

Registration Decision

Application name	Dennis Forrest & Ors on behalf of the Kakarra Part A Native Title Claim Group and State of Western Australia (Kakarra Part A)
Name of applicant	Dennis Forrest, Jakob Murray, Michael Tucker, Yvonne Oliver, Shayne Warmdean, Travis Tucker and Tom Graham
Federal Court of Australia No.	WAD297/2020
NNTT No.	WC2020/005
Date of Decision	3 March 2021

Claim accepted for registration

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

Bryn Hughes

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

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

CORRIGENDUM

Correction to the Registration Decision made on 3 March 2021 at the following pages:

Page 3: where a word is missing. Paragraph [6], line 1, is corrected to read “must be”.

Page 15: where a word is incorrect. Paragraph [73], line 8, is corrected to read “group description”.

Page 15: where a word is incorrect. Paragraph [73], line 12, is corrected to read “*Burragubba*”.

Page 33: where a word is missing. Paragraph [141], line 15, is corrected to read “that the”.

Page 33: where a word is incorrect. Paragraph [141], line 18, is corrected to read “substantially uninterrupted”.

Bryn Hughes

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

18 March 2021



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Reasons for Decision

CASES CITED

Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (**Burragubba**)

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

De Rose v State of South Australia [2002] FCA 1342 (**De Rose**)

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

Doolan v Native Title Registrar [2007] FCA 192 (**Doolan**)

Evans v Native Title Registrar [2004] FCA 1070 (**Evans**)

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (**Warrie**)

Griffiths v Northern Territory of Australia [2007] FCAFC 178 (**Griffiths FC**)

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 FC**)

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

Harrington-Smith on behalf of the Wongatha People v Western Australia (No 5) [2003] FCA 218 (**Harrington-Smith No. 5**)

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (**Harrington-Smith No. 9**)

Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938 (**Tjungarrayi No 3**)

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

Noble v Mundraby, Murgha, Harris and Garling [2005] FCAFC 212 (**Noble**)

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

Moran v Minister for Land and Water Conservation for the State of New South Wales [1999] FCA 1637 (**Moran**)

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

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

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

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

Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (**Wakaman**)

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

Ward v Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (**Ward v Registrar**)

BACKGROUND

- [1] This is an application filed on behalf of the Kakarra Part A native title claim group (**claim group**). It covers an area of approximately 10,889 square kilometres in the southern region of Western Australia, approximately 30 km south east of Kalgoorlie (**application area**).
- [2] The claim group has filed two applications, each covering approximately half of the area they assert they have native title rights and interests in. The application currently being considered

for registration is Kakarra Part A and relates to the western portion of the total area claimed by the claim group. I understand the remaining area is covered by WAD298/2020 Dennis Forrest & Ors on behalf of the Kakarra Part B Native Title Claim Group and State of Western Australia (**Kakarra Part B**).

- [3] The application was filed on 16 December 2020 and the Registrar of the Federal Court (**Court**) gave a copy of the application and accompanying affidavits to the Native Title Registrar (**Registrar**) on 17 December 2020 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.³

Registration conditions

- [4] Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [5] Given that the application was made on 16 December 2020 and has not been amended, I am satisfied that neither s 190A(1A) nor s 190A(6A) apply.
- [6] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision. Attachment A contains the information which will be included on the Register.

Procedural fairness

- [7] On 21 December 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the West Australian government (**State**) advising that should the State wish to supply any information or make any submissions, it should do so by 15 January 2021.
- [8] Also on 21 December 2020, the senior officer wrote to the applicant's representative to advise that any additional information the applicant wished to be considered should be provided by 15 January 2021.
- [9] On 15 January 2021, the applicant's representative provided the following documents (**additional material**):
- (a) Preliminary anthropological report, dated 15 January 2021 (**anthropological report**);
 - (b) Affidavit affirmed by [Name removed], dated 18 December 2020 (**anthropologist's affidavit**);
 - (c) Affidavit affirmed by [Name removed], dated 15 January 2021 (**solicitor's affidavit**);

³ Section 190A(1).

