

Registration Decision



Application name	Bindunbur #2
Name of applicant	Ernest Damien Manado, Cecilia Churnside, Alec Dann, Betty Dixon, Walter Koster and Phillip McCarthy on behalf of the Bindunbur Native Title Claim Group
Federal Court of Australia No.	WAD128/2018
NNTT No.	WC2018/004
Date of Decision	18 May 2018

Claim not accepted for registration

I have decided that the claim in the Bindunbur #2 application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must not be accepted for registration.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy ss 190B(2), (5)–(7). It also does not satisfy ss 190C(3)–(4).

Katy Woods

*Delegate of the Native Title Registrar*²

¹ All legislative references are from the *Native Title Act 1993* (Cth) (the Act), unless stated otherwise.

² Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 23 August 2017 and made pursuant to s 99 of the Act.

Reasons for Decision

CASES CITED

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)

Gudjala People #2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)

Martin v Native Title Registrar [2001] FCA 16 (*Martin*)

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*).

Northern Territory of Australia v Doepel [2003] FCA 1384 (*Doepel*)

State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)

Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

Wulgurukaba People #1 v State of Queensland [2002] FCA 1555 (*Wulgurukaba*)

BACKGROUND

- [1] This amended application was filed on behalf of the Bindunbur native title claim group. It covers land and waters in the Dampier Peninsula in north-west Western Australia.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the amended application and accompanying affidavits to the Native Title Registrar (the Registrar) on 24 April 2018 pursuant to s 64(4) of the Act.
- [3] I am satisfied that neither s 190A(1A) nor s 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)(b) does not arise. The amendments to the application include changes to the map and description to correct typographical errors that are not of a type contemplated in s 190A(6A) and do not therefore meet the requirements of that condition.

- [4] If the claim in the application satisfies all the registration test conditions in ss 190B–190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁴
- [5] I have decided that the application does not satisfy all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [6] Section 190A(3) sets out the information to which the Registrar must have regard when considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’. As required by s 190A(3), I have considered the information in the application and accompanying documents provided by the applicant.
- [7] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 2 May 2018 (the geospatial report) and have considered information available through Geospatial Services in relation to locations mentioned in the application.
- [8] I note that I can consider material from outside of the application for some of the conditions of registration, however I do not consider it appropriate to engage in fact-finding, noting the guidance from Mansfield J that the Registrar’s task ‘is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application’.⁵
- [9] The applicant has referred to the judgments of the Court in *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2017] FCA 1367 and *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2018] FCA 275, and states in the Introductory Note to this application that ‘[t]his claim is made subject to, and in reliance upon, the evidence given on behalf of the Applicant in the proceeding on the original application and the findings in [those] decisions’.⁶
- [10] I have not considered the evidence or the findings in either of those decisions because:

³ Section 190A(6).

⁴ Section 190A(6B).

⁵ *Doepel* [16].

⁶ Form 1 Introductory Note [C].

- I do not have before me the evidence of the applicant/s in either of those proceedings, nor access to it;⁷
- There is no information from the applicant as to:
 - (a) which parts of the two *Bindunbur* judgments are relevant to this particular application and the specific land and waters that it covers;
 - (b) which findings should be preferred in the event of any inconsistencies between the two judgments; and
 - (c) what weight to give the findings of the judgments in comparison to the material contained in the Form 1 and accompanying affidavits.

[11] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁸

[12] The state of Western Australia (the state government) has not provided submissions in relation to the application of the registration test.⁹

Procedural fairness

[13] As noted above, I have considered the material within the application and accompanying documents filed by the applicant on 24 April 2018. On 27 April, the practice leader for the matter (the practice leader) wrote to the state government advising that I would be relying on this information for my decision, and should they wish to make any submissions, they should do so by 7 May 2018.

[14] On 8 May 2018 the practice leader received confirmation that the state government had no comments or submissions to make in relation to the application.

[15] Also on 8 May 2018 the lawyer for the applicant confirmed with the practice leader that the applicant would not be submitting any further material in support of the application.

[16] This concluded the procedural fairness processes.

⁷ See *Martin* [23].

⁸ Section 190A(3)(b).

⁹ Section 190A(3)(c).

Merits of the claim (s 190B) – Conditions not met

Identification of area subject to native title – s 190B(2) condition not met

[17] I am not satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are not sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

What is required to meet this condition?

[18] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provide certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed; and
- (b) any areas within the external boundary over which no claim is made.¹⁰

Does the information about the external boundary meet this condition?

[19] Attachment B includes a written description of the external boundary of the application area, described as ‘all the land and waters within the area of mining tenement E04/2084 as it was on 20 September 2013, but only to the extent that it overlapped area [sic] of Unallocated Crown Land on that date’. There follows a description with reference only to coordinate points, including the commencement point of ‘17.283333 S and 122.516667 E’. I note also that the coordinate points are not all given to the same number of decimal places.

[20] Attachment C is a map showing the external boundary of the application area, prepared by Kimberley Land Council and titled ‘Bindunbur New Claim’. The map is in colour with the external boundary marked in bold outline with black hatch fill. Other features include:

- (a) Mining tenement E04/2084, depicted in bold blue outline;
- (b) A parcel of Unallocated Crown Land, labelled ‘UCL 152’;
- (c) Colour topographical background image, including roads water courses and bores;
- (d) Scalebar, northpoint and coordinate grid; and

¹⁰ *Doepel* [122].

