National Native Title Tribunal

Registration test decision

Application name	Jurruru People # 3
Name of applicant	Ivan Smirke, Brenda Smirke, Nathaniel Tommy and Kellman Limerick
NNTT file no.	WC2016/001
Federal Court of Australia file no.	WAD62/2016

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

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

Date of decision: 4 August 2016

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Nadja Mack

Delegate of the Native Title Registrar [1]

[1] Pursuant to sections 190, 190A, 190B, 190C, 190D of the Act under an instrument of delegation dated 15 November 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

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

Application overview and background

[2] The application was filed in the Federal Court of Australia (Federal Court) on 4 February 2016. The Registrar of the Federal Court gave a copy of it to the Registrar on 5 February 2016 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A.

[3] Given that the application was made on 4 February 2016 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[4] I have reached the view that the claim satisfies all of the conditions in ss 190B and 190C and pursuant to ss 190A(6), the claim in the application must be accepted for registration. This document sets out my reasons, as the delegate of the Registrar, for my decision.

[5] Attachment A to these reasons sets out the information to be included on the Register of Native Title Claims.

Information considered when making the decision

[6] As required by s 190A(3) I have had regard to the following information when considering the claim: the application, including its attachments; additional material provided by the applicant directly to the Registrar on 12 February 2016; overlap analysis (geospatial report) prepared by the Tribunal's Geospatial Services on 11 February 2016 (GeoTrack 2016/0220) and a Native Title Vision Plus analysis undertaken by myself on 29 July 2016.

[7] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act.

[8] 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

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

- On 11 February 2016, the Tribunal wrote to the applicant's legal representative, informing him that the Registrar has appointed a delegate to apply the registration test to this matter and inviting the applicant to provide any further information for consideration by 8 April 2016. On 12 February 2016 the applicant provided further information to the Registrar.

- On 11 February 2016 the State of Western Australia (State) was advised of the application and the registration test timeframe. On 15 February 2016 the applicant's additional information was provided to the State with an invitation to make submissions by 8 April 2016. No submissions were received from the State.

Procedural and other conditions: s 190C

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

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

[10] 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.

[11] 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)[2].

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

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

Native title claim group: s 61(1)

[14] The native title claim group is described in Attachment A to Schedule A of the application.

[15] I note that, if the description of the native title claim group was 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 requirement of s 61(1) would not be met and the claim could not be registered—*Doepel* at [36].

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[2] *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (Doepel) at [16] and also at [35] to [39]

[16] On the face of the application, there is nothing to indicate that not all the persons in the native title claim group are included, or that it is in fact a sub-group of the native title claim group that brought this claim.

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

Name and address for service: s 61(3)

[18] The name and address for service of the persons who are the applicant are provided in Part B.

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

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

[20] This section requires the applicant either to name all persons in the claim group or to describe them in a way so that it can be ascertained whether a person belongs to the group or not. This application does not name the persons in the claim group but it does contain a description of the persons in Schedule A.

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

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

[22] The application is accompanied by the affidavits required by s 62(1)(a) from each person jointly comprising the applicant, namely Ivan Smirke, Brenda Smirke, Nathaniel Tommy and Kellman Limerick. Each of these affidavits is signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently addresses the matters required by s 62(1)(a)(i)-(v).

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

Details required by s 62(1)(b)

[24] Subsection 62(1)(b) requires that the application 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)*

[25] Schedule B refers to Attachment B which sets out a description of the external boundary of the application area. Schedule B also describes the areas within the external boundaries that are excluded from the application.

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

[26] Schedule C refers to Attachment C which contains a map showing the application area and its external boundaries.

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

[27] Schedule D states that no searches have been carried out.

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

[28] Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law. I assess the adequacy of the description in the corresponding merit condition at s 190B(4) below.

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

[29] Schedule F sets out a description of the rights and interests claimed and the factual basis for the assertions set out in s 62(2)(e). The description does more than recite the particular assertions and in my view, meets the requirements of a general description of the factual basis for the assertions identified in this section[3]. I assess the adequacy of the description in the corresponding merit condition at s 190B(5) below.

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

[30] Schedule G sets out details of activities currently carried out by the native title claim group in relation to the area claimed.

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

[31] Schedule H states that the applicant is not aware of notifications under this section. No applications fall within the external boundary of this application. This is confirmed by the geospatial assessment.

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

[32] Schedule HA states that there no such applications of which the applicant is aware.

