



Registration test decision

Application name	Bindunbur
Name of applicant	Ernest Damien Manado, Alec Dann, Walter Koster, Cecilia Churnside, Betty Dixon, Phillip McCarthy
NNTT file no.	WC2015/007
Federal Court of Australia file no.	WAD359/2013 ¹
Date application made	18 December 2015
Date application last amended	Leave granted on 14 December 2015 to combine WAD359/2013 with WAD94/2014
Date of Reasons	29 March 2016

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

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

Date of decision: 24 March 2016

Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 20 November 2015 and made pursuant to s 99 of the Act.

¹ The Federal Court has ordered this amended (combined) application continue in and under the application number WAD359/2013. The NNTT allocates a fresh reference number to this application.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the amended Bindunbur native title determination application (WAD359/2013) to the Native Title Registrar (the Registrar) on 22 December 2015 pursuant to s 64(4) of the Act². This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.

[3] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application, namely, to combine the two Bindunbur native title determination applications (WAD359/2013 and WAD425/2013) are not of a type contemplated in subparagraphs 190A(6A)(d)(i) to (v) and do not therefore meet the requirements of that condition.

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

Application overview and background

[5] A number of Binbunbur native title determination applications have been filed and considered for registration since 2013.

[6] Three single applications:

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

- Bindunbur (Area A) (WAD359/2013) filed 20 September 2013 and accepted for registration on 26 November 2013;
- Bindunbur (Area C) (WAD425/2014) filed 14 November 2013 and was not considered for registration; and
- Bindunbur (Area B) (WAD94/2014) filed 24 April 2014 and was not accepted for registration on 4 September 2014.

[7] Two combined applications:

- 3 December 2013 – leave granted to combine Bindunbur (Area A) with Bindunbur (Area C); resulting in the lead application Bindunbur (WAD359/2013), and
- 14 December 2015 – leave granted to combine Bindunbur with Bindunbur (Area B) resulting in the current amended application.

[8] The Bindunbur claim is now a single application covering the combined three areas. In these reasons I refer to it as the ‘current amended application’.

[9] The area of the now combined Bindunbur application covers a large expanse (approximately 7585sqkm) of the Dampier Peninsula in the Kimberley region of Western Australia, north east of Broome in the south, to the north of Beagle Bay. The area reaches west to the Lacepede Islands in the Indian Ocean and east to Derby, including the coastal waters of King Sound. The boundaries of the claim area meet the boundaries of a number of native title determination applications and determinations: the Jabirr Jabirr and Goolarabooloo claims (western), the Rubibi (southern), Nyikana Mangala (south eastern) and Bardi Jawi (northern) determinations.

Information considered when making the decision

[10] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[11] As required by s 190A(3)(a), I have had regard to information in the current amended application. On 18 January 2016, the applicant’s legal representative requested that I have regard to all of the materials which were previously considered when the registration test was applied to the pre combination applications. I have therefore considered all of these documents including those provided to the Registrar in addition to the applications filed in the Court³.

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

[12] I note that there is no information before me of the kind identified in s 190A(3)(b).

³ These are listed at paragraph [37].

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[13] The State of Western Australia (the state government) has not provided any submissions in relation to the application of the registration test.

Section 190A(3): other information to which Registrar considers it appropriate to have regard

[14] I consider it appropriate to have regard to the previous delegate's statement of reasons for the registration decisions in relation to the pre combination applications.

[15] I have also considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 5 January 2016 (the geospatial report).

Procedural fairness steps

[16] As noted above, I have considered the additional material referred to me by the applicant on 18 January 2016. On 9 March 2016, I wrote to the State of Western Australia (the state government) advising that I would be relying on this information in my application of the registration test and that should they wish to make any submissions, they should do so by 21 March 2016. The state government made no comments or submissions in relation to the material referred to me by the applicant. This concluded the procedural fairness processes.

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

Description of the area covered by the application

[17] Attachment S identifies that the area covered by the application, as per the information provided at Schedule B Identification of Boundaries, has been amended.

[18] Schedule B describes the application area as all the parcels of land and waters and all other land and waters which are within the area described in Attachment B, shown in the map attached at Attachment C and not excluded by paragraph 8.

[19] Attachment B describes the area covered by the application as all the land and waters within the external boundary described by metes and bounds referencing native title determinations, native title determination applications, reserves, pastoral leases, cadastral parcels, Fraser River and coordinate points (referencing GDA94 and shown to six (6) decimal points). The area is described to specifically exclude the following native title determinations and determination applications: WAD49/98 Bardi Jawi, WAD6061/98 Dambimangari, WAD6006/98 Rubibi Community, WAD6255/98 Mayala, WAD6099/1998 Nyikina Mangala, WAD124/10 Jabirr Jabirr People, WAD104/11 Mawadjala Gadjidgar, WAD258/12 Warrwa #2.

[20] Schedule B also lists general exclusions at [8] to describe the areas not covered by the application.