(e) Notes relating to the datum used to prepare the map.

[21] I note the comment in the geospatial report that '[t]he description and map are not consistent and do not identify this amended application with reasonable certainty'.

[22] In particular, the geospatial report provides that:

- the unallocated Crown land (UCL) parcel (Lot 851 on DP66631) is incorrectly identified as 'UCL 152' on the map at Attachment C;
- a conflict of expression exists between paragraph 1 of Attachment B, which identifies the application area as the overlapping area of mining tenement E04/2084 and an area of Unclaimed Crown Land, and the list of coordinate points which is included without any datum reference;

[23] Having considered the conclusions of the geospatial report, and the map and description in Attachments B and C, I agree with the assessment in the geospatial report and am not satisfied that the external boundary of the application area can be identified on the earth's surface with reasonable certainty.

Does the information about excluded areas meet this condition?

[24] Schedule B includes a description of areas within the boundaries that are excluded from the application area. This description adopts general clauses to identify the excluded areas, including areas in relation to which a previous exclusive possession act has been done, and areas where native title has been validly extinguished.

[25] I note French J's comment in regard to the requirements of s 190B(2), that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions [in the Act] to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.¹¹ Following this reasoning, I am satisfied that the description of the excluded areas is sufficiently clear for the purposes of s 190B(2), as historic tenure searches could identify the areas described in the general exclusion clauses in Schedule B, so long as the map and description were amended to allow for identification of the external boundary with reasonable certainty.

Identification of the native title claim group – s 190B(3) condition met

[26] I am satisfied the claim sufficiently identifies the native title claim group and therefore meets the requirements of s 190B(3).

¹¹ *Strickland* [55].

What is required to meet this condition?

[27] For the application to meet the requirements of s 190B(3), the Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[28] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’: whether the application has been made on behalf of the correct native title claim group is not relevant.¹²

[29] I also note that the requirements of s 190B(3) ‘do not appear to go beyond consideration of the terms of the application’.¹³ I therefore cannot consider material outside of the application at this condition.

Does the description of the persons in the native title claim group meet this condition?

[30] Schedule A provides a description of the native title claim group. I note that I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’.¹⁴

[31] Schedule A states ‘[t]he members of the native title claim group in aggregate comprise the descendants (including by adoption) of the following persons...’.¹⁵ This is followed by a list of 45 people.

[32] Schedule A then states that the members of the native title claim group, in addition to being descendants of the named ancestors, are described as ‘being, generally, persons from *buru* or family group locations:

- (a) in the southwest of the claim region 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 region and generally (but not always) associated with the identifier label Nyul Nyul; and

¹² *Doepel* [51], [37]; *Gudjala 2007* [33].

¹³ *Doepel* [16].

¹⁴ *Wakaman* [34].

¹⁵ Schedule A [5].

(c) in the northeast and east of the claim region generally (but not always) associated with the identifier label Nimanbur which in turn is sometimes associated with the identifier label Bardi (Nimanbur).¹⁶

[33] Schedule A also refers me to Introductory Note D, which is found on page 3 of the application, however that Note reflects only that this amended application is the same as the original but for amendments to Schedule H, and so I do not consider it relevant to my consideration of s 190B(3).

[34] In relation to the description in Schedule A, I understand the term 'in aggregate' to mean 'as a whole', and 'comprise' to mean 'consists of'. I therefore understand that the whole claim group consists of the descendants of the named ancestors who may also be associated with at least one of the identifier labels attached to different geographical areas of the 'claim region'. I understand the term 'claim region' to refer to a broader area that includes the area covered by this application.

[35] I consider that in order for an individual to qualify as a member of the group they must be a descendant (including by adoption) of the listed apical ancestors. This description provides a clear objective starting point, being descent from named persons. Determining all the members of the group from the 45 people will require some genealogical research, however I note Carr J's view that the need to undertake a factual enquiry to determine the members of the group does not mean that the group has not been described sufficiently.¹⁷

[36] I consider that the information about the 'family group locations' in the application area, which are associated with the listed 'identifier labels' does not amount to a second criterion for membership of the claim group. This is because no explanation is provided regarding whether use of one of the identifier labels requires self-identification, identification by others, or both. I also note the caveat that people in the various parts of the claim region 'generally (*but not always*)' are associated with the relevant identifier label.¹⁸ No explanation is provided as to whether, or how, failure to apply one of the identifier labels affects a person's membership of the claim group.

[37] It would appear that a person who can demonstrate descent from one of the named ancestors would be a member of the claim group. The remainder of the information in Schedule A describes some identification options which are not mandatory, and therefore the use of identifier labels does not provide a second criterion for membership.

¹⁶ Ibid [5](a)–(c).

¹⁷ *WA v NTR* [67].

¹⁸ Schedule A [5], emphasis added.

Identification of claimed native title – s 190B(4) condition met

[38] I am satisfied the description in Schedule E is sufficient for me to clearly understand and identify the itemised rights as ‘native title rights and interests.’

What is required to meet this condition?

[39] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified, as required by s 62(2)(d).

[40] The question for this condition is whether the claimed rights are understandable and have meaning, having regard to the definition of the term ‘native title rights and interests’ in s 223 of the Act.¹⁹

Does the description of the native title rights and interests meet this condition?

