National Native Title Tribunal

# Registration test decision

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|---|---|
| Application name | Yi-Martuwarra Ngurrara |
| Name of applicant | Josephine Forrest, Benjamin Laurel, Malcolm Morra, Harry Yungabun, Peter Clancy, Berndaette Williams, Mervyn Numbagardie, Elsie Dickens, Dunba Nunju, Claude Forrest, Sammy Costain. |
| NNTT file no. | WC2012/002 |
| Federal Court of Australia file no. | WAD25/2012 |
| Date application made | 1 February 2012 |
| Date application last amended | 10 September 2014 |

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

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

**Date of decision:** 19 December 2014

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Jessica Di Blasio

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 8 August 2014 and made pursuant to s 99 of the Act.

# Reasons for decision

## *Introduction*

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

[2] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

### Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Yi-Martuwarra Ngurrara claimant application to the Registrar on 9 October 2014 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim as the nature of the amendments, which primarily relate to a change to the claim group description, are not envisaged by the circumstances of ss 190A(1A) or 190A(6A).

[5] Therefore, in accordance with subsection 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. This is commonly referred to as the registration test.

### Registration test

[6] Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s 190C requirements first, in order to assess whether the application contains the information and documents required by s 190C before turning to questions regarding the merit of that material for the purposes of s 190B.

[7] Pursuant to ss 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss 190B and 190C.

## Information considered when making the decision

[8] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I must have regard to, but I may have regard to other information, as I consider appropriate.

[9] I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

[10] I have had regard to the following documents in my consideration of the application for the purposes of the registration test:

- Form 1 and all attachments; and
- Geospatial assessment and overlap analysis (Geospatial assessment) completed by the Tribunal's Geospatial Services dated 22 October 2014.

[11] 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 of the Act.

[12] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

## Procedural fairness steps

[13] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23]–[31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[14] The case manager with carriage of this matter wrote to both the applicant and the State of Western Australia (the State) on 28 October 2014 providing a timeframe for registration testing as well a timeframe for any submissions they may wish to make in relation to the application of the registration test.

[15] At the date of making this decision no submissions have been received from the State.

# *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.

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

[17] In reaching my decision for the condition in s 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

[18] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of s 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s 61(5). The matters in ss 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s 190C(2). I already test these things under s 190C(2) where required by those parts of ss 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

[19] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

**Native title claim group: s 61(1)**

[20] In *Doepel*, Mansfield J confined the nature of the consideration for this requirement to the information contained in the application—at [37] and [39]. I therefore understand that I should consider only the information contained in the application and should not undertake any form of merit assessment of the material when considering whether I am satisfied that 'the native title claim group as described is in reality the correct native title claim group'—*Doepel* at [37].

[21] If the description of the native title claim group in the application were to indicate that not all persons in the native title group were included, or that it is in fact a subgroup of the native title claim group, then, in my view, the relevant requirement of s 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

[22] There is a description of the claim group included at Schedule A of the application.

[23] There is nothing on the face of the application which suggests that the application is not brought on behalf of all members of the native title claim group, I am therefore satisfied that the native title claim group as described in Schedule A meets the requirements of s 61(1).

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

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

[25] The name and address for service of the applicant is included at Part B of the application.

[26] The application contains all details and other information required by s 61(3).

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

[27] I understand that this provision is 'a matter of procedure' and does not require me to consider whether the description is 'sufficiently clear', merely that one is in fact provided—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 *(Gudjala 2007)* at [31] and [32]. I am not required or permitted to be satisfied about the correctness of the information in the application naming or describing the native title claim group—*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198—at [34].

[28] The native title claim group is described at Attachment A of the application.

[29] The application contains all details and other information required by s 61(4).

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

[30] The application is accompanied by the affidavit required by s 62(1)(a).

[31] The application is accompanied by dated and witnessed affidavits sworn by each of the persons who comprise the applicant. The statements required by s 62(1)(a)(i) to (iv) are contained in paragraphs [2] to [5] of the affidavits.

[32] The wording of subparagraph 62(1)(a)(v) was amended by the *Native Title Amendment (Technical Amendments) Act* 2007 (Cth) (the *Technical Amendments Act*). Prior to the amendment, the provision had required only that an applicant's affidavit state 'the basis on which the applicant is authorised as mentioned in subparagraph (iv)'. I am not aware of any case law that has considered the level of detail required by the new wording of subparagraph (v). However,

the explanatory memorandum for the *Technical Amendments Act* gives some context for the current form of s 62(1)(a)(v). The explanatory memorandum describes the motive behind the new wording in the following way:

> 1.223 Some affidavits accompanying applications provide little or no information setting out the basis of authorisation, for example, merely setting out the date the authorisation meeting was held. This limits the utility of requiring the applicant to state the basis on which the applicant is authorised.
>
> 1.224 [The Bill] would amend subparagraph 62(1)(a)(v) to provide that the applicant must include a statement in the affidavit accompanying the application 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. This should include indicating whether the decision-making process complied with paragraph 251[B](a) or 251[B](b).

[33] In my view, these comments indicate that the new subparagraph (v) was designed to ensure that applicant's affidavit(s) set out details of the authorisation process in a way that identifies the particulars of the process and how it was complied with.

[34] The persons who jointly comprise the applicant each state in their affidavits that:

> The details of the process of decision making complied with in authorising me, together with the other persons who are the applicant, to make the application and to deal with matters arising in relation to it are:
>
> a. Every member of the native title claim group entitled to speak for country (or in relation to matters which affect country, like this application)
>
> b. The weight given to each persons' views is subject to their age, gender and Ngurrara or 'countrymen' status;
>
> c. No formal vote is required to reach a decision in accordance with this process, and
>
> d. Decisions are delivered or announced by senior men.
>
> This is the decision making process followed to authorise the making of this application during a meeting held on 9 April 2014 at the Recreation Centre, Fitzroy Crossing—at [6] and [7].

[35] I understand that this statement is setting out the decision making process used by the claim group to authorise the making of the application. I note that although it provides a substantial amount of detail regarding the process complied with, it does not specify whether the decision making process is a traditional decision making process, per s 251B(a) or an agreed to and adopted process, per s 251B(b). I have inferred from the nature of the decision making process as described in the affidavits that it is likely a decision making process of the kind

described in s 251B(a), being a traditional decision making process. I note that although my consideration at this section is restricted to the material in the affidavit only, my inference is confirmed by references in the certification at Attachment R, to the use of a traditional decision making process to authorise the making of the application.

[36] I note that the explanatory memorandum, relevant sections of which are extracted above, refers specifically to the inclusion of the type of decision making process utilised, having regard to s 251B(a) and (b). The affidavits before me do not include information specifying whether s 251B(a) or (b) was complied with when authorsing the making of the application. It is my view however that, given the Act itself requires 'details' of the decision making process, and the explanatory memorandum, in my view, is concerned to explain that such details must be more than briefly stating the date or location of the authorisation meeting, and is therefore concerned to elucidate information which details the decision making process and how it was complied with, it is open to me to be satisfied, on the basis of the details before me, that the affidavits in fact comply with the requirement at s 62(1)(a)(v), despite being silent regarding the issue of which process per s 251B(a) or (b) was used. This is because the affidavits do provide, what is in my view, substantial detail about the decision making process and how it was complied with, and goes further than merely stating that the applicant is authorised and providing information about the date or location of the authorisation meeting.

[37] Having considered the terms of the Act in light of the explanatory memorandum that accompanied the 2007 amendments, I am satisfied that the details included in the affidavits before me are sufficient for the purposes of s 62(1)(a). In this regard, I also note that s 190C(2) is concerned with procedural matters and that the information provided for the purposes of s 62(1)(a) does not need to satisfy me that the applicant is, in fact, properly authorised—see *Doepel* at [74].

[38] For the above reasons, I am satisfied that the application contains the information required by s 62(1)(a).

[39] The application is accompanied by the affidavit required by s 62(1)(a).

**Details required by s 62(1)(b)**

[40] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a)–(h), as identified in the reasons below.

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

[41] Attachment B of the application is a written description of the external boundaries of the application. Schedule B includes a list of general exclusions from the application area.

[42] The application includes all details and other information required by s 62(2)(a).

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

[43] Attachment C of the application includes a map of the extermal boundaries of the area claimed.

[44] The application includes all details and other information required by s 62(2)(b).

*Searches:* s *62(2)(c)*

[45] Schedule D of the application states that 'no searches have been carried out by or on behalf of the native title claim group in relation to this schedule'.

[46] The application includes all details and other information required by s 62(2)(c).

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

[47] Schedule E of the application includes a list of the native title rights and interests claimed in the application.

[48] The application includes all details and other information required by s 62(2)(d).

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

[49] Information relevant to the asserted factual basis for the claim in the application is contained at Schedule F of the application. I am of the view that I need only consider whether the information regarding the claimants' factual basis addresses in a general sense the requirements of s 62(2)(e)(i)–(iii). I understand that any 'genuine assessment' of the sufficiency of the factual basis is to be undertaken by the Registrar when assessing the application for the purposes of s 190B(5). I am of the view that this approach is supported by the Court's findings in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

[50] The application contains all details and other information required by s 62(2)(e).