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[3] Kiefel J in *Queensland v Hutchinson* (2001) 108 FCR 575; [2001] FCA 416 notes that it is not enough to merely recite the general or the three particular assertions in s 62(2)(e); what is required to meet the requirement of s 62(2)(e) is a 'general description' of the factual basis for the three particular assertions —at [25].

The Full Federal Court (French, Moore, Lindgren JJ) commented in obiter on the requirements of s 62(2)(e) in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*). Their Honours said:

> The fact that the detail specified by s 62(2)(e) is described as a 'general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description to be true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality.

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

[33] Schedule I refers to Attachment I which contains a list of s 29 notifications that have been issued in relation to the whole or part of the application area as at 5 November 2015. I note that my Native Title Vision Plus search provides the details of a current s 29 notice which has a notification date of 18 May 2016. Section 190A(2) requires that I use best endeavours to finish considering the claim by the end of four months after the notice is given, i.e. 18 September 2016.

Conclusion

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

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[35] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if all three of the conditions found in s 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9].

[36] The geospatial report shows that there is no other application on the Register of Native Title Claims that covers all or part of the area covered by this amended application. This is confirmed by the iSpatial View search results. The requirement to consider common members therefore does not arise.

[37] 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.

[38] 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.

[39] My consideration is governed by s 190C(4)(a) as the one representative body for the application area, the Yamatji Marlpa Aboriginal Corporation (YMAC), has certified the application. The signed certification dated 29 January 2016 is attached to the application as Attachment R.

[40] For the certification to satisfy the requirements of s 190C(4)(a) it must comply with the provisions of s 203BE(4)(a)–(c). I note that it is not the task of the Registrar under s 190C(4)(a) to look behind a certification, nor is he required to be satisfied that the applicant is authorised—see *Doepel* at [79]–[82].

[41] In my view the certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and 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.

[42] Further, the certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion. In summary, the certificate states that:

- YMAC in 2006 engaged a consultant anthropologist to undertake anthropological research for the Jurruru # 1 native title claim. His research findings and internal research conducted informed the list of ancestors described in the application.

- In July 2013 the Federal Court conducted a preservation evidence hearing to hear the evidence of three Jurruru witnesses. The evidence outlines the extent of Jurruru Country and includes the area subject to this application.

- Based on anthropological research conducted by YMAC and its experience with previous meetings, YMAC is satisfied that there is no traditional decision-making process for authorising the making of an application. The group, at an authorisation meeting held on 16 November 2015, agreed to and adopted a decision-making process which has been used in previous meetings.

- The authorisation meeting was notified by YMAC by personal letters to all Jurruru claimants on YMAC's database as well as by notices published in two Pilbara regional papers.

- People present at the meeting were representative of the claim group and the Jurruru People.

- The authorisation decision for this application has been made in accordance with the agreed to and adopted decision-making process.

[43] Section 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what it has done to meet the requirements of s 203BE(3)'. The certificate is silent on this issue, however, I infer that this requirement is not applicable given that there are no overlapping applications as identified above.

[44] For the above reason I am of the view that the requirements set out in s 190C(4)(a) are **met.**

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.

[45] Schedule B and Attachment B provide a description of the external boundary of the claim area and Attachment C is a map depicting the boundary. The geospatial report which provides an analysis of the description and map, and advises whether the application area has been described with reasonable certainty, notes the following:

'Description
Schedule B refers to Attachment B.
Attachment B contains a written description prepared by the National Native Title Tribunal, dated 5 November 2015 that describes the external boundary of the application area and includes a metes and bounds description referencing topographic features, cadastral boundaries, existing native title determinations and application boundaries and coordinate points referenced to the Geodetic Datum of Australian 1994 (GDA94) shown to six (6) decimal places.

Schedule B lists general exclusions.

Map
Schedule C refers to Attachment C.

Attachment C is an A3 colour map, prepared by the National Native Title Tribunal, titled 'Jurruru #3', prepared on 9 November 2015 and includes:

- The application area as a bold blue outline;
- Native title determinations as a grey outline and stipple pattern and labelled;
- Native title determination application WAD6033/1998 Wajarri Yamatji as a bold cyan outline and labelled;
- Colour coded land tenure and selected localities as a background;
- Scalebar, northpoint, coordinate grid; locality diagram and legend; and
- Notes relating to the source, currency and datum of data used to prepare the map.

Assessment
The description and map are consistent and identify the application area with reasonable certainty.'

[46] Having regard to the identification of the claim area at Schedule B's Part (a), Attachment B and the map at Schedule C, I am satisfied that the application area has been described such that the location of it on the earth's surface can be identified with reasonable certainty.

