

Registration Decision

Application name	Jinka Jervois Pastoral Leases
Name of applicant	Andrew Reiff, Banjo Madrill, David Blue, Donald Madrill, Henry Oliver and Timothy Norman on behalf of the members of the Ankerente, Arntinarre, Arraperre, Artwele, Atnwarle, Ilparle, Immarkwe, Ltye and Thipatherre landholding groups who are connected to the area covered by this application
Federal Court of Australia No.	NTD16/2018
NNTT No.	DC2018/002
Date of Decision	7 September 2018

Claim accepted for registration

I have decided that the claim in the Jinka Jervois Pastoral Leases application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Katy Woods

*Delegate of the Native Title Registrar*²

¹ All legislative references are to 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 27 July 2018 and made pursuant to s 99 of the Act.

Reasons for Decision

CASES CITED

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

De Rose v State of South Australia (No 2) [2005] FCAFC 110 (*De Rose FC2*)

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 Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (*Alyawarr*)

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*)

BACKGROUND

- [1] This application was filed on behalf of the Ankerente, Arntinarre, Arraperre, Artwele, Atnwarle, Ilparle, Immarkwe, Ltye and Thipatherre native title claim group. It covers the land and waters in two adjacent pastoral leases, Jinka and Jervois, to the north-east of Alice Springs in the Northern Territory.
- [2] On 11 May 2018 the applicant filed an application with the Federal Court of Australia (the Court).
- [3] On 13 July 2018 the applicant filed an amended application with the Court to rectify issues identified in the map and description of the application area and make amendments to Schedules D and J.
- [4] On 17 July 2018 the Registrar of the Court gave a copy of the amended application and accompanying affidavits (the application) to the Native Title Registrar (the Registrar) pursuant

to s 64(4). As the application has not previously been considered under s 190A, I am satisfied that neither s 190A(1A) or s 190A(6A) apply and the full registration test should be undertaken.

- [5] 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, it must not be accepted for registration.⁴ I have decided that the application satisfies all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [6] As required by s 190A(3), I have considered the information in the application. 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 20 July 2018 (the geospatial report) and have considered information available through Geospatial Services to locate places mentioned in the application.
- [7] There is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers,⁵ and the Northern Territory (the territory government) has not provided submissions in relation to the application of the registration test.⁶
- [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’.⁷

Procedural fairness

- [9] On 19 July 2018 the senior officer for the matter (the senior officer) wrote to the territory government advising that I would be relying on the information in the application for my decision, and that should they wish to make any submissions, they should do so by 27 July 2018.
- [10] On 30 July 2018 the senior officer received confirmation that the territory government would not be making any submissions. This concluded the procedural fairness process.

³ Section 190A(6).

⁴ Section 190A(6B).

⁵ Section 190A(3)(b).

⁶ Section 190A(3)(c).

⁷ *Doepel* [16].

Merits of the claim (s 190B) – Conditions met

Identification of area subject to native title – s 190B(2) condition met

[11] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas is 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?

[12] 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 provides 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.⁸

How does the information about the external boundary meet this condition?

[13] Schedule B describes the application area in terms of the ‘NT portions’ it covers.

[14] Attachment A is an A3 colour map prepared by the Central Land Council, titled ‘Jinka & Jervois PPLs Native Title Determination Application’, dated 9 July 2017 which includes:

1. The application area depicted in bold green outline with cross hachuring;
2. Surrounding land parcels coloured by tenure and labelled;
3. Four Insets showing the excluded NT Portions;
4. Selected topographic features are shown and labelled;
5. Scalebar, legend, coordinate grid and location diagram; and
6. Notes relating to the source, currency and datum of data used to prepare the map.

[15] The geospatial assessment is that the map and description are consistent and identify the application area with reasonable certainty. Having considered the description in Schedule B and the map in Attachment A, I agree with the geospatial assessment and am satisfied that the external boundary of the application area can be identified on the earth’s surface with reasonable certainty.

⁸ *Doepel* [122].

How does the information about excluded areas meet this condition?

[16] Schedule B describes the excluded areas in terms of NT portions and roads. The description of the roads includes their names, width and location, with references to surrounding NT portions, for example:

16. A road 150 metres wide (Plenty Highway) from the boundary of NT Portion 2454 (Huckitta Station) to the boundary of NT Portion 366 (Jervois Station).

[17] I consider that the excluded areas are described in sufficient detail to satisfy the requirements of s 190B(2).

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

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

What is required to meet this condition?

[19] For the application to meet the requirements of s 190B(3), the Registrar must be satisfied that the persons in the native title claim group are named in the application; or the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[20] 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.⁹ 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’,¹⁰ and that the requirements of s 190B(3) ‘do not appear to go beyond consideration of the terms of the application’.¹¹

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

[21] The description in Schedule A extends to 19 pages. It begins:

1. [t]he members of the native title claim group in aggregate comprises the members of the Ankerente, Arntinarre, Arraperre, Artwele, Atnwarle, Ilparle, Immarkwe, Ltye and Thipatherre landholding groups (“the landholding group”). Those persons according to the traditional laws acknowledged and customs observed by them:

(a) have spiritual physical and/or historical associations with the area described in Schedule B (“the application area”) and are traditionally connected to the area through:

⁹ *Doepel* [51], [37]; *Gudjala 2007* [33].

¹⁰ *Wakaman* [34].

¹¹ *Doepel* [16].

- i. descent from ancestors (including adoption) connected with the application area as described in paragraph 8(a) below; or
 - ii. non-descent based connections as described in paragraphs [sic] 8(b) below;
- (b) hold the common or group rights and interests comprising the native title in the application area.

[22] Paragraphs 2–6 of Schedule A provides further description of the claim group, including that the nine landholding groups are named after their respective ‘estate areas’ and are affiliated to particular parts of the application area, that the landholding groups are associated with the North Eastern Arrernte language, and that members of the claim group are recognised as traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and as native title holders under the Act in relation to other areas.

[23] Paragraph 7 names the members of the applicant and identifies their association to one or more of the landholding groups.

[24] Paragraph 8(a) makes up approximately 15 pages of Schedule A. It begins:

- 8. In accordance with the claimants’ system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:
 - a. descendants (by birth or adoption) of one or more of the following named and unnamed ancestors of the landholding group (“the ancestors”): ...

[25] There follows nine lists of the members of each landholding group. Within each of the nine lists, the apical ancestors are listed in bold, followed by the names of their descendants, followed by a catch-all of ‘and their descendants’ or ‘no known descendants’.

[26] Paragraph 8(b) reads:

- 8. In accordance with the claimants system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are: ...
 - b. accepted as members of the landholding group by the senior descent based members of the landholding group on the basis of non-descent connections to the estate.

[27] There follows seven lists of people who are described by name; their association to one of the nine landholding groups and the nature of their ‘connection to the estate’.

[28] Paragraph 9 states that the ancestors in paragraph 8(a) ‘are the uppermost generation of the known ancestors of members of the native title claim group’.