(d) Affidavit affirmed by [Name removed], dated 15 January 2021 (**Claimant 1 affidavit**);
and

(e) affidavit affirmed by [Name removed], dated 14 January 2021 (**Claimant 2 affidavit**).

- [10] On 21 January 2021, the senior officer wrote to the State's representative advising that the delegate would be considering the additional material in their application of the registration test and that should the State wish to make any submissions, they should do so by 29 January 2021. That correspondence enclosed copies of all of the additional material except for the anthropological report. A confidentiality undertaking was provided in relation to the anthropological report.
- [11] On 25 January 2021, the representative of the State wrote to the Tribunal providing the signed confidentiality undertaking and requesting an extension of time for the provision of registration test submissions.
- [12] On 25 January 2021, the senior officer wrote to the State's representative providing a copy of the anthropological report.
- [13] On 27 January 2021, the senior officer wrote to the State's representative advising them an extension of time had been granted and that any information the State wished to be considered should be provided by 5 February 2021.
- [14] On 5 February 2021, the Tribunal's senior officer for the matter received confirmation that the State had no comments or submissions to make in relation to the additional material.
- [15] Also on 5 February 2021 representatives for the State and representatives for the Upurli Upurli Nguratja native title claim group separately provided submissions in relation to the application of the registration test to the Kakarra Part B application (**Kakarra Part B submissions**).
- [16] The representative for the State provided the following document in relation to the Kakarra Part B application (**State submissions**):
- (a) 'State of Western Australia's Submissions in Relation to Registration of Claimant Application'.
- [17] The representative for the Upurli Upurli Nguratja claim group provided the following documents in relation to the Kakarra Part B application:
- (a) 'Submissions of the Applicant in WAD 281 of 2020 (Upurli Upurli Nguratja Claim) on the Registration of Native Title Determination Application WAD 298 of 2020' (**Upurli Upurli Nguratja submissions**) which included as annexures:
- (i) Attachment A of the Upurli Upurli Nguratja Form 1 Application;
 - (ii) Schedule A of the Kakarra Part B Form 1 Application;
 - (iii) Section 62 affidavit of Dennis Forrest dated 19 November 2020;

- (iv) Upurli Upurli Nguratja Registration Decision dated 22 January 2021;
- (v) Affidavit of [Name removed] affirmed 5 February 2021;
- (vi) Unsworn affidavit of [Name removed] signed 3 February 2021;
- (vii) Affidavit of [Name removed] sworn 4 February 2021;
- (viii) Unsworn affidavit of [Name removed] signed 4 February 2021; and
- (i) Map showing the overlap of the Kakarra Part B Claim over the Upurli Upurli Nguratja Claim prepared by Central Desert.

[18] On 8 February 2021, the senior officer wrote to the applicant's representative advising that the delegate had received information in relation to the Kakarra Part B application which they believed could affect the registration testing of the Kakarra Part A application. That correspondence accompanied material relating to the Kakarra Part B application, including the Kakarra Part B submissions. The correspondence advised that any submissions in response to that material the applicant wished to be considered in the registration testing of this application should be provided by 12 February 2021.

[19] On 12 February 2021, the applicant's representative provided the following documents in relation to the combined Kakarra Part A and Kakarra Part B applications (**further additional material**):

- (a) Submissions from the applicant's representative dated 12 February 2021 (**reply submissions**);
- (b) Affidavit affirmed by [Name removed] dated 12 February 2021 (**solicitor's further affidavit**); and
- (c) Cover page and Annexure B of a document titled 'Report on the Genealogical Descent Groups of Central East Goldfields People (WC99/30) and Summary of Family Groupings for the Purposes of Nominating Working Group membership' dated August 2010 (**GLSC Genealogies**).

