National Native Title Tribunal

Registration Decision

Application name	Marlinyu Ghoorlie
Name of applicant	Brian Champion Snr, Henry Richard Dimer (Kunjilli), Maxine Patricia Dimer (Nyunyi), Raelene Peel, James Champion, Darren Indich, Simon Champion
Federal Court of Australia No.	WAD647/2017
NNTT No.	WC2017/007
Date of Decision	28 March 2019
Date of Reasons	4 April 2019

Claim accepted for registration

I have decided that the claim in the Marlinyu Ghoorlie application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth).[1] Therefore the claim must be accepted for registration.

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Heidi Evans

Delegate of the Native Title Registrar[2]

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

[2] Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 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*)

Griffiths v Northern Territory [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*)

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

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 *(Lawson)*

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)*

Noble v Mundraby [2005] FCAFC 212 (*Noble*)

Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

Risk v National Native Title Tribunal [2000] FCA 1589 (*Risk*)

Sampi v State of 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*)

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

Strickland v State of Western Australia [2015] FCA 914 (*Strickland v WA*)

Ward v Northern Territory [2002] FCA 171 *(Ward)*

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] The application was first made on 22 December 2017. Due to fatal flaws with the application, it was amended on 9 May 2018 before being considered by a delegate of the Registrar pursuant to s 190A. On 3 August 2018, I decided that the application did not meet the requirements of the registration test. The applicant sought a reconsideration of that decision on 6 September 2018 and, on 16 October 2018, a Member of the National Native Title Tribunal (the Tribunal) similarly found that the application did not meet all of the conditions of the registration test. The applicant amended the application on 11 December 2018 and this is the application before me.

[2] The amended application has been filed on behalf of the Marlinyu Ghoorlie native title claim group. It covers approximately 98,000 square kilometres of land and waters in the vicinity of Southern Cross and Kalgoorlie-Boulder in the western part of the Goldfields region of Western Australia. The Great Eastern Highway runs through the southern part of the application area. I

note that there has been no change in the application area as compared to the previous application filed in May 2018.

[3] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 12 December 2018 pursuant to s 64(4) of the Act.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. This is because those provisions only apply where an order of the Court has been made pursuant to s 87A regarding the amendment, or where the previous application appears in an entry on the Register of Native Title Claims. This matter does not involve either of these circumstances.

[5] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.[3] If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.[4]

[6] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

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 the following documents provided by the applicant, or referred to by the applicant and already in the Registrar's possession, on 6 January and 25 February 2019: [5]

1. Letter of 6 January 2019 from [Name removed] to Tribunal Senior Officer – Applications;
2. Document, 'Further Information and Submissions in Support of Registration', dated 1 June 2018;
3. Document, 'Information and Submissions in Response to Submissions of [Name removed]', dated 11 July 2018;
4. Affidavit of [Deponent 1 removed], affirmed 1 June 2018;
5. Affidavit of [Deponent 2 removed], affirmed 29 May 2018;
6. Unsigned statement of [Name removed];
7. Document titled, 'Kalamaia Kalaako Kapurn Nation Stories', by [Name removed] and [Name removed];
8. Genealogical manuscript, titled 'Southern Cross (Karratjibbin)', by Daisy Bates;
9. Copy of death certificate for [Name removed] from the Registry of Birth, Deaths and Marriages Perth;
10. Native Welfare record issued by the Southern Cross Police Station, dated 5 August 1909;

[3] See s 190A(6).
[4] See s 190A(6B).
[5] See s 190A(3)(a).

11. Native Welfare record issued by the Colonial Secretary's Department – Aborigines and Fisheries, dated 6 August 1909;
12. Document, 'Descendants of Nellie', undated;
13. Document, 'Descendants of Kadee and Warada', undated;
14. Affidavit of [Anthropologist removed], affirmed 18 September 2018;
15. Unsigned statement of [Name removed] (Attachment M to the previous application);
16. Letter of 25 February 2019 from [Name removed] to Tribunal Senior Officer – Applications;
17. "Key Sites Distribution Map";
18. Legend to the Key Sites Distribution Map;
19. Letter of 25 February 2019 from anthropologist [Anthropologist removed] to [Name removed]; and
20. Settled unsigned affidavit of [Deponent 3].

[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.[6]

[10] The State of Western Australia (the State) has provided submissions regarding the additional material and the application of the registration test[7] on 12 March 2019.

[11] I have 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 14 December 2018 (the geospatial report).

[12] As above, I may have regard to such other information as I consider appropriate. On 16 January 2019, the Registrar received from [Name removed], a letter (dated 16 December 2018) expressing [Name removed]'s views on the application. On 19 February 2019, a letter was received from [Name removed], also expressing her views on the application. Further, on 13 March 2019, [Name removed] made submissions (dated 11 March 2019) to the Registrar about the application. I have had regard to these pieces of correspondence in making this registration decision.

[13] I have also had regard to the response of the applicant to the adverse material provided by [Name removed], [Name removed], [Name removed] and the State, which was provided on 21 March 2019.

[14] I also considered it appropriate to have regard to the Reconsideration decision of Tribunal Member, Ms Helen Shurven, dated 16 October 2018, in relation to my decision of 3 August 2018 that the previous application not be accepted for registration.

Procedural fairness

[15] As noted above, I have considered the additional material provided by the applicant on 6 January 2019, and on 25 February 2019. On 5 March 2019, the Tribunal's Senior Officer for the matter wrote to the State advising that I would be relying on this information in my

[6] See s 190A(3)(b).
[7] See s 190A(3)(c).

application of the registration test and that should they wish to make any submissions, they should do so by 12 March 2019. On 12 March 2019, the State provided submissions in relation to the application and the additional material.

[16] On 14 March 2019, the applicant was provided with a copy of the State's submissions and a copy of the correspondence from [Name removed], [Name removed] and [Name removed]. The applicant provided a response on 21 March 2019. I did not consider that this response raised any new issue requiring further comment from the parties in the procedural fairness process, and as such, the response was not provided to the State.

[17] This concluded the procedural fairness process.

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

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

[18] 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.

What is required to meet this condition?

[19] 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]

Does the information about the external boundary meet this condition?

[20] Schedule B refers to Attachment B, which is a written description of the external boundary of the application area. It is a metes and bounds description prepared by the Tribunals' Geospatial Services on 7 November 2017, referring to the boundaries of native title determination applications, lot on plans, roads, other reserves, town sites, lake shorelines and coordinate points.

[21] Two maps showing the external boundary of the application area are contained in Attachment C. One of these is the map that accompanied the previous application. Both maps are labelled 'Marlinyu Ghoorlie' and were prepared by the Tribunal's Geospatial Services on 7 November 2017. They include:

- the application area depicted with bold dark blue outline;
- tenure;
- towns, labelled;

[8] *Doepel* at [122].

- scalebar and coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[22] The geospatial report concludes that the description and maps are consistent and identify the application area with reasonable certainty. Having considered the information before me about the area, I agree with the assessment.

Does the information about excluded areas meet this condition?

[23] Schedule B also describes those areas within the external boundary that are excluded from the application area, by way of a list of general exclusion clauses. This method of describing excluded areas is sufficient to satisfy the requirement at s 190B(2).[9]

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

[24] I am satisfied the claim meets the requirements of s 190B(3)(b).

What is required to meet this condition?

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

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

[26] The only question for this condition is 'whether the application enables the reliable identification of persons in the native title claim group': whether the claim has been made on behalf of the correct native title claim group is not relevant.[10]

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

[27] The description of the persons comprising the native title claim group in Schedule A is sufficiently clear so that it can be ascertained whether any particular person is in that group.

[28] My understanding of the description in Schedule A is that there is only one criterion that an individual must satisfy in order to qualify as a member of the group. That is, a person must be a descendant of one of three apical ancestors: Nellie Champion, Kadee and Warada.

[29] It is clear that ascertaining who the group members are would take some research, or factual 'inquiry' (for example by consideration of genealogies and family trees), however I do not consider that this prevents the description from being sufficiently clear.[11]

[30] I note that the description does not specify whether the group includes persons descended by means of adoption, or whether only biological descendants are included. However, I am satisfied that through a process of conducting research into the laws and customs of the group, it could be determined whether descent by adoption is an acceptable qualification for group membership, and from this, that the members of the group could be ascertained.

[9] *Strickland* at [50] to [55].
[10] *Doepel* at [51] and [37]; *Gudjala 2007* at [33].
[11] *WA v NTR* at [67].

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

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

What is required to meet this condition?

