Registration test decision

Native title determination application	Kariyarra
Applicant	TR (Deceased), Cyril Gordon, Donny Wilson, BA (Deceased), Kerry Robinson
Federal Court No.	WAD6169/1998
NNTT No.	WC1999/003

I have considered the claim made in the further amended Kariyarra claimant native title determination application filed on 1 September 2014 in accordance with s 190A of the *Native Title Act 1993* (Cth) (the Act).[1]

This document comprises a statement of my reasons for the decision that the claim satisfies all of the conditions in s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters).

Pursuant to s 190A(6) of the Act, the claim must be accepted for registration. ***Annexure A*** sets out the amendments required under s 190(3)(a)(i) in relation to the entry on the Register of Native Title Claims (RNTC) for the claim.

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Susan Walsh, delegate of the Native Title Registrar (Registrar)
20 October 2014

[1] All references to legislative sections refer to the *Native Title Act 1993* (Cth), as in force on the day this decision is made, unless otherwise specified.

Introduction

[1] On 15 February 1999, Nicholson J of Federal Court gave leave for the application to be amended and combined with 11 other Kariyarra claimant applications.[2] On 22 April 1999, the claim was entered on the RNTC under s 190(1)(a), following a decision by a delegate of the Registrar that the claim must be accepted for registration under s 190A(6), because it satisfied all of the conditions of ss 190B and 190C.

[2] On 9 July 2014, North J of the Federal Court gave leave for the application to be amended in the terms of the substituted amended Form 1 native title determination application filed on 4 April 2014: see *TR (Deceased) on behalf of the Kariyarra People v State of Western Australia* [2014] FCA 734 (*TR v WA*).

[3] On 6 August 2014, the Federal Court gave the Registrar a copy of the substituted amended application and accompanying documents under s 64(4) of the Act, thereby triggering the registration test in relation to the claim under s 190A—see subparagraph (1). I note that the exception to considering the claim set out in s 190A(1A) does not apply in this case, as the order by the Court granting leave to amend was not made under s 87A (determination in relation to part of the area covered by the application). I deferred the registration test at the request of the applicant to allow the application to be further amended to correct errors within Schedules B and C as to the area covered by the application. The applicant filed a further amended application on 1 September 2014 and received leave from the Court for the further amendment on 5 September 2014.

[4] On 15 September 2014, the Federal Court provided a copy of the further amended application and accompanying documents to the Registrar under s 64(4). It is the claim in the further amended application that I must consider for registration under s 190A. I note that the amendments to the application fall outside the scope of s 190A(6A),[3] as they relate to the description of the persons in the native title claim group, the claimed native title rights and interests and the factual basis for the assertion that the native title rights and interests claimed exist. Accordingly, I have I have considered the claim against all of the conditions in ss 190B and 190C, as required by s 190A(6).

[5] As required by s 190A(3)(a), I have had regard to the following information in considering the claim:

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2 Claimant applications WAD6078/1998, WAD6079/1998, WAD6080/1998, WAD6081/1998, WAD6084/1998, WAD6148/1998, WAD6149/1998, WAD6150/1998, WAD6155/1998, WAD6156/1998 and WAD6163/1998

3 Subsection 190A(6A) provides that the Registrar must accept some earlier registered claims referred by the Court under s 64(4) without considering the claim against all of the conditions in ss 190B and 190C where the only effect of the amendment is to reduce the area, remove a claimed right or interest and/or do one or more of the other minor things set out in s 190A(6A).

(a) information in the further amended application and accompanying affidavits, provided to the Registrar by the Court under cover of its letter dated 15 September 2014;

(b) information in the other documents provided by the applicant under cover of a letter from the applicant's legal representative to the Registrar dated 11 July 2014, namely:

(i) an anthropological report by Dr Kingsley Palmer dated December 2013 (including the map in Appendix B of the report);

(ii) a supplementary anthropological report by (Anthropologist) dated December 2013;

(iii) a registration test decision dated 28 May 2014 for the adjoining Kariyarra-Abydos claimant application (WAD47/2014) (applicant's additional information)

[6] There is no information before me of the kind set out in s 190A(3)(b) (information obtained as a result of searches conducted of registers of interests for land or water maintained by the Commonwealth or State of Western Australia). I note that the State was offered an opportunity to supply information under s 190A(3)(c) and to consider and comment in relation to the applicant's additional information. The State informed the Registrar on 19 August 2014 that it did not require such an opportunity, thus there is no information before me of the kind set out in s 190A(3)(c).

[7] Under the concluding words of s 190A(3) (the Registrar may have regard to such other information as she considers appropriate), I have also had regard to information in:

(a) an assessment and overlaps analysis by the Tribunal's Geospatial Services dated 22 September 2014;

(b) the decision by North J in *TR v WA* granting leave to amend the application.

[8] My decision as a delegate of the Registrar, under an instrument of delegation dated 8 August 2014, is that the claim in the further amended application satisfies all of the conditions of ss 190B and 190C, as set out in the reasons that now follow.

190B Registration: conditions about merits of the claim

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

[9] The claim **satisfies** the condition of s 190B(2) for the reasons set out below.

[10] Paragraph 190B(2) provides:

> The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 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.

[11] Paragraphs 62(2)(a) and (b) provide that the application must contain the following details:

> (a) information, whether by physical description or otherwise, that enables the boundaries of:
> (i) the area covered by the application;
> (ii) any areas within those boundaries that are not covered by the application ;
> to be identified;
> (b) a map showing the boundaries of the area mentioned in subparagraph (a)(i).

Details required by ss 62(2)(a)(i) and (b) concerning boundaries of area covered by application

[12] These details are found in Attachment B (written description of the boundaries) and Attachment C (map showing the boundaries of the area covered by the application).

[13] There has been no change to the boundaries of the area, although the information within Attachment B has been updated to clarify that the application does not cover any areas covered by the adjoining Ngarluma/Yindjibarndi (WAD6017/1996) determination area. Further, the application now contains a clearer map of the external boundaries in Attachment C of the application.

[14] In my view, the information in Attachments B and C provides the reasonable certainty required by this condition. The written description in Attachment B is a metes and bounds description referring to topographic features, cadastral boundaries, bearings, distances and coordinate points to the nearest metre and referenced to the Australian Map Grid 1984 (AMG84). The map in Attachment C shows the external boundary as a bold black line. The map also shows relevant cadastral boundaries and contains a Scalebar, Northpoint, coordinate grid and location map. The map contains notes relating to the source, currency and data use to prepare the map. The map and written description are consistent with each other. In my view, they together provide sufficient certainty to locate the external boundaries of the area covered by the application on the earth's surface.

