 applicant that the Warrabinga-Wiradjuri application should not be accepted for registration. I also received a submission to this effect from a director of the Wellington Valley Wiradjuri Aboriginal Corporation. (I note that the Wellington Valley Wiradjuri have a registered native title determination application, NSD912/09, which lies to the north-east of the Warrabinga-Wiradjuri application, but does not overlap it.)

In the interests of procedural fairness, I provided all of this information to the Warrabinga-Wiradjuri applicant with an opportunity to comment before my decision.

I also informed the Warrabinga-Wiradjuri applicant in a letter dated 8 July 2011 of certain other information before me concerning an earlier Wiradjuri-Warrabinga (United Clans of North East Wiradjuri) claimant application NSD457/10 and its s. 190E reconsideration dated 6 October 2010 by Tribunal Member DP Sosso and also concerning a series of earlier applications which have all been made in years gone by in the vicinity of the area of this new Warrabinga-Wiradjuri application by the North East Wiradjuri People native title claim group. It seems to me that the Warrabinga-Wiradjuri claim group and the NSD953/11 and NSD955/11 claim group were formerly part of the North East Wiradjuri People claim group.

I also referred the Warrabinga-Wiradjuri applicant to a Tribunal preliminary future act decision by DP Sumner in *Coalpac/NSW/North East Wiradjuri People* [2009] NNTTA 133 dated 19 October 2009) concerning a dispute that had arisen within the North East Wiradjuri People claim group.

In response to these matters, I received submissions and additional information from the Warrabinga-Wiradjuri applicant on 15 and 18 July 2011.

I have considered certain information that is publicly available from the Office of the Registrar of Indigenous Corporations (ORIC) concerning the membership of the Gundungurra Tribal Council Aboriginal Corporation and the Warrabinga Native Title Claimants Aboriginal Corporation, which I considered relevant to my consideration of the registration test condition in s. 190C(3) (no common members with previously registered native title claims) and s. 190C(4) (authorisation).

I have also considered the following:

Tribunal application for the Wiradjuri (Ben Bullen) native title determination application NSD6062/98 made by Wendy Lewis on 12 May 1997, discontinued on 20 October 1999

Wendy Lewis’s Form 5, Notice of Intention to become a Party to the previously registered and overlapping Gundungurra NSD6060/98 application filed 15 February 2001

Documents from the Tribunal’s 1999–2000 files relating to the Gundungurra registration test

Geospatial overlaps analysis for the Warrabinga-Wiradjuri application area dated 28 June 2011

a search of the website for ‘The Land’ newspaper showing details of its circulation in various rural regions of NSW

searches of ‘Google Maps’ for Portland (the town most proximate to this new application area)

extracts from the Registrar of Native Title Claims for the nearby Wellington Valley Wiradjuri application, the overlapping Gundungurra application and the overlapping NSD953/11 and NSD955/11 applications, including map attachments showing the areas covered by those applications

extracts from the Tribunal’s Geospatial mapping database for showing regional maps depicting the Wellington Valley Wiradjuri area and the Warrabinga-Wiradjuri area

a map prepared by the Tribunal’s Geospatial division dated 7 July 2011 titled ‘Warrabomga *(sic)* -Wiradjuri mud map and surrounding claims’

the Tribunal’s application summaries and registration test decisions relating to native title determination applications by the North East Wiradjuri People claim group, as listed in Attachment A at the end of this statement

All of the documents containing information I have considered as at the date of my decision are found in my delegate’s file, reference 2011/01669. Where I have had particular regard to a document, this is identified in my statement of reasons. I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4)—see *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) at [16].

I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal:

providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK;

undertaking its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are ‘without prejudice’. Further, mediation is private as between the parties and is also generally confidential (ss. 94K and 94L of the Act).

I have provided procedural fairness to the state of New South Wales which I believe is required of me as a result of the decision in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [21] to [38]. This was done by letter to the state on 23 June 2011, to which the state responded by e-mail dated 29 June 2011 that it did not intend making submissions in relation to the registration testing of the Warrabinga-Wiradjuri application or the NSD953/11 and NSD955/11 applications. I again offered the state an opportunity to comment in relation to the applicant’s additional authorisation information (received 30 June 2011); however the state did not avail itself of this opportunity.

In my view, the statutory scheme governing the Registrar’s registration testing of claimant applications and the subsequent notification of applications to a range of persons (including the registered native title claimants of any overlapping applications) *after* the registration test decision is made as required by s. 66(6) has curtailed the ordinary rules of procedural fairness—see *Hazelbane v Doepel* (2008) 167 FCR 325; [2008] FCA 290 at [23] to [31].

It follows in my view that I am not required to provide the NSD953/11 and NSD955/11 applicant or the Wellington Valley Wiradjuri claim group with details surrounding, or copies of, the full range of material that is before me or any further opportunity to make submissions/provide information before my registration test decision is made. The Tribunal informed the NSD953/11 and NSD955/11 applicant and [name removed] of the Wellington Valley Wiradjuri claim group of this position by letters dated 6 July 2011.

Order of consideration of registration test conditions

Section 190B sets out conditions that test particular merits of the claim made in the application and s. 190C sets out conditions about ‘procedural and other matters’. The procedural condition is found in s. 190C(2) and it requires me to be satisfied that the application contains certain specified details and other information and be accompanied by any prescribed documents (outlined in ss. 61 and 62). Some of these details are then relevant to my consideration of the authorisation condition in s. 190C(4) (where the application has not been certified) and to my consideration of the merit conditions in s. 190B. I propose therefore to consider the s.  190C(2) procedural condition first, in order to assess whether the application contains the requisite details etc. *before* turning to questions regarding the merits of those details etc. at other parts of the registration test.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

For the reasons that follow, I am **satisfied** that the application meets the procedural condition in s. 190C(2) because I have found that the application contains the details and other information required by ss. 61 and 62.

The decision of Mansfield J in *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) is authority that my consideration of the requirements of ss. 61 and 62 pursuant to s. 190C(2) 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 and does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2) except in a very limited case discussed by his Honour at [35]–[36] when considering the requirements of ss. 61(1) and 61(4). In other words, the question of me here is simply this: does the application contain the prescribed details and other information?

I turn then to each of the various parts of ss. 61 and 62 which require that the application contain details and other information and be accompanied by any affidavit or other document.

Native title claim group: s. 61(1)

The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

The application **contains** all details and other information required by s. 61(1).

As I discuss in my analysis of *Doepel* above, I am of the view that the Registrar’s task under s. 190C(2) is of a procedural kind. When it comes to s. 61(1), it seems to me that s. 190C(2) requires me to simply consider whether the application sets out the native title claim group in the terms required by s. 61(1). It is only if the description of the native title claim group in the application indicated that not all persons in the native title group were included, or that it was in fact a subgroup of the ‘native title group’, as that term is defined in s. 61(1), that the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

A description of the persons in the native title claim group is found in schedule A of the application. It follows an ‘apical ancestor’ model of describing the persons in the native title claim group as being the descendants of Peggy Lambert, Jimmy Lambert, Dianna Mudgee, James “Tracker” Macdonald, Thullagumaulli and Aaron.

Further information about the persons in the native title claim group is found in the affidavit by claim group member [name removed] in Attachment F2 of the application, which reveals that of the six ancestral lines, the group descend from the union of Peggy and Jimmy Lambert and there are no known descendants from another two of the named ancestors—Thullagumaulli and Aaron.

There is nothing on the face of the description or elsewhere in the application itself to indicate a problem of the kind discussed by Mansfield J in *Doepel* at [36]. That said, there is a range of information before me outside of the application, including in the applicant’s additional information in relation to the authorisation condition (received 30 June 2011) and in submissions and information provided by the NSD953/11 and NSD955/11 applicant, that may give rise to the kinds of concerns traversed by Mansfield J in *Doepel* and in other decisions of the Federal Court relevant to the authorisation condition in s. 190C(4). I discuss this at that point of my decision below.

Name and address for service: s. 61(3)

The application must state the name and address for service of the person who is, or persons who are, the applicant.

The application **contains** all details and other information required by s. 61(3). These details are found on p. 1 and at the end of the Form 1 in Part B.

Native title claim group named/described: s. 61(4)

The application that persons in a native title claim group authorise the applicant to make must:

1. name the persons in the native title claim group, or
2. otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application **contains** all details and other information required bys. 61(4).

I refer to my reasons above in relation to s. 61(1). It follows in my view that the application contains the details required by the related provisions of s. 61(4). These details are found in Schedule A, the content of which is reproduced in my reasons below for the related merit condition in s. 190B(3). Whether or not I am satisfied that the description is sufficiently clear, so that it can be ascertained whether any particular person is a person in the native title claim group, is the task when considering the relevant merit condition of the registration test in subsection 190B(3)—*Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

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

The application must be accompanied by an affidavit sworn by the applicant that:

1. the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
2. the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
3. the applicant believes all of the statements made in the application are true, and
4. the applicant 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, and
5. setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application **is accompanied** by the affidavit required by s. 62(1)(a).

The application is accompanied by an affidavit from each of the three persons comprising the applicant—see affidavits by Wendy Ann Lewis, Mavis Ann Agnew and Martin Ronald De Launey, all made on 18 June 2011 and filed in the Court with the application on 22 June 2011.

Each affidavit makes the statement required by subparagraphs 62(1)(a)(i) to (iv).

It is my view that subparagraph 62(1)(a)(v) requires the applicant to identify how the authorisation decision complies with either of the two decision-making processes in s. 251B—a process mandated by traditional law and custom or a process agreed and adopted by the native title claim group. In my view, the details required by subparagraph (v) are contained in the affidavits where each deponent provides brief details of the agreed and adopted decision-making process complied with when authorising the applicant—this is found at paragraph [5] of each affdavit. I do not undertake any assessment of the merits of that information when considering whether the application is accompanied by an affidavit for the purposes of s. 190C(2). Whether I am satisfied that the applicant is authorised is the task at s. 190C(4)(b)—see *Doepel* at [87].

I note that the information in the accompanying affidavits about the authorisation process is brief; however on 30 June 2011 the applicant provided addidtional affidavit evidence (by [name removed], Wendy Lewis, [the applicant's legal representative] and [name removed) together with written submissions from [the applicant’s legal representative]. On 15 and 18 July 2011 the applicant’s legal representative] provided further submissions and another affidavit by [a claim group member] in relation to the asserted authorisation process, including the notification by [that claim group member] of the members of the Warrabinga Native Title Claimants Aboriginal Corporation as to the forthcoming authorisation meeting on 18 June 2011.

I consider all of this material in my reasons below at s. 190C(4).

Application contains details required by s. 62(2): s. 62(1)(b)

The application must contain the details specified in s. 62(2).

The application **contains** all details and other information required bys. 62(1)(b) because it does contain the details required by s. 62(2)(a) to (h), as set out in the reasons that follow.

Information about the boundaries of the area: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

1. the area covered by the application, and
2. any areas within those boundaries that are not covered by the application.

The application **contains** all details and other information required by s. 62(2)(a). This is found in Schedule B of the application.

Map of external boundaries of the area: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application **contains** all details and other information required by s. 62(2)(b). This is found in Attachment C of the application.

Searches: s. 62(2)(c)

The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(c). Schedule D states that the Applicant is not aware of any such searches.

Description of native title rights and interests: s. 62(2)(d)

The application must contain a description of native title rights and interests claimed in relation to particular lands and 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.

The application **contains** all details and other information required by. 62(2)(d). This is found in Attachment E and does not consist of a statement to 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.

Description of factual basis: s. 62(2)(e)

The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:

1. the native title claim group have, and the predecessors of those persons had, an association with the area, and
2. there exist traditional laws and customs that give rise to the claimed native title, and
3. the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **contains** all details and other information required by s. 62(2)(e). The general description of the factual basis is found in Attachments F, F1 and F2.

Activities: s. 62(2)(f)

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application **contains** all details and other information required by s. 62(2)(f). This is found in Schedule G.

Other applications: s. 62(2)(g)

The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application **contains** all details and other information required by s. 62(2)(g).

Schedule H states that the applicant is not aware of any overlapping applications.

There are the two recently made NSD953/11 and NSD955/11 applications that also cover the same area as that covered by the Warrabinga-Wiradjuri application. Although the Warrabinga-Wiradjuri applicant’s additional information discloses some interaction amongst the persons responsible for each of these competing applications prior to them being made, there is nothing to indicate that, when the Warrabinga-Wiradjuri applicant made their application on 22 June 2011, they were aware that the NSD953/11 and NSD955/11 applications had been made a few days previously on 17 June 2011.

There is one previously registered application—this is the Gundungurra NSD6060/98 application—which partly overlaps the area of the Warrabinga-Wiradjuri application on the northern boundary of the Gundungurra application. It is difficult to imagine that the Warrabinga-Wiradjuri applicant is not aware of the overlap between the two applications; Wendy Lewis is a respondent to the Gundungurra application and has, to my knowledge, been so for many years (see her Form 5 filed in the Court on 15 February 2001).

Because I am not sure how Ms Lewis was not aware of the overlap, I have had some difficulty reaching a decision that the statement in Schedule H satisfies the condition of s. 190C(2) in relation to s. 62(2)(g). I have decided ultimately that I am constrained by the decision in *Doepel* that my consideration of s. 190C(2) must confine itself to what is in the application and must not look at the entire range of material that is before me on the state of the applicant’s knowledge at the time this application was made about the existence of overlapping applications.

I encourage the Warrabinga-Wiradjuri applicant to pay attention to the requirements of s. 62(2)(g) in the event further applications are filed.

Section 24MD(6B)(c) notices: s. 62(2)(ga)

The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(ga). Schedule HA states that the applicant is not aware of any such notices.

Section 29 notices: s. 62(2)(h)

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(h). Details of four s. 29 notices covering the application area are found in Schedule I and the boundaries of each notice area are depicted on the map in Attachment C.