*Activities:* s *62(2)(f)*

[51] Schedule G of the application contains a list of activities currently carried out by the claim group in relation to the application area.

[52] The application contains all details and other information required by s 62(2)(f).

*Other applications:* s *62(2)(g)*

[53] Schedule H of the application states 'Not applicable'. I take this to mean that the applicant is not aware of any other applications that have been made in relation to the whole or a part of the area covered by this application.

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

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

[55] Schedule HA of the application states 'the applicant is not aware of any notifications in relation to this schedule.'

[56] The application contains all details and other information required by s 62(2)(ga).

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

[57] Schedule I of the application refers to Attachment I which includes details of s 29 notices given over the area of which the applicant is aware.

[58] The application contains all details and other information required by s 62(2)(h).

*Conclusion*

[59] The application contains the details specified in ss 62(2)(a)–(h), and therefore contains all details and other information required by s 62(1)(b).

## 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:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[60] This requirement is concerned to ensure that the Registrar is satisfied that no person included in the native title claim group for the current application is a member of the native title claim group for any previous application.

[61] I understand that this requirement only arises if the conditions specified in subsections (a), (b) and (c) are all satisfied— *State of Western Australia v Strickland* [2000] FCA 652. I therefore must first consider if there are any previous claims that overlap the application area, that were on the Register when the current application was made, and that remain on the Register at the date of this decision. If there is no such claim, then there will be no 'previous overlapping application' for the purposes of this requirement.

[62] The Tribunal's Geospatial Services prepared a Geospatial assessment and overlap analysis of the application area dated 22 October 2014, which states that no applications as per the Register of Native Title Claims overlap the external boundary of this application. My own searches of the

Tribunal's databases confirm this. As such, there is no 'previous overlapping application' for the purposes of this requirement.

[63] The application satisfies the condition of s 190C(3).

## Subsection 190C(4)
## Authorisation/certification

> Under s 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

[65] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

[66] Attachment R of the application is a certification from Kimberley Land Council (KLC) dated 21 July 2014 and signed by the Chief Executive Officer. I have had regard to the Geospatial assessment dated 22 October 2014 which identifies KLC as the only representative body responsible for the area covered by the application. KLC is therefore the only body that could certify the application.

[67] Section 203BE(4) sets out particular statements that must be included in a certification for a native title determination application. Namely that the representative body must be of the opinion that the requirements of ss 203BE(2)(a) and (b) have been met, their reasons for being of that opinion, and where applicable set out what the body has done to meet the requirements of s 203BE(3). The necessary opinions at ss 203BE(2)(a) and (b) relate to authorisation of the claim by members of the native title claim group and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

*Section 203BE(4)(a)*

[68] This provision requires a statement from the representative body that it is of the opinion that the requirements set out in s 203BE(2)(a) and (b) have been met.

[69] The certificate contains the required statements.

*Section 203BE(4)(b)*

[70] This provision requires the representative body to set out its reasons for being of the opinion required at s 203BE(4)(a).

[71] The certificate provides the following relevant information with regard to the claim group authorising the making of the application:

- The KLC undertook extensive notification of the authorisation meeting including distributing a notice to relevant Aboriginal organisations and communities for display on notice boards, providing the notice to roadhouses, stores, the Fitzroy Crossing arts centre and the Kimberley Aboriginal Law and Culture Centre, sending the notice to Wangi Radio for public announcement, placing the notice in the Broome advertiser, Kimberley Echo and the Pilbara Echo local newspapers as well as mailing personal notices to known members of the claim group and informing claim group members through word of mouth.

- A traditional decision making process was used at the authorisation meeting to authorise the applicant to make the application and deal with matters arising in relation to is. KLC staff have observed the use of this traditional decision making process at various meetings of the claim group.

[72] The certificate provides the following relevant information with regard to ensuring all reasonable efforts were made to describe or otherwise identify all the persons in the native title claim group:

- The KLC through its staff and consultants, has over a number of years undertaken extensive anthropological and genealogical research and community consultations with the claim group for the purpose of identifying all persons who hold native title in the area

- Consent determinations have been made over Part A and Part B of an earlier Ngurrara native title determination application in adjoining areas to the current application. The claimants in the current application include all those native title holders for the two determined areas as well as additional people whom the group has identified as having rights and interests in the country of the current application.

- The process of identification of all native title claim group members in relation to the current application has continued with the engagement of [anthropologist name deleted], who also attended the original authorisation meeting for the claim when it was first filed on 26 and 27 October 2011.

- Since the original authorisation meeting [anthropologist name deleted] has undertaken further consultation with members of the claim group, including senior claimants, regarding the claim group description. He then attended the authorisation meeting on 9 April 2014 which resolved to amend the claim group description and authorised the current amended application.

[73] The certificate contains the required information pursuant to s 203BE(4)(b)

***Section 203BE(4)(c)***

[74] This provision requires that, where applicable, the representative body briefly set out what it has done to meet the requirements of s 203BE(3), namely that the representative body make all reasonable efforts to reach agreement between any overlapping claimant groups and to minimise the number of overlapping applications in relation to the application area. Section 203BE(3) further provides that a failure to comply with this subsection does not invalidate any certification of the application by a representative body.

[75] The certification is silent on this provision. I note that it is only 'where applicable' that a representative body is required to set out what it has done to meet the requirement of subsection 203BE(4)(c). The application and geospatial assessment both state that there are no overlapping applications, it is therefore my view that addressing this requirement can be understood to be 'not applicable' in these circumstances.

[76] Nevertheless, as mentioned above, failure to comply with this subsection does not render the certification invalid.

[77] In my view the certification meets the requirements of s 203BE(4)(c).

***My decision***

[78] For the above reasons I am satisfied that the application has been certified under Part 11 by the only representative body that could certify the application and I am satisfied that it complies with s 203BE(4).

[79] I am therefore satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

# *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.

[80] A description of the application area is contained at Attachment B of the application. Attachment B is titled 'Yi-Martuwarra Ngurrara Description' and describes the application area as covering all the land and waters within the external boundary by a metes and bounds description referencing native title determinations and applications, land parcels, topographic features and coordinate points in decimal degrees and shown to six decimal places referencing the Geocentric Datum of Australia 1994 (GDA94). The description was prepared by the Tribunal's Geospatial Services and is dated 14 November 2011.

[81] Attachment B specifically excludes land and waters covered by a number of native title determinations and claimant applications.

[82] Schedule B of the application also lists general exclusions from the application area.

[83] Attachment C of the application is a map of the external boundaries of the application area. The map at Attachment C is an A4 colour copy of an A3 map entitled "Yi-Martuwarra Ngurrara' prepared by Geospatial Services dated 14 November 2011. The map includes:

- The application area depicted by a bold red outline;
- Adjoining native title determinations are shown and labeled;
- Surrounding cadastre is shown and labeled;
- Selected topographic features are shown and labeled;
- Scalebar, northpoint, coordinate grid and location diagram; and
- Notes relating to the source, currency and datum of data used to prepare the map.

[84] Section 190B(2) requires that the information provided in the boundary description and map be sufficient for the Registrar to be satisfied that it can be said with reasonable certainty whether the native title rights and interests are claimed in the particular land and waters covered by the application. That is, the written description and map should be sufficiently clear and consistent.

[85] I have had regard to the Geospatial assessment provided by the Tribunal's Geospatial Services on 22 October 2014. The Geospatial assessment states that the area covered by the application has not been amended or reduced. The area does not include any areas which have not previously been claimed. I understand that there have been no amendments made to the area claimed as a result of this amended application. The Geospatial assessment concludes that the description and map are consistent and identify the application area with reasonable certainty. Having also considered the map and boundary description contained in the application, I agree with that conclusion.

[86] The application satisfies the condition of s 190B(2).

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

The Registrar must be satisfied that:
(a) the persons in the native title claim group are named in the application, or
(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[87] The application contains a description of the native title claim group. Thus, I must consider whether 'the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.'

[88] Schedule A of the application describes the native title claim group as follows:

> The claimant group comprises those Aboriginal people who hold in common the body of traditional laws and customs concerning the claim area. Those people are:
>
> (a) The biological descendants of the following apical ancestors: [a list of ancestors names is then provided]
>
> (b) Are acknowledged by the native title claimants in (a) as having rights and interests in the claim area through a direct relationship by birth/finding and growing up in places ("Ngurrara") within the application area.

[89] Attachment F1 which includes a connection report by anthropologist [anthropologist name deleted] further elaborates on the basis of connection to the claim area and criteria for membership of the claim group. The connection report relevantly states the following:

> [text deleted]

***The requirements of s 190B(3)(b)***

[90] The nature of the task at s 190B(3)(b) is for the Registrar to focus upon the adequacy of the description to facilitate the identification of the members of the native title claim group, rather than upon its correctness—*Doepel* at [37] and [51].