[29] Paragraph 10 describes the means by which a person can become a member of a landholding group, other than descent. These means include long-term residence in an estate and ‘authority and responsibility for shared Dreaming tracks and/or places of significance connected with an estate’.

[30] Paragraph 11 explains the claimant group’s rules about succession in relation to two of the nine estates, and the resulting changes to the responsibilities of particular claim group members. It notes that additional information about the rules of succession is contained in Schedule F.

[31] Paragraphs 12–15 provide further information about how rights and interests in land arise from the different types of connection (descent and non-descent). Paragraph 13 explains that rights and interests in land are inherited through all four grandparental lines. Paragraph 14 explains that non-descent based rights and interests ‘are usually limited to the individual and are not transmittable’. Paragraph 15 explains that a number of members of the claim group are members of more than one estate group.

[32] Based on the description in Schedule A, I consider that in order for an individual to qualify as a member of the group they either:

1. be a member of at least one of the nine land-holding groups by virtue of their descent (including by adoption) of the listed apical ancestors described in paragraph 8(a); or
2. be one of the non-descent based members listed in paragraph 8(b).

[33] The description of the descent-based members includes an objective starting point, being descent from persons either named or described, organised in accordance with their association with the nine landholding groups. Determining all the members of the group from the 38 apical ancestors 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.¹²

[34] I consider that the description of the non-descent based members is exhaustive. This is because the description in paragraph 8(b) is comprehensive and paragraph 14 explains that the rights held by non-descent based members are not transmittable to other people.

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

[35] I am satisfied the description in Schedule E is sufficient to readily identify the claimed native title rights and interests and thus meets the requirements of s 190B(4).

¹² *WA v NTR* [67].

What is required to meet this condition?

[36] According to Mansfield J, s 190B(4) 'requires the Registrar to be satisfied that the description in the application required by s 62(2)(d) is sufficient to allow the claimed native title rights and interests to be identified'.¹³

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

[37] Schedule E states:

1. The native title rights and interests of the native title holders are the non-exclusive native title rights and interests possessed under and exercisable in accordance with the traditional laws acknowledged and traditional customs observed, including the right to conduct activities necessary to give effect to them:

[38] There follows a list of 11 non-exclusive rights such as the right to hunt, gather and fish on the land and waters.

[39] Paragraph 3 of Schedule E states '[t]he native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others'. I therefore consider the native title claim group are not claiming a right of exclusive possession over any part of the application area.

[40] I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 at this condition as I will address that as part of my consideration of s 190B(6), where I must decide whether each of the claimed rights are prima facie established.

Factual basis for claimed native title – s 190B(5) condition met

[41] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the three assertions of ss 190B(5)(a)–(c).

What is required to meet this condition?

[42] 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, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
- (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

¹³ *Doepel* [92].

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

[43] I understand that my task is to 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’.¹⁴

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

[44] 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’¹⁵ and that the factual basis material should demonstrate:

1. that the claim group presently has an association with the area, and the claim group’s predecessors have had an association with the area since European settlement;¹⁶
2. that there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;¹⁷ and
3. that there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’.¹⁸

How does the factual basis material support an association of the predecessors of the claim group with the area at sovereignty or European settlement and since that time?

[45] Schedule F asserts:

18. ...members of the native title claim group, as their ancestors before them, have a connection with the application area: ...

- (c) ethnographic sources confirm that at the time of contact and settlement of the region and continuing to the present day, people affiliated with a dialect of the Arrernte language, including members of the native title claim group and their ancestors, maintained physical, spiritual and other cultural associations with their country, including occupation and use of the application area.

[46] The assertion in paragraph 18(c) is supported by references to the journals of explorers H.V. Barclay in 1878, Lindsay in 1888, and early anthropologists Spencer and Gillen’s book ‘The Native Tribes of Central Australia’ published in 1899. Based on the dates of these works, I consider it is reasonable to infer that settlement in the application area occurred in the period 1870–1900.

¹⁴ Doepel [16]-[17]; *Gudjala 2008* [83], [92].

¹⁵ *Gudjala 2007* [40].

¹⁶ *Ibid* [52].

¹⁷ *Ibid*.

¹⁸ *Martin* [26]; *Corunna* [39], [45].

- [47] With regards to the intervening generations, Schedule F refers to ethnographic research including that of Tindale in 1931 and 1940, and TGH Strehlow in 1958, 1964, 1971 and 1974.
- [48] The affidavit of [name deleted] deposes that he has rights in the application area through his grandmother [name deleted].¹⁹ [name deleted] was born in 1972 so I can infer that his grandmother was likely born in the 1920s, one generation after settlement. The affidavit deposes that [name deleted] used to get food from Thring Bore in the application area, where there was a big camp during her lifetime.²⁰ The affidavit deposes that when she was older, [name deleted] lived on No 1 Bore on the Atnetye ALT (Aboriginal Land Trust) land, which I can see is located adjacent to the application area to the south.²¹ The affidavit states that the deponent's mother, who I infer was born in the 1940s or 1950s, would get bush foods from around the application area and do her grocery shopping at Bonya community, also within the application area.²²
- [49] The affidavit of [name deleted] deposes that he has rights in the application area through his grandfather [name deleted].²³ [name deleted] was born in 1954 so I can infer that his grandfather was born in the 1890s or 1900s, around the time of settlement. The affidavit deposes that the deponent's father worked on the nearby Lucy Creek and Huckitta Stations, and '[d]uring Christmas holidays he used to go down to his country on Jinka and get wood to make boomerangs'.²⁴ He also recalls his father and his cousin going hunting 'around all the spring country on Jinka Station, around Jinka Spring, Picton Spring and old Huckitta Bore'.²⁵ Using the Tribunal's geospatial database, I can see that Jinka Springs flows through the north east of the application area and Picton Spring and Huckitta Bore lie just outside of the application area around the north-eastern corner.
- [50] The affidavit of [name deleted] deposes that he has rights in the application area through his grandfather [name deleted].²⁶ The affidavit deposes that [name deleted] started working in about 1976 on Tarlton Downs station, adjacent to the application area to the east. Based on information in other claimants' affidavits that they were 10–15 years old when they commenced working, I can infer that [name deleted] was likely born in the 1960s and so his grandfather would have likely been born around 1900. The affidavit deposes that after his

¹⁹ Affidavit of [name deleted] [7].

²⁰ Ibid [8].

²¹ Ibid.

²² Ibid [9].

²³ Affidavit of [name deleted] [7].

²⁴ Ibid [8].

²⁵ Ibid [10].