Subsection 190C(3)
No common claimants in previous overlapping applications

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

1. the previous application covered the whole or part of the area covered by the current application, and
2. the previous application was on the Register of Native Title Claims when the current application was made, and
3. the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

The application **satisfies** the condition of s. 190C(3).

The first task is to identify whether there are any previously registered applications of the kind discussed in subparagraphs 190C(3)(b) and (c) overlapping some or all of the area covered by the Warrabinga-Wiradjuri application when it was made on 22 June 2011. The second task, if there are any previously registered applications, is to consider whether I am satisfied that there are no members in common.

For the first task, I have an overlaps analysis by the Tribunal’s Geospatial Services Unit dated 28 June 2011 (Geospatial analysis) showing that there are three applications covering some or all of the area of the Warrabinga-Wiradjuri application. For these three overlapping applications I have made my own searches of the Register of Native Title Claims (Register) as to when the applications were entered on the Register or not removed after being accepted for registration pursuant to s. 190A (if made before commencement of the registration test provisions of the Act on 30 September 1998).

The results of the Geospatial analysis and my own searches of the Register are shown on the table below:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Overlapping Native Title Determination Application (NTDA)** | **Register entry (registration test details)** | **NTDA Area(sq km)** | **Overlap Area(sq km)** | **%****NTDA overlaps NSD1000/11** | **% NSD1000/11****overlaps NTDA** |
| NSD953/11 Wiray-dyuraa Ngumbaay-dyil  | 19 July 2011 (accepted for registration) | 3.123 | 3.12 | 100.00 | 10.49 |
| NSD955/11 Wiray-dyuraa Maying-gu  | 19 July 2011(accepted for registration) | 26.654 | 26.65 | 100.00 | 89.51 |
| NSD6060/98 Gundungurra Tribal Council Aboriginal Corporation 6 (Gundungurra application) | 23/06/2000 (accepted for registration on 21 June 2000 and not removed from Register)  | 18673.680 | 13.77 | 0.07 | 46.26 |

NSD953/11 and NSD955/11 do not meet the criteria identified in subparagraphs 190C(3)(b) and (c) and are not previously registered applications in the sense required by those provisions, despite having been made a few days before the Warrabinga-Wiradjuri application on 17 June 2011 and despite being entered on the Register as at the date of my decision.

This is because the critical date for an overlapping application to be a previously registered application pursuant to s. 190C(3) is the date that the current application was made (i.e. filed in the Federal Court)—see subparagraph 190C(3)(b). For the Warrabinga-Wiradjuri application this date is 22 June 2011. The NSD953/11 and NSD955/11 applications, although filed in the Court a few days previously on 17 June 2011, was not entered on the Register until sometime later. It follows in my view that I need not embark on the second task of considering whether there are members in common between the NSD953/11 and NSD955/11 applications and the Warrabinga-Wiradjuri application.

On 23 June 2000, the Gundungurra application was not removed from the Register after being considered for and accepted for registration pursuant to s. 190A, where it still remains. The Gundungurra application thus satisfies all three criteria in s. 190C(3)(a) to (c) and is a previously registered application to which s. 190C(3) applies. I must therefore embark on the second task and consider whether I am satisfied that there are no members in common between it and the Warrabinga-Wiradjuri application.

I have looked at the Register extract for the Gundungurra application—the applicant comprises Elsie Stockwell and Pamela Stockwell and the native title claim group is described as comprising ‘all members of the Gundungurra Tribal Aboriginal Corporation’. A copy of the Rules of the Gundungurra Tribal Aboriginal Corporation attached to the amended Gundungurra application filed in the Court on 8 October 1999 reveal that membership of the corporation is open to ‘the descendants of the Gundungurra people’.

Although I doubt that such a description of the persons in the Gundungurra native title claim group complies with ss. 61(1) or 61(4), I am able to conclude for the purposes of my consideration at s. 190C(3) that the Gundungurra application is being prosecuted by persons claiming to be ‘Gundungurra people’, provided they are also members of the relevant Aboriginal Corporation. Of course, such a vague description does not really tell me much about the persons who are members of the Gundungurra native title claim group.

The information in the Warrabinga-Wiradjuri application does not really assist—the applicant states that it is not aware of the overlapping Gundungurra application in Schedule H and also says in Schedule O, in answer to the request for details about membership of any overlapping applications, that this is not applicable. It does not appear that the Warrabinga-Wiradjuri applicant has turned its attention to this matter in a considered way when preparing the application.

The lack of attention to detail in relation to the overlapping Gundungurra application within the Warrabinga-Wiradjuri Form 1 has made it difficult for me to be moved to a positive state of mind that there are no members in common; however, I am able to do so, having regard to a range of other information before me about the membership of the Gundungurra and the Warrabinga-Wiradjuri claim groups. (I note *Doepel* is authority that I am not confined to the contents of the application itself when considering s. 190C(3)—at [16].)

I have considered the general reports lodged by the Gundungurra Tribal Aboriginal Corporation and the Warrabinga Native Title Claimants Aboriginal Corporation for the year ended 30 June 2010 with ORIC, which both contain lists of the current membership of each corporation. (I note that the Warrabinga-Wiradjuri applicant’s own information is that the membership of the Warrabinga corporation were invited to participate in the authorisation of the Warrabinga-Wiradjuri application.) There are no persons common to both membership lists.

I have also considered the Gundungurra membership list against what I know about the membership of the Warrabinga-Wiradjuri native title claim group, including the persons present at the authorisation meeting on 18 June 2011. There are no names in common that arise when looking at this documentation.

I have read both the amended Gundungurra application filed in the Federal Court on 8 October 1999 and the delegate’s registration test decision for that application dated 21 June 2000. The Gundungurra application and delegate’s reasons refer to a number of Gundungurra persons, including [seven names removed].

I note that schedule H of the Gundungurra application refers to a compensation claim lodged by the Warrabinga-Wiradjuri applicant, Wendy Lewis, and a copy of the relevant documentation in Attachment H indicates that at that time she was prosecuting such a claim on behalf of Warrabinga/Clans of North East Wiradjuri persons and not Gundungurra persons.

I have no information or submission to indicate that any Warrabinga-Wiradjuri claim group member was also a member of the Gundungurra claim group and there is no other information or submissions before me to indicate that there is any commonality between the two claim groups.

On the basis of the information available to me it appears that these applications are being prosecuted by different and competing claim groups. I have reached the view that I can be satisfied that no person included in the native title claim group for the Warrabinga-Wiradjuri application is also a member of the native title claim group for the previously registered Gundungurra application.

I encourage the Warrabinga-Wiradjuri applicant and their legal representative to pay attention to the details required by s. 62(2) and the Federal Court Rules as to the prescribed contents of the Form 1 for Schedules H and O respectively, in the event further applications are filed.

Subsection 190C(4)
Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

1. the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
2. the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

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

The application **satisfies** the condition of s. 190C(4).

Law

The application has not been certified and subparagraph 190C(4)(a) does not apply. My consideration of the authorisation of an uncertified native title determination application is governed by the terms of s. 190C(4)(b), namely, I must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Section 251B defines what it means for all the persons in a native title claim group to authorise a person or persons to make and deal with a native title determination application—the relevant persons authorise a person or persons, if:

1. where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group authorise the person or persons to make the application, and deal with matters arising in relation to it, in accordance with that process (a ‘traditionally mandated decision–making process’)
2. where there is no traditionally mandated decision–making process, the persons in the native title claim group authorise the person or persons to make and deal with the application, in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group (an ‘agreed and adopted decision–making process’).

I understand that the references in ss. 190C(4)(b) and 251B to all the persons in the native title claim group extending authorisation for the making of a native title determination application is not to be interpreted literally. Nonetheless the material before me must demonstrate that authorisation has flowed as a result of a decision or decisions in which the native title claim group as a whole has been afforded a reasonable opportunity to participate (absent a traditionally mandated decision–making process which provides otherwise) using one of the two decision–making processes identified in s. 251B.

The following additional legal principles govern my consideration of whether the applicant is authorised by all the other persons in the native title claim group:

Unanimous decision–making is not mandated, unless this is the case under the group’s traditional laws and customs which must be followed (i.e. a decision–making process under s. 251B(a).

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 agreed to and adopted by the persons in the native title claim group.

Agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement.

Authorisation by a majority of those who comprise a ‘native title claim group’ following an agreed and adopted process is possible. In other words, the requirement that ‘all’ the persons in the native title claim group authorise an applicant does not mean that a single dissentient or non–participant will invariably have an ability to veto authorisation.

‘Agreed to an adopted by’ imports the giving to all of those in the native title claim group, whose whereabouts are known and have capacity to authorise, every reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process.

In considering whether I am satisfied at s. 190C(4)(b) that the applicant is authorised by the ‘native title claim group’, I must give that term the meaning found in s. 61(1):

. . . all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed . . . [[1]](#footnote-1)

Interaction of ss. 190C(4) and 190C(5)

The application includes the information required by s. 190C(5)—this is found in Attachment R, which in fact comprises a short statement to the effect that:

the three persons comprising the applicant (Wendy Lewis, Mavis Agnew and Martin de Launey) are members of the native title claim group by virtue of their descent from an ancestor or ancestors named in Schedule A (which uses an ‘apical ancestor model’ to describe the persons in the native title claim group);

the applicant is authorised to make the application and to deal with matters arising in relation to it by the rest of the native title claim group following a claim group meeting held at Charbon on 18 June 2011 pursuant to a majority voting decision–making process which the members of the group present at the meeting unanimously agreed to and adopted.

Although the application contains the information required by s. 190C(5), it is still necessary for me to consider the substantive condition in s. 190C(4)(b). In *Doepel* at [78], Mansfield J states that ‘the interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.’ I am not limited to the information in the application or accompanying s. 62(1)(a) affidavits when considering this condition—*Strickland v Native Title Registrar* (1999) 168 ALR 242 at pp. 259-60, approved on appeal to the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [78].

Consideration

In relation to this condition, I have the statements in Attachment R and the affidavits made by the three applicant persons pursuant to s. 62(1)(a) accompanying the application. I have a range of other information provided by the applicant directly to the Registrar on 30 June 2011 in relation to their claimed authority from the rest of the native title claim group. I also have submissions from the competing NSD953/11 and NSD955/11 applicant and from [name removed] of the Wellington Valley Wiradjuri Aboriginal Corporation. I provided this potentially adverse information to the applicant, and have submissions and further information in response dated 15 and 18 July 2011 from its legal representative ([the applicant’s legal representative) and further information to address the concerns of the NSD953/11 and NSD955/11 applicant and Wellington Valley Wiradjuri people.

Finally, there is a range of information before me in relation to other native title claims in this area by the North East Wiradjuri People.

The applicant states in their s. 62(1)(a) affidavits filed in the Court on 22 June 2011 that their authority stems from a decision made at a meeting of the native title claim group in Charbon on 18 June 2011. They claim to be authorised by following an agreed to and adopted decision–making process which permitted the attendees at the meeting in Charbon to make a decision if a majority voted by show of hands in favour of that decision. I understand the applicant to claim that there are no traditional laws and customs which mandate how this decision must be made, thus allowing the group to agree and adopt a decision–making process which permitted a majority vote, which they did at the Charbon meeting.

There is some information about the native title claim group in the application:

Schedule A states that the claim is made on behalf of the descendants of six apical ancestors—Peggy Lambert, Jimmy Lambert, Dianna Mudgee, James “Tracker” Macdonald, Thullagumaulli and Aaron;

[A claim group member] (Attachment F2) states in her affidavit dated 21 June 2011 that:

the current members of the claim group descend from the union of Peggy and Jimmy Lambert through their daughter Rose Lambert and neither Peggy or Jimmy is known to have had children with any other persons—at [3]

there are no known descendants of Thullagumaulli or Aaron—at [2], [8] and [9]

It is clear from [the claim group member’s] evidence that the current members of the claim group thus claim to be descended from three ancestral lines—Peggy and Jimmy Lambert, Dianna Mudgee and James “Tracker” Macdonald. In a later affidavit dated 18 June 2011, [the claim group member] identifies that as Thullagumaulli is in the generation above Peggy and Jimmy Lambert and is part of her family’s oral history surrounding the giving of names, he may be a forebear of her family.

On 30 June 2011, the applicant provided additional information about the events leading up to and at the authorisation meeting in Charbon on 18 June 2011. This material was not filed in the Court with the application but has been prepared subsequently and provided as additional information to the Registrar to support the applicant’s claimed authority. I must consider this information as it is provided to me by the applicant—see s. 190A(3)(a). Further, I am not limited to what is in the application about authorisation but must consider all of the available and relevant information in the course of moving to a positive state of mind about the relevant matters in s. 190C(4)(b)—*Doepel* at [78].

The applicant’s additional information comprises:

Affidavit by [claim group member] dated 30 June 2011 describing the efforts that he made, as a member of the claim group and director of the Warrabinga Native Title Claimants Association, to arrange for the publication of a notice about the forthcoming authorisation meeting in two newspapers —“The Land” on 2 June 2011 and the “Mudgee Guardian” on 3 June 2011.

The following points emerge when reading the public notice, (copies of which are annexed to [the claim group member’s] affidavit):

Both notices disclose an intention to seek authority not only for a claim over the four s. 29 mining tenement notices the subject of this application, but standing authority to make further native title claims in a much larger area, in response to future mining tenement applications being notified in that area.

The Mudgee Guardian notice (Annexure “B”) provides a diagram or sketch of this larger area of country in which the persons described in the notice are said to hold native title.

The persons described in the notices are the descendants of five of the six ancestral lines named in schedule A and an additional four ancestral lines— John Bloodwood, Penaguin, Phillips Rayner and Sophia Allsop—raising the question of whether the descendants of those extra ancestors are properly part of the native title claim group from whom authorisation must flow for the making of this application.

