National
Native Title
Tribunal

Registration Decision

Application name	Birriman-gan
Name of applicant	Mervyn Mulardy, Trent Marshall, Shirley Spratt, Rene Hopiga, Del Roe, Brendan Charles, Linda Nardea, Deborah Shadforth, Thomas Edgar, Neil McKenzie, Roslyn Dixon, Dianne Appleby
Federal Court of Australia No.	WAD541/2018
NNTT No.	WC2019/007
Date of Decision	7 August 2019

I have decided that the claim in the Birriman-gan application satisfies all of the conditions in ss 190B–190C of the *Native Title Ac*t *1993* (Cth).[1] Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims (Register).

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Heidi Evans

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

[1] A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Reasons for Decision

CASES CITED

Aplin on behalf of the Waanyi Peoples v Queensland [2010] FCA 625 (*Aplin*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
Drury v Western Australia [2000] FCA 132 (*Drury*)
Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)
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*)
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 Land Council v Quall [2019] FCAFC 77 (*Quall*)
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)
Sampi v Western Australia [2005] FCA 777 (*Sampi*)
State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)
Stock v Native Title Registrar [2013] FCA 1290 (*Stock*)
Wakaman People #2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)
Western Australia v Ward [2002] HCA 28 (*Ward HC*)

BACKGROUND

[1] This is an amended application filed on behalf of the Birriman-gan native title claim group (claim group). It covers approximately 2194 square kilometres of land and waters south east of Broome and immediately north of Gingerah, in the Kimberley region of Western Australia. The amendment of this application gives effect to the orders of the Court of 24 May 2019 that the Karajarri Yanja application (WAD17/2019) be combined with the Birriman-gan application.

[2] The Registrar of the Federal Court (the Court) gave a copy of the amended application and accompanying affidavits to the Native Title Registrar (Registrar) on 6 June 2019 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.[2]

Registration conditions

[3] Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other

[2] Section 190A(1).

matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.

[4] 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) does not arise.

[5] The orders of the Court of 24 May 2019 granting leave to amend specified the nature of the amendment, being the combination of the Karajarri Yanja application (WAD17/2019) with the Birriman-gan application. Subsequently, the amendment has resulted in an increase of the area covered by the application, such that s 190A(6A) does not apply.[3]

[6] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

Information considered

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

[8] I have had regard to information in the application. I have also considered documents provided by the applicant directly to the Registrar on 25 June 2019 and 5 July 2019:[4]

1. Letter from [Name removed], Senior Legal Officer, Kimberley Land Council to the National Native Title Tribunal (NNTT), dated 25 June 2019;
2. Affidavit affirmed by [Name removed] on 4 July 2019 ([Name removed] affidavit); and
3. Applicant's Additional Material provided to the Native Title Registrar for the purposes of deciding whether to place the claim on the Register of Native Title Claims, undated (Additional Submissions).

[9] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.[5]

[10] The State of Western Australia (the state) has not provided any submissions in relation to the application of the registration test.[6]

[11] I may also have regard to such other information as I consider appropriate.[7] I have set out in my reasons below those instances where I have had regard to other materials and the basis upon which I considered it appropriate to do so.

[3] Section 190A(6A)(d)(i).
[4] Section 190A(3)(a).
[5] Section 190A(3)(b).
[6] Section 190A(3)(c).
[7] Section 190A(3).

[12] 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 24 June 2019 (the geospatial report).

Procedural fairness

[13] As noted above, I have considered the additional material provided by the applicant on 25 June 2019 and 5 July 2019. On 15 July 2019, I wrote to the state advising that I would be relying on this information in my application of the registration test and inviting the state government to comment on the material. By email on 15 July 2019, the state government confirmed it would not be making submissions in relation to the additional material. This concluded the procedural fairness processes.

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

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

[14] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

[15] Schedule B describes the application area as all of the area located between the following native title determinations, but not so as to overlap with any of those determinations:

a. Native title determination WAD6006/1998 Rubibi Community;

b. Native title determination WAD 6100/1998 Karajarri People (Area A);

c. Native title determination WAD6099/1998 Nyikina Mangala.

[16] A map showing the boundary of the application area appears at Attachment C. It has been prepared by the Kimberley Land Council, on 16 April 2019, and it includes:

- the application area depicted by a bold blue outline, labelled as 'Claim Area';
- satellite imagery background with labelled roads, homesteads and towns;
- surrounding native title determinations depicted by transparent grey shading, labelled;
- scalebar, northpoint, legend; and
- notes relating to the source of the satellite imagery and datum of data used to prepare the map.

[17] Schedule B also states that in the event of any inconsistency between the map and the description, the description is to prevail. The geospatial report concludes that the map and description of the boundary of the application area are consistent and identify the area with reasonable certainty. In this way, I am satisfied the information about the external boundary of the application area is sufficiently clear to identify the area covered by the application.

[18] Paragraph [2] of Schedule B lists general exclusion clauses, that is, areas within the external boundary that are excluded from the application, such as areas where extinguishment of

native title has occurred. In my view, the use of general clauses to describe these excluded areas is not problematic in the application satisfying the requirements of s 190B(2). I am satisfied that once historical tenure searches for the area are completed, these excluded areas could be known with certainty.

[19] It follows that I am satisfied the information contained in the application is sufficient to provide reasonable certainty about the land and waters in relation to which native title is claimed.

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

[20] I am satisfied the claim meets the requirements of s 190B(3). The application describes the persons comprising the native title claim group rather than naming them, therefore, I am satisfied the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in the group.[8]

[21] The focus of my consideration is 'whether the application enables the reliable identification of the persons in the native title claim group'.[9] I am not to consider the correctness of the description, or whether those described do, in fact, qualify as members of the native title claim group.[10]

[22] The description of the native title claim group appears in Schedule A of the application. It provides that '[t]he members of the native title claim group comprise the Karajarri people, the Yawuru people and the Nyikina people, defined as follows…' A description of each of these groups follows, providing certain criteria which must be met in order for an individual to qualify as a Karajarri/Yawuru/Nyikina person. I have considered each of these descriptions separately below to determine whether there is sufficient clarity about the persons comprising each of the three groups and subsequently, the native title claim group as a whole.

Karajarri people

[23] Schedule A describes the Karajarri people as those people who refer to themselves as Karajarri, being persons who:

(a) are of Karajarri descent;

(b) identify as Karajarri and are accepted as such by the Karajarri;

(c) adhere to Karajarri customs and traditions; and

(d) are by Karajarri laws and customs entitled to the use or occupation of the Karajarri lands irrespective of whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission and includes those persons having native title thereto under common law.

[24] From this, I understand that an individual must meet four criteria in order to be considered a member of the group. The difficulty with the description is the absence of any external reference point, or objective starting point, from which an inquiry into the group members could be initiated. Generally, the Court has been of the view that descriptions purely relying

[8] Section 190B(3)(b).
[9] *Doepel* at [51].
[10] *Doepel* at [37].

on self-identification do not assist in providing certainty about who is and who is not a member of the group.[11]

[25] As above, this application combines the application areas subject of the Karajarri people application (WAD17/2019) and the Birriman-gan application (WAD541/2018). The Karajarri people application appears in an entry on the Register of Native Title Claims. In light of the lack of objective reference point in the description of the Karajarri people before me, I have considered it appropriate to access, through the Tribunal's databases, the extract from the Register for the underlying Karajarri people's application, which contains the following description of the persons comprising the Karajarri people:

> The native title claim group comprises the descendants of Nganara, Minyirr Palajangka, Ingala [2] and Yamadu "Mutpi".