Details required by s 62(2)(a)(ii) concerning areas not covered by application

[15] I must also assess the sufficiency of the details required by paragraph 62(2)(a)(ii) for any areas within the boundaries that are not covered by the application ('internal excluded areas'), which are described via a generic description within paragraphs 1 to 5 of Schedule B. Paragraphs 1 and 2 employ the terminology of the Act and equivalent state legislation to exclude areas within the boundaries affected by acts that have extinguished native title (e.g. 'category A past acts' and 'previous exclusive possession acts, as defined in s 23B'). Paragraph 3 identifies that there is no claim to any native title rights and interests which confer exclusive possession, occupation, use

and enjoyment over areas covered by a 'previous non-exclusive possession act' as defined in s 23F of the Act and equivalent state legislation. Paragraph 4 provides for the exclusion of any other area where native title rights and interests have otherwise been wholly extinguished. Paragraph 5 contains the proviso that where the non-extinguishment principle (as defined in s 238 of the Act and including ss 47, 47A and 47B) applies to any areas affected by the extinguishment identified in paragraphs 1 to 3, such that the extinguishment must be disregarded, then the areas are included within the application area. It is stated that further particulars of such areas will be provided prior to the hearing.

[16] Nicholson J in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*) was satisfied that a generic description of internal excluded areas such as that contained in this application met s 62(2)(a)(ii), if the applicant is not in possession of the facts relating to extinguishment to more particularly delineate the internal excluded areas. I note that the applicant states in Schedule L that it has not had the opportunity or the resources to fully obtain or analyse land tenure data for the whole of the area. In *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51] to [52] (*Strickland*), Justice French agreed with the decision in *Daniel* in the context of the Registrar's assessment of a generic description of internal excluded areas against the requirements of s 190B(2).

[17] There is no information before me, including from the State under s 190A(3)(c) to indicate that the applicant is in possession of tenure information which would enable the more precise identification of areas within the boundaries covered by the kinds of acts described in paragraphs 1 to 4 of Schedule B. It follows, in my view, that a generic description of the internal excluded areas meets the condition of s 190B(2).

Section 190B(3): Identification of native title claim groups

[18] The claim **satisfies** the condition of s 190B(3), for the reasons set out below.

[19] Paragraph 190B(3) provides:

> (3) 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.

[20] Schedule A of the application originally provided that the native title claim group comprised 78 named persons. The amended application now provides the following description of the persons in the native title claim group:

> The native title claim group comprises those Aboriginal persons who:
> a) are a descendant from one or more of the following apical ancestors:
> [11 apical ancestors are named]; and

b) recognise themselves as having rights and interests in the area of land and waters covered by the application under Kariyarra traditional law and custom.

[21] Carr J found in *Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*) that the task for the Registrar under s 190B(3)(b) is 'largely one of degree with a substantial factual element'—at [27]. I refer also to the decision by Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [63] to [69] (*Western Australia v Registrar*) that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another.' The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55 (set out above) in relation to definition of areas, apply equally to the issue of sufficient description of the native title group—at [67] (underlining added).

[22] In my view, the 'substantial factual element' and basis for a 'factual inquiry' are sufficiently set out within the description provided in Schedule A, namely:

(a) the 11 apical ancestors from whom the claim group are descended have been named; and

(b) the statement that recognition as a person with rights and interests in the application area is ultimately mediated 'under Kariyarra traditional law and custom'.

[23] In relation to the second element, Attachment F discloses that the acknowledgement and observance of traditional law and custom by the native title claim group in relation to the application area has been the subject of ethnographic research from the time of the early explorers to the early 20th century, during the 1950s to the 1970s and culminating in an expert anthropological report by Dr Kingsley Palmer (Palmer) dated December 2013,[4] who commenced work as an anthropologist in the Pilbara region in the early 1970s (Palmer report).

[24] I am of the view that ascertaining the members of the claim group depends on two known elements—showing descent from a named ancestor or ancestors and recognition under Kariyarra traditional law and custom. Both elements have been the subject of significant research and inquiry, as evidenced by the Palmer report. It follows in my view that the description is sufficiently clear for the purposes of this condition as it provides the 'substantial factual element' and a clear basis for a 'factual inquiry' of the kind discussed by Carr J in *Ward v Registrar* and *Western Australia v Registrar* respectively.

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4 A copy of which has been provided to me by the applicant.

190B(4) Identification of claimed native title

[25] The claim **satisfies** the condition of s 190B(4), for the reasons that follow.

[26] Paragraph 190B(4) provides:

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

[27] Paragraph 62(2)(d) provides that the application must contain:

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

[28] The description of the claimed rights is found in Schedule E (refer to my reasons at s 190B(6) below for the text of the description). The description sets out a claim 'to possess, occupy, use and enjoy the area as against the whole world' in relation to any area landward of the high water mark, where there has been no extinguishment of native title or any extinguishment must be disregarded (defined as 'Area A'). For those areas not included in Area A (defined as 'Area B'), the applicant claims a series of rights and interests related to the use of the area and its resources, e.g. to hunt, fish and gather the resources of the land and waters, to access and be present there, to live, camp and erect shelters, to undertake ceremonial activities, to care for its places and objects of importance and to trade its resources.

[29] In *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*NT v Doepel*), Mansfield J agreed with the Registrar that s 190B(4) requires a finding as to 'whether the claimed native title rights and interests are understandable and have meaning'—at [99]. I am of the view that the description in this case is sufficient to allow the native title rights and interests claimed to be readily identified. The claimed rights have been clearly and comprehensively described in a way that does not infringe s 62(2)(d). Further, the description is meaningful and understandable, having regard to the definition of the expression 'native title rights and interests' in s 223 of the Act.

[30] Whether I consider that the claimed rights can be established prima facie is the task at s 190B(6), discussed below.

190B(5) Factual basis for claimed native title

[31] The claim **satisfies** the condition of s 190B(5), for the reasons that follow.

[32] Paragraph 190B(5) provides:

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 interests; and
(c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[33] Following Mansfield J at [17] of *NT v Doepel*, I understand that my assessment is to 'address the quality of the asserted factual basis for [the] claimed rights and interests … but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests.' I understand that it 'is not for the Registrar to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'.[5]

[34] Mansfield J approved the Registrar's focus on each of the three particular assertions, when considering s 190B(5) overall. In his Honour's view, if the claim did not provide a sufficient factual basis for any one or more of the three assertions, it would follow that the factual basis was likewise insufficient to support the general assertion that the claimed native title rights and interests exist within the chapeau or head of s 190B(5).[6]

190B(5)(a)

[35] For the reasons that follow, I am **satisfied** that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

[36] The facts pertaining to this assertion are summarised in paragraphs 1 to 6 of Attachment F and supported by information contained in the Palmer report. Attachment F states that the Kariyarra people have been associated with the general geographical location of the application area from the time of the early explorers (the early to mid 1860s) until the present. The content of their pre-sovereignty society and its traditional laws and customs was the subject of significant ethnographic inquiry and research by the anthropologist A.R. Radcliffe in the early 20th century, who published a seminal paper in 1913 about the customary practices and relationship to country by the Kariyarra and two neighbouring groups (the Ngarluma and Marthuthunira). Norman Tindale also recorded information about their customs and traditional boundaries when he visited the region in 1953. The Kariyarra have also been studied by F. McCarthy, C. Von

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5 Approved by a Full Court of the Federal Court (French, Moore and Lindgren JJ) in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 [2008] FCAFC 157 at [83] to [85] (*Gudjala FC*).

