



# Registration test decision

Application name	Stirling Neutral Junction
Name of applicant	Norman Price Pwerle, Tommy Thompson Kngwarreye, Tommy Walkabout Thangale and Lenny Nelson
NNTT file no.	DC2011/002
Federal Court of Australia file no.	NTD17/2011
Date application made	19 July 2011
Date application last amended	19 September 2013

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

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

**Date of decision:** 6 February 2014

---

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 30 July 2013 and made pursuant to s. 99 of the Act.

# Reasons for decision

## Introduction

[1] This document sets out my reasons, as the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

[2] Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) 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 Stirling Neutral Junction claimant application to the Native Title Registrar (the Registrar) on 24 September 2013 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 primary amendment made to the application relates to the composition of the claim group. I note that an amendment of this nature does not fall within the scope of ss. 190A(1A) or 190A(6A) and therefore the Registrar's duty to consider the claim against the conditions of the registration test has been enlivened by this amended application.

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

[6] The Stirling Neutral Junction native title claim was first filed on 19 July 2011 and accepted for registration on 19 August 2011.

[7] On 19 September 2013, with leave of the Court, an amended application was filed. The amendments made relate primarily to the composition of the native title claim group, to exclude two parcels of land from the application area and to provide an updated certification. Further, other minor amendments have been made to details in Schedule F that relate to the changes to the claim group composition. The amended application was referred to the Registrar pursuant to s. 64(4) on 24 September 2013.

### **Registration test**

[8] 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.

[9] Pursuant to s. 190A(6), 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**

[10] 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.

[11] 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.

[12] 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;
- geospatial assessment and overlap analysis dated 2 October 2013.
- the pre-amendment application filed on 19 July 2011 and accepted for registration on 19 August 2011.

[13] 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, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

[14] 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**

[15] 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] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[16] On 1 October 2013 the case manager with carriage of this matter wrote to the Northern Territory Government informing it of the Registrar's receipt of the amended application, outlining that the full registration test would need to be applied and provided a timeframe in which the Registrar proposed to complete the registration test. The same letter invited submissions regarding the registration testing of the amended application from the Northern Territory Government.

[17] On 2 October 2013 the Northern Territory Government wrote to the case manager stating that it did not intend to make any submissions in relation to the registration testing of this amended application.

# 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.

[18] 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.

[19] 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] to [39]. In other words, does the application contain the prescribed details and other information?

[20] 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), as 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.

[21] Turning to 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)**

[22] 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].

[23] 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].

[24] Schedule A of the application states that ‘the native title claim group comprises the members of the Akalperre, Amakweng, Alapanp, Arlwekarr, Arlpawe, Arnerre, Arnmanapwenty, Errene/Warlekerlange, Errweltye, Kwerrkepentye’. Membership of the claim group is determined through descent from an apical ancestor, or alternatively, a person who is not descended from an apical ancestor may become a member when accepted by the senior descent based members of the group on the basis of their non-descent connections to the estate.

[25] 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).

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

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

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

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

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

[29] 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.

[30] The native title claim group is described at Schedule A of the application.

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

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

[32] Section 62(1)(a) requires an affidavit from the applicant to accompany the application. The affidavit must speak to each of the matters in s. 62(1)(a)(i) to (v).

[33] The amended application is accompanied by four affidavits each sworn by one of the people comprising the applicant. These affidavits were sworn in July of 2011 and are the same affidavits that were filed with the original application on 19 July 2011. I note that in the previous decision to accept the application for registration dated 19 August 2011 the Registrar’s delegate was of the view that these affidavits met the requirements of s. 62(1)(a).

[34] The primary amendment to this application is to alter the description or composition of the native title claim group. I note however that the persons comprising the applicant have not changed. The affidavits that accompany the application refer to and provide details of an authorisation process for the persons comprising the applicant (as required by s. 62(1)(a)(iv) and (v)) which took place on 12 July 2011. It is clear from the amended application, in particular the

certification from Central Land Council (CLC) at Schedule R, that a further authorisation meeting was held on 25 July 2013.

[35] I am of the view that original affidavits that also accompany this amended application are sufficient for the purposes of s. 62(1)(a) for the following reasons.

[36] In *Drury v Western Australia* [2000] FCA 132 (*Drury*) French J discussed whether or not it was necessary for the applicant to file fresh affidavits in the circumstances of amendments to claims. His Honour stated:

Section 62, insofar as it deals with accompanying affidavits in subs 62(1), is dealing with the position at the point of filing of the application. It is not, in my opinion, intended to cover amendment of applications... Section 62 does not, either expressly or by implication, convey a requirement that fresh affidavits have to be filed on the occasion of every amendment—at [11]

[37] I note that in the circumstances of this amended application previously compliant affidavits again accompany the application, they are however, not *fresh* affidavits, in the sense that they refer to a previous authorisation meeting to demonstrate the authority of the persons comprising the applicant to bring the application and deal with matters relating to it.

[38] I understand from French J in *Drury* that the matter of filing fresh affidavits is a matter of discretion for the Court. I am of the view that the affidavits which accompany this amended application include statements of the kind required by s. 62(1)(a)(i) to (v). Given that the Court did not require fresh affidavits to accompany the application when granting leave to amend, and given that the persons comprising the applicant remain the same in this amended application, I am of the view that it is appropriate for me to consider these affidavits for the purpose of s. 190C(2). The affidavits were previously found to comply with s. 62(1)(a) by a delegate of the Registrar and I am also of the view that they comply with this requirement.

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

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

[40] The application contains all details and other information required by s. 62(1)(b).

[41] The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

[42] Schedule B is a written description of the application area. Part (a) describes areas covered by the application and part (b) describes areas excluded from the application.

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

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

[44] Schedule C refers to Attachment A which is a colour map of the external boundaries of the application area.

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

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

[46] Schedule D includes details of searches undertaken by the applicant in relation to the area covered by the application. The results of the searches relating to existing tenure are included as Attachment B and the results of searches relating to existing mining interests are included as Attachment C to the application.

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

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

[48] A description of the native title rights and interests claimed by the native title claim group in relation to the application area is included at Schedule E.

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

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

[50] Information relevant to the asserted factual basis for the claim in the application is contained at Schedule F of the application.

[51] 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) to (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), and 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].

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

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

[53] Schedule G provides details of activities currently carried out by the native title claim group in relation to the application area.

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

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

[55] Schedule H states that '[t]he applicant is not aware that any other applications seeking a determination of native title or a determination of compensation in relation to native title have been made in relation to the whole or a part of the area covered by the application.'

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

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

[57] Schedule HA states '[n]ot applicable' which I take to mean that the applicant is not aware of any s. 24MD(6B)(c) notices in relation to the application area

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



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

[59] Schedule I states that '[t]he following notices under section 29 of the Act have been given in relation to the application area:'. I note however, that there are no details following this sentence. I take this to mean that the applicant is not aware of any s. 29 notices that have been given in relation to the application area.

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

### *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.

[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 are registered, 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 an overlap analysis dated 2 October 2013 which states that there are no applications as per the Register of Native Title Claims that overlap the external boundary of this amended application. As such, there is no 'previous overlapping application' falling within the boundary of the application area. It is therefore not necessary for me to consider the requirement of s. 190C(3) any further.

[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] Schedule R of the application is a certification from Central Land Council (CLC). The certification is signed by the Native Title Manager in the absence of the Director of the CLC and is dated 1 August 2013.

[67] I have had regard to a map maintained by the Tribunal which outlines the regions for representative bodies, and bodies funded to perform the function of representative bodies. I understand from this map that the CLC is the only representative body for the Southern part of the Northern Territory, including the application area. I have also had regard to the Geospatial assessment dated 2 October 2013 which identifies the CLC as the only representative body responsible for the area covered by the application. The CLC is therefore the only body that could certify the application.

[68] 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.

[69] I understand that my role at s. 190C(4) is not to 'look behind' the certification or enquire as to the merits of the certification, all the task requires of me is that I am 'satisfied about the fact of certification by an appropriate representative body' — *Doepel* at [78].

**s.203BE(4)(a)**

[70] This provision requires a statement from the representative bodies that they are of the opinion that the requirements set out in s. 203BE(2)(a) and (b) have been met.

[71] The certificate contains the required statements.

**s. 203BE(4)(b)**

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

[73] The certification provides the following relevant information:

- A meeting organised by the CLC was held on 25 July 2013 in order to obtain instructions from the native title claim group in relation to the application. The meeting was attended by claimants, including all senior members of the native title claim group. CLC legal and anthropology staff were also present.
- The traditional laws and customs of the native title claim group were observed during the meeting and the people who attended the meeting had authority under that process to make decisions relating to the application and authorised the people comprising the applicant to make the application and deal with matters arising in relation to it.
- The CLC has conducted anthropological and historical research in relation to the persons who hold native title in the area. This research indicates that the members of the native title claim group, as described in the application, are the only persons who assert and are entitled to claim native title in the application area and this is acknowledged by the wider Aboriginal community.
- The description of the persons and the criteria for membership of the native title claim group accords with the traditional laws acknowledged and customs observed by those persons and identifies or describes all the persons who hold the common or group rights comprising the native title claimed in the application area.

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

*s. 203BE(4)(c)*

[75] 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.

[76] The certification states that '[t]he Central Land Council is not aware of any other application or proposed application that partly or wholly covers the application area.'

[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] For the reasons set out above, 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.

# 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 provided at Schedule B of the application and a map outlining the external boundaries of the application area is provided at Attachment A. I note that the area of the application has been amended to exclude two parcels of land and this amendment is reflected in both Schedule B and the new map at Attachment A.

[81] Schedule B part (a) describes the area covered by the application by reference to Northern Territory (NT) Portions including:

- 3 lots within Stirling Station;
- part of Neutral Junction Station described by metes and bounds making reference to geographic coordinates, road reserves and cadastral boundaries;
- 4 lots that make up the North-South stock route;
- 1 reserve
- 1 lot of vacant crown land; and
- 2 other lots

[82] Schedule B part (b) describes areas excluded from the application by listing NT Portions. NT Portion 557 and NT Portion 3603 are the two portions which have been newly excluded from the application as a result of this amended application.

[83] Schedule C refers to Attachment A which is a colour map titled Stirling and Neutral Junction Native Title Determination Application. It has map number 2011-135d and was produced by the CLC and is dated 1 August 2013. The map includes:

- the application area depicted by a bold green outline and hatched fill;
- cadastral boundaries colour coded according to tenure type and labelled;
- topographic features and localities shown and labelled;
- scalebar, northpoint, coordinate grid, locality diagram, legend, and six inset maps; 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 2 October 2013. The Geospatial assessment states that the area covered by the application has been amended and reduced. The area does not include any areas which have not previously been claimed in the original application.