[32] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the application's description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.[12]

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

[33] The description of the native title rights and interests claimed by the native title claim group in Attachment E is clear and the rights claimed are understandable as native title rights and interests.

[34] The first and second paragraphs of Attachment E are headed 'Native title where traditional rights are wholly recognisable'. They describe a right of possession, occupation, use and enjoyment to the exclusion of all others, explaining that the claim to this right only applies to parts of the claim area where there has been no extinguishment of native title or where extinguishment is to be disregarded, and that it is not claimed over parts of the claim area subject to the public right to fish or navigate. It is also explained that, in relation to flowing and underground waters, the applicant claims the right to use and enjoy those waters, including the right to hunt on and fish from, and take and use those waters.

[35] The third and fourth paragraphs of Attachment E are headed, 'Native title where traditional rights are partially recognisable', and explain that the rights described here apply where the exclusive rights above do not apply. The rights described are non-exclusive and include the right to live and remain on the area, to hunt, fish and gather the traditional resources of the area, to take and use water on the area, and to engage in cultural activities including the transmission of knowledge on the area.

[36] I have read the contents of Attachment E, including the stated qualifications or limitations on the rights, and am satisfied there is no inherent or explicit contradiction in that description. I consider that it is clear, and with reference to s 223(1) of the Act, the rights described can be understood as native title rights and interests.

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

[37] 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 subsections 190B(5)(a), (b) and (c).

[12] *Doepel* at [99] and [123].

What is required to meet this condition?

[38] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is a 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 the native title rights and interests; and
(c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[39] 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'.[13]

[40] 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'.[14]

[41] To satisfy the condition, 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.[15]

[42] Relying on the statements contained in the affidavits affirmed by the applicant persons pursuant to s 62(1)(a) that accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true.[16]

[43] The factual basis material appears in Schedules F, G, Attachment M to Schedule M, and in the additional material supplied by the applicant directly to the Registrar for the purposes of the registration test, set out above at 'Information considered'.[17]

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

[44] 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;[18]

[13] *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].
[14] *Gudjala 2008* at [92].
[15] *Gudjala 2007* at [39].
[16] *Gudjala 2008* at [91] to [92].
[17] At [7].
[18] *Gudjala 2007* at [52].

- it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;[19] and
- the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.[20]

Is there a sufficient factual basis for the requirement at s 190B(5)(a)?

[45] The factual basis is sufficient to support an assertion that the claim group have, and its predecessors had, an association with the land and waters of the application area.

[46] The material explains it was in the 1830s that the first explorers and surveyors came to the region including the application area,[21] but that settlement did not take place until the gold rush of the 1890s.[22] From the material before me, I understand that the native title claim group are the Kalamaia Kalaako Kapurn people, who are essentially two dialect groups of the wider 'Gubrun' or Kapurn-speaking people, who shared similar laws and customs.[23] The material includes a number of anthropological and linguistic maps. Having considered these maps and the boundaries of the country they depict as being the traditional country of the Kalamaia and/or Kalaako people, I consider they generally support an assertion that these dialect groups were associated with the land and waters of the application area.

[47] Contextual information addressing the nature of the association of the predecessors of the group with the area is provided, explaining that:

- The physical environment of the region meant that the northern parts of the application area were less frequently inhabited due to the lack of availability of fresh water;[24]
- Water features prominently in the mythology of the claim group and its predecessors, which meant that there was more regular and frequent use of the areas around Coolgardie, Mount Burgess and Southern Cross;[25]
- The gold rush era resulted in significant upheaval to the traditional occupation of country by Aboriginal people, and clashes between the predecessors of the group and neighbouring groups (for example at Kalgoorlie) are well-documented, evidencing the predecessors' strong defense of the boundaries of the application area;[26] and
- Where Aboriginal populations in the region were so heavily impacted by the gold rush that they ceased to occupy certain areas, the laws and customs operating in the area gave rise to succession of rights in 'orphaned' areas.[27]

[48] Regarding an association of the predecessors of the group with the area at the time of European settlement, the material provides that apical ancestor Nellie Champion's parents

[19] *Gudjala 2007* at [51] and [52].
[20] See *Martin* at [23]–[26], affirmed in *Corunna* at [35]–[39] and [42]–[44].
[21] Letter from [Anthropologist removed] of 25 February 2019, at [1](a).
[22] Letter from [Anthropologist removed] of 25 February 2019, at [1](e).
[23] Letter from [Anthropologist removed] of 25 February 2019, at [4](l).
[24] Letter from [Anthropologist removed] of 25 February 2019 at [2](a).
[25] Letter from [Anthropologist removed] of 25 February 2019 at [2](b).
[26] See for example Letter from [Name removed] of 25 February 2019, at pp. 3-4.
[27] Letter from [Name removed] of 25 February 2019 at p. 2.

would have been alive at this time, and notes that according to a former anthropological source, Nellie's mother is buried at Wattoning in the western part of the application area.[28]

[49] It is further explained that Nellie was recorded in genealogies by anthropologist Daisy Bates in Mount Burgess and Southern Cross in 1907, but that claimants understand her country extended to Widgiemooltha, Kambalda and east to Golden Ridge (within the area known as Feysville).[29] From the map provided by the applicant in the additional material of 25 February 2019, and through my own research using the Tribunal's Native Title Vision Plus database, I am aware that all of these places are in the eastern portion of the application area.

[50] Nellie's son, [Name removed], as detailed in an anthropological source referenced in the material, held cultural knowledge for western parts of the application area, and spoke of a well-travelled Kalamaia path from Southern Cross through Bullfinch, Mount Churchman, Paynes Find, Wattoning and Wilgoyne.[30]

[51] Apical ancestor Kadee is said to have been associated with places including Mount Burgess and Davyhurst (northwest of Mount Burgess).[31] According to the material, [Name removed], Kadee and Warada's son, was the traditional owner of the Coolgardie area.[32] It is explained that he knew the Yintirri song/story and its associated sites, which runs through the eastern part of the application area.[33]

[52] The material also speaks of a Kalamaia Kalaako Kapurn leader in the application area at the turn of the century known as [Name removed]. It is explained that [Name removed] was the owner or leader for the country around Wilgoyne, in the western part of the application area. [Name removed] had four sons, [Name removed], [Name removed], [Name removed] and [Name removed], who the material states have no living descendants today. The material describes how [Name removed], who is buried at Mukinbudin, passed on his knowledge of the western parts of the application area to [Name removed] before he died.[34]

[53] Also according to the material, the son of [Name removed], [Name removed], had detailed knowledge of the rockholes between Paynes Find and Southern Cross, around Beacon, and knowledge of the application area and the laws and customs relating to the area was passed down by his father. He in turn has passed this onto his children, including members of the claim group.[35] Specifically, one claimant explains how [Name removed] taught [Name removed] (the claimant's father) that their traditional country included Youanmi, in the far north of the application area.[36]

[54] In my view, the material outlined above clearly addresses an association of the predecessors of the group with the area at the time of European settlement, and over the period since settlement. The material speaks to the places and country with which the apical ancestors were associated around the turn of the century, and explains how their traditional country

[28] Letter from [Anthropologist removed] of 25 February 2019, at [1](d).
[29] Letter from [Anthropologist removed] of 25 February 2019 at [5](f).
[30] Letter from [Anthropologist removed] of 25 February 2019 at [5](i).
[31] Letter from [Anthropologist removed] of 25 February 2019 at [5](a).
[32] Letter from [Anthropologist removed] of 25 February 2019 at [5](c).
[33] Letter from [Anthropologist removed] of 25 February 2019 at [5](b).
[34] Letter from [Anthropologist removed] of 25 February 2019 at [5](j).
[35] Letter from [Anthropologist removed] of 25 February 2019 at [5](l).
[36] Letter from [Anthropologist removed] of 25 February 2019 at [5](m).

and knowledge of that country was passed down through each generation following. It is also clear from the material that this association was both physical and spiritual, noting that particular predecessors are remembered as having knowledge of stories, songs and significant sites within the application area, which they passed on to their children and grandchildren.