6 *NT v Doepel* at [130].

Brandenstein and J. Wilson, who recorded the continued existence of a Kariyarra community in the application area during the 1950s and 1970s.

[37] Attachment F states that members of the claim group continue to use the application area in the same or a similar way to their ancestors, including visiting and protecting sites, hunting and gathering food resources, gathering medicinal plants and bush resources for miscellaneous use and cultural activities and accessing and fishing in the sea. Attachment F states that the Kariyarra possess extensive knowledge of, and law and custom in relation to, the application area, including, their significant sites, food resources, medicinal plants and the sea. It is claimed that the extent of this knowledge and the complexity of the law and custom demonstrate a long term association with the area.

[38] Palmer states that the application area is located in the northern Pilbara region of Western Australia and provides the following description:

> Roughly speaking WAD6169/1998 extends seaward from approximately 45 kms east of Depuch Island to a point approximately 17 kms east of Port Hedland. The application area extends south to Chichester Range in the south east and the Mungaroona Range in the south west, taking in substantial portions of the Yule River drainage basin and the Turner River and Turner River West.

[39] Palmer identifies that although sovereignty is 1829, settlement of the region did not commence until some decades later. According to Palmer, by the mid 1860s the 'coastal Kariyarra ... would have seen substantial changes to their hunting and gathering way of life as their country was appropriated by pastoralists who shepherded sheep across their country. Those who lived further to the south and away from the coast may have been affected some years later.' Palmer surmises that there would have been little or no difference to the traditional laws and customs of the Kariyarra and the extent of their country in the years between sovereignty in 1829 and contact between the Kariyarra and the settlers in the mid 1860s.[7]

[40] Palmer identifies that European settlement (described as 'effective sovereignty') began in the mid-1860s with grants to pastoralists of land in the region (paras 33–34). Early accounts describe the territory of the Kariyarra as being:

(a) on the Yule River (which runs centrally through the application area)—para 49;
(b) bordered to the west by Balla Balla on the coast (a watercourse that lies a short distance outside the north-western boundary) and the Turner River to the east (this flows in the eastern reaches of the application area)—paras 49 & 55.

[41] Palmer provides information about the early records from the early 1900s in relation to the Aboriginal inhabitants of the Pilbara, who would hunt, fish, make weapons and perform increase rituals, burial rites and initiation ceremonies. These records spoke also of the Aboriginal inhabitants adhering to a system of social categorisation that regulated marriage (paras 48 to 52, 64, 67 to 69, 71 to 75).

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[7] See paras 33–34.

[42] Anthropological research and ethnography by A.R. Radcliffe-Brown, following field work by him in the region in 1911, established that the pre-sovereignty Kariyarra encompassed a wide area of country, from Balla Balla in the west and including country around the Yule and Turner Rivers (which flow through the application area) (paras 88–89, 236). Later research from the 1950s indicates that Kariyarra country extended as far inland and south as the Mungaroona Range and Mumbillina Bluff and also included Mallina, Yandeyarra and Kangan stations (paras 186–88, 236). I note that Yandeyarra station is proximate to the western boundary of the application area whereas Kangan station is adjacent to the northern and north-western boundaries. There is also information that the Kariyarra fished the rivers of their country, as well as the 'littoral zones in the north of that country', providing support for an association with the waters off the coast but not with the waters of the 'deep reef', from Depuch Island in the west to Port Hedland in the east (paras 44, 176, 204).

[43] The anthropological research and writings of Radcliffe-Brown are important to the asserted factual basis, for the particular focus on the Kariyarra (being one of the three Pilbara language groups studied) and because of the recorded accounts from the predecessors of the native title claim group who may have been born prior to European settlement and therefore represent an account of how things would have been for the Kariyarra in the period between settlement in the 1860s and sovereignty in 1829 (para 122). These predecessors included members of the claim group living and working on pastoral properties in the region, a situation which had been in place for about 50 years when Radcliffe-Brown visited the region in 1911 (para 95).

[44] Radcliffe-Brown published a seminal paper in 1913 providing evidence that the Kariyarra predecessors observed and acknowledged laws and customs based on a complex system of kinship and social classifications that governed not only kin relationships and marriage, but also how rights in land were held and transmitted amongst members of the relevant society (paras 93 to 108, 126–129).

[45] Later research in the region by N. Tindale in 1953 and F. McCarthy in 1962 (paras 201, 207–209, 227) identified Dreaming mythic sites located at Port Hedland, Yandeyarra and east of the Turner River. This indicates that customary beliefs were important to the Kariyarra predecessors at the time of the research undertaken by McCarthy and Tindale in the mid-20th century (paras 174, 196). The Kariyarra were distinguishable from neighbouring groups by the language they spoke, it being observed that language delineated the bounds of Kariyarra country from Peawah and Balla Balla in the west to Port Hedland and the Turner River in the east (paras 200, 234).

[46] The linguist C. von Brandenstein provides some information about the Kariyarra language in his 1967 essay on Pilbara languages, although Kariyarra was not the focus of his study (para 211–214). He also recorded the use of a section system and an increase site for babies near Yandeearra (paras 212–213, 215) and that there was a 'proprietary link' between a person and the totem represented at a particular site or *talu* on that man's country (paras 214, 230).

[47] J. Wilson undertook field research in 1959–60 in the region for his Master's thesis on striking Aboriginal pastoral workers in the Pilbara and makes some reference to Kariyarra individuals. This included (Person) from Mundabullangana Station (on the coast between the western boundary and the Turner River) (para 224). Wilson divided the language groups for the region into the 'riverline' people, who included Nyamil and Kariyarra and the 'desert' groups, the majority of whom were Nyangamarda (para 219). Wilson noted that the riverline people were keen fisher-folk, including the Coombie family, which 'acknowledged Gariera kin ties' (para 225). According to Wilson, the Kariyarra were 'in a substantial minority' and may have been 'assimilated into the more dominant groups' of the region. However, Wilson later wrote of his observations at the time that 'local site holders' were 'favoured' over 'Aboriginal immigrants', the latter being accorded 'lower ritual status' (paras 225–26, 231). Palmer notes that the Kariyarra were not the focus of Wilson's work (para 231).

[48] The 11 apical ancestors for the native title claim group are discussed within the Palmer report, including the references within the ethnographic record which supports that they are Kariyarra persons with an association to the application area, as are their descendants (paras 287–89, 320–23, 331–43, Chapters 8, 9 & 11). Palmer's findings concerning current membership of the claim group and their association with the area are summarised within Table 9.4 (Summary of findings on various family groups), at paras 398–402 and Chapters 17 and 18.