[86] The Geospatial assessment identifies one point of uncertainty in the written description namely that the reference to 'part of NT Portion 5017' is not clear as it does not indicate which part of that Portion is intended to be included. The assessment notes that the northernmost severance of that Portion falls within the Native Title Determination NTD12/08 Neutral Junction as determined by the Federal Court on 13 July 2011. The assessment further notes, however, that the map does clearly depict the external boundary of the application area and it is therefore possible to ascertain which part of NT Portion 5017 is included within the boundary of the application with reference to the map. Despite this point of uncertainty or lack of clarity in the written description, 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.

[87] Given the above, I am satisfied that the information and map 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.

[88] 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.

#### *The requirement of s. 190B(3)*

[89] The nature of the task at s. 190B(3) 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]. 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*).

#### *Description of the native title claim group*

[90] The native title claim group is described in some detail at Schedule A. It is described as comprising the 'members of the Akalperre, Amakweng, Alapanp, Arlwekarr, Arlpawe, Arnerre, Arnmanapwenty, Errene/Warlekerlange, Errweltye, Kwerrkepentye, Rtwerrpe, Tyarre Tyarre and Wake landholding groups (the 'landholding groups').' These persons, according to their traditional laws and customs, have spiritual, physical and/or historical associations with the application area and are connected to the area through:

- descent from ancestors (including adoption) connected with the application area as described in paragraph 8(a) of Schedule A; or
- non-descent based connections as described in paragraph 8(b) and 10 of Schedule A.

[91] Paragraph 8 of Schedule A is headed 'Membership of the native title claim group' and states:

In accordance with the applicant's system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:

- descendants (by birth or adoption) of one or more of the following named and un-named ancestors of the landholding groups (the "ancestors"): [a number of named and un-named ancestors in respect of each landholding group are included. In respect of each of the landholding groups a number of descendants from each ancestor are also listed]
- accepted as members of one (or more) of the landholding groups by the senior descent based members of the landholding group on the basis of their non-descent connections to the estate.

[92] Paragraph 10 of Schedule A describes the non-descent based method of membership to the claim group as follows:

Under the claimants' system of traditional laws and customs a person who is not descended from the ancestors becomes a member of a landholding group when accepted by the senior descent based members of the group on the basis of non-descent connections to the estate. The non-descent criteria that senior members of a landholding group have regard to when considering the recruitment of a particular individual are:

- Spiritual identification with and responsibility for an estate;
- conception site and/or birthplace affiliation with an estate;
- long term residence in an estate;
- close kinship ties, including intermarriage;
- shared section/subsection and/or moiety affiliation;
- possession of secular knowledge of an estate;
- possession of traditional religious knowledge, authority and responsibility for an estate;
- seniority in traditional matters concerning the claim group and/or the estate.

[93] An example outlining the application of this non-descent based membership criteria for a member of the claim group being Tommy Thompson Kngwarraye is then provided which further clarifies estate affiliation by non-descent based means.

### *My consideration*

[94] As Schedule A describes the native title claim group rather than naming the persons, it follows that the requirement of s. 190B(3)(b) applies. I therefore must be satisfied that the native title claim group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group.

[95] In some instances, some of the ancestors from whom one must be descended in order to claim membership to particular landholding groups are unnamed .

[96] Despite some apical ancestors being unnamed, which could lead to some uncertainty as to the identity of the claim group overall, I am satisfied, based on the naming of their immediate descendants and other persons in the following generations, that the description is sufficient as it nevertheless provides an objective reference point upon which to commence a factual inquiry to ascertain whether any particular person is a member of the claim group.

[97] 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 the same reasons I am satisfied that the first criteria for membership to the native title claim group, being descent from an apical ancestor, (as described at paragraph 8 above) is sufficient for the purposes of s.190B(3)(b).

[98] Turning to the second limb of criteria for membership of the claim group, being non-descent based affiliation, I am again satisfied that this criteria meets the requirements of s. 190B(3)(b). This is because the criteria upon which non-descent based membership to the claim group is determined is clearly set out at paragraph 10 of Schedule A, as outlined above. This criteria provides an objective reference point, both in terms of which people have the power to decide non-descent based connection (namely senior descent based members of the group) and in terms of the level of connection required to be eligible for membership to the group via non-descent based means. 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 non-descent based connections.

[99] 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 Schedule A of the application, whether a particular person is a member of the native title claim group.

[100] 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.

[101] Mansfield J, in *Doepel*, stated that it is a matter for the Registrar to exercise ‘judgment upon the expression of the 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].

[102] 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].

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

1. To the extent that any extinguishment of native title rights and interests must be disregarded the native title rights and interests that are claimed in relation to the application area are possession, occupation, use and enjoyment to the exclusion of all others.
2. To the extent that any extinguishment of native title rights and interests is not to be disregarded the native title rights and interests of the native title holders are the rights possessed under and exercisable in accordance with their traditional laws and customs, including the right to conduct activities necessary to give effect to them, being:
  - (a) the right to access and travel over any part of the land and waters;
  - (b) the right to live on the land, and for that purpose, to camp, erect shelters and other structures;
  - (c) the right to hunt, gather and fish on the land and waters;
  - (d) the right to take and use the natural resources of the land and waters;
  - (e) the right to access, take and use natural water on or in the land;
  - (f) the right to light fires for domestic purposes, but not for the clearance of vegetation;
  - (g) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;
  - (h) the right to conduct and participate in the following activities on the land and waters:
    - (i) cultural activities;
    - (ii) ceremonies;
    - (iii) meetings;
    - (iv) cultural practices relating to birth and death including burial rites;
    - (v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs,

and, subject to the rights of any person arising under the laws in force in the Northern Territory to be present on the land, the right to privacy in the exercise and enjoyment of those activities;

- (i) the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders;
- (j) the right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources;
- (k) the right to be accompanied on the land and waters by persons who, though not native title holders, are:
  - (i) people required by traditional law and custom for the performance of ceremonies or cultural activities on the land and waters;
  - (ii) people who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders;
  - (iii) people required by the native title holders to assist in, observe, or record traditional activities on the areas.



3. Subject to paragraph 1 and the operation of the non-extinguishment principle where it applies all the rights and interests listed in paragraph 2 above existed and continue to exist in relation to the application area as a whole.
4. Unless any extinguishment of native title rights and interests must be disregarded the native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others.
5. The applicant acknowledges that the native title rights and interests are subject to and exercisable in accordance with valid laws of the Northern Territory of Australia and the Commonwealth of Australia.
6. The common or group rights and interests comprising the native title are held by the members of the landholding groups that together comprise the native title claim group over the application area as a whole. However, the distribution of rights and interests within the group and in respect of different parts of the application area is governed by the claimants' system of traditional laws and customs, including:
  - (a) the particular association that members of the native title claim group have with one or more of the landholding groups and their respective estate areas; and
  - (b) individual circumstances, including age, gender, knowledge, and physical and mental capacity.
7. The activities referred to in Schedules G and M were and are undertaken in the exercise of the native title rights and interests set out in paragraph 2.

[104] 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.

[105] 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.

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

[107] 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).

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

[108] 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].

[109] 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 affidavit swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s. 190B(5)—at [83] to [85] and [90] to [92].

[110] 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 at hearing—*Doepel* at [47];
- 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].

[111] 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) to (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]*<sup>1</sup>, 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]*.

[112] In line with these authorities it is, in my view, fundamental to the test at s. 190B(5) that the claim provide 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].

[113] The following parts of the application and accompanying documents are relevant to my consideration of this requirement:

- Schedule A;
- Schedule E;

---

<sup>1</sup> See *Gudjala FC* [90] to [96]

- Schedule F; and
- Schedule M;
- affidavits of the people who together comprise the applicant.

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

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

[115] Doswett J observed in *Gudjala [2007]* (not criticised by the Full Court on appeal), with respect to this aspect of the factual basis, that the information 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];
- that there is information which supports that the claim group is associated with the ‘area as a whole’ – *Gudjala [2009]* at [67].

[116] I also note that broad statements about association with the application area that lack geographic particularity may not provide the requisite factual basis for this section. Such an association need not be only physical. A spiritual association with the whole of the claim area, so long as there is geographic particularity may also be sufficient for the purposes of this requirement. – *Martin v Native Title Registrar [2001]* FCA 16 at [26].

### ***Applicant’s factual basis material***

[117] The application asserts that the 13 landholding groups that comprise the native title claim group constitute a single community bound by a common set of rights and interests over land in the application area. Schedule A states:

The application area is located in Kaytetye, Anmatyerr and Warumungu territory respectively. The common body of traditional laws acknowledged and customs observed by members of the native title claim group govern how rights and interests in land are acquired and who holds them in particular parts of this territory, including the application area. The thirteen landholding groups which together comprise the native title claim group constitute a community or group whose members hold the common or group rights comprising the native title over the application area as a whole – at [2].

[118] Schedule A outlines that each of the 13 landholding groups that comprise the native title claim group are associated with a particular region or portion of the application area as follows:

The term “estate” is used to describe the land and waters associated with a landholding group – which are commonly named after a prominent site or place in the estate concerned. The thirteen landholding groups are named after their respective estate areas and affiliated to the following parts of the application:

- (a) Akalperre – central and south-west;
- (b) Alapanp – western;
- (c) Amakweng – south-west;

- (d) Arlwekarr – south;
- (e) Arlpawe – north-east;
- (f) Arnerre – north-east;
- (g) Arnmanapwenty – southern;
- (h) Errene/Warlekerlange – central;
- (i) Errweltye – north;
- (j) Kwerrkepentye – eastern;
- (k) Rtwerrpe – central, eastern;
- (l) Tyarre Tyarre – western[;]
- (m) Wake – northern—at [4].

[119] I understand that members of the Arlwekarr, Arnmanapwenty, Errweltye, Tyarre Tyarre and Wake landholding groups have previously been referred to and or recognised as the traditional Aboriginal owners of neighbouring land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). I also understand that members of Arnerre, Errene/Warlekerlange and Wake landholding groups have previously been recognised as native title holders of neighbouring land.

[120] Schedule F provides further relevant information. It again restates that members of the 13 landholding groups comprise a single society that share a common body of laws and customs. Schedule F provides that these laws and customs originated in the Altyerre (the Dreaming) and it is clear that it is as a result of the Altyerre that the claimants derive their association and possession of rights and interests in the land of their territory, which is broader than, but includes, the application area.