[55] I consider there is also material before me addressing a present association of the claim group with the application area. In particular, the material includes statements from members of the claim group about the activities they currently engage in at specific places within the application area. These activities include undertaking site surveys for road works,[37] site recording,[38] visiting significant sites[39] and singing out to country or spiritual forces within that country,[40] camping, hunting,[41] and passing on knowledge about places in the claim area to younger generations.[42]

[56] For example, one claimant says:

> During the school holidays I would bring my children back to events and take them out bush to teach them about places and their meaning, and reminiscing about things that had happened there. This was passing on the knowledge. As a kid dad would take us to certain places and tell us to call out who we are and which parents was ours.
>
> Dad would say in language what each place was and the meaning of that place. Since I returned to the Goldfields I have spent time connecting and returning to Rowles Lagoon near Coolgardie, Gidgie Lake (I am saddened, by what has become of this place), King of the West, Lake Douglas, Cave Hill (which is a spiritual place for us) and Idgiemalootha. A lot of these places are still there and still used by people, but access is sometimes restricted because of the mining and the pastoral industry.[43]

[57] I note that the requirement at s 190B(5)(a) is that the association asserted is with the whole of the application area. Having considered the locations referred to and places named within the material, with reference to the boundary of the application area, I am satisfied that the association spoken of is with the whole of the area. In particular, the applicant has put before me a map depicting all of the places referred to in the material, including ceremonial sites, sacred or significant sites, camp sites used by claimants and by their predecessors, waterholes, song lines and dreaming sites. Accompanying the map is a document titled 'Key Sites Distribution – Details' which sets out information about each of the sites marked on the map. The sites marked fall across the full extent of the application area, as shown on the map. It follows that I am satisfied the association is with the entirety of the area subject of the application.

[58] In its submissions of 12 March 2019, the State argues that the factual basis material is not sufficient at this condition, specifically that:

- the additional material provided by the applicant does not provide any evidence of an association between the apical ancestors of the group and areas other than those

[37] Unsigned affidavit of [Deponent 3] at [40].
[38] Unsigned affidavit of [Deponent 3] at [40].
[39] Letter from [Anthropologist removed] of 25 February 2019 at [10](e).
[40] Unsigned affidavit of [Deponent 3] at [39].
[41] Unsigned affidavit of [Deponent 3] at [47].
[42] Letter from [Anthropologist removed] of 25 February 2019 at [6](f).
[43] Unsigned affidavit of [Deponent 3] at [21] – [22].

subject of earlier material – namely the areas of Southern Cross, Mount Burgess and Coolgardie; and

- the 'Key Sites Distribution Map' deals in substance only with contemporary or 20th century associations with places in the application area.

[59] In response, the applicant argues that the word 'predecessors' as it appears in s 190B(5)(a) should not be understood as being 'synonymous with the specific apical ancestors named' in the claim group description.[44] The applicant relies on comments by Barker J in *Strickland v WA*, specifically at [156], as support for this proposition, noting however, that on the facts of that case, His Honour did not find the material sufficient for the requirement at s 190B(5)(a).[45]

[60] Regarding these particular submissions of the State, it is my view that the applicant has provided factual information, including information prepared by an anthropologist working with the claim group, that speaks to an association of the apical ancestors of the group with *parts* of the application area. It also speaks to an association of the parents of the apical ancestors with *further parts* of the application area, and to stories known by claimants about paths of travel taken by predecessors of the group across *other additional parts* of the application area, including before settlement in the region. This information has already been discussed above, at [49] and [51].

[61] As submitted by the applicant,[46] it is not a requirement that the material presented to the Registrar for the purposes of the registration test be 'evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim'.[47] In my view, noting also that I am to rely on the statements in the s 62(1)(a) affidavits affirmed by the applicant persons that the statements contained in the application are true, the information before me is sufficient at this condition.

[62] Subsequently, it is my view that the factual basis material before me sufficiently addresses all of the issues raised by the State, relevant to this condition of the registration test.

[63] Also relevant to this condition, [Name removed], a member of the native title claim group by descent from Warada and Kadee, states in her letter to the Registrar that she 'know[s] where the lands of the Gubrun people are', and '[t]he Claim includes lands that are the traditional lands of Nyungar and Yamatji people'. On this basis, and others, she states her objection to the claim.

[64] [Name removed], in her letter to the Registrar states she 'object[s] to all the boundaries of [the] Claim', however she does not explain the basis upon which she objects to these boundaries. Similarly, [Name removed] submits 'the Application grossly overstates the lands and waters' held by a Champion predecessor, 'jointly with others', under traditional laws and customs.

[65] In response, the applicant provides that the submissions presented by these three persons are 'bald, highly-generalised assertions for which no supporting evidence is provided'.[48] As set out

[44] Letter from [Name removed] of 21 March 2019, at [11].
[45] Letter from [Name removed] of 21 March 2019, at [11].
[46] Letter from [Name removed] of 21 March 2019, at [6].
[47] *Gudjala 2008* at [92].
[48] Letter from [Name removed] of 21 March 2019, at [19].

in my reasons above, the material provided by the applicant that is before me is detailed, and provides factual information about the association (both physical and spiritual) of the members of the claim group and their predecessors, over the period since European settlement to the present day, with the land and waters of the application area. As required, the material supports an association with the whole of the area claimed.

[66] I do not consider that these statements alone from [Name removed], and [Name removed] and [Name removed], without further supporting factual information, is material of sufficient weight to cause me to reach a different conclusion from the one discussed above. In my view, the applicant's material fully and comprehensively addresses the matters required by s 190B(5)(a) such that the statement of these individuals' opinions on the area claimed do not displace this view.

[67] The requirement at s 190B(5)(a) is met.

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

[68] 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 that give rise to the claim to native title rights and interests'. The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of 'native title rights and interests' within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007*[49] by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court in *Yorta Yorta*.

[69] 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';[50]
(b) the origins of the content of the law or custom concerned can be found in the normative rules of a society[51] which existed before the assertion of sovereignty by the Crown;[52]
(c) the normative system has had a 'continuous existence and vitality since sovereignty';[53] and
(d) the relevant society's descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.[54]

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

[49] *Gudjala 2007* at [26] and [62] to [66].
[50] *Yorta Yorta* at [46].
[51] 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].
[52] *Yorta Yorta* at [46].
[53] *Yorta Yorta* at [47].
[54] *Yorta Yorta* at [87].

'identifying some link between the apical ancestors and any society identified at sovereignty'.[55]

[71] I understand that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).[56]

Is there a sufficient factual basis for the requirement at s 190B(5)(b)?

[72] I am satisfied the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed, by the native title claim group giving rise to the claim to native title.

[73] The starting point at s 190B(5)(b) must be the identification of a society of people, at sovereignty or at least European settlement, living according to normative laws and customs in the application area.[57] I understand the material to assert that the relevant society was the Kalamaia and Kalaako dialect groups of the Gubrun or Kapurn language. The letter of anthropologist [Anthropologist removed] of 25 February 2019 states her view that these dialect groups covered 'slightly different territories' within the application area, and:

> …spoke a very similar language, shared a two-moiety skin system, translating these into a four-moiety system in the eastern parts of the claim to account for the Western Desert influence, practiced ceremony together; sending their boys to different locations around the claim area, and had shared customs and rights to country passed down from elders to younger generations and through strategic marriages.[58]

[74] Elsewhere, [Anthropologist removed] sets out various historical and anthropological sources she has considered in reaching this view, including the works of Daisy Bates in 1907, Norman Tindale in 1939, and earlier sources recording the interactions of early settlers in the area with the local Aboriginal people. For example, she explains that words specific to the Kalamaia language were recorded by explorers in 1864 at a camp near Lake Lefroy on the eastern edge of the application area. In her affidavit affirmed 18 September 2018, she states that, in 1836 J. S. Roe observed a type of ceremony at Mount Moore (understood to be in the vicinity of Lake Moore in the northwest of the application area); in 1864 Hunt reported a large group gathered for ceremony at Moorine Rock (west of Southern Cross); in 1893 Luck recorded his viewings of initiation ceremonies at Golden Valley and Wangine Lake; and in 1897 Bailey wrote of his witness at Menzies of a gathering of groups from Coolgardie and Mount Jackson.[59]

[75] Various other historical sources are referred to in [Anthropologist removed]'s affidavit, recording early observations of laws and customs of the inhabitants of the application area

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[55] See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not disagree with his Honour's assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

[56] See *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'.

[57] *Gudjala 2007* at [65] and [66].

[58] At [4](l).