[20] On 17 February 2021, the senior officer wrote to the State's representative advising that the delegate would be considering the additional material in their application of the registration test and that should the State wish to make any submissions, they should do so by 22 February 2021. That correspondence enclosed copies of all of the further additional material except for the GLSC Genealogies. A confidentiality undertaking was provided in relation to the GLSC Genealogies.

[21] On 18 February 2021, the State's representative wrote to the Tribunal advising that they did not wish to make any further submissions regarding the application of the registration test in relation to this matter.

[22] This concluded the procedural fairness process.

Information considered

- [23] 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’.
- [24] I have had regard to information in the application. I have also considered the additional information provided by the applicant directly to the Registrar on 15 January 2021 and 12 February 2021.⁴
- [25] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁵
- [26] As noted above the State has not provided any submissions in relation to the application of the registration test.⁶
- [27] I may also have regard to such other information as I consider appropriate.⁷ As such I have had regard to the Kakarra Part B submissions provided directly to the Registrar on 5 February 2021.
- [28] I have also considered:
- (a) 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 23 December 2020 (**geospatial report**);
 - (b) information in the Tribunal’s geospatial database; and
 - (c) information in the Register of Native Title Claims (**Register**).

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

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

- [29] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.⁸
- [30] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

Section 61

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

⁴ Section 190A(3)(a).

⁵ Section 190A(3)(b).

⁶ Section 190A(3)(c).

⁷ Section 190A(3).

⁸ *Doepel* [16], [35]–[39].

Section	Details	Form 1	Result
s 61(1)	Native title claim group has authorised the applicant	Part A(2); Schedule R, s 62 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

Section 62

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

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

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

[33] To meet the requirements of s 190C(3) the Registrar must be satisfied that no person included in the native title claim group for the application was a member of the native title claim group for any previous application. A ‘previous application’ is an application which:

- (a) covers the whole or part of the area covered by the current application; and
- (b) has an entry relating to the claim in the previous application on the Register when the current application was made; and
- (c) the entry was made, or not removed, as a result of consideration of the previous application under s 190A.

[34] Schedule H refers to Attachment H. Attachment H provides the application WAD186/2017 Maduwongga partially overlaps the application area. The geospatial report and my own searches of the Tribunal’s geospatial database confirm that 69.60% of the current application area is overlapped by the Maduwongga application. The Maduwongga application therefore meets the requirements of s 190C(3)(a).

- [35] According to the Register, the Maduwongga application was accepted for registration and entered onto the Register on 3 August 2017. It was therefore on the Register when the current application was made on 16 December 2020. As such the requirement of s 190C(3)(b) is met in relation to the Maduwongga application.
- [36] The Register entry for the Maduwongga application was made as a result of consideration of the application under s 190A and has not been removed. This means s 190C(3)(c) is met.
- [37] As the Maduwongga application meets each of the criteria in s 190C(3), it is a 'previous application' for the purpose of the Act. As such I must consider whether there are members of the Maduwongga native title claim group who are also members of the claim group for the current application.
- [38] Schedule O provides that: 'No members of the native title claim group are also members of the Maduwongga native title claim group.' I have reviewed the Register entry for Maduwongga and found no commonalities between the identified apical ancestors or the applicant members. I am therefore satisfied that no person included in the native title claim group for this application was a member of the native title claim group for the Maduwongga application.
- [39] My own searches also provide that 69.27% of the application area is overlapped by the application WAD4/2021 Jardu Mar People. The Jardu Mar People application therefore meets the requirements of s 190C(3)(a).
- [40] According to the Register, the Jardu Mar People application was made on 14 January 2021. As such, it was not on the Register when the current application was made on 16 December 2020. This means it does not meet the requirements of s 190C(3)(b). The Jardu Mar People application is therefore not a 'previous application' for the purposes of s 190C(3).
- [41] I am therefore 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 and that s 190C(3) is met.