[41] Paragraphs 11 and 12 in Schedule E describe the rights and interests in relation 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...

[as] the native title right recognized by the common law of Australia [as] the right of possession, occupation, use and enjoyment of land and waters as against all others’.

[42] I consider that this broadly-worded description of the rights and interests claimed in relation to these areas is consistent with the requirements of s 62(2)(d), and satisfies s 190B(4).²⁰

[43] Paragraphs 13 and 14 in Schedule E describe the rights and interests in relation to ‘every part of the claim area to which paragraph [12] does not apply’.²¹ Paragraph 14 states that these 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...’.²² There follows a list of rights and interests marked (a)–(c). Given the wording of this paragraph, I consider the list of rights and interests to be exhaustive.

¹⁹ *Doepel* [99], [123].

²⁰ *Strickland* [60]; *Strickland FC* [80]–[87]; *Wulgurukaba* [12].

²¹ Schedule E [13]–[14].

²² *Ibid* [14].

[44] Schedule E contains caveats that the asserted native title rights and interests are subject to the valid laws of the Commonwealth and the State of Western Australia and do not include a claim to ownership of any minerals, petroleum or gas wholly owned by the Crown.²³

[45] Schedule E also states that the claimed rights and interests are held by the members of the native title claim group 'subject to and in accordance with traditional law and custom'.²⁴

[46] I am satisfied that the rights and interests in this list may be understood as 'native title rights and interests' as defined by s 223, which have 'meaning'.²⁵

Factual basis for claimed native title – s 190B(5) condition not met

[47] I am not satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support any of the three assertions of s 190B(5)(a)–(c).

What is needed to meet this condition?

[48] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist, in particular:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
- (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[49] The question for this condition is whether the factual basis is sufficient to support these three assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.²⁶

[50] I also note French J's view that '[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the

²³ Ibid [17]–[18].

²⁴ Ibid [15].

²⁵ *Doepel* [99].

²⁶ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material.²⁷

What is required to provide a sufficient factual basis for s 190B(5)(a)?

[51] I understand that s 190B(5)(a) requires the factual basis material to address:

- that the predecessors of the group were associated with the area over the period since sovereignty;²⁸
- that there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;²⁹ and
- that there is an association with the entire claim area, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’.³⁰

What information has been provided in support of the assertion at s 190B(5)(a)?

[52] Schedule F states, ‘[i]n relation to this Schedule F, the Applicant *also* relies on the *evidence and findings* referred to in Introductory Note C on p 3 above relevant to the description of native title rights and interests claimed.’³¹

[53] As discussed above, I do not have access to the evidence referred to in the Introductory Note, nor any information from the applicant regarding which of the findings, from the two judgments referred to, are relevant to the description of the native title rights and interests claimed in relation to the particular land and waters covered by this application.

[54] The use of the word ‘also’ in the paragraph from Schedule F quoted above leads to further difficulties as it is not clear to me what weight to give the evidence and findings referred to (but not provided) in comparison with the material that has been provided in the application and affirmed by members of the claim group in their affidavits as true.³²

[55] Noting French J’s view in *Martin* referred to above, I have not undertaken searches for material to demonstrate a factual basis for the rights and interests claimed by the applicant and have only considered the information that has been provided in the application at this condition.

²⁷ *Martin* [23].

²⁸ *Gudjala 2007* [52].

²⁹ *Ibid.*

³⁰ *Martin* [26]; *Corunna* [39], [45].

³¹ Schedule F [19A], emphasis added.

³² Attachment T.

[56] Regarding the association of the predecessors of the group with the area over the period since sovereignty, Schedule F asserts:

- British sovereignty was extended to the claim area in 1828;³³
- Contact with the ancestors of the claim group did not occur ‘in the region of the claim area’ until the early 1880s;³⁴
- The ‘organised presence in the claim region of Aboriginal people’ has been recorded by Bates (undated), Bischofs (1908), Kaberry (1934), Capell (1940), Elkin (1933), Petri (1938), Tindale (1974) and Worms (1952);³⁵
- ‘At all times since sovereignty the members of the native title claim group and their predecessors respectively according to their traditional laws and customs have enjoyed such access to the claim area as they have desired and by such means as they have been able... possessed the rights and interests referred to in Schedule E... [and] have had an association with the claim region’.³⁶

[57] Regarding the association between the whole group and the claim area, Schedule F asserts that:

- ‘The native title claim group and its predecessors have an association with the claim region by the traditional laws acknowledged and customs observed by them...’;³⁷
- ‘Many members of the native title claim group and their predecessors were also born in and lived for all or much of their lives within the claim region...’;³⁸
- ‘The members of the native title claim group and their predecessors have had a continuous presence in the claim region...’;³⁹
- ‘Many ancestors and kin of members of the native title group are buried with or near the claim region *including the claim area*’.⁴⁰

Is the factual basis sufficient for the assertion of s 190B(5)(a)?

[58] I understand that s 190B(5)(a) requires me to ‘address the relationship which all members claim to have in common in connection with the relevant land’.⁴¹ In my view, Dowsett J’s

³³ Schedule F [24].

³⁴ Ibid [25].

³⁵ Ibid [26].

³⁶ Ibid [103]–[105].

³⁷ Ibid [21].

³⁸ Ibid [34].

³⁹ Ibid [36].