[91] It may be that determining whether any particular person is a member of the native title claim group will require 'some factual inquiry' however 'that does not mean that the group has not been described sufficiently.'—see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67] *(WA v NTR).*

[92] In *WA v NTR*, Carr J found that a claim group description which described the group according to descent from, or adoption by, identified ancestors and their descendants was sufficiently clear to satisfy the condition of s 190B(3)(b). Carr J found that it was possible to begin with a particular person, and then through factual inquiry, determine whether that person fell within one of the criteria identified in the description—at [67]. For these same reasons I am satisfied that the first limb of the criteria for membership to the claim group, being descent from one of the identified apical ancestors (listed at paragraph (a) of Schedule A) is sufficient for the purposes of s 190B(3)(b).

[93] Turning to the second limb of criteria for membership of the claim group, being affiliation based on recognition by other members of the claim group, derived from birth/finding place and or growing up in the application area, I am again satisfied that this criteria meets the requirements of s 190B(3)(b). In my view, this second limb of criteria for membership, although perhaps not as easy to apply as simple descent from ancestors, provides an objective reference point, both in terms of the kinds of things that would demonstrate the level of connection required for membership to the claim group, for example, being born on or growing up on the application area, and with the assistance of the further explanation in the report at Attachment F.1 of the application, in terms of which people have the power to decide claim group membership by this criteria (being senior/more knowledgeable members of the group). From this criteria, I consider that it is possible, again with some factual inquiry, to determine whether any particular person is a member of the claim group through both the descent based 'rule' and the acknowledged through connection to the area 'rule' at both paragraphs (a) and (b) of Schedule A.

[94] I am therefore satisfied that the overall requirement of s 190B(3)(b) is met, as it is possible, through some factual inquiry, to ascertain, by reference to the description in the application, whether a particular person is a member of the native title claim group.

[95] The application satisfies the condition of s 190B(3).

## 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.

[96] Mansfield J, in *Doepel*, stated that it is a matter for the Registrar to exercise 'judgment upon the expression of native title rights and interests claimed'. His Honour considered that it was open to the decision-maker to find, with reference to s 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests—at [99] and [123].

[97] Primarily the test is one of 'identifiability', that is, 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

[98] The following list of native title rights and interests claimed in the application area is included at Schedule E:

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 s238, ss47, 47A or 47B apply), the native title claim group claims the right to possess, occupy, use and enjoy the lands and waters of the application area to the exclusion of all others.

2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claims the following rights and interests:

    (a) The right to travel over, move about and have access to the application area;

    (b) The right to hunt, fish and forage on the application area;

    (c) The right to take, use and enjoy the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone, ochre and resin;

    (d) The right to trade in resources of the application area;

    (e) The right to have access to and use and maintain the natural water resources of the application area including the beds and banks of watercourses;

    (f) The right to live on the land in the application area;

    (g) The right to camp on the application area;

    (h) The right to erect shelters and other structures on the application area;

    (i) The right to:

i. Engage in cultural activities;

ii. Conduct ceremonies;

iii. Hold meetings;

iv. Teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and

v. Participate in cultural practices relating to birth and deaths, including burial rights;

(j) The right to have access to, care for, maintain and protect places, sites and areas of importance in the application area;

(k) The right to speak for and make non-exclusive decisions about the application area;

(l) The right to light fires for domestic purposes and customary practices;

(m) The right to uphold, regulate, monitor and enforce customary law;

(n) The right to control access to, and use of, the application area by other Aboriginal People who seek access to use of the lands and waters;

(o) The right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purpose); and

(p) The right to regulate and resolve disputes among the native title claimants of the application area.

3. The native title rights and interests are subject to:

(a) The valid laws of the State of Western Australia and the Commonwealth of Australia; and

(b) The rights (past) or present conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State.

(c) The traditional laws and customs of the native title claim group.

[99] It is my view that the native title rights and interests as described above are understandable and have meaning. I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[100] The application satisfies the condition 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:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[101] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

***The nature of the task at s 190B(5)***

[102] The nature of the Registrar's task at s 190B(5) was the subject of consideration by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or assess the strength of the evidence...' I am to assume that what is asserted is true and then consider whether 'the asserted facts can support the claimed conclusions'—*Doepel* at [17].

[103] The Full Court in *Gudjala FC* agreed with Mansfield J's characterisation of the task at s 190B(5). The Full Court also said that a 'general description' of the factual basis as required by s 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and [is] something more than assertions at a high level of generality', could, when read together with the applicant's affidavits swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s 190B(5)—at [83]–[85] and [90]–[92].

[104] The above authorities establish clear principles by which the Registrar should be guided when assessing the sufficiency of a claimants' factual basis:

- 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—*Doepel* at [47]; and
- the Registrar is to assume the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests—*Doepel* at [17].

[105] It is, however, important that the Registrar consider whether each particularised assertion outlined in s 190B(5)(a), (b) and (c), is supported by the claimant's factual basis material. Dowsett J in *Gudjala* [2007] and *Gudjala People #2* [2009] FCA 1572 (*Gudjala [2009]*) gave specific content to each of the elements of the test at s 190B(5)(a)–(c). The Full Court in *Gudjala FC*, did not criticise generally the approach taken by Dowsett J in relation to each of these elements in *Gudjala [2007]*[1], including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009].*

[106] In line with these authorities it is, in my view, fundamental to the test at s 190B(5) that the claim provides a description of the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further 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)'—*Gudjala [2007]* at [39].

[107] The following information is relevant to my consideration of this requirement:

- Form 1;
- Attachment F including document titled 'registration test report' and the supplementary connection report by [anthropologist name deleted] at Attachment F.1; and
- Attachment M.

**Reasons for s 190B(5)(a)**

[108] Dowsett J observed in *Gudjala [2007]* (not criticised by the Full Court on appeal), with respect to this aspect of the factual basis, that the applicant must demonstrate:

- that the claim group as a whole presently has an association with the area, though not all members must at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty—at [52]; and
- that there is information which supports that the claim group is associated with the 'area as a whole'—*Gudjala* [2009] at [67].

[109] I also note that broad statements about association with the application area that do not provide geographic particularity may not provide the requisite factual basis for this section—*Martin v Native Title Registrar [2001]* FCA 16 at [26].

[1] See *Gudjala FC* [90]-[96]

*The applicant's factual basis material*

[110] Attachment F of the application includes the following documents; a document titled 'Registration Test Report' and a supplementary consent determination report (anthropological report), written by anthropologist [anthropologist name deleted] prior to a consent determination for a previous Ngurrara native title claim which adjoins this application (Attachment F.1). I note that Attachment F.2 is a copy of registration test reasons made by a delegate of the Registrar for a Ngurrara Part B claim, which has also since been determined and adjoins this application. I have considered this document but have formed my own views on the material before me. Attachment F.3 is a map of the Ngurrara country which outlines the Ngurrara part A and part B determination areas as well as the current application area. Attachment F.4 is an affidavit of a claim group member which provides some information about his connection to Ngurrara country and his identity as a person who belongs to Ngurrara country, including information about sacred places and Dreaming tracks within the application area.

[111] The information before me is detailed and extensive. I have considered it all. Below I set out some of the kinds of information before me, though it is by no means an exhaustive summary of the information considered.

[112] The registration test report sets out information contained in the anthropological report which has applicability to the current application. In particular it details that there are many areas considered in the anthropological report that fall within the boundaries of the current application and outlines the relevance of much of the information in the anthropological report, particularly the Dreaming and spiritual information, to the current application area. Read together the two documents provide a great deal of information relevant to my overall consideration at s 190B(5) and more specifically that at s 190B(5)(a).

[113] The registration test report explains that the area considered by [Anthropologist name deleted] in the anthropological report was larger than the Ngurrara part A claim area and includes the area covered by this application. Excerpts of the anthropological report detailing the extent of the Ngurrara country boundaries and places where Dreaming beings are said to have passed through or occupy within the current application area, are provided.

[114] The registration test report explains that Ngurrara country broadly can be understood as encompassing two 'ecological zones' being the 'arid, sandhill spinifex region' which falls predominately within the Ngurrara part A claim area and over the Southern portion of this application area and the 'relatively well-watered area of hills, creeks and springs south of the Fitzroy River drainage system' which falls within the majority of the application area currently before me—at [2.5]. there are many references throughout the anthropological report to the 'well-watered' parts of Ngurrara country or to the area south of the Fitzroy river drainage system, often referred to as 'the pastoral zone' on Ngurrara country.

[115] The registration test report outlines information relevant to the consideration at s 190B(5)(a), including details of place names discussed in the report that fall within the application area before me. It states:

> In addition, when discussing the work of the early anthropologists such as Phyllis Kaberry and Norman Tindale in the region of the original application and current claim area, there are numerous references in the [anthropologist name deleted] Report to areas within or close to the current claim that are relevant in the context of subsection 190B(5)(a). For example:
>
> - [119]– Christmas Creek and the St George Ranges.
> - [120]– St George Ranges, Christmas Creek station and *Kanina* in the Bulka Hills (in the north-west of the current claim area) and the reference to the "pastoral zone" refers to the majority of the current claim area.
> - [121]– *Jurnjati* (east) is a jila located in the current claim area (see Map A).
> - [161]– discusses the link between people in the original claim area and the people in the "relatively well-watered northern area of creeks and hills" that includes the current claim area as previously mentioned.
> - [163]– references to the northern *jila* country which encompasses the pastoral stations south of the Fitzroy River and the Christmas Creek—at [3.1].