The ancestral line of James “Tracker” Macdonald (being an apical ancestor named in Schedule A) was not identified in the notice, raising the question of whether his descendants were invited to participate in the authorisation process.

Affidavit by Wendy Lewis (one of the three persons comprising the applicant) dated 30 June 2011 describing the efforts that she made to ensure that the known descendants of James “Tracker” Macdonald were extended a reasonable opportunity to participate in the authorisation process, and the involvement of these descendants, either in person or by apology, at the authorisation meeting.

Affidavit by [the applicant's legal representative] dated 27 June 2011 describing his involvement in the authorisation process, as the applicant’s solicitor and chair of the authorisation meeting. Of particular note is [the legal representative’s] recount of the attendance at the authorisation meeting of approximately 20 to 30 people who disputed that the ancestors named in the notice were Wiradjuri people and who removed themselves to another part of the property to hold their own authorisation meeting.

Affidavit by claim group member [name removed] dated 29 June 2011 ([name removed] is the author of the affidavit in Attachment F2 of the application) describing her involvement and attendance at the authorisation meeting and her understanding of the representation at the meeting of the three ancestral lines for which there are known descendants, i.e. the union of Peggy and Jimmy Lambert, Dianna Mudgee and James “Tracker” Macdonald.

I also have a submission from [the applicant's legal representative] dated 30 June 2011 in relation to this additional information. [These] submissions address the numbers at the meeting and the efforts made to ensure the extending of a reasonable opportunity to the descendants of James “Tracker” Macdonald to participate in the authorisation process, notwithstanding the omission of his name from the public notice:

Numbers at the meeting

The number of claim group members who attended the authorisation meeting (13) needs to be considered in light of the overall membership, estimated at 300 to 400 people, not including children.

It is submitted that this represents a significantly greater representation than at the authorisation meeting considered in *Coyne v State of Western Australia* [2009] FCA 533 (*Coyne*), which found that 72 people were sufficiently representative of a group that numbered at least five to six thousand adults. [The legal representative] also refers to *Roe v Western Australia (No 2)* [2011] FCA 102 at [14].

All decisions at the Charbon authorisation meeting were made unanimously, whereas approximately 33% of the persons in attendance at the authorisation meeting discussed in *Coyne* voted against the decision taken to authorise that applicant.

Omission of James “Tracker” Macdonald from meeting notices

[The legal representative] refers to a similar event that arose in the Yued application (WC97/71), the subject of a registration test decision by a delegate of the Registrar on 3 September 2010, which also appears to have been the subject of evidence (including by [the legal representative]) discussed in *M.B (deceased) v Western Australia)* [2010] FCA 1110 at [4] and [6].

It is submitted that the omission of the Yued apical ancestral couple from the published meeting notices and the actions subsequently taken to include persons in the authorisation process and as part of the relevant native title claim group (being persons who came forward in response to the notice to identify their descent from this ancestral couple and their respective asserted connections with the area covered by the application and the native title claim group) are similar to the actions described by Wendy Lewis in [5] of her affidavit dated 30 June 2011.

I am of the view that there is nothing particularly problematic or controversial, on its face, about the omission of James “Tracker” Macdonald as an ancestral line from the public notice, in light of the evidence in Wendy Lewis’s second affidavit dated 30 June 2011 about the efforts that she made to involve the small number of his known descendants (four individuals are named by Wendy Lewis) and the apparent participation of those descendants in the authorisation process.

I am also of the view that there is nothing particularly contentious, on its face, about the asserted participation rates in an authorisation process within a relatively small claim group of 13 people in person and 29 people by written apology, where the former are said to have been in unanimity and the great majority of the latter are said to have expressed support for the proposed claims.[[2]](#footnote-2)

As to the size of the claim group, the general description of the factual basis in Attachment F states at [8] that it presently comprises 300 to 400 people (not including children) of whom approximately 50% live within the larger area of country shown on the diagram in the second notice and of whom most of the remainder regularly visit (three to four times a year).

More recent evidence by [name removed][[3]](#footnote-3) states that she gave personal notice informing claim gorup members of the forthcoming authorisation meeting to 55 members of the Warrabinga Native Title Claimants Association (WNTCA) and that she e-mailed the notice to a further 15 members. She also personally delivered a notice to one of James “Tracker” Macdonald descendants.[[4]](#footnote-4) As a result of these actions, [name removed] states that she gave notice of the meeting to all claim group members for whom the WNTCA had postal or email addresses.

According to the last general report available from ORIC dated 30 June 2010 the WNTCA had a membership of 45 persons. [name removed] also identifies at [15](b) of her first affidavit dated 21 June 2011 (in Attachment F2) that approximately 50 to 60 members of the claim group regularly hunt and fish with their country and the application area. Information provided by Wendy Lewis in her second affidavit dated 30 June 2011 indicates that there are relatively few known descendants of James “Tracker” Macdonald, namely, [names removed] and the sisters, [names removed], and their families.[[5]](#footnote-5)

The evidence I have reviewed about group numbers is indicative of a relatively compact group comprising the extended family networks from the three ancestral lines of the Lamberts, Dianna Mudgee and James “Tracker” Macdonald. In light of this evidence it is reasonable to assume that the task of giving personal notice of the meeting to known members of the group for whom addresses were held was accomplished, as is attested to by [name removed]. The group also took the added step of publishing the notice in a regional newspaper that circulates in the application area (the Mudgee Guardian) and in The Land. Although [name removed] attests that The Land circulates nationally, my review of the website for this publication indicates that it circulates in rural and regional New South Wales and does not have a national circulation. However, given the evidence that personal notice was given to all known members of the group for whom addresses were held, it would appear that a more extensive publication of the notice was not required in this case.

The public notice names an additional six ancestral lines (Thullagumaulli, Aaron, Sophia Allsop, Penaguin, John Bloodwood and Phillips Rayner) and then only includes two such lines (Thullagumaulli and Aaron) in the native title claim group description, despite a view that there are no known descendants from any of the six ancestral lines. (There is a belief, recently attested to by [name removed] in her third affidavit dated 18 July 2011 at [5] that Thullagumaulli may well be a forebear of Peggy or Jimmy Lambert and thus an ancestor of this branch of the native title claim group.)

The inclusion of Aaron and Thullagumaulli is explained in [name removed] first affidavit in Attachment F2[[6]](#footnote-6) and appears to me to be related to both men having been placed or identified in the historical record as of Wiradjuri descent or from this part of Wiradjuri country, supported by their own oral history, such that these two men have a particular resonance or importance and current members of the group wish to be identified as being related to these individuals.

The non-inclusion of Sophia Allsop, Penaguin, John Bloodwood and Phillips Rayner has been explained as relating to the fact that these persons are not known despite having been identified in earlier research undertaken by the NSW Native Title Services Ltd as being either Wiradjuri or from this region of Wiradjuri country in the post-contact period. It appears that the group wished to extend an opportunity to any descendants to participate in the authorisation and when no-one responded to the notice or attended the meeting, they decided that these ancestral lines could be safely omitted from the claim group description. This decision is related to none of the known group having any particular affiliation with or knowledge of such persons as being either Wiradjuri or from this part of Wiradjuri country in the post-contact period. This is explained in [name removed] second affidavit dated 29 June 2011 at [6] to [10].

Earlier manifestations of the native title claim group (known as the North East Wiradjuri People of the Bathurst/Lithgow/Mudgee area) with registered native title claims in this part of the world also defined themselves by descent from these ancestors. There is also some evidence in the Wiradjuri-Warrabinga NSD457/2010 application (now discontinued) that a descendant of Sophia Allsop had asserted his membership of this claim group.[[7]](#footnote-7) However, in her third affidavit dated 18 July 2011, [name removed] states at [4] that this individual, despite signing a mining agreement involving the North East Wiradjuri People, never provided a genealogy to substantiate his claim, has since moved to Western Australia and has made no further contact with them.

I accept the applicant’s evidence in this latest application that (1) there are no known descendants of Sophia Allsop, Penaguin, John Bloodwood and Phillips Rayner, and/or (2) no-one claiming descent responded to the public notice.

Having regard to the totality of the information before me, it would seem that the non-inclusion of descendants from Sophia Allsop, Penaguin, John Bloodwood and Phillips Rayner does not raise a real concern for me that the applicant may only be authorised by, or the application has been made on behalf of, a sub-group or something less than the entirety of the ‘native title claim group’, as that term is defined in s. 61(1).

There is information in the applicant’s additional information received on 30 June 2011 that around 20 or 30 persons arrived at the authorisation meeting and disputed that the ancestors named in the notice were Wiradjuri; and that they then removed themselves to another part of the property to hold their ‘own authorisation meeting’.[[8]](#footnote-8) Ms Lewis states in her affidavit dated 30 June 2011 that although she has known these people most of her life, none of them claim to be descended from the ancestors named in the public notice or from James “Tracker” Macdonald (whose name was omitted from the public notice).[[9]](#footnote-9)

However I received adverse information and submissions from three of the persons who say they tried to participate in the authorisation process—Bill Allen (part of the NSD953/11 and NSD955/11 applicant), [name removed] (the NSD953/11 and NSD955/11 legal representative) and [name removed] (a member of the registered Wellington Valley Wiradjuri native title claim group and director of the Wellington Valley Wiradjuri Aboriginal Corporation).[[10]](#footnote-10)

The NSD953/11 and NSD955/11 applications entirely overlap the Warrabinga-Wiradjuri application and have also been made in response to the four mining tenement notices covered by the Warrabinga-Wiradjuri application. The NSD953/11 and NSD955/11 applicant comprises Bill Allen, Joe Bugg, Stpehen Riley and John Brasher. The NSD953/11 and NSD955/11 claim group is generally described as the ‘Wiradjuri people being those Aboriginal people whose traditional land and waters are situated generally in the Bathurst/Lithgow/Mudgee district . . . who hold in common the body of traditional law and culture governing the area that is the subject of the claim’ and more particularly as the biological descendants of four apical ancestors: Windradyne, John (Jack) Riley, Wongamar and Lala Goodwin.

The Wellington Valley Wiradjuri people have a registered native title claim (NSD912/2009) to the north-west of the Warrabinga-Wiradjuri claim area. Although the Wellington Valley Wiradjuri claim does not overlap the Warrabinga-Wiradjuri application area, it clearly overlaps with the larger area of country shown in the Mudgee Guardian notice and over which the Warrabinga-Wiradjuri applicant claims to have received standing authority to lodge native title claims in response to any future mining tenement application notices. It is this notice which appears to have prompted the Wellington Valley Wiradjuri to write to the Tribunal on 14 June 2011 and to attend the authorisation meeting on 18 June 2011.

Mr Allen[names removed] were amongst the 20-30 persons referred to by [the applicant's legal representative] who came to the meeting.

The NSD953/11 and NSD955/11 claim group and the Wellington Valley Wiradjuri claim group reject the native title claims of the Warrabinga-Wiradjuri as articulated in the public notice. They say that they sent representatives to the meeting with the intention of refusing to authorise such a native title claim or claims in the Wiradjuri country over which they assert native title rights and interests as Wiradjuri people from the Wellington Valley area and the Bathurst/Lithgow/Mudgee area respectively. [name removed] (Wellington Valley Wiradjuri) and Mr Allen (Bathurst/Lithgow /Mudgee Wiradjuri) say that they were refused permission to participate in the Warrabinga-Wiradjuri authorisation process.

The response to this adverse information from the Warrabinga-Wiradjuri applicant is that none of these persons are descended from any of the apical ancestors described in the public notice and are not part of the native title claim group required to authorise the native title claim or claims identified in the public notice.[[11]](#footnote-11)

In my view, the proper constitution of a native title claim group who extend authority to an applicant is a necessary part of the s. 190C(4)(b) decision—*Risk* at [60]–[62] and *Watson* at [31]–[36]. The information I have reviewed from Mr Allen, [names removed] indicates that there is a dispute about the inclusiveness of the native title claim group who were permitted to participate in the authorisation of the Warrabinga-Wiradjuri native title claim.

I am also aware that persons in each of the NSD953/11 and NSD955/11 and the Warrabinga-Wiradjuri applications have in the past together prosecuted a series of native title determination applications as one native title claim group, known as the North East Wiradjuri People of the Bathurst/Lithgow/Mudgee region (the North East Wiradjuri People). The North East Wiradjuri People claim group included the descendants of four of the ancestral lines named in the new Warrabinga-Wiradjuri application (Peggy and Jimmy Lambert, Dianna Mudgee, Aaron and Thullagumaulli) and one of the ancestral lines named in the NSD953/11 and NSD955/11 applications (Windradyne). I provide some brief details surrounding these relevant native title determination applications in Attachment A at the end of this statement.

I understand that a dispute arose in 2009[[12]](#footnote-12) such that the former North East Wiradjuri People claim group has entirely disbanded and this continues to be the subject of litigation in the NSW Supreme Court (*Allen, in the matter of North East Wiradjuri Co Limited (Administrators Appointed)* [2010] FCA 1248 surrounding the appointment of administrators to companies or trust funds formed by the original North East Wiradjuri People claim group to manage native title future act payments. Presumably these payments were received following the Registrar’s acceptance of and entry of the claims referred to in Attachment A on the Register of Native Title Claims pursuant to s. 190A.

It appears to me that the former North East Wiradjuri People claim group has split in two, such that the descendants of Peggy and Jimmy Lambert, Dianna Mudgee, Aaron and Thullagumaulli (together with the descendants of a newly identified ancestor, James “Tracker” Macdonald) have authorised the Warrabinga-Wiradjuri application and the descendants of Windradyne (together with the descendants of three newly identified ancestors, Wongamar, John (Jack) Riley and Lala Goodwin) have authorised the NSD953/11 and NSD955/11 applications.