[21] Schedule C refers to Attachment C entitled 'Mid Dampier Peninsula'. The legend identifies the claim area by a bold blue lined boundary and labeled as "Bindunbur" and identifies a claim region by a bold dashed yellow outline and labeled as "Claim Region". Where the boundaries of the claim area and claim region are coincident, the blue outline is dashed. The map includes proximate native title determination applications and determinations; land tenure depicted by colour with identifying text; scalebar, northpoint, coordinate grid, legend, locality map; and notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[22] The information in relation to the external boundaries of the area covered by the application allows me to identify the location and extent of those boundaries and to be reasonably certain of the area on the earth's surface. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described, and thereby be excluded from the application.

[23] The geospatial report makes the assessment that the description and the map are consistent with each other such that the area covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the external boundary of the area covered by the application is identifiable and, along with the general exclusions that serve to identify the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[24] 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.

[25] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. It is therefore necessary to consider whether the application satisfies the requirements of s 190B(3)(b). I note the comments of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) that the focus of s 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group—at [51]; and is

- not on ‘the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained’ — at [37].

[26] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view 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].

[27] The description of the native title claim group at Schedule A is as follows:

The members of the native title claim group in aggregate comprise the descendants (including by adoption) of the following persons,

Murrjal
 Dorothy Kelly
 Liddy Kenagai
 Liddy Skinner
 Bornal
 William Wallai & Mary Nelagumia
 Senanus
 Frank Walmandu & granddaughter Sophie McKenzie
 Jimmy Bulongi (aka Frank Dinghi)
 Nabi
 Appolonia
 Dorothy
 Agnes Imbarr
 Deborah & Jacky
 Ethel Jacky
 Alice Daradara
 Matilda
 Louisa
 Milare & Kelergado
 Flora
 Madeline
 Malambor (Tjanganbor)
 Walmandjin & son Ringarr Augustine
 Alice Kotonel Wright
 Bismarck
 Kokanbor and Felix Nortingbor and Victor
 Abraham Kongudu
 Narcis Yumit, Peter Biyarr, Anselem and Patrick (brothers)
 Patrick Mouda
 Kandy
 Mary and Din Din
 Jidnyambala and Bobby Ah Choo
 Fred/Friday Walmadayin
 being, generally, persons from buru or family group locations:
 (a) in the southwest of the claim area generally (but not always) associated with the identifier label Jabirr Jabirr, which is sometimes referred to as including the identifier label Nyombal;

- (b) in the northwest of the claim area and generally (but not always) associated with the identifier label Nyul Nyul; and
- (c) in the northeast and east of the claim area generally (but not always) associated with the identifier label Nimanbur which in turn is sometimes associated with the identifier label Bardi (Nimanbur).

[28] In my view, the description of the group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by biological descent from the persons named in the description. The final three paragraphs (a) to (c) provide further qualifying descriptors that identify persons (generally) with a *buru* or family group location. These do not, in my view, detract from the clarity of the preceding descent based description. It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors or their association with their *buru*, but that would not mean that the group has not been sufficiently described.

[29] 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.

[30] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

The Registrar referred to s. 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

[31] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Schedule E of the application contains the description of native title rights and interests claimed in relation to the area covered by the application, as required by s 62(2)(d):

Native title where traditional rights are wholly recognisable

11. Paragraph [12] applies to every part of the claim area:
 - (a) where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded; and
 - (b) which is not subject to the public right to navigate or the public right to fish.
12. Where this paragraph [12] applies the right possessed under traditional law and customs is properly interpreted as, and the native title right recognised by the common law of

Australia is, the right of possession, occupation, use and enjoyment of land and waters as against all others.

Native title where traditional rights are partially recognisable

13. Paragraph [14] applies to every part of the claim area to which paragraph [12] does not apply.
14. Where this paragraph [14] applies, the right possessed under traditional law and customs is properly interpreted as the right of possession, occupation, use and enjoyment of land and waters as against all others, but the native title rights and interests recognised by the common law of Australia are the rights to do all such things as may be done under the right referred to in paragraph [12] save for controlling the access to or the use of land or waters by others; being the (non- exclusive) rights to:
 - (a) have access to, remain on and use the land and waters;
 - (b) access and take the resources of the land and waters; and
 - (c) protect places, areas and things of traditional significance on the land and waters

Area covered by the native title and who holds the rights

15. Each of the native title rights referred to in each of paragraphs [12] and [14] exist in relation to the whole of each part of the claim area to which those paragraphs respectively apply and is held by the members of the native title claim group subject to and in accordance with traditional law and custom, as further described in paragraphs [42]-[62] in Schedule F.

Activities currently carried on

16. Activities in exercise of the native title rights referred to in Schedule E are all such activities as are contemplated by those rights and interests and include the activities identified in Schedule G

[32] A further two paragraphs follow qualifying the description to say that the rights are subject to the laws of Australia and to define the meaning of ‘resources’⁴.

[33] When read together with the exclusion statements in the description of those areas not covered by the application⁵, I am of the view that the native title rights and interests claimed can be ‘properly understood’. I understand that the application claims possession, occupation, use and enjoyment to the exclusion of all others only in those areas where it can be recognised, and claims only the 3 listed non-exclusive rights where the exclusive right cannot be recognised. I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[34] 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:

⁴ Schedule E at [17] and [18].