[59] Affidavit of [Anthropologist removed] affirmed 18 September 2018, at [5].

such as those relating to the establishment of camp grounds near native wells and soaks, the use of natural resources in the area for food, tools and artefacts, burials, marriage, the use of message sticks, and beliefs about the spirits of the deceased.[60]

[76] In the material, [Anthropologist removed] sets out her analysis of the works of Bates and Tindale regarding the groups in the area around the time of, and following, the impacts of the gold rush era, including their laws and customs. She also refers to the later findings of Kingsley Palmer. In this way, she provides detailed asserted facts which explain the conclusions reached regarding the society occupying the area prior to or around the time of European settlement.[61]

[77] In light of this information before me, I am satisfied the factual basis addresses the society occupying the area at around the time of European settlement, and the shared laws and customs of a normative character that those persons acknowledged and observed. I understand that these laws and customs related to ceremony and initiation rites, access to and use of the application area (including travelling across the area for ceremony), shared language, and acceptance of both a two and four-system moiety attaching to different regions within the application area. I further understand that laws and customs around marriage between the Kalamaia and Kalaako in some way facilitated the sharing of rights to land within the application area.[62]

[78] The State has made submissions that relate to this requirement of the registration test. In particular, the State submits that:

- the material does not support a single society in occupation of the application area;[63] and
- there is 'no evidence, other than a very general legal and anthropological assertion', that the laws and customs in operation in the area allowed for the succession of rights and interests in orphaned country to the predecessors of the group, and/or no evidence in support of the process by which this occurred.[64]

[79] Regarding the first point, the State submits information provided in the affidavit of [Anthropologist removed] of 18 September 2018 is not consistent with any conclusion of a single society in occupation of the application area, pointing to [Anthropologist removed]'s reference to the work of Bates, who found that 'the Southern Cross natives' are 'distinctly different' to other neighbouring groups 'by reason of moiety and other customs'.[65] The applicant's response explains that [Anthropologist removed]'s reference to 'neighbouring groups' in fact refers to groups whose traditional territory lies outside of the application

[60] Affidavit of [Anthropologist removed] affirmed 18 September 2018, at [6]-[8].
[61] Affidavit of [Anthropologist removed] affirmed 18 September 2018, at [14]-[28]; letter from [Anthropologist removed] of 25 February 2019, at [3] and [4].
[62] See affidavit of [Anthropologist removed] affirmed 18 September 2018, at [15].
[63] State's submissions of 12 March 2019, at [9].
[64] At [11].
[65] State submissions of 12 March 2019, at [9].

area,[66] and that [Anthropologist removed] found Bates' work to support an association of the Southern Cross natives with a range of areas 'largely consistent with the current claim area'.[67]

[80] I note that in her letter of 25 February 2019, [Anthropologist removed] states:

> The breadth of historical, linguistic and anthropological evidence combined with testimonial evidence from the current claim members … leads me to conclude that *Kalamaia* and *Kalaako* were different dialects of a larger language group (*Kaburn*) covering slightly different territories within the current claim area…[68]

[81] As above, I have approached the information contained in the application and accompanying materials as true, and on that basis, noting the conclusions of [Anthropologist removed] in her letter of 25 February 2019, I do not consider the State's submission of sufficient substance to displace my view of the materials before me. The State has not presented any information to suggest that the claim area is, in fact, the territory of another group not addressed by [Anthropologist removed] in the supporting materials.

[82] Responding to the second point, the applicant points to 'detailed factual assertions concerning the process of succession by which the senior generation of the native title claim group and their immediate predecessors obtained rights and interests in relation to the whole of the application area', provided within the factual basis material.[69] Having considered that material, I concur with the applicant's response. In particular, the applicant has set out specific examples of the way in which succession of rights to country occurred. This includes the following example regarding one predecessor of the group who had no living descendants and who passed on knowledge of his country to a member of the claim group:

> [Name removed] was the acknowledged *Kalamaia Kalaako Kapurn* leader in the Wilgoyne area around the turn of the century. His children [Name removed], [Name removed], [Name removed] and [Name removed] (known as the [Name removed] brothers – no living descendants) grew up … at Wilgoyne Homestead. […] Before he died, '[Name removed]' [[Name removed]] taught his knowledge of sites in these western areas of the claim to [Name removed].
>
> [Name removed] is the son of [Name removed] and stated his father and [Name removed] ([Name removed]) taught him the boundaries of his country. This included stories, songs and places to avoid. [Name removed] had knowledge of the songlines as far east as Widgiemooltha and taught these to [Name removed]. He demonstrated confidence that his [sic] was part of his traditional country. [Name removed] recognises that he has custodial responsibility to pass knowledge down to the younger generations and educate them about sites, laws, customs and cultural protocols for the claim area.[70]

[83] From the material, I understand that [Name removed] passed on his knowledge of his country, and the laws and customs of the Kalamaia Kalaako Kapurn, to his sons, and that in turn one of these men, [Name removed], in the years before he passed away, shared this knowledge with [Name removed]. In my view, this information supports an assertion that the traditional laws and customs operating in the area provided for succession.

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[66] Letter from [Name removed] of 21 March 2019, at [5]; and see affidavit of [Anthropologist removed] affirmed 18 September 2018, at [15].
[67] Affidavit of [Anthropologist removed] affirmed 18 September 2018, at [14].
[68] At [4](l).
[69] Letter from [Name removed] of 25 February 2019, at [7].
[70] Letter from [Anthropologist removed] of 25 February 2019, at [5](j) and (k).

[84] The State submits that there is 'no evidence' that the remaining members of a relevant society 'died out or otherwise abandoned' parts of the claim area. In my view, however, material of this type is not necessary for the purposes of the condition. The material sets out in some detail the impacts of the gold rush era upon the groups in the region within which the claim area is situated.[71] I consider it reasonable for me to infer this resulted in the considerable demise of those groups, or societies, and their traditional occupation of areas within the affected region.

[85] I note that the material must explain the link between the apical ancestors, with reference to who the group is described, and the society in the area at settlement. In my view, this explanation is provided. As above, I understand the material to assert that settlement in the area took place in the late 1800s with the influx of Europeans associated with the gold rushes. The material states that Bates recorded Nellie Champion at Mount Burgess and Southern Cross in 1907,[72] such that I can infer Nellie to have been a member of the society around the time of settlement. The material also states that in 1966, Tindale interviewed the great grandson of apical ancestors Kadee and Warada, [Name removed].[73] I consider it reasonable to infer, being three generations prior to [Name removed], that these apical ancestors were part of the society in the area in the period before settlement, that is, about 1890.

[86] [Name removed] submits that the native title claim group is only a subgroup of the Gubrun/Kapurn people, limited to the members of the Champion and Dimer families, and that these persons 'do not have a distinct system of law under which they can establish separate native title rights and interests.'[74] Similarly, [Name removed] states that the claim group is 'not a true traditional grouping.'[75]

[87] In response, and addressing a related submission by the State, the applicant provides that 'the genealogical material provided, which depicts a number of contemporary families being descended from the three named ancestors' contradicts submissions that the claim group is comprised of one or two families only.[76] Having considered the material, including the genealogies of the apical ancestors, it is clear that [Name removed] and her family are members of the native title claim group. I do not consider that [Name removed] has explained the basis upon which she asserts the claim group to be only a subgroup or smaller family group of a larger native title claim group. I note that she has not provided supporting evidence to show that the actual native title claim group is a wider group of persons.[77]

[88] Again, therefore, I consider the submissions made by [Name removed] and [Name removed] are assertions of little substance. That is, the submissions express the views of these individuals and/or their families, but do not provide further supporting evidence which would cause me to depart from the conclusions I have reached regarding the sufficiency of the material before me in meeting the requirement at s 190B(5)(b). Consequently, I consider these submissions of little weight and insufficient substance to displace my view regarding

[71] See for example the letter of [Anthropologist removed] of 25 February 2019, at [1](e).
[72] Letter from [Anthropologist removed] of 25 February 2019, at [5](f).
[73] Letter from [Anthropologist removed] of 25 February 2019, at [3](c).
[74] [Name removed] submission of 13 March 2019.
[75] [Name removed] submission of 16 December 2018.
[76] Letter from [Name removed] of 21 March 2019, at [7].
[77] This issue is discussed in greater detail below at s 190C(4)(b).

whether the requirement here is met. I have set out above the reasons for which I am satisfied the factual basis material is sufficient to support an assertion of a society in the area at settlement, acknowledging and observing shared laws and customs, of which the apical ancestors of the claim group were members.

[89] Noting my satisfaction that the factual basis is sufficient to support such a society, the question I now must consider whether the laws and customs acknowledged and observed by the native title claim group can be said to be 'traditional'. That is, whether the laws and customs of the group today are rooted in those of the pre-sovereignty society occupying the application area, and have been handed down through the generations since that time.