[26] There is no explanation in the material before me as to why the application does not adopt this description of the Karajarri people, noting my understanding that these persons have combined with the persons comprising the underlying and pre-amended Birriman-gan native title claim group to bring the current application. In my view, it does, however, indicate that anthropological and genealogical research has been done about the group to determine the apical ancestors from whom the claim group members are descended. It also demonstrates that the group has previously been described with sufficient clarity to meet the requirement of this condition and enable registration of the claim in the application.

[27] In addition to this, I note that the Federal Court has made a determination of native title in favour of the Karajarri people which covers a significantly large area immediately adjacent to, and south of, the application area (WAD6100/1998). Again, I have considered it appropriate to have regard to the description of the Karajarri people set out in the determination and appearing in the relevant entry on the National Native Title Register.

[28] That description is identical to the one before me. Therefore, as the Court has accepted this description as sufficiently clear to enable the identification of the members of the Karajarri people, being those persons who are the common law holders for the determined area for the purposes of s 255, it follows that I am also satisfied the description before me is sufficiently clear to identify those same persons who comprise the Karajarri people for the purposes of s 190B(3)(b) regarding this application.

[29] In reaching this view, I note that in *Aplin*, Dowsett J considered previous observations by the Court regarding membership of a native title group, commenting that such cases 'clearly demonstrate that membership must be based on group acceptance', and that for any indigenous society, 'the society may accept the views of particular persons as sufficient to establish group acceptance.'[12]

[30] Turning then to the remaining parts of the claim group description before me, regarding the Yawuru people and the Nyikina people.

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[11] See *Wakaman* at [38].
[12] At [260].

Yawuru people

[31] The Yawuru people are described with reference to four criteria, any of which I understand can be met in order for an individual to qualify as a member of the group. The first criterion is descent from one of 33 named ancestors or ancestor couples, with a further qualification that, 'where a person has only one Yawuru parent, that person self-identifies as Yawuru'.

[32] Persons meeting the second criterion are:

> Aboriginal persons who have been adopted as children or been grown up by a Yawuru person as members of the Yawuru community under the traditional laws and customs of the community and who self-identify and are generally accepted by other members of the community, as Yawuru persons.

[33] Persons meeting the third criterion are:

> Aboriginal persons who possess high cultural knowledge and responsibilities in relation to the claim area and: (i) were born in; or (ii) have a long term physical association with, that area under the traditional laws and customs… and who self-identify and are generally accepted by other members of the community, as Yawuru persons.

[34] And persons meeting the fourth criterion are 'descendants of persons referred to in (b) or (c) save that where a person has only one Yawuru parent, that person self-identifies as Yawuru.'

[35] I am satisfied the persons meeting the first criterion could be identified with certainty, once a directed inquiry has been undertaken. I do not consider the need to undertake an inquiry of this nature prevents the description from being sufficiently clear for the purposes of this condition.[13] The named ancestors provide an objective reference as a starting point for such an inquiry. Some further questioning of those persons who have only one Yawuru parent would be required, to determine whether they self-identify as Yawuru, however I consider that through an interviewing process, these persons would be known.

[36] I am also satisfied that the persons meeting the second criterion could be determined with sufficient clarity, again, by undertaking a factual inquiry. This may involve research into the laws and customs of the Yawuru people dealing with adoption, and then a process whereby persons meeting the first criterion are interviewed regarding whether there is acceptance by the wider group of a particular individual as Yawuru. The individual would also need to be questioned as to whether they self-identify. I have already discussed above, the way in which group acceptance and self-identification have been acknowledged by the Court as crucial elements in identifying native title claim group members.[14]

[37] I consider the same approach could determine the persons meeting the third criterion. That is, a process of interviewing other Yawuru persons regarding the cultural knowledge and responsibilities held by an individual and whether they are accepted by the wider group as Yawuru. The individual could be questioned regarding whether they were born in, or have

[13] *WA v NTR* at [67].
[14] At [29] above.

long term physical association with, the application area, and further, whether they self-identify as Yawuru.

[38] The application of the fourth criterion appears straightforward in that once those satisfying the second and third criteria are known, these persons can also be known, being the descendants of those persons. Again, by interviewing those individuals, it could be determined whether they self-identify.

[39] In light of the above discussion, and the process described for determining the persons meeting each of the four criteria for the Yawuru people, I am satisfied the persons comprising the Yawuru people can be known with sufficient clarity for the purposes of s 190B(3)(b).

Nyikina people

[40] The Nyikina people are described with reference to one criterion only: that persons are the descendants of 18 named ancestors, ancestor couples or ancestor sibling groups. I consider the application of this criterion straightforward and am satisfied that through some genealogical research and factual inquiry, the persons meeting this criterion could be determined with sufficient clarity.

[41] While the description does not specify whether 'descendants' includes persons adopted by or grown up by biological descendants, in my view, further research into the traditional laws and customs of the Nyikina people would determine whether such adopted persons qualify as members of the group. It follows that I consider this description meets the requirement in s 190B(3)(b).

Conclusion

[42] As above, I have considered the descriptions set out in Schedule A of those persons comprising each of the Karajarri people, Yawuru people, and Nyikina people, and formed a view that those descriptions are sufficiently clear to allow for the identification of the members of each of those groups. Noting the description of the Birriman-gan native title claim group, comprising the Karajarri people, Yawuru people and Nyikina people, it follows I consider this description sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

[43] The requirement at s 190B(3) is met.

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

[44] 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.'

[45] To meet the requirement of this condition, the application must describe the native title rights and interests claimed clearly, and in a way that is easily understood. I am to consider, having regard to the definition in s 223(1), whether the rights and interests described have meaning as 'native title rights and interests'. I note that I have not, however, undertaken a consideration of whether each right or interest claimed satisfies that definition. My view is that is a more appropriate task at the corresponding merit condition of s 190B(6) in assessing whether the rights and interests claimed can be, prima facie, established.

[46] The description of the claimed rights and interests appears at Schedule E. The first paragraph is titled 'Native title where traditional rights are wholly recognisable', and describes a right of exclusive possession as against all others. The paragraph clarifies that this right is claimed over areas where there has been no extinguishment or where it is to be disregarded, and over areas that are not subject to a public right to fish or navigate.

[47] The second paragraph is titled 'Native title where traditional rights are partially recognisable', and describes non-exclusive rights to have access to, remain on and use the land and waters; access and take the resources of the land and waters; and, protect places, areas and things of traditional significance on the land and waters. This paragraph explains that these rights are claimed in relation to any area not covered under the first paragraph.

[48] The remaining paragraphs of Schedule E set out various qualifications on the exercise of the rights, including that they are held subject to and in accordance with the claim group's traditional laws and customs, and the laws of the Commonwealth and State of Western Australia. Paragraph [6] also clarifies that 'resources' does not include minerals, petroleum, geothermal energy or geothermal energy resources that are wholly owned by the Crown.