[49] There is a wealth of material within the report that discusses the association of the native title claim group with the application area, including their long-standing residence at Port Hedland and South Hedland within the north-east of the application area, on the coast and on the Yandeyarra Reserve, in the southern inland reaches of the application area. The evidence is that they hunt and fish in the way taught to them by their old people and that they know and visit its special sites, many of which are documented on the map in Appendix B of the Palmer report. This stated association, which is asserted to have endured from the earliest days of settlement until the present, is documented in the ethnographic record and also by Palmer, who has worked as an anthropologist in the region since the early 1970s. The details provided by Palmer are comprehensive, documenting the association not only of the 11 apical ancestors, but of other Kariyarra antecedents, with many places within the bounds of or proximate to the application area.

[50] In my view, the information provided by Palmer speaks of an enduring association with a physical and spiritual dimension over the entire period since European settlement until the present with a sufficiently wide geographic compass that appears to relate to the application area as a whole. It follows that I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and their predecessors had, an association with the area.

190B(5)(b)

[51] For the reasons that follow, I am **satisfied** that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

[52] In my view, the factual basis for this assertion must address that the native title rights and interests find their source in 'traditional' laws and customs, having regard to s 223(1)(a), which provides that for rights to be 'native title rights and interests' they must 'be possessed under the traditional laws acknowledged, and traditional customs observed' by the relevant Aboriginal peoples or Torres Strait Islanders. Therefore, I must pay attention to the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) as to what will amount to 'traditional' laws and customs: see Dowsett J at [26] of *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*). This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157(*Gudjala FC*), who noted that one question, amongst others, which needs to be addressed is whether 'there was, in 1850–1860[8], an indigenous society in the area, observing identifiable laws and customs'—at [96].

[53] The following is a brief synopsis of my understanding of the case law which has developed around the requirement in s 223(1)(a) that native title rights and interests in relation to land and waters must be possessed under 'traditional' laws and customs:

(a) for laws and customs to be 'traditional', they must derive from a body of norms or a normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty;

(b) a society is a body of people united in their acknowledgement and observance of laws and customs with normative content;

(c) the acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time;

(d) it is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs;

(e) change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently

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8 I note that this was the period during which the area covered by the Gudjala People's application was settled by the Europeans.

acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[9]

[54] Palmer identifies that the relevant pre-sovereignty society in relation to the application area was the subject of considerable ethnographic research in the early 20th century by Radcliffe-Brown, who published a seminal paper in relation to the Kariyarra and other Pilbara groups in 1913. This research establishes that the Kariyarra were regarded as a separate group with rights and interests in relation to an area of land and waters roughly bounded by the Balla Balla River in the west and Port Hedland and the Turner River in the east. Speaking the Kariyarra language within these boundaries was a clear marker of territorial identity. The Aboriginal persons within these boundaries acknowledged and observed a complex set of laws and customs governing social relations (including marriage) which was inextricably linked to rights in land, it being observed that subgroups within the larger Kariyarra 'tribe' held rights to particular areas, based on descent from persons similarly connected to such areas.

[55] Attachment F refers to those parts of Palmer where these assertions are significantly fleshed out and expanded upon, including:

(a) an account of the early ethnographic record which places the Kariyarra people within the general geographic location of the application area at the time of the early explorers;

(b) a discussion of the work of Radcliffe-Brown, Tindale and McCarthy, Von Brandenstein and Wilson from the early 20th century, mid 20th century and the 1950s to 1970s respectively, in which detailed observations are found in relation to the predecessors of the native title claim group, including their affiliation with places located within or proximate to the application area;

(c) the evidence of continuing residence by a majority of the claim group within the application area, particularly at Port Hedland (on the coast, in the north-eastern section of the application area) and the Yandeyarra Aboriginal community (inland, in the southern reaches of the application area);

(d) an examination of the extensive knowledge held by the members of the claim group of the application area and its resources, coupled with their continuing use of the area, for visiting and protecting significant sites, hunting and gathering food and other resources for sustenance and cultural activities, including the sea areas covered by the application.

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[9] In addition to *Yorta Yorta*, I refer to the following decisions by the Full Court, which have considered what is required under s. 223(1) in light of the principles laid by the High Court: *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*), *Risk v Northern Territory of Australia* (2007) 240 ALR 75; [2007] FCAFC 46 (*Risk*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*).

[56] Palmer sets out the account of early explorers, settlers and ethnographers (principally D. Bates and E. Clement) in Chapter 2. In my view, the information is sufficient to support an assertion that in the years following European settlement, Aboriginal persons known as Kariyarra were identified as being from the region within and proximate to the application area, from Sherlock Station and Balla Balla River (to the west of the application area), to the Yule and Turner Rivers (located centrally within the application area), Port Hedland (on the coast in the north-east of the application area and beyond the bounds of the application area, north-east to the De Grey River.

[57] Palmer provides an account of the work of the anthropologist A.R. Radcliffe-Brown in the early decades of the 20th century in relation to the region and states that he provides 'the only anthropological account of the Kariyarra derived from the first or second decade of the twentieth century' (para 83). Palmer notes that the Kariyarra are in the 'unusual position [where] fundamental elements of their ethnography were recorded by a trained anthropologist at a time when older men and women of the group could well have been born prior to the date of effective sovereignty' (or European settlement)—para 122. Palmer states that although 'Radcliffe-Brown may have considered that some aspects of customary practices had fallen into desuetude, I think it reasonable to conclude that the field data [he] collected represented a substantial account of the way things may have been for the Kariyarra prior to sovereignty [and] the data, analyses and observations of Radcliffe-Brown are then of importance when considering the degree to which customary action, normative rules and other aspects of Kariyarra culture have perdured to the present ' (para 122).

[58] Radcliffe-Brown visited the region for research purposes in 1911 and published his seminal paper *Three Tribes of Western Australia* concerning the Kariyarra, the Ngarluma and the Marththunira in 1913. Radcliffe-Brown identified that the 'Kariera tribe occupies the coast of Western Australia from a point to the east of the Sherlock River to a point east of Port Hedland, extending inland for about 50 miles. The tribe is adjoined by the Ngarla on the east, the Ngaluma on the west, the Injibandi on the south, and the Namal on the south-east' (para 94). Radcliffe-Brown estimated that the Kariyarra occupied approximately 3,500 to 4,000 square miles (para 95) and that members of the group were living and working on pastoral properties, a situation which had been in place for about 50 years (para 95). According to Radcliffe-Brown they were distinguished from their neighbours by possession of a name, a language and a 'defined territory' (para 95). Radcliffe-Brown understood that their 'tenurial system' was based 'local groups, each with own defined territory' (para 96). A map of the 14 descent groups identified by Radcliffe-Brown at that point for Kariyarra territory overall is provided on pg 30 of the report (figure 3.3). (Radcliffe-Brown noted that this map may not be complete and does not purport to show all of the local groups formerly existing—para 160).