⁴⁰ Ibid [37], emphasis added.

stated requirement that the ‘alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)’ is also relevant when considering whether this condition is met.⁴²

[59] I consider that these principles highlight the need for the factual basis material to explain the extent and nature of the association of the particular claim group and its predecessors with the application area.

Does the factual basis material support an association of the predecessors of the claim group previously with the area?

[60] In my view, the material does not provide a sufficient factual basis addressing that the predecessors of the claim group had an association with the land and waters covered by this application. There are no references to any locations inside the application area and insufficient evidence of any association between the predecessors and the application area.

[61] By way of example of the deficiencies of the factual basis material, I note the assertions at paragraph [33], which I have reproduced in full below:

33. The ancestors referred to in Schedule 2 of the Determination Sought (**ancestors**)

- (a) are descended from the Indigenous people occupying the claim region at the time referred to in paragraph [5];
- (b) *generally* are known to be *from the claim region* at the time referred to in paragraph [25];
- (c) were members of a society which comprised *or included* people who identified themselves respectively by one or more of the labels “Jabirr Jabirr”, “Ngumbarl”, “Nyul Nyul” and “Nimanbur”; and
- (d) were, *generally* persons from buru or family group local areas:
- (e) in the southwest of the claim region *and claim area – generally (but not always or only)* associated with Jabirr Jabirr, which is sometimes referred to as including Ngumbarl;
- (f) in the northwest of the claim area – *generally (but not always or only)* associated with Nyul Nyul; and
- (g) in the northeast and east of the claim area – *generally (but not always or only)* associated with Nimanbur which in turn is sometimes associated with Bardi.⁴³

[62] With regard to [33](a), the reference to paragraph [5] does not clarify the time referred to. Paragraph [5], which is part of Schedule A of the Form 1 application, does not specify a time period.

⁴¹ *Gudjala 2007* [40].

⁴² *Ibid* [39].

⁴³ Schedule F [33], emphasis added.

[63] With regard to [33](b), the reference to paragraph [25] provides that British contact with the ancestors of the claim group occurred in the early 1880s. However it is unclear on what basis the ancestors are 'generally' known to be from the claim region during the early 1880s. Furthermore the reference to the 'claim region' does not assist in demonstrating that the ancestors had an association with the specific area covered by this application.

[64] With regard to [33](c)–(e), the references to the various identifier labels are unhelpful given that they appear to be optional, as discussed above in relation to s 190B(3). The references to the unspecified 'claim region', without any further description, means that I cannot ascertain the relationship between the predecessors and any of the particular land or waters covered by this application.

Does the factual basis material support an association of the claim group currently with the area?

[65] In my view, there is insufficient factual basis to show the association the claim group currently has with the application area.

[66] Schedule F provides only general assertions in relation to the association the claim group has with the claim region. There are no examples provided of the association any member of the claim group has with the specific land or waters of the application area.

[67] The affidavit material provides examples of members of the claim group having an association with the following areas:

- Repulse Point and Disaster Bay;⁴⁴
- Beagle Bay;⁴⁵
- Winawal (Sandy Point);⁴⁶
- Carnot Bay;⁴⁷ and
- 'on the coast near Valentine Island'.⁴⁸

[68] The Tribunal's Geospatial Services has confirmed that all of these locations are coastal and none are in the application area. The closest named location to the application area is Carnot Bay, 32 kms to the north-east, and Valentine Island is 86 kms to the north-west.

⁴⁴ Affidavit of Ernest Damien Manado, affirmed 26 August 2013, [3].

⁴⁵ Affidavit of Cecilia Mary Churnside, affirmed 28 August 2013, [3].

⁴⁶ Affidavit of Alec Dann, affirmed 13 September 2013, [3]; affidavit of Betty Dixon, affirmed 5 September 2013, [3].

⁴⁷ Affidavit of Walter Koster, affirmed 10 September 2013, [3].

⁴⁸ Affidavit of Phillip McCarthy, affirmed 10 September 2013, [3].

Is there a sufficient factual basis that the association both past and present relates to the area as a whole?

[69] There is no material within the application that provides a factual basis for either a past or a present association with the application area. There are no references to any locations within the application area at all.

Decision on s 190B(5)(a)

[70] I consider that the factual basis material does not adequately address the association the claim group have, or their predecessors had, with the application area, in either a physical or spiritual sense. The factual basis material does not explain the extent or nature of the association that claim group members have with the application area. I am therefore not satisfied that there is a sufficient factual basis to meet the requirements of s 190B(5)(a).

What is required to provide a sufficient factual basis for s 190B(5)(b)?

[71] Section 190B(5)(b) requires me to be satisfied that the factual basis material is sufficient to support an assertion ‘that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests’.

[72] ‘Native title rights and interests’ is defined in s 223(1)(a) as meaning those rights and interests ‘possessed under the traditional laws acknowledged, and the traditional customs observed,’ by the native title holders.

[73] Noting the similarity in language between the two provisions, I consider that it is appropriate to interpret s 190B(5)(b) in light of the case law regarding the definition of ‘native title rights and interests’ in s 223(1).

[74] The observations of the High Court in *Yorta Yorta* about the meaning of the word ‘traditional’ in relation to laws and customs include that:

- ‘the origins of the content of the law or custom concerned are to be found in the normative rules’ of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs;⁴⁹

⁴⁹ *Yorta Yorta* [46], [49].