[47] The specific exclusions to the area of the application are clearly identified at Schedule B Part (b). 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. In *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51][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). I am of the view that the generic description of the internal excluded areas is sufficient for the purposes of s 190B(2).

[48] I therefore agree with the geospatial report and am satisfied that the information and the map required by s 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 areas of the land or waters.

[49] 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.

[50] Schedule A contains a description of the persons in the native title claim group. The group is described by reference to two ancestors as follows:

> The persons who comprise the Jurruru People's native title claim group are those persons who:
> (a) are descended from Kantitharra or Punartu or are adopted by such biological descendants in accordance with traditional laws acknowledged and the traditional customs observed by the Jurruru People;
> (b) identify themselves as Jurruru under traditional law and custom and are so identified by other Jurruru People as Jurruru; and
> (c) have a connection with the land and waters in the Determination Area, in accordance with the traditional laws acknowledged and the traditional customs observed by the Jurruru People.

[51] Pursuant to subsection 190B(3)(b) I must be satisfied that the description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

[52] In considering the operation of s 190B(3)(b) in *Doepel*, Mansfield J stated that the section's focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained—at [37].

[53] Further, Carr J in State of *Western Australia v Native Title Registrar* (1999) 95 FCR 93 found, in the way native title claim groups were described, 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'—at [67].

[54] In my view, describing the claim group as the 'descendants' of certain named persons provides a sufficiently reliable and objective means by which to ascertain a person's membership of the group. While the additional criteria of self-identification and connection with the land and waters in the determination area add an element of complexity, the description also includes rules (the traditional laws and customs of the claim group) that explain how self–identification and the establishment of a connection operate. A factual inquiry of every descendant of the claim group's ancestors to determine if they self-identify with the group and have a connection with the claim area would allow determination of membership of the claim group.

[55] I note that the reference to 'Determination Area' in the description appears to be a drafting error, should read 'claim area' and does not impact on the clarity of the description.

[56] For the above reasons I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

[57] 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.

[58] Section 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.

[59] The description of the claimed rights is found in Schedules E, with definitions of terms referred to in this Schedule set out on page two of the application:

> **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 and the laws of the State of Western Australia and the Commonwealth of Australia;
> 2. Valid interests conferred pursuant to the laws of the State of Western Australia and the Commonwealth; and
> 3. The body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which the native title claim group have a connection to the land and waters the subject of this Application.
>
> **Rights in Area A**
>
> In relation to Area A, the Applicant claims the following native title rights and interests pertaining to exclusive possession:
>
> 1. The right to possession, occupation, use and enjoyment of that area as against the whole world.
>
> **Rights in Area A and Area B**
> The Applicant claims the following native title rights and interests in relation to:
> - Area A if the claim to exclusive possession cannot be recognised; and
> - Area B
>
> 2. The right to access and to take resources (other than minerals, petroleum and gas) in the area for any purpose;
> 3. The right to access the area, to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
> 4. The 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;

5. The right to invite and permit others to have access to and participate in or carry out activities in the area; and

The right to visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;

Area A means land and waters within the Application area that are landward of the high water mark and which comprises:

(i) areas of unallocated Crown land (including islands) 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 which 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 and in relation to which to 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 above.

[60] In *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 Schedule E 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.

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

[62] 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.

[63] Following Mansfield J at [17] of *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' and 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'. This was endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*) at [83].

[64] In addition to the information contained in Attachment F, the applicant provided the following factual basis material directly to the Registrar:

> Letter by the applicant's legal representative to the Registrar dated 12 February 2016 and its attachments, being:
> (a) Statement of (Name Removed), anthropologist, dated 3 December 2015, with annexures
> - LG 1 Map of Site locations
> - LG 2 Map of Pastoral boundaries
> - LG 3 Genealogy; and
> (b) Statements given by three members of the Jurruru Applicant in preservation evidence before the Federal Court in relation to the area covered by the Jurruru People Claims (WAD 6007 of 2000 and WAD 327 of 2012):
> - Statement of (Name Removed), dated 27 May 2013;
> - Statement of (Name Removed), dated 28 May 2013; and
> - Statement of (Name Removed), dated 5 June 2013 (witness statements).

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

Reasons for s 190B(5)(a)

[66] The assertion in s 190B(5)(a) relates to the association of the native title claim group and that of their predecessors with the area covered by the application.

General principles

[67] I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for the assertion in s 190B(5)(a) needs to address that:

- the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times; and
- there has been an association between the predecessors of the group and the claim area since sovereignty —at [52].