⁵ Schedule B at [8].

- (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

[35] The current amended application is the product of the combination of three native title determination applications: WAD359/2013 (Area A), WAD94/2014 (Area B) and WAD425/2013 (Area C) (the pre combination applications or claims). The area covered by the current amended application is a combination of all three areas.

[36] In relation to each of the originating claims, the Forms 1, claimant affidavits and the additional material submitted directly to the Registrar differ only to the extent that the relevant geographic area dictates that they differ. Schedules F and G, providing information relevant to the factual basis condition, are identical in each application. The description of the native title claim group in the current amended application is the same as that in each pre combination application.

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

Information considered

[38] For the purposes of my consideration of the factual basis for the claim made in the current amended application, the applicant has requested that I rely on material previously considered by the Registrar in relation to the pre combination applications. The materials before the previous delegate in her consideration of the factual basis for the pre-combination claims consist of the following:

Bindunbur Area A WAD359/2013

- Form 1 filed 20 September 2013
- Affidavit of Alec Dann sworn 13 September 2013
- Affidavit of Betty Dixon sworn 5 September 2013
- Affidavit of Cecilia Mary Churnside sworn 28 August 2013
- Affidavit of Ernest Damien Monado sworn 26 August 2013
- Affidavit of Phillip McCarthy sworn 10 September 2013
- Affidavit of Walter Koster sworn 10 September 2013
- Submissions and additional assertions dated 28 October 2013

Bindunbur Area C WAD425/2013

- Amended Form 1 filed 28 November 2013
- Affidavit of Alec Dann sworn 12 November 2013
- Affidavit of Betty Dixon sworn 12 November 2013

- Affidavit of Cecilia Mary Churnside sworn 11 November 2013
- Affidavit of Phillip McCarthy sworn 6 November 2013
- Affidavit of Walter Koster sworn 11 November 2013
- Affidavit of Ernest Damien Manado sworn 11 November 2013
- Submissions and additional assertions dated 26 November 2013

Bindunbur WAD359/2013 (combined)

- Form 1 filed 3 December 2013

Bindunbur Area B WAD94/2014

- Form 1 filed 28 April 2014
- Same six affidavits that were filed for Bindunbur Area A

[39] I have read and had regard to all of this material for the purposes of my own consideration of the factual basis for the current amended application.

Consideration of statement of reasons for decision in other Bindunbur applications

[40] As referred to earlier in these reasons, three registration decisions have been made in relation to the pre combination applications:

26 November 2013	Bindunbur (Area A)—WAD359/2013 filed 20 September 2013
20 December 2013	Binunbur—WAD359/2013 being the combination of Areas A and C (amended 3 December 2013)
4 September 2014	Bindunbur (Area B)—WAD94/2014 filed 24 April 2014 ⁶

[41] I am of the view that it is appropriate that I have regard to the previous delegate's⁷ statement of reasons for each of the decisions listed above, and specifically the reasons she provided for the factual basis condition in each case. In my view the reasons remain relevant and applicable because the current amended application combines all three areas covered by those applications previously considered for registration and the applicant continues to rely on the same material referred to by the delegate in her consideration of those applications.

[42] I have read all of the affidavits listed above and the submissions provided in October and November 2013 and considered the current amended application against the requirements for the provision of a sufficient factual basis. I have read each of the previous delegate's statement of reasons and formed the view that I agree with her summaries of the material and her assessment, reasoning and conclusions in respect of the three assertions for the factual basis condition. For all of the above reasons, I have decided to adopt the previous delegate's summaries of the material as I consider them applicable to the current amended application because the same facts and law

⁶ Bindunbur (Area B) met all the procedural and merit conditions required for registration on the Register of Native Title Claims (the Register). However, the application was not accepted for registration because the native title claim group had claimants in common with the underlying previously registered Djabera-Djabera application (WAD6124/1998) and therefore did not meet the requirements of s 190C(3). The Djabera-Djabera application was struck out by the Court on 8 July 2015 and removed from the Register on 20 July 2015. The Bindunbur application as currently amended no longer overlaps any application.

⁷ The same delegate made the registration decisions in relation to each of the pre combination claims.

apply. Further, I have decided to adopt the reasons of the previous delegate because I have reached the same conclusions and agree with the basis for her conclusions. In my view, the application, the additional material of 2013 and the claimant affidavits of 2013 is sufficient to support the factual basis for the claim made in the current amended application.

[43] The reasons that follow refer to the statement of reasons of the previous delegate's three decisions, which I name:

- (i) 'Bindunbur' (combination of areas Area A and C),
- (ii) 'Bindunbur (Area A)' included as Attachment B in the above her decision, and
- (iii) 'Bindunbur (Area B)'

[44] In the interests of brevity I have not quoted the reasons in their entirety⁸ but instead reference the paragraphs relevant to my consideration and quote her conclusions.