A key part of each group’s new claim is that they reject the claims of the other group; they say that they are the correct group because they are descended from Aboriginal persons who were alive at the time of or after European settlement in this particular region and who have a Wiradjuri identity in the historical record, a claim which is supported by each group’s own oral history.

Mr Allen’s information particularly questions the Wiradjuri identity of most of the Warrabinga-Wiradjuri ancestors (with the exception of Jimmy Lambert) and the current Wiradjuri identity of the [family names removed] families, because of his view that they are not descended from known Wiradjuri post-contact ancestors and/or have lost their connection with the wider Wiradjuri normative system that has operated in the region since European settlement in the 1820s.

In turn the Warrabinga-Wiradjuri applicant provide a factual basis to support that their group hold native title under the traditional laws and customs of a wider Wiradjuri normative system whereby native title is held by various sub-groups in particular regions of wider Wiradjuri country. The Warrabinga-Wiradjuri applicant reject the notion that Mr Allen’s ancestor, Windradyne, has any known descendants ([name removed], dated 18 July 2011, at [6]) on the basis of advice received from an NSW Native Title Services Ltd anthropologist in June 2007.

Having considered the totality of the submissions and information before me, I have decided that this is a situation where there is a dispute about the correct native title claim group for the application area, rather than an application authorised by a sub-group only of the real native title claim group. It is noteworthy in my view that the NSD953/11 and NSD955/11 claim group authorised its own native title claim in this area on behalf of a differently constituted claim group than that described in the Warrabinga-Wiradjuri application.

It is a concern in my view that there has been considerable activity in this region over a number of years by an apparently larger and more inclusive native title claim group than the one that is found in either of the Warrabinga-Wiradjuri or NSD953/11 and NSD955/11 applications. Many claims have been registered for this differently composed and apparently larger native title claim group. Individuals who are part of the Warrabinga-Wiradjuri claim group (and, for that matter, the NSD953/11 and NSD955/11 claim group) not only made these claims as a person or persons authorised by the North East Wiradjuri People claim group, but also provided signed affidavits to support registration in favour of this differently composed and potentially larger native title claim group.

I am conscious that the registration test, particularly the conditions of s. 190C(3) and s. 190C(4), were designed by parliament to prevent competing native title claims by factions or elements of what are in reality the same native title claim group from securing the significant statutory rights that flow from being entered on the Register of Native Title Claims. I note that the *Native Title Amendment Act 1998* (Cwlth) also implemented significant changes to s. 61, such that a claimant native title application may only be made by a person/s authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed and must either name the persons in the native title claim group or provide a sufficiently clear description of the persons who have extended the requisite authority—ss. 61(1) and (4).

The importance of ss. 61(1) and 61(4) to the legitimacy of a native title determination application and its ultimate prospects of success has been the subject of much litigation, for example, *Harrington-Smith v Western Australia (No. 9)* [2007] FCA 31 at [1171] to [1172], [1175], [1186], [1189] to [1193], [1200] to [1204], [1269], [1293], and [2896]; *Dieri People v South Australia* [2003] FCA 187 at [55] to [57] and *Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 at [17] to [28].

However, in light of my finding that this is a dispute about the correct native title claim group rather than the inclusiveness of that group, it is not in my view appropriate that I endeavour to make any findings about the former issue. That, in my view, is a matter for the Court following notification of this claim pursuant to s. 66 and the joinder of respondent parties, including those Wiradjuri persons or groups who assert native title on a different basis to that articulated in this application.

Conclusion

The evidence I have reviewed shows that the native title claim group do not have traditional laws and customs which mandate a decision–making process that must be followed. The evidence indicates that the group have utilised a ‘majority vote’ agreed and adopted decision–making process which they adopted at an authorisation meeting on 18 June 2011.

The affidavits by [name removed] (30 June 2011), Ms Lewis (30 June 2011) and [name removed] (29 June and 18 July 2011) are sufficient in my view to show that notice of the meeting was provided by a variety of means including publication in two papers that circulate in the region and by giving the notice personally to all known members of the group, of which there would appear to be about 71 persons ([name removed], dated 18 July 2011, at [2]).

[Name removed], the group’s legal representative, has made an affidavit dated 27 June 2011, in which he details the attendance of 13 claim group members and the passing by acclamation or unanimously of decisions or resolutions which agreed the relevant decision–making process of a majority vote and then extended authority to the applicant using that process. [name removed] has made an affidavit dated 29 June 2011 stating at [5] that she received 31 apologies before the meeting, the great majority of which supported the proposed claim, either by telephone or in writing.

I am satisfied on the basis of the information provided by the applicant and also by their legal representative and other claim group members involved in the authorisation process that the applicant is authorised. I am also satisfied that the three persons comprising the applicant are members of the native title claim group—they have each deposed to this fact in their s. 62(1)(a) affidavits.

It appears to me that the applicant is authorised using a ‘majority vote’ agreed and adopted decision–making process at the meeting in Charbon on 18 June 2011, after extending a reasonable opportunity to known members of the native title claim group to participate in the authorisation process. It appears that the participants in the authorisation process (either in person or by apology) agreed and adopted the relevant process and then used that process to authorise the applicant to make this native title determination application and to deal with matters arising in relation to it.

Merit conditions: s. 190B

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

The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

The application **satisfies** the condition of s. 190B(2).

Schedule B describes the external boundaries of the application area by reference to the external boundaries of four mining tenement applications, the relevant details of which are provided in Schedule B. A map which clearly shows the location and boundaries of each mining tenement application is found in Attachment C of the application. The map additionally contains a topographic background image, scalebar and north point and notes relating to the datum used to prepare the map. A report by the Tribunal’s Geospatial unit dated 28 June 2011 states that the description and map are consistent and identify the application area with reasonable certainty.

Having regard to the comprehensive identification of the application area by reference to known mining tenement applications and the clarity of the mapping of the application area in Attachment C, I am satisfied that the application area has been described and mapped such that the location of it on the earth’s surface can be identified with reasonable certainty.

A written description of the areas within the external boundary that are not covered by the application (i.e. the internal boundary) is found in Schedule B. This is a generic description that excludes from the application any areas subject to a number of acts defined in the Act, including the tenures or grants described in s. 23B of the Act. It also states that the application does not include areas where native title has otherwise been extinguished.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of a tenure history or other information such that a more comprehensive description of these areas would be required to meet the requirements of the section. The applicant expressly states in Schedule D that it has not made any searches of non-native title interests. In these circumstances, I find that the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless, it is reasonable to expect that the task can be done on the basis of the information in Schedule B.

For these reasons, I am satisfied that the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters, and the requirements of s. 190B(2) are therefore met.

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

The Registrar must be satisfied that:

1. the persons in the native title claim group are named in the application, or
2. the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The application **satisfies** the condition of s. 190B(3).

The description of the native title claim group in Schedule A of the application is in these terms:

The application is made on behalf of the descendants of the following persons:

Peggy Lambert Jimmy Lambert

Dianna Mudgee James “Tracker” Macdonald

Thullagumaulli Aaron.

As the members of the native title claim group are not named it is necessary to consider the application against the requirements of subparagraph 190B(3)(b).

In my view descent from named ancestors is an acceptable mechanism and provides the requisite clarity required by s. 190B(3)—see *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591. It follows that I am 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.

Subsection 190B(4)
Native title rights and interests identifiable

The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

The application **satisfies** the condition of s. 190B(4).

My view is that for a description to meet the requirements of s. 190B(4), it must describe what is claimed in a clear and easily understood manner—see *Doepel* at [91] to [92], [95], [98] to [101] and [123].

The application provides a description of the claimed native title rights and interests in Attachment E in the following terms:

**The Qualifications**

The applicants claim in relation to the claim area, including land and waters, the native title rights and interests set out below **("the Rights and Interests"**) subject to the following qualifications:

(i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of New South Wales, they are not claimed by the applicants.

(ii) To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not claimed to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of New South Wales or accorded under international law in relation to the whole or any part of the offshore place.

(iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the Native Title Act 1993 (Cth), was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of New South Wales, and a law of that State has made provision as mentioned in section 23I in relation to the act.

(iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the *NTA* as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

(v) The native title rights and interests claimed are subject to any valid rights created under the common law or a law of the State or the Commonwealth.

**The Rights and Interests**

Subject to the above qualifications, the rights and interests claimed in relation to the claim area, including land and waters, are:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply) the Claim Group claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the Claim Group.

2. Over areas where a claim to exclusive possession cannot be recognised, the Claim Group claim the following rights and interests:

(a) the right to access and move about the land;

(b) the right to hunt and fish, to gather and use the resources of the land and waters such as food and medicinal plants and trees and ochre;

(c) the right to have access to and use of water on or in the land and waters;

(d) the right to live, being to enter and remain on the land, to camp and erect temporary shelters and other structures for that purpose, and to travel over and visit any part of the land and waters;

(e) the right to light camp fires;

(f) the right to engage in cultural activities on the land;

(g) the right to hold meetings on the land; and

(h) the right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters.

I find this description clear and understandable. I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified for the purposes of s. 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

1. that the native title claim group have, and the predecessors of those persons had, an association with the area, and
2. 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 interest, and
3. that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **satisfies** the condition of s. 190B(5).

Nature of the task at s. 190B(5)

This was analysed by Mansfield J in *Doepel* who said the following:

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That 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. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. 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.

This assessment was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (French, Moore and Lindgren JJ) (*Gudjala FC*)—at [83] to [85], an appeal from the decision by Dowsett J in *Gudjala 2007*. The Full Court had this to say about the requirements of s. 62(2)(e) (which calls for the applicant to provide a general description of the factual basis within the application form) and how this feeds into what will amount to a sufficient factual basis under s. 190B(5):

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*—at [92]. (emphasis added)

The Full Court indicated at [93] of *Gudjala FC* that it would be wrong for the Registrar to approach the material provided in relation to the factual basis ‘on the basis that it should be evaluated as if it was evidence furnished in support of the claim’.

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the material as if it were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the application and the accompanying documents in relation to the factual basis, apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out s. 190B(5).

*Gudjala FC* considers the analysis by Dowsett J in *Gudjala 2007* of the elements a sufficient factual basis must address to meet the requirements of s. 190B(5).*[[13]](#footnote-13)* There is nothing to indicate that the Full Court considered Dowsett J to have erred in his analysis of the particular assertions in s. 190B(5). It appears that Dowsett J, although mindful of the Full Court’s direction on how to treat the factual basis materials, applied the same principles to his analysis when he again considered the Gudjala People #2 application against the registration test in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [18] to [77]. In my view, comments by Dowsett J in *Gudjala 2009* about what a sufficient factual basis must address are similarly relevant to the Registrar when undertaking the task at s. 190B(5).

I refer to the comment by Dowsett J in *Gudjala 2009* that the Registrar, in performing the task at s. 190B(5), 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’—*Gudjala 2009* at [29].

It would not, according to Dowsett J in *Gudjala 2009*, be sufficient for an applicant to simply assert that the claim group’s laws and customs are traditional because they derive from a pre-sovereignty society of which they are descendant. That would merely be a restatement of the claim without any factual basis; ‘there must at least be an outline of the facts upon which the applicant relies’—at [29].

In my view, the approach by Dowsett J in *Gudjala 2009* in relation to each of the particular assertions did not differ markedly to the approach which he took in *Gudjala 2007*, with the possible exception of a less stringent approach to the first assertion in s. 190B(5)(a), found to be met on the material before his Honour when considering the application a second time—*Gudjala 2009* at [79] and [80].

I note that in *Gudjala 2007* Dowsett J said that ‘it was necessary 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]. However, it is my view that these comments need to be considered in the overall context of what else has been said on the nature of the Registrar’s task and the requirements of s. 190B(5):

* the applicant is not required ‘to provide anything more than a general description of the factual basis’—*Gudjala FC* at [92];
* the nature of the material provided need not be of the type that would prove the asserted facts —*Gudjala FC* at [92];
* the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47];
* the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests—*Doepel* at [17].

In this matter, I have received adverse information disputing the asserted native title rights and interests of the Warrabinga-Wiradjuri from a competing claim group (NSD953/11 and NSD955/11) and another Wiradjuri claim group who have a registered claim in the wider area of country which the Warrabinga-Wiradjuri assert to be theirs (Wellington Valley Wiradjuri NSD912/2009).

The adverse information from the Wellington Valley Wiradjuri[[14]](#footnote-14) is that their own anthropological research by [name removed] for a period in excess of 12 years did not establish that any of the Warrabinga-Wiradjuri ancestors are Wiradjuri. It is said that ‘no other Wiradjuri familes accept the [names removed] subgroup or their families as Wiradjuri nor have their antecedents been accepted for several generations (or if ever) as Wiradjuri people.’[[15]](#footnote-15) I am referred to an excerpt of a report from [name removed] said to establish that biological descent alone from named ancestors is not sufficient to attain group rights; there must also be a Wiradjuri affiliation for at least the two prior generations; self-identification is not a valid basis for claiming to be Wiradjuri; status as a member must be validated by other members of the group, past and present.[[16]](#footnote-16)

The Wellington Valley Wiradjuri application area lies to the north-west of the Warrabinga-Wiradjuri application area and does not overlap the Warrabinga-Wiradjuri application. There is an overlap however with the larger area of country said to be Warrabinga-Wiradjuri (see statements to this effect in [4]–[5] of Attachment F and the map in Attachment F1).The Tribunal’s Geospatial unit has produced a ‘mud map’ dated 7 July 2011 and it shows the approximate extent of a significant overlap between the larger Warrabinga-Wiradjuri area and the Wellington Valley Wiradjuri area.