Applicant's material

[68] The applicant's legal representative in its letter of 12 February 2016 directs me to the witness statements of (Name Removed), (Name Removed), and (Name Removed), in relation to this requirement. I note that further relevant information is contained in (Name Removed),' statement.

[69] In summary, the material before me provides the following factual information:

- Attachment R, YMAC's certificate, states that the evidence of the three Jurruru witnesses outlines the extent of the entirety of Jurruru country and includes the claim area. (Name Removed) in her statement adds that the same Jurruru language and laws and customs attested to in the statements apply to the claim area as well as the whole of Jurruru country.

- The claim area, which consists of two areas jointly covering about 466.0849 sq km, abuts the south-western boundary of the Jurruru Determination WAD6007/00 of 1 September 2015. According to the map labeled 'LG2', which is attached to (Name Removed), statement, four pastoral stations fall partly within the external boundary of the claim area: Kooline Station, Glen Florrie Station, Ullawarra Station and Wyloo Station. I note that the map labeled 'LG1', which is also attached to (Name Removed), statement, shows the location of a number of Jurruru sites within the claim area or in its vicinity.

- The deponents of the witness statements are siblings. Their grandfather was apical ancestor Kantitharra. Kantitharra's brother is apical ancestor Punartu. As noted in (Name Removed), statement, Kantitharra's country would have been the same as Punartu's. According to the family tree attached to the statement and labeled 'LG3', Kantitharra was born ca 1870. As noted in (Name Removed), statement, Kantitharra got his name from the pool in the Ashburton River close to the Station's homestead where he was born. I note that the location is not mapped on LG1, however I understand that it is located outside the claim area, but within the determination area.

- The witness statements support the assertion that members of the claim group have, and their ancestors had, an association with the claim area and areas in its vicinity. Each deponent provides evidence in relation to (some or all) the stations covered by the claim area and sites within the claim area or wider Jurruru country, including their and their predecessors' use of the area and its significance to the Jurruru people (e.g. the site marked as #77 in the northern portion of the claim, a spirit place (dalu) for tobacco). There is also information about their and their predecessors' use of the flora and fauna and other resourses found in the claim area and areas in the vicinity.

[70] I note in relation to the requirement that there has been an association between the predecessors of the group and the claim area since sovereignty, that the link in the material before

me is established to ca 1870, the given birth date of apical ancestor (Name Removed). It is possible, in circumstances where there is no information about the situation at sovereignty, to draw an inference that the situation at first European contact was the same. The application is silent on when first European settlement in the claim area occurred.

[71] I have turned to the determination for the abutting Jurruru application WAD6007/00 (Jurruru determination) which was made over Part A in September 2015 *(Smirke on behalf of the Jurruru People v State of Western Australia* [2015] FCA 939). In my view, it is appropriate that the delegate take into account evidence given and findings made in other proceedings where such evidence and findings are relevant to the current application, particularly where the application is made by the same community of native title holders and the application area is surrounded by, or abuts, the earlier determination. The way in which an administrative decision maker can have regard to the findings of a Court was addressed in the decision of *Cadbury Uk Ltd v Registrar of Trade Marks (Cadbury)* [2008] FCA 1126. In that instance, Finklestein J indicated that a Tribunal was entitled to have regard to the findings of a judge, but that it would fall into error if it took the approach that it could not disagree with such findings (at [18] and [19]).

[72] I note that Schedule F quotes from the determination.

[73] At [44] of his judgement, Mckerracher J states that

> The connection material, combined with the preservation evidence of three of the Jurruru claimants, is in the State's view, sufficient to demonstrate that the Jurruru application has a credible basis and that the Jurruru People have maintained some physical presence in the Jurruru Part A Determination Area since the acquisition of British sovereignty. In addition, evidence of their continuing physical or spiritual involvement in the Jurruru Part A Determination Area was sufficient to enable the State to conclude that this connection had not been severed. Taken together, the State was satisfied that the material presented was sufficient to evidence the maintenance of connection according to traditional laws and customs in the Jurruru Part A Determination Area.

[74] While the above does not provide further information about the date of European contact in the claim area, it sets out the State's acceptance of continued physical presence in the determination area since sovereignty. I further note that the application for the Jurruru # 2 claim, which is located to the east of the claim before me (about 100 km from the northern portion and about 60 km from the southern portion), explains that first European settlement in the area occurred in the mid 1860s.