²⁶ Affidavit of [name deleted] [7].

grandfather's death, his grandmother married [name deleted], who grew his mother up.²⁷ I can infer that these ancestors were also likely born around the time of settlement. The affidavit deposes that the deponent's grandmother and mother lived on '[name deleted]'s country' which included Jervois station and Lucy Creek station, and that there was a big camp and lots of people living there then.²⁸ The affidavit deposes that the deponent's grandparents 'used to get the stone for the knives and axes from the range near the old Jervois mine in the northern part of Jervois'.²⁹

[51] The affidavit of [name deleted] further deposes that he also has rights in the application area through his great-grandfather [name deleted] (his mother's mother's father). He deposes that his great-grandfather 'showed my grandmother [name deleted] all about that country, he took her around'.³⁰ From the dates provided, I can infer that [name deleted]'s great-grandfather was likely born around the 1870s, at or just before the time of settlement. The deponent recalls a camp near Bonya Bore where his grandmother [name deleted] was living 'in windbreaks and humpies' and that the old people would make flour from grass seeds and get ochre from the Bonya waterhole.³¹ He also recalls his mother and grandmother collecting bush medicine from around Eurolley Bore, which I can see lies in the centre of the northern part of the application area. He deposes that both his parents worked at the Jervois mine, also located in the central northern part of the application area.

[52] The affidavit of [name deleted] deposes that he has rights in the application area through his paternal grandfather [name deleted] and his maternal grandfather [name deleted].³² As [name deleted] was born in 1968 I can infer that his two grandfathers were likely born in the early 1900s, soon after settlement. The affidavit deposes that [name deleted] 'used to live at the big camp at Bonya Bore on Jervois Station', and that 'a lot of the old people worked there then' 'living in humpies and got their food from rations but they also went hunting all through there to get food'.³³ I can see from the Tribunal's geospatial database that Bonya Bore lies in the middle of the application area on Bonya Creek. The affidavit further deposes that the deponent's father worked on the nearby stations of Huckitta and Lucy Creek, and returned to live at Tyeyengtyenge rockhole in the application area soon after the deponent was born.³⁴

²⁷ Ibid [8].

²⁸ Ibid [9].

²⁹ Ibid [10].

³⁰ Ibid [11].

³¹ Ibid.

³² Affidavit of [name deleted] [7].

³³ Ibid [8].

³⁴ Ibid [9]–[10].

- [53] The affidavit of '[name deleted]' deposes that he has rights in the application area through his great-grandmother [name deleted].³⁵ While I do not have any dates as reference points, I can infer that given the three intervening generations, [name deleted] would likely have been alive around the time of settlement or soon after. He deposes that his father worked at the Jervois mine in the application area and on Marqua station to the east.³⁶
- [54] The affidavit of [name deleted] deposes that he has rights in the application area through his great-grandfather [name deleted].³⁷ Again, given the three intervening generations I can infer that he would have been alive around the time of settlement or soon after. [name deleted] deposes that his grandfather lived at 'old Bonya before the new place in a tin shed there on his country'.³⁸ He deposes that his father took him to Bonya to live after his mother passed away, and his father started working on Jervois station.³⁹
- [55] In my view, the material provides a sufficient factual basis to support the assertion that the predecessors of the claim group had an association with the land and waters covered by this application. The affidavit material provides sufficient references to locations across the application area and to surrounding stations, and sufficient evidence of the physical association the native title claim group's predecessors, including the apical ancestors, had with the application area at settlement. I also consider that there is sufficient evidence of the physical association of the intervening generations with the application area, noting that there have been only one or two generations between the apical ancestors at the time of settlement and the current members of the claim group.

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

- [56] With regards to the association of the current claim group with the application, Schedule F refers to the six affidavits of claim group members that accompany the application.
- [57] The affidavit of [name deleted] deposes that he was born in 1972 in Alice Springs and grew up around the region of the application area, and recalls hunting around Jervois station and on the Jinka plain. He also refers to his familiarity with Bonya, Narpa Bore, Eurolley Bore, which I can see all lie within the application area. He also refers to his time on Atula station in the

³⁵ Affidavit of [name deleted] [7].

³⁶ Ibid [8].

³⁷ Affidavit of [name deleted] [7].

³⁸ Ibid [8].

³⁹ Ibid [9].

Atnetye ALT, which lies directly to the south. He further deposes that he has been living at Bonya community on the application area since 1996.⁴⁰

[58] The affidavit of [name deleted]deposes that he was born in 1954 on Lucy Creek station worked on Lucy Creek station and moved back to Bonya community and got a job working on Jervois station, lived at Ilperle outstation (part of Jinka station that is excised from this claim) for about 29 years and that he continues to go camping on Atula Creek at the southern boundary of the application area and at the neighbouring Indiana station.⁴¹

[59] The affidavit of [name deleted] deposes that he was born in the bush on the application area near the boundary with Lucy Creek Station and grew up on Jervois station. He states ‘we camped at the camp near Bonya Bore when I was really little and later we moved to the camp near the Jervois homestead because my father started working at the station’.⁴² He deposes that he started working in about 1976 on Tarlton Downs station, adjacent to the application area to the east, and that he also worked on the surrounding stations of Huckitta, Mt Riddock, Bushy Park, Atula and Numery. He deposes that he still goes to Jervois to go hunting, getting bush food and bush medicine, and that his daughter lives at Bonya and ‘I taught my daughter all about the country and taken her out and showed her’.⁴³

[60] The affidavit of [name deleted] deposes: ‘[w]hen I was a little kid we moved to Tyeyengtyenge rockhole near Bonya on the application area. After than my father worked at Moly Hill mine on the application area and we lived up there and go down to Bonya for the weekends’.⁴⁴ He deposes that he began working on Jervois station when he was about 10 years old. He deposes that he still lives at Bonya ‘and I still go out hunting and getting bush food from all over the application area’.⁴⁵

[61] The affidavit of [name deleted] deposes that he grew up at Bonya from about the age of eight. He now lives at [location deleted] but visited the application area to go hunting and get bush food ‘a few years back’.⁴⁶ He deposes that his younger brother grew up at Bonya and lived there until he got married last year.

[62] Schedule F also refers to the information in Schedules G and M to support the assertion that members of the native title claim group have maintained their connection with the application area. Schedule G lists the activities undertaken by the members of the claim group and

⁴⁰ Affidavit of [name deleted] [11]–[13].

⁴¹ Affidavit of [name deleted] [9], [11]–[12].

⁴² Affidavit of [name deleted] [13].

⁴³ Ibid [15]–[16].

⁴⁴ Affidavit of [name deleted] [10].

⁴⁵ Ibid [11]–[12].

⁴⁶ Affidavit of [name deleted] [10]–[12].

Schedule M summarises information about two of the claimants' connection with the application area.

[63] In my view, the information about in the claimants' affidavits about being born on or nearby to the application area, working on the application area or on nearby stations, and living on and visiting various parts of the application area, including with their families, provides a sufficient factual basis to show the association the claim group currently has with the application area.

How does the factual basis material support an association, both past and present, to the area as a whole?

[64] As summarized above, the claimants' affidavits contain numerous references to the lands that make up the application area, Jinka and Jervois stations, both in terms of their own association, and that of their predecessors. There are also references to claim group members and their predecessors working and living on the surrounding stations of Huckitta, adjacent to the west; Lucy Creek, adjacent to the north; and Tarlton Downs, adjacent to the east. There are also references to Indiana Station and the land held by the Atnetye Aboriginal Land Trust, both adjacent to the south; and to the next 'ring' of surrounding stations including Marqua to the east, Numery to the south, and Mount Riddock and Bushy Park to the west.