[121] Schedule F states:

the native title rights and interests described in Schedule E are held under and exercised in accordance with the traditional laws acknowledged and customs observed by members of the native title claim group and their ancestors, since time immemorial, including:

- (a) At the time when British sovereignty was asserted; and
- (b) At the time of contact with non-Aboriginal people—at [2].

[122] It is clear from this information that members of the society to which the claimants belong understand that their identity is derived from Altyerre, or the Dreaming:

There is a communally acknowledged belief amongst members of the society to which the claimants belong, including the members of the native title claim group, that the physical and cultural landscape, the legal, social, kinship and religious systems, and the conditions for their continuity, were established by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed Altyerre... and glossed as ‘The Dreaming’ or ‘Dreamtime’ in English. The claimants’ system of traditional laws and customs has its foundations in the Altyerre and is held to be unchanged from the time of its creation and to have been transmitted unchanged to each succeeding generation by the ancestors—at [5]

[123] I understand that there is a strong process of transmission of cultural knowledge and that oral modes of transmission are used to pass information from generation to generation. It is

asserted that 'knowledge of descent connections is transmitted orally although individuals beyond the grandparental level are rarely remembered and earlier ancestors are ultimately believed to be spiritually descended from the Dreaming ancestors.'

[124] Schedule F also states that:

ethnographic and historical sources confirm that at the time of contact and settlement of the region, and continuing to the present day, people with affiliations to the Kaytetye, Anmatyerr and Warumungu languages, including members of the native title claim group and their ancestors, maintained physical, spiritual and other cultural associations with their country, including occupation and use of the application area itself—at [19(c)].

[125] A long list of bibliographical material is provided regarding those ethnographic and historical sources mentioned in the extracted passage above, although no extracts or further detail from them is included with the application.

[126] Schedule M also provides a great deal of information relevant to my consideration at s. 190B(5)(a). It is clear from this information that members of the native title claim group currently reside within the application area at various locations, being 'Wilora Community Living Area (CLA) and Ankweyleyengke Aboriginal Land Trust (ALT), both surrounded by Stirling Station; and at Tara CLA surrounded by Neutral Junction Station—at [1]'. Schedule M also states other members of the claim group reside within close proximity to the application area at places like 'Aleyaw, Petyal, Nthwery Pwerray (all located with the Ahakeye ALT); at Angenty within Anningie Station; and at Akwerrenge CLA within Neutral Junction Station—at [1]'. .

[127] Schedule M also provides details of the traditional physical connection of three of the people comprising the applicant, including details of their parents' and grandparents' association with the application area, their knowledge of relevant Dreaming stories for their landholding group and their society more generally and information about the types of activities, like collecting bush food and hunting, that they undertake on the application area. It is stated that they have carried out these activities for their entire lives, continue to do so today and learnt them from older generations of the claim group, such as their parents and grandparents. An example is as follows:

Norman Price Pwerle was born in 1945 at the old camp at Stirling Station. His father was [name removed], an Anmatyerr man who worked at Stirling Station and his mother was a Kaytetye woman from Arnerre country. Norman's *arrengey* (FF) [it is explained elsewhere in the application that FF means Father's father], [name removed], also lived on Arlwekarr country, between Ti Tree and Barrow Creek. Both Norman's father and father's father are buried on Stirling Station, east of Wilora. Norman resides at Wilora CLA, within Stirling Station, which is on his country, Arlwekarr. As a younger man Norman worked at Stirling Station doing stockwork and fencing. He used to walk on foot, go hunting throughout Stirling and along the Hanson River and Taylor Creek. He would walk all around Stirling Station with his parents and grandparents camping, hunting and gathering bush food—at [3].

[128] Further information of this kind, in somewhat more detail, is provided in each of the affidavits which have been made by each of the persons comprising the applicant. Each of the deponents outlines the landholding groups they are affiliated with; in each case this is several landholding groups. The affidavit material does not include a person from each of the thirteen landholding groups, however each of the applicant persons speaks of their membership to a large majority of the landholding groups that comprise the native title group.

[129] Each of the affidavits demonstrate that each deponent understands themselves to be part of the broader Kaytetye, Anmatyerr and Warumungu groups or territories that each of the landholding groups fall within.

[130] The following are some examples of the kinds of information included in the affidavit material that speaks to the association of the current claim group and their predecessors with the area covered by the application.

[131] *Affidavit of Tommy Thompson Kngwarraye:*

- The application area is part of Kaytetye, Anmatyerr and Warumungu territory and Tommy is a Katetye person and a member of the Twerrpe, Wake, Arnerre, Errene/Warlukulangu, Alhalker/Anagker and Kwerrkepentye landholding groups and the native title claim group. I note that Alhalker/Anagker is a landholding group that was removed from the native title claim group as a result of the recent amendments.
- Tommy explains that his affiliation with the application area is as a result of his knowledge of the country and that that arises from generational transmission of the Dreaming or Altyerre. He has rights and interests in the application area through his father and father's father, his knowledge of the country and Dreaming and his long association with many of the landholding groups.
- Tommy's father and father's father grew up living and walking around their country. He was born on the homestead near Neutral Junction Station and he's spent most of his life living on his country.
- After Tommy was married, he and his wife lived on Neutral Junction, travelling on foot to places like Taylor Creek and Redbank Waterhole and across to the Hanson River, Baxter Well, all around in the application area. During these times his daughter [name removed] was born out bush, on the northern side of Neutral Junction on Arnerre country, just north of the application area. Tommy also dug the Cooloola well on the Hanson River while working on Stirling Station and helped build the homestead at Numagalong, before it was Stirling Station.
- Tommy was put through the Law on Neutral Junction, at the same place where he was born. His father and father's younger brother, [name removed], taught him about Twerrpe Law. He went through the ceremony and then was taken out bush by all the old men for about two and half years to learn Twerrpe, Kwerrkepentye and Arnerre Law properly.
- Tommy explains that '[a]t the back of Tara there is a creek the flows down after rain from a hill. Near the start of that creek is that home of the Whirlwind Dreaming, my Dreaming and he travels up from Twerrpe on my country north through Neutral Junction and then onto Singleton Station to the north, on Ileyarne country. I follow my Dreaming through there. We still have the ceremony song and those painting things. We got that from the old people who have passed away. We still have that memory, still have those maps in our minds. That ceremony is still on our minds. Our maps are inside. I teach all that Twerrpe knowledge to our young men when they have been through that ceremony. I teach them at ceremony time and afterwards. I have all the knowledge and Dreamings for my country.'

[132] *Affidavit of Tommy Walkabout:*

- The application area is part of Kaytetye, Anmatyer and Warumungu territory and Tommy Walkabout is a Kaytetye person and a member of the Akalpere, Kwerrkepentye and Errene/Warlukurlangu landholding groups and the native title claim group. I note that as a result of the recent amendments the spelling of Errene/Warlukurlangu has been updated, to Errene/Warlekerlange, in Schedule A of the application. I understand this to be a change in orthography only not a change to the substantive landholding group in anyway.
- Tommy Walkabout acknowledges and observes traditional Kaytetye laws and customs which are derived from the Altyerre (Dreaming). According to these laws Tommy Walkabout has rights and interests in the application area through his father and father's father. Their country is Akalpere and it is located on Stirling Station.
- Tommy Walkabout was raised on his country by his father, including on Stirling, Neutral Junction and Barrow Creek. Tommy states that his father used to walk around in the bush, all across the application area. He spent most of his life on or around his country.
- Tommy Walkabout also talks of his father's father [name removed], who he says grew up and lived mainly on his country, Akalperre. He also states that his grandfather's old sister, [name removed] passed away at Sitrling Station. He says he had a lot to do with his grandfather and [name removed] and that they looked after him.
- Tommy Walkabout states that his mother is Kwerrkepentye and that he thinks both of his parents were born around Barrow Creek, near their country. He states that 'they were born in the early part when white people came in walking around, prospecting for minerals with a pick and shovel'.
- Tommy Walkabout was born at Hatches Creek around 1947, when his parents were working nearby there at wolfram mine. He states that not long after he was born his parents came back to their country and that is mainly where he was raised. Tommy Walkabout talks of his childhood as constantly moving between Neutral Junction, Barrow Creek and Stirling, visiting many different families and staying at different camps, but constantly walking all around his country. He says often he would come and stay at Neutral Junction to be around other kids his age, and so he grew up with many Akalpere, Errene and Warlekerlange kids.
- Tommy Walkabout learnt all the old stories about the various landholding groups he is affiliated with from the old people at the homesteads, camps and all around when he travelled with his family. The old men put him through Young Men's Business at Barrow Creek. This ceremony lasted a few months. Tommy Walkabout now passes on many of the Dreaming stories for the different landholding groups of which he is affiliated to the right young men so they too can know them and protect them.
- Tommy Walkabout continues to travel across the application area and currently resides at Ankweleyelengkwe Land Trust which is surrounded by Stirling Station. He has lived there since before there were houses there, he says 'I sat down here when there was no houses, only tin shade and I had to cart water'.

[133] *Affidavit of Norman Price:*

- The application area is part of Kaytetye, Anmatyerr and Warumungu territory and Norman is an Anmatyer person and a member of the Arlwekarr, Arnerre, Akalpere and Alhalker/Anangker landholding groups. Again I note that the Alhalker/Anangker landholding group is no longer part of the claim group as a result of the recent amendments.
- Norman acknowledges and observes the traditional laws and customs of the Kaytetye people, which arises as a result of the Altyerre (Dreaming). According to this law, Norman has rights and interests in the application area through his father and father's father for Arlwekarr, and to Arnerre through his mother and mother's father and to Akalpere through his mother's mother.
- Norman states that his father was born on Stirling Station and that he worked all his life there. Norman has also lived all his life on his country. Norman states that his father's father lived on Arlwekarr country between Ti-Tree and Barrow Creek. Both his father and father's father are buried on Stirling station, just east of the Wilora community.
- Norman was born in 1945 at the old camp at Stirling Station, near the homestead. He grew up on the station and used to travel all around it to go hunting and to collect food and water. He used to travel to the Hanson River, to the Warlukurlangu soakage, Bullocky's soak near Mt Stuart and all around that area. He says that this was before motor cars. He talks of having known Tommy Thompson (another of the people comprising the applicant) from when he would camp up near New Barrow with his family.
- Norman has lived at the Wilora Community Living Area since it was built in the 1980s on Stirling Station. He continues to travel across his country to collect bush food and go hunting.
- He too was put through the Young Men's Ceremony by the old men and now passes these Dreaming stories on to younger generations.