- the ‘normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty’;⁵⁰
- the law or custom ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’;⁵¹ and
- those laws and customs have been acknowledged and observed ‘substantially uninterrupted’ since sovereignty, having been passed down the generations to the claim group.⁵²

[75] In *Gudjala 2009*, Dowsett J also discussed some of the factors that may guide the Registrar in assessing the factual basis, including that:

- the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;⁵³
- if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestors and the pre-sovereignty society from which the laws and customs are derived;⁵⁴ and
- the factual basis contains an explanation as to how the current laws and customs of the claim group are ‘traditional’ in how they relate to the rights and interests in the application area.⁵⁵

What information has been provided in relation to the society?

[76] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society or a society that existed prior to European settlement, acknowledging and observing normative laws and customs. Under the heading ‘Relevant society’, Schedule F provides the following:

- At sovereignty, ‘ancestors of the members of the native title claim group inhabited the Dampier Peninsula and shared a system of laws and customs’;⁵⁶

⁵⁰ Ibid [47].

⁵¹ Ibid [46].

⁵² Ibid [87].

⁵³ *Gudjala 2009* [37], [52].

⁵⁴ Ibid [40].

⁵⁵ Ibid [29], [54], [69].

⁵⁶ Schedule F, [31].

- ‘This shared system of laws and customs extended at least to the ancestors of the members of the native title claim group and may have also extended to some neighbouring areas and people – at least to those associated with the identifier label Bardi’;⁵⁷
- ‘Many members of the native title claim group and their predecessors were also born in and lived for all or much of their lives within the claim region and many members of the native title claim group continue to do so’;⁵⁸
- ‘The members of the native title claim group and their predecessors have had a continuous presence in the claim region and there has been continuous conduct there by them of the activities identified in Schedule G’;⁵⁹
- ‘Many ancestors and kin of members of the native title claim group are buried within or near the claim region including the claim area’;⁶⁰
- ‘The Applicant says that:
 - (a) In approaching questions about society; and laws and customs and their acknowledgement and observance, it is relevant to take account of the matters referred to in paragraphs [38]-[39];
 - (b) The matters referred to in paragraphs [38]-[39] do not deny to rules informed by those practicalities the normative quality of laws or customs; or deny to behaviour conforming to those practicalities the quality of acknowledgement and observance of those laws or customs’;⁶¹ and
- ‘Linguistically, there is a single language for the entire Dampier Peninsula, referred to by some linguists as Nyulnylan’.⁶²

Conclusions on factual basis addressing the society

[77] With regard to the assertion that the ancestors of the claim group inhabited the Dampier Peninsula at sovereignty, I cannot be satisfied that there existed an identifiable pre-sovereignty society in the application area. I note that there is a list of early historians and researchers included in Schedule F and an assertion that there are references in that literature to the various identifier labels and to ‘some of the known ancestors of members of the native

⁵⁷ Ibid [32].

⁵⁸ Ibid [34].

⁵⁹ Ibid [36].

⁶⁰ Ibid [37].

⁶¹ Ibid [40]; see below discussion on [38]–[39].

⁶² Ibid [80].

title claim group’,⁶³ as well as the assertion that there is a single language for the ‘entire Dampier Peninsula’. Such general information does not provide a sufficient factual basis to demonstrate the existence of a society, in the application area, at sovereignty.

[78] With regard to the assertion that a shared system of laws and customs extended to the ancestors of the claim group and may have also extended to some neighbouring areas and people – at least to those associated with the identifier label *Bardi*, I cannot be satisfied that a relationship existed between the ancestors and any pre-sovereignty society, as there is no information before me to demonstrate such a relationship. Several members of the claim group affirm their identity as *Bardi*, however as discussed above, none of these people assert a connection to the specific area covered by this application.⁶⁴ There is also no information about the relationship the ancestors who did not identify as *Bardi* had with the application area.

[79] With regard to the assertions that members of the claim group and their ancestors were born and lived in the claim region, and continuously conducted the activities identified in Schedule G, that schedule states that the activities include ‘accessing, using and remaining in the claim area’.⁶⁵ There is a conflict of expression between the ‘claim region’ in Schedule F, which I understand covers a larger area; and the ‘claim area’ in Schedule G. I am unable to resolve this conflict on the material before me, as the claim region is not defined and there is no evidence which speaks directly to any of the area covered by this application. There are no specific examples provided of any conduct, either past or present, which would enable me to be satisfied that the activities conducted by members of the claim group today derive from the activities conducted by the ancestors of the group under their traditional laws and customs, in the application area.

[80] With regard to the assertions that the contents of paragraphs [38]–[39] are relevant to questions about society, those paragraphs speak to the abundance of foods ‘close to the coast’ which means that property is more closely demarcated on the coast than ‘in the less resource rich inland areas.’⁶⁶ Paragraph [39] asserts that ‘[t]he people of the mid Dampier Peninsula share and at all material times have shared this environment’.⁶⁷ I can find no material in either of these paragraphs which provides a factual basis for the existence of a society, in the application area, either at sovereignty or any time since.

⁶³ Ibid [26].

⁶⁴ See affidavits of Ernest Damien Manado [2]; Cecilia Mary Churnside [2]; Betty Dixon [2]; Walter Koster [2]; Phillip McCarthy [2].

⁶⁵ Schedule G [107].

⁶⁶ Schedule F [38].

⁶⁷ Ibid [39].