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

- [42] In order to meet the requirements of s 190C(4), the Registrar must be satisfied that either of the following is the case:
- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or
 - (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
- [43] Schedule R provides that the application has not been certified and as such I must consider the requirements of s 190C(4)(b).
- [44] Section 190C(4)(b) has two limbs and requires that the applicant is both:

- (a) a member of the native title claim group; and
- (b) 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

[45] Following s 190C(4)(b) is a note providing that the word authorise is defined in s 251B. Section 251B provides that:

For the purposes of this Act, all the persons in a native title claim group... authorise a person or persons to make a native title determination application... and to deal with matters arising in relation to it, if:

- (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group... must be complied with in relation to authorising things of that kind—the persons in the native title claim group... authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
- (b) where there is no such process—the persons in the native title claim group... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

[46] Section 190C(5) provides that if the application has not been certified, the Registrar cannot be satisfied that the conditions of s 190C(4) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirements set out in s 190C(4)(b) have been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirements of s 190C(4)(b) have been met.

[47] I therefore understand that for an application to satisfy s 190C(4)(b) it must also meet the requirements of s 190C(5).

Information considered

[48] The information I have before me which addresses this condition is found in:

- (a) the application;
- (b) the s 62 affidavits;
- (c) the anthropologist's affidavit;
- (d) the solicitor's affidavit;
- (e) the State submissions;
- (f) the Upurli Upurli Nguratja submissions;
- (g) the reply submissions; and

(h) the solicitor's further affidavit.

Does the application satisfy the requirements of s 190C(5)?

- [49] Paragraph (a) of Schedule R(2) provides that all of the persons who comprise the applicant are members of the native title claim group and are authorised to make the application by all the other persons in the native title claim group.
- [50] Paragraph (b) of Schedule R(2) provides that the grounds upon which the Registrar should consider the statement in paragraph (a) is correct are set out in the s 62 affidavits filed with the application. The s 62 affidavits provide that the claim group authorised the applicant to make the application at a meeting held on 11 August 2020 at the Overland Motel in Kalgoorlie (**11 August meeting**), pursuant to a decision-making process under the traditional laws and customs of the claim group.⁹
- [51] The s 62 affidavits provide that following the 11 August meeting a claim group meeting was held on 19 November 2020.¹⁰ At that meeting the claim group instructed the applicant to bring the claim in two parts.¹¹ The present application, which relates to the western portion of the combined claim area, is Part A. As noted above I understand that the remainder of the combined claim area is subject to the Kakarra Part B application.
- [52] The Court has previously noted that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained'.¹² In light of that guidance, I am satisfied the statements in Schedule R(2) are sufficient to meet the requirements of s 190C(5).

Does the application satisfy the requirements of s 190C(4)(b)?

Is the applicant a member of the claim group?

- [53] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group. As discussed above, Schedule R(2) contains a statement to this effect. The s 62 affidavits from each of the members of the applicant also contain such a statement.¹³ In the absence of any information to the contrary, I am therefore satisfied that the persons comprising the applicant are all members of the claim group.

Is the applicant authorised to make the application by all the other persons in the claim group?

- [54] Section 190C(4)(b) requires the applicant to be authorised to make the application, by all the other members of the claim group. I understand my task at this section requires me to identify the decision-making process used by the claim group and consider how it was applied to authorise the applicant to make the application.¹⁴

⁹ Section 62 affidavits [2]-[5].

¹⁰ Ibid [6].

¹¹ Ibid [6].

¹² *Strickland* [57].

¹³ Section 62 affidavits [1], [2].

¹⁴ *Noble* [16].

[55] As noted above, the s 62 affidavits provide that the claim group used a traditional decision-making process at the 11 August meeting to authorise the applicant to make the application.¹⁵ This is also stated in the anthropologist's affidavit.¹⁶ Such a process is permitted by s 251B(a).