[49] In my view, the description is clear and the rights and interests can be easily understood as, and have meaning as, native title rights and interests. I have read the description as a whole and am satisfied there is no inherent or explicit contradiction within the terms in Schedule E. It follows that I consider the description sufficient to allow the native title rights and interests to be readily identified.

[50] The requirement at s 190B(4) is met.

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

[51] 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 assertion. In particular, there is a sufficient factual basis for the three assertions of ss 190B(5)(a)–(c).

[52] 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;[15]

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group giving rise to the claim to native title rights and interests;[16] and

(c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.[17]

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[15] Section 190B(5)(a).
[16] Section 190B(5)(b).
[17] Section 190b(5)(c).

[53] The question for this condition is whether the factual basis is sufficient to support these 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.'[18]

[54] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.[19] That is, the material must contain sufficient details addressing the particular native title claimed, by the particular native title claim group, over the particular land and waters of the application area.[20]

[55] The factual basis material appears at Schedules F and G, and in the additional material provided by the applicant directly to the Registrar on 5 July 2019.

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

[56] To meet the requirement at s 190B(5)(a), the factual basis must support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area. Generally, to satisfy this requirement:

- it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;[21]
- it is necessary that the material support an association of the group as a whole with the area, and an association of the predecessors of the whole group with the area over the period since sovereignty, or at least European settlement;[22] and
- the materials must support the association of the group presently, and of the group's predecessors, as being with the whole of the area claimed.[23]

Reasons for s 190B(5)(a)

[57] The application area sits approximately 45km south east of Broome in the Kimberley region of Western Australia. Determinations of native title have been made in favour of the three language groups comprising this Birriman-gan native title claim group on all sides of the application area. This includes the Yawuru determination (Rubibi Community, WAD6006/1998 and WAD223/2004) to the west, the Karajarri determination (WAD6100/1998) to the south, and the Nyikina determination (Nyikina Mangala, WAD6099/1998) to the east.[24]

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[18] *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].
[19] *Gudjala 2008* at [92].
[20] *Gudjala 2007* at [39].
[21] *Gudjala 2007* at [52].
[22] *Gudjala 2007* at [51]-[52].
[23] *Martin* at [23]-[26], affirmed in *Corunna* at [35]-[39] and [42]-[44].
[24] The Nyikina Mangala native title claim group comprises a wider group of persons than the Nyikina people included in the present native title claim group – see extract [5:13] from the [Anthropologist 1 removed] Report at p. 21 of the Additional Submissions.

[58] The Additional Submissions provide that sovereignty in Western Australia occurred in 1829, but that the application area did not experience the impacts of European settlement until the early to mid-1880s.[25] An extract from a report prepared by anthropologist [Anthropologist 1 removed], dated November 2018 (the [Anthropologist 1 removed] Report), included in an appendix to the Additional Submissions, states that the author's senior informants were, therefore, all born at a time only two to four generations later than predecessors who were living a 'purely hunter gatherer existence' in the area.[26]

[59] The material explains that the area subject of the application is a shared, 'cross-over' area, where members of the three language groups held rights and interests at the regional level, rather than at any local estate level.[27] In one of the [Anthropologist 1 removed] Report extracts, the anthropologist explains that all of his informants, whether Yawuru, Karajarri, or Nyikina, spoke of the application area as shared country, and from his own consideration of the earliest anthropological sources, he understands this view to derive from the situation at the time of sovereignty.[28]

[60] The basis of the association of the three language groups with the application area is said to be grounded in *bugarigara*, or the Dreaming. This fundamental belief in *bugarigara* is common to Yawuru, Karajarri, and Nyikina people, and includes belief in specific dreamings that traverse the application area. The first of these is known as [dreaming name removed], and another is called [dreaming name removed]. The material explains that [dreaming name removed] is predominantly recognised by Yawuru and Karajarri people, while all three groups practice the [text removed].[29]

[61] I understand the material to assert that the association of the three groups with the application area is largely centred around the use of, and access and travel to, two of the sites connected with these dreamings.[30] These sites are [site name removed], which I understand is located [location removed] of the application area, and [site name removed], which is situated [location removed] of the area, and is [location removed].[31] The material provides that both sites 'were important locations for ceremony shared by the three language groups',[32] and to attend such ceremonies, members of the three groups would travel through the application area.[33]

[62] This is spoken about by claimant and Karajarri man, [Name removed], in his affidavit. He states:

> …My father was born just outside of the Claim Area at [site name and location removed] … My father was born out at that place in the 1920s or 1930s, I'm not sure when. He passed away about 10 years ago now and he was in his late 70s.

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[25] At [15].
[26] Extract [5.5] at p. 19 of the Additional Submissions.
[27] Additional Submissions at [36].
[28] Extract [5.2] at p. 19 of the Additional Submissions.
[29] Additional Submissions at [20]-[21], and extract [4:33] at p. 18.
[30] Additional Submissions at [45]-[47].
[31] [Name removed] affidavit at [6] and [8].
[32] Additional Submissions at [45].
[33] Additional Submissions at [45].

> My father walked that country of the Claim Area, he walked all through there with his father, my grandfather, [Name removed], he was a Karajarri man as well. He was with him at [site name removed] when he was growing up and walked with him all around that way, in the Claim Area, hunting, camping, learning the stories of that country.
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> My father and mother knew about this place, they went out there and hunted all around there. My father would have gone out to that site out there [site name removed]. It's in [location removed] the Claim Area.[34]

[63] The material includes discussion of [Anthropologist 1 Removed]'s views of the existing anthropological material, including the earliest sources from the area, and of his research conducted with claimants from each of the three language groups. In an extract from the [Anthropologist 1 Removed] Report, the author states his conclusion that as it was a combined language group that was the society at sovereignty holding rights and interests in the application area, the native title claim group are persons descended from the persons comprising those language groups at sovereignty or settlement.[35] He subsequently sets out the description of the claim group for each of the three language groups, taken from the National Native Title Register extract for the surrounding determinations.

[64] Specifically, the anthropologist refers to the fact that the Nyikina Mangala native title claim group is a broader group of persons than the Nyikina people who form part of the present claim group. He explains that through research and assistance from a senior Nyikina Mangala claimant, he has identified the relevant Nyikina ancestors, including an additional few ancestors who the evidence suggests had associations with this application area.[36]

[65] It is therefore my understanding that the anthropologist is of the view that the ancestors listed in the particular extract for each language group are persons who the anthropological and historical materials indicate were associated with areas surrounding and including the application area. As above, I further understand that this association was largely connected to travel through the application area to attend ceremonies at [site names removed].

[66] I consider this assertion within the material is supported by the statements contained in the [Name removed] affidavit. As set out in my reasons above at [62], the claimant explains how his father and his grandfather both travelled around the sites [site names removed], including through the application area. He also explains the way they camped, hunted and shared stories of that country while on those journeys. From the claimant's statements, I understand that his grandfather would have been born around the turn of the century, only a decade or so after settlement in the area in the 1880s. Noting that his grandfather knew the stories and dreamings for that country, I consider it reasonable to infer that he was passed that knowledge by his parents and grandparents who would have been occupying and travelling through the area at the time of settlement. It follows that I consider the factual basis sufficient to support an association of the predecessors of the claim group with the application area at settlement.