[65] I also note the references to many locations which lie within the application area, including:

- | | | |
|------------------|------------------|--------------------|
| 1. Bonya Bore | 5. Valley Bore | 9. Bonya Creek |
| 2. Thring Bore | 6. Jinka Spring | 10. Jervois mine |
| 3. Narpa Bore | 7. Picton Spring | 11. Moly Hill mine |
| 4. Eurolley Bore | 8. Atula Creek | 12. Marshall River |

[66] I have formed the view that there is sufficient information in the claimants' affidavits to demonstrate that the claim group have, and its predecessors had, an association with the application area as a whole. This is because there are references to locations that are spread across the application area, as well as to surrounding areas and locations on all sides, where claim group members and their predecessors were born, lived, worked and undertook activities such as hunting animals and gathering bush foods and medicines.

[67] In addition, I consider that there is a clear link between the association of current claim group and the association of its predecessors with the lands and waters of application area. This is because each of the claimants' affidavits speaks of how they are connected to particular estates or land-holding group in the application area through descent affiliation from one or

more of the apical ancestors. I consider that it is clear that this current association has its origins in the preceding generations' association with the application area.

Conclusions on factual basis addressing an association with the application area

[68] I consider that the factual basis material adequately addresses the association the claim group have, and their predecessors had, with the application area. It appears that the members of the claim group and their predecessors have maintained their connection to the application area by working on the Jinka and Jervois pastoral stations, as well as surrounding stations since settlement occurred and continually since that time. Current members of the claim group continue to live on the application area at the community of Bonya and camp at locations in and around the application area. The factual basis material explains the physical association that claim group members have, and their predecessors have had, with the application area, which I am satisfied meets the requirements of s 190B(5)(a).

[69] I note Schedule F asserts the claim group has a spiritual association with the application area held and maintained in accordance with laws and customs, however given those assertions are also relevant to the question of the claim group's laws and customs, I have considered them in more detail as part of my task at s 190B(5)(b) below.

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

[70] 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 claimed native title rights and interests.

[71] 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similarity between s 190B(5)(b) and s 223(1)(a), I consider it is appropriate to interpret s 190B(5)(b) in light of the case law about the definition of 'native title rights and interests' in s 223(1).

[72] The High Court in *Yorta Yorta* held that a law or custom is 'traditional' where:

1. it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice';⁴⁷
2. the origins of the content of the law or custom can be found in 'the normative rules' of a society that existed prior to sovereignty;⁴⁸

⁴⁷ Ibid [46].

3. the normative system has had a ‘continuous existence and vitality since sovereignty’;⁴⁹
and
4. the relevant society’s descendants have acknowledged the laws and observed the customs ‘substantially uninterrupted’ since sovereignty.⁵⁰

[73] Dowsett J provided the following guidance about how s 190B(5)(b) requires the factual basis material to:

1. demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of that pre-sovereignty society;⁵¹
2. demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs are derived, if descent from named ancestors is the basis for membership of the group;⁵²
3. contain an outline of the case 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, and not just restate the claim.⁵³

What information has been provided in relation to the society at settlement?

[74] 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.

[75] Schedule F asserts:

The nine landholding groups whose members comprise the native title claim group are part of a regional society which includes all North Eastern Arrernte landholding groups and other Arrernte peoples with whom they have a close association, for example, through intermarriage, ceremonial connections and mutual estate recognition. Members of this society acknowledge and observe a common body of Arandic traditional laws and customs.

[76] As discussed above in relation to s 190B(5)(a), Schedule F asserts that ethnographic sources confirm that at the time of settlement, people affiliated with a dialect of the Arrernte language occupied and used the application area. Schedule F references over 20 historical, ethnographic and anthropological sources dating back to 1878. One particularly relevant source is Tindale’s ‘Geological notes on the Iliaura country northeast of the MacDonnell Range, Central Australia’. As the application area lies directly to the northeast of the

⁴⁸ *Yorta Yorta* [46], [49].

⁴⁹ *Ibid* [47].

⁵⁰ *Ibid* [87].

⁵¹ *Gudjala 2009* [37], [52].

⁵² *Ibid* [40].

⁵³ *Ibid* [29].

MacDonnell Range, I can infer that this source has particular relevance to the society in and around the application area.

[77] I note that the factual basis material must address a link between the claim group and the application area, which may involve establishing a link between the apical ancestors by which the group is described, and the society at settlement. In this regard, the claimants' affidavits assert:

1. There was a 'big camp' at Thring Bore where ancestor [name deleted] lived around the time of settlement;⁵⁴
2. There was a 'big camp' where a lot of people lived near Athere waterhole where ancestors [name deleted] and [name deleted] lived around the time of settlement or in the early decades following settlement;⁵⁵ and
3. There was a 'big camp' at Bonya Bore where ancestor [name deleted] lived in the early decades following settlement, and that a lot of people were living there in humpies.⁵⁶

Conclusions on factual basis addressing the society at settlement

[78] I consider that the significant number of historical sources referenced in Schedule F that relate to the Central Desert region including the application area, support the assertion that predecessors of the claim group were part of a regional society identified as 'Arrernte' by virtue of their language, laws and customs.

[79] I note that as settlement in the application area is asserted to have occurred approximately one generation outside of living memory, in the late 1800s, the information in the affidavits of the claimants about 'big camps' in the application area in which their grandparents lived when they were young is relevant to my consideration of whether or not a society existed in the application area at settlement. I consider that it is reasonable to infer that these camps likely existed at the time of settlement, particular those in which lots of people were living due to nearby water sources.

[80] I consider that the factual basis is sufficient to support the assertion that there was a society in the application area at settlement and that the ancestors of the claim group were members of that society.

⁵⁴ Affidavit of [name deleted] [8].

⁵⁵ Affidavit of [name deleted] [9].

⁵⁶ Affidavit of [name deleted] [8].

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

[81] Schedule F also describes the following features of the system of laws and customs observed by the ancestors of the claim group at settlement:

1. Foundations of the law in the *Altyerre* (dreaming);
2. The existence of a kinship system which incorporates actual and classificatory kin relations between people and also metaphoric relationships between people, their ancestral country and the *Altyerre*;
3. A further level of social classification based on sections and moieties/subsections;
4. A land tenure system inherited by patri-, matri- or combined descent, or conferred on non-descent based members by senior descent based members of the group; with particular roles assigned to individuals with particular connections. For example, persons affiliated to an estate through their mother's father are called *kwertengerle* which translates as 'managers' or 'policemen' for the particular estate;
5. Transmission, acknowledgement and observance of traditional laws and customs by traditional modes of oral transmission, teaching and common practice;
6. The observance of spiritual practices relating to 'Dreaming tracks' associated with totemic sites and places on the application area.