[116] The registration test report therefore serves to identify various references throughout the anthropological report which are specific to this application or also relevant to the factual basis of this application. Examples like the extract above provide reference points for me to consider the association of claim group members with the particular area of this claim.

[117] There is a great deal of information in the anthropological report that speaks to the association of current claim group members and their predecessors with areas within or proximate to the current application. The anthropological report considers research from earlier anthropologists and compares that with information collected by [anthropologist name deleted] from current claim group members and more contemporary research. It is through this comparison that the report is able to establish or infer continuity of association and place people who belong to Ngurrara country in the application area at a time prior to dominant European settlement in the area. I note that references in the anthropological report to the 'claim area' are in fact references to the Ngurrara Part A application that has since been determined. I will refer to this as the Ngurrara Part A claim area.

[118] The anthropological report states that the claim group members understand their country as being passed to them from the forebears and antecedents. Their country is composed of a series of campsites and walking tracks:

[text deleted]

[119] The anthropological report provides information about the significance of life cycle events in claimants' lives which establish their connection or 'belonging' to country. Of particular significance are two events [text deleted]. An explanation of the significance of 'finding' is also provided in the report from a claim group member—at [34] and [inset C].

[120] Much of the anthropological report focuses on the spiritual connection of the claimants with the application area. [text deleted].

[121] [anthropologist name deleted] details the boundaries of Ngurrara traditional country according to his research and describes the Northern boundary as follows:

> Northern boundary: this boundary also follows the boundaries of old and current pastoral leases. In the claimants' view, the *jila* country extends north of the [Ngurrara part A] Claim Area and includes [text deleted]

[122] Many of the places listed in the extract above are identified as falling within the application area or proximate to it. I am able to locate them in the application area using the maps attached to the anthropological report, through my own searches on the Tribunal's mapping database and from references to places within the application area included in the registration test report.

[123] The anthropological report states that much of the basis for the claimants' connection to country and their understanding of traditional laws and customs have its origins in the Dreaming, which has been passed to them through the generations, suggesting an association with the stories and the application area by the predecessors of the group. The anthropological report considers the extent of this generational transmission of key spiritual knowledge by comparing observed practices today with those recorded by early explorers and researchers as follows:

> From the senior claimants' accounts, the common basis for a great deal of their knowledge of and beahviour at places in the [Ngurrara part A] claim area originates in what they were told about their 'country' by their predecessors, among whom were their parents and grand-parents. [text deleted]. The first explorer to traverse the [Ngurrara part A] Claim Area was Colonel Edgerton Warburton in 1873. Quite likely, some of the claimants' grand-parents were living there at the time- about a quarter century before the start of sustained European contact—at [105].

[124] I understand that [anthropologist name deleted]'s references to the Ngurrara part A claim area in the anthropological report have equal applicability for the area over which the application before me falls. This includes information pertaining to the spiritual association and generational transmission of cultural knowledge by claim group members and their predecessors.

[125] In relation to the ongoing occupation of the area by claim group members the anthropological report states the following:

> Indigenous movement within that area encompassing the deeper desert of the [Ngurrara part A] Claim Area and the southern extremes of the pastoral stations was probably unexceptional as regards to *habitual* traditional patterns of occupation and land-use. There are several bases for this view. I obtained a number of accounts indicating that, before the mid 1960s, now senior claimants and their forebears had been living over at least two generations (and perhaps more) in the marginal desert area of the stations while going back and forth into the sandhill country of the north-central [Ngurrara part A] Claim Area with their kin. Accordingly, claimants repeatedly identify sites in both the sandhill country of what is now the [Ngurrara part A] Claim Area and the northern *jila* country which encompasses the pastoral stations south of the Fitzroy River and the Christmas Creek as either Walmajarri and Mangarla, and sometimes both.
>
> Such evidence from claimants is corroborated by details contained in Kaberry's unpublished notes and genealogies (see section four, para 119-20). This material supports the fact that Walmajarri individuals occupied the arid, sandhill and spinifex region of what is now the northern [Ngurrara part A] Claim Area (in the general vicinity of *yarntayi*), as well as the relatively well-watered area of hills, creeks, and springs to the south of the Fitzroy River drainage system. As I have indicated (Inset B), both ecological zones contain the *jila*-kalpurtu sites associated with the *jila* law. In my view, the presence of such cultural features in the landscape is indicative of a long and common association by the people to sites within these two zones—at [163] and [164].

[126] As discussed above the areas referred to throughout the report as pastoral zones or as the 'relatively well-watered' area, according to the maps detailing places before me and the registration test report, fall predominately within the application area, such that common association being discussed above is referring to all Ngurrara country, including the application area before me.

[127] The anthropological report also provides information about current claim group members' association with the application area, particularly through teaching younger generations about the spiritual properties of the landscape. The report states that following Governmental policy changes in the 1970s many claim group members moved back into the pastoral area of Ngurrara country and continue to reside there. Some of these places include Kadjina (in Kalijita of the St George Ranges), Yakanarra and Djugerari (on Cherrabun Station), Yari Yari, Jilamparti and Ngaranjarti, all of which I have been able to ascertain are located within or proximate to the application area before me. In a concluding statement about the ongoing connection of the claimants with the whole of their country, including the application area, the anthropological report states:

> To conclude, evidence from the secondary sources, along with accounts recorded from the claimants and my own observations indicate that, while some changes have occurred in the claimants' society and way of life, the claimants continue to maintain a physical, cultural and economic connection

with the *jila* country, including the [Ngurrara part A] Claim Area and that this connection is in accordance with their traditional laws and customs—at [179].

[128] Attachment M of the application is an affidavit from [deponent 1 name deleted] a claim group member. There is a great deal of information in the affidavit that speaks to the current association of [deponent 1 name deleted] and other claim group members with the application area. [deponent 1 name deleted] discusses how he was born at [place name deleted], a community that I understand falls within the application area. He talks of continuing to access the application area and working across it as a [text deleted]. There is information about conducting ceremony on the application area, camping, hunting and fishing on the application area, about visitng the jila sites on the application area. [deponent 1 name deleted] also discusses how he was taught about the sites, ceremonies and Ngurrara place names for significant locations across the application area from 'the old people' before him and that he passes this on to younger generations now.

***My consideration***

[129] Based on the information before me, examples of which I have extracted and detailed above, I am satisfied that the claim group and their predecessors have and had an association with the application area.

[130] It is clear that the claim group members understand their connection to Ngurrara country as arising from the Dreaming stories, in particular the jila sites and law that I understand traverse the Ngurrara country, including the application area.

[131] I note that the Ngurrara Part A claim, for which the anthropological report was written, was determined, with the claim group holding exclusive native title rights and interests over the whole area. Additionally, a much smaller Ngurrara Part B area has also been determined with the same claim group holding the native title for the area. Both the part A and the part B determinations adjoin the application area before me. The primary amendment to this application is changes to the claim group description. Further apical ancestors have been added to the description at Schedule A from which claim group members can descend in order to establish membership to the group. I understand that these changes came about as a result of further research by [anthropologist name deleted] into the claim group and the area and was particularly the result of his further consultation with claim group members who consider the additional ancestors to have had, and therefore their descendants to continue to have, rights and interests in the area.

[132] It is my view that the material in the anthropological report, although considering the claim group for the part A and part B determinations, which did not include the additional apical ancestors, have equal applicability to the claim group and application area currently before me.

That is because association of the claim group, as I understand it, arises as a result of a spiritual understanding and association with the area. [text deleted]. Knowledge of significant ceremonies, Dreaming tracks and jila sites are integral to the connection with places across Ngurrara country and the application area more specifically. The anthropological report broadly details the many ways which the claim group members today and their predecessors can be said to have experienced, shared and maintained that spiritual connection.

[133] The example of [deponent 1 name deleted], a claim group member, whose affidavit about his connection to Ngurrara country and acknowledgement and observance of traditional laws and customs is included at Attachment M of the application, provides an example of the connection and association of current claim group members with the area today. It is clear from this affidavit that [deponent 1 name deleted] is familiar with many of the Dreaming stories from which his sense of belonging to country arises and that he learnt these stories from 'the old people' before him and that he passes them on to the younger generations of the claim group today.

[134] Similarly, the anthropological report through comparisons of beliefs, stories and practices undertaken by the group in the area today and those recorded by earlier researchers and Europeans in the application area, demonstrates an ongoing continuity in the stories and activities conducted by claim group members. There is therefore an available inference from these comparisons that the association, particularly that which arises as a result of the spiritual understanding and connection to place through the jila and other Dreaming laws, arises as a result of the transmission of such key cultural practices from generation to generation. This transmission is, according to the research and conclusions in the anthropological report able to be linked to family members of the current claim group back to a time in the mid to late 1800s when European settlement of the area had not yet occurred or was only beginning. It is therefore my view that there is an available inference that the transmission of spiritual information as well as observance of cultural practices and general occupation of the area, all significant to the claim group's association and ongoing sense of belonging to country would have occurred in the period between first European settlement of the area and sovereignty.