Reasons for s 190B(5)(a)

[45] The current amended application refers consistently throughout to the 'claim region'. This area is defined at Schedule B by reference to the map of the claim area at Attachment C in which it is identified by a dashed yellow line. The claim region predominantly follows the boundaries of the area covered by the current amended application (the claim area), but also extends further west to cover the Jabirr Jabirr and Goolarabooloo applications and further south east to cover the area in which the two Mt Jowlaenga polygon applications fall. The information provided by the applicant in respect of each of the pre combination claims asserts an association with the entirety of this claim region⁹. It is my understanding that the factual basis material before me is intended to speak to the association of the group and its predecessors with that entire area, within which the claim area falls.

[46] In my view, this material establishes the presence on, association with and occupation by Aboriginal people since sovereignty in the area covered by the current amended application and the wider claim region. Geographical reference is made to both the coastal and inland land and waters of the mid Dampier Peninsula. For example, [Place names deleted].

[47] It is clear that members of the native title claim group and their predecessors were born, live and have lived for all or much of their lives within or near the area covered by the amended application—Schedule F at [34]. Claimants speak of their association with their *buru* – meaning camp, place, home, ground, country. A person's *buru* is the local area to which their family has a traditional connection. It is referred to in the claimant affidavits as a person's ancestral country, and has been passed onto them by their predecessors, they having been taught how to look after and use the country. This continuous presence is evident throughout all of the material pertaining

⁸ A search of the Tribunal's Registers will elicit the complete list of decisions (and their statement of reasons) in each pre combination Bindunbur application.

⁹ The same claim region boundary is identified in each of the Area A, B and C applications.

to each of the three claim areas that comprise the entire area covered by the current amended application.

[48] The previous delegate addressed the asserted current and previous association of the native title claim group against the geographic extent areas of the three pre combination claims:

- Bindunbur (Area A) — middle Dampier Peninsula
- Bindunbur (Area B) — mid-western coastline of Dampier Peninsula, Carnot Bay, including the Lacepedes Islands to the west
- Bindunbur (Area C) — north-east of mid Dampier Peninsula, comprising Beagle Bay and the surrounding region

[49] The previous delegate was satisfied that the factual basis was sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with each of these areas. The material on which she relied was the same material referred to above and on which the applicant has asked me to rely in my consideration of the factual basis for the current amended application. I have relied on her consideration of s 190B(5)(a) in her decisions in the Bindunbur (Area A) application¹⁰; the Bindunbur application¹¹ and the Bindunbur (Area B) application¹². In reaching her decision in the Bindunbur application, the previous delegate relied on and adopted her own conclusions reached in the Bindunbur (Area A) application and then considered separately the material relevant to the area covered by the Bindunbur (Area C) application¹³.

[50] The statement of reasons for the Bindunbur (Area A) application sets out the facts asserted to support the association of the native title claim group and its predecessors with that area— at [118] to [125]. The delegate’s consideration of this material then follows—at [126] to [145]. Much of the information, and this is acknowledged by the delegate in her reasons, refers to areas beyond the external boundaries of the claim area, by reference to the ‘claim region’. It was the delegate’s conclusion:

The additional material speaks in detail of the relationship of the group as a whole, presently and historically, with the inner Peninsula area, asserting that it was an area regarded by the members of the group, in accordance with their laws and customs, as a ‘shared area or “common ground”’, while territorial interests in coastal parts of the claim region were more clearly demarcated between local groups. The material further asserts that claimants’ predecessors taught them the way in which their ancestors had shared that area. I note that the application area contains a relatively minor portion of coastal land, and largely comprises the inner part of the Peninsula, and on this basis, I accept that the material is sufficient in supporting an assertion that it is the whole of the group, including the predecessors of those persons, that have an association with the land and waters of the application area—at [142].

¹⁰ Statement of reasons—Bindunbur application, Attachment B at [118] to [145].

¹¹ Statement of reasons—Bindunbur application, [94] to [119].

¹² Statement of reasons—Bindunbur (Area B), [98] to [121].

¹³ This application not having been previously tested.

[51] This 'wider' region, as it was then, comprises the full extent of the current amended application that combines all three areas¹⁴ and in my view continues to be relevant to my consideration.

[52] The delegate then sets out in detail the information relevant to the association of the native title claim group and its predecessors' with the area covered by the former Bindunbur (Area C) application—at [98] to [105]. This is then followed by her consideration of that information—at [106] to [119]. She concluded that she was satisfied that the factual basis material was sufficient to support an assertion that the native title claim group have, and its predecessors had, an association with the area covered by the former (Area C) application.

[53] The statement of reasons in Bindunbur (Area B) sets out the facts asserted to support the association of the native title claim group and its predecessors—at [99] to [108]. The delegate's consideration of this material then follows—at [109] to [120]. She concludes:

I have set out above the reasons for which I consider the factual basis sufficient to support an association with the entirety of the application area. Noting my view that the factual basis is also sufficient to support an asserted association between the apical ancestors of the group and the area at the time of European contact, and prior to this back to the time of sovereignty, and noting that I consider there to be a sufficient factual basis in support of an asserted association between the members of the group today and the area, and an association of the predecessors of those persons back two or three generations to the time of contact with the area, I have, therefore, formed the view that the requirement at s 190B(5)(a) is met. 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 land and waters of the application area—at [121].