[134] *Affidavit of Lenny Nelson:*

- The application area is part of Kaytetye, Anmatyerr and Warumungu territory. Lenny is a member of the Wurrulju landholding group and the native title claim group. I understand that as a result of recent research updated orthography has been used in the claim group description at Schedule A in this amended application, such that Wurrulju in the original application refers to Errwelye in the amended application, and that they are the same substantive landholding group.
- Lenny acknowledges and observes the traditional laws and customs of the Kaytetye people which arise from the Altyerre (Dreaming). According to these laws and customs he has rights and interests in the application area through his father and father's father for Wurrulju, for Jarra Jarra (updated orthography in amended claim is Tyarre Tyarre) through his father's mother and his mother's mother is from Wake.
- Lenny states that his father was born at Baxter Well within the application area. He also says his father's father was shot at Baxter Well. Lenny's father worked as a police tracker



but would always return to Baxter Well when he had holidays. Lenny always went with his father on these trips back to Baxter Well.

- In the 1980s when Jarra Jarra outstation was built Lenny and his father went and camped there, they would go onto Wurrulju country within the application area and he learnt all about the country from his father. They travelled around up to Numagalong, passed through Baxter Well.
- Lenny was initiated at Alekarenge by his father and other old men. They taught him all the stories for Wurrulju. His sons have also been through the Law.

### *My consideration*

[135] Based on the above information I am satisfied that the claim group as a whole presently has and previously had an association with the application area.

[136] The information contained in the application at Schedules A, F and M is detailed and clearly outlines that the claim group as a whole comprise a single society, united by their understanding of the Altyerre or Dreaming. I understand that this society includes many landholding groups or estates, across a vast region and that anthropological and historical research indicates that there are 13 relevant landholding groups for the area covered by the native title claim.

[137] I understand that each landholding group is affiliated with certain regions in the application area and that, depending on one's landholding group affiliation, knowledge for an area and the ability to teach younger generations about the significant Dreaming stories associated with that area will vary.

[138] Many of the place names or landmarks discussed in the material, as summarised above, fall within the external boundary of the application area or within close proximity to it. Each applicant person is a member of multiple landholding groups and together a significant number of the landholding groups that comprise the claim group are discussed in the affidavit material. Each of the affidavits, in my view, clearly demonstrates that members of the native title claim group (and their predecessors) have (and had) an association with the application area. This association has been passed to them through generations back to the creation ancestors, who it is asserted, lived before the time of first European contact. I am of the view that the information can be said to contain geographic particularity, which supports the assertion of an association held by the claim group members and their predecessors with locations across the whole claim area.

[139] It is clear that the claim group have a strong physical association with the application area through, for example, visiting the application area for hunting and camping trips, working on Neutral Junction and Stirling Stations to be 'on country' or living in the communities that are within or in close proximity to the application area. It is clear that senior members of the claim group take responsibility for protecting their country and the sacred sites of both their particular landholding groups as well as all the area covered by the territories that comprise the claim group.

[140] The material demonstrates that the claim group also have a strong spiritual association with the application area. Many of the affidavits detail which Dreaming stories travel through or are associated with the application area. I understand that these Dreaming stories provide the spiritual connection, from time immemorial, of the claim group members with the application

area. Of particular significance, irrespective of landholding group membership is a belief in a creation period or Altyerre. It is through these Dreaming stories that the claim group derive their native title rights and interests. These stories are shared and the rituals and ceremonies associated with the stories and the sacred sites on the application area are protected and celebrated, especially during Young Men's Business and when young men are taught the Law. These stories, songs and ceremonies that form the spiritual element of the claim groups' association with the application area are learnt from older generations. It is clear from the detail provided in the affidavits that this spiritual knowledge has been passed from the claim groups' predecessors, through the generations, to the current claim group members, and that current claim group members have responsibility for continuing to share these stories with younger generations.

[141] 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.

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

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

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

[144] 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] to [96].

[145] 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.

[146] Dowsett J stated in *Gudjala* [2007] that asserted 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];
- 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*

[147] As outlined above there is a great deal of information in the application at Schedules A, F and M that is relevant to my consideration of s. 190B(5) generally and specifically my consideration at s. 190B(5)(b).

[148] In particular Schedule F makes several general assertions that the claim group have native title rights and interests in the application area according to their traditional laws and customs and that they have held these rights and interests since both prior to sovereignty and at the time of first European contact.

[149] I understand that the basis for the rights and interests in the land covered by the application area arise as a result of;

a communally acknowledged belief amongst members of the society to which the claimants belong, including the native title claim group, that the physical and cultural landscape, the legal, social, kinship and religious systems, and the conditions for their continuity, were established by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed *Altyerre*—Schedule F at [5].

Schedule F states that the term *Dreaming* covers a range of attributes including: ‘cosmogony, spiritual ancestors and accounts of their exploits and travels, spiritual power, religious laws and objects, places, rituals, designs and songs, and explicit and implicit events and directives of both a sacred and everyday nature—at [6].’

[150] It is asserted that the rights and interests in land therefore arise as a result of the *Dreaming* stories and that the system of land tenure is based on these. Under the claimants’ land tenure system, rights and interests in an estate are primarily inherited through descent from the group’s ancestors, but can also be conferred on members of the group who are accepted by the senior descent based members on the basis of their non-descent connections to the area.

[151] Schedule F asserts that that there is a strong system of oral transmission, teaching and common practice of laws and customs associated with the native title claim group, and as mentioned above it states that ‘[k]nowledge of descent connections is transmitted orally although individuals beyond the grandparental level are rarely remembered and earlier ancestors are ultimately believed to be spiritually descended from the *Dreaming* ancestors—at [17].’

[152] It is asserted in the information in the application that members of the native title claim group have a connection with the application area based on the knowledge that has been passed to them from previous generations, especially through knowledge regarding the *Altyerre* and subsequently their traditional laws and customs and that these laws and customs continue to be practiced today and passed on to younger generations in much the same way as received from previous generations.

[153] The affidavits provide further information regarding the types of laws and customs currently observed by members of the claim group and also further support the assertion that these laws and customs were taught to the claim group by their ancestors and that they continue to be passed to younger generations in much the same way as in the past. Some examples are as follows:

When we were walking, we were looking after country as we went along and we got water all along there. We know where all the water is, where those soakages are and the names of the

soakages. We teach this to the younger generations so they know. We built shelters, windbreaks and shades and made fires to cook with and to keep warm. We made a big mob of boomerangs. We used to collect the stone for knives and spearheads from the rocky country from around my country and trade them with others—affidavit of Tommy Thompson Kngwarraye at [21].

[154] And;

To learn that country and ceremony properly those young fellas got to be there. They go hunting every day, go hunting, walking around this country, but Dreamtime, ceremony time they have to follow that Dreaming track and all that songs, about the soakages, creeks, those rocks or ceremony tress, all that, all those gullies, creek soakages, everything. I've got that all in my head from following all those old fellas. When I take those young men back onto their country so they can really learn about those places, I show them all those places and we follow all those tracks. We also still do ceremony to make things grow more—affidavit of Tommy Thompson Kngwarraye at [34].

[155] The affidavits also describe the importance of protecting sacred sites and to that end restricting access to certain sites, by both other claim group members such as women and children and people from outside the claim group. The responsibility for protecting these sites, it is asserted, is taught and learned through ceremonial initiation and the collection of knowledge that is passed through the generations as described above. Examples of the importance of protecting and restricting access to sites are as follows:

I go out all the time onto my country hunting and looking around because I live in the middle of my own country. Sometimes I help Central Land Council mob on those mining clearances. Helping out and protecting that country on the application area. We went out a couple of days ago to look at an area where a mining company wanted to drill. We had to check out that it wasn't near one of our sites. We have to protect our country from people who want to drill—affidavit of Tommy Walkabout at [24].

[156] And;

I can speak for and make decisions about my country and help out for my mother's father's country, because I am apmerek-artwey and kwertengerl for those countries. Amerek-artwey and kwertengerl are the right people to look after that country. When those anthropologists want to do research on my country they have to come and ask me and I will take them out there and show them. Even when someone is married into our mob they still have to go out hunting with one of us. They can't go alone because they don't know this country. We take them with us—affidavit of Tommy Walkabout at [27].

[157] Many of the deponents speak of travelling all around their country with their parents and grandparents and learning about the Dreaming stories and ceremonies for sites and places across their country, including the application area. An example from Tommy Thompson Kngwarraye's affidavit is as follows:

My father also shared that Bushfire Dreaming with Errene/Warlukurlangu. Twerrpe and Errene shared that same Dreaming, and he taught me that ceremony, so I can teach the Errene apmerek-artwey—at [11].

[158] And;

I grew up mainly on Neutral Junction Station and also walking around all that country where the application area is. My father and family walked up to Hatches Creek for the Wolfram where my brother was working. My father showed me all that Kaytetye country, the sites and soakages. My mother's father was there too then.—at [15]

[159] It is clear that the claim group members utilise the resources on the land and have a strong physical and spiritual reliance on the land. The collection and use of the resources and the practices associated with hunting and gathering are traditional, it is asserted, as they have been learnt from older generations and continue to be taught to younger generations in much the same way. The importance of sharing resources with the broader community or claim group is also often emphasised. Each of the affidavits speak of the practice of hunting and gathering such as:

I still go hunting today and I can get any type of bush food, such as kangaroo, emu, bush potato and bush plum all over this area. I don't have to ask anyone permission to do this, I can just go. I go hunting on the east side and on the west side of Stirling. I go out with other men and my sons. I show them where to go for bush food. Sometimes we go out to Ooranlingie for kangaroo, or Arnmanapwentye on the Stirling boundary. We go out and get bush medicine near Tommy Walkabout's place and all around. We know where those trees are and we go and get it. I get wood from the Bean Tree on Stirling and Neutral to make coolamons for ceremony. We get that ochre for ceremony at Oralingie and near the homestead on Stirling. We share that with other men and women, not just us. We share with other Kaytetye mob. They always give us something back when we give them that ochre, like trading—affidavit of Norman Price at [15].

[160] And;

We used to go hunting all the time there before that gas line was built. We had a bush track. I have the right to hunt and gather any bush food I want on my country and my mother's country, because I am apmerek-artwey and kwertengerl. I can get kangaroo or bush turkey or anything. I don't have to ask anyone permission when I go hunting. I go out hunting regularly. I don't have to ask permission—affidavit of Tommy Walkabout at [25].