What information has been provided about what the traditional decision-making process entails?

[56] I understand that in order to be satisfied of the fact of authorisation, in accordance with the identified decision-making process, my task involves an inquiry through the material available to the Registrar.¹⁷ The material before me provides the following information about the society of the claim group and the decision-making process under their traditional laws and customs:

- (a) The application area is within the external boundaries of the 'anthropological construct' known as the Western Desert Cultural Bloc (**WDCB**);¹⁸
- (b) The traditional decision-making process of people associated with this portion of the WDCB, and thus the claim group, is predicated on consensus;¹⁹
- (c) The decision-making process involves 'everyone having a say' with decisions then being made by consensus;²⁰
- (d) Elders, individuals who have a more active role in caring for country, individuals with more knowledge of country, and individuals with a long association of themselves and their ancestors to the claim area are consulted and deferred to in the collective decision-making processes, particularly where there is a disagreement;²¹ and
- (e) The predominant subject matter of this decision-making approach relates to decision-making about country and as such it is appropriate to use this process in authorising the applicant for a native title claim.²²

[57] From the information which I have summarised above I understand that under the traditional laws and customs of the WDCB there exists a process of decision-making by consensus, with everyone having a say. The claim group, as part of the WDCB, applied this process when authorising the applicant.

[58] In *Burragubba*, Reeves J discussed the development of the practice of convening and conducting authorisation meetings under s 251B of the Act, including where a traditional decision-making process exists.²³ His Honour noted that 'proper notice' is essential to the validity of the authorisation meeting.²⁴ As such, I consider that in circumstances where the applicant was purported to be authorised at an authorisation meeting my task in assessing

¹⁵ Section 62 affidavits [4], [5].

¹⁶ Anthropologist's affidavit [11]-[13], [22].

¹⁷ *Strickland FC* [78].

¹⁸ Anthropologist's affidavit [6].

¹⁹ *Ibid* [11], [13].

²⁰ Section 62 affidavits [4]; Solicitor's affidavit annexure "SLK 8".

²¹ Section 62 affidavits [4]; Anthropologist's affidavit [11]-[12].

²² Anthropologist's affidavit [13].

²³ *Burragubba* [29].

²⁴ *Ibid* [30].

this condition must involve some consideration of the notice of the authorisation meeting as well as how the decision-making process was applied.

What information has been provided about how the authorisation meeting was notified?

[59] The material before me provides that public notice of the 11 August meeting was undertaken by publishing a meeting notice in the 27 June 2020 and 11 July 2020 editions of the *Kalgoorlie Miner* newspaper.²⁵ Public notification was also carried out through the publication of a meeting notice on the website of the National Indigenous Times for a period of four weeks beginning 2 July 2020.²⁶

[60] Personal notice of the 11 August meeting was carried out on 29 June 2020. This personal notice was provided through a mail-out of 596 copies of the 11 August meeting notice to those persons on the Central East Goldfields People's Trust mailing list who were known to meet the proposed claim group description.²⁷

[61] A copy of the 11 August meeting notice is annexed to the solicitor's affidavit. The notice includes the date, time, location and purpose of the 11 August meeting. The notice includes a map which shows the combined Part A and Part B application areas.²⁸

[62] Regarding who should attend the 11 August meeting the notice provides that:

'You are invited to attend this meeting if:

(a) You are a descendant of any of the following:

- a. Noona Roundhead;
- b. The spouses Miimiidhaanuu (Peter Mimitjunu or King Peter) and Maggie;
- c. Padalji (Jack Anderson);
- d. Yambii (Alice Yampi);
- e. Wipaana (aka Wiparna/Noorie Weebunner/Maggie Weebunner);
- f. The spouses Jimmy Teatree and Judaabi (aka Tutaabii/Nellie Teatree);
- g. Morrel;
- h. Sinclair Beeberwin, father of Don Sinclair;
- i. Tuwarn (aka Linda Smith);
- j. Thanang (aka Minnie Walker);
- k. Kileeen Ngurnmpurrna (aka Kyaleen Numbaarn), mother of Timothy Rundle; and
- l. Toby Willis.