[90] The material gives numerous examples of laws and customs of the predecessors of the group being handed down through the generations, and the way this process continues today. For example, it is stated that in Tindale's 1966 interview with [Name removed], [Name removed] explained how he was taught the Yintirri song/story and its associated sites within the application area by his grandfather, [Name removed], the son of apical ancestors Kadee and Warada.[78] Elsewhere within the material, a claimant explains how her grandfather [Name removed] was taught about the law by his father [Name removed] (Nellie's husband).[79] Another claim group member talks about a trip out on country where he took young men out to see Kapurn/Gubrun sites. This included a visit to an old ceremony ground near Coolgardie where they were taught not to speak to anyone at that place, and not to bring anyone out there.[80]

[91] There are various laws and customs acknowledged and observed by the claim group today described in the material. For example, one claimant says that members of the claim group must 'be careful' who they marry, and that he and his wife were put through 'Kaburn law' to be married, by 'the old people'.[81] Another claimant explains his knowledge of the song, dance and sites related to the story of the Milikia Bird, which saved people from the Wanmularr (Western Desert) people. The material provides that this story was passed down by [Name removed] (Nellie's son) to a younger predecessor, then onto the claimant.[82] Another claimant talks about her grandfather, [Name removed] (also Nellie's son), being regarded as the 'boss of Kalgoorlie and the 'receiver of message sticks which could only be read by senior people'.[83] Yet another example is where a claimant explains that he doesn't like his people going out to sites within the application area 'without actually talking and knowing the land'. He explains that people visiting these sites have to '[let] the Kaburn old people spirits know who you are', and that he does this 'in language'.[84]

[92] Addressing laws and customs specifically giving rise to rights in the application area, in one example, the material states: 'Apical ancestor [Name removed] [Kadee and Warada's son]

[78] Letter from [Anthropologist removed] of 25 February 2019, at [5](b).
[79] Letter from [Anthropologist removed] of 25 February 2019, at [5](g).
[80] Letter from [Anthropologist removed] of 25 February 2019, at [6](f).
[81] Letter from [Anthropologist removed] of 25 February 2019, at [10](c).
[82] Letter from [Anthropologist removed] of 25 February 2019, at [9](g).
[83] Letter from [Anthropologist removed] of 25 February 2019, at [9](d).
[84] Letter from [Anthropologist removed] of 25 February 2019, at [8](j).

through a process of ritual incorporation, bestowed rights and interests in Kalarku country on his adopted son [Name removed].'[85]

[93] Therefore, I consider the material speaks to aspects of the laws and customs acknowledged and observed by the society at settlement, that are reflected in the laws and customs of the group today. That is, laws and customs surrounding ceremonies and ceremony sites, marriage, message sticks and beliefs about the presence of the spirits of deceased forebears were all recorded in early historical or anthropological sources regarding the pre-settlement society, and are also laws and customs acknowledged and observed by members of the claim group presently. In this way, I consider the material speaks to laws and customs that are rooted in those of the society in the area at settlement.

[94] In addition to this, however, I consider the material clearly demonstrates the way in which specific laws and customs have been passed down through the generations between the society at settlement, and the present claim group members, giving details of the name of each person of each generation who received and then passed on such knowledge. The material sets out claimants' understanding of the process and the persons (including the apical ancestors) by and through which they came to know their laws and customs, including how they relate to their country.

[95] It follows that I consider the factual basis material sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the native title claim group, giving rise to the claim to native title.

[96] This requirement is met.

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

[97] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.' In order for a delegate to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses the following matters outlined by Dowsett J in *Gudjala 2007:*

- 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; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.[86]

Is there a sufficient factual basis for the requirement at s 190B(5)(c)?

[98] I have already set out 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 in the area at settlement, acknowledging and observing normative laws and customs from which the group's current laws and customs are derived.

[85] Letter from [Anthropologist removed] of 25 February 2019, at [8](f).
[86] *Gudjala 2007* at [82].

[99] In my view, the factual basis is also sufficient in supporting an assertion that the acknowledgement and observance of those laws and customs has continued in a substantially uninterrupted manner since European settlement. In addressing this assertion at s 190B(5)(c), I consider the material explains how each generation from the members of the claim group presently, back to the apical ancestors in the area at settlement, acknowledged and observed particular laws and customs relating to the claim area, and how that information and knowledge was passed on to each following generation.

[100] For example, in her affidavit of 18 September 2018, anthropologist [Anthropologist removed] explains:

> Continuity of site-specific knowledge and use can be seen at place such as *Warratar* Rockhole with the informants [Name removed] and [Deponent 2 removed], both descendants of Kaddee [sic] and Warada. [Name removed] was told about the *Warratar* Rockhole by her grandfather (Nyuumani aka [Name removed] [son of Warada and Kadee]), her father ([Name removed]) used to go dogging in the area and she often camped there with her parents. She then passed on the information about the place to her son [Deponent 2 removed]…[87]

[101] Another example is where the material provides that [Name removed] was taught the law by his father [Name removed] (Nellie's husband), including details of the death song. It is explained that during the 1950s, as elders, [Name removed] and [Name removed] were travelling around Mukinbudin, Southern Cross and Bullfinch for work, and during this time, they taught younger Kalamaia Kalaako Kapurn men about their country. Regarding Lake Moore, [Name removed] taught his son [Name removed] that you need to be careful at that place and know the way to get to a fresh water soak on the other side.[88]

[102] In my view, these examples from the material support an assertion of continuity, showing how each separate generation has acknowledged and observed laws and customs relating to their country, and the process by which these laws and customs were passed on to the next generation. Noting the excerpt above and the reference to [Name removed]'s son, I consider the material also speaks to the way members of the group today have passed on knowledge of laws and customs to their children and grandchildren, such that I can infer the acknowledgment and observance of the group's laws and customs continuing into future generations.

[103] Therefore, I am satisfied the factual basis is sufficient to support an assertion that the group have continued to hold native title rights in accordance with their traditional laws and customs.

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

[104] 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).

[87] At [51].
[88] Letter from [Anthropologist removed] of 25 February 2019, at [8](a) and (b).

What is required to meet this condition?

[105] 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 clamed can be established.' I note the following comments by Mansfield J in *Doepel* in relation to this condition:

1. it requires some measure of the material available in support of the claim;[89]
2. although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);[90] and
3. s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.[91]

[106] 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.'[92]

[107] 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;[93]

(b) a right or interest in relation to the land or waters of the application area;[94] and

(c) not extinguished in relation to the entirety of the application area.[95]

[108] The description of the rights and interests claimed is contained in Attachment E to the application. Paragraph [2] describes a right of exclusive possession, which also includes a right to use and take resources from flowing and underground waters on the area. Paragraph [4] sets out non-exclusive rights and interests claimed, set out in the headings below.

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

Right of exclusive possession

[109] The nature of a native title right to 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.[96]

[110] 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:

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[89] *Doepel* at [126].
[90] *Doepel* at [127].
[91] *Doepel* at [132].
[92] *Doepel* at [135].
[93] Section 223(1)(a).
[94] Section 223(1)(b).
[95] Section 223(1)(c).
[96] At [88].

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others;[97]
- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom;[98] 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.'[99]

[111] I consider there is information before me that speaks to a right of this nature. In particular, one claimant explains how her grandfather, [Name removed], was a law man and was responsible for ensuring trespassers did not come onto Kalamaia Kalaako Kapurn country without permission. The claimant relays a story where her grandfather exercised this duty and delivered punishment to strangers who were in the area and would not explain the purpose of their visit.[100] She says elsewhere in the material that 'if any strangers came to Kalgoorlie they would have to speak with my father.'[101]

[112] The material also sets out the details of an attack by the predecessors of the group upon settlers who were camping in the north of the application area in 1875, at Ularring. The applicant argues that this evidences the fierce defence of the boundaries of the application area by the predecessors of the group, pursuant to their laws and customs.[102]

[113] Statements by members of the claim group also indicate, in my view, they believe consequences will flow and/or harm will come to persons who do not engage with country according to their laws and customs, and that it is spiritual presences in the landscape that will inflict this harm. Claimants talk in particular about places they are not allowed to go to and behaviours they adhere to when approaching certain sites.[103]

[114] In my view, this information addresses the way in which members of the group and their predecessors have acted as gatekeepers for their country, protecting it from physical harm and misuse by strangers, and also ensuring that practices to appease the spirits inhabiting the landscape are followed so as to prevent spiritual harm to members of the group and outsiders. In light of this material before me, I consider a right of exclusive possession established on a prima facie basis.