[82] The claimants' affidavits contain examples of the laws and customs acknowledged and observed by the claim group. Having considered that material, my view is that the factual basis material speaks to laws and customs of the claim group that are 'traditional' in that they are rooted in the laws and customs of the society that existed at settlement of which the ancestors named at Schedule A belonged.

[83] The claimants' affidavits give examples of the way in which knowledge of laws and customs has been passed down through the generations to the members of the group. For example, one claimant says:

My mother's mother's father was Yerrey-Yerr Kngwarreye ... for Thipatherre [landholding group] ... and I am kwertengerle [policeman] for that country through him. He showed my grandmother [name deleted] all about that country, he took her around. [name deleted] told my mother all about that country ... My mother and my grandmother taught me about that country. [name deleted] told me a lot of stories and taught me where to go and where not to go.⁵⁷

[84] Claimants depose how they learned about their country and their particular totems after participating in an initiation ceremony. One claimant deposes, for example:

⁵⁷ Affidavit of [name deleted] [11], [14].

I went through Young Men's ceremony at Alice Springs and after it had finished the men and my father brought me back to Ilparle country and started teaching me about the sacred sites and the Dreamings. That the proper way to learn to go onto country. They took me to the main place for our country Ilparle soakage. The old men taught me the songs and the Law. I learnt my Dreamings – Ingwa (night) and Utnerrengatye (caterpillar) there on my country. The young men are taught the same way today, they go onto country to learn.⁵⁸

[85] In addition to this, the laws and customs acknowledged and observed by the claim group today, as described by claimants in their affidavits, include those acknowledged and observed by the society at settlement as asserted in Schedule F. For example, all the claimants' affidavits speak about their observation of the kinship system described in Schedule F, including their role in that system and how it relates to the landholding group or groups with which they identify. One claimant deposes, for example:

The application area is part of North Eastern Arrernte territory. I am a North Eastern Arrernte man and kwertengerle [manager/policeman] for Thipatherre, Ankerente and Imarrkwe country covered by this application... Under North Eastern Arrernte traditional laws and customs decisions about country and who has the authority to speak for or act on behalf of a landholding group are made by the senior, knowledgeable apmerek-artweye [owners/bosses] and kwertengerle of the group.⁵⁹

[86] The claimants' affidavits also explain how the traditional laws and customs are observed across the landholding groups of the application area, for example:

If the decision concerns more than one estate group, senior, knowledgeable apmerek-artweye and kwertengerle of each landholding group must be present.⁶⁰

[87] Claimants describe how they observe particular practices around access to sacred sites in the application area, for example:

When the anthropologists came... I went with the other old men and showed them around my country. It's my job to do that because I am apmerek-artweye [sic] and I have the knowledge ... there are some men's sites in the application area where no women or kids can go. If they did there would be big trouble. At one place they might go blind if they went there, they are not allowed.⁶¹

Conclusions on factual basis addressing existence of traditional laws and customs

[88] From the information in Schedules A and F, the examples above and other examples found in the claimants' affidavits, I consider the factual basis is sufficient to support the assertion that the laws and customs acknowledged and observed today by the native title claim group are rooted in the laws and customs of the pre-sovereignty East Arrernte society. The claim group members continue to follow a system of social organisation and kinship that governs relationships in the East Arrernte society including the application area.

⁵⁸ Affidavit of [name deleted] [13].

⁵⁹ Affidavit of [name deleted] [5].

⁶⁰ Ibid.

⁶¹ Affidavit of [name deleted] [15], [17].

[89] The material addresses the ways in which these laws and customs have been handed down through the generations to the members of the claim group through descriptions of members of the intervening generations teaching current members of the claim group about how to make boomerangs, hunt, practice bush medicine and protect sacred sites, amongst other things, through oral transmission and common practice.

[90] As the laws and customs have been passed onto the claim group members by their parents, who were the children and grandchildren of the apical ancestors, I can infer that the apical ancestors would have practiced the same or similar modes of teaching. This leads to the conclusion that the laws and customs observed currently are 'traditional' in the sense described in *Yorta Yorta* as they derive from the laws and customs observed by a society that existed at the time of settlement.

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

[91] 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.⁶² It also requires a factual basis supporting an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least European settlement.⁶³

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

[92] As discussed above, I am satisfied that the factual basis is sufficient to support an assertion of a society at settlement in the application area acknowledging and observing laws and customs from which the present laws and customs of the native title claim group are derived. It is also my view that the factual basis is sufficient to support an assertion that those laws have been continually acknowledged and observed by the intervening generations since settlement without substantial interruption.

[93] I have formed this view based on the information in the claimants' affidavits about how they and their predecessors, over the period since settlement have maintained a physical presence in the area, predominantly through their work on the stations that make up the application area. As discussed at s 190B(5)(a) above, the claimants' affidavits demonstrate that most of the deponents, their families and their predecessors were born on or near the application area, and spent a considerable part of their lives residing in the area, either working on stations, living in the community of Bonya or in camps at bores, rockholes and outstations

⁶² *Gudjala 2009* [29].

⁶³ *Gudjala 2007* [82].

across the application area. I consider that this continuous occupation has enabled the members of the claim group to continue to acknowledge and observe the laws and customs of their ancestors since settlement without substantial interruption.

[94] My view is also based on the information in the claimants' affidavits about their predecessors, including how they practiced their laws and customs in the application area, including those relating to the kinship system. For example, one claimant deposes that after his grandmother [name deleted] married apical ancestor [name deleted]:

He [name deleted] adopted my mother and grew her up. [name deleted] was [boss] for Ankerente and so I am [manager] for Ankerente through him. [The deponent's mother] grew up walking around all that country with her mother and [name deleted], all the old people...⁶⁴

[95] He goes on to describe observing and learning different aspects of traditional laws and customs from his predecessors:

...they [the old people] would get kangaroos, turkeys, emus, perentie and goanna. Anything they could find. All the lizards, we would eat them as kids and baby birds... Those old people would make flour from grass seeds and they would grind it up. I used to eat that... I remember they used to get ochre wherever they found it while they were out hunting. My mother and grandmother used to get bush medicine from around Euroolley Bore [in the application area]. We still get that.⁶⁵

[96] Another claimant shares knowledge of his grandmother as follows:

When I was a young fella she [my grandmother] told us where our country was, through her. She told us we can go there and carry on from here. That's one of your home areas. We can go and look around when we want. When she was older she went and lived on her country on No 1 Bore on Atnetye ALT, not far from the boundary of the application area. She used to walk around Thring Bore on the application area and get food from around there.⁶⁶

Conclusions on factual basis addressing continuity of traditional laws and customs

[97] I consider the factual basis sufficient in supporting an assertion that the claim group have continued to hold their native title in accordance with traditional laws and customs. This is because information in the application, summarised above, demonstrates that current claimants possess knowledge about how the generations since the apical ancestors have acknowledged and observed their laws and customs in relation to the application since around the time of settlement.