Consideration

[54] In *Gudjala 2007* Justice Dowsett considered that in assessing the factual basis material, it was necessary for the Registrar to address 'the relationship which all the members claim to have in common in connection with the relevant land'—at [40]. Further to this, the facts alleged must 'support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—at [39]. The factual basis material should therefore provide information that pertains to the identity of the native title claim group, the predecessors of the group and the nature of their association with the area of the application.

[55] In my view, the previous delegate's summaries of the factual basis material for the pre combination claims are both clear and accurate. I adopt the reasons of the previous delegate because I have considered all of the same material (Schedule F of the application, the additional material and claimant affidavits) and have reached the same conclusion. I consider that the material is sufficient to demonstrate the association of the members of the claim group and its predecessors with the now combined area. It is clear to me on my reading of the material that there is a link between the current claim group's association and its predecessors' association

¹⁴ I refer to my consideration of this area above at [44]

with the application area to be found in the application and other material before me. The information demonstrates the claim group's connection to the land and waters of the application area through descent affiliation to that area. In this way it is clear that this current association has its origins in the preceding generations' association with the area.

[56] For these reasons and for those set out by the previous delegate in her statement of reasons I am satisfied that the native title claim group has and its predecessors had an association with the area.

Reasons for s 190B(5)(b)

[57] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

[58] Justice Dowsett considered the requirements of s 190B(5) for a second time in *Gudjala 2009* when he addressed the adequacy of the factual basis underlying an applicant's claim. Relevant to assessing the application's assertions in relation to s 190B(5)(b), in Dowsett J's view, there is a requirement for factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters—at [29]. Therefore, the factual basis for the claim is required to address whether or not the relevant traditional laws and customs that give rise to the claim to native title rights and interests have their origin in a pre-sovereignty, normative system with a substantially continuous existence and vitality since sovereignty. This is the proposition that emerged from the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (*Yorta Yorta*), and was relied on by Dowsett J in his *Gudjala 2007* decision—at [26].

[59] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate¹⁵:

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

[60] In the context of the registration test (and explicitly the task at s 190B(5)(b)), there must be factual material capable of supporting the assertion that there are 'traditional' laws and customs

¹⁵ This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala (2007)* at [62] and [63].

[61] In my view, there is sufficient factual account in the current amended application and additional material and claimant affidavits to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

[62] The previous delegate considered and summarised the material before her in relation to the nature of Bindunbur society and the traditional laws and customs acknowledged and observed by the native title claim group. The material on which she relied was the same material referred to above and on which the applicant has asked me to rely in my consideration of the factual basis for the current amended application. I have relied on her consideration of this material for the purposes of s 190B(5)(b) in her decisions in the Bindunbur (Area A) application¹⁶ and the Bindunbur (Area B) application¹⁷.

[63] In the statement of reasons for the Bindunbur (Area A) application, the previous delegate summarised the material at [152] to [157], considered that material at [158] and [176] and then made the following conclusions:

Fourthly, and finally, I have formed the view that the laws and customs acknowledged and observed by the group are traditional laws and customs. In this regard, I consider the factual basis sufficient to support a clear transmission of the system of laws and customs described, from the apical ancestors forming part of the society at European settlement through the intervening generations to the claimants today, and that those laws and customs are underpinned by a strong belief held by members of the group in the spirits of their ancestors continuing to occupy the application area and ‘police’ the area, including claimants’ behaviour in relation to that area. From this, I consider that the system of laws and customs described within the factual basis material, as acknowledged and observed by the claim group, is rooted in, and derived from, the normative system acknowledged and observed by the pre-sovereignty society—at [177].

She summarised at [128] to [136] and considered at [137] to [156] the material in her statement of reasons for the Bindunbur (Area B) application, concluding:

Consequently, in light of the above discussion, I consider that the factual basis material is sufficient to support an assertion of a system of laws and customs acknowledged and observed by the group that is traditional in nature, that is, it is rooted in the laws and customs of the Indigenous society occupying the area, including the group’s apical ancestors, at the time of European contact—at [157].

[64] The previous delegate was satisfied that there was a sufficient factual basis to support the assertion that the claim group acknowledge and observe traditional laws and customs which give rise to the claim to native title rights and interests. I adopt the reasons of the previous delegate

¹⁶ Statement of reasons—Bindunbur application, Attachment B at [146] to [178]. In reaching her decision in the Bindunbur application, the previous delegate relied on and adopted her own conclusions reached in the Bindunbur (Part A) application.

¹⁷ Statement of reasons—Bindunbur (Part B) at [122] to [159].

because I have considered all of the same material (Schedule F of the application, the additional material and claimant affidavits) and have reached the same conclusions. I agree that the factual basis material is sufficient to support the 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.

Reasons for s 190B(5)(c)

[65] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs. In order for the Registrar to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala 2007* at [63], [65] and [66] (as summarised above).