²⁵ Solicitor's affidavit [13].

²⁶ Solicitor's further affidavit [20].

²⁷ Solicitor's affidavit [11]-[12].

²⁸ Ibid [25], annexure "SLK3".

(b) Or you:

- a. have an ancestor with a long association with the proposed claim area in accordance with traditional laws and customs; and
- b. you have a long association with the proposed claim area in accordance with traditional laws and customs; and
- c. you have religious, sacred and/or ritual knowledge of the area.’²⁹

[63] The anthropologist’s affidavit provides that, on the basis of their knowledge, training, experience and research to date, the above description reflects their opinion of the people who hold native title rights and interests in the application area.³⁰

What information has been provided about the conduct of the 11 August meeting?

[64] The material before me provides that the 11 August meeting was attended by the solicitor for the claim group, a consultant anthropologist and a member of Paperbark Corporation Services who provided administrative support.³¹ Attendees were asked to register upon arrival and the consultant anthropologist confirmed whether they fell within the proposed claim group description through consulting the Central East Goldfields genealogies (**Genealogies**).³² Where attendees were not known to fall within the proposed claim group description the consultant anthropologist engaged with them to determine how they might fall within the Genealogies or otherwise meet the pathways of connection identified in the 11 August meeting notice.³³

[65] The 11 August meeting was attended by 53 claim group members.³⁴ A further 7 people attended the meeting but did not participate in the decision process as they did not meet the proposed claim group description.³⁵ The claim group members in attendance were representative of 10 of the 12 identified apical ancestors or apical pairs.³⁶

[66] Annexed to the solicitor’s affidavit of the applicant is a record of the 11 August meeting outcomes. The record of outcomes provides that there was discussion concerning the role of the applicant, which the solicitor for the claim group explained as being ‘to do all things necessary to prosecute the native title claim.’³⁷ The claim group’s solicitor also advised the claim group that the applicant be appointed on a conditional basis so that those persons comprising it could resign or otherwise cease being a member.³⁸ At Resolution 4(a) the claim group members, pursuant to the traditional decision-making process, authorised eight persons to form the applicant and make the native title claim on their behalf. At Resolution 4(b) the claim group members resolved that should any named person cease to be a member

²⁹ Ibid annexure “SKL 3”.

³⁰ Anthropologist’s affidavit [6], [8].

³¹ Solicitor’s affidavit [14], annexure “SLK8”.

³² Anthropologist’s affidavit [16]-[17].

³³ Ibid [17], [21].

³⁴ Ibid [20].

³⁵ Ibid [21].

³⁶ Anthropologist’s affidavit [20]; Solicitor’s affidavit annexure “SLK 8”.

³⁷ Solicitor’s affidavit annexure “SLK 8”.

³⁸ Ibid annexure “SLK 8”.

of the applicant, the other members remain authorised to comprise and act as the applicant.³⁹ The record of outcomes annexed to the solicitor's affidavit provides that these resolutions were preceded by 'extensive discussion' amongst the attendees and were 'Passed by consensus'.⁴⁰

- [67] The anthropologist's affidavit provides that he closely observed the 11 August meeting and observed the participants make a number of collective decisions consistent with the consensus model of traditional decision-making processes associated with the WDCB and therefore the claim group.⁴¹

What information has been provided about whether authorisation has been given by the whole of the claim group?

- [68] As noted above, on 5 February 2021 the representative for the State and the representative for the Upurli Upurli Nguratja claim group separately provided submissions in relation to the Kakarra Part B application. As the applicant's material provides that the Kakarra Part A and Kakarra Part B applicants were authorised at the same meeting, in my view the material in those submissions relating to the authorisation of the applicant is also relevant to the Kakarra Part A application.