[135] It is also my view that the material before me contains sufficient geographic particularity, detailing an association of the whole claim group generally with regions and places across the entirety of the application area. Many of the place names referred to in the material are identifiable as falling within the external boundaries of the application area and many more are within close proximity to it. I understand that much of the information in the anthropological report about the association and activities of the claim group speaks to their association and activities across all Ngurrara country and this clearly incorporates many significant sites across the application area before.

[136] On this basis, I am of the view that the material supports an assertion that there is an association of the whole claim group and their predecessors over the area throughout the period since sovereignty.

[137] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(a).

**Reasons for s 190B(5)(b)**

[138] Dowsett J in *Gudjala [2007]* linked the meaning of 'traditional' as it appears in s 190B(5)(b) with that at s 223(1) in relation to the definition of 'native title rights and interests'. This idea of 'traditional' necessarily requires consideration of the principles derived from Members of the *Yorta Yorta Aboriginal Community v Victoria (2002)* 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). This aspect of Dowsett J's decision was not criticised by the Full Court on appeal—*Gudjala FC* at [90]–[96].

[139] Dowsett J's examination of *Yorta Yorta* lead him to conclude that a necessary element of this aspect of the factual basis is the identification of a relevant society at the time of sovereignty, or at least, first European contact—*Gudjala [2007]* at [26]. I understand that a sufficient factual basis needs to address that the traditional laws and customs giving rise to the claimed native title have their origins in a pre-sovereignty normative society with a substantially continuous existence and vitality since sovereignty.

[140] Dowsett J stated in *Gudjala [2007]* that the facts necessary to support this aspect of the factual basis 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]; and
- the link between the claim group described in the application and the area covered by the application, which, 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'—at [66] and see also at [81].

***The applicant's factual basis material***

[141] The registration test report provides a list of sections within the anthropological report which it is asserted are relevant to the condition at s 190B(5)(b).

[142] The anthropological report provides a great deal of information about the traditional laws and customs of the claim group in relation to the application area. As mentioned in my reasons for s 190B(5)(a) above, it is clear that the claim group derive their identity and understanding of cultural practices from their spiritual connection to Ngurrara country. It is clear that a common understanding of 'law' and the creation of country informs the claim group's traditional laws and customs. The anthropological report states:

> for those sites connected to [text deleted], the claimants identify their origins in an epoch long before their time. [text deleted]

[143] The anthropological report provides information about the claim group's belief that certain [text deleted]. There are details of many stories about these beings and the spiritual significance they hold for the claim group members. The anthropological report states that several claimants tell these stories in their own ways that corroborate other research regarding their spiritual beliefs. It is asserted in the anthropological report that it is [text deleted] that the claim group are united and understand their rights and responsibilities in the land—see for example, chapter 3.3. In relation to this point the anthropological report states:

> W.E.H. Stanner concurred with the Berndts about the key role of the Dreaming in Aboriginal social life and belief. As he points out, the Dreaming has 'less to do with the setting up of the world than with the instituting of relevances within it'. A key characteristic of the Dreaming is that it resists change: to sets things 'in an enduring form' As for the Berndts, it is a moral system providing a template for human behavior: it 'endow[s] all things- including man, and his condition of life- with good and/or bad properties'. The Dreaming Beings are seen to bestow upon living human beings the 'necessary and enabling conditions of social conduct'. They introduced various customs and instituted the social order. In these ways, the Dreaming Beings 'live on and exert their influence' on the lives of human Beings.
>
> The Dreaming then has the double effect of providing a way to look at the world and also to deal with it – a model of and a model for reality. I conclude that, in its general features, the Dreaming is a system of belief and action that is normative in its content, and this also applies to the claimants—at [108] and [109].

[144] The anthropological report considers earlier records and research of the area, particularly in relation to the use of the land. In particular, the anthropological report talks of the research of Phyllis Kaberry conducted in the mid 1930s, which also included some genealogical work. The anthropological report states:

> [text deleted] They recalled how she travelled on a horse during 'holiday time' from station work with a group of people who were walking from Go Go Station to Christmas Creek to attend initiation ceremonies there.

> The Walmajarri and some Mangarla and Yulparija men and women in Kaberry's notes are associated with ninety or so indigenous place-names. Some of these individuals could have been born as early as the 1860s or 1870s, well before European pastoral development began. The sites are in a region from Billiluna west to Christmas Creek and the St George Ranges ('Kali-ida'/Kalijita), and south into the desert—at [118] and [119].

[145] The anthropological report notes that in addition to the recording of sites, many of which have spiritual significance to the claim group across the application area both in Kaberry's research and within the knowledge of current claim group members, Kaberry also recorded details of rain making ceremonies. These rain making ceremonies have also been observed in more contemporary times by [anthropologist name deleted] throughout the course of his research. He concludes by stating:

> The close correspondence between Kaberry's information on sites, mythology and ritual practice lends further substantiation to the traditional basis of key laws and customs of the claimants, particularly as they are tied to the Dreaming. Furthermore, some of Kaberry's informants were senior men in 1935-36. It is likely that they would have been born in the 1860s or 1870s- well before European exploration and settlement in the region of the [Nuggrara part A] Claim Area—at [124].

[146] The anthropological report includes a chapter titled 'Intergenerational Transmission of Laws and Customs' which details the continuity in observance and acknowledgement of various laws and customs by members of the claim group.

[147] This chapter of the anthropological report talks about senior claim group members teaching younger generations about key cultural practices across the application area. A non-exhaustive list of some of the types of laws and customs [anthropologist name deleted] has found are taught through intergenerational transmission is provided. This list includes: teaching information about forebears including their sections and subsection; details of senior claimants' connection to their country; information regarding connection to places and significant sites as well as resource rich locations, eg places to locate ochre, water etc; teaching a world view including details of history using a timeline and the events of the Dreaming as well as Dreaming protocols such as deference to senior people, prohibitions about accessing certain sites e.g. men's only sites etc; and teaching traditional techniques associated with the gathering and hunting of bush foods—see [147].

[148] There are many examples throughout the anthropological report of the kinds of laws and customs acknowledged and observed by claim group members today that are found by [anthropologist name deleted] to be 'traditional' in the sense that they are asserted to derive from older generations and have their origin in a time prior to European settlement, back to the Dreaming time, according to the belief system of the claim group. An example is as follows:

> [text deleted]… in these and many other ways, occupation of and the claimants' presence in the living landscape of the [Ngurrara part A] Claim Area is circumscribed by the dictates of the claimants' laws and customs—at [205].

[149] Other information relating to particular walking tracks, which must be followed because, amongst other things, they provide paths to safe drinking water across the arid desert and other suitable locations for camping when moving about the Ngurrara country are taught to younger generations. The anthropological report indicates that these tracks are still, as much as possible, followed today, even when the area is accessed by motor vehicles. Information pertaining to the seasons and when certain bush foods are most readily available and how to find them, as well as where and how to find water of various varieties, including permanent and non-permanent sources, is also passed, it is asserted, from generation to generation and continues to be taught to young claim group members today.

[150] The affidavit of [deponent 1 name deleted] at Attachment M of the application provides further contemporary information about the acknowledgement and observance of laws and customs and how they were taught to [deponent 1 name deleted] by older generations and he continues to teach them to younger generations. [deponent 1 name deleted] states:

> [text deleted] I have taught my children *Walmajarri* language and when the time comes my old people and I will teach them as well. I am also passing these things on to the young *Ngurrara* Rangers. I teach them all of the language names, the real names, for plants and animals. This way our young people will become strong with *Walmajarri* law, language and culture—at [4].

[151] There are several examples in [deponent 1 name deleted]'s affidavit of him acknowledging and observing laws and customs of the claim group as taught to him by 'the old people'. He explains, for example, that he can hunt and fish across the claim area:

> I hunt and fish on the proposed *Yi-Martuwarra Ngurrara* claim area every weekend unless my wife gets angry. We don't usually go to the supermarket for our food. We still get it traditional way. This is still very strong in my community. I encourage all the young people to prepare it traditional way as well. [text deleted] we hunt and fish for all our own food. I make sure they prepare it traditional way so they know and they can teach others. My old people taught me how to use the land for food and I teach my children and others—at [19]

[152] [deponent 1 name deleted] also talks of collecting bush foods and other resources across the application area:

> Up in the river country of the proposed *Yi-Martuwarra Ngurrara* native title claim area we collect bush fig. we also collect bush tomato and bush orange. We use the conkerberry for many things. We use the berries for food and medicine. We use the leaves for smoking ceremonies. If you boil up the plant you can make a thing like 'Vicks Vapour rub'. It is really good for your breathing when you have a cold or the flu. We also use the white gum for making articles to cook with or for covers over

> a bush oven. I see our old people with articles that weren't made by us. They would swap things they made with things made by other mobs. My uncle just passed and left me all his boomerang, spear and things and some of them weren't made the way we make things, they have come from other places—[25].

***My consideration***

[153] The information before me is extensive and provides a detailed picture of the kinds of laws and customs acknowledged and observed by the claim group, as well as in-depth explanations about the spiritual basis or Dreaming narratives that provide the protocols and set out the social norms according to which, it is asserted, the claim group have, and continue, to abide by today. It is clear that the cultural knowledge possessed by claim group members today was taught to them by their forebears and that this represents a tradition or pattern of oral transmission of key cultural information back to a time prior to European settlement, and by inference, prior to sovereignty.