Prima facie case – s 190B(6): condition met

[98] I consider that the claimed rights and interests have been established on a prima facie basis. Therefore, the application satisfies the condition of s 190B(6).

⁶⁴ Affidavit of [name deleted] [8].

⁶⁵ Affidavit of [name deleted] [9], [12].

⁶⁶ Affidavit of [name deleted] [8].

What is required to meet this condition?

[99] 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 Mansfield J's comment that s 190B(6) imposes a more onerous test to the individual rights and interests claimed.⁶⁷

Which of the claimed native title rights and interests can be established on a prima facie basis?

[100] Schedule F includes a table of the 'Rights Claimed' as per the list in Schedule E and the 'Evidence in Affidavits' for the existence of those rights. This table is helpful to my task at s 190B(6) and I have considered the information contained in the claimants' affidavits regarding each of the claimed rights below.

The right to access and travel over any part of the land and waters – established

[101] Throughout the claimants' affidavits there are examples of the claimants and their predecessors accessing and travelling through the application area. An example is found in [name deleted]'s affidavit where he talks about his grandmother's, his mother's and his own access to the application area and travel through it for various purposes including getting bush food and bush medicine.⁶⁸

The right to live on the land, and for that purpose, to camp and erect shelters and other structures – established

[102] There are also multiple examples of claimants and their predecessors living on the application area, including at the community of Bonya, and camping and erecting shelters. For example the affidavit of one claimant speaks of old people erecting windbreaks and humpies at Bonya Creek.⁶⁹ Another claimant recalls predecessors of the claim group erecting shelters and deposes that he still lives at Bonya and when he goes out camping he makes windbreaks.⁷⁰

The right to hunt, gather and fish – established

[103] There are examples of claimants and their predecessors hunting and gathering in the affidavit material, one claimant recalls hunting kangaroo and porcupine with his father and other old men on Jinka Station across to Huckitta Station, and gathering bush oranges and other bush food.⁷¹

⁶⁷ *Doepel* [132].

⁶⁸ Affidavit of [name deleted] [8], [9], [12].

⁶⁹ Affidavit of [name deleted] [111].

⁷⁰ Affidavit of [name deleted] [8]–[12],

⁷¹ *Ibid* [8]–[9].

[104] Although I can find no specific information about fishing, I consider that I can infer that fishing is a right held in accordance with traditional law and custom, given the multiple references to natural water sources such as rivers, springs and soakages, and the references to claimants and their predecessors obtaining ‘bush food’ and ‘bush tucker’ from the application area, which I infer would have included food from water sources.⁷²

The right to take and use the natural resources – established

[105] There are examples of claimants and their predecessors taking and using a variety of natural resources for a variety of purposes, such as taking wood for fires, shields and boomerangs;⁷³ stone and spinifex resin for knives and axes;⁷⁴ bush tobacco and other plants for bush medicine.⁷⁵

The right to access, take and use natural water on or in the land - established

[106] There are numerous references throughout the affidavits to natural water sources in the application area and to claimants and other claim group members accessing, taking and using the natural water for various purposes. One claimant recalls how his grandparents ‘followed the water around their country’ and how the ‘old people’ taught him to locate soakages.⁷⁶ Another claimant recalls his mother washing him in ‘bush medicine water’ on the application area when he got sick.⁷⁷

The right to light fires for domestic purposes – established

[107] The claimants’ affidavits talk of how they and their predecessors have used fire to cook food on the application area. One claimant recalls visiting the application area ‘his father’s country’ when he was about eight years’ old and cooking perentie and porcupine ‘on a fire’. He also deposes how on a recent camping trip to the application area he and his family cooked the bush food they had gathered on a fire.⁷⁸

The right to share and exchange natural resources, including traditional items made from the natural resources – established

[108] There are references throughout the affidavits to the predecessors and current members of the claim group sharing and exchanging a variety of natural resources including bush

⁷² Affidavit of [name deleted] [14]; affidavit of [name deleted] [8].

⁷³ Affidavit of [name deleted] [10].

⁷⁴ Affidavit [name deleted] [10].

⁷⁵ Affidavit of [name deleted] [9].

⁷⁶ Affidavit of [name deleted] [11], [14].

⁷⁷ Affidavit of [name deleted] [10].

⁷⁸ Affidavit of [name deleted] [10]–[11].

medicine,⁷⁹ kangaroo,⁸⁰ bush orange and sugarbag⁸¹ and perentie.⁸² There are also references to the sharing of things made from natural resources, such as flour from grass seeds and bush medicine made from plants and animal fat.⁸³

The right to access and to maintain and protect sites and places that are important under traditional laws and customs – established

[109] Many of the claimants' affidavits talk of protecting important sites on the application area. For example, one claimant talks about how he drives around 'checking up on places. I go down to those sacred sites and make sure they haven't been damaged'.⁸⁴ Another deposes how he goes with his daughter to look after the rockholes, and that '[t]he people who live at Bonya look after those sites and make sure there is no damage. When I go out to Bonya I go out with them and check up on the sites to protect them and look after my country'.⁸⁵

The right to conduct and participate in the following activities:

- 1. Cultural activities – established*
- 2. Ceremonies – established*
- 3. Meetings – established*
- 4. Cultural practices relating to birth and death including burial rites – established*
- 5. Teaching the physical and spiritual attributes of sites that are important under traditional laws and customs – established*

[110] I consider that the activities listed in paragraphs 2-5 of this right can broadly described as 'cultural activities'. Many of the affidavits talk about the deponent's experiences going through Young Men's ceremonies that include being taken onto the application area to learn particular cultural knowledge from senior men.⁸⁶

[111] The authorisation meeting for this claim provides an example of a meeting occurring on the application area (at Bonya), which the claimants depose occurred in accordance with traditional processes.⁸⁷

[112] Many of the claimants' affidavits speak of how their relatives are buried on the application area, which I consider demonstrate cultural practices relating to death including burial rites.

⁷⁹ Affidavit of [name deleted] [12].

⁸⁰ Affidavit of [name deleted] [8].

⁸¹ Ibid [9].

⁸² Ibid [12].

⁸³ Affidavit of [name deleted] [12].

⁸⁴ Affidavit of [name deleted] [14].

⁸⁵ Affidavit of [name deleted] [16], [18].

⁸⁶ Affidavit of [name deleted] [13]; affidavit of [name deleted] [17].

⁸⁷ Affidavit of [name deleted] [6]; Affidavit of [name deleted] [6].

One claimant states: '[m]y father and my brother are buried out there on our country on the application area. People didn't go there for a while after that'.⁸⁸

[113] There is no specific information regarding cultural practices relating to birth, however I consider it is reasonable to infer from the information in the application that such practices are observed in the application area in accordance with traditional law and custom. I note that 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'.⁸⁹ The paucity of material about this component of the right may perhaps be a result of the affidavits all being deposed by male members of the claim group. The references to 'men's sites... where no women or kids can go' indicates to me that some knowledge may be gender-restricted and so it is possible that knowledge about cultural practices relating to births may be held primarily by women.⁹⁰ Considering the information in the application about other cultural practices, and applying the guidance provided by Mansfield J, I consider the claim to a right to undertake cultural practices relating to births is arguable and therefore should be accepted on a prima facie basis.