[75] Considering the above information, the fact that (Name removed) was born ca 1870 and the State's assessment of the evidence and connection material as recorded in the extract from the Jurruru determination, I find that there has been an association between the predecessors of the group and the claim area since sovereignty.

[76] On the basis of the above, I am **satisfied** that the requirements of s 190B(5)(a) are met.

Reasons for s 190B(5)(b)

[77] For this requirement, the factual basis must identify the relevant pre-sovereignty society and the persons who acknowledged the laws and customs of that society. Where a native title claim group is defined by reference to an apical ancestor model, the factual basis must also explain the link between those persons (the ancestors) and the relevant society. The factual basis must contain a sufficient explanation of how laws and customs can be said to be traditional as well as sufficient details to support the assertion that there has been continuous acknowledgement and observance— see, for instance, *Gudjala [2007]* at [63], [65], [66]; *Gudjala [2009]* at [36], [37], [40].

[78] Schedule F and the additional material provided directly to the Registrar state that the traditional laws and customs of the Jurruru People have governed the Jurruru People and the claim area at sovereignty and that these laws and customs continue to the present day. As noted above, paragraphs 2 and 6 and part of paragraph 5 of Schedule F are quoted from the Jurruru determination (see [16] of the Jurruru determination which records the joint submissions made by the applicant and the State regarding the Jurruru People's connection to country).

[79] In summary, from the material before me I understand that:

- The claim area forms part of the traditional country of the Jurruru People who comprise a single society, speaking a common language.
- Jurruru traditional laws and customs are believed to have been put in place by the ancestral beings when the world was created. These laws and customs govern the exercise of the rights and interests in the claim area and who can exercise them.
- The traditional laws and customs include the following rules: for ownership of, and responsibility for Jurruru country; to follow for matters such as ceremonies and rituals; for sections of skin groups, avoidance and marriage; special relationships with animals; accessing and visiting country; the intergenerational transfer of laws and customs; and the preparation and consumption of food.
- These laws and customs have continuously been observed by each generation of Jurruru People since sovereignty and continue to be observed today, as is evident from the witness statements.

[80] In my view, the factual basis material does sufficiently address the requirements of s 190B(5). It identifies the pre-sovereignty society, being the Jurruru People, and provides some facts in support of the existence of this society in the claim area. It also links the identified ancestors with areas in the vicinity of the claim area, thus allowing the favorable inference that

those persons formed part of the relevant society. The material also explains that the laws and customs of the current claim group are traditional, having been transmitted and taught from one generation to the next. I also note the above quoted extract from the Jurruru determination about the State having been satisfied that the material presented was sufficient to evidence the maintenance of connection according to traditional laws and customs in the Jurruru Part A Determination Area which abuts the claim area.

[81] On the basis of the above, I am satisfied that the requirements of s 190B(5)(b) are met.

Reasons for s 190B(5)(c)

[82] Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta*—at [47] and [87].

[83] Dowsett J at [82] *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 on 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 to European settlement.

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

[85] The factual basis in support of this assertion is provided in the additional material submitted directly to the Registrar. From the material, I understand that the members of the claim group continue to acknowledge and observe the traditional laws and customs passed on to them by their ancestors and that there has been a continuity in the observance of traditional law and custom going back to sovereignty. There are ample examples in witness statements. See also my summary of the material above at s 190B(5)(b).

[86] Having considered the material I am satisfied that the factual basis provided is sufficient to support an assertion that the members of the claim group and their predecessors have continued to hold native title in accordance with their traditional laws and customs.

[87] On the basis of the above, I am **satisfied** that the requirements of s 190B(5)(c) are met.

Conclusion

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

Subsection 190B(6)
Prima facie case

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

[89] To meet the requirements of s. 190B(6) at least one of the native title rights and interests claimed needs to be established, prima facie. Only established rights will be entered on the Register: see s. 186(1)(g) and the note to s. 190B(6). Where I have found that a particular claimed right cannot be established, prima facie, I refer the applicant to the provisions of s. 190(3A) which allow the applicant to provide additional information in support of a further consideration by the Registrar of the ability of the right to be registered.

[90] In relation to the consideration of an application under s 190B(6), I note Mansfield J's comment in *Doepel*:

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
> Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

[91] The definition of 'native title rights and interests' in s 223(1) guides my consideration of whether, prima facie, an individual right and interest can be established. In particular I take account of the interpretation of this section in:

- *Yorta Yorta* (see s 190B(5) above) in relation to what it means for rights and interests to be possessed under the traditional laws acknowledged and the traditional customs observed by the native title claim group; and
- The High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'.