[59] Radcliffe-Brown provides the following information about the Kariyarra and their relationship with their traditional country, including:

(a) territorial rights to roam, hunt and gather within the boundaries of one's local group (para 97);

(b) the need for permission to enter the country of another local group, except if following a kangaroo or emu that had crossed the boundary into another's territory (para 97);

(c) visiting and sharing of food amongst local groups, such that there was 'a perpetual shifting to and fro both within the country of the group and from one group to another' (para 98);

(d) that one tribe was not clearly marked off from its neighbours around tribal borders, so that 'there are often near the border a number of local groups that occupy an indeterminate position', e.g. those who were 'half Ngaluma, half Kariera' (para 98);

(e) rules concerning relationships and marriage that operated amongst the Kariyarra, including marrying out of one's local group, with the wife retaining rights to her own country, so that man and wife were generally welcome there and a man 'seems also to have a sort of secondary right over the country of his mother's birth', which manifested in him being sure of a welcome there (para 99);

(f) a Kariyarra 'system of kinship and associated behaviours' giving rise to 'reciprocal rights and duties' and regulating 'the whole social life of the people' (para 103). This system was 'based on actual relations of consanguinity and affinity that can be traced by means of the genealogical knowledge preserved by the old people' (para 103). The recognition of relationships was found by Radcliffe-Brown to be 'so extended that everyone whom an individual comes in contact in the ordinary course is his relative' bet it 'brother', brother-in-law', 'father' or 'uncle'. It is only with one's relations does one interact; without knowing one's relationship to another 'all intercourse is impossible' (para 103) and this puts the other in the category of an enemy (para 102). Thus, according to Radcliffe-Brown, the 'classes of the Kariyarra tribe are groups of related persons' (para 103);

(g) Radcliffe-Brown understood that this system, including rules relating to potential marriage partners based on consanguinity (blood or kinship ties), was 'fundamental to local organisation' whereby 'each local group ... that is, each of the local subdivisions of the tribe, consists of members of one couple only' (para 104). (Palmer notes at para 105 that Radcliffe-Brown later refined his definition of the 'local group', by adopting the term 'clan');

(h) some evidence of the observance of totemism by Kariyarra local or clan groups and initiation rituals (paras 107–108), although it appears that Radcliffe-Brown also saw evidence of some discontinuance of ritual around totem or *talu* sites within a clan territory (paras 106–107).

[60] In Part 3 of the report, Palmer explains how this pre-sovereignty society has endured to the present day, albeit with some adaptation as a result of European settlement of traditional Kariyarra lands and waters in the 1860s. There is a wealth of information from current claim group members who trace descent from Kariyarra ancestors and have a special connection to particular places documented in the report[10] and shown on the map in Appendix B.

[61] The factual basis that is asserted is that the native title claim group observe laws and customs whereby rights, responsibilities and interests in relation to land and waters are exercised by the descendants of the ancestors named in Schedule A. In my view, the factual basis is sufficient to support an assertion that the current Kariyarra descent groups (which revolve around the ancestral connections named in Schedule A) continue to have knowledge of their ancestral country, its totemic associations (*talu*) and mythological beings (*warlu*) and that this has been passed to them from their elders and ancestors in the generations since European settlement. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Kariyarra gain rights to country on the basis of cognatic descent is founded upon a normative system that is likely to have been present at or before the time of sovereignty. I consider that there is a sufficient factual basis for the assertion that the current laws and customs are traditional in the sense that they have been acknowledged and observed in the generations since settlement and are rooted in the customary laws and practices of a pre-sovereignty society with rights and interests in an area that matches the area covered by the application.

[62] The factual basis provides information about the way that the claim group continues to maintain the Kariyarra system of social organisation and kinship, including the exercise of rights in land, based on ancestral connections and rules of descent. The factual basis is sufficient to support an assertion that the claim group continue to perform traditional practices on the area such as hunting, fishing, gathering natural resources for various purposes, as has been undertaken by their predecessors and this is based on customary rules that have been consistently acknowledged and observed in the generations since European settlement.

[63] Having regard to the very comprehensive information in the Palmer report, I am satisfied that the factual basis sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth and common practice, to the current members of the claim group, and have been acknowledged by them without substantial interruption.

190B(5)(c)

[64] I am **satisfied** that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. I rely on my reasons above for the assertion of s 190B(5)(b) setting out why I was

[10] See, for example, Table 10.1 on pgs 138–139.

satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests. The information there referred to is likewise sufficient, in my view, to support a finding that the group have continued to hold the native title in accordance with their traditional laws and customs.

[65] The Kariyarra people are said to adhere to the belief that their ownership of the application area extends back, under traditional law and custom, to the beginning of time whereby their language and country were created together as inseparable parts. This is the *munguny* or *kapurkai*, their name for the Dreamtime creator who gave them their laws and customs, their *talu* (totemic sites) and *warlu* (mythic snake) and which is the source of the rules that govern the Kariyarra People today (para 7 of Att F).

[66] The Kariyarra are said to possess a body of ritual knowledge (songs, stories) relating to the application area that has been passed to them from ancestors who lived long before sovereignty and which underpin their traditional laws and customs and are a key means for transference of that law and custom from generation to generation (para 8 of Att F).

[67] It is said that the Kariyarra have continued to hold native title in the application area in accordance with such laws and customs via (a) descent (cognatic) from ancestors connected with the area; and (b) recognition of their Kariyarra identity by following their Kariyarra ancestral line, which is a choice influenced by factors such as familiarity with country and acquisition of traditional and cultural knowledge pertaining to the application area, its resources, rituals and special places (para 9 of Att F).

[68] These assertions are fleshed out in considerable detail within the Palmer report. I refer to the following:

(a) the information contained in Table 13.1 and the map in Appendix B which provides information about the location of many places with totemic significance (*Talu*) throughout the application area, as passed to current claim group members from their ancestors and other predecessors;

(b) the information in Chapter 17 about the 11 apical ancestors from whom current claim group members descend, including references from the ethnographic record which support their connection to the application area and a Kariyarra identity;

(c) the speaking of language in the post-settlement period as a marker of the bounds of Kariyarra country from that of their neighbours to the west and east. The Kariyarra language, although not currently widely spoken, nonetheless persists as a reference point for Kariyarra identity, including in relation to the observance of rules

pertaining to social relations, totemic sites of significance and belief in the creative beings of the Dreamtime (paras 988–989);

(d) the persistence in the Kariyarra generations following the settlement era of rules relating to ownership of land similar to those observed by Radcliffe-Brown in the post-settlement era of the early 20th century, whereby descent or country groups exercised rights to discrete areas, underpinned by recognition of a spiritual correspondence between a person and the country to which they belong, including its totemic significance (*talu*), which finds its expression in song, stories and ritual knowledge (paras 487–488, 991, 998);

(e) the evidence of a continuing society who reside in strategic places within the application area, including on the coast at Port Hedland and inland at Yandeyarra reserve, and who hunt, fish, travel and otherwise use the land and its resources in the way that their ancestors have done (Chapters 12–16).

190B(6) Prima facie case

[69] The claim **satisfies** the condition of s 190B(6), for the reasons that follow.

[70] Paragraph 190B(6) provides:

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.
>
> Note: If the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established. Only those rights and interests are taken into account for the purposes of subsection 31(2) (which deals with negotiation in good faith in a "right to negotiate" process) and subsection 39(1) (which deals with criteria for making arbitral body determinations in a "right to negotiate" process).