What information has been provided in relation to the laws and customs?

[81] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are ‘traditional’, that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society. Schedule F includes assertions about laws and customs in paragraphs [41]–[105] and I have included some of these below by way of example:

- ‘The laws and customs recognise three basic social levels at which people identify themselves and other in relation to territory in the claim region (**social levels**)’;⁶⁸
- ‘Strangers ideally must ask permission... and can be refused access or have conditions imposed on access to an area’;⁶⁹
- ‘Access to an area or to a place or thing within an area, by any person who is not a member of the rights holding group for that area may be refused, made subject to conditions, or terminated for breach of traditional law or custom’;⁷⁰
- ‘Access to some places, sites and areas is restricted on the basis of age, seniority, gender and ritual knowledge and authority’;⁷¹
- ‘Resources should not be wasted’;⁷²
- ‘Persons who hold rights or interests in an area have concomitant responsibilities and should exercise the rights in such manner as to “look after”, care for, protect and maintain the area...’;⁷³
- ‘Beliefs held by people of the claim region include beliefs about *bugarrigarr*, ancestral beings...’;⁷⁴
- ‘Rules about marriage include the notion of a ‘right-way’ marriage and that people who are too closely related should not marry’;⁷⁵
- ‘A regional system of Law comprising mythology and ritual practices referred to as the “Northern Tradition” is acknowledge and observed...’;⁷⁶

⁶⁸ Ibid [42], emphasis in original.

⁶⁹ Ibid [55].

⁷⁰ Ibid [58].

⁷¹ Ibid [60].

⁷² Ibid [64].

⁷³ Ibid [67].

⁷⁴ Ibid [71].

⁷⁵ Ibid [75].

⁷⁶ Ibid [85].

- ‘Corroborees are held at which public songs and dances (*ilma, ngulu or nurlu*) are performed’;⁷⁷ and
- ‘The laws acknowledged and customs observed by members of the native title claim group, are given normative force:
 - (a) through the beliefs in *bugarrigarr*;
 - (b) through kinship and relationships;
 - (c) by respect for the authority and guidance of elders; and
 - (d) by social pressure, a fear of being ostracised or otherwise by punishment by elders or mythological forces for breach of laws or customs’.⁷⁸

[82] In addition to the assertions in Schedule F, members of the claim group assert in their affidavits that they were taught about how to look after and use their country by their predecessors.⁷⁹

Conclusion on factual basis addressing laws and customs

[83] Other than the limited references to the *bugarrigarr*, the language family *Nyulnyulan* and the identifier labels discussed above, the factual basis addressing laws and customs is provided at such a high level of generality that they could apply equally to any other claim. Schedule F contains no mention of any of the named ancestors, any of the claim group members, or any part of the particular lands and waters of the application area which would enable me to identify the laws and customs of the claim group and assess whether they are ‘traditional’ in how they relate to the rights and interests in the application area. Similarly, the assertions by the claim group members in their affidavits are too general to support the existence of traditional laws and customs.

Decision on s 190B(5)(b)

[84] I note Dowsett J’s view that the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).⁸⁰ While Schedule F sets out information describing a system of ‘traditional laws and customs’, this information is too general to provide a sufficient factual basis for its

⁷⁷ Ibid [91].

⁷⁸ Ibid [95].

⁷⁹ See affidavits of Ernest Damien Manado [4]; Cecilia Mary Churnside [3]; Alec Dann [3]; Betty Dixon [3]; Walter Koster [3]; Phillip McCarthy [3].

⁸⁰ *Gudjala 2009* [29], [54], [69].

existence. Further, the lack of references to places in the application area and the very broad statements with ‘no geographical particularity’ mean that I am not satisfied that the factual basis material is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests in the application area, as required by s 190B(5)(b).⁸¹

What is required to provide a sufficient factual basis for s 190B(5)(c)?

[85] This condition is concerned with whether the factual basis material is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[86] Meeting the requirements of this condition relies on whether there is a factual basis supporting the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.⁸²

[87] I also understand that if the applicant’s factual basis material relies upon the drawing of inferences, that ‘[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity’.⁸³

Is the factual basis sufficient for the assertion of s 190B(5)(c)?

[88] The application provides only very broad statements that could be said to speak to the requirements of s 190B(5)(c), for example:

- ‘At all times since sovereignty the members of the native title claim group and their predecessors respectively by those laws and customs have and have had an association with the claim region’;⁸⁴
- ‘The members of the native title claim group are biologically and socially recognised descendants of the ancestors and their predecessors at sovereignty’;⁸⁵ and
- ‘The members of the native title claim group are today, and they and their predecessors at all times since sovereignty without interruption but subject to adaptive change have

⁸¹ *Martin* [26].

⁸² *Ibid* [29].

⁸³ *Gudjala 2009* [33].

⁸⁴ Schedule F [105].

⁸⁵ *Ibid* [96].

been, a body (or part of a broader body) of persons united in and by their acknowledgement and observance of laws and customs...'.⁸⁶

[89] While Schedule F directs me to consider the information in Schedules E, G and M to meet the requirements of s 190B(5),⁸⁷ I can find no material in those schedules that would justify making an inference of continuity in the application area between the laws and customs of a pre-sovereignty society and those of the claim group.