Non-exclusive right to live, being to enter and remain, camp and erect temporary shelters and other temporary structures for that purpose and to travel over and visit any part of the claim area

[115] The following statement by a member of the claim group is an example of the type of material before me that speaks to this right:

> I remember there were several 'reserves' in Kalgoorlie for Aboriginal people. Most of them were on the fringes of town. However, there were also a few in the town itself. One of the reserves (not far

[97] *Sampi* at [1072].
[98] *Griffiths* at [71].
[99] *Griffiths* at [127].
[100] Unsigned affidavit of [Deponent 3], at [34].
[101] Letter from [Anthropologist removed] of 25 February 2019, at [8](e).
[102] Letter from [Name removed] of 25 February 2019, at p. 3.
[103] See for example, letter from [Anthropologist removed] of 25 February 2019, at [8](j); Unsigned affidavit of [Deponent 3], at [45] and [46].

> from where the Kapurn cemetery is in Coolgardie), we went and cleaned it up and erected a fence around it, so that we can show the young and preserve it […]
>
> There was also an old reserve behind the abattoirs in Boulder. Many corroborees were held here and there was also a dancing ground and this was a big camping ground for the Kalamaiai.[104]

[116] Elsewhere within the material, claimants talk about visiting relatives living in different parts of the application area, how they travelled across the area for this reason,[105] and also to participate in ceremony,[106] and to hunt and gather resources.[107]

[117] In my view, this information is sufficient to allow me to consider the right established on a prima facie basis.

Non-exclusive right to hunt, fish, gather and use the traditional resources of the claim area

[118] The following statement by a member of the claim group is an example of the type of material before me that speaks to this right:

> Many times we would go out bush hunting. When we get something, we make a *kala* for cooking. While waiting for the ashes to form, we would look for trees to dig for bardi (witchety grub) or goanna. While the food would be cooking we would sit around the fires and yarn and be teaching all the stories that have been passed down to us from the oldies. We would have 2 fires going: one to cook all the food and another to sit and talk about stories.[108]

[119] And also the following statement of a claim group member:

> […] An example is a particular location near the [sic] Mt Jackson where I, accompanied by many other members of the Claim Group have, for decades, been camping, hunting, fishing, collecting timbers, bush foods, medicines and minerals. We eat sand, which is one of our traditions. We go hunting there and will catch, prepare, cook and eat game such as kangaroos, bardi grubs, emu eggs, bobtails and echidna. We also gather quandongs, bush onions, mangoes and other bush foods.
>
> […]
>
> In all these hunting and collecting trips we often bring some of the produce back with us to share with others as is required under our laws and customs.[109]

[120] I consider these statements show the way in which members of the group gather resources from the claim area for their own and other members of the group's use, and also how they gather and use these resources in accordance with specific practices and methods established by their laws and customs.

[121] In my view, therefore, this material is sufficient to allow me to consider the right established on a prima facie basis.

Non-exclusive right to take and use water on the claim area

[122] There are numerous examples of information before me that speaks to this right. The material explains that there was a 'higher density of significant Aboriginal sites around Coolgardie,

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[104] Unsigned affidavit of [Deponent 3], at [16] and [17].
[105] Unsigned affidavit of [Deponent 3], at [13] and [14].
[106] Affidavit of [Anthropologist removed] affirmed 18 September 2018, at [40].
[107] Statement of [Name removed], at [33].
[108] Unsigned affidavit of [Deponent 3], at [23].
[109] Statement of [Name removed], at [33] and [36].

Mount Burgess and Southern Cross due to nearby plentiful water resources permitting a longer term population'.[110] Elsewhere, claimants talk about how camp sites and other important sites frequently used by the group and its predecessors allowed for access to plentiful natural water supplies.

[123] For example, one claimant says:

> […] Another [reserve] was right near the rockhole in town, because we could access water there. At the rockhole a big massacre took place where people from the Western Desert had come here because they knew Kalamaia-Kapurn had plenty of food and water, which resulted in a big fight and many people being killed. Even after the massacre took place people chose to stay in the reserve […][111]

[124] Another claimant explains how his father taught him the location of and the way to access particular soaks in the application area:

> Dad said you got to be careful there [at Lake Moore]. It looks like a snake (Bimara). Other [sic] the other side there's a fresh water soak, but to get to that you've got to know the road. Know how to go there. Dad told us that story a long time ago […][112]

[125] From these statements, I understand the right to access water as being one that has been exercised across the preceding generations, pursuant to the laws, customs and practices of the claim group and its predecessors.

[126] In my view, this information is sufficient to allow me to consider the right established on a prima facie basis.

Non-exclusive right to engage in cultural activities and the transmission of cultural knowledge on the claim area, including a right to visit and protect places of cultural or spiritual importance, and a right to conduct burials, ceremony and ritual on the area

[127] The material contains numerous examples of the way claimants and their predecessors have exercised this right. One such example is where a claim group member states:

> My father told me that the goanna was the keeper of a Rockhole at Mt Jackson, and also of a Kapurn grave site in the north of Coolgardie. My father told me that he had the responsibility to care for these sites and to pass this responsibility onto someone else before he died. He didn't get the chance to pass on all his information over before he passed away, but he did give significantly important information to my brothers and some of his grandsons. I am working with these family members to make sure both that this information is preserved, and that confidentiality in this sensitive information is maintained.[113]

[128] Elsewhere, another claimant states that:

> When I go out to the sites, I don't like my kids and my grandchildren, my people going out without actually talking and knowing the land. Talking to it. What you're doing is you're letting them all know. You're letting the Kaburn old people spirits know who you are. So I tell them in language. I tell them I'm [Name removed], and whoever else is with me, I say the name, then the place becomes calm

[110] Letter from [Anthropologist removed] of 25 February 2019, at [2](b).
[111] Unsigned affidavit of [Deponent 3], at [16].
[112] Letter from [Anthropologist removed] of 25 February 2019, at [8](b).
[113] Unsigned affidavit of [Deponent 3], at [43].

because they know what you're talking about. You're not intruding. You're respecting them, and they are respecting you. Very strong stuff.[114]

[129] From these and other statements, I understand that the practices of visiting important sites on country, and passing on knowledge about those sites, is a practice that has continued across the generations, passed down by knowledgeable elders to younger generations pursuant to their traditional laws and customs. I note that the material also speaks of burial or grave sites, which I consider speaks of a right of the group to conduct such burials on the application area.

[130] In light of this information before me, I consider the right established on a prima facie basis.

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

[131] 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.

What is required to meet this condition?

[132] 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'.[115]

[133] 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, therefore evidentiary material is required;
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;[116]
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;[117] and
- the material may need to address an actual presence on the area.[118]

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

[134] Noting the wording of s 190B(7), I have focused my attention upon the relationship of one particular member of the claim group with the application area, being [Deponent 3].

[135] Among various other asserted facts, the material provides the following about [Deponent 3] and her physical connection with parts of the application area:

- she was born in Kalgoorlie in 1965;[119]
- her father's father was [Name removed], the son of apical ancestor Nellie Champion;[120]

[114] Letter from [Anthropologist removed] of 25 February 2019, at [8](j).
[115] See subsection (a).
[116] *Doepel* at [17].
[117] *Gudjala 2007* at [89].
[118] *Yorta Yorta* at [184].
[119] Unsigned statement of [Deponent 3], at [1].

- as a child with her family, she predominantly lived in Kalgoorlie, but also spent time at Southern Cross, Coolgardie, Esperance, Norseman and Perth, places where her father secured employment;[121]
- as a child, her father would take her to specific places in the application area and teach her to 'call out who we are and which parents was ours';[122]
- she has spent time 'connecting and returning to' Rowles Lagoon near Coolgardie, Gidgie Lake, Lake Douglas, Cave Hill and Idgiemalootha;[123]
- one time her father took her to show her Southern Cross reserve, explaining that there was a sacred site just on the other side of the reserve;[124]
- her father also took her to visit an old corroboree ground in West Kalgoorlie, explaining that predecessors of the group once danced there for three to four days;[125]
- she takes her children when she goes to visit and care for sites, and has passed on responsibilities to them to look after sites around East Kalgoorlie and Nanny Goat Hill;[126]
- she considers Kalgoorlie her spiritual home.[127]

[136] From this information, I consider it clear that [Deponent 3] has spent the most part of her life within the application area, and that she has a particular connection with places in and around Kalgoorlie. As to whether [Deponent 3]'s physical connection with the area can be said to be traditional, in my view, the material does speak to her connection as one that is in accordance with the traditional laws and customs of the claim group.