[71] I refer to my reasons above at s 190B(4) where I found that the description of the claimed native title rights and interests is sufficient to allow the claimed rights to be readily identified. That description is in the following terms:

> ***Area A*** means land within the application area that is landward of the high water mark and which comprises: (i) areas of unallocated Crown land that have not been previously subject to any grant by the Crown; (ii) areas to which s. 47 of the Act applies; (iii) areas to which s. 47A of the Act applies; (iv) areas to whic s. 47B of the Act applies; and (v) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies or in relation to which there has not been prior extinguishment of native title.
>
> ***Area B*** means land and waters within the application area that is not included in Area A.
>
> ***Subject to law and customs***

The native title rights and interests claimed in this application are subject to and exercisable in accordance with: 1. the common law, the laws of the State of Western Australia and the Commonwealth of Australia; 2. valid interests conferred under those laws; and 3. the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which native title claim group have a connection to the area of land ansd waters the subject of this application.

Rights in Area A
In relation to Area A only, the applicant claims the right to possess, occupy, use and enjoy the area as against the whole world.

Rights in Area B
The applicant claims the following listed native title rights and interests in relation to Area B:
1. A right to hunt and otherwise take fauna in and from the area
2. A right to fish in the area
3. A right to gather and take flora (including timber) in and from the area
4. A right to take soil, sand, gravel, stone, flint, clay, ochre, shells and other traditional resources, other than minerals, petroleum and gas, in and from the area;
5. A right to access and be present on or within the area;
6. A right to live, camp and erect shelters upon or within the area;
7. A right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
8. A right to invite and permit others to have access to and participate in or carry out activities in the area;
9. A right to conduct and participate in ceremonies, burials, other cultural activities and meetings within the area;
10. A right to visit, care for and maintain places and objects of importance within the area and protect them from physical harm;
11. A right to have access to and take water from within the area;
12. A right to trade in the resources of the area.

In relation to Area A only: the right to possess, occupy, use and enjoy the area as against the whole world.

[72] I consider that, prima facie, this right can be established.

[73] In *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*), the majority considered that the 'expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' and conveys 'the assertion of rights of control over the land'—at [89] and [93]. More recently, the Full Court reviewed the case law in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

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

> occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71] (Underlining added).

[74] *Griffiths FC* indicates at [127] that what is required to prima facie establish the exclusive right under the condition of s 190B(6), is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Full Court stressed at [127] that:

> [It is also] important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.

[75] I am of the view that there is material before me which prima facie establishes the existence of this right within Area A.

[76] Radcliffe-Brown observed in 1911–1913 about rules relating to territorial boundaries and the consequences of trespassing on another's ancestral land:

> [t]he country of a local group, with all its products, animal, vegetable, and mineral, belongs to the members of the group in common. Any member has the right to hunt over the country of his group at all times. He may not, however, hunt over the country of any other local group without the permission of the owners. … Hunting or collecting vegetable products on the country of another local group constitutes an act of trespass and was in former times liable to the punished by death. The importance attached to this law seems to have been so great that offences against it were very rare (Palmer, 97).

[77] One claimant says that:

> [y]ou supposed to know where you can go and what you can do. Law is important because we have responsibility to people and the land. It's more dangerous in our law because you do the wrong thing you get dead. You would get punished by people (Palmer, 567).

[78] Another claimant says that permission must be sought by both Aboriginal and non-Aboriginal people before entering particular ancestral country (Palmer, 566).

[79] The Palmer report refers to areas within Kariyarra country where access is forbidden to provide protection from the spiritual dangers in those locations, such as initiation grounds. Some places are considered 'to be inherently dangerous in a spiritual sense and visiting them, whether knowingly or not, may result in sickness and perhaps death' (Palmer, 521). One claim member speaks of a man who visited Kariyarra country and collected rocks and artefacts from it and became very sick and almost died. Upon returning the items to the country, his health rapidly improved —(Palmer, 524). According to Palmer, the rules relating to permission and exclusion of those who are not Kariyarra from land and waters continues to be acknowledged and observed by the Kariyarra and it is based on customary practice that derives from the relevant pre-sovereignty society (Palmer, 97, 238–39, 532–43).

In relation to Area B:
1. A right to hunt and otherwise take fauna in and from the area
2. A right to fish in the area

3. A right to gather and take flora (including timber) in and from the area
4. A right to take soil, sand, gravel, stone, flint, clay, ochre, shells and other traditional resources, other than minerals, petroleum and gas, in and from the area
5. A right to access and be present on or within the area
6. A right to live, camp and erect shelters upon or within the area
7. A right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong
8. A right to invite and permit others to have access to and participate in or carry out activities in the area
10. A right to visit, care for and maintain places and objects of importance within the area and protect them from physical harm
11. A right to have access to and take water from within the area

[80] For the reasons given above in relation to the exclusive right over Area A, I am also of the view that these itemised rights in relation to Area B can be prima facie established. Additionally, there are many references in the material to the prima facie existence of these non-exclusive rights.

[81] There is information that members of the claim group hunt and fish their land and waters in the generations since settlement and in a manner consistent with traditional laws and customs concerning use of the land, waters and its resources. The second report provided by the applicant on Kariyarra bush tucker and medicine by (Anthropologist)((Anthropologist) report) explains these matters well, including how fish and shellfish are an important source of food for the Kariyarra and fishing is a favourite pastime for many claimants. There is evidence that the Kariyarra have knowledge of the various species of fish that can be found throughout the Kariyarra traditional lands, such as salmon, barramundi, bony brim and black perch ((Anthropologist), para 25.1). The Palmer report notes that some members of the claim group were observed fishing in the pools in the Turner and Yule Rivers (para 942). There is information about members of the claim group gathering witchetty grubs, saps, leaves, tree barks, seeds, water reed, bush fruits, native tobacco and other natural resources for various reasons including for food and medicinal reasons (Anthropologist) report, paras 4.1–16.1, 22.1, 24.1).

[82] There is evidence that claim group members make regular use of country and its resources, including water. They live in settlements within Kariyarra land. They speak of regularly accessing country to visit and hunt (Palmer 958–959). The anthropological material also indicates that some of the apical ancestors and other predecessors resided on or accessed the application area prior to the date of effective sovereignty, whereas other apical ancestors had access to other Kariyarra traditional lands.

[83] The factual basis material refers to various ceremonies including burial rituals and other cultural activities being performed in the Kariyarra traditional country.

[84] One claimant says that when she goes fishing on country, she removes any rubbish and another claimant says that they cover rock-holes with iron to prevent the water from evaporating (Palmer, 517). The early literature indicates that the predecessors also cared for and maintained places and objects of importance on country (Palmer, 553).

[85] There is also evidence of the continuity of traditional law and custom relating to speaking for particular areas and protocols concerning the giving of permission to others within the

Aboriginal communities to which the claim group belong to enter areas and to participate in activities. In my view, these rights have been expressed in such a way that they do not seek to exert control over persons, other than other Aboriginal persons governed by the traditional laws and customs observed by the native title claim group.