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[34] At [6]-[8].
[35] Extract [5:12] at p. 20 Additional Submissions.
[36] Extract [5:13]-[5:16] at p. 21 Additional Submissions.

[67] I am also satisfied the factual basis speaks to an association of the group's predecessors with the area over the period since that time. As above, a claimant explains the way the preceding generations of his own family spent time on the application area, naming those persons and identifying them as Karajarri.[37] In addition, throughout the Additional Submissions, there is reference to various persons from each of the three language groups who took a role as informants for anthropologists working in the region across the decades following settlement. For example, an extract from the [Anthropologist 1 Removed] Report, appearing in the Additional Submissions, states that '[Anthropologist 2 Removed]'s principal informant in the early 1960s was the well-known Nyikina man, [Name removed] (dec), who was said to know best the sites along these travels of the creative beings of [dreaming name removed]'.[38] It follows that I am satisfied the factual basis is sufficient to support an association of the predecessors of the group over the period since settlement.

[68] Regarding an association of the claim group presently with the area, in his affidavit, [Name removed] describes various times spent on, and trips through, the application area with other members of the claim group. For example, he states:

> There is good hunting all through that Claim Area, my fathers were always stopping through that country and we still do today as well. I remember this time about 10 years ago, not too long ago, I went out with my dad and other Karajarri men, uncle [Name removed], [Name removed], [Name removed] and we camped out at [location removed], we danced there, did cultural activities, sung songs together. We also went to [site name removed] on that trip. Those old men had spent their whole life travelling through the Claim Area.[39]

[69] In addition, the Additional Submissions refer to a trip taken by Karajarri men in 2018 where they travelled across the application area on their way to [location removed], hunting turkey and *barni* and sourcing wood for spears.[40] A field trip taken in 2002 is also mentioned, where Karajarri, Nyangumarta, Mangala, Nyikina and Yawuru elders visited the site [site name removed].[41] In light of this information, I am satisfied the factual basis is sufficient in supporting an association of the group presently with the area.

[70] The requirement at s 190B(5)(a) is that the factual basis support an association with the entirety of the application area. As explained above, the application area is surrounded on all sides by determinations of native title in favour of the three language groups comprising the present native title claim group. Also explained above, the site [site name removed] is located [location removed] of the application area. I consider that it is reasonable to infer, therefore, that for ceremony held at [site name removed], members of each of the three groups were required to traverse across the application area from all directions, such that their paths of travel would have covered the whole of the area.

[71] In addition to this, the material notes that the application area is otherwise lacking in prominent physical features and apart from the two dreamings referred to, is relatively

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[37] At [62] of these reasons.
[38] Extract [3.2:3] at p. 13.
[39] At [22].
[40] Additional Submissions at [48].
[41] Extract [3.2:2] at p. 13.

culturally sparse.[42] It asserts, however, that rights and interests jointly held in the area by the three groups mean the claim group and its predecessors have camped, hunted, shared knowledge of dreamings on, and travelled throughout the area pursuant to the laws and customs shared by the group.[43] In light of this information before me, I am satisfied the factual basis speaks to an association of the group and its predecessors with the whole of the area.

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

[72] To meet s 190B(5)(b), the factual basis must support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group giving rise to the claim to native title rights and interests.' I note that the wording of this assertion is almost identical to paragraph (a) of the definition of 'native title rights and interests' in s 223(1). For this reason, in *Gudjala 2007*, Dowsett J considered the meaning to be applied to s 190B(5)(b) in light of the case law regarding s 223(1), particularly the leading decision of the High Court in *Yorta Yorta*.

[73] According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

(a) it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice';[44]

(b) the origins of the content of the law or custom concerned can be found in the normative rules of a society[45] which existed before the assertion of sovereignty by the Crown;[46]

(c) the normative system has had a 'continuous existence and vitality since sovereignty';[47] and

(d) the relevant society's descendants have acknowledged the laws and observed the customs since sovereignty without substantial interruption.[48]

[74] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied upon by the claim group 'have their source in a pre-sovereignty society and have been observed since that time by a continuing society.'[49] His Honour held that 'the starting point must be identification of an indigenous society at the time of sovereignty',[50] or at least European settlement, and that the material must establish a link between the native title claim group described in the application and the area covered by the application, which

[42] Additional Submissions at [46].
[43] Additional Submissions at [42].
[44] *Yorta Yorta* at [46].
[45] The term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta* at [49].
[46] *Yorta Yorta* at [46].
[47] *Yorta Yorta* at [47].
[48] *Yorta Yorta* at [87].
[49] *Gudjala 2007* at [63].
[50] *Gudjala 2007* at [66].

involves 'identifying some link between the apical ancestors and any society identified at sovereignty.'[51]

[75] I understand, however, that it is not appropriate to impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the application for the purposes of s 190B(5).[52]

Reasons for s 190B(5)(b)

[76] As above, the starting point at s 190B(5)(b) is a society of people living in accordance with shared laws and customs in the application area, at the time of settlement. The material provides that settlement in the region including the application area took place in the 1880s.[53] As set out in my reasons above at s 190B(5)(a), the material also asserts that there are two to four generations between the senior members of the claim group and the persons who occupied the area at settlement.[54]

[77] Regarding the relevant society at settlement, the material provides that it was comprised of persons belonging to three different language groups – that is, Yawuru, Karajarri and Nyikina-speaking persons. It is explained that ethnographers working in the area in the 1920s and 1930s documented the normative practices and beliefs of each of the three language groups, referring to Phyllis Kaberry in the 1930s regarding the Nyikina, A.P. Elkin in the 1920s regarding the Yawuru, and Ralph and Marjorie Piddington in the 1930s regarding the Karajarri.[55] The Additional Submissions state it is 'reasonable to assume that the informants of these early ethnographers were likely to have been born prior to – or at least near to – effective sovereignty and reflect a connection to the pre-sovereignty society.'[56]

[78] The Additional Submissions go on to describe those normative laws and customs shared by the three language groups and how these gave rise to their rights and interests in the area. Such laws and customs related to and included 'a four section moiety system regulating marriage and classificatory kinship systems, as well as shared characteristics in how one gains connection to country.'[57] These concepts are said to have all been underpinned by the 'fundamental belief in the Dreaming or *bugarigara*.'[58]

[79] Further detail regarding the shared belief in *bugarigara* is given, and the specific dreamings associated with the application area. The material states that the concept was first documented in the late 1920s, and was believed by informants to have infused the three languages into the landscape of the application area.[59] It is further noted that the word *bugarigara* for 'dreaming' is common to all three groups.[60]

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[51] *Gudjala 2007* at [66].
[52] *Stock* at [64], where His Honour held that 'it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists'.
[53] Additional Submissions at [15].
[54] Extract [5.5] at p. 19 of the Additional Submissions.
[55] Additional submissions at [17].
[56] At [17].
[57] Additional Submissions at [18].
[58] Ibid.
[59] Additional Submissions at [24]-[25].
[60] Additional Submissions at [20].