[114] There are also references throughout the affidavits of the deponents and their siblings learning from their parents, grandparents and senior claim group members about the spiritual and physical attributes of their country, including the application area. One claimant deposes how his great-uncle, father and uncles 'would teach me and my brother. They showed me the sites and taught me the Law for those countries. That's the proper way to learn, on that country. Still the same today, they [sic] young men are taken out onto that country to learn'.⁹¹

The right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders provided that the right does not extend to making any decision that purports to control the access of such persons to the land and waters – established

[115] One claimant deposes: 'I make decisions about where Aboriginal people who are not native title holders can go on my country. I make the decision where they can go if they want to go hunting. I make the decision where they can go and where they can't because there might be a sacred site there'.⁹² I understand that the deponent has the right to make those decisions because of his role as a 'policeman' for one of the landholding groups in the claim, and his role

⁸⁸ Affidavit of [name deleted] [16].

⁸⁹ *Doepel* [135].

⁹⁰ Affidavit of [name deleted] [17].

⁹¹ Affidavit of [name deleted] [17].

⁹² Affidavit of [name deleted] [16].

as a ‘boss’ for another group in the claim.⁹³ Other deponents hold similar authority and make similar statements regarding their right to make decisions about the use and enjoyment of the application area by Aboriginal people who observe the same traditional laws and customs.⁹⁴

[116] I understand that this right is connected to the positions of authority within the claim group, based on the information in the claimants’ affidavits, Schedule F and Schedule A. I note that ‘native title rights and interests’ are defined in s 223(1) as ‘the communal, group or individual rights and interests of Aboriginal peoples’. I also note the Full Court’s finding in *De Rose FC2* that whether native title can be claimed or held by an individual or group must be reached by reference to the body of laws and customs of the relevant society.⁹⁵ I consider that this right is claimed to be held by particular individuals within the claim group, being the ‘policemen’ and ‘bosses’ of the landholding groups, as I consider that there is sufficient information that the right is held in accordance with traditional law and custom, noting the assertions in Schedule F and the explanations of the claimants in the affidavits of how they hold their particular positions of authority through their predecessors and their observance of the rules of the Arrernte kinship system.⁹⁶ I therefore consider that this right is prima facie established.

The right to be accompanied on the land and waters by persons who, though not native title holders, are:

- 1. People required by traditional laws and customs for the performance of ceremonies or cultural activities – established*
- 2. People who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders – established*
- 3. People required by the native title holders to assist in, observe or record traditional activities on the areas – established*

[117] I consider that there is sufficient information to establish this right on a prima facie basis. I understand that the group of people described in paragraph 1 of this right are people who observe Arrernte laws and customs but are not part of the claim group. I understand that the people described in paragraph 2 include, but may not be limited to, extended family members who do not form part of the claim group, as there are explanations in the affidavits about how men holding the requisite authority must accompany ‘my wife’s family’ and other Aboriginal people who want to go hunting on the application area.⁹⁷ I understand that the people

⁹³ Ibid [5].

⁹⁴ See for example the affidavit of [name deleted] [4], [20].

⁹⁵ *De Rose FC2* [31].

⁹⁶ Ibid.

⁹⁷ Affidavit of [name deleted] [15]–[16].

described in paragraph 3 include, but may not be limited to, people undertaking anthropological and cultural heritage work.

[118] In relation to the people described in paragraphs 1 and 2, I note the comments of the Full Court in *Alyawarr* that with recognition of such rights regarding restriction of access, '[t]here is a risk that it may be seen as creating a criterion for exclusion based in part upon Aboriginality'.⁹⁸ As the laws and customs of the Eastern Arrernte people are asserted to be observed by a wider group than the native title claim group, this application presents a similar difficulty as existed in *De Rose*. That matter concerned the 'nguraritja' or 'traditional owners' of the claim area and a wider group of people of the Western Desert Cultural Bloc who observed the same or similar laws and customs, whose access to the claim area the claim group sought to control, despite the absence of a claim of exclusive possession. However, it is not my role determine the content or the extent of the claimed right, or resolve any potential inconsistencies. My role extends only to consider whether there is information in the application which allows me to be satisfied that the right can be established, in accordance with traditional laws and customs, on a prima facie basis. I am satisfied that the application contains sufficient information of this type.

[119] As with the right to make decisions about the use and enjoyment of the application area discussed above, I understand that this right is exercised by the individuals in the claim group with the requisite cultural authority. I have formed this view on the basis of information in the claimants' affidavits, for example: '[o]nly those men who know that country, the apmerek-artwey [bosses] and kwertengerl [policemen] can take them [anthropologists] out and show them. I can also take out other families who aren't from this country'.⁹⁹

Conclusions on rights and interests prima facie established

[120] 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 satisfied that the application contains sufficient information of this type. In addition, because I am 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 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.

⁹⁸ *Alyawarr* [151].

⁹⁹ Affidavit of [name deleted] [15].

Physical connection – s 190B(7): condition met

[121] I am satisfied that at least one member of the native title claim group currently has a traditional physical connection with a part of the claim area.

What is required to meet this condition?

[122] 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.

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

1. The material must satisfy the Registrar (or her delegate) of particular facts and evidentiary material is therefore required;
2. 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;¹⁰⁰
3. The physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;¹⁰¹
4. The material may need to address an actual presence on the application area.¹⁰²

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

[124] Schedule M of the application summarises the connections that three claim group members have with the application area. Having read the summary in Schedule M and his affidavit that accompanies the application, I am satisfied that claim group member [name deleted] holds the required traditional physical connection. I have formed this view based on the information in his affidavit about:

1. His birth on the application area near the boundary with Lucy Creek Station;¹⁰³
2. His time spent living and working on the application area and surrounding stations;¹⁰⁴
3. His observation of, and learning from, predecessors of the claim group including about the production of bush foods and medicines and about areas where he could go and could not go;¹⁰⁵

¹⁰⁰ *Doepel* [18].

¹⁰¹ *Gudjala 2007* [89].

¹⁰² *Yorta Yorta* [184].

¹⁰³ Affidavit of [name deleted] [13].

¹⁰⁴ *Ibid* [13]–[16].

¹⁰⁵ *Ibid* [12], [14].