[137] This is because the material explains the way [Deponent 3] was taught information about particular sites of significance within the application area by her predecessors, and shown how to behave in relation to these sites so as to appease spiritual presences in the landscape. I discuss in my reasons above at s 190B(5)(b)[128] the way in which a belief in the spirits of the deceased occupying the landscape is an aspect of the traditional laws and customs of the claim group.

[138] The information also demonstrates [Deponent 3]'s knowledge of ceremonial sites and the ceremonial events that happened at those sites, as taught to her by her father. Again, in my reasons above,[129] I note the way the factual basis speaks to this as being an aspect of the system of traditional law and custom acknowledged and observed by the native title claim group.

[139] It follows that I consider the material before me addresses a physical connection of [Deponent 3] that is in accordance with the traditional laws and customs of the native title claim group.

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[120] At [7].
[121] At [11].
[122] At [21].
[123] At [22].
[124] At [31].
[125] At [18].
[126] At [31].
[127] At [25].
[128] At [94].
[129] At [94].

[140] Therefore, I am satisfied that one member of the group currently has, or previously had, a traditional physical connection with some part of the application area.

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

[141] In my view the application does not offend any of the provisions of ss 61A(1), 61A(2) and 61A(3), as shown below, and therefore the application satisfies the condition of s 190B(8):

Requirement	**Information addressing requirement**	**Result**
s 61A(1) no native title determination application if approved determination of native title	Geospatial assessment	Met
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraph [2] and see also Schedule L	Met
s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Attachment E	Met

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

[142] In my view the application does not offend any of the provisions of ss 190B(9)(a), (b) and (c), as shown below, and therefore the application meets the condition of s 190B(9):

Requirement	**Information addressing requirement**	**Result**
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
(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 sections 61 and 62 – s 190C(2): condition met

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

What is required to meet this condition?

[144] 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 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken.[130]

Subsection 61

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A, s 62(1)(a) affidavits	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Subsection 62

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Annexure to the Form 1	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B and Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Attachment 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	Attachment I	Met

No previous overlapping claim group – s 190C(3): condition met

[147] 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.

What is required to meet this condition?

[148] 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[131]) 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;
2. there must be an entry for the claim in the previous application on the Register of Native Title Claims 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.

[130] *Doepel* at [16] and also at [35] to [39].
[131] Emphasis in original.

[149] It is only where there is an application meeting all three of the criteria above, that is, a 'previous application', that the requirement for me to consider the possibility of common claimants is triggered.[132]

[150] The geospatial report provides that there is one claim overlapping part of the application area that appeared on the Register of Native Title Claims at the time the current application was made. It is the Maduwongga application (WC2017/001; WAD186/2017). From my search of information contained within the Tribunal's databases, I am aware that the application was entered onto the Register after being considered by a delegate of the Registrar pursuant to s 190A, and that it has not been removed from the Register since that time.

[151] As it is a 'previous application' meeting all three criteria of s 190C(3), I must consider whether there are any common claimants between the native title claim groups for that previous application and the one before me.

[152] The Maduwongga native title claim group are the descendants of Kitty Bluegum. The apical ancestors for the current application are Nellie Champion, Kadee and Warada.

[153] Schedule H identifies the Maduwongga application as a registered claim that overlaps the current application area. Schedule O of the Form 1, addressing common claimants, states: 'To the best of the applicant's knowledge and belief, there is no overlap in the membership of the native title claim group [for this application and the membership for] the overlapping application WAD 186 of 2017.'

[154] Noting this statement by the applicant, and having considered the claim group descriptions for each of the applications, and the names of the applicant persons, there is nothing to suggest that there are members in common between the claim group for the previous application and the claim group for the current application.

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

[155] I am satisfied the requirements set out in s 190C(4)(b) are met.

What is required to meet this condition?

[156] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions.[133] If the application has not been certified, the Registrar must be satisfied that 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.[134]

[157] As the application does not purport to be certified under s 190C(4)(a), it is necessary to consider if the application meets the requirements set out in s 190C(4)(b). I must also consider the requirements as set out in s 190C(5). That is, that the application itself includes a statement to the effect that the requirement of paragraph 4(b) has been met and briefly sets out the grounds on which the Registrar should consider that it has been met.

[132] See *Strickland FC* at [9].
[133] See subsection 190C(4)(a).
[134] See subsection 190C(4)(b).

The authorisation material

[158] In applying the conditions of the registration test to the amended application, I note that the applicant confirmed I am to have regard to the documents provided as additional material in relation to the previous application of the test in August 2018, some of which address the requirements of authorisation.[135]

[159] I understand that the applicant relies on the authorisation meeting held on 13 October 2017 in Coolgardie as the basis of its authority to make this application. I address this matter further in my reasons below.

Is the requirement at s 190C(5) met?

[160] In *Doepel*, Mansfield J discusses the interaction between s 190C(4)(b) and s 190C(5) and how the Registrar is to be satisfied as to these conditions of the registration test:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). The interactions of s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.[136]

[161] Having considered the information contained in the application and in the s 62(1)(a) affidavits, I am satisfied that it contains the statement required by s 190C(5)(a). Schedule R contains a further 'brief' statement setting out the grounds upon which the Registrar can consider the requirement at s 190C(4)(b) met, including information about an authorisation meeting held 13 October 2017 in Coolgardie, at which the applicant was authorised to make the application by the members of the native title claim group.

Does the material address the requirement of s 251B?

[162] Following s 190C(4)(b) in the Act is a note referring to the definition of 'authorise' in s 251B. Section 251B provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways:

(a) in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists;[137] or

(b) in any other case, by an agreed or adopted process in relation to authorising things of that kind.[138]

[163] It follows that the material must speak to the decision-making process used by the group to authorise the applicant to make the application. Part A of the Form 1 refers to a decision-making process agreed on and adopted on the day of the meeting. The s 62(1)(a) affidavits accompanying the application explain the process as one involving nominations of persons to

[135] See letter from [Name removed] of 6 January 2019, at p. 1.
[136] *Doepel* at [78].
[137] Section 251B(a).
[138] Section 251B(b).

be the applicant, with each nomination being voted upon by the group, and a decision made by simple majority. Schedule R sets out the same information.

[164] A copy of the minutes for the authorisation meeting held on 13 October 2017[139] shows that while there was no resolution passed regarding the appropriate decision-making process to be used by the group for the purposes of authorising the applicant, nor did the group confirm the absence of a traditionally-mandated process, the persons present at the meeting proceeded to pass a number of resolutions about the application using a simple majority vote. The minutes also record for each resolution whether all were in favour, if there were any objections, and/or any abstentions.

[165] The applicant also specifically addresses this issue in the material, referring to the decision in *Noble* that there is no requirement for a formal agreement to the process of decision-making by the group for the purposes of s 251B, and that agreement to a decision-making process can be proved by the conduct of the parties.[140] The material also contains a statement by an elderly member of the claim group explaining that the group's laws and customs do not cover the making of decisions under 'European legislation' and subsequently, 'mainstream processes' are used for authorising the making of native title claims.[141]

[166] In my view, this information is sufficient to address the requirement at s 251B. It confirms that there is no decision-making process mandated by the group's laws and customs, and demonstrates that those present at the meeting agreed to and adopted a simple majority vote process for the purposes of authorising the applicant to make the application and deal with matters arising in relation to it.

Were the members of the group given every reasonable opportunity to participate in the decision?

[167] Where the native title claim group agrees to and adopts a decision-making process to authorise an applicant to make and deal with a claimant application, there is no requirement that all the persons comprising the group be involved in that decision-making process. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate in the decision-making process. [142]

[168] The affidavit of [Deponent 1 removed] sets out information about how the meeting was notified, including that public notices were placed in three newspapers relevant to the application and application area on 19, 20 and 26 September 2017, approximately three weeks prior to the date of the meeting.[143] A copy of the notice, which includes a map of the application area, a description of the claim group, and a clear statement of the purpose of the meeting, is provided in the materials.[144] In addition to the public notification, [Deponent 1 removed] explains that 'extensive efforts were made to directly contact as many known descendants of the claim group ancestors as possible, by word of mouth and social media posts.'[145] Schedule R of the Form 1 explains that an agenda was prepared for the meeting and

[139] Annexure "BC-3" to the affidavit of [Deponent 1 removed] affirmed 1 June 2018.
[140] Further information and submissions in support of registration, 1 June 2018, at p.1, referring to *Noble* at [18].
[141] Further information and submissions in support of registration, 1 June 2018, at pp. 1-2.
[142] *Lawson* at [25].
[143] At [3] to [5].
[144] At annexure 'BC-1' of [Deponent 1 removed]'s affidavit affirmed 1 June 2018.
[145] At [5].

maps relevant to the application were obtained from the Tribunal 'for presentation to persons both before and at the meeting.'