[80] The [dreaming name removed] is the main *bugarigara* relating to and passing through the application area, and it is associated with [cultural information removed] which all three groups observed and participated in.[61] The site [site name removed] is identified in the anthropological record as being the location of shared ceremony between Yawuru, Karajarri and Nyikina.[62]

[81] Regarding the four section subsection moiety system, the material explains that each of the early ethnographers recorded adherence to this system for the Yawuru, Karajarri and Nyikina, and that it not only regulated marriage practices, but also allowed for intermarriage between the three groups.[63]

[82] The material also points to the shared laws and customs between the three language groups surrounding how rights and interests in the application area arise. It is explained that the application area at settlement was shared country, where rights and interests were held at a regional level such that affiliation with one of the three language groups gave rise to rights and interests, rather than the operation of any family or estate-based tenure system. In this way, the principle of descent was key in determining affiliation with a language group.[64]

[83] The Additional Submissions also point to the way in which shared dreamings amongst the three groups underpinned their rights and responsibilities in relation to the application area.[65] The result was that no Yawuru, Karajarri or Nyikina person required permission to access, traverse, camp on or exploit the resources of the application area.[66]

[84] In light of this information before me, I am satisfied the factual basis material addresses a society in the area at settlement, comprising Yawuru, Karajarri and Nyikina-speaking persons, who shared normative laws and customs relating to dreamings, kinship systems, marriage and the inheritance of rights and interests in the application area.

[85] I am also satisfied the material explains the link between the apical ancestors named in the claim group description in Schedule A, and the society at settlement. One of the extracts from the [Anthropologist 1 Removed] Report refers to certain informants of anthropologist [Anthropologist 2 Removed], who spent time in the application area in the early 1960s. These informants included Nyikina man, Butcher Joe Nangan, and Yawuru elder Paddy Djiagween.[67] Both men are named in the native title claim group description in Schedule A, as apical ancestors for the Nyikina and Yawuru groups respectively. I understand from the material that the men were in their senior years at the time [Anthropologist 2 Removed] interviewed them.[68] I consider it reasonable to infer, therefore, that they would have been born around 1900, or perhaps the late 1890s.

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[61] Additional Submissions at [20]-[21].
[62] At [23].
[63] Additional Submissions at [26]-[27].
[64] Additional Submissions at [39]-[40].
[65] At [44].
[66] At [45].
[67] Extract [3.2:3] at p. 13 of the Additional Submissions.
[68] Extract [3.2:3] at p. 13 of the Additional Submissions.

[86] In my view, this information establishes a link between the apical ancestors named in the claim group description and the society at settlement, namely that they were persons who were born into that society only a few years or a decade after settlement took place. That is, the parents of the apical ancestors would have been members of the regional society at settlement.

[87] In addition to information about the laws and customs of the society at settlement, the material speaks about the laws and customs acknowledged and observed by the claim group presently. Noting the case law principles set out above, the focus of my consideration is whether those laws and customs can be said to be traditional. That is, whether they are laws and customs rooted in those of the society at settlement.

[88] Schedule F states that 'laws and customs have been passed down from older generations to younger generations by traditional teaching, through the generations of persons comprising the native title claim group preceding the present generations to the present generations'. An example of the way in which laws and customs relating to country have been transferred down through the generations is given in the [Name removed] affidavit where the deponent states:

> My father went out to this place [site name removed] more recently as well for the native title stuff, for the original Karajarri claims. My father and my father's brother, [Name removed], they were leading the Karajarri native title claim back then, I knew about this Claim Area from them, we travelled through it but I wondered why we didn't keep going with our Karajarri claim in that area. They wanted to talk to those other two groups, to Yawuru and Nyikina about the Claim Area because they come in there as well. Nyikina and Yawuru got dreaming for this Claim Area as well as Karajarri. Those old men knew it was shared country so we didn't go further with that claim just for Karajarri people. They have passed away now but we carry that on now, we know it is shared country.[69]

[89] I note the claimant discusses one of the aspects of the laws and customs of the society at settlement described by the material, being the land tenure system whereby rights and interests in the area are shared between the three language groups. From the claimant's statement I understand that this knowledge regarding how rights and interests are held has been passed down to the members of the claim group by their predecessors.

[90] Another aspect of the laws and customs of the society at settlement that the material describes in a contemporary context is travel across the application area for the purposes of attending ceremony. The Additional Submissions explain that today, Karajarri people travel across the application area on their way to a site in [location removed], where they participate in corroboree. The material states that '[t]his travel across the country represents a contemporary incarnation of the historical travelling through the subject land to attend ceremony'.[70]

[91] Yet another example of an aspect of the laws and customs of the society at settlement that can be seen in operation among members of the claim group is the on-going significance of

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[69] At [9].
[70] At [48].

the site [site name removed], and the dreamings associated with the site. From the material, I understand that claimants from each of the three language groups have knowledge of the site and the [dreaming name removed] dreaming attached to it.[71] The [Name removed] affidavit also refers to the knowledge the claimant's father had of the site, which it is implied was passed down to him by his own father, the claimant's grandfather.[72]

[92] In my view, these examples support an assertion that the current laws and customs of the claim group are derived from and rooted in those of the society at settlement. For this reason, and noting the description within the material of the way in which laws and customs have been handed down through the preceding generations to the members of the claim group, I am satisfied that the factual basis is sufficient to support the existence of traditional laws acknowledged and traditional customs observed, by the native title claim group giving rise to the claim to native title.

[93] The requirement at s 190B(5)(b) is met.

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

[94] To meet s 190B(5)(c), the factual basis must support an assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.' In *Gudjala 2007*, Dowsett J suggested the factual basis may need to address the following in order to satisfy this requirement:

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.[73]

[95] I have already explained above at s 190B(5)(b), the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at settlement in the area, acknowledging and observing shared laws and customs. I have also explained my reasons for finding the factual basis sufficient in supporting a system of traditional laws and customs, that is, a system of laws and customs of the claim group today that is rooted in the system at settlement.

[96] Subsequently, my focus here is whether there has been continuity in the acknowledgment and observance of those traditional laws and customs over the period since settlement, without substantial interruption. In my view, the material is sufficient in supporting an assertion of continuity. As explained above at s 190B(5)(b), there is information before me about laws and customs being handed down through the generations,[74] and also information about how those laws and customs are acknowledged and observed by members of the claim group in the same way their predecessors at settlement acknowledged and observed them.[75]

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[71] Extract [3.5:8] at p. 16 of the Additional Submissions.
[72] At [7]-[8].
[73] At [82].
[74] See at [88] of these reasons above.
[75] At [89]-[92] of these reasons above.

[97] An example of this material is in the [Name removed] affidavit. The deponent speaks about one of the aspects of the system of traditional laws and customs discussed in my reasons at s 190B(5)(b) above,[76] that is, the way rights and interests in the application area are shared between the three language groups. [Name removed] describes how this aspect of the system of traditional laws and customs was observed by his predecessors during the years since settlement, and how it continues to be acknowledged and observed by members of the claim group today.[77] I consider that this information speaks to how laws and customs have been acknowledged and observed in a substantially uninterrupted manner since settlement.

[98] In light of this material before me, I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title in accordance with the traditional laws and customs set out in the material that answers the requirement at s 190B(5)(b).

[99] The requirement of s 190B(5)(c) is met.