The adverse information from the NSD953/11 and NSD955/11 applicant includes information said to establish that with the exception of Jimmy Lambert, (who is accepted as a Wiradjuri man of the Dabee clan who lived in the northern part of the Bathurst/Lithgow/Mudgee area at the time of European contact), none of the other four named ancestors can be verified as ancestors of the Wiradjuri. There is also information about Wendy Lewis, [two names removed andMartin DeLauney said to establish that neither they, nor their predecessors, have any connection in a native title sense with either a Wiradjuri identity or with the area covered by this new application.[[17]](#footnote-17) Mr Allen provides information said to establish that although Jimmy and Peggy were a married couple, he did not father any children with her. It is Mr Allen’s view that Peggy may have been a Wonnaruah woman, as Jimmy Lambert is understood to be the only Wiradjuri survivor of the Dabee massacre. Mr Allen concedes that Peggy might have been the only Dabee woman to escape (with two daughters); however as Wiradjuri law does not permit inter-marriage, it is more likely, in Mr Allen’s view, that Jimmy lived with Peggy because she was not Wiradjuri.

In response, the Warrabinga-Wiradjuri applicant has provided an affidavit by [name removed] dated 18 July 2011, in which she states, relevantly:

*6. At a meeting relating to native title and a mine called Moolarben, 16th and 17th June, 2007, [name removed], a social anthropologist . . . from NSW Native Title Service Ltd . . . announced that he had not been able to establish any living persons as having genealogical links to Wyndradine. I therefore do not accept the claims of Bill Allen or others to be descendants of Wyndradine.*

*8. I always knew that I was Aboriginal, and that I was Wiradjuri. At all stages of my life, I have associated with other Wiradjuri people. At high school in the late 1950s, I knew [name removed] and her sister [name removed], both nieces of [name removed]. We acknowledged each other as being Wiradjuri. From the early 60s, I was part of a Wiradjuri diaspora based in Liverpool and also mixed with members of the Wiradjuri diaspora based in Redfern. I associated with Wiradjuri people including [names removed], members of the [name removed] family from Wellington, [names removed], members of the [name removed] family, [name removed] from Condobolin, [names removed]. I acknowledged those people as Wiradjuri, and they acknowledged me as Wiradjuri. When you met someone for the first time, you would ask each other questions like: “Who’s your father?”, or “Who’s your mob?”. From that, you could work out how people fit genealogically, and where their country was. It was only in the late 1990s when disputes over native title claims started to leave to challenges from some other Wiradjuri people over the Wiradjuri identity of my sisters and me.*

There is no doubt a significant dispute between these two competing groups and what is being put to me now about the identity of the ancestors and current group members must be considered in the context of that dispute. It is noteworthy also that in previous native title claims, individuals who are now part of the Warrabinga-Wiradjuri and the NSD953/11 and NSD955/11 groups respectively, provided affidavit evidence to support that Windradyne, Peggy and Jimmy Lambert, Thullagumaulli, Aaron and Dianna Mudgee were all Wiradjuri persons from the post-contact era and that all of their descendants were entitled to be regarded as having a real and credible claim to native title in this part of the world. It is difficult to be sure that the larger native title claim group which prosecuted those earlier claims has now entirely fractured; however I feel constrained by the case law as to the limited role for the Registrar in examining the sufficiency of the factual basis for the asserted native title rights and interests.

I have ultimately concluded in the face of the significant comments by the Court over the years on the limits of the s. 190B(5) consideration, that these disputed issues of fact are not my province. It is not for me to supplant the Court’s role. What is required is to consider the quality of the applicant’s asserted factual basis for the claimed rights and interests; but only in the sense of ensuring that, if they are ultimately found by a Court to be established, they can support the existence of the claimed native title. The role is to determine whether the asserted facts can support the claimed conclusions; but it 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. I conclude that disputed issues relating to the correct identity of the native title holders are issues for the trial and it is not appropriate that I endeavour to resolve them here.

Section 190B(5)(a)—that the native title claim group have, and the predecessors of those persons had, an association with the area

I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for this assertion needs to address:

That the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times.

That there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

This analysis of what the factual basis materials must support in relation to the assertion in s. 190B(5)(a) was not criticised by the Full Court in *Gudjala FC*—see [69] and also at [96].

For this particular assertion, the applicant provides the following factual basis in the application (the truth of which is affirmed by each of the three persons comprising the applicant in their accompanying s. 62(1)(a) affidavits):

Statements in paragraphs [4] to [9] of Attachment F:

***The predecessors of the native title claim group had an association with the application area [s.62(2)(3)(i)]***

1. *Immediately prior to 7 February 1788, the predecessors of the native title claim group acknowledged and observed the traditional laws and customs referred to in paragraphs 1 to 3 above, and belonged to a number of clan groups sharing the same dialect, which collectively held the specific rights and interests claimed in this application in relation to an area for which the approximate boundaries are shown on* ***Map F1*** *attached (being an area which included the whole of the area which is subject to this application), in accordance with these laws and customs. They occupied the application area in accordance with these laws and customs. These laws and customs included a law by which rights to country were passed down through cognatic descent, with membership also requiring identification with country indicated on Map F1, and acknowledging and observing the laws and customs of the wide Wiradjuri Nation.*
2. *Effective settlement of Warrabinga-Wiradjuri country occurred in the 1820s. As a result of massacres, numbers were decimated, and the few families which survived assumed rights and responsibilities for the whole of the dialect area, being the area indicated on Map F1. This was a phenomenon which was replicated throughout the wider Wiradjuri Nation, and it represented an adaptation of the law of group succession as it was acknowledged and observed throughout the Wiradjuri Nation immediately prior to 7 February 1788, whereby neighbouring kin had the right and responsibility to assume ownership of “orphaned” country. [footnote 3: Because of this, it is not necessary to establish for the purpose of this proceeding the identity of boundaries of the pre-contact clans within the dialect group]*
3. *The survivors of these massacres – including the named claim group ancestors Peggy and Jimmy Lambert, Dianne Mudgee and James “Tracker” Macdonald and the next two to three generations of their families – generally lived and worked on stations within their country, or worked at other jobs within their country. (By way of illustration, Jimmy and Peggy Lambert lived and worked on Dabee Station.) This gave them the freedom to continue to visit places of significance within their country, to hunt, gather and use the resources of their country, and to transmit the laws and customs relating to land to each successive generation. Through active kin-networks, these families maintained knowledge of each other, as persons holding rights in relation to their country under the laws and customs of the wider Wiradjuri Nation. These families were not forced to live on missions, but remained practicing an independent lifestyle through to what might be termed the “modern” era which commenced in the late 1960s. Accordingly, each generation of the predecessors of the present native title claim group continued to collectively acknowledge and observe a system of traditional laws and customs relating to land, including those listed in paragraph [3] above.*

***The native title claim group has an association with the application area, and has continued to hold the claimed native title in accordance with the traditional laws and customs that give rise to that native title [s.62(2)(3)(i) and (iii)]***

1. *The particular native title rights claimed by the native title claim group in relation to the application area are group rights and interests held under the communal native title of the wider Wiradjuri Nation.*
2. *The native title claim group presently comprises approximately three to four hundred people (not including children), of whom approximately 50% presently live within the area loosely identified on Map F1, and of whom most of the remainder regularly visit that country (and generally visit it three or four times a year). The oldest surviving members of the claim group are now in their eighties. The present members of the native title claim group continue to collectively acknowledge and observe a system of traditional laws and customs relating to land, including those listed in paragraph [3] above.*
3. *For further information, see the copy of an affidavit affirmed by [name removed] which is* ***Attachment F2****.*

Affidavit by [name removed] in Attachment F2:

1. *I was born in [place name and date of birth removed]. I am a member of the claim group as described in this application. My father was [name removed]. His mother was [name removed]. [name removed] father was [name removed]. [name removed] mother was [name removed]. [name removed] was the daughter of Peggy and Jimmy Lambert.*

***CLAIM GROUP COMPOSITION***

1. *The presently identified current members of the native title claim group comprise descendents of the following ancestors:*
	1. *Peggy Lambert;*
	2. *Jimmy Lambert;*
	3. *Dianne Mudgee; and*
	4. *James “Tracker” Macdonald.*
2. ***Peggy Lambert and Jimmy Lambert*** *were a married couple; the claim group members descended from them are in fact descendants of the union between these two people, through their daughter Rose Lambert. Neither is known to have had children with any other person.*
3. *I was told by my grandmother [name removed] that Peggy and Jimmy Lambert were both full-blood Aboriginal people from the Rylestone area, and leaders of the Dabee clan (being one of the clans within the dialect group which collectively owned the area identified as Warrabinga-Wiradjuri country on Map F1 to this application). She told me that they were survivors of a massacre which took place at Bremar, in the Capertee Valley. Our family still holds the “King” plate that was given to Jimmy Lambert, and the “Queen” sash that was given to Peggy Lambert. Both of them were born circa 1830.*
4. ***Dianne Mudgee*** *was born circa 1820-1826 in the Mudgee area, and was native to that area (being an area within the area identified as Warrabinga-Wiradjuri country on Map F1 to this application). Oral history holds that her Wiradjuri name was Emanjili or Irinjili, meaning “strong, harmonious black woman; peacemaker”. After her partner, Robert Raynor, died in 1874, she lived with her son Shadrack at Piambong, until her death in 1902.*
5. ***James “Tracker” Macdonald*** *was an Aboriginal man, and a member of one of the clans within the dialect group which collectively owned the country identified on Map F1 prior to effective European occupation of that area. He was born circa* ***1872****. He worked as a policeman, which is how he came to be given the nickname “Tracker”.*
6. *Nan and my father told me since I was a child that the families of Dianna Mudgee and James “Tracker” Macdonald were part of our mob.*
7. ***Thullagumaulli*** *is recorded in an 1833 blanket return as a member of the Dabee “tribe”, and as having been approximately 34 years of age at the time. A copy of the relevant page from the blanket return is annexed hereto and marked* ***“A”.*** *(The relevant entry is number 18, towards the bottom of the page) Although we (meaning the other members of the claim group and me) are not presently aware of any living descendants of Thullagumaulli, it is culturally important for us to leave it open for any surviving descendants who may exist to be able to assert membership of the claim group, as the name has been handed down through oral history. “Thullagumaulli” was the nickname given to my father’s brother Charlie (and I note that the blanket return records the “original” Thullagumaulli as having the given name of “Charley”). My uncle is now deceased, but when he was still alive, he used to answer the phone: “Hello, Thullagumaulli here!”. He wept when we discovered the blanket return which verified the origin of his nickname.*
8. *Similarly, we are not aware of there being any surviving descendants of the guide known as* ***Aaron,*** *but we are nevertheless concerned to leave it open for any surviving descendants who may exist to be able to assert membership of the claim group, because we believe that he was a member of our people; indeed, oral history holds that my ancestor Jimmy Lambert considered it important that he be buried at the place near Cudgegong, Rylestone, Kandos and Charbon known as “Aaron’s Pass”.*

***TRANSMISSION OF TRADITIONAL LAWS AND CUSTOMS***

1. *My main teachers were my Nan and my father.*
2. *They taught me a combination of spoken word (for example, telling me where the boundaries of our country are) and practical instruction (for example, by showing me how to manufacture twine from the sinews of a wallaby).*
3. *They told me where our country was, and took me to show me where the boundaries were. They taught me about places of importance within our country by taking me there, and telling me the historical or mythological stories connected with them. One special place within our country that my Nan showed me – and which me and other claim group members continue to visit and take care of – is Dunn’s Swamp, for which the Wiradjuri name is “Gunguddy”.*
4. *My Nan taught me how to use the sinew from wallabies as thread for sewing by demonstrating it for me. She showed me how you could use a cross-hatching stitch to sew two wallaby skins together.*
5. *On the basis of my discussions throughout my lifetime with numerous other members of the claim group, I know that this manner of teaching has been reasonably uniform throughout the claim group. In turn, my generation of the claim group pass on the same laws, customs and cultural history to the younger generations of the claim group.*

***DETAILS OF ACTIVITIES WHICH ARE CARRIED OUT BY MEMBERS OF THE NATIVE TITLE CLAIM GROUP WITHIN THE AREA SHOWN ON MAP F2 (sic) AND THE APPLICATION AREA IN SUPPORT OF EACH OF THE RIGHTS AND INTERESTS CLAIMED IN THE APPLICATION***

1. *The laws and customs which I discuss below are all laws and customs that I was taught by my Nan or my father through the methods discussed and illustrated at [11] to [14] above, and which other senior members of the claim group were taught by their own immediate ancestors.*
2. ***The right to access and move about the land***

*Members of the claim group walk throughout our country and the application area, monitoring the country. This is done in exercise of our right and responsibility as land-owners to care for our country, pursuant to Wiradjuri law. Most of those claim group member who live outside our country regularly visit our country and visit with kin, as this is necessary to affirm their identity as a “landowner” under Wiradjuri law. One rule that I was taught by my Nan – and which continues to be acknowledged and observed by the members of the claim group as a whole – is that if your child is born outside our country, you need to bring that child to our country before it is twelve months old. One claim group member in her 30s who lives in Tasmania (a descendant of James “Tracker” Macdonald) comes back to our country twice a year. She always stops by my place on these visits to see if I am at home. If I am not there, she will leave me a note.*

1. ***The right to hunt and fish, to gather and use the resources of the land and waters such as food, medicinal plants and trees and ochre***

*Approximately fifty to sixty members of the claim group regularly hint and fish within their country and the application area, in accordance with the laws and customs which govern those activities, including the following:*

* *When hunting kangaroos or wallabies, you can only take the males, not the females (the same applies to freshwater eels). You only take what you and other members of the group need; you only kill to eat. You must share what you take within the claim group.*
* *Because we are freshwater people, the only water creatures we can eat are yellow-belly fish, yabbies and eels. (I hate the coast, because of all the beautiful fish that I am not allowed to eat!)*
* *Before cooking echidna, you must remove the tongue.*
* *There is one place in our country that has poisonous berries. If you crush them up and spread them on the water, the fish will be stunned, and it is then easy to grab them.*