[161] Each of the deponents speak of Young Men's Business as a period of initiation where they were all taught about the relevant Dreaming stories for their landholding groups as well as all the songs, ceremonies and rules associated with the landholding groups which they were initiated into. The material demonstrates that it as a result of this Young Men's Business ceremony that the deponents became senior members of the group, are responsible for protecting the areas into which they were initiated, are able to make decisions about the areas they are responsible for and also carry the responsibility of teaching younger generations about their country and initiating younger men at the appropriate times.

[162] Tommy Walkabout speaks about when he learnt the Law and how he is now responsible for teaching that Law to younger generations:

The old men put me through Young Men's Ceremony at Barrow Creek and they showed me all that area. I was there at Barrow Creek when they grabbed me for Business. My father was there for that ceremony. All the families came. All the families from Stirling and Neutral, all together. We went to Barrow Creek for the ceremony. That Ceremony lasted for a few months. They taught me about the Akalpere Dreaming, Possum side and those other Dreamings like Bilby. Those old kwertengerls put me through. [name removed]'s father, [name removed] and I were in bush camp together. They've all passed away. The Errene mob put me through. Three Warlukurlangu and Errene boss families, three brothers put me through, but I can't call their names. That's the Law. I was taught Kwerrkepentye when I was staying at Tara, working on Neutral Junction.

After that ceremony the old kwertengerls showed me that country and taught me properly for Akalpere. Thye [sic] taught me the songs for my country. After business, the same kwertengerls took me onto country and showed me and taught me that Law. It's their job to show young men the country and those important places, to teach them properly. We went all over there on the

place, my home country. When I went through I got my country first and the Warlukurlangu and the others. When I was sitting at Barrow Creek, I went to business every year, getting knowledge from old people. Getting knowledge for my line. I still do that, but now I teach my line so they can take over—at [15] to [16].

### *My consideration*

[163] The factual basis material does not assert when European contact was likely to have first occurred in the application area. I note that many of the persons who have provided affidavit material state that they were born around the 1940s and they are able to link themselves, through family members, usually grandparents, to either the listed apical ancestors or some of the earlier descendants of the apical ancestors who are also listed in Schedule A as part of the claim group description. I have inferred from the information before me that some of the ancestors discussed by the applicant persons in their affidavits were likely living around the mid to late 1800s.

[164] Some of the affidavits speak of the deponents themselves or their parents and grandparents living on the application area before or around the time of significant white settlement. I understand this from statements such as ‘When I was growing up we used to walk around on foot, no motor car, all around’ and ‘They were born in the early part when white people came in walking around, prospecting for minerals with a pick and shovel.’ Many of the deponents speak of the big camp that existed on the area that is now Stirling Station. They used to visit it or live there before the area was made a pastoral station. I understand from this information that the applicant persons are referring to a time prior to the significant presence of European settlement, many discuss walking a long way to get rations of food and tin, but it is clear that over the actual application area there was limited interaction with European settlers in the ‘early days’. I understand that the applicant person’s parents and grandparents, in particular, were likely on or near the application area before, at least, sustained European contact, noting that most applicant persons were born in the 1940s. Given the remote nature of the application area in the Northern Territory I am of the view that sustained European contact could likely have occurred a significant time after sovereignty was asserted, and from this I am of the view that I can infer that the recent previous generations of several of the applicant persons were living, substantially uninterrupted by white settlement, on or proximate to the application area, at least throughout their childhood years.

[165] It is clear the Young Men’s Business is a ceremonial learning time that occurs every year and plays a significant role in the cultural life of the native title claim group and their wider society. I understand that this is one significant example of the transmission of traditional laws and customs from older generations to younger generations, when stories, responsibilities and customary practices are shared, taught and learnt. It is clear from the affidavit material that in many instances the people who comprise the applicant have been taught their traditional laws and customs from either the apical ancestors themselves or close descendants of them.

[166] The material demonstrates a factual basis for a rich, continuous system of normative rules or laws and customs which are acknowledged and observed by the claim group members in the application area today. I understand the factual basis to say that these laws and customs are rooted in a spiritual belief system which has at its core the concept of Altyerre, a time of creation when spiritual ancestors travelled across the land long ago. It is from the belief in this creative time that the claim group’s traditional laws and customs originate, and it is these same laws and customs to which the native title claim group continue to abide today. It is asserted that the claim

group are descendants of the apical ancestors listed at Schedule A, and that those ancestors are in turn descendants of those people who, bound by the same laws and customs, occupied the territories that the claim group are affiliated with when the country was created in Altyerre time.

[167] 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 practises 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 support the assertion that these laws and customs have been orally transmitted in a substantially unchanged manner since at least the time at which the apical ancestors identified in Schedule A were occupying the application area and surrounding affiliated country.

[168] 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].

[169] In my view, the factual basis materials are sufficient to support an assertion that there has been strong cultural continuity since the generation of the apical ancestors 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 mid to late 1800s and sovereignty.

[170] The information before me discusses a rich, substantially continuous cultural tradition derived from various ancestral lines arising from birth and evidencing a longstanding connection with the application area and its surrounding country. Having regard to all of this information 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.

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

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

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

[173] I am of the view that this requirement is referable to the second element of what is meant by 'traditional laws and customs' discussed by the High Court 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].

[174] Dowsett J, in *Gudjala [2007]* indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

[175] 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].

[176] 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].

[177] In my reasons at s. 190B(5)(b) I have explained why, and the basis upon which, I was able to be satisfied that the factual basis is sufficient to support the assertion that there was a society from which the current members of the claim group descended, inhabiting the application area, acknowledging and observing a normative system of laws and customs at or around the mid to late 1800s. I am also of the view that my reasons above outline the basis for my being satisfied that there is a sufficient factual basis to support an assertion that the laws and customs observed today are 'traditional' laws and customs, being that they were observed by and have their source in the normative rules of the society that existed at the time the apical ancestors were living, and there is also an available inference, back to sovereignty.

[178] The information in the application provides a considerable amount of information regarding the continuity in the observance of the claim group's laws and customs since sovereignty, or at least the time at which the apical ancestors would have been living. The information in the affidavits speaks of the deponents being taught about the claim group's culture from parents, grandparents and other 'old people'. Many of the affidavits discuss the centrality of the process of initiation or Young Men's Business to the learning and transmission of traditional laws and customs:

I went through Young Men's business at Stirling Station near that homestead. My father and big brother were there then. They gave me that Law for my side. My kwertengerls were there, like [name removed]'s brother. He's passed away now. After I went through the Law, the old people took me out onto country and gave me more and more Law. We were out there for about 5 months. They showed me more and more. I learnt all the way. All my son's [sic] have been through the Law and I have given them all our culture for our side. Alwekerr. [name removed] has all that sacred knowledge for my country Alwekerr and Anangker, like me. We both have that knowledge. If he passes away, then I will hold all that. I know my country and I know my Law and I teach that Law to my children, those men—affidavit of Norman Price at [16].

[179] Information regarding the transmission of knowledge through the Young Men's Business initiation process is just one example from the material provided that demonstrates, in my view, a sufficient factual basis for the continuity of the traditional laws and customs of the native title claim group. It is said that claim group members have been taught about the Law and the



Dreaming stories and songs associated with them. It is asserted that these ceremonial processes conducted today and experienced by the deponents are the same as occurred for generations before them and that it has always been so since the Altyerre time.

[180] I am of the view that this provides a sufficient factual basis for the assertion that there has been an intergenerational transmission of a key cultural practice that dictates members of the claim groups' association with certain places. I understand it to be asserted that the laws and customs currently observed and acknowledged were derived from pre-sovereignty laws and customs. For the reasons above, I am therefore satisfied that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title rights and interests subject of the claim, in accordance with their traditional laws and customs.

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

## *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.

[182] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

[183] 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].

[184] 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; and
- have not been extinguished over the whole of the application area.

[185] 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*)).

[186] I will now consider each of the rights and interests claimed in Schedule E. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

1. *To the extent that any extinguishment of native title rights and interests must be disregarded the native title rights and interests that are claimed in relation to the application area are possession, occupation, use and enjoyment to the exclusion of all others.*

[187] 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].

[188] 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 possess, occupy, use and enjoy land to the exclusion of all other—at [88].

[189] 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].

[190] The affidavits of each of the persons comprising the applicant contain information that in my view supports the right of the claim group, according to traditional law and custom, to control access to their country, including the application area. The following excerpt is an example:

If a stranger wanted to come into Akalpere country they would have to ask us. If they wanted to go around looking for kangaroo, we might say yes you can go and look around there, but they would have to ask me or one of the other owners first, couldn’t just go without permission. If I was out and saw people I didn’t know I could tell them they have to leave. But our families already know, and they know they must come and ask if they want to go. They know they need permission.

I can speak for and make decisions about my country and help out for my mother’s father’s country, because I am *apmerek-artwey* and *kwertengerl* for those countries. *Apmerek-artwey* and *kwertengerl* are the right people to look after that country. When those anthropologists want to do research on my country they have to come and ask me and I will take them out there and show them. Even when someone is married into our mob they still have to go out hunting with one of us. They can’t go alone because they don’t know this country. We take them with us—Tommy Walkabout at [26] and [27].

[191] And;

I am a senior *apmerek-artwey* for Arlwekarr country, and so are my brother and sister, [names removed]. We share that job, to speak for and make decisions about Arlwekarr country. When Central Land Council needs to go out and do clearances for mining companies, I go out and tell them where they can go and where they can’t go on my country. I need to speak up and protect my country. I did all the clearances for my country when the new railway went through and in 2009 when the cable went through. I had to tell them where they could go. They had to go around all those sacred sites we have there. The railway line had to go around my places, they couldn’t go through.

If someone who is not from my country wants to come and look around, they must come and ask first. If they know then they're all right but if they don't know that country or me, then they have to come and ask me, talk to me first. They must ask permission from me, or other apmerek-artwey or kwertengerl— Norman Price at [22] and [23].

[192] The material demonstrates that the core concepts outlined above by the High Court in *Ward* such as that right to 'speak for country' and be asked permission about access to the claim area are rights and interests currently exercised by the claim group. I understand these rights, characteristic of the right of exclusive possession, to be traditional in the sense that the right to exercise control over the area is passed from generation to generation, and has been since, I infer, before sovereignty.