[66] In respect of this condition, the previous delegate relied on the conclusions she reached in relation to ss 190B(5)(a) and (b) in her decision in the Bindunbur (Area A) application and was of the view she could adopt her reasons for decision in s 190B(5)(c)—at [130] to [132]. In that decision she set out the applicant's factual basis material at paragraph [182] and then made the following assessments:

As discussed in my reasons at s. 190B(5)(b), I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the group, that is, laws and customs derived from those of a society at sovereignty. I have also discussed above, my view that the factual basis is sufficient in supporting an assertion of the way in which those laws and customs have been transferred from the ancestors in the area at sovereignty, through the intervening generations, to the claim group members today.

In addition to this, it is my view that the mythological and spiritual underpinning of the system of laws and customs asserted, through which that system obtains its normative force, has resulted in a strict adherence to the rules and conduct prescribed by those laws and customs, as taught to them by their predecessors. In this way, I consider that the factual basis supports an assertion that the claim group members and their predecessors all experience a sense of being bound by those laws and customs, noting their genuine fear of adverse implications should they fail to abide by them.

Noting also that the information contained in the factual basis provides that the claim group and their predecessors have maintained a continuous occupation of the application area and surrounding region, thus allowing them to continue to exercise their native title rights and interests in relation to the area pursuant to the group's laws and customs, I have formed the view that the factual basis is sufficient in supporting an assertion that the native title claim group have continued to hold their native title in accordance with those traditional laws and customs—[183] to [185].

[67] I adopt the reasons of the previous delegate because I have considered all of the same material (Schedule F of the application, the additional material and claimant affidavits) and have reached the same conclusion. I agree that the information in the factual basis material is sufficient to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. Schedule F and the additional material contain

many statements that assert the continuity of the native title claim group's traditional laws and customs. Further, the claimant affidavits illustrate and, in my view, demonstrate that these laws and customs have been passed from generation to generation by traditional modes of oral transmission, teaching and common practice, and continue to be acknowledged and observed today among the current generations of the claim group.

Conclusion

[68] 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.

[69] For the current amended application to meet this merit condition, I must be satisfied that at least one of the native title rights and interests claimed by the native title claim group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s 190B(6):

- it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — at [135].
- it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[70] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the current amended application to determine whether prima facie, they:

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

[71] In my view, as set out above at s 190B(5), the current amended application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests. I am of the view that it is appropriate that I have regard to the previous delegate's statement of reasons for her decisions in relation to the pre combination application. Her reasons in each case remain relevant and applicable to the prima facie condition.

[72] What follows is my consideration of each of the rights and interests claimed in the current amended application as to whether they can be established prima facie to exist under the native title claim group's traditional laws and customs

Exclusive right

Native title where traditional rights are wholly recognisable

1. Paragraph [12] applies to every part of the claim area:

(a) where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded; and

(b) which is not subject to the public right to navigate or the public right to fish.

2. Where this paragraph [12] applies the right possessed under traditional law and customs is properly interpreted as, and the native title right recognised by the common law of Australia is, the right of possession, occupation, use and enjoyment of land and waters as against the all others.

[73] I understand this statement to be a claim to the right of possession, occupation, use and enjoyment of the land and waters of the claim area as against all others, but only where it can be recognised or sustained. I have taken account of what the applicant has to say in relation to those Bindunbur traditional laws and customs that give rise to the right to exclusive possession and have considered whether it is sufficient to support the claim such that it can be established prima facie.

[74] The majority decision of the High Court in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*) considered that '[t]he 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'. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established prima facie.

[75] Further, the nature of exclusive possession was considered by the Full Court of the Federal Court in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths*). In that instance, the Court found a claim to exclusive possession, use or occupation did not require demonstration that a native title claim group could exclude people from their country in a manner analogous to a proprietary right of exclusion. Rather the Court found that:

'The relationship to country is essentially a "spiritual affair" ... The question of exclusivity depends upon the ability of [a native title claim group] to effectively exclude from their country people not of their origin'—at [127].

[76] Such effective exclusion is determinable by reference to the content of traditional law and custom. In the specific facts of *Griffiths*, the Court found that the traditional laws and customs of the native title holders included spiritual sanction being visited upon unauthorised entrants to country. The Court further found that through the relevant law and custom, the native title holders were the 'gatekeepers' for the purposes of preventing such harm and avoiding injury to

country. On this basis the Court found that exclusive possession was held by the native title holders—at [127].