*Claim group members gather reeds, from which twine is produced by using the stripping-and-rolling technique that has been handed down from each generation of the claim group to the next. That twine is then used to weave baskets, or as fishing line.*

*There is one plant in our country that can be used to heal cuts.*

*You can suck on the leaf from a particular tree when you are thirsty.*

*One type of pink-flowering ironbark tree in our country has honey in it.*

*Claim group members take and use red and white ochre for body decorations.*

1. ***The rights to have access to and use of water on or in the land and waters***

*In the hills throughout our country and within the application area, there are springs and soaks; my Nan taught me how to dig them out to liberate the water. We use all the creeks throughout our country and the application area, in exercise of our rights as landowners under Wiradjuri law.*

1. ***the right to live, being to enter and remain on the land, to camp and erect temporary shelters and other structures for that purpose, and to travel over and visit any party of the land and waters***

*Approximately half of the present members of the native title claim group reside permanently within our country. At least once a year, groups of claim group members will go camping within the application area, and will build temporary shelters using the techniques which have been passed down from each generation of the claim group to the next. This is done in exercise of our rights as landowners under Wiradjuri law. As mentioned above, members of the claim group walk throughout our country and the application area, monitoring the country. We do so in exercise of our right and responsibility as land-owners to care for our country, pursuant to Wiradjuri law.*

1. ***The right to light camp fires***

*On the camping trips discussed above within the application area, we light camp fires. Again, this is done in exercise of our rights as landowners under Wiradjuri law.*

1. ***The right to engage in cultural activities on the land***

*We regularly organise cultural camps which are held within our country, for the purpose of teaching claim group members the laws which are discussed throughout this paragraph, and to teach them the techniques which are discussed throughout this paragraph. Senior members of the claim group teach these things in the same manner that we were taught ourselves by our Elders. While these camps are targeted at the younger generations of the claim group, they are open to all members, so that adults who want to re-affirm their identity as landowners have the opportunity to do so. These camps play an important role in ensuring (as they do ensure) that the claim group as a whole continues to acknowledge and observe the traditional laws and customs which connect us to our country.*

1. ***The right to hold meetings on the land***

*All claim group meeting are held within our country. This provides a good opportunity for claim group members to affirm their identity as landowners under Wiradjuri law by visiting their country and visiting with kin.*

1. ***The right to teach the physical and spiritual attributes of places and area of importance on or in the land and waters***

*An important part of transmitting knowledge of our laws and customs and knowledge of country involves teaching stories relating to places within country. This is often best done by visiting the places in question. One story which I was taught, and which is now being passed on to younger generations of the claim group, is the story of Gurandagee the eel and Murrigan the hunter Native Cat or Quoll. Murrigan tracked Gurandagee through different bodies of water, forming parts of the landscape within our country as he went. He called others to assist him with the hunt. When he finally caught Gurandagee, he didn’t kill him; he just took enough flesh from his body to feed himself, and the others who had helped him.*

In my view the totality of the information provided in Attachment F, including [name removed] affidavit, amounts to a factual basis which is sufficient to support the assertion that the native title claim group as a whole currently have an association with the application area. The evidence provided in [name removed] affidavit in Attachment F2 provides specific information outlining the current association by the group as a whole with the application area. I refer to the following excerpts from paragraph [15]:

members of the claim group walk throughout our country and the application area monitoring the country and this is done in exercise of their rights and responsibility as land owners to care for their country, pursuant to Wiradjuri law;

most of the claim group who live outside country visit it regularly and visit with kin, as this is necessary to affirm your identity as a “land owner” under Wiradjuri law;

one rule taught to her by her Nan is that if your child is born outside country, you need to bring that child back before it is 12 months old;

one member in her 30s (a descendant of James “Tracker” Macdonald) comes back twice a year and always stops by to visit her;

approximately 50 to 60 members regularly hunt and fish within their country and the application area, in accordance with the laws and customs governing these things, including only taking males of the species and what is needed for food and then sharing what is taken within the claim group;

approximately half the present members of the native title claim group reside permanently within their country. (I understand this phrase to refer to the wider area of country identified on the rough map in Attachment F1 of the application.) At least once a year groups of claim group members will go camping within the application area and will build temporary shelters using techniques which have been passed down from generation to generation. This is done in exercise of their rights as landowners under Wiradjuri law. They light fires, in exercise of their rights as landowners under Wiradjuri law;

cultural trips are held on country to teach Wiradjuri laws to members of the group and to teach the techniques discussed throughout paragraph 15 of [name removed] affidavit;

an important part of transmitting knowledge of their laws and customs and knowledge of country involves teaching stories relating to place within country. One story taught to [name removed] and which is now passed on to younger generations of the claim group is the story of the Gurandagee the eel and Murrigan the hunter native cat or quoll.

I am also satisfied that the factual basis provided is sufficient to support an assertion that the predecessors of the native title claim group had an association with the application area. [name removed] states in [2] of her affidavit that the group are descended from the Lamberts, Dianna Mudgee and James “Tracker” Macdonald. Although there are another two apical ancestors named in schedule A (Thullagumaulli and Aaron) they have no known descendants, with the possible exception of [name removed] family.[[18]](#footnote-18)

[name removed] states in Attachment F2, [4] that she was told by her grandmother ([name removed]) that Peggy and Jimmy Lambert were full-blood Aboriginal people from the Rylestone area and leaders of the Dabee clan. This, according to [name removed], is one of the clans within the dialect group which collectively owned Warrabinga-Wiradjuri country, as shown on Map F1. The Lamberts survived a massacre at Bremar in the Capertee Valley and were born circa 1830. [name removed] family still holds the King Plate given to Jimmy Lambert and the Queen sash given to Peggy Lambert.

[name removed] states in Attachment F2, [5] that Dianna Mudgee was born 1820–1826 in the Mudgee area and was native to that area.

According to [name removed], James “Tracker” Macdonald was an Aboriginal man and a member of one of the clans within the dialect group which collectively owned the country shown on the map in attachment F1. He was born in 1872. [name removed[ states that her grandmother and her father told her since she was a child that the families of Dianna Mudgee and James “Tracker” Macdonald were part of their mob—at [6] and [7].

[name removed] states that Thullagumaulli and his nickname Charley is recorded in an 1833 blanket return for Bathurst as a member of the Dabee tribe and being approximately 34 years old at that time. Thullagumaulli was the nickname of [name removed] father’s brother Charlie. In a later affidavit dated 18 July 2011, [name removed] attests to her belief that these matters are suggestive that Thullagumaulli is an ancestor for her family. She states that as Thullagumaulli was from an earlier generation than Peggy and Jimmy Lambert he may well be a direct forbear of her family—at [5].

The final ancestor named in Schedule A is Aaron and [name removed] states in her first affidavit in Attachment F2 that they believe him to be a member of her people. She relates the oral history of her group that her ancestor Jimmy Lambert considered it important to be buried at the plance near Cudgegong, Rylston, Kandos and Charbon known as “Aaron’s Pass”—at [9].

The places identified by [name removed]for which these ancestors are associated are all proximate to the application area. Bathurst lies a short distance to the south-west. Cudgegong, Dabee and Charbon (a constellation of small settlements around Kandos and Rylstone) are a similar distance away to the north. Capertee lies between Kandos/Rylstone and the application area. Mudgee is further away to the north-west.

I am satisfied that the material is sufficient to support an assertion that each of the apical ancestors named in Schedule A had an association with the application area.

I am also satisfied that the information before me is sufficient to support an assertion that the claim group have maintained an association since European settlement with the application area. As set out above, information is provided in the affidavit by [name removed] which indicates that there is an ongoing association by various generations of the families descended from the Lamberts, Dianna Mudgee and James “Tracker” Macdonald with the application area.

In conclusion I amsatisfied, based on the material before me, that the factual basis provided is sufficient to support the assertion described in s. 190B(5)(a).

Section 190B(5)(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

The language of the assertion in subparagraph (b) nearly mirrors that found in s. 223(1)(a) which is part of the definition for the term ‘native title rights and interests’. In my view, the factual basis for this assertion must address the assertion that the claimed native title rights and interests find their source in ‘traditional’ laws and customs. My usage of inverted commas around the word ‘traditional’ highlights that its meaning in ss. 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression ‘traditional’ in relation to the meaning of native title rights and interests is used uniformly throughout the Act.

Accordingly, as was discussed by Dowsett J in *Gudjala 2007* at [26], the factual basis provided by an applicant must pay attention to the High Court’s decision in *Yorta Yorta Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) and in Full Court decisions since as to what is meant by rights and interests being possessed under ‘traditional’ laws and customs. This aspect of Dowsett J’s decision was not criticised by the Full Court in *Gudjala FC* who noted that one question, amongst others, which needs to be addressed in the factual basis materials is whether ‘there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs’—at [96].

The following is a brief synopsis of my understanding of the case law which has developed around the requirement in 223(1)(a) that native title rights and interests must be possessed under ‘traditional’ laws and customs:

For laws and customs to be ‘traditional’, they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty.

A society is a body of people united in their acknowledgement and observance of laws and customs with normative content.

The acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued ‘substantially uninterrupted’ in each generation from sovereignty until the present time.

It is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under ‘traditional’ laws and customs.

Change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[[19]](#footnote-19)

Having regard to the case law about what it means for native title to be possessed under traditional laws and customs, it is my view that a sufficient factual basis for the assertion in s. 190B(5)(b) needs to address that the relevant traditional laws and customs have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I refer to comments by Dowsett J in *Gudjala 2007* that the factual basis materials for this assertion must address:

that the laws and customs currently observed have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];

that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65] and see also at [66] and [81];

that explains the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve ‘identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage’, although the apical ancestors need not themselves have comprised a society—at [66] and [81].

This aspect of Dowsett J’s decision was not criticised by the Full Court in *Gudjala FC*—at [71], [72] and [96].

I refer also to these additional comments by Dowsett J in the later *Gudjala 2009* decision about the requirements in s. 190B(5)(b):

identification of an indigenous society at sovereignty is the starting point, as it ‘is impossible to identify a system of laws and customs as such without identifying the society which recognizes and adheres to those laws and customs’ [36];

there must be some link between the claim group and claim area, including the identification of a link between the apical ancestors and the relevant society, although it is not necessary that it be shown that the ancestors were members of the relevant society [40];

such laws and customs that exist now may not be identical to those that existed prior to sovereignty but must ‘have their roots in the pre-sovereignty laws and customs’ [22].

The factual basis needs to identify the relevant indigenous society operating in the application area at the time of sovereignty or, at the very least, the time of contact/settlement. Once identified, it follows that the factual basis must discuss the existence of laws and customs with a normative content that are associated with that society. In other words, the factual basis needs to discuss the relationship between the laws and customs now acknowledged and observed and those which were acknowledged and observed before sovereignty.

The factual basis for the assertion in s. 190B(5)(b) is provided in the following parts of Attachment F:

***There exist traditional laws and customs that give rise to the claimed native title [s.62(2)(3)(iii)]***

1. *Immediately prior to 7 February 1788, the Wiradjuri Nation, including the predecessors of the present members of the native title claim group, acknowledged and observed a set of laws and customs which governed, interalia, the holding of rights in relation to land and waters, the use and exploitation of resources and the protection of sites of significance. Wiradjuri country extended from the western foothills of the Blue Mountains and Lithgow through Bathurst, Orange and Dubbo to Nyngan in the far west; in the south it stretched to Albury. Broadly speaking, the Wiradjuri occupied almost the entire length of the Lachlan and Murrumbidgee Rivers, as well as 100km along the Upper Murray. Because the laws and customs regarding things such as holding of rights in land and waters, the use and exploitation of resources and the protection of sites of significance conferred rights and responsibilities on particular groups of people within the Wiradjuri Nation to particular areas of land and waters, those people were connected to the land and waters by those laws and customs. Because the Wiradjuri Nation collectively held such rights and responsibilities in relation to all areas of land and water within a wider area which includes the application area, the people of the Wiradjuri Nation as a whole were connected to the whole of that wider are by those laws and customs. The people of the Wiradjuri Nation were united in and by their acknowledgement and observance of a set of laws and customs, and thereby constituted a society. Though all members of the Wiradjuri Nation acknowledged and observed the same set of laws and customs, this “unity” did not necessarily involve all member or groups within the Wiradjuri Nation being aware of one another. However, inter-linked regional kin networks extending across several land-holding groups (which might be pictured as a series of overlapping circles) did share the knowledge necessary to determine who held right to speak in which particular areas within the relevant region.*
2. *From 7 February 1788 through to the present day, some of the laws and customs which were acknowledged and observed by the Wiradjuri Nation people immediately prior to 7 February 1788 have been handed down from one generation of the Wiradjuri Nation people to the next, by both work of mouth (including through the telling of stories) and practical instruction, in an unbroken chain through to the present day. Further, each generation of Wiradjuri Nation people (including the present generation) has acknowledged and observed those laws and customs. Those law and customs may accordingly be described as traditional laws and customs. Furthermore, the regional kin networks described in paragraph [1] above have survived throughout the contact era to the present day.*
3. *The presently-surviving laws and customs of the Wiradjuri Nation which may be described as traditional laws and customs which relate to rights in land include the following:*
	1. *Rights in land are based on filiation to a parent or grandparent who also held rights in that land, ie. the person identifies him/herself as a members of a land-holding entity on the basis of descent from a parent or grandparent who also identified as a member of that land-holding entity;*
	2. *All resources within the territory of a particular group within the Wiradjuri Nation, such as the Warrabinga-Wiradjuri, are the property of that group. These resources include “mobile resources” such as kangaroo.*
	3. *The members of the land-holding entity have the right to use the resources of the country, provided that they do so in accordance with rules which prescribe what may be done, what may not be done and the manner in which things may be done. By way of illustration, the hunting of animals must be done in accordance with rules that govern matters such as what times of the year particular animals may be taken, and how what is caught must be shared within the relevant group.*
	4. *Members of land-holding entities within the Wiradjuri Nation require permission to use resources within each other’s country.*