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

2. (a) *the right to access and travel over any part of the land and waters;*

(b) *the right to live on the land, and for that purpose, to camp, erect shelters and other structures;*

[194] There is a great deal of information in the affidavits that speak to the existence, prima facie, of the claim group's right to travel across and live on the land, including to camp and erect shelters. My reasons above at s. 190B(5) detail many examples of the people who comprise the applicant spending most of their lives travelling across the claim area and their country more broadly. They state that when travelling they would camp and build shelters whilst living at various places 'out bush' and travelling all around their country. Examples include 'we were walking all around with lots of Kaytetye people and we walked around from New Barrow, to Taylor's Crossing and all over the application area' and 'we built shelters, windbreak and shades and made fires to cook with and to keep warm.' — Tommy Thompson Knwarraye at [20] and [21].

[195] The other affidavits similarly speak of the deponents travelling all across their country, routinely camping and erecting shelters as they moved from place to place learning about and caring for and protecting their country.

[196] In my view, the above provide examples of the existence of the right, held by the claimants, which was exercised by the predecessors in much the same way and in that sense is a right held under traditional law and custom, to travel across the application area and to live on the application area including camping and erecting shelters on the application area.

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

3. (c) *the right to hunt, gather and fish on the land and waters;*

(d) *the right to take and use the natural resources of the land and waters;*

(e) *the right to access, take and use natural water on or in the land;*

[198] It is my view that there is sufficient information in the affidavits for these rights to be established, prima facie. Each of the deponents of the affidavits speaks extensively of hunting across the land, collecting the resources of the land for making boomerangs, building camps and other similar traditional activities. Similarly, the deponents speak of following the creeks, collecting water from soakages for activities such as cooking. The following are some examples that demonstrate the kind of material in the affidavits that establish these rights, prima facie:

When I was working on Neutral Junction we went out onto that country to go hunting. We went hunting all around Akalpere, Arnerre, Errene/Warlukurlangu, Twerrpe, hunting and camping out and I got to know that country. When we went hunting we had to share food we got with the old people. Old people would tell us. We would say we are going this way to go hunting, old people would say, you can go this way, that's ok as long as you bring some meat back. We would go camping and Kwerrkepentye, sometimes camping at Bottom Bore and then back around the other side of Arnerre country, Twerrpe. We would get sugarbag, porcupine, goanna, kangaroo, everything. We would get water from the bores and soakages there on Neutral Junction and then down onto Stirling. We went out hunting all over my country and close up countries. We were taught all about that country and where to go for food. I teach that to my young fellas now – Tommy Walkabout at [23].

[199] Many of the affidavits discuss the continuing practice of hunting by the deponents themselves as well as the younger generations of the claim group that they have taught. They talk of collecting water from creeks and soakages and sharing meat and bush tucker with others.

[200] Again I am of the view that the material in the application asserts that the right to hunt, take natural resources and water from the land is a right held by the claim group pursuant to traditional laws and customs.

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

*4. (f) the right to light fires for domestic purposes, but not for the clearance of vegetation;*

[202] As outlined above each of the affidavits speaks of the deponents growing up travelling across their country and camping and living at various places. Much of this discussion also details claim group members hunting and cooking, using fire. Lenny Nelson states that 'we would camp and cook our meat that we hunted with fires' – at [11]. Similarly, Tommy Thompson Kngwarraye states that 'we built shelters, windbreaks and shades and made fires to cook with and to keep warm.' – at [21]

[203] The above are some examples that demonstrate, in my view, the right to light fires for domestic purposes is a traditional right and custom held by the claim group.

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

*5. (g) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;*

[205] It is clear from the affidavit material that the Dreaming stories which are taught to the men during Young Men's Business ceremonial time instill a responsibility to protect and maintain the cultural traditions of the landholding groups that one is initiated into. Many of the deponents of the affidavits speak of being the senior men who are responsible for protecting sacred sites and ensuring that only the right people access culturally significant places.

[206] The following are some examples from Tommy Thompson Kngwarraye's affidavit detailing his traditional responsibility to maintain and protect sites of significance: 'when I was a young fella I walked around with my father on our country. I still do that today. When it is your private country you need to walk around and make sure it's all protected' and 'I still go there on the application area to go hunting and to check up on all those sites.' – at [16] and [22]. Tommy Thompson also explains that it is his responsibility to protect sacred sites and objects on the application area despite them not being associated with landholding groups to which he is

directly descended because he is preserving the stories for younger generations who he must teach to take on the responsibilities as they get older:

I act as apmerek-artwey for Errene because I have the ceremony that belongs to those young people. One of my jobs is to look after those sacred objects and that cave. I have to help to return that sacred object back to its proper place. If a tourist came and messes up that cave I would get in trouble as "I have been handed over the country" to look after until the proper apmerek-artwey get old enough to learn properly.—at [31]

[207] I am satisfied, therefore, that there is enough information in the affidavits to establish, prima facie, the right to access and to maintain and protect sites and places.

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

6. (h) *the right to conduct and participate in the following activities on the land and waters:*

- (i) *Cultural activities;*
  - (ii) *Ceremonies;*
  - (iii) *Meetings;*
  - (iv) *Cultural practices relating to birth and death including burial rites;*
  - (v) *Teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs,*
- and, subject to the rights of any person arising under the laws in force in the Northern Territory to be present on the land, the right to privacy in the exercise and enjoyment of those activities;*

[209] There is extensive material in the affidavits that detail the cultural activities of the members of claim group. It is clear that undertaking activities relating to the physical and spiritual attributes of the traditional laws and customs of the group occurred and continues to occur extensively in both previous and current generations of the claim group. The affidavit material indicates that ceremonial and ritual practices are central to the identity, protection and continuation of the cultural practices of the claim group. Each of the deponents speaks of their knowledge of the Dreaming stories relevant to the landholding groups with which they are affiliated and their role in ensuring ceremonies take place, the songs and rituals associated with particular Dreamings and sites are carried out, and that all of these ceremonies and songs are taught to younger generations.

[210] Many of the extracted examples in my reasons above detail the ceremony of Young Men's Business and the importance of senior men teaching these practices to younger generations. Additionally it is clear that senior men are responsible for having meetings to decide about the appropriate time and people to be involved in ceremony, and that ceremonies are routinely carried out in private, with harsh penalties directed at those, especially women and children who should not be present for certain ceremonial and ritual activities.

[211] I am satisfied that these activities are based on the traditional law and custom of the native title claim group and that there is sufficient information before me to establish the existence of this right, prima facie.

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

7. (i) *The right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders;*

[213] The affidavit material speaks of the senior members of the claim group being responsible for making decisions about which young people are taught and shown the sacred sites and Dreaming stories. The affidavit material makes it clear that it is up to the most knowledgeable members of the claim group to make decisions about the detail of cultural knowledge and access to places across the claim area that other members of the claim group are afforded. An example from the affidavit of Tommy Thompson Kngwarraye is as follows:

If they need to teach those young men and take them to those really important places, they will call us up and we will come and talk about that business, sort it out and decide which ones are the right kwertengerls to go with them. Only the right ones can go, the ones who have enough knowledge. I help make that decision. The rest got to stay and only the main mob got to go to those very important places—at [27].

[214] Norman Price also discusses being a senior knowledgeable man that makes decisions about where other members of the claim group can go on their country:

There are many men's sites on my country, including Alwekerr, our main place. Only initiated men can go there. No women or children. There would be big trouble if they did. In the old days they would kill them, not now, just trouble. Old men make the decision when young men can go into those sites. They need to have the right senior men, apmerek-artwey and kwertengerl. They can't go in by themselves, even if they are from Alwekerr, they still need the right men there. When we go in and work in that place we must sing those right songs for that place—at [20].

[215] It is my view that the affidavit material provides sufficient information to establish this right exists, *prima facie*, and is a traditional right in the sense that it has passed from the claim group's predecessors through the generations.

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

8. (j) *the right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources;*

[217] Each of the deponents of the affidavits speak of the importance of sharing resources, in particular food from hunting and gathering bush tucker with other family and claim group members. Lenny Nelson states at [19] '[w]hen I get kangaroo I bring it back and share it with all of my family. Sharing that meat and bush tucker is our way' similarly Norman Price discusses the various places he travels to in order to hunt, gather bush tucker, bush medicine and ochre for ceremonies, he concludes by stating '[w]e share that with other men and women, not just us. We share with other Kaytetye mob. They always give us something back when we give them that ochre, like trading.'— at [15].

[218] I understand from these examples and others like them in the affidavit material that the process of sharing resources like meat, ochre and bush medicine is a traditional custom that is part of the societal norms to which the claim group members adhere. I am satisfied that this is a traditional right and interest and that there is sufficient information before me to establish its existence, *prima facie*.

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

9. (k) *the right to be accompanied on the land and waters by persons who, though not native title holders, are:*

- (i) *People required by traditional law and custom for the performance of ceremonies or cultural activities on the land and waters;*
- (ii) *People who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders;*
- (iii) *People required by the native title holders to assist in, observe, or record traditional activities on the areas.*

[220] Each of the affidavits speak of the deponents being accompanied onto the claim area by anthropologists or other people from the CLC in order to do research and put together this native title claim. However, it is my view that neither the information in the application itself or the accompanying affidavits, speaks to claim group members being accompanied onto the application area by people who are not members of the native title claim group in order to perform ceremonies or cultural activities.

[221] Similarly, it is my view that the material does not speak of claim group members being accompanied by people who are not claim group members but otherwise have rights, according to the traditional laws and customs of the claim group, in relation to the land and water covered by the application. I understand from the affidavit material in particular that the claim group assert a level of control of access over the application area and that according to the traditional laws and customs of the group it is up to the senior knowledgeable members of the claim group to grant permission to others to enter the application area. Examples such as mining companies and people building roads and railways needing to consult before entering the area are provided. None of these examples, however, detail non-claim group members being given permission to access the area or accompany claim group members onto the area for ceremonial or other reasons arising because of traditional rights and interests of the claim area.

[222] It is my view that there is insufficient information in the material before me to establish this right, prima facie.

[223] **Outcome:** Not established, prima facie.

[224] 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.

[225] 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].

[226] 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].

[227] 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].

[228] 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 Norman Price

[229] I understand from both the information at Schedule M of the application and Norman Price's affidavit that he currently resides on country, within the application area at the Wilora Community Living Area. I understand that he was born at an old camp at Stirling Station in 1945, spent his childhood walking all around his country, including the application area with his parents and grandparents and as he got older he did stockwork and fencing on Stirling Station. He states that '[t]his is my father's father's country and my country, Arlwekarr. So I've lived all my life on my own country.' – at [14].