Decision on s 190B(5)(c)

[90] Given my finding that the factual basis is not sufficient to support the assertion of the existence of traditional laws and customs at s 190B(5)(b), I cannot be satisfied that the factual basis is sufficient to support the assertion of the continuity of traditional laws and customs as required by s 190B(5)(c).

Prima facie case – s 190B(6): condition not met

[91] I consider that none of the claimed rights and interests have been established on a prima facie basis. Therefore, the application does not satisfy the condition of s 190B(6).

What is required to meet this condition?

[92] For the application to meet the requirements of s 190B(6), the Registrar 'must consider that, prima facie, at least some of the native title rights and interests claimed can be established.' I note the following comments by Mansfield J in relation to this condition:

- It requires some measure of the material available in support of the claim;⁸⁸
- Although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);⁸⁹ and
- Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.⁹⁰

[93] Mansfield J found that the use of the words 'prima facie' in s 190B(6) means that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.⁹¹

⁸⁶ Ibid [97].

⁸⁷ Ibid [106].

⁸⁸ *Doepel* [126].

⁸⁹ Ibid [127].

⁹⁰ Ibid [132].

Decision on 190B(6)

[94] Because I am not satisfied that there is sufficient factual basis material to support the assertion of the existence of traditional laws and customs as required by s 190B(5)(b), I am not satisfied that there is sufficient information to show that, prima facie, the native title rights and interests claimed can be established. This is because, according to the definition provided in s 223(1), a native title right or interest is one that is held under traditional laws acknowledged and traditional customs observed. Further, the lack of any reference in the material to the specific land and waters of the application area make it impossible to determine whether any of the claimed rights and interests exist in relation to it.

[95] In addition to this, to meet the condition of s 190B(6), there must be information within the application that talks about each of the individual rights claimed. I am not satisfied that the application contains sufficient information of this type. As discussed above, the broad statements in Schedule F are too general, and the affidavit material does not speak to any location inside the application area which might assist to establish the rights and interests claimed on a prima facie basis for the purposes of s 190B(6).

Physical connection – s 190B(7): condition not met

[96] I am not satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

What is required to meet this condition?

[97] For the application to meet the requirements of s 190B(7), the Registrar ‘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’.⁹²

[98] The following principles have emerged from the case law about what is required at s 190B(7):

- The material must satisfy the Registrar (or her delegate) of particular facts and evidentiary material is therefore required;
- The focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;⁹³

⁹¹ Ibid [135].

⁹² Section 190B(7)(a).

⁹³ *Doepel* [18].

- The physical connection must be in accordance with the traditional laws and customs of the claim group,⁹⁴
- The material may need to address an actual presence on the application area.⁹⁵

Is there evidence that a member of the claim group has a traditional physical connection?

[99] Given the lack of reference to any part of the land or waters in the application area, in either the Form 1 itself or the accompanying affidavits, I can find no evidence that a member of the claim group has, or previously had a physical connection with the specific area covered by the application, traditional or otherwise.

No failure to comply with s 61A – s 190B(8): condition met

[100] In my view the application complies with the provisions of ss 61A(1)–(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination application if approved determination of native title	Geospatial report	Met
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B	Met
s 61A(3) claimant applications not to claim certain rights and interest in previous non-exclusive possession act areas	Schedule E	Met

No extinguishment etc. of claimed native title – s 190B(9): condition met

[101] In my view the application meets the requirements of s 190B(9):

Requirement	Information addressing	Result

⁹⁴ *Gudjala 2007* [89].

⁹⁵ *Yorta Yorta* [184].

	requirement	
s 190B(9)(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
s 190B(9)(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
s 190B(9)(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B	Met

Procedural and other matters (s 190C)—Conditions met

Information etc. required by ss 61–2 – s 190C(2): condition met

[102] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

What is required to meet this condition?

[103] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material.⁹⁶

Section 61

[104] The application contains the details specified in s 61.

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

⁹⁶ *Doepel* [16], [35]–[39].

Section 62

[105] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Attachment T	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B and Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis:	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

No previous overlapping claim group – s 190C(3): condition not met

[106] I am not satisfied that no person in the native title claim group for this application was not also a member of the native title claim group for any previous overlapping application.

What is required to meet this condition?

[107] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application’.⁹⁷ To be a ‘previous application’:

- The application must overlap the current application in whole or part;

⁹⁷ Emphasis in original.

- There must be an entry for the claim in the previous application on the Register of Native Title Claims (the Register) when the current application was made; and
- The entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

Are there any relevant ‘previous applications’?

[108] The geospatial report states that one application falls within the external boundary of the application area. It identifies that the Bindunbur claim WAD359/2013 was accepted for registration on 24 March 2016 and was therefore on the Register at the time this application was made. As the previous application is described in the geospatial report as ‘accepted for registration’, its entry on the Register would have been made as a result of the application being considered under s 190A. I am therefore satisfied that the Bindunbur claim WAD359/2013 is a ‘previous application’ for the purposes of s 190C(3).

Are there claimants in common?

[109] Schedule O states that ‘[t]he Applicant and each member of the native title claim group are also members of the Bindunbur native title claim group in the original application in proceeding WAD359/2013’.⁹⁸ For completeness, I have ascertained from the Register that the members of the native title group that make up the applicant in this current application are the same as the members of the native title group that made up the applicant in the previous application WA359/2013. I am therefore satisfied that there are at least some claimants that are common to both claims.