[77] The previous delegate relied on the conclusions she reached in her decision in the Bindunbur (Area A) application¹⁸ in relation to the exclusive right claimed by the Bindunbur native title claim group. In that decision, she was satisfied that this right is established *prima facie* because it was evidenced in the material before her—set out at paragraphs [198] to [201]. She reaches the following conclusion:

Having been satisfied at s. 190B(5)(b) regarding a system of traditional laws and customs acknowledged and observed by the native title claim group, in light of the material set out above, I have formed the view that the right to exclusive possession is, *prima facie*, established. The material before me speaks in considerable detail of the land tenure system under which the claimants and their predecessors considered themselves to be the rightful owners of the application area, and whereby each family holds exclusive rights in relation to their *buru*. The material asserts that those exclusive rights arise by way of an individual being descended from a particular apical ancestor known to have physically occupied the area at the time of European settlement, and who is understood to continue to inhabit the area in spirit form. I also have clear examples of the way in which the claimants continue to exercise exclusive rights on the application area, as taught to them by their predecessors, and the ramifications understood to flow from a failure to adhere to laws and customs surrounding the exercise of these rights. Noting the clear transmission of the traditional laws and customs through the preceding generations to the claimants, the assertion of which I was satisfied the factual basis supported in relation to s. 190B(5)(b), I am of the view that the right is one held in accordance with those traditional laws and customs—Attachment B at [202].

[78] I adopt the reasons of the previous delegate because I have considered all of the same material (Schedule F of the application, the additional material and claimant affidavits) and have reached the same conclusion. I agree with the basis for her conclusion and am satisfied that the right can be established *prima facie*.

Non-exclusive rights

Native title where traditional rights are partially recognizable

1. Paragraph [4] applies to every part of the claim area to which paragraph [2] does not apply.
2. Where this paragraph [14] applies, the rights and interests possessed under traditional law and customs are properly interpreted as the rights of possession, occupation, use and enjoyment of land and waters as against the whole world, but the native title rights and interests recognised by the common law of Australia are the rights to do all such things as may be done under the right referred to in paragraph [12] save for controlling access to or the use of land or waters by others; being the (non-exclusive) rights to
 - (a) have access to, remain on and use the land and waters;
 - (b) access and take the resources of the land and waters; and
 - (c) protect places, areas and things of traditional significance on the land and waters

[79] The previous delegate was satisfied that these rights are established *prima facie* because they were evidenced in the material before her. Again, she relied on the conclusions she reached

¹⁸ Statement of reasons Bindunbur application at [137].

in her decision in the Bindunbur (Area A) application¹⁹ in relation to these three non exclusive rights claimed by the Bindunbur native title claim group. She sets out the information relevant to her consideration at [205] to [217] of Attachment B.

[80] I adopt the reasons of the previous delegate because I have considered all of the same material (Schedule F of the application, the additional material and claimant affidavits) and have reached the same conclusion. I agree with the basis for her conclusion and am satisfied that the right can be prima facie established.

Conclusion

[81] 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.

[1] 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. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application' — *Gudjala FC* at [84].

[82] In *Doepel*, Mansfield J also considers the nature of the Registrar's task at s 190B(7):

Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration — at [18].

[83] The previous delegate was satisfied the Bindunbur application provided evidence that at least one member of the claim group currently has a traditional physical connection with parts of

¹⁹ Statement of reasons Bindunbur application at [137].

the application area. In that decision she relied on the conclusions she reached in her decision in the Bindunbur (Area A) application²⁰. Her statement of reasons sets out the information that speaks to such a connection of [Name deleted]²¹— Attachment B at [223] to [224]. She concludes:

From this information within the application and additional material, I have formed the view that I am satisfied that [Name deleted] has had, and continues to have, a physical connection with the land and waters of the application area, primarily the [Place name deleted]. Noting that this connection is understood by [Name deleted] to arise by way of his descent from apical ancestor [Genealogical details deleted], and that the extent of the knowledge possessed by [Name deleted] about the area was passed to him by his uncles and predecessors in accordance with the group's traditional laws and customs, it is my view that this connection is traditional in nature— Attachment B at [225].

[84] I adopt the reasons of the previous delegate because I agree with the basis for her conclusion and have therefore reached the same conclusion. The applicable law and the facts in the current amended application remain the same and I am satisfied the requirements have been met that at least one member of the native title claim group currently has or previously had a traditional physical connection

[85] 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 s61A (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;

²⁰ Statement of reasons Bindunbur application at [143].

²¹ Appendix B to the October and November 2013 submissions.

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.

[86] 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)

[87] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report dated 5 January 2016 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the current amended application.

Section 61A(2)

[88] 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. Schedule B provides the relevant general exclusion statements that the current amended application excludes any area where a previous exclusive possession act was done in relation to the area covered by the application.

Section 61A(3)

[89] 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. Schedule E provides a statement that in my view meets the requirements of this section which qualifies the applicant's claim to exclusive possession, by stating that it is claimed:

where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded... – at 11(a).

Conclusion

[90] 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.

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

Section 190B(9)(a)

[92] Schedule Q identifies that no claim is made to ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Section 190B(9)(b)

[93] Schedule P identifies that no claim is made to exclusive possession of any offshore place.

Section 190B(9)(c)

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

Conclusion

[95] 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)

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.

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

[97] Section 190C(2) 'directs attention to the contents of the application and supporting affidavits' and 'seeks to ensure that the application contains 'all details' required by s 61'. This condition is procedural only and simply requires the Registrar to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. I am not required to undertake any merit or qualitative assessment of the material for the purposes—*Doepel* at [16] and also at [35] to [39]. In other words, I must be satisfied that the current amended application contains the prescribed details and other information required of it.