[230] Schedule M states that both Norman's father and grandfather are buried on Stirling station east of Wilora and that his mother is from Arrene country, also one of the landholding groups that comprise the native title claim group.

[231] Norman talks of being initiated through Young Men's Business ceremonies at Stirling Station, stating that his father and big brother were present for the Business. His affidavit states that it was his father and father's father that taught him the Law and gave him his culture. He also discusses having the responsibility for giving his culture to his sons and other young men now – at [16].

[232] Norman states that he is responsible for the witchetty grub, night, and black headed python Dreamings (amongst others) and that his father taught him these Dreamings and their affiliated sites in Alwekarr country. I understand that Norman is responsible for protecting the sacred sites and objects associated with those Dreamings and as his sons and other younger men grow older, he slowly imparts the knowledge of those Dreamings on to them. Norman explains that part of the responsibility to protect sacred sites and objects involves him regularly going out on country to look at the main places and make sure they haven't been damaged, he continues to do this today with the younger men. Additionally, Norman grew up camping all across Stirling Station



and hunting and gathering food on the application area, and continues to hunt and gather today. Schedule M states:

He regularly goes hunting on the application area. He gathers any type of bush food he can find such as kangaroo, emu, bush potato and bush plum. He does not have to ask anyone to do this and often takes his sons with him—at [3].

[233] It is clear from the information provided in Norman’s affidavit and at Schedule M of the application 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 Norman has with the area and the laws and customs he acknowledges and observes in relation to the area and the claim group’s country more generally have been taught to him by his father and father’s father and that they are rooted in belief that Altyerre ancestors created the claim group’s country in Altyerre time and that this set down the laws and customs to which the claim group and their predecessors do adhere to, and have adhered to. It is these same laws and customs that Norman understands were taught to him and that he teaches to his sons and other young men in the claim group. For these reasons I am satisfied that the material is sufficient to support an assertion that Norman Price currently has, and previously had, a traditional physical connection with the application area.

[234] 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, 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 provisions 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, 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 provisions 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 confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

- (4) However, subsection(2) and (3) does not apply if:
- (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
  - (b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it.

[235] 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)**

[236] 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.

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

[238] In my view the application **does not** offend the provisions of s. 61A(1).

### **Section 61A(2)**

[239] 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.

[240] Schedule B expressly excludes from the application any area 'in relation to which a previous exclusive possession act under s. 23B of the NTA has been done'.

[241] In my view the application **does not** offend the provisions of s. 61A(2).

### **Section 61A(3)**

[242] 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.

[243] Schedule E includes a statement to the effect that the applicant does not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of others unless any extinguishment of native title rights and interests must be disregarded.

[244] In my view, the application **does not** offend the provisions of s. 61A(3).

[245] 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.

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

#### **Section 190B(9)(a)**

[247] Schedule Q states that the applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

[248] The application **satisfies** the subcondition of s. 190B(9)(a).

#### **Section 190B(9)(b)**

[249] Schedule P of the application states 'not applicable'. The application does not cover any offshore place.

[250] The application **satisfies** the subcondition of s. 190B(9)(b).

#### **Section 190B(9)(c)**

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

[252] The application **satisfies** the subcondition of s. 190B(9)(c).

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

[End of reasons]

# Attachment A

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

<b>Application name</b>	Stirling Neutral Junction
<b>NNTT file no.</b>	DC2011/002
<b>Federal Court of Australia file no.</b>	NTD17/2011

In accordance with ss. 190(1) and 186 of the *Native Title Act 1993* (Cwlth), 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:**

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

**Date application entered on Register:**

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

**Applicant:**

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

**Applicant's address for service:**

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

**Area covered by application:**

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

**Persons claiming to hold native title:**

1. The native title claim group comprises the members of the Akalperre, Amakweng, Alapanp, Arlwekarr, Arlpawe, Arnerre, Arnmanapwenty, Errene/Warlekerlange, Errweltye, Kwerrkepentye, Rtwerrpe, Tyarre Tyarre and Wake landholding groups ('the landholding

groups'). Those persons according to the traditional laws acknowledged and customs observed by them:

- (a) have spiritual, physical and/or historical associations (as described in Schedule F) with the area described in Schedule B ('the application area') and are connected to the area through:
    - (i) descent from ancestors (including adoption) connected with the application area as described in paragraph 8(a) below; or
    - (ii) non-descent based connections as described in paragraphs 8(b) and 10 below;
  - (b) hold the common or group rights and interests comprising the native title in the application area.
2. The application area is located in Kaytetye, Anmatyerr and Warumungu territory respectively. The common body of traditional laws acknowledged and customs observed by members of the native title claim group govern how rights and interests in land are acquired and who holds them in particular parts of this territory, including the application area. The thirteen landholding groups which together comprise the native title claim group constitute a community or group whose members hold the common or group rights comprising the native title over the application area as a whole.
3. The application area is located in Kaytetye, Anmatyerr and Warumungu linguistic territory. However, under the traditional laws acknowledged and customs observed by members of the native title claim group rights in land are not acquired through membership of a language group. Accordingly, linguistic affiliation or language group identity is not necessarily indicative of a person's connection to particular land and waters.
4. The term "estate" is used to describe the land and waters associated with a landholding group – which are commonly named after a prominent site or place in the estate concerned. The thirteen landholding groups are named after their respective estate areas and affiliated to the following parts of the application area:
  - (a) Akalperre – central and south-west;
  - (b) Alapanp – western;
  - (c) Amakweng – south-west;
  - (d) Arlwekarr – south;
  - (e) Arlpawe – north-east;
  - (f) Arnerre – north-east;
  - (g) Arnmanapwenty – southern;
  - (h) Errene/Warlekerlange –central;
  - (i) Errweltye – north;
  - (j) Kwerrkepentye – eastern;
  - (k) Rtwerrpe – central, eastern;

(l) Tyarre Tyarre – western

(m) Wake – northern.

5. The persons authorised to make the application are members of the following landholding groups (through father's father):

Norman Price Pwerle                      Arlwekarr

Tommy Thompson Kngwarreye                      Rtwerrpe

Tommy Walkabout Thangale                      Akalperre

Lenny Nelson                      Errweltye

6. Members of the following landholding groups have previously been referred to and/or recognised as the traditional Aboriginal owners of neighbouring land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA'):

(a) **Arlwekarr** – Not a claimant landholding group. Referred to: *Land Claim by Alyawarra and Kaititja*. Report by the Aboriginal Land Commissioner, to the Minister for Aboriginal Affairs (1979) pars 79, 85 – spelt Alogwara);

(b) **Arnmanapwenty** – Claimant group: *Ti Tree Station Land Claim*. Report No. 24. Report by the Aboriginal Land Commissioner, Mr Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory (1987) par 72[2] – spelt Alpmanapentye);

(c) **Errweltye** (then spelt Wurrulju) – Claimant group: *Kaytej, Warlpiri, Warlmanpa Land Claim*. Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory (1982) pars 72-78, 106, 113.

(d) **Tyarre Tyarre** (then spelt Jarrajarra) – Claimant group: *Kaytej, Warlpiri, Warlmanpa Land Claim*. Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory (1982) pars 57-71, 106, 113);

(e) **Wake** – Claimant group: *Kaytej, Warlpiri, Warlmanpa Land Claim*. Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory (1982) pp.14-15 – as part of the Wakulpu landholding group); *Warumungu Land Claim*. Report No. 31. Report by the Aboriginal Land Commissioner, Mr Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory (1988) – this claim dealt in part with the Akwerlpe, spelt Wakurlpu, part of the landholding group); *McLaren Creek Land Claim*. Report No. 32. Findings, Recommendation and Report by the Aboriginal Land Commissioner, Mr Justice Olney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory (1991) – spelt Wakurlpu-Waake);

7. Members of the following landholding groups have previously been recognised as native title holders of neighbouring land under the *Native Title Act 1993* (Cth):

(a) **Arnerre** – Neutral Junction Determination (*Kngwarraye on behalf of the members of the Arnerre, Wake-Akwerlpe, Errene and Ileyarne Landholding Groups v Northern Territory of Australia* [2011] FCA 765);

(b) **Errene/Warlekerlange** – Neutral Junction Determination (*Kngwarraye on behalf of the members of the Arnerre, Wake-Akwerlpe, Errene and Ileyarne Landholding Groups v Northern Territory of Australia* [2011] FCA 765);

(c) **Wake** – Singleton Determination (*Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911); Neutral Junction Determination (*Kngwarraye on behalf of the members of the Arnerre, Wake-Akwerlpe, Errene and Ileyarne Landholding Groups v Northern Territory of Australia* [2011] FCA 765).

### **Membership of the native title claim group**

8. In accordance with the applicant’s system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:

(a) descendants (by birth or adoption) of one or more of the following named and unnamed ancestors of the landholding groups (the “ancestors”):

#### **AKALPERRE** (Kaytetye – Mpetyane/Thangale)

Descendants of four classificatory siblings whose father was Akalpere Ampetyane.

#### **Akalpere Tim Thangale**

Tommy Walkabout Thangale and siblings – FF; Eileen Mpetyane and siblings – FF.

#### **George Hayes Thangale**

Rowny Hayes and siblings – FF.

#### **Nancy Thangale**

Ronnie Wilson Kngwarreye – FM.

#### **Unnamed Thangale female**

Norman Price Pwerle and siblings – MM.

#### **AMAKWENG** (Anmatyerr – Peltharr/Ngwarray)

#### **Unnamed Amakweng-areny Ngwarray male**

Comet Peltharr – F.

#### **ALAPANP** (Anmatyerr – Ngal/Mpetyan)

#### **Unnamed Alapanp-areny Ngal male**

Raymond Rankin Ngal and Teddy Rankin Ngal – FF.

#### **ARLWEKARR** (Anmatyerr – Kemarr/Pwerl)

Descendants of four unnamed Arlwekarr-areny Kemarr brothers and one Kemarr sister.

#### **Unnamed Arlwekarr-areny Kemarr male**

Timothy Price – FFF and Kevin Tilmouth Pengart – MFFF.

#### **Unnamed Arlwekarr-areny Kemarr male**

Hilda Price Pwerl and Norman Price Pwerl – FFF.

**Unnamed Arlwekarr-areny Kemarr male**

May Kemarr – FFF.

**Unnamed Arlwekarr-areny Kemarr male**

Beryl Gorey Kemarr and Mark Gorey Kemarr – FF.