Identity of claimed native title holders – s 190C(4): condition not met

[110] I am not satisfied that the requirements of s 190C(4)(a) are met. While the application has been certified by an identified representative Aboriginal/Torres Strait Islander body with the power to certify the application, and the certification contains the information required by ss 203BE(4)(a)–(b), the requirements of s 203BE(4)(c) are not met.

What is required to meet this condition?

[111] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that either:

⁹⁸ Schedule O [125].

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;⁹⁹ 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.¹⁰⁰

[112] Schedule R of the application refers me to Attachment R (the certificate), which is titled, 'Certification by Kimberley Land Council' and refers to s 203BE and s 190C(4)(a). As the application purports to be certified, I must be satisfied that the certificate:

- (a) identifies the relevant representative body;
- (b) identifies the representative body's power under Part 11 to issue the certification; and
- (c) meets the requirements of s 203BE(4).¹⁰¹

Which representative body has been identified?

[113] The certificate states that it is provided by the Kimberley Land Council (KLC). It is dated and signed by the Chief Executive Officer of the KLC.

[114] I am satisfied that the relevant representative body has been identified.

What power under Part 11 does the representative body have to issue the certification?

[115] The certificate does not state that the KLC is recognised under s 203AD as the representative Aboriginal / Torres Strait Islander body for the region covering the claim area, but states that the certification is made in accordance with s 203BE.

[116] The geospatial report confirms that the KLC is the only representative body for the whole of the area covered by the application. I have verified this information against current data held by the Tribunal's Geospatial Services in the national map of Representative Aboriginal and Torres Strait Island Body areas. That map shows the KLC to be the recognised representative Aboriginal/Torres Strait Island Body for the area covering the application area, pursuant to s 203AD. As a recognised representative body, the KLC can perform all of the functions listed in s 203B, including, relevantly, the certification functions referred to in s 203BE.¹⁰²

[117] I am satisfied that the KLC has the power under Part 11 to issue the certification.

⁹⁹ Section 190C(4)(a).

¹⁰⁰ Section 190C(4)(b).

¹⁰¹ *Doepel* [80]–[81].

¹⁰² Section 203B(1)(b).

Does the certification meet the requirements in s 203BE?

[118] Section 203BE(4) provides that '[a] certification of an application for a determination of native title by a representative body must:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
- (b) briefly set out the body's reasons for being of that opinion; and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3)'.

[119] I have considered these requirements in turn below.

Section 203BE(4)(a)

[120] Section 203BE(4)(a) requires a representative body to state in its certification that an application meets the requirements of ss 203BE(2)(a)–(b).

[121] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it.

[122] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[123] The certificate states that the KLC is of the opinion that all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it, and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the other persons in the native title claim group. The certificate states that this opinion is provided pursuant to s 203BE(2).

[124] I am satisfied that s 203BE(4)(a) is met.

Section 203BE(4)(b)

[125] Regarding s 203BE(4)(b), the certificate sets out the KLC's reasons for its opinion that s 203BE(2)(a) is met under a sub-heading 'Authorisation'. This includes an outline of how the applicant was authorised at a meeting of senior elders on 31 July 2013. According to the certificate, the authorisation occurred under traditional decision-making processes which the KLC has been advised about by anthropologist [Name deleted] and relevant family groups.

[126] The certificate also includes the reasons for the KLC's opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group, the matter addressed in s 203BE(2)(b). The certificate notes that the KLC 'has over a number of years undertaken extensive anthropological and genealogical research and conducted community consultations with families who assert traditional connection to the Mid Dampier Peninsula for the purposes of identifying all persons who are members of the native title claim group for the application.'¹⁰³

[127] I am satisfied that s 203BE(4)(b) is met.

Section 203BE(4)(c)

[128] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3).

[129] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

- (a) Achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
- (b) Minimise the number of applications over the land or waters.

[130] Given that the geospatial report shows an overlap with another native title claim, and noting that the KLC is aware of this overlap,¹⁰⁴ I consider that the certificate should briefly set out what the representative body has done to meet the requirements of s 203BE(3), as required by s 203BE(4)(c).

[131] The certificate does not include any information to demonstrate what the KLC has done in relation to any overlapping applications for determinations of native title, as required by s 203BE(3).

[132] I am therefore not satisfied that s 203BE(4)(c) is met.

Decision on s 190C(4)

[133] As the certificate does not meet all the requirements in s 203BE(4), s 190C(4) is not met.

End of reasons

¹⁰³ Attachment R.

¹⁰⁴ See Schedule H [111]: 'The original application in proceeding WAD359/2013 covers the entirety of the application area'.

Katy Woods

18 May 2018

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 23 August 2017 and made pursuant to s 99 of the Act.

Attachment A

Summary of registration test result

Application name	Bindunbur #2
NNTT No.	WC20185/004
Federal Court of Australia No.	WAD128/2018
Date of decision	18 May 2018

Section 190B conditions

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190B(2)		Not met
s 190B(3)		Aggregate result: Met
s 190B(4)		Met
s 190B(5)		Aggregate result: Not met
s 190B(6)		Not met
s 190B(7)(a) or (b)		Not met
s 190B(8)		Aggregate result: Met
s 190B(9)		Aggregate result: Met

Section 190C conditions

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190C(2)		Aggregate result: Met
S 190C(3)		Not met

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190C(4)		Aggregate result: Not met