[98] 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)

[99] This section provides that a native title determination application 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'. The Registrar must consider 'whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

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—*Doepel* at [36].

[100] In my view, there is nothing on the face of the current amended application that suggests that it is not brought on behalf of all members of the native title claim group.

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

Name and address for service: s 61(3)

[102] Part B of the application states on page 33 the name and address for service of the persons who are the applicant.

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

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

[104] Schedule A provides a description of the persons who comprise the native title claim group.

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

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

[106] Each of the six persons who comprise the applicant have signed an affidavit swearing or affirming, in full, to all the statements required of this section. The affidavits have all been executed in August / September 2013 and originally accompanied the Binbunbur (Area A)

application. The persons comprising the applicant are the same for the current amended application as they were for the former application.

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

Details required by s 62(1)(b)

[108] 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)

[109] Schedule B provides a list of general exclusion statements for those areas not covered by the application and refers to Attachment B for the description of the external boundaries of the area covered by the application which is a metes and bounds description of those geographical external boundaries, referencing geographic coordinate points.

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

[110] Schedule C refers to Attachment C being a map showing the external boundaries of the area covered by the application.

Searches: s 62(2)(c)

[111] Schedule D provides the statement that no searches have been carried out.

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

[112] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application.

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

[113] Schedule F provides a general description of the factual basis for the claim made in the application.

Activities: s 62(2)(f)

[114] Schedule G identifies activities the claim group currently carries out in relation to the area covered by the current amended application.

Other applications: s 62(2)(g)

[115] Schedule H states there are no other applications seeking determinations in relation to the area covered by the current amended application.

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

[116] Schedule HA states that the applicant is not aware of any such notices.

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

[117] Schedule I states that the applicant is aware of two such notices issued with a notification date of 14 August 2013.

Conclusion

[118] The application contains the details specified in ss 62(2)(a) to (h), and therefore does contain 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.

[119] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim in relation to the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c)—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court.

[120] The Tribunal's geospatial report confirms that no native title determination applications fall within the external boundaries of the current application. As the Bindunbur amended application is not overlapped by any other applications, there is no requirement that I consider the issue of common claim group membership.

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

Subsection 190C(4)

Authorisation/certification

Under s 190C(4) the Registrar 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.

[122] For the condition of s 190C(4) to be satisfied, I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met. Schedule R refers to Attachment R which comprises a certification made by the Kimberley Land Council (KLC). As the application purports to be certified by the representative body for the area, the relevant consideration for me is at s 190C(4)(a). This imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires is that I be ‘satisfied about the fact of certification by an appropriate representative body’ which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s 203BE—*Doepel* at [80] and [81].

Identification of the representative body

[123] The Tribunal’s geospatial report of 5 January 2016 confirms that the KLC is the only representative body for the whole of the area covered by the application. It is therefore the only body that could certify the application under s 203BE.

[124] The certificate is dated 30 November 2015 and is signed by the Deputy Chief Executive Officer for KLC.

Does the certificate meet the requirements of 203BE

[125] Attachment R is entitled, ‘Certification’, and under the heading, ‘Statement of Opinion pursuant to section 203BE(2) of the Native Title Act’, it provides that, pursuant to s 203BE(1)(a), the KLC certifies that it is of the opinion that all the persons in the native title claim group have authorised the applicant to make the application, and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all of the persons in the group. This statement meets the requirement of s 203BE(4).

[126] Under the heading, ‘Reasons for Opinion pursuant to section 203BE(2)(a) and (b)’, the certificate sets out the grounds on which the representative body holds that opinion. In summary:

- the native title claim group has a traditional decision-making processes which arises from traditional principles governing peoples authority to make decisions about country and the KLC has been advised by an anthropologist and relevant family groups that this decision-making process is based on relevant traditional laws and customs;
- decisions in relation to the application (including to combine with the Area B application) involved meetings of senior people who have the authority to speak for the affected local areas;
- at a gathering of senior elders on 31 July 2013 the applicant was authorised in accordance with these processes to make the application and deal with matters arising in relation to it; and
- for the purposes of identifying all the other persons who are members of the native title claim group, the KLC has, over a number of years, undertaken extensive anthropological and

genealogical research, and community consultations with families who assert traditional connection to the mid Dampier Peninsular.

[127] In my view, the statements made in the certificate, as summarised above, are sufficient for it to be said that the certificate briefly sets out the reasons for the KLC being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.

[128] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. The certificate does not address this issue. In my view, given there is no overlapping application in relation to the area covered by the current amended application, there is no requirement for the certificate to address this provision.

[129] I am satisfied that the application has been certified under Part 11 by the representative Aboriginal/Torres Strait Islander body that could certify the application and that it complies with requirements of s 190C(4)(a).

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Bindunbur
NNTT file no.	WC2015/007
Federal Court of Australia file no.	WAD359/2013

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:

18 December 2015

Date application entered on Register:

24 March 2016

Applicant:

As per Schedule of Applications

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

As per Schedule