[92] I also need to consider the case law relating to extinguishment when examining the rights and interests claimed. Rights that clearly fall prima facie outside the scope of the definition of 'native title rights and interests' in s 223(1) cannot be established. In my consideration I take into

account information contained in the application on activities conducted by the claim group. While current activities by claimants on the claim area which are said to be in exercise of the claimed native title rights and interests are not determinative of the existence of a right and interest, they can be supportive of it.

Consideration

Exclusive rights and interests

[93] Schedule E states that that the native title right and interest claimed are the rights to possession, occupation, use and enjoyment of that area against the whole world. Area A (which is defined on page 2 of the application as

> ***Area A*** means land and waters within the Application area that are landward of the high water mark and which comprises:
>
> (i) areas of unallocated Crown land (including islands) 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 which 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 and in relation to which to there has not been any prior extinguishment of native title.

[94] *Ward HC* is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded because of the Act.

[95] The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 indicates that the question of exclusivity depends upon the ability of the native title holders to 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'—at [127].

[96] I note that in the Jurruru determination the nature and extent of the native title rights and interests in relation to the determination area was confined to non-exclusive rights. As noted above, I am entitled to have regard to the findings of a judge, as I do, but I would fall into error if it took the approach that I could not disagree with the findings. I further note that the finding made might not have been on the evidence presented by the applicant, but on the basis of the tenure of the determination area. I have no information about the reasons for the finding.

[97] (Name Removed), states that the place where he was born is 'a bit special to me' and that, although decisions are made by all the family and not just one person, he has a greater say about things to do with this place. Under the heading of 'permission' he states in relation to other

Aboriginal people, not members of the claim group who want to do something on Jurruru country, that 'they got to come and see us first'. He says that the same applies to 'white fellas too – if they want to work on something, doing machinery work and road sides and that, I think they really should come and see us first, like most of them have been getting away with it before, but no more now'. He adds that '[m]ost Aboriginal people I grew up with always go by the rules and ask. But some don't. Not much punishment happens these days if they don't ask, but in the old days it did'. He further states that '[i]f people are coming onto Jurruru country, we are the ones who have to take them because they won't know where they are going but we know Jurruru country. We are *ngurrura or nguraji* for country – which means we belong to country – we are countrymen. Its always been like this'. He also says that '[i]f there is a visitor in Jurruru country to permanent water holes, they gotta do whatever the Jurruru people tell them to do, like get water in their mouth and blow the water out, and say who they are, and what they're doing there – that's what the stranger has to do'. He also gives an example of a non-Jurruru person having been given permission to use a dalu, noting that 'other people can use a dalu in someone else's country but they got to get the OK to use it'.

[98] (Name Removed), in his statement also notes that '[s]trangers can come into Jurruru country, but they should stop outside – they should let Jurruru people know. They should ring up the older people first. If they don't ask, they might get crook. If they never ask they might go to the wrong place – they might die or die of thirst'. He also adds that this applies to non-Aboriginal people and notes that he asks for permission when going to other people's country ('I still follow that tribal law'). Relevant statements are also contained in the other witness statements.

[99] In my view, the material before establishes that, prima facie, the claim group members have a right under their traditional laws and customs to effectively exclude from their country people not of their community. The fact that, as stated by (Name Removed), the obligation to seek permission has not been observed by non-Aboriginal people and the right to control access has rarely been enforced by the claimants, at least in recent history, in my view, goes to the exercise of the right, rather than its existence. As noted by the court, most recently in *Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5)* [2016] FCA 752 at [681], the non-exercise of a right is to be differentiated from its non-existence. Further, the Full Federal Court in *Banjima FFC* observed that 'post-sovereignty conduct is relevant to issues of continuity, adaptation, and possible abandonment of traditional laws and customs, but the mere fact that Europeans did not have regard to a traditional custom, in a context where native title rights were not recognised and could not be enforced as against Europeans post-sovereignty, does not say anything about the Banjima people's observance and vitality of the traditional law and custom' - *Banjima People v State of Western Australia (No 2)* [2015] FCAFC 171; BC201512210, at [45].

[100] For the above reasons I am of the view that the material before establishes that, prima facie, the claim group members have a right under their traditional laws and customs to effectively exclude from their country people not of their community.

Non-exclusive rights and interests

[101] I now consider the remaining rights and interests claimed which are set out in Schedule E under the heading 'Rights in Area A and Area B'. Below I provide a summary of information that has been provided by the applicant to establish the prima facie existence of these rights. I note that my reasons should be considered in conjunction with, and in addition to, my reasons and the material outlined at s. 190B(5) above.