In relation to Area B:
12. A right to trade in the resources of the area

[86] I have reached the view that this is not a right that can be established prima facie as I am not presented with any information which shows or asserts that such a right was possessed under the traditional laws and customs of the relevant pre-sovereignty society.

Conclusion

[87] To conclude, as all but one of the claimed rights can be established prima facie, I find that the requirements of this condition are satisfied. My instructions for the entry onto the RNTC appear in ***Attachment A*** at the end of this statement.

190B(7) Physical connection

[88] The claim **satisfies** the condition of s 190B(7), for the reasons that follow.

[89] Paragraph 190B(7) provides:

> 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 have been expected currently to 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 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.

[90] The Palmer report is replete with references to named claim group members and their predecessors, including the 11 apical ancestors, having a traditional physical connection that is both current and previous, in relation to many places within the application area. I refer to my reasons at s 190B(5) for details pertaining to this.

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

[91] The claim **satisfies** the condition of s 190B(8), for the reasons that follow.

[92] Paragraph 190B(8) provides:

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of section 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.

61A(1): No claim to areas covered by determinations of native title

[93] I have undertaken a search of the Tribunal's Geospatial database which reveals that no part of the application area is also covered by a previous native title determination.

61A(2): No claim to areas covered by previous exclusive possession acts

[94] Schedule B clearly states that the application does not include any such areas (refer to my reasons at s 190B(2) above).

61A(3): No claim to areas covered by previous non-exclusive possession acts

[95] The claimed rights and interests described in Schedule E are clearly framed so that exclusive possession is only claimed in relation to areas where no such acts have been done or if claimed, any extinguishment by such acts must be disregarded due to the operation of the non-extinguishment principle set out in the Act.

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

[96] The claim **satisfies** the condition of s 190B(9), for the reasons that follow.

[97] Paragraph 190B(9) provides:

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:
>
> a. to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas; or
> b. to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; 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 subsection 47(2), 47A(2) or 47B(2)).

[98] Schedule Q states that no claim is made to any minerals, petroleum or gas owned by the Crown. In my view, this express statement satisfies s 190B(9)(a). The claimed rights and interests are framed in such a way that they do not purport to exclude all other rights in relation to any offshore places (see Schedule E and my reasons above for ss 190B(4) & (6)). Finally, the application and accompanying documents do not disclose, and I am not otherwise aware that, the native title rights and interests claimed have otherwise been extinguished. The claim satisfies s 190B(9)(c).

190C Registration: conditions about procedural and other matters

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

[99] The claim **satisfies** the condition of s 190C(2), for the reasons that follow.

[100] Paragraph 190C(2) provides:

> The Registrar 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.

[101] In my view, the application contains all details and other information, and is accompanied by the affidavit, required by ss 61 and 62. My reasons for this now follow.

61(1) Applications that may be made

[102] Item (1) of the Table in s 61(1) provides that a native title determination application, for a determination of native title under s 13(1), may be made by *'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'*.

[103] I note that whether or not the person or persons claiming to be authorised by a 'native title claim group' as that term is defined in s 61(1) (see s 253) is, in fact, so authorised cannot be determined by the Court until it is determined that there are persons holding the particular native title claimed—see *Harrington-Smith (No 9)* at [1186]- [1193]. I note also that s 190C(2) does not permit the Registrar to undertake any merit or qualitative assessment against the requirements of s 61(1). In this regard, I refer to the consideration by Mansfield J in *NT v Doepel* as to the nature of the task at s 190C(2) in relation to the details required by s 61(1), in light of the NTG submission that there was information before the Registrar which called into question whether the claim group description provided could ever satisfy the requirements of s 61(1), to which his Honour responded:

> I do not need to refer to that material for the purpose of considering the Territory's submission. Section 190C(2) directs attention to the contents of the application and the supporting affidavits. It seeks to ensure that the application contains `all details' required by s 61. There is obviously good reason why that should be so. If the application did not contain the required information, for example as to the composition of the native title claim group, the subsequent determination of the application would be difficult. And the identity of those on whose behalf the claimants would enjoy procedural rights under subdiv P of Div 3 of Pt 2 of the NT Act upon registration of the claim would be unclear. It also ensures that the claim, on its face, is brought on behalf of all members of the native title claim group: see e.g. *Edward Landers; Quall v Native Title Registrar* [2003] FCA 145 (*Quall v NTR*)—at [35].
>
> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—at [36].

[104] In my view, the limited circumstances which may permit the Registrar to assess the details do not arise in this case as there is nothing on the face of the application to indicate that 'not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group'—at [36].

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

[105] Part A, item 1 and Part B of the Form 1 contains the statement of the names of and the address for service of the persons who are the applicant. The persons so named are TR (deceased) Cyril Gordon, Donny Wilson, BA (deceased) and Kerry Robinson. I note that two of these persons are deceased and I direct that the entry on the Register be adapted accordingly, in line with the heading used by the Federal Court to identify the relevant persons comprising the applicant.

61(4) Applications authorised by persons

[106] Section 61(4) provides that a '*native title determination application that persons in a native title claim group authorise the applicant to make must: (a) name the persons; or (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'*. Schedule A contains a description of the persons in the native title claim group.

[107] Dowsett J held in *Gudjala 2007* that the task at s 190C(2) in relation to s 61(4) is merely to assess that the persons are named or a description provided and whether those details are sufficient is the task of the corresponding merit condition in s 190B(3)— at [31] and [32].

s62(1)(a) Affidavits in prescribed form

[108] There are affidavits from the three living persons who comprise the applicant and they contain the statements required by this section.

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

[109] The required details are found in Schedule B and Attachment B and a map showing the boundaries is provided in Attachment C.

62(2)(c) Searches of non-native title rights and interests

[110] Schedule D states that the applicant has yet to conduct its own searches and inquiries to determine the existence of non-native title rights and interests in relation to the area covered by the application. Section 62(2)(c) only requires the disclosure of details and results of searches conducted by the applicant; the express statement in Schedule D that this is yet to occur meets the requirements of this section.

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

[111] Schedule E contains a description of the claimed native title rights and interests. See my reasons above at s 190B(4) which analyses the adequacy of the description and finds it be sufficient to allow the rights claimed to be readily identified. It follows in my view, for the reasons outlined above, that the description does not consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

62(2)(f) Activities

[112] These details are provided in Schedule G.

62(2)(e) General description of factual basis on which it is asserted that the native title rights and interests claimed exist and for the particular assertions of ss 62(2)(e)(i) to (iii)

[113] This is provided in Attachment F.

62(2)(g) Other applications

[114] Schedule H states that there are no other applications of which the applicant is aware.

62(2)(ga) s24MD(6B)(c) notices

[115] These details are provided in Attachment HA.

62(2)(h) s29 notices

[116] These details are provided in Attachment I.

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

[117] The claim **satisfies** the condition of s 190C(3), for the reasons that follow.