[154] It is clear from the material that many of the claimants learnt about Ngurrara country from their parents and grandparents. As extracted above, these people were likely some of the same people the subject of Kaberry's research in 1935-36. The anthropological report states that some of Kaberry's informants at the time were senior claim group members, placing their dates of birth around the 1860s and 70s, a time, per the anthropological report, prior to pastoral activity in the area and therefore dominant European settlement and interference. The anthropological report, as detailed above, further makes clear that the claim group members today are direct descendants of these same informants. There is therefore a clear connection between the claim group members today and their predecessors, back several generations.

[155] It is clear from the information before me that there existed at the point of first European contact in the area, a society united by traditional laws and customs which they believe were derived from spiritual ancestral beings connecting them to significant sites across Ngurrara country. This is clear because of the research conducted by Kaberry and others discussed in the anthropological report around the time of first European contact or informed by claim group members who would have been present then. This research and the information pertaining to the traditional laws and customs acknowledged and observed by the claim group around at least the 1860s and 1870s is comparable to and in many ways matches the information collected today by contemporary research, most notably that conducted by [anthropologist name deleted]. Many of the Dreaming narratives told, including information about creation beings who are believed to still occupy particular sites across Ngurrara country, including on the application area, are sufficiently similar to those recorded by earlier research. Likewise patterns of travelling across Ngurrara country, use of certain walking tracks determined by Dreaming protocols continue to be used today in line with tracks recorded to have been used by many generations previous.

[156] It is clear from both the anthropological report and the affidavit at Attachment M that the claim group relies on a rich tradition of oral teaching. Many claim group members who were interviewed for the anthropological report (information and quotes relating to some of these interviews are included in the report) as well as [deponent 1 name deleted] in his affidavit, talk of how they understand themselves to belong to Ngurrara country. There is a common understanding of the laws that are taught by the 'old people' and passed at appropriate times to younger generations.

[157] These laws that are passed to claim group members through oral teaching pertain to all aspects of life, ranging from history and world view stories about creation and other origin stories that form part of the Dreaming all the way to basic subsistence activities like where to collect precious resources like water, bush foods, medicines and ochre.

[158] Given all of the information before me I am of the view that there is sufficient detail in the factual basis material provided to demonstrate a strong pattern of inter generational transmission of cultural practices and belief systems and rituals unique to a society of people that have been occupying and affiliated with the claim area and beyond for many generations. The factual basis materials supports the assertion that these laws and customs have been orally transmitted in a substantially unchanged manner since at least around the time of the 1860s and 70s.

[159] In *Gudjala [2009]* Dowsett J discussed circumstances where it may be possible to infer continuity of the relevant pre-sovereignty society:

> In some cases it will be possible to identify a group's continuous post-sovereignty history in such detail that one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since. It would similarly be possible, in those circumstances, to infer that the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as pre-sovereignty laws and customs—at [30].

[160] In my view, the factual basis materials are sufficient to support an assertion that there has been strong cultural continuity since the generation observed by Kaberry and other researchers, born at least around the 1860s to 1870s through to the present generations. This, in my view, is sufficient to support an inference that this cultural vitality and continuity is likely to have been transmitted in much the same way in the period between the 1860s and 70s and sovereignty.

[161] Having regard to all of the information before me I am satisfied that the factual basis provided is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claimed native title rights and interests

[162] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(b).

**Reasons for s 190B(5)(c)**

[163] I am of the view that this requirement is also necessarily referrable to the second element of what is meant by 'traditional laws and customs' in *Yorta Yorta*, being 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—at [47] and also at [87].

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

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

[166] In addressing this aspect of the factual basis Dowsett J in *Gudjala [2009]* considered that, should the claimants' factual basis rely on the drawing of inferences, it was necessary that a clear link be provided between the pre-sovereignty society and the claim group:

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity—at [33].

[167] As discussed above, I am satisfied that there is sufficient information before me to infer that there existed a society, at sovereignty, that observed traditional laws and customs. In particular, it is my view that the factual basis material demonstrates the existence of an identifiable society with traditional laws and customs in the application area around the 1860s and 1870s. I understand from the information before me, that this is likely to be a time prior to first sustained European settlement in the application area, and that much of the information pertaining to observations and research of early explorers and researchers reflect and depict traditional cultural practice uninterrupted by European settlement. This, along with information that demonstrates a strong pattern of intergenerational teaching, provides sufficient information speaking to the continuity of the observance of those same traditional laws and customs from the time since sovereignty to today. Examples of the continuity in the transmission and practice of traditional laws and customs are extracted and considered in some detail at my reasons above for ss

190B(5)(a) and (b). One such example discussed above is the continuation of rain making ceremonies in much the same way as those observed by Kaberry in her 1930s study.

[168] The information before me links the current claim group, through the people who comprise the applicant, directly to the predecessors for the group occupying the area prior to sustained European settlement. It is my view that the strong link between the ancestors and the current claim group members, and the pattern of intergenerational transmission of key cultural practices, back to a generation present on the application area at the time of first European contact, demonstrates a sufficient factual basis for the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

[169] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(c).

### Conclusion

[170] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised 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.

[171] The pertinent question at this requirement is whether or not the claimed rights and interests can be prima facie established. Mansfield J, in *Doepel*, discussed what 'prima facie' means stating that, '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'—at [135]. It is accepted that the Registrar may be required to undertake some 'weighing' of the material or consideration of 'controverting evidence' in order to be satisfied that this condition is met—at [127].

[172] In undertaking this task I am of the view that I must have regard to the relevant law as to what is a native title right and interest as defined in s 223(1) of the Act. I must therefore consider, prima facie, whether the rights and interests claimed:

- exist under traditional law and custom in relation to the land or waters in the application area;
- are native title rights and interests in relation to land or waters: see chapeau to s 223(1); and
- have not been extinguished over the whole of the application area.

[173] The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest' in relation to land or water'—*Western Australia v Ward*

*[2002]* HCA 28 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to' are of wide import'—(*Northern Territory of Australia v Wlyawayy, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005]* FCAFC 135 (*Alyawayy FC*).

[174] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

## Consideration

*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), the native title claim group claims the right to possess, occupy, use and enjoy the lands and waters of the application area to the exclusion of all others.*

[175] In *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 land'—at [89] and [93].

[176] Further, it was held that:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses, occupy, use and enjoy land to the exclusion of all others—at [88].

[177] The Court in *Griffiths v Northern Territory of Australia [2007]* FCAFC 178 (*Griffiths FC*) examined the requirements for proving that the right to exclusive possession is vested in the native title claim group, finding that:

> ... the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.—at [71].

[178] There is a great deal of information in the anthropological report which speaks to the exclusive nature of the native title rights and interests of the claim group across Ngurrara country. Section 6.1.1 of the anthropological report is titled 'Possession of the area to the exclusion of all others' and, amongst other sections, speaks of the exclusive nature of the claim group's occupation and connection with their Ngurrara country. The anthropological report states the following:

> The claimants' right to possess the [Ngurrara part A] Claim Area is fundamentally and physically manifest in [text deleted]

[179] I understand this to be a spiritual mechanism for explaining the exclusive control the claim group exercise over the Ngurrara country. Their understanding of and connection to the Dreaming stories and beings provides the basis for their control over land.

[180] The anthropological report provides a further list of other characteristics of the claim group and their traditional laws and customs which demonstrate, in [anthropologist name deleted]'s view, the existence of the right to exclusively possess Ngurrara country, and therefore the application area.

[181] Further, section 6.2.2 of the anthropological report is titled 'The Right to Control the Access of Others to and their use and enjoyment of the resources of the Claim Area' and this speaks to the exertion of control over access to the Ngurrara country and resources within it. It is clear that this control is exerted by the claim group as a result of their belief in and understanding of the Dreaming, but clearly is understood to extend to all people, including non-Aboriginal people who may not necessarily subscribe to the Dreaming belief systems and narratives. The anthropological report explains:

> [text deleted]

[182] By way of example of the claimants' belief that these Beings also impact upon those people, like Europeans, who do not have beliefs in the Dreaming beings, the following explanation is also provided:

> While Europeans (or *kartiya*) may not share such beliefs as the claimants and other Aboriginal people, nevertheless their behavior is also subject to [text deleted]. This is to say, the claimants interpret *kartiya* transgression of their laws and customs this way. [text deleted] (see section four, para 85)—at [254].

[183] It is my view that these examples and the other information before me demonstrate that the claim group have the right to control access and exclusively possess their Ngurrara country including the application area. It is therefore my view that this right is established, prima facie.

[184] **Outcome:** established, prima facie.

*Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claims the following rights and interests:*

*(a) the right to travel over, move about and have access to the application area;*
*(f) the right to live on the land in the application area;*
*(g) the right to camp on the application area;*
*(h) the right to erect shelters and other structures on the application area;*

[185] Again, there is a great deal of information that speaks to each of these rights. It is clear from the anthropological report that claim group members and their predecessors have and continue to travel across the application area in order to visit significant sites, gather bush foods and other resources, conduct ceremonies and teach the features of the landscape, among other things. Travelling across the application area necessarily requires camping and the erecting of shelters and there is information in the anthropological report which details the traditional shelters and dwellings built and used by claim group members.