[169] [Name removed], a member of the native title claim group by descent from Kadee and Warada, submits that she and her sister were not notified of the application, nor did they authorise the making of the application. I note that [Name removed] resides in South Australia. In her letter, she states her assumption that the group making the claim avoided making contact with her due to the logistical difficulties of consulting a claim group member in another State.

[170] [Name removed], also a member of the claim group by descent from Nellie Champion, similarly submits that she and her family were not consulted about the application, and did not authorise the applicant to make the application.

[171] From their submissions, it is clear that both these individuals and their families are members of the native title claim group. In response to the submissions, the applicant states that it relies on the information provided about the way in which the meeting was notified. The applicant further notes that one of the newspapers used to advertise the authorisation meeting, 'The Australian', has a national circulation which includes, therefore, South Australia.[146] Previously in response to submissions from [Name removed], the applicant also argued there was no requirement for each individual member of the claim group to authorise persons to make the application.[147]

[172] The material does not clarify whether [Name removed] and [Name removed] were personally notified of the authorisation meeting. In my view, however, the process by which notice of the meeting was given was thorough and broad. I consider the information set out in the notice confirmed the purpose of the meeting and who was invited, and enabled for relevant persons to make an informed decision as to whether their attendance was required. It also allowed sufficient time (some three weeks) for any persons wishing to attend to make arrangements to do so. In addition to the public notice given of the meeting, the material explains that word of mouth and social media was used to give personal notice to known members of the group.

[173] I am satisfied that all the members of the group were given every reasonable opportunity to participate in the decision to authorise the applicant to make and deal with the application.

Are the persons who authorised the applicant a properly constituted native title claim group?

[174] The submissions made by [Name removed] and [Name removed], and by [Name removed] (together, 'the objecting parties'), all raise an issue regarding the persons who comprise the native title claim group. That is, the group of persons who authorised the applicant to make the application and deal with all matters arising in relation to it. [Name removed] asserts that the claim group 'is not a traditional grouping'.[148] [Name removed] submits that the 'people who call themselves Marlinyu Ghoorlie [...] are a small family group or sub-group [...] effectively part of the Champion and Dimer families.' She further submits that the Marlinyu Ghoorlie claim group 'do not have a distinct system of laws under which they can establish separate native title rights and interests', and the 'basis for their native title is the normative

[146] Letter from [Name removed] of 21 March 2019 at [12].
[147] Information and submissions in response to submissions of [Name removed], p.1.
[148] [Name removed] submissions of 16 December 2018.

system of the Gubrun[149]' and 'not of some smaller group of persons within' that larger group.[150]

[175] [Name removed] submits that she was incorrectly recorded as a member of the [Name removed] family at the authorisation meeting (which she and her brother attended), yet she was attending on behalf of her mother, a Champion. She says that the [Name removed] family does not have an apical ancestor 'on the claim' and that the claim is 'not true representation of all families.'[151]

[176] From this material, I understand the objecting parties to assert that the native title claim group is, in fact, a sub-group of a larger group of persons who, as referred to in s 61(1), 'hold the common or group rights and interests comprising the particular native title claimed.' I note that at s 190C(4)(b), I am required to turn my mind to whether the applicant is authorised by a properly constituted native title claim group.[152]

[177] While they submit that they and/or their family members were not consulted about the application, it is clear from the objecting parties' submissions that they are all members of the native title claim group. They each state this fact in their submission. The genealogies, on which the applicant relies, also confirms the objecting parties' descent from the ancestors to which they refer, and thereby their membership of the group.

[178] In my view, there is nothing within the terms of the application that indicates the native title claim group is a subgroup of a wider group,[153] and none of the objecting parties has put before me information or material that supports their contention that other Gubrun/Kapurn persons have been excluded from the group. In response to the objecting parties' submissions, the applicant asserts that they express merely the opinions and views of those individuals without supporting evidence and, when 'weighed against the detailed and extensive factual assertions made by the applicant', the applicant's assertions should stand.[154]

[179] As addressed in my reasons at s 190B(5)(b), I am satisfied the factual basis material is sufficient to support the assertion that the relevant society for the native title claim group is the Gubrun/Kapurn people, which includes two dialect groups within that broader language group, the Kalamaia and Kalaako. It follows, therefore, that I consider the applicant's factual basis material sufficiently addresses the issue raised by [Name removed] that the application is brought by a smaller group within that society.

[180] I note that it is not my role to determine the correctness of the native title claim group described.[155] As discussed above, the applicant has put before me information about the group and its composition, and the society occupying the area at settlement, including the apical ancestors from whom those persons are descended. I do not consider the submissions made by the objecting parties, without supporting material, are of sufficient substance to

[149] This word 'Gubrun' is cut off from the scanned document sent by [Name removed], however with reference to the remaining parts of the letter, it is inferred this is the correct/intended word.
[150] [Name removed] submissions of 13 March 2019.
[151] [Name removed] submissions of 19 February 2019.
[152] *Risk* at [60] to [66].
[153] See my reasons above at s 61(1) for the purposes of s 190C(2), at [147], and at s 190B(3), at [25] to [32].
[154] Letter from [Name removed] of 21 March 2019, at [13] and [19].
[155] See *Doepel* at [37].

displace my view of the material before me, that the applicant has made the application on behalf of a properly constituted native title claim group.

The meeting on 13 October 2017

[181] As above, the applicant relies on the meeting of 13 October 2017 at Coolgardie as the basis of the applicant's authority to make this application. I note that since that meeting, the application has been amended (being the application before me), but that the amendment did not involve a change to the persons comprising the applicant.

[182] The meeting minutes provide that the persons present (I understand this to be approximately 79 individuals) resolved that seven persons nominated at the meeting be elected as 'Applicants for the Marlinyu Ghoorlie Native Title Claim.'[156] These are the persons named in the Form 1 as the applicant, who have sworn affidavits pursuant to s 62(1)(a) that accompany the application. Those affidavits confirm that the persons comprising the applicant were authorised by the claim group to 'make the application and to deal with all matters arising in relation to it.'

[183] Noting the wording of s 190C(4)(b), I understand the focus of the requirement is on the applicant being authorised, not upon the application itself. Further, I consider that the members of the group giving their authority to the applicant persons to 'deal with all matters arising in relation to' an application, encompasses the act of amending the application, particularly where that amendment seeks to address previous deficiencies of the application in order to achieve registration.

[184] Notwithstanding this, Schedule R and the meeting minutes explain that after that resolution was passed, the group engaged in a discussion surrounding the scope of the applicant's authority. The minutes confirm that a further resolution addressing this matter was passed unanimously by the persons in attendance. The wording of that resolution appears in the minutes as follows:

> Resolution A – In all matters involved in the pursuit of Native Title Rights and Interests of the claim and all other matters arising therefore the Applicant will be subject to the directions of the Native Title Claim Group. The Claimant Group meeting "Authorises the applicant and members of the applicant to make decisions in accordance with the Native Title Act 1993". The Claimant Group meeting "Authorises the applicant and members of the applicant to make decisions by majority vote".

[185] In my view, the consideration of this matter by the persons in attendance at the meeting, and the subsequent decision set out above, indicate that the authority given by the native title claim group to the applicant extended to the applicant arranging and filing an amended application, such that the requirements of the Act could be satisfied.

[186] Regarding information about the meeting itself, I have before me a copy of the notices used to advertise the meeting, a copy of the attendance records, and a copy of the minutes taken at the meeting which show each resolution passed and the votes for and against each resolution. This includes the resolution by the group to authorise the seven applicant persons to make the application and deal with all matters arising in relation to it, as confirmed by the statements in the s 62(1)(a) affidavits. There is nothing in the material that suggests there was any major disagreement or dissent amongst the persons in attendance.

[156] Annexure "BC-3" to the affidavit of [Deponent 1 removed] affirmed 1 June 2018, see Resolution 9.

[187] In my view, the information before me addresses the substance of the questions posed by O'Loughlin J in *Ward* that authorisation material provided in support of an application must speak to in order to satisfy the requirement at s 190C(4)(b).[157] For the reasons set out above, I consider the information before me sufficient to allow me to be satisfied of the fact of authorisation by all the members of the native title claim group.

End of reasons

[157] *Ward* at [24] and [25].