**Cecelia [Polly] Mpetyalyemp**

Brian Turner Peltharr and Eugene Turner Peltharr – FM.

**ARLPAWE** (Kaytetye – Mpetyane/Thangale)

**Descendants of Jupiter Pwerle**

Ronnie Wilson Kngwarreye and Michael Wilson Kngwarreye – MF.

**ARNERRE** (Kaytetye – Kemarre/Pwerle)

Descendants of four Arnerre-arenye Pwerle males.

**Mick Tywerlame**

No known living descendants.

**Dan Pwerle**

Michael Hayes – adoptive FF.

**Tommy Pwerle**

Amy Pwerle, Hilda Pwerle and Lena Pwerle – FF; Sonny Jakara – FFF.

**Tiger Pwerle**

No known living descendants.

**ARNMANAPWENTY** (Anmatyerr – Penangk/Pengarte)

Descendants of one unnamed Arnmanapwenty-areny Pengart male ancestor and his eleven Penangk children.

Mavis Penangk; Ray Penangk and Ray Nelson Pengart – FF.

**ERRENE/WARLEKERLANGE** (Kaytetye – Pengarte/  
Penangk)

Descendants of three Errene-arenye Pengarte siblings.

**Troferly Pengarte**

Ivy Penangke – F; Patsy Brown Pengart – FF; Kim Brown Penangk – FFF.

**Chippy Pengarte**

Nancy Peterson Kemarre – MF.

**Elkertelharenye Pengarte**

Winnie Martin Pwerle – M; Mick Wake Mpetyane – FM.

**ERRWELTYE** (Kaytetye/Warumungu – Pwerle/Kemarre [Kaytetye])



Descendants of three classificatory brothers.

**Unnamed Kemarre male**

Ned Womberdi Kemarre – FF.

**Hanson Kemarre**

Johnny Nelson Pwerle – F.

**Unnamed Kemarre male**

Daisy Hateches Trailen Pwerle – FFF.

**KWERRKEPENTYE** (Kaytetye – Kapetye/Kngwarreye)

Descendants of seven classificatory Kwerrkepentye-areny Petyarre siblings.

**Annie Petyarre**

Michael Hayes Pwerle – father’s adoptive FM.

**Unnamed Petyarre female**

No known descendants.

**Topsy Petyarre**

Tommy Walkabout Jangale – M.

**Alec Petyarre**

No known descendants.

**Unnamed Petyarre female**

Hilda Brett Akemarr and siblings – FM.

**Kitty Petyarre**

Noreen Bredd Kemarre and siblings – FM.

**Mary Anne Mpwelarr Petyarre**

Katie Corbett Apetyarr – MM.

**RTWERRPE** (Kaytetye – Kapetye/Kngwarreye)

Descendants of five classificatory Twerrpe-arenye Kapetye siblings.

**Long Jack Kapetye**

No known descendants.

**One Arm Jack Kapetye**

Tommy Thompson Kngwarreye – F.

**Kwelyayt Kapetye**

Jacob Petyarre – FF.

**Mary Kapetye**

No known living descendants.

**Hilda Angarrene Kapetye**

No known living descendants.

**TYARRE TYARRE** (Kaytetye – Kapetye/Kngwarreye)

Descendants of five classificatory brothers and one sister.

**Paddy Kngwarraye/Jungarrayi**

Peter Horsetailer Kapetye/Japaljarri – F.

**Unnamed Kngwarraye/Jungarrayi male**

Lady Kapetye/Napaljarri – F.

**Albert Makert Wilpatyenek Kngwarraye/Jungarrayi**

Mona Heywood Kngwarraye/Nungarrayi – FF; Ned Kelly Kngwarraye/Jungarrayi – FF; Billy Pumper Dobbs Kngwarraye/Jungarrayi – FF; Dudley Haines Kngwarraye/Jungarrayi – FF; Johnny Nelson Pwerke/Jupurrula – MF.

**Dora Kngwarraye/Nungarrayi**

Mick Wake Mpetyane – M.

**Albert McDonald Kngwarraye/Jungarrayi**

Graham Scott-McDonald Jungarrayi/Thangala – FF.

**Jinapirda Kngwarraye/Jungarrayi**

Dianne Shannon Kngwarraye/Nungarrayi – FF.

**WAKE** (Kaytetye/Warumungu – Thangale/Mpetyane [Kaytetye])

Descendants of unnamed Wake-*areny* Mpetyane male and his son Jimmy Thangale.

Mick Wake Mpetyane – FF.

(b) accepted as members of one (or more) of the landholding groups by the senior descent based members of the landholding group on the basis of their non-descent connections to the estate.

9. The named ancestors in paragraph 8(a) are the uppermost generation of the known ancestors of members of the native title claim group.

10. Under the claimants' system of traditional laws and customs a person who is not descended from the ancestors becomes a member of a landholding group when accepted by the senior descent based members of the group on the basis of non-descent connections to the estate. The non-descent criteria that senior members of a landholding group have regard to when considering the recruitment of a particular individual are:

- (a) spiritual identification with and responsibility for an estate;
- (b) conception and/or birthplace affiliation with an estate;
- (c) long-term residence in an estate;

- (d) close kinship ties, including intermarriage;
- (e) shared section/subsection and/or moiety affiliation;
- (f) a more distant ancestral connection to an estate, for example, mother's father's mother;
- (g) possession of secular knowledge of an estate;
- (h) possession of traditional religious knowledge, authority and responsibility for an estate;
- (i) authority and responsibility for shared Dreaming tracks and/or places of significance connected with an estate;
- (j) seniority in traditional matters concerning the claim group and/or the estate.

For example, in addition to his descent based affiliation to Rtwerrpe estate, Tommy Thompson Kngwarraye is accepted as a member of Arnerre, Errene/Warlekerlange, Kwerrkepentye and Wake landholding groups through non-descent bases. He is acknowledged as a senior knowledge holder for all of these estates which surround Rtwerrpe estate and he is a long-term resident at Tara community within the Neutral Junction pastoral lease. He acts as *kwertengerl* for Wake on the basis of knowledge and his connection through Ahakeye (Bush Plum) Dreaming; and for Arnerre on the basis of long-term residence, knowledge and close kinship and marriage ties. He also acts as *apmerek-artwey* for the Errene and Kwerrkepentye due to his knowledge of the sacra affiliated with these estates and because he belongs to the correct patrimoiety for both.

11. The claimants' system of traditional laws and customs includes rules about succession. Traditional succession processes have been recognised in relation to land in the region of the application area: see *Warumungu Land Claim*. Report No. 31. Report by the Aboriginal Land Commissioner, Mr Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory (1988) pars 23.1.1–23.1.2 and 23.3.1–23.4.1. Kaytetye traditional succession processes have been researched and reported in the *Singleton Anthropology Report* (2006:61–63) by Susan Donaldson (Singleton, NTD 6011/2000, determined in 2010: *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911); *Neutral Junction Consent Determination Report* (2010:46) by Harold Koch and Grace Koch (Neutral Junction, NTD 13/2008. Determination 13 July 2011); *Sandover Application Anthropology Report* (2011:54-57) by Craig Elliott and Natalie Kwok (NTD 6069/2001, yet to be determined). There are no known instances of succession in relation to the application area. Additional information about these rules is contained in Schedule F.

12. Under the claimants' system of traditional laws and customs descent is the most important basis for the possession of rights and interests in land. Subject to individual circumstances members of the landholding groups who are descended from one of the ancestors possess and transmit a wide range of traditional rights and interests.

13. Under the claimants' system of traditional laws and customs rights and interests in land are inherited through all four grandparental lines. However, the members of a landholding group with descent connections through father's father and mother's father are generally able to activate the widest range of rights in relation to the estate.

14. Under the claimants' system of traditional laws and customs the range of rights and interests in land possessed by members of a landholding group who are not descended

from the ancestors depends on individual circumstances, including the nature and extent of their non-descent connections to the estate. Generally such rights and interests are not transmittable.

15. A number of members of the native title claim group are members of more than one estate group, for example, due to different grandparental links to multiple estates. For example, Norman Price Pwerle is affiliated with Arlwekarr through FF, Arnerre through MF and Akalperre through MM. Tommy Walkabout Thangale is affiliated with Akalperre through FF and with Kwerrkepentye through MF.

### **Registered native title rights and interests:**

To the extent that any extinguishment of native title rights and interests must be disregarded the native title rights and interests that are claimed in relation to the application area are possession, occupation, use and enjoyment to the exclusion of all others.

2. To the extent that any extinguishment of native title rights and interests is not to be disregarded the native title rights and interests of the native title holders are the rights possessed under and exercisable in accordance with their traditional laws and customs, including the right to conduct activities necessary to give effect to them, being:

- (a) the right to access and travel over any part of the land and waters;
- (b) the right to live on the land, and for that purpose, to camp, erect shelters and other structures;
- (c) the right to hunt, gather and fish on the land and waters;
- (d) the right to take and use the natural resources of the land and waters;
- (e) the right to access, take and use natural water on or in the land;
- (f) the right to light fires for domestic purposes, but not for the clearance of vegetation;
- (g) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;
- (h) the right to conduct and participate in the following activities on the land and waters:
  - (i) cultural activities;
  - (ii) ceremonies;
  - (iii) meetings;
  - (iv) cultural practices relating to birth and death including burial rites;
  - (v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs,

and, subject to the rights of any person arising under the laws in force in the Northern Territory to be present on the land, the right to privacy in the exercise and enjoyment of those activities;

- (i) the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders;
- (j) the right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources;

3. Subject to paragraph 1 and the operation of the non-extinguishment principle where it applies all the rights and interests listed in paragraph 2 above existed and continue to exist in relation to the application area as a whole.

4. Unless any extinguishment of native title rights and interests must be disregarded the native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others.

5. The applicant acknowledges that the native title rights and interests are subject to and exercisable in accordance with valid laws of the Northern Territory of Australia and the Commonwealth of Australia.

6. The common or group rights and interests comprising the native title are held by the members of the landholding groups that together comprise the native title claim group over the application area as a whole. However, the distribution of rights and interests within the group and in respect of different parts of the application area is governed by the claimants' system of traditional laws and customs, including:

- (a) the particular association that members of the native title claim group have with one or more of the landholding groups and their respective estate areas; and
- (b) individual circumstances, including age, gender, knowledge, and physical and mental capacity.

7. The activities referred to in Schedules G and M were and are undertaken in the exercise of the native title rights and interests set out in paragraph 2.

[End of document]