4. His position as a *kwertengerle* (policeman) for several landholding groups in the claim and undertaking of duties associated with that position, such as accompanying outsiders onto the application area;¹⁰⁶
5. His observance of the *Altyerre* (Dreaming) in relation to the application area, including the kinship system through which he holds cultural authority,¹⁰⁷ customs in relation to the sharing of resources,¹⁰⁸ and laws around authorised access to the application area;¹⁰⁹ and
6. His initiation as a young man at the nearby Harts Range and subsequent learning on the application area from senior men about the laws and customs relevant to the landholding groups of which he is a member.¹¹⁰

[125] From this information, I am satisfied that [name deleted] has a physical connection to parts of the application area. I infer from his affidavit that he has spent his entire life on his traditional country. I am also satisfied that the material demonstrates that [name deleted]'s connection with the application area is 'traditional' in the sense required by s 190B(7). I am satisfied that his knowledge of the application area has been passed to him from the predecessors of the claim group while spending time on his country, including the application area. As I consider that the factual basis material is sufficient to support an assertion that traditional laws and customs acknowledged and observed by the predecessors of the claim group have been passed down to the current members of the claim group, it follows that I am satisfied that [name deleted]'s connection with the application area is in accordance with traditional laws and customs.

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

[126] 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):

Section	Requirement	Information	Result
s 61A(1)	No native title determination application if approved determination of native title	Geospatial report, my own searches	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraph 21	Met

¹⁰⁶ Ibid [5], [11], [18]–[20].

¹⁰⁷ Ibid [7].

¹⁰⁸ Ibid [12].

¹⁰⁹ Ibid [21].

¹¹⁰ Ibid [17].

s 61A(3)	Claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule E, paragraph 3	Met
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No extinguishment etc. of claimed native title – s 190B(9): condition met

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

Section	Requirement	Information	Result
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	There is no information in the application that discloses to me that native title rights and interests in the application area have otherwise been extinguished	Met

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

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

[128] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents. I note I am not required to undertake a merit assessment of the material.¹¹¹

Section 61

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

Section	Details	Information	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

¹¹¹ *Doepel* [16], [35]–[39].

Section 62

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

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits filed with application	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 A	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 met

[131] I am 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?

[132] 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’.¹¹² To be a ‘previous application’:

1. the application must overlap the current application in whole or part;
2. 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
3. the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[133] If there are no ‘previous applications’, then the requirement is not triggered.¹¹³

¹¹² Emphasis in original.

¹¹³ *Strickland FC* [9].

Are there any relevant ‘previous applications’?

[134] The geospatial report states there were no applications on the Register of Native Title Claims which fell within the external boundary of this application area as at 31 July 2018, when the geospatial report was completed.

[135] My own searches of the Register confirm there are no applications that overlap the current application. This means that I do not need to consider whether there are any claimants in common between the current claim group and any overlapping group.

Identity of claimed native title holders – s 190C(4): condition met

[136] I am satisfied that the requirements of s 190C(4)(a) are met.

What is required to meet this condition?

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

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;¹¹⁴ 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.¹¹⁵

[138] Schedule R of the application provides a certification, and so 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).¹¹⁶

Which representative body has been identified?

[139] The certificate states that it is provided by the Central Land Council. It is dated and signed by the Director. I am satisfied that the relevant representative body has been identified.

¹¹⁴ Section 190C(4)(a).

¹¹⁵ Section 190C(4)(b).

¹¹⁶ *Doepel* [80]–[81].

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

[140] The geospatial report confirms that the Central Land Council is the only representative body for the whole of the area covered by the application. I have verified this information against the Tribunal's national map of Representative Aboriginal and Torres Strait Island Body areas. That map shows the Central Land Council 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 Central Land Council can perform all of the functions listed in s 203B, including, relevantly, the certification functions referred to in s 203BE.¹¹⁷ I note also that the heading of the certificate and paragraph 1 therein states that the application is certified in accordance with s 203BE(1)(a). I am satisfied that the Central Land Council has power to issue the certification under Part 11.

Does the certification meet the requirements in s 203BE?

[141] 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)'.

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

Section 203BE(4)(a)

[143] 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).

[144] 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.

[145] 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.

[146] The certificate states:

¹¹⁷ Section 203B(1)(b).

Statement [s 203BE(4)(a)]

3. The Central Land Council is of the opinion that the requirements of section 203BE(2)(a) and (b) have been met, namely, that:

- (a) 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
- (b) 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.

[147] I am satisfied that these statements met the requirements of s 203BE(4)(a).

Section 203BE(4)(b)

[148] The certificate provides the following regarding the authorisation of the applicant:

Reasons [s 203BE(4)(b)]

4. The Central Land Council is of this opinion for the following reasons:

Authorisation of the Applicant

- (a) A meeting was held on 4 July 2017 at Bonya Community to obtain instructions from the native title claim group in relation to the application ("the claimant meeting"). The meeting was organised and facilitated by the Central Land Council and attended by claimants, including all senior members of the native title claim group. Central Land Council legal and anthropology staff attended the meeting.
- (b) Under the traditional laws and customs of the native title claim group there is a process of decision-making that must be complied with in relation to authorising things of this kind and in accordance with that process the persons who attended the claimant meeting had authority to make decisions relating to the application and authorised the following persons to make the application and to deal with matters arising in relation to it for so long as they are willing and able to do so:
- (c) Central Land Council staff consulted the claimant meeting about the application and received instructions from claimants agreeing with its contents. The persons authorised to make the application were also consulted about its contents.
- (d) Each of the persons authorised to make the application subsequently signed an affidavit pursuant to section 62(1)(a) acknowledging that they are authorised by the native title claim group to lodge the application and deal with the matters arising in relation to it.

[149] The certificate also includes the following with regards to the efforts made to describe all the persons in the claim group:

All reasonable efforts made to describe all persons in the native title claim group

- (e) The Central Land Council has conducted anthropological and historical research in relation to the persons who hold the claimed native title rights and interests in the application area. That research indicates:
 - (i) the members of the native title claim group described in the application are the only persons who assert and are entitled to claim native title rights and interests in the application area and that this is acknowledged by the wider Aboriginal community; and
 - (ii) the description of the persons and criteria for membership of the native title claim group accords with the traditional laws acknowledged and customs observed by those persons and identifies or describes all the persons who hold the common or group rights comprising the native title claimed in the application area.

[150] I am satisfied that these statements meet the requirements of s 203BE(4)(b).

Section 203BE(4)(c)

[151] 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).

[152] 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, then 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.

[153] As discussed above at s 190C(3), there are no applications which overlap this claim, meaning s 203BE(3) not applicable. Regardless, the certificate includes the following to meet the requirement of s 203BE(4)(c):

No overlapping applications [s 203BE(4)(c)]

5. The Central Land Council is not aware of any other application or proposed application that partly or wholly covers the application area.

[154] I am satisfied that this statement meets the requirements of s 203BE(4)(c).

Decision on s 190C(4)

[155] As the certificate meets all the requirements in s 203BE(4), s 190C(4)(a) is met.

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Jinka Jervois Pastoral Leases
NNTT No.	DC2018/002
Federal Court of Australia No.	NTD16/2018

Section 186(1): Mandatory information

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.

Application filed/lodged with: Federal Court of Australia

Date application filed/lodged: 17 July 2018

Date application entered on Register: 7 September 2018

Applicant: As per Schedule

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

Katy Woods

7 September 2018

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.