***The predecessors of the native title claim group had an association with the application area [s.62(2)(3)(i)]***

1. *Immediately prior to 7 February 1788, the predecessors of the native title claim group acknowledged and observed the traditional laws and customs referred to in paragraphs 1 to 3 above, and belonged to a number of clan groups sharing the same dialect, which collectively held the specific rights and interests claimed in this application in relation to an area for which the approximate boundaries are shown on* ***Map F1*** *attached (being an area which included the whole of the area which is subject to this application), in accordance with these laws and customs. They occupied the application area in accordance with these laws and customs. These laws and customs included a law by which rights to country were passed down through cognatic descent, with membership also requiring identification with country indicated on Map F1, and acknowledging and observing the laws and customs of the wide Wiradjuri Nation.*
2. *Effective settlement of Warrabinga-Wiradjuri country occurred in the 1820s. As a result of massacres, numbers were decimated, and the few families which survived assumed rights and responsibilities for the whole of the dialect area, being the area indicated on Map F1. This was a phenomenon which was replicated throughout the wider Wiradjuri Nation, and it represented an adaptation of the law of group succession as it was acknowledged and observed throughout the Wiradjuri Nation immediately prior to 7 February 1788, whereby neighbouring kin had the right and responsibility to assume ownership of “orphaned” country. [footnote 3: Because of this, it is not necessary to establish for the purpose of this proceeding the identity of boundaries of the pre-contact clans within the dialect group]*
3. *The survivors of these massacres – including the named claim group ancestors Peggy and Jimmy Lambert, Dianne Mudgee and James “Tracker” Macdonald and the next two to three generations of their families – generally lived and worked on stations within their country, or worked at other jobs within their country. (By way of illustration, Jimmy and Peggy Lambert lived and worked on Dabee Station.) This gave them the freedom to continue to visit placed of significance within their country, to hunt, gather and use the resources of their country, and to transmit the laws and customs relating to land to each successive generation. Through active kin-networks, these families maintained knowledge of each other, as persons holding rights in relation to their country under the laws and customs of the wider Wiradjuri Nation. These families were not forced to live on missions, but remained practicing an independent lifestyle through to what might be termed the “modern” era which commenced in the late 1960s. Accordingly, each generation of the predecessors of the present native title claim group continued to collectively acknowledge and observe a system of traditional laws and customs relating to land, including those listed in paragraph [3] above.*

***The native title claim group has an association with the application area, and has continued to hold the claimed native title in accordance with the traditional laws and customs that give rise to that native title [s.62(2)(3)(i) and (iii)]***

1. *The particular native title rights claimed by the native title claim group in relation to the application area are group rights and interests held under the communal native title of the wider Wiradjuri Nation.*
2. *The native title claim group presently comprises approximately three to four hundred people (not including children), of whom approximately 50% presently live within the area loosely identified on Map F1, and of whom most of the remainder regularly visit that country (and generally visit it three or four times a year). The oldest surviving members of the claim group are now in their eighties. The present members of the native title claim group continue to collectively acknowledge and observe a system of traditional laws and customs relating to land, including those listed in paragraph [3] above.*
3. *For further information, see the copy of an affidavit affirmed by Robyn Williams which is* ***Attachment F2****.*

This description of the factual basis is then supported by the affidavit by [name removed] in Attachment F2, reproduced above. I have also received additional information in the form of another affidavit by [name removed] dated 18 July 2011 and in submissions from the applicant's legal representative dated 15 July 2011.

In my view, the factual basis provided is sufficient to support an assertion that there exist traditional laws and customs which give rise to the claimed native title rights and interests in the area covered by this application. Attachment F, [1] of the factual basis identifies that the relevant pre-sovereignty society or normative system was the Wiradjuri nation and places the application area within the province of that nation.

Attachment F, [1] of the factual basis identifies that laws and customs regarding holding of rights in land and waters conferred rights and responsibilities on particular groups of people within the Wiradjuri nation to particular areas of the wider Wiradjuri nation. It is said that there were inter-linked regional kin networks extending across several land-holding groups who shared the knowledge necessary to determine who held rights to speak in particular sub-areas within the wider Wiradjuri nation.

Attachment F, [2] of the factual basis is an assertion that some of the laws and customs acknowledged and observed by the Wiradjuri nation people prior to sovereignty have survived through to the present day in the sense that they have been handed down from one generation to the next. Importantly, the regional kin networks have survived throughout the contact era to the present day.

Attachment F, [3] identifies a number of traditional laws and customs relating to rights in land, including that they are based on filiation to a parent or grandparent who also held rights in that land. It is said that their traditional laws and customs dictate that all resources of a particular group are the property of that group and other land-holding entities within the Wiradjuri nation require permission to use another country’s resources.

Attachment F, [4] states that, prior to sovereignty, the predecessors of the Warrabinga-Wiradjuri native title claim group belonged to a number of clan groups sharing the same dialect, which collectively held native title in an area the approximate boundaries of which are shown on Map F1. (The Tribunal’s Geospatial Unit have plotted the boundary shown on the rough sketch in Attachment F1 onto a topographic map of the region. This shows a significant area that stretches south to the vicinity of Mittagong and Bowral; west to the vicinity of Cowra, Bathurst and Wellington; north to the outskirts of Coonarabran; and east to the outskirts of the outer-west of Sydney.)

Attachment F, [4] states that the predecessors of the claim group occupied this region under the previously described laws and customs whereby rights to country were passed down through cognatic descent, with membership also requiring identification with the country shown on Map F1 and acknowledging the laws and customs of the wider Wiradjuri nation.

Attachment F, [5] reveals that following European settlement of the region in the 1820s, numbers of the Wiradjuri people in this part of the world were decimated, such that only a few families survived. It is claimed that the survivors assumed rights and responsibilities for the whole of the dialect area shown on Map F1 (which they call Warrabinga-Wiradjuri country). This, it is said, was replicated throughout the wider Wiradjuri nation and it represented an adaptation of the pre-sovereignty Wiradjuri nation law of group succession, whereby neighbouring kin had the right and responsibility to assume ownership of “orphaned” country.

Attachment F, [6] states that the survivors, including Peggy Lambert, Jimmy Lambert, Dianna Mudgee and James “Tracker” Macdonald and the next two to three generations of their families, generally lived and worked on stations on their country or worked at other jobs within their country. The example of Jimmy and Peggy Lambert living and working at Dabee Station is provided. (I can see that Dabee, which is proximate to Kandos/Rylstone, lies a short distance to the north of the application area.) This, it is said, gave the survivors the freedom to continue to visit significant sites, to hunt and gather and to transmit the laws and customs relating to land to each successive generation. Through active kin-networks, these families maintained knowledge of each other as persons who hold rights in relation to their country under the laws and customs of the wider Wiradjuri nation. It is said that these families were not forced onto missions and remained practising an independent lifestyle through to the late 1960s. It is said that each generation of the predecessors of the present native title claim group continued to collectively acknowledge and observe a system of traditional laws and customs relating to land including those which accord rights in land based on filiation to a parent or grandparent with those rights (see Attachment F, [3]).

Attachment F, [8] states that the group presently comprise approximately 300 to 400 people of whom approximately 50% live within the area shown on Map F1 and of whom the remainder regularly visit. The oldest are in their eighties and they all continue to collectively acknowledge and observe a system of traditional laws and customs relating to land, including those which accord rights in land based on filiation to a parent or grandparent with those rights (see Attachment F, [3]).

The evidence provided by Robyn Williams in Attachment F2 provides support for the described factual basis in Attachment F. She provides specific information that locates each of Peggy Lambert, Jimmy Lambert, Dianna Mudgee, James “Tracker” Macdonald, Thullagumaulli and Aaron to areas that are proximate to this application area, as I have discussed in my reasons above for s. 190B(5)(a).

[name removed] evidence in Attachment F2 describes the transmission of traditional law and custom from her grandmother and father, who I understand are descendants of Peggy and Jimmy Lambert. She provides evidence that the group as a whole practice the traditional laws and customs of their forebears and exercise rights and responsibilities in relation to an area that includes the application area. She very specifically talks about the practice of traditional law and custom relating to rights to hunt and gather on the application area, including exploitation of the male species, prohibited species, cooking methods, sharing with others in the group and only taking what you need—at [15b].[name removed] says that her main teachers where her grandmother (Nan) and father—at [10]. She says that from her discussions throughout her lifetime with other members of the group, she knows this manner of teaching has been reasonably uniform throughout the claim group.

[name removed] says that her generation pass on the same knowledge, laws and customs to the younger generations—at [14]. She discusses the families that she knows and who have visited her and their country throughout her lifetime, including the descendants of James “Tracker” Macdonald and Dianna Mudgee—at [7] and [15e]. [name removed] provides evidence that the group regularly organise cultural camps so as to ensure the continuation of law and custom—at [15d]. She says that approximately half the present members of the group reside permanently on their country and at least once a year, groups will camp within the application area and build temporary shelters using traditional techniques they have been taught and which have been passed down from generation to generation—at [15d].

In paragraph [9] of her latest affidavit dated 18 July 2011, [name removed] states that from as far back as she can remember her father and paternal grandmother would visit their traditional country at least twice a year. As a child she would go with them and as a young adult she would visit once a year. As she got older those visits became more frequent, particularly as her father became too old to travel and monitor his country and he started transferring more and more responsibility to her and her sisters. She concludes that they are all now living on their country full time.

In response to a request for more information about the continuation of traditional law and custom by the wider Wiradjuri nation under which the claim group assert that they hold group rights, [the applicant's legal representative] referred me to a number of articles in *Aboriginal History* discussing the continuity of Wiradjuri traditional law and custom in the post-European settlement era, including by the anthropologist Gaynor MacDonald ( 1998 Vol. 22 p. 162), Heather Goodall (1988 12:2 at p. 208) and Peter Read (1984, 8:1, pp. 45, 54–55).[[20]](#footnote-20) There is also the evidence by [name removed] at [8] in her final affidavit dated 18 July 2011 discussing her sense of belonging to the wider Wiradjuri nation and its kin networks, which she has experienced throughout her life.

There appears to be little doubt that European settlement from the 1820s effected the most profound changes on the lives of the indigenous inhabitants of this part of the world. There may well be significant evidentiary hurdles to ultimately establishing or proving the substantially uninterrupted continuation of traditional law and custom over the entire area shown on Map F1, on the basis of the very limited number of persons who appear to have survived European settlement. The group’s own factual basis materials discuss the decimation of its population by massacres in the region in the 1820s, such that only a few families survived. There are persons who claim to be descendants of another key Wiradjuri post-contact figure (Windradyne) with an affiliation of approximately the same distance to the west (around Bathurst) as that of a key Warrabinga-Wiradjuri ancestral line (Jimmy and Peggy Lambert who are affiliated a short distance to the north of the application area around Kandos/Rylstone/Dabee). The descendants of Windradyne say that it is their group who survived European settlement and who hold native title and have authorised their own native title claims (NSD953/11 and NSD955/11) over the area covered by the Warrabinga-Wiradjuri claim.

However, it seems to me that the authorities I discuss above clarify that s. 190B(5) only requires the applicant to put forward the facts said to support their argument about the identity of the relevant native title holders and the normative system under which their asserted native title is said to derive; I must accept that what is asserted is true, and I do (cf. *Doepel* at [17]). It is my view that the factual basis materials are more than assertions at a high level of generality and do allow a genuine assessment of the application (cf. *Gudjala FC* at [92]). The dispute that arises on those facts is for the trial judge to resolve.

Based on the applicant’s factual basis materials, I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed rights and interests. I do note that the material speaks most strongly to the continuation of traditional law and custom under a wider regional system (the Wiradjuri nation) in an area that is proximate to the application area, being a short distance from the Capertee valley and Kandos, Rylstone and Dabee. If further applications are intended outside that area, it would seem that more details describing the linkages with those areas would be required.

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

I take the view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term ‘traditional laws and customs’ in *Yorta Yorta*, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way: see *Yorta Yorta* at [47] and also at [87].

*Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;

that there has been continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* at [96] appears to agree that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

I am of the view that the applicant’s factual basis material overall provides sufficient detail to support an assertion that the claim group have continued to acknowledge and observe the traditional laws and customs of the society in existence at sovereignty. I refer to my discussion at ss. 190B(5)(a) and 190B(5)(b) about the specifics of this material.

To summarise, the applicant has identified that the relevant pre-sovereignty society is the Wiradjuri nation. It is claimed that the pre-sovereignty traditional laws and customs of that society conferred rights on particular groupings of people to particular areas, including rights to speak for country and to use the resources of that country. Rights were based on filiation to a parent or grandparent who also held rights in that land. Continuation of the normative system in a substantially uninterrupted way is discussed in Attachment F, [4] to [8] and in [name removed] affidavit in Attachment F2.

Although it is claimed that the incursion of European settlement decimated the group, the few surviving families were able to stay on their country (the example of Jimmy and Peggy Lambert living and working on Dabee is provided) and to practice the laws and customs of their forebears. Some information has been provided in a later affidavit by [name removed] dated 18 July 2011 and in a letter from [the applicant's legal representative] indicating that the wider Wiradjuri nation has persisted despite the profound impacts of European settlement and subsequent policies from the 19th century until modern times (said to be the late 1960s). In her original affidavit in Attachment F2, [name removed] gives specific content to the statements in Attachment F where she discusses the claim group in some detail, including the ancestral lines from whom current members descend, and the transmission and practice of traditional law and custom passed down from earlier generations, including her grandmother and father, who are descended from Peggy and Jimmy Lambert and who were particularly affiliated with Dabee, a short distance north of the application area.