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

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

[101] 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 *Doepel* in relation to this condition:

- it requires some measure of the material available in support of the claim;[78]
- it appears to impose a more onerous test to be applied to each of the individual rights and interests claimed, as compared with s 190B(5);[79]
- the use of the words 'prima facie' mean '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.'[80]

[102] Noting the definition of 'native title rights and interests' in s 223(1) of the Act, in order for me to consider a right or interest prima facie established, it must be shown to be a right or interest that is:

(a) possessed under the traditional laws and customs of the native title claim group;[81]

(b) a right or interest in relation to the land or waters of the application area;[82]

(c) not extinguished in relation to the entirety of the application area.[83]

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[76] At [82].
[77] [Name removed] affidavit at [9], excerpted in these reasons at [88].
[78] *Doepel* at [126].
[79] *Doepel* at [132].
[80] *Doepel* at [135].
[81] Section 223(1)(a).
[82] Section 223(1)(b).
[83] Section 223(1)(c).

Exclusive possession

[103] The nature of a right of exclusive possession was discussed in *Ward HC*, where the High Court held that:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.[84]

[104] Since *Ward HC*, there have been a number of cases that have also considered the substance of such a right. From these cases, the following principles have emerged:

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others;[85]
- the right cannot be formally classified as proprietary – its existence depends on what the evidence discloses about its content under traditional law and custom;[86] and
- the material must speak to how, pursuant to their laws and customs, the group is able to 'exclude from their country people not of their community', acting as 'gatekeepers for the purpose of preventing harm and avoiding injury to country.'[87]

[105] In my view, the material before me speaks to a right of this nature. In the Additional Submissions, it is explained that '[t]here is no evidence indicating that anyone other than the members of each of these three language groups has ever had a connection to or association with the Application Area.'[88] The Additional Submissions also refer to the [Name removed] affidavit 'which identifies that other people do not know the traditional laws and customs for the Application Area and accordingly have no right to access or use the Application Area'.[89]

[106] I consider the statements in the [Name removed] affidavit describe various aspects of a right of exclusive possession. The deponent states:

> If people wanted to travel out to that country where the Claim Area is, like *kardiya* or if they were Walmajarri, Jaru, something else, they would have to ask permission to go through the Claim Area. You always have to ask permission if you're going through someone else's country. The Claim Area is shared, so we don't ask permission from Yawuru and Nyikina if we're going out there and they wouldn't ask our permission either. We might let each other know though, tell them that we going out to that place, that cross-over country, to make sure people are informed.
>
> It's very different if someone else wanted to go through there who wasn't Yawuru, Nyikina or Karajarri. Only those three groups have *bugarigara* story for the Claim Area, we share ceremony on that country, we've inter-married there, it's our place together. It wouldn't be right for other people to just go there without permission.

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[84] At [88].
[85] *Sampi* at [1072].
[86] *Griffiths* at [71].
[87] *Griffiths* at [127].
[88] At [39].
[89] At [38].

> If you go out to that country where the Claim Area is and you don't know that country, something might happen to you, you always have to have the rightful people there. If you don't blow in that *jila* you might make the *pulany* angry, might smell them big rain might come down or might punish the people who didn't follow the rules, in Karajarri culture, we have to respect that and respect that place. You need to blow in that *jila* to let the *pulany* know that you are there. That is the custom for Karajarri, Yawuru and Nyikina. Other people don't know that they need to come to us before going there.[90]

[107] From this information, I understand that the claimants adhere to particular processes in relation to others (and themselves) accessing the application area. That is, strangers are required to seek the permission of Karajarri, Yawuru or Nyikina people before they enter the area. In my view, this speaks to the way claimants make decisions about access to the area by persons external to the group. I further understand that this process is grounded in a belief that harm may come to persons who enter the area and do not follow particular rituals aimed at appeasing the spirits occupying the landscape. In this way, I consider the information speaks to the way in which the claimants act as 'gatekeepers for the purpose of preventing harm'.[91]

[108] Noting the descriptions of the particular processes and rituals that must be followed by strangers to country in the application area, adhered to by claimants, I consider the material addresses the content of the right pursuant to the traditional laws and customs of the claim group.

[109] It follows that I consider the right to exclusive possession established on a prima facie basis.

Non-exclusive right to have access to, remain on and use the land and waters

[110] I consider the right established on a prima facie basis. An example of the material before me which addresses this right is the following statement by a member of the claim group:

> My father, his name was the same as my name, I call him [Name removed] now. My mother, I call her [Name removed]. I am a Karajarri person through them. My father was born just outside of the Claim Area at [site name removed] which is [location removed]… My father was born out at that place in the 1920s or 1930s, I'm not sure when. He passed away about 10 years ago now and he was in his late 70s.
>
> My father walked that country of the Claim Area, he walked all through there with his father, my grandfather, [Name removed], he was a Karajarri man as well. He was with him at [site name removed] when he was growing up and walked with him all around that way, in the Claim Area, hunting, camping, learning the stories of that country.[92]

[111] From this information, and noting that above I considered a right of the claim group to exclusive possession established on a prima facie basis, I understand that claimants and their predecessors have, since around the time of settlement, enjoyed free access to and use of the application area, including walking and camping throughout the area.

[90] At [17]-[19].
[91] *Griffiths* at [127].
[92] [Name removed] affidavit at [6]-[7].

[112] Therefore, I consider the right to have access to, remain on and use the land and waters established on a prima facie basis.

Non-exclusive right to access and take the resources of the land and waters

[113] I consider the right established on a prima facie basis. An example of the material before me which addresses this right is the following statement by a member of the claim group:

> There is plenty of bush medicine out in this country that people go and get all the time. Our main bush medicine *bantaraku*, is all through the Claim Area. You can use it for sores, drink it for cough, use it for medicine. Our women go out there and grab it from all over country, grab it from the Claim Area and turn it into ointment. Just last week I saw [Name removed] and [Name removed] selling foot balm made from that bush medicine at the markets here in Broome. The women are always heading out there to grab it. What they do is grab the bark and boil it and it comes out really red and then they turn that into balms, ointments all sorts of things. They get that in the Claim Area, there's a lot of it out there.[93]

[114] Elsewhere the claimant says:

> Because we know the *bugarigara* for the Claim Area, it gives us rights in that country. Rights like keeping tourists away and other people who don't ask permission from any of the three groups. We also have rights to use that country, use the resources, take the resources and sell them or take them just for ourselves.[94]

[115] Again, noting that I consider a right of exclusive possession established on a prima facie basis, it follows that in the excerpt above, a member of the claim group expresses a right to take and use the resources of the application area. In this way, I consider the material speaks specifically to the way in which members of the claim group and their predecessors have taken and used the area's resources.[95]

[116] Therefore, I consider the right to access and take the resources of the application area established on a prima facie basis.

Non-exclusive right to protect places, areas and things of traditional significance on the land and waters

[117] I consider the right established on a prima facie basis. An example of the material before me which addresses this right is the following statement by a member of the claim group:

> This land is important to us and important to our law. We need to keep the Claim Area protected. Us Karajarri law bosses, like [Name removed], [Name removed], [Name removed], [Name removed], [Name removed], [Name removed], [Name removed] I could go on and name them all, we need to work with Nyikina and Yawuru law bosses as well to make sure our law continues to run through the Claim Area. People like [Name removed] and [Name removed], they are in this Claim Area and know the stories as well, they're important for the Claim Area and for all Karajarri and Nyikina people.[96]

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93 [Name removed] affidavit at [27].
94 At [14].
95 See [Name removed] affidavit at [26].
96 [Name removed] affidavit at [16].