2. the right to access and to take resources (other than minerals, petroleum and gas) in the area for any purpose

[102] I note that at s 190B(6), I am only to consider whether the right claimed can be, prima facie, established, and that this is not the same consideration that the Court must undertake in making a determination of native title. The right to take resources for any purpose was most recently considered in *State of Western Australia v Willis on Behalf of the Pilki People* [2015] FCAFC 186 (*Pilki FC)* and in *Rrumburriya Borroloola Claim Group v Northern Territory of Australia* [2016] FCA 776 (*Rrumburriya Borroloola*). In both matters the government parties disputed that the evidence established that the right under the traditional laws and customs of the group was as broad as including the taking of resources for commercial purposes.

[103] Barker J, Dowsett J and Jagot J in *Pilki FC* each published separate reasons and it is my view that the question of the type of evidence required to prove a right to take resources for any purpose remained unclear following the judgment. I note that Barker J in *Pilki FC* , having regard to ss 223(1) and 225 of the NTA, to their origin in the judgment of Brennan J in *Mabo No 2* at 59-60 and 70, and to the plurality judgment in *Ward HC* at [89]-[93] and to the joint judgment in *Yorta Yorta* at [40], said that the finding that native title rights and interests are exclusive will not generally satisfactorily elucidate the particular rights and interests which are possessed by the relevant Aboriginal people. He concluded at [154], that the question as to what rights should be determined ultimately is an evidentiary one.

[104] Similarly, in *Rrumburriya Borroloola* Mansfield J concluded at [128], after considering 'authorities to which the Court was referred', that the nature and extent of the native title rights and interests is to be determined upon the careful consideration of the whole of the evidence. His Honour heard evidence from claimants and anthropological exerts about the claimants' ancestors trading with Macassan People of Indonesia prior to Australian sovereignty. He noted in relation to that evidence that

> I have made extensive findings as to the nature and extent of the dealings between the people of the region and the Macassans. The issue remaining is to determine whether those dealings,

> at the time of sovereignty, took place in accordance with their traditional laws and customs or represented a distinct sphere of activity of economic participation and endeavour, remote from their traditional laws and customs – at [307].

[105] Following extensive consideration of the evidence, Mansfield J concluded that the Rrumburriya Borroloola Group's dealings took place in accordance with traditional laws and customs, were of a commercial kind and were not simply part of a ceremonial exchange system and found that '…the right to take resources was not confined to taking for personal or communal purposes of a domestic or subsistence in nature. There is no basis in the Aboriginal or the expert evidence which I have accepted for concluding that the admitted right to take resources was confined in this way (or at all)' – at [364]. His Honour stressed that there is a difference between the existence of a right under traditional laws and customs that is logically separate from the fact of its exercise. The nature and extent of an activity may inform the existence of a right, but it is the possession of the right, not its exercise, which is the proper question – [110]. In that regard he referred to North J's statement in *Willis on behalf of the Pilki People v State of Western Australia [2014] FCA 714 (Pilki SJ)*at [118] that '…it is not necessary as a matter of logic to prove that activity in conformity with traditional laws and customs has taken place in order to establish that a right exists. In many cases, proof of activities undertaken pursuant to laws or customs will assist in proving the existence of the right. But evidence of the activity is not necessary. Thus, if the applicants had not shown that they traditionally accessed and took resources for commercial purposes, they could still show that they had the right to do so if there were traditional laws or customs which gave them such a right'. Mansfield J also noted that Jagot J in *Pilki FC* at [99]-[100] expressly agreed with that observation.

[106] In my view the witness statements provide sufficient information to establish, prima facie, the existence of a right to access and take resources (other than minerals, petroleum and gas) in the area to satisfy the claimants' personal, domestic or non-commercial needs. The witness statements provide evidence about the claimants and their predecessors accessing the application area or areas in its vicinity specifically to take resources such as kangaroo, bush turkey, goanna, emu, snakes, frogs and ducks, bush medicines, paperbark and spinifex. While the purpose for which these resources are taken is not always specified, I consider it reasonable to assume that resources were and are used for sustenance and perhaps ceremonial and customary purposes. It is my view, however, that the material before me is not sufficient to establish that traditional laws and customs gave the claimants the right to access and to take resources for commercial purposes. I note that, while not determinative, as noted above, there is also no information before that would support the exercise of such a broad right i.e. evidence of trade or commercial use of the resources.