[186] It is very clear from the anthropological report and the affidavit at Attachment M that many claim group members have been born and raised on the application area. Although there is some information which suggests that claim group members do not often continue to live in the more arid areas of their Ngurrara country, the 'relatively well watered' pastoral zone which is the area the subject of this application clearly has continued to be occupied and lived in by the claimants throughout the generations, where possible. Many claimants have continued to live and work on the pastoral stations within their country and specifically within the application area. For example the anthropological report states:

> Many of the claimants now live at Kadjina (in Kalijita or the St George ranges), Ngalapirta (on Kalyeeda Station), and Yakanarra and Djugerari (on Cherrabun Station). Some also live on the Aboriginal-owned pastoral stations of Mowla Bluff, Yungnora (Noonkanbah), Kupartiya and Jarlmadanga Mt Anderson). On the [Ngurrara part A] Claim Area, the Kurlku community begun in the late 1970s and is still operating. More recently, Puluwala camp was set up in 1995. Three other small communities of Yari Yari, Jilamparti and Ngaranjarti are located just north of the claim boundary (see Map A)—at [176].

[187] I note that many of the place names listed in the above extract fall within the boundary of the current application before me. Many others are proximate to it.

[188] Speaking of travelling across Ngurrara country and camping on it [deponent 1 name deleted] states in his affidavit at Attachment M:

> [text deleted]

[189] With regard to the erection of dwellings on Ngurrara land the anthropological report explains:

> Also in 'rain time' the claimants construct and erect dwelling in the *jila* country. Known as *mangkaja*, these dwellings are built of wood and spinifex and in the side of a sandhill, and they afford complete protection from the rain—at [213].

[190] These and other examples like them provide sufficient information, in my view, to establish the existence of these rights, prima facie.

[191] **Outcome:** established, prima facie.

*(b) the right to hunt, fish and forage on the application area;*
*(c) the right to take, use and enjoy the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone, ochre and resin;*
*(e) the right to have access to and use and maintain the natural water resources of the application area including the beds and banks of watercourses;*

[192] There is ample information before me that speaks to the use, by claim group members and the predecessors, of the natural resources of the application area. This includes, hunting and gathering bush foods and medicines, the use of other resources such as ochre and wild tobacco and the use of water resources, for both subsistence and spiritual purposes.

[193] Much of the focus of the anthropological report is on the connection to and occupation by the claim group of their country, including the application area. In demonstrating or providing information which speaks to these issues a multitude of subsistence and spiritual examples are provided that pertain to the use of resources, such that these rights are spoken about extensively throughout the anthropological report.

[194] Further information which goes to establishing the existence of these rights, prima facie, is included in the affidavit at Attachment M. An example of the kind of information in the affidavit is as follows:

> [text deleted]
>
> I hunt and fish on the proposed Yi-Martuwarra Ngurrara claim area every weekend unless my wife gets angry. We don't usually go to the supermarket for our food. We still get it traditional way. This is still very strong in my community. I encourage all the young people to prepare it traditional way as well. [text deleted] we hunt and fish for all our own food. I make sure they prepare it traditional way so they know and they can teach others. My old people taught me how to use the land for food and I teach my children and others—at [18].

[195] Speaking of using the resources on the claim area for bush medicines and the making of other tools, [deponent 1 name deleted] states in his affidavit:

> We also use the proposed *Yi-Martuwarra Ngurrara* claim area to collect bush tucker and medicine as well as material to make things like *boomerang*, spears, *kooljamans* and other things.
>
> Up in the river country of the proposed Yi-Martuwarra Ngurrara native title claim area we collect bush fig. we also collect bush tomato and bush orange. We use the conkerberry for many things. We use the berries for food and medicine. We use the leaves for smoking ceremonies. If you boil up the plant you can make a thing like 'Vicks Vapour rub'. It is really good for your breathing when you have a cold or the flu. We use gum trees and bloodwood trees to make boomerang and spears. We also use the white-gum articles that weren't made by us. They would swap things made by other

mobs. My uncle just passed and left all of his boomerang, spear and things and some of them weren't made the way we make things, they have come from other places—at [24] and [25]

[196] These and many other examples in the anthropological report, in my view, establish the existence of these rights, prima facie.

[197] **Outcome:** established, prima facie.

*(d) the right to trade in resources of the application area;*
*(o) the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purpose);*

[198] A section of the anthropological report, 6.2.3 'The Right to Trade in the Resources of the Area' speaks to the existence of the rights, prima facie. This section of the anthropological report details the various recordings throughout European history of the claim group sharing, trading and exchanging resources with other Aboriginal people across the desert regions.

[199] The anthropological report states that 'evidence of exchange relationships between people living in what is now the [Ngurrara part A] Claim Area and others can be found in the earliest written records, in 1873'—at [260]. The anthropological report also goes on to provide information from Tindale, recorded in the 1970s pertaining to trade routes and central trade locations. It then concludes with more recent observations of claimants exchanging objects such as boomerangs, wooden boards and those associated with love magic and ochres.

[200] In my view, the information in the anthropological report regarding the existence of these rights is detailed and substantial, such that it is sufficient to establish the existence of these rights, prima facie.

[201] **Outcome:** established, prima facie.

*(i) the right to:*

*i. engage in cultural activities;*
*ii. conduct ceremonies;*
*iii. hold meetings;*
*iv. teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and*
*v. participate in cultural practices relating to birth and death, including burial rights;*

[202] Throughout both the anthropological report and the affidavit at Attachment M there is much discussion of activities, ceremonies, practices relating to birth and death as well as the centrality of teaching about places and significant sites by claim group members.

[203] In my reasons above for s 190B(5) and other rights and interests already discussed in this section I have included many examples that also speak to the existence of this right. For example,

relating to the significance of 'finding' and place of birth to claim group identity and membership, as well as the continuity in rain making ceremonies observed by Kaberry and [anthropologist name deleted] alike, decades apart.

[204] There is a lot of information in [deponent 1 name deleted]'s affidavit about his being responsible for taking younger claim group members out onto country and teaching them the stories for places and about the significant sites across Ngurrara country. Likewise, he talks of having been taught in this fashion by 'the old people' before him. [deponent 1 name deleted] also discusses in his affidavit, knowledge of and the continuing use of burial sites on the application area. Below is an extract regarding a burial place:

> [text deleted]

[205] In my view there is ample information before me which establishes the existence of this right, prima facie.

[206] **Outcome:** established, prima facie.

*(j) the right to have access to, care for, maintain and protect places, sites and areas of importance in the application area;*
*(n) the right to control access to, and use of, the application area by other Aboriginal People who seek access to use of the lands and waters;*

[207] Much is written in both the anthropological report and the affidavit at Attachment M regarding the importance of looking after and protecting country, especially significant jila sites. [deponent 1 name deleted] talks about ensuring people do not harm the sites and the responsibility of caring for country:

> As a [text deleted] I make sure that these places are not destroyed by the invasion of feral plants and animals. This helps keep these places strong, helps keep the stories strong, and this keeps our culture strong. I have a responsibility [text deleted] a traditional owner to protect and care for these places that are special to us. That is why our old people tell us about these places, the paintings, the songs and the stories. They tell us so we know what to protect and how to protect it—[10].

[208] It is also clear the there are certain rules or protocols which must be complied with in terms of who within the claim group is able to make decisions about certain areas, speak to the spiritual beings or access certain locations. There is mention in my reasons above and throughout the anthropological report to such protocols, including rules about men's and women's only sites.

[209] [deponent 1 name deleted] also speaks in his affidavit referring to the right people for certain jila sites and deferring to 'the old people' before taking resources like water and other things from the application area. He states:

[text deleted]

[210] There is also a great deal of information in the anthropological report regarding the significance of painting country. It is asserted that particular family groups are associated mostly strongly with certain regions of Ngurrara country depending on a series of factors, including birth place, finding place etc. [text deleted]

[211] It is therefore my view that the information before me establishes the existence of these rights, prima facie.

[212] **Outcome:** established, prima facie.

*(l) the right to light fires for domestic purposes and customary practices;*

[213] The anthropological report provides information relevant to the existence of this right. In particular it details the spiritual significance of fire, in addition to the subsistence uses of it, for example, for cooking. The anthropological report states the following:

[text deleted]

[214] Similarly the affidavit of [deponent 1 name deleted] at Attachment M talks of how he does 'traditional burning':

> I am also allowed to do traditional burning under both tradition and custom [text deleted]. The old people used to burn to look after country. They would burn off the overgrown areas so it regenerated good feed for the kangaroos and other animals we hunt. This would help fatten them up. People also understood the big damage that big bushfires do during the dry season so they would burn during the wetter months to avoid big fires—at [27]

[215] It is clear that fire and the lighting of fire and burning of parts of the claim area plays a significant role in the spiritual and cultural life of the claim group. I am therefore of the view that examples like those extracted above, and other information in the material before me, demonstrates the existence of this right, prima facie.

[216] **Outcome:** established, prima facie.