[118] From this statement, I understand that the claimant believes protecting the application area and the law and stories that run through the area to be his obligation under his laws and customs, and that he shares this understanding with other prominent members of the claim group. I consider I can infer that he has been taught about this obligation by his elders.

[119] In light of this information before me, I consider the right to protect places, areas and things of traditional significance established on a prima facie basis.

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

[120] I am 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. Having considered the material before me, I am satisfied that [Name removed] has a traditional physical connection with some part of the application area.

[121] 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.'

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

- the material must satisfy the delegate of particular facts and therefore evidentiary material is required;[97]
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the application area;[98]
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;[99]
- the material may need to address an actual presence on the area.[100]

[123] Noting the wording of s 190B(7), I have focused my attention on one member of the claim group, namely [Name removed]. The material provides the following information about [Name removed]:

- he knows the application area very well and he goes out there often;[101]
- he travels through the application area to get to Karajarri country – in order to participate in ceremony, and to look after places on his country;[102]
- he went through the area with his father and his uncle, when the Karajarri native title claim was on foot;[103]
- he knows the stories and dreamings that pass through the application area;[104]

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[97] *Doepel* at [18].
[98] Ibid.
[99] *Gudjala 2007* at [89].
[100] *Yorta Yorta* at [184].
[101] [Name removed] affidavit at [4].
[102] At [5].
[103] At [9].
[104] At [10]-[12].

- he went out on the area last year with some rangers and hunted turkey;[105]
- he also went out there recently with his son and used a boomerang to catch a turkey;[106]
- there are regular cultural activities in [location removed] that he participates in, and he travels through the application area to attend those activities.[107]

[124] From this, I consider it clear that [Name removed] has spent time within the application area, and that he has a physical connection with it. I also consider that the physical connection is a traditional one. That is, it is a connection pursuant to the traditional laws and customs of the native title claim group. This is because the material describes the knowledge [Name removed] has of the dreamings that run through the application area, and how he went through the area with his father and other senior men, during which time I understand he was taught this information. In my reasons at s 190B(5)(b) above, I explain the way the material asserts the shared dreamings of the three language groups to be a key aspect of the system of laws and customs acknowledged and observed by the claim group.[108]

[125] It follows that I am satisfied at least one member of the claim group currently has or previously had, a traditional physical connection with part of the application area.

[126] The requirement at s 190B(7) is met.

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

[127] In my view the application does not offend any of the provisions of ss 61A(1)–(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	**Information addressing requirement**	**Result**
Section 61A(1) No native title determination application if approved determination of native title	Geospatial report	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraph [2]	Met
Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule E, paragraph [1]	Met

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

[128] In my view the application does not offend any of the provisions of ss 190B(9)(a)–(c) and therefore the application meets the condition of s 190B(9):

[105] At [23].
[106] At [24].
[107] At [32].
[108] At [91] above.

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 2(e)	Met

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

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

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

[130] 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. This condition does not require any merit or qualitative assessment of the material to be undertaken.[109]

Section 61

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

Section	Details	Form 1	Result
s 61(1)	Applicant authorised by the native title claim group	Schedule A, Attachment R	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 62

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

Section 62(1)(a)

[133] I note the application is not accompanied by the affidavits sworn by the applicant persons referred to in s 62(1)(a). While the Additional Submissions state that the information within should be considered along with other specified materials ‘which have been provided to the Native Title Registrar’,[110] and include the s 62 affidavits ‘as filed in the Birriman-gan

[109] *Doepel* [16], [35]–[39].
[110] At [7].

proceedings in the Court on 22 November 2018',[111] copies of these affidavits were not filed with the amended application.

[134] In my view, however, this is not fatal to the application. In *Drury*, the Court considered whether the filing of fresh affidavits by the applicant persons was required for an amended application. In that case, the amendment of the application involved a reduction of the claim area, and the Court found that the filing of fresh affidavits would be 'a pointless bureaucratic imposition'[112] and that s 62 does not, 'either expressly or by implication, convey a requirement that fresh affidavits have to be filed on the occasion of every amendment.'[113]

[135] The Court did, however, point to circumstances where the filing of fresh affidavits may be required, and I note that one such example was where two applications are combined and the pre-combined applications do not have the same applicants.[114] For the combined application before me, the applicant persons are the same applicant persons who appear in the entry on the Schedule of Native Title Determination Applications for the previous, pre-combined Birriman-gan application. The entry on the Register for the pre-combined Karajarri Yanja application names three persons as the applicant, however none of those persons is named as an applicant for the current application.

[136] While this appears to be a scenario where the Court may require fresh affidavits, my understanding of the finding of French J in *Drury* is that, regardless of the circumstances, any demand that the applicant file fresh affidavits is a matter for the Court. His Honour held:

> …These examples are not proposed as necessary conditions of the classes of amendment mentioned. They are ultimately within the discretion of the Court. However, advisors to applicants seeking amendment of the application should consider these matters in determining what material to submit in support of the proposed amendment.[115]

[137] I have before me the orders of the Court of 24 May 2019 regarding the combining of the Birriman-gan application and the Karajarri Yanja application. Specifically, those orders provide that 'the applicant be given leave to amend the Birriman-gan application by replacing it with the amended application titled "Amended native title determination application for the Birriman-gan Native Title Claim" annexed to the affidavit of [Name removed] of 3 May 2019 and labelled "AR-8" (**the Amended Application**).'

[138] From this, I understand that the Court has considered the substance and contents of the amended application prior to it being filed in the Court, and has not made any orders requiring the applicant to file fresh s 62(1)(a) affidavits. On that basis, I do not consider that in applying the conditions of the registration test, I can impose such a requirement.

[139] It follows that I consider this requirement met.

[111] At [7].
[112] At [13].
[113] At [11].
[114] At [14].
[115] At [14].

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Comments above	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule 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 met

[140] I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

[141] 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***[116]) was a member of a native title claim group for any previous application.' To be a 'previous application':

1. the application must overlap the current application in whole or part;[117]

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;[118] 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.[119]

[142] It is only where there is an application satisfying all three criteria set out in ss 190C(3)(a), (b) and (c), that the requirement for me to consider the possibility of common claimants is triggered.[120]

[143] The geospatial report provides there is one application overlapping part of the current application that currently appears in an entry on the Register, namely the Karajarri People application (WAD17/2019). I note that the orders of the Court granting leave to amend the Birriman-gan application so as to combine it with the Karajarri application refers to the latter application as the 'Karajarri Yanja' application, while the geospatial report refers to the 'Karajarri People' application. The Federal Court application number for these applications is, however, identical (WAD17/2019), and on that basis I accept that each term refers to the

116 Emphasis in original.
117 Section 190C(3)(a).
118 Section 190C(3)(b).
119 Section 190C(3)(c).
120 *Strickland FC* at [9].

same application. For consistency with the materials in the current amended application before me, I have used ‘Karajarri Yanja’ to refer to the application.

[144] From my own searches of the Tribunal’s databases, I have confirmed the Karajarri Yanja application was entered onto the Register in November 2012 following its consideration pursuant to s 190A(6), and has remained on the Register since that time. Therefore, it appears to meet the definition of a ‘previous application’ pursuant to s 190C(3).