[118] Paragraph 190C(3) provides:

> The Registrar 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. an entry relating to the claim in 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 consideration of the previous application under section 190A

[119] There are no previously registered claims that cover the whole or part of the area covered by the application, such that the requirement to consider members in common does not arise.

190C(4) Identity of claimed native title holders

[120] The claim **satisfies** the condition of s 190C(4), for the reasons that follow.

[121] Paragraph 190C(4) provides, relevantly to this application:[11]

> The Registrar must be satisfied that either of the following is the case:
>
> d. the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or
>
> Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d). A representative Aboriginal/Torres Strait Islander body may certify the application, even if it is the only representative body for part of the area claimed.
>
> e. 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.

[122] My consideration is governed by ss 190C(4)(b) as there are two representative bodies in the area covered by the application[12] and there is only a certification from one of those bodies. This is the certification dated 16 October 2013 by YMAC in Attachment R of the further amended application. This means that I must be satisfied that the applicant:

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[11] I have not included the note after subparagraph (a), as the application has not been certified.

[12] Kimberley Land Council and Yamatji Marlpa Aboriginal Corporation (YMAC)

(a) is a member of the native title claim group; and

(b) 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

[123] It is clear that the living persons who comprise the applicant are Kariyarra persons; they each depose to this fact in their accompanying affidavit and there are references to their status as claim group members in the Palmer report. Further, the two deceased persons who make up the applicant are identified in the Palmer report as Kariyarra persons. It follows that I am satisfied that the applicant is a member of the native title claim group.

[124] There is extensive material provided to support the applicant's claim to be authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group. There is the certification by YMAC within Attachment R of the application in which the representative body provides a statement of the reasons for holding the opinion that authorisation has occurred pursuant to an agreed and adopted decision-making process at a meeting held on 23 October 2013 in South Hedland.

[125] It was at this meeting that consideration was given to the anthropological research and the expert findings that the existing description of the native title claim group required amendment so as to reflect that the native title claim group comprises several extended family groups which can be identified by reference to 11 apical ancestors, as set out in Schedule A of the application. The evidence is that YMAC organised and were present at the authorisation meeting and that notice was given via post to all Kariyarra claimants and also by publishing notice of the meeting in two regional newspapers. The certificate attests to a registration process supervised by YMAC anthropologists to identify claim group members and the genealogical material compiled by YMAC, based on the anthropological research was used to check that attendees were Kariyarra and thus entitled to participate in the authorisation process.

[126] The information provided is that the Kariyarra do not have a traditionally mandated decision-making. It is the case that the attendees at the meeting agreed to and adopted a process which has been used in previous meetings. This process is attested to by in the affidavits by the three living persons who comprise the applicant and also in affidavits provided by a lawyer who has worked with the Kariyarra since 2006. It entails the Kariyarra making decisions at community meetings notified by YMAC, via consensus of the Kariyarra families where possible, with the views of senior Law men and women given particular weight. If necessary, consensus can be achieved by a majority vote of families and senior law men and women.

[127] There is evidence that the claim group followed this process at the authorisation meeting of 23 October 2013, from the affidavits provided by the applicant, and also from the legal officer who has worked with the claim group since 2010. Although consensus was not possible when the matter was first discussed, due to two new family groups who did not agree with the proposed amendment of the native title claim group description. The evidence is that the matter was then put to a vote, whereby seven family groups voted in favour, one group abstained and one family group voted against the proposed amendment of the claim group description. It is said by the YMAC anthropologist who has at the meeting that this accorded with the way the group has made decisions in the past. It is also said that the family groups who agreed with the resolutions included most of the senior Kariyarra law men and women present at the meeting.

[128] Having regard to the comprehensive information provided in and accompanying the application, I am satisfied that the applicant is authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group via an agreed to and adopted decision-making process whereby the claim group makes decisions at community meetings.

[129] The evidence is that the meeting was well publicised such that the claim group were given every reasonable opportunity to attend and make their views known. The question of amending the native title claim group was discussed and when consensus could not be achieved, the issue was put to a vote. The evidence is that such a process is agreed to and adopted by the group and reflects how decisions have been made in relation to their native title business in the past. Although three family groups did not vote in favour of the proposed change, there was a majority of seven groups in favour and it appears to have been accepted by all that a decision by such a majority would carry the day in favour of the applicant amending the claim to reflect the anthropological research as to the correct identity of the native title claim group.

[130] Having regard to these matters, I am satisfied that the applicant is authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group.

[end of statement]

Attachment A:

Amendments to Register of Native Title Claims

In accordance with s 190(3)(a)(i) of the Act, the following amendments to the information entered on the Register for the claim[13] are required:

Application filed/lodged with:

No amendment

Date application filed/lodged:

No amendment

Date claim entered on Register:

No amendment

Applicant's name:

- No amendment, except for removal of the names of the two deceased persons comprising the applicant

Applicant's address for service:

No amendment

Area of land or waters covered by the claim:

Change – please replace the existing information with that found in Schedule B and also add Attachments B and C of the further amended application filed 1 September 2014.

Description of the persons who it is claimed hold the native title:

Change – Please replace the existing information with Schedule A of the further amended application.

Description of the native title rights and interests in the claim that the Registrar in applying s 190B(6) considered, prima facie, could be established:

Change – please replace existing information with the following:

Area A means land within the application area that is landward of the high water mark and which comprises:

areas of unallocated Crown land that have not been previously subject to any grant by the Crown;

(i) areas to which s. 47 of the Act applies;

[13] These are the details prescribed by s 186(1), which were included on the Register under s 190A(1), after the claim was previously accepted for registration.

(ii) areas to which s. 47A of the Act applies;

(iii) areas to which s. 47B of the Act applies, and

(iv) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies and in relation to which to [sic] there has not been any prior extinguishment of native title.

Area B means land and waters within the application area that is not included in Area A.

Subject to laws and customs

The native title rights and interests claimed in this application are subject to and exercisable in accordance with:

1. the common law, the laws of the State of Western Australia and the Commonwealth of Australia;
2. valid interests conferred under those laws; and
3. the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which native title claim group have a connection to the area of land and waters the subject ot this application.

Rights in Area A

In relation to Area A only, the applicant claims the right to possess, occupy, use and enjoy the area as against the whole world.

Rights in Area B

The applicant claims the following listed native title rights and interests in relation to Area B:

1. A right to hunt and otherwise take fauna in and from the area;
2. A right to fish in the area;
3. A right to gather and take flora (including timber) in and from the area;
4. A right to take soil, sand, gravel, stone, flint, clay, ochre, shells and other traditional resources, other than minerals, petroleum and gas, in and from the area;
5. A right to access and be present on or within the area;
6. A right to live, camp and erect shelters upon or within the area;
7. A right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
8. A right to invite and permit others to have access to and participate in or carry out activities in the area;
9. A right to conduct and participate in ceremonies, burials, other cultural activities and meetings within the area;
10. A right to visit, care for and maintain places and objects of importance within the area and protect them from physical harm;

11. A right to have access to and take water from within the area;