[107] For the above reasons I consider that the right is, prima facie, not established.

[108] As noted above only established rights will be entered on the Register - see s. 186(1)(g) and the note to s. 190B(6). I refer the applicant to the provisions of s. 190(3A) which allow the applicant to provide additional information in support of a further consideration by the Registrar of the ability of the right to be registered.

3. the right to access the area, to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area
6. the right to visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm
[109] Given that I am satisfied that the factual basis material establishes a right to exclusive possession held by the claim group, I am similarly of the view that the factual basis material establishes the existence of the non-exclusive rights and interests claimed. This right is inherently linked to, and in my opinion can be considered an element of, the exclusive right to possession. The witness statements provide evidence to the effect that Jurruru People do not need any permission to access Jurruru country and can remain on the claim area and use the area for any purpose. The witness statements also contain evidence that the Jurruru People protect and maintain places of cultural importance, for example, by attending heritage surveys.

[110] For the above reasons I consider that these right are, prima facie, established.

4. the 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
5. the right to invite and permit others to have access to and participate in or carry out activities in the area
[111] Again, given that I am satisfied that the factual basis material establishes a right to exclusive possession held by the claim group, I am similarly of the view that this lesser right is established. I rely on the same material as outlined above in relation to the exclusive right.

For the above reasons I consider that these rights are, prima facie, established.

[112] For the above reason I am of the view that 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.

[113] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application. I take 'traditional physical connection' to mean a physical connection in accordance with the particular laws and customs relevant to the claim group, being 'traditional' in the sense discussed in *Yorta Yorta*.

[114] Sufficient material is provided in the witness statements regarding the traditional physical connection, current and past, of members of the native title claim group. As noted above, members of the claim group, such as the three witnesses, continue to access the claim area, following protocols prescribed by traditional laws and customs.

[115] I am therefore satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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

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

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

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If:
(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
(b) either:
(i) the act was an act attributable to the Commonwealth; or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

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

(3) If:
(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
(b) either:
(i) the act was an act attributable to the Commonwealth, or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

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

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

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and
(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[117] 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)

[118] 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. In my view the application does not offend the provisions of s. 61A(1) because the geospatial report reveals that there are no approved determinations of native title over the application area and this is confirmed by my Native Title Vision Plus search.

Section 61A(2)

[119] 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. In my view the application does not offend the provisions of s 61A(2) because Schedule B, paragraph (b) 2 excludes from the application area any areas covered by previous exclusive possession acts as defined in s 23B.

Section 61A(3)

[120] 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. In my view, the application does not offend the provisions of s 61A(3) because Schedule B, paragraph b(3) states that a claim to exclusive possession is not made over areas where such a claim cannot be recognised.

Conclusion

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

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Section 190B(9)(a)

[123] The application at Schedule Q states that no ownership of minerals, petroleum or gas wholly owned by the Crown, in the right of the Commonwealth or the State of Western Australia, is claimed.

Section 190B(9)(b)

[124] The application at Schedule P states that the applicant does not claim exclusive possession of all or any part of any offshore place. I note that the claim does not cover any offshore places.

Section 190B(9)(c)

[125] There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Jurruru People # 3
NNTT file no.	WC2016/001
Federal Court of Australia file no.	WAD62/2016

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

4 February 2016

Date application entered on Register:

4 August 2016

Applicant:

As per Schedule entry

Applicant's address for service:

As per Schedule entry

Area covered by application:

As per Schedule entry

Persons claiming to hold native title:

As per Schedule entry

Registered native title rights and interests:

Please add the following:

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 and the laws of the State of Western Australia and the Commonwealth of Australia;
2. Valid interests conferred pursuant to the laws of the State of Western Australia and the Commonwealth; and
3. The body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which the native title claim group have a connection to the land and waters the subject of this Application.

Rights in Area A

In relation to Area A, the Applicant claims the following native title rights and interests pertaining to exclusive possession:

1. The right to possession, occupation, use and enjoyment of that area as against the whole world.

Rights in Area A and Area B

The Applicant claims the following native title rights and interests in relation to:

- Area A if the claim to exclusive possession cannot be recognised; and
- Area B

3. The right to access the area, to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
4. The 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;
5. The right to invite and permit others to have access to and participate in or carry out activities in the area; and
6. The right to visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;

Area A means land and waters within the Application area that are landward of the high water mark and which comprises:

(i) areas of unallocated Crown land (including islands) 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 which 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 and in relation to which to 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 above.

[End of document]