[145] As set out in the Background above, the Court has made orders combining the Karajarri Yanja application with the Birriman-gan application, by way of amendment to the Birriman-gan application as the lead application. This is the amended application before me.

[146] Noting that the claim group description for the combined application before me includes those persons identifying as Karajarri people, on a plain reading of s 190C(3), I understand that the application would fail. However, I do not consider that s 190C(3) was intended to operate to prevent the registration of amended applications. As the current application, in fact, combines the underlying Karajarri Yanja application with the underlying (unregistered) Birriman-gan application, in my view, the previous application and the current application are one in the same. This is supported by the fact that upon registration of this amended application, the entry on the Register for the previous Karajarri Yanju application will cease to exist.

[147] On that basis, I do not consider there is a previous overlapping application that triggers the requirement for me to consider common claimants between claim groups.

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

[148] I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

[149] To meet s 190C(4), the Registrar must be satisfied:

> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or
>
> (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.

[150] Schedule R states that the application has been certified by the Kimberley Land Council (the KLC) and the certificate appears at Attachment R. It follows that at this condition, I must be satisfied that:

> (a) the Kimberley Land Council is an appropriate representative body that can certify the application; and

(b) the certificate complies with the requirements set out in s 203BE(4).[121]

Is there an appropriate representative body able to certify the application?

[151] The geospatial report confirms that the KLC is the only representative body in relation to the application area. The certificate at Attachment R contains the following statement:

> Certified by [Name removed], Chief Executive Officer and Director, Kimberley Land Council Aboriginal Corporation (representative body for the Kimberley area, pursuant to *Native Title (Recognition as Representative Body – Kimberley Land Council) Instrument 2018* dated 21 June 2018.

[152] From this information, and confirmed through my consideration of the Tribunal's National Representative Aboriginal and Torres Strait Islander Body map, I understand the KLC is a recognised representative body pursuant to s 203AD(1). This means the KLC is charged to perform all of the functions of a representative body, including the function of certifying native title determination applications set out in s 203BE(1)(a). It follows that I am satisfied the KLC is an appropriate representative body that can certify the application.

Does the certificate comply with s 203BE(4)?

[153] 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).

[154] As above, section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)-(b) have been met.

[155] 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.

[156] Section 203BE(3)(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.

[157] I have considered the contents of the certificate at Attachment R and am satisfied it contains the required statements. The certificate complies with s 203BE(4)(a).

[158] Addressing the requirement at s 203BE(4)(b), under the heading 'Reasons for Opinion pursuant to section 203BE(2)(a) and (b) NTA', the certificate sets out the following information:

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[121] *Doepel* at [78]-[81].

- at the authorisation meeting for the application held in Broome on 21 November 2018, the members of the native title claim group confirmed they do not have a mandatory traditional decision-making process for the purposes of decisions of this kind;

- the claim group agreed by consensus that decisions would be made by consensus of the three language groups (Yawuru, Nyikina and Karajarri);

- using that process, the claim group passed resolutions authorising the applicant to make the application and deal with matters arising in relation to it.

[159] In my view, this information is sufficient in 'briefly setting out' the representative body's reasons for being of the opinion stated. The certificate complies with s 203BE(4)(b).

[160] 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).

[161] 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 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.

[162] As discussed above at s 190C(3), there are two applications as per the Schedule of Native Title Determination Applications that overlap with the current application, however these are the two applications that have been combined to form the amended application before me. It follows that there are no overlapping applications by competing claim groups, such that s 203BE(3), and subsequently s 203BE(4)(c), are not applicable. The certificate complies with s 203BE(4)(c).

Implications of the Quall decision

[163] As above, the certificate includes a statement that the application is certified by, and it has been signed by, the Chief Executive Officer and Director of the KLC, [Name removed]. Noting the potential implications of the Full Federal Court's decision in *Quall*,[122] I caused the Senior Officer to contact the applicant seeking clarification of the basis upon which Mr Nolan's signature and the statement in the certificate could be accepted that it was, in fact, the KLC who had certified the application.

[164] On 25 June 2019, the applicant responded. I have summarised the applicant's submissions below:

- the *Quall* decision distinguishes between a delegate who purports to act in the name of a principal, and an agent who may properly act under the name of the principal;

[122] In *Quall*, the Full Federal Court held that the provisions of the Native Title Act 1993 (Cth) did not permit the representative body to delegate the performance of its functions to its staff – see at [135].

- the principle of agency allows an agent to act in the principal's name, while a delegate who purports to do so is acting invalidly;
- the KLC is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act);
- section 274-1 of the CATSI Act provides that:

> (1) The business of an Aboriginal and Torres Strait Islander corporation is to be managed by or under the direction of the directors.
>
> (2) The directors may exercise all the powers of the corporation except any powers that this Act or the corporation's constitution requires the corporation to exercise in general meeting.

- the effect of this rule is that the directors of the KLC may exercise the certification function of the KLC as a representative body;
- further, rule 9.5 of the KLC's Constitution provides that '[t]he Directors may by resolution delegate any of their powers to [a director or employee of the KLC, among other persons]', and '[t]he exercise of power by a delegate is as effective as if the Directors had exercised it';
- on 30 May 2019, the directors of the KLC resolved to delegate the certification functions of the KLC to [Name removed];
- as the Court only considered in *Quall* an implied delegation under the *Native Title Act*, this rule means the actual delegation to [Name removed] under the Constitution is effective and 'results in a decision by the KLC.'

[165] From this information, I understand the applicant puts forward two arguments as to why the certificate at Attachment R is sufficient in addressing the issues raised by the *Quall* decision. Firstly, under the CATSI Act, by way of the principle of agency, the Directors of the KLC are able to exercise the powers of the representative body (including the certification of applications), as the KLC. Subsequently, I accept this to be an assertion that the statements of opinion contained in the certificate are those of the KLC rather than [Name removed]'s personal opinions.

[166] Secondly, the applicant submits that notwithstanding the agency principle, there has been an actual delegation by the KLC of its power to certify the application. This occurred on 30 May 2019 by way of resolution of the KLC Directors in accordance with rule 9.5 of the KLC's Constitution.

[167] I have considered these submissions by the applicant and, in the absence of any contrary submissions from the state, I am satisfied they address the potential implications of the *Quall* decision for the particular certificate before me. I note the emphasis within the case law regarding the task at s 190C(4)(a), that the delegate is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and

‘revisit’ or ‘consider the correctness of the certification’.[123] In these circumstances, the applicant has provided me with relevant and detailed information regarding the certificate’s validity in light of *Quall*, and on that basis, I consider I can be satisfied of the fact of certification.

[168] It follows that I am satisfied the KLC has certified the application through [Name removed], a Director, acting as agent for the representative body, and by way of an effective delegation from the remaining Directors given on 30 May 2019.

[169] In light of this view, and the conclusions reached above regarding the KLC being an appropriate representative body to certify and the certificate complying with s 203BE(4), the requirement at s 190C(4)(a) is met.

End of reasons

[123] *Doepel* at [78]-[82].

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Birriman-gan
NNTT No.	WC2019/007
Federal Court of Australia No.	WAD541/2018

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) 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:

6 June 2019

Date application entered on Register:

7 August 2019

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]

____

Heidi Evans

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.