I amsatisfied, based on the material before me, that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Conclusion

Mansfield J in *Doepel* approved an approach by the Registrar that analysed ‘the information available to address, and make findings about, the particular matters to which s. 190B(5) refers’—at [130]. I refer also to the comments of Mansfield J at [132] that it is correct for the Registrar to focus primarily upon the particular requirements of s. 190B(5), as this is the way in which the Act draws the Registrar’s attention to the task at hand. If the factual basis supports the three assertions in subparagraphs (a) to (c), then the requirements of the section overall are likely to be met.

It follows as a result of my consideration of each of the three particular assertions that the application satisfies the condition of s. 190B(5) overall because I am satisfied that the factual basis is sufficient to support each of the three particular assertions in s. 190B(5).

Subsection 190B(6)
Prima facie case

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie establishe are identified in the reasons that follow.

General Comments

I refer to the following comments from *Doepel* about the nature of the test at s. 190B(6):

It is a prima facie test and ‘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’—*Doepel* at [135].

It involves some ‘measure’ and ‘weighing’ of the factual basis and imposes ‘a more onerous test to be applied to the individual rights and interests claimed’—*Doepel* at [126], [127] and [132].

Exclusive right not prima facie established

The applicant has framed its native title rights and interests as a claim in the first instance to the exclusive right to possess, occupy, use and enjoy the lands and waters as against the whole world. The applicant expressly states that this claim is made ‘over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply)’. I shall call this the ‘exclusive right’.

It is my view that this is not a right that can be prima facie established.

In *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*), the majority considered that the ‘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’ and conveys ‘the assertion of rights of control over the land’ – at [89] and [93].

More recently, the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

[T]he 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 consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71].

*Griffiths FC* indicates at [127] that what is required to prove the exclusive rights is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively ‘exclude from their country people not of their community’, including by way of ‘spiritual sanction visited upon unauthorised entry’ and as the ‘gatekeepers for the purpose of preventing harm and avoiding injury to country’. The Full Court stressed at [127] that:

[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.

I do not feel that the information in Attachment F [3], which discusses ownership of particular areas being vested on the basis of the filiation to a parent or grandparent who also held rights in that area, sufficiently explores the laws and customs around this particular right. Further, there is nothing in [name removed] affidavit evidence which talks about the Warrabinga-Wiradjuri group being permitted under the traditional laws and customs of the wider Wiradjuri nation to exclude other indigenous people who are not from their community from their country.

For these reasons I find that the exclusive right is not established.

Non-exclusive rights prima facie established

Attachment E, [2] identifies that over areas where a claim to exclusive possession cannot be recognised, the claim group seek recognition of a series of rights and interests relating to their access to and use of the application area, which I now discuss:

(a) the right to access and move about the land;

**Established:**

There is evidence from [name removed] at Attachment F2, [15a] which speaks to the group walking their country and the application area, monitoring it, which they do in exercise of the rights and responsibilities as land-owners to care for their country under Wiradjuri law.

(b) the right to hunt and fish, to gather and use the resources of the land and waters such as food and medicinal plants and trees and ochre;

**Established:**

There is a lot of information from [name removed] at Attachment F2, [15b] describing the observance of traditional law and custom relating to hunting, fishing and gathering resources on their country and the application area.

(c) the right to have access to and use of water on or in the land and waters;

**Established:**

This is discussed in [name removed] affidavit in Attachment F2, [15c].

(d) the right to live, being to enter and remain on the land, to camp and erect temporary shelters and other structures for that purpose, and to travel over and visit any part of the land and waters;

**Established:**

This is discussed in [name removed] affidavit in Attachment F2, [15d].

(e) the right to light camp fires;

**Established:**

[name removed] states at Attachment F2, [15d] that the lighting of camp fires is done in exercise of their rights as landowners under Wiradjuri law when on camping trips within the application area.

(f) the right to engage in cultural activities on the land;

**Established:**

[name removed] states at Attachment F2, [15e] that cultural camps are regularly held to teach Wiradjuri laws and the techniques relating to hunting, gathering resources and other traditional practices. According to [name removed], these camps play an important role in ensuring that the claim group continues to acknowledge and observe the traditional laws and customs which connect the group to their country.

(g) the right to hold meetings on the land; and

**Established:**

This is discussed in [name removed] affidavit in Attachment F2 , [15f].

(h) the right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters.

**Established:**

At Attachment F2, [15g], [name removed] states that an important part of transmitting knowledge of their laws and customs and of country involves teaching stories relating to places within country and this is best done visiting the places in question. She describes the story of Gurandagee the eel and Murrigan the hunter native cat or quoll taught to her and which is now passed to younger generations.

Subsection 190B(7)
Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

1. currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
2. previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
3. the Crown in any capacity, or
4. a statutory authority of the Crown in any capacity, or
5. any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application **satisfies** the condition of s. 190B(7).

I understand the phrase ‘traditional physical connection’ to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group, being traditional as discussed in *Yorta Yorta*. I note also that [29.19] of the explanatory memorandum to the *Native Title Amendment Act 1998* indicates that parliament intended that the connection described in s. 190B(7) ‘must amount to more than a transitory access or intermittent non-native title access’.

Mr Allen has provided information to the effect that [name removed] and others related to her do not have or have previously had a traditional physical connection with any part of the application area, it being the case that they grew up in the Sydney basin. However, the whole tenor of the evidence provided by [name removed] in her affidavit in Attachment F2 and in a later affidavit dated 18 July 2011 satisfies me that she currently has or previously had a traditional physical connection to the application area or part of it. I refer particularly to this statement from paragraph [9] of her latest affidavit:

From as far back as I can remember (I was born in 1947), my father and paternal grandmother would visit their traditional country at least twice a year. As a child, I would go with them. As a young adult, I would go and visit my country about once a year. As I got older, those visits became more frequent. This was particularly the case once my father began to become too old to be able to travel and monitor his country, and he started transferring more and more responsibility onto me and my sisters (and we are now all living within our country full-time).

Additionally, [name removed] affidavit in Attachment F2 of the application at [15] specifically talks about the connection that she and others have with the application area in particular, including hunting and gathering there in accordance with traditional laws governing usage of the male species and other like things, camping within the application area and building temporary shelters using the techniques that have been passed down through the generations. This, [name removed] states, they do in exercise of their rights as landowners under Wiradjuri law.

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

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.

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result below.

No approved determination of native title: s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

The application meets the requirement under s. 61A(1). There are no approved determinations of native title over the application area.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which

1. a previous exclusive possession act (see s. 23B)) was done;
2. either:
	1. the act was an act attributable to the Commonwealth, or
	2. the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:

1. the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
2. the application states that ss. 47, 47A or 47, as the case may be, applies to it.

The application meets the requirement under s. 61A(2), as limited by s. 61A(4). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area: see statements to this effect in Schedule B.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

1. a previous non-exclusive possession act (see s. 23F) was done, and
2. either:
	1. the act was an act attributable to the Commonwealth, or
	2. the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

The application meets the requirement under s. 61A(3), as limited by s. 61A(4). Attachment E is clearly drafted such that any claim exclusive possession, occupation, use and enjoyment is only made over areas where there has been no extinguishment or where any extinguishment is to be disregarded because of ss. 47, 47A or 47B (refer to my reasons for s. 190B(4) above).

Combined result for s. 190B(8)

The application satisfies the condition of s. 190B(8), because it meets the requirements of s. 61A, as set out in the reasons above.

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

1. a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
2. the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
3. in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

The application **satisfies** the condition of s. 190B(9).

The application satisfies s. 190B(9)(a) as Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown.

The application satisfies s. 190B(9)(b) as it is located well inland and does not extend to offshore places.

The application satisfies s. 190B(9)(c) as Schedule B [7] states any land or waters where the native title rights and interests have been otherwise extinguished is excluded from the claim.

Attachment A:
Details of previous North East Wiradjuri People claims

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Federal Court reference****(NNTT)**  | **Applicant** | **Area** | **Accepted for registration pursuant to s.190A**  | **Period entered on Register of Native Title Claim** |
| NSD6015/2002(NC02/10) | William Gary Allen **Colin Thomas Gibbons**Dennis Edward George BarberLola Joy McConnell | Ben Bullen State Forest No 434, MLA78 and MLA202 | 22/11/2002 | 2/11/2002 - 1/9/2004 |
| NSD1089/2005 (NC05/1) | William AllenMartin De Launey Lynette Syme | MLA 259 approx. 13km south east of Ulan  | 5/8/2005 | 5/8/2005 - 18/7/2006 |
| NSD803/2006 (NC06/5) | Leonie Simpson Anthony Kennedy Lynette Syme | MLA 271 approx. 5km east of Portland | 30/5/2006 | 30/5/2006 - 20/8/2008 |
| NSD1618/2006(NC06/8) | Anthony Kennedy Lynette SymeJoseph Bugg | MLA278 approx 5km east of Portland  | 22/9/2006 | 22/9/2006 - 20/8/2008 |
| NSD429/2007(NC07/3) | Peter O’MaraLynette Syme | MLA 265 approx 27 km north-east of GulgongMLA 290 approx 5km south south-east of Ulan | 20/4/2007 | 20/04/2007 - 6/11/2009 |
| NSD1598/2008(NC08/1) | Peter O’MaraLynette Syme | EL 6288, 27 km north-east of Gulgong and 5km south south-east of Ulan  | 13/11/2008 | 13/11/2008 - 10/11/2009 |
| NSD216/2009(NC09/1) | William Gary AllenEster CutmoreWendy LewisLynette SymeElaine BuggMartin de Launey | MLA324 approx 7km north-east of Portland | 17/4/2009 | 17/4/2009 - 19/1/2010 |

Note:

All of these native title determination applications identify that the native title claim group are the North Eastern Wiradjuri People of Bathurst/Lithgow/Mudgee area who are the families or persons descended from the following apical ancestors:

Thomas Governor, Aaron, Phillips Rayner (spelt ‘Raynor’ in NSD1089/2005), Windradyne, Dianna Mudgee, Sophia Allsopp, Peggy Lambert, Jimmy Lambert (identified as the one ancestral line of Peggy and Jimmy Lambert in NSD1618/06, NSD803/06, NSD1089/05 and NSD6015/02), John Bloodsworth, Thullagumaulli, Penagraa (aka Penaguin) (identified as ‘Penaguin’ in NSD6015/02)

1. *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 (*Fesl*) at [26] and [71]–[72] ( Logan J) distilled these principles from earlier case law on the requirements of s. 251B. See also *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) at [25], Stone J; *Wharton on behalf of the Kooma People v State of Queensland* [2003] FCA 790 (*Wharton*) at [34], Emmett J; *Noble v Mundraby* [2005] FCAFC 212 at [18] and *Noble v Murgha* [2005] FCAFC 211 at [34], North, Weinberg and Greenwood JJ; and *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [1265], Lindgren J. For the final principle, see *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) and *Watson v Native Title Registrar* (2008) 168 FCR 187; [2008] FCA 574 (*Watson*). [↑](#footnote-ref-1)
2. See [name removed] dated 29 June 2011 at [4] and [5]. [↑](#footnote-ref-2)
3. See [name removed] dated 18 July 2011 at [2]. [↑](#footnote-ref-3)
4. See discussion of this in Wendy Lewis second affidavit dated 30 June 2011 at [4]. [↑](#footnote-ref-4)
5. Wendy Lewis dated 30 June 2011 at [4]. [↑](#footnote-ref-5)
6. [name removed], Attachment F2, 21 June 2011 at [8]–[9]. [↑](#footnote-ref-6)
7. See Attachment F of the Wiradjuri-Warrabinga (United Clans of North East Wiradjuri) application (NSD457/2010). [↑](#footnote-ref-7)
8. Simon Blackshield dated 27 June 2011 at [3] to [5]. [↑](#footnote-ref-8)
9. Wendy Lewis dated 30 June 2011 at [3]. [↑](#footnote-ref-9)
10. This information is found in letters and accompanying documents dated 14 June and 5 July 2011 from Wellington Valley Wiradjuri Aboriginal Corporation; dated 7 July 2011 from Mr Allen; and dated 8 July 2011 from [name removed] (NSD953/11 and NSD955/11 legal representative). [↑](#footnote-ref-10)
11. See written submissions by [the applicant's legal representative] dated 15 July 2011. [↑](#footnote-ref-11)
12. This is discussed by Tribunal Member DP Sumner in *Coalpac/NSW/North East Wiradjuri People* [2009] NNTTA 133 (19/10/2009). [↑](#footnote-ref-12)
13. See *Gudjala FC* at [68] to [72], [77] and [90] to [96]. [↑](#footnote-ref-13)
14. See letter dated 5 July 2011 signed by [name removed], Director of Wellington Valley Wiradjuri Aboriginal Corporation (WVWAC). [↑](#footnote-ref-14)
15. See p. 2 of letter dated 5 July 2011 from WVWAC. [↑](#footnote-ref-15)
16. Excerpt of WVW Genealogical Report/June 2011/p.3. [↑](#footnote-ref-16)
17. Statement signed by Bill Allen dated 7 July 2011. [↑](#footnote-ref-17)
18. See [name removed], 18 July 2011 at [5]. [↑](#footnote-ref-18)
19. The special meaning of the word ‘traditional’ in s. 223(1) was first considered by the High Court in *Yorta Yorta*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr* *FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta HC*, *Alyawarr* *FC* and *Bennell FC*. [↑](#footnote-ref-19)
20. Full references are found in [the legal representative’s] letter dated 15 July 2011. [↑](#footnote-ref-20)