*(k) the right to speak for and make non-exclusive decisions about the application area;*

[217] It is my view that this right cannot be recognised as a non-exclusive right. As discussed above in relation to the exclusive rights claimed, the Court has taken the view that, 'it is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses, occupy, use and enjoy land to the exclusion of all others'— *Ward HC* at [88]

[218] This notion conveys that the native title holders have the right to control access to that country, which is inconsistent with it being a non-exclusive right. In some instances the Court has recognised in consent determinations a qualified framing of this right to speak for country, such as the right to speak for country and make decisions about Aboriginal persons who are bound by the relevant traditional laws and customs—see, for instance, *De Rose v State of South Australia* [2013] FCA 687. However, the expression of this right is not similarly qualified.

[219] **Outcome:** not established, prima facie.

*(m) the right to uphold, regulate, monitor and enforce customary law;*
*(p) the right to regulate and resolve disputes among the native title claimants of the application area.*

[220] I do not consider that these rights are capable of meeting the requirement at s 190B(6). Primarily, that is because I do not understand them to be rights in relation to land and waters.

[221] In *Neowarra v Western Australia* [2003] FCA 1402 (*Neowarra*), Sundberg J held that a similarly framed right to 'uphold and enforce the traditional laws and customs' was not a right in relation to land or waters, but rather was a right in relation to people. His Honour also held that were he wrong about this point, this right was also inconsistent with it being a non-exclusive right. That is because his understanding of the right as framed is that it would enable control over how other persons exercised their rights in the area — [488].

[222] Similarly in *Neowarra,* it was held that a right in relation to resolving disputes among native title holders was in relation to people rather than land or waters — [490].

[223] It is therefore my view that these rights cannot be established, prima facie.

[224] **Outcome:** not established, prima facie.

### Conclusion

[225] The application satisfies the condition of s 190B(6).

## Subsection 190B(7)
## Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably 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:
  (i) the Crown in any capacity, or
  (ii) a statutory authority of the Crown in any capacity, or

(iii) 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.

[226] I understand the phrase 'traditional physical connection' to mean a physical connection with the application area in accordance with the traditional laws and customs of the group as discussed in the High Court's decision in *Yorta Yorta—Gudjala [2007]*—at [89].

[227] Mansfield J in *Doepel* considered the Registrar's task at s 190B(7) and stated that it requires the Registrar 'to be satisfied of particular facts', which will necessarily require the consideration of evidentiary material, however, I note that the role is not the same as that of the Court at hearing, and in that sense the focus is a confined one—at [18].

[228] Mansfield J commented:

> The focus is upon the relationship of a least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

[229] As I am required to be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters covered by the application, I have chosen to concentrate my attention on the factual basis provided pertaining to one member of the claim group, namely [deponent 1 name deleted] .

[230] I understand from his affidavit at Attachment M of the application that [deponent 1 name deleted] has spent most of his life on Ngurrara country. He states that he was raised by his mother and step father at [place name deleted], a community on Ngurrara country.

[231] It is clear that [deponent 1 name deleted] understands his belonging to Ngurrara country as arising from his descent from his parents. He states that his mother comes from [place name deleted] on Ngurrara country. His [text deleted], who he says raised him, was born at [place name deleted] and it was he along with other 'old people' that taught [deponent 1 name deleted] the Walmajarri law and language. Today [text deleted] work to look after their Ngurrara country. As a result of this role I understand [deponent 1 name deleted] continues to spend a lot of time all across Ngurrara country, including the application area.

[232] It is clear from the information in the affidavit that [deponent 1 name deleted] has responsibility for teaching younger generations the law. He states that he has taught his own children about the stories and places across Ngurrara country and that he also teaches the young Ngurrara rangers when they are out on the application area and Ngurrara country more broadly.

[233] [deponent 1 name deleted] is able to name several significant sites, jila sites, on the application area, which he states he was taught about when walking all across Ngurrara country

with the 'old people'. He talks of being responsible for protecting those sites now and teaching the younger generations about the Dreaming and stories associated with those places.

[234] [deponent 1 name deleted] speaks about visiting many places on the application area as well as undertaking many activities across it. He talks of hunting, fishing, camping and gathering other resources like bush foods, medicines, ochre and timber for boomerangs and other tools. [deponent 1 name deleted] is familiar with burial sites and places where ceremonies are conducted across the application area and cultural protocols relating to accessing certain water sources and other significant sites.

[235] It is clear from the information provided in [deponent 1 name deleted]'s affidavit that he has a current physical connection with the application area. I am also satisfied that the material can be said to be 'traditional' as it is clear that the connection [deponent 1 name deleted] has with the area and the laws and customs he acknowledges and observes in relation to the area have been taught to him by his step father and other 'old people', and that they are rooted in a belief in the spirit beings and creation stories, from which the claim group, and their predecessors, derive the laws and customs, to which they adhere today. It is these laws and customs, that have been passed through the generations since the creation time that [deponent 1 name deleted] understands were taught to him and that he teaches to his children and other young people in the claim group. For these reasons I am satisfied that the material is sufficient to support an assertion that [deponent 1 name deleted] currently has, and previously had, a traditional physical connection with the application area.

[236] The application satisfies the condition of s 190B(7).

## 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 provides:

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

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth; or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth, or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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

(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

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

*Section 61A(1)*

[238] 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.

[239] The Geospatial assessment and my own searches of the Tribunal's mapping database, confirm that the application area is not covered by an approved determination of native title.

[240] In my view the application does not offend the provision of s 61A(1).

*Section 61A(2)*

[241] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

[242] Schedule B of the application excludes 'any area in relation to which a previous exclusive possession act, as defined in section 23B of the NTA was done and the act was an act attributable to the Commonwealth'.

[243] In my view the application does not offend the provision of s 61A(2).

*Section 61A(3)*

[244] Section 61A(3) provides that an 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 a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply.

[245] Schedule E of the application states that the applicant claims exclusive possession only in those parts of the claim area where it can be recognised, such as areas where there has been no prior extinguishment or where ss 238, 47, 47A or 47B apply.

[246] In my view the application does not offend the provision of s 61A(3).

### Conclusion

[247] In my view the application does not offend any of the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8).

## 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:
> (a) 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
> (b) 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
> (c) 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.

[248] I consider each of the subconditions of s 190B(9) in my reasons below.

*Section 190B(9)(a)*

[249] Schedule Q states 'none'. The application therefore does not claim ownership of any minerals, petroleum or gas wholly owned by the Crown.

[250] The application does not offend the provision of subsection 190B(9)(a).

*Section 190B(9)(b)*

[251] Schedule P states 'none'. The application therefore does not claim exclusive possession of any offshore place.

[252] The application does not offend the provision of subsection 190B(9)(b).

*Section 190B(9)(c)*

[253] The application does not disclose and I am not otherwise aware that the native title rights and interests have otherwise been extinguished in the application area.

[254] The application does not offend the provision of subsection 190B(9)(c).

## Conclusion

[255] In my view the application does not offend any of the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).

[End of reasons]

# Attachment A

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

| | |
|---|---|
| Application name | Yi-Martuwarra Ngurrara |
| NNTT file no. | WC2012/002 |
| Federal Court of Australia file no. | WAD25/2012 |

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

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

**Application filed/lodged with:**

Federal Court of Australia

**Date application filed/lodged:**

1 February 2012

**Date application entered on Register:**

29 February 2012

**Applicant:**

As per extract from the Schedule of Native Title Application

**Applicant's address for service:**

Robert Powrie

Kimberley Land Council Aboriginal Corporation

PO Box 2145

Broome WA 6725

**Area covered by application:**

As per extract from the Schedule of Native Title Application

**Persons claiming to hold native title:**

As per extract from the Schedule of Native Title Application

**Registered native title rights and interests:**

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 s238, ss47, 47A or 47B apply), the native title claim group claims the right to possess, occupy, use and enjoy the lands and waters of the application area to the exclusion of all others.

2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claims the following rights and interests:

    (a) The right to travel over, move about and have access to the application area;

    (b) The right to hunt, fish and forage on the application area;

    (c) The right to take, use and enjoy the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone, ochre and resin;

    (d) The right to trade in resources of the application area;

    (e) The right to have access to and use and maintain the natural water resources of the application area including the beds and banks of watercourses;

    (f) The right to live on the land in the application area;

    (g) The right to camp on the application area;

    (h) The right to erect shelters and other structures on the application area;

    (i) The right to:

        i. Engage in cultural activities;

        ii. Conduct ceremonies;

        iii. Hold meetings;

        iv. Teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and

        v. Participate in cultural practices relating to birth and deaths, including burial rights;

(j) The right to have access to, care for, maintain and protect places, sites and areas of importance in the application area;

(k) The right to speak for and make non-exclusive decisions about the application area;

(l) The right to light fires for domestic purposes and customary practices;

(n) The right to control access to, and use of, the application area by other Aboriginal People who seek access to use of the lands and waters;

(o) The right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purpose); and

3. The native title rights and interests are subject to:

(a) The valid laws of the State of Western Australia and the Commonwealth of Australia; and

(b) The rights (past) or present conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State.

(c) The traditional laws and customs of the native title claim group.

[End of document]