- [69] In relation to the Kakarra Part B application the Upurli Upurli Nguratja submissions provide that the applicant was not authorised to make the application in accordance with the traditional decision-making process as not all members of the claim group 'had a say in authorising the Kakarra Part B Claim' at the 19 November 2020 meeting.⁴² There does not appear to have been broad public notification of this 19 November meeting and some members of the claim group were not aware the meeting was held.⁴³

- [70] The State relies upon and adopts the submissions of the Upurli Upurli Nguratja applicant.⁴⁴ The State also submits that the anthropological report identifies a potential requirement for people living in the Tjuntjuntjara community to be included in the claim group.⁴⁵ The State submits that there is no evidence that notice of the authorisation meeting was provided to members of this community.⁴⁶

- [71] In their reply submissions the applicant provides that the persons comprising the applicant were authorised to bring the entire combined Kakarra claim at the meeting held on 11 August 2020 and subsequently 'instructed' to bring the claim in two parts at the 19 November 2020 claim group meeting.⁴⁷ As the applicant had already been authorised there was no need to publicly authorise the 19 November 2020 meeting, the decision to bring the claim in two parts being a matter of 'process, rather than substance'.⁴⁸ The applicant's reply submissions noted

³⁹ Ibid annexure "SLK 8".

⁴⁰ Ibid annexure "SLK 8".

⁴¹ Anthropologist's affidavit [22].

⁴² Upurli Upurli Nguratja submissions [18]-[20].

⁴³ Ibid [18]-[20].

⁴⁴ State submissions [8].

⁴⁵ Ibid [14].

⁴⁶ Ibid [14].

⁴⁷ Applicant's reply submissions [25]-[28].

⁴⁸ Ibid [28]-[43].

that the 11 August meeting notice was publicly notified and invited all persons who were not descended from the apical ancestors but otherwise met the connection pathways to attend the meeting.⁴⁹ The submissions also note that personal notification of at least one member of the Tjuntjuntjara community was attempted and there is nothing to suggest this personal notification was not successful.⁵⁰

Consideration

- [72] In my view, the first question I must address is whether the applicant was authorised to make the application at the meeting held 11 August 2020 or the meeting held 19 November 2020. The material provided by the applicant consistently refers to authorisation occurring at the 11 August meeting and I have summarised the relevant resolutions from that meeting above. I understand that following the 11 August meeting, the claim group's representative became aware that another application may be brought over part of the proposed application area.⁵¹ As such, at the 19 November meeting the claim group resolved to bring the application in two parts, with the current application being 'Part A' and the application concerning the remainder of the application area being 'Part B'.⁵² I note that the persons authorised by a claim group are not merely authorised to bring the application, but also 'to deal with matters arising in relation to it'.⁵³ The solicitor's affidavit provides that this authorisation to deal with matters arising in relation to the claim was raised and discussed at the 11 August meeting. In my view, the applicant was authorised to bring an application over the entirety of the combined Part A and Part B areas at the 11 August meeting. This included authorisation to deal with matters which arose in relation to the claim. I consider that the lodgement of another claim over part of the proposed application area, leading to the decision by the applicant to bring the claim in two parts, is one such matter.
- [73] The notice of the 11 August meeting advised of the time, date and location of the meeting and included contact details for any person wishing to gain more information about the application. It provides the purpose of the 11 August meeting, being to authorise the making of a native title claim and to authorise an applicant to bring that claim. Notification was conducted through both public and personal formats and was published in two editions of a regional newspaper as well as on the website of a relevant national newspaper. Personal notification of the 11 August meeting was sent to 596 persons who were identified as meeting the proposed claim group discussion. The invitation to attend extended to those persons descended from the identified apical ancestors and also to any person who otherwise met the connection pathways. As publication of the notice occurred between 27 June and 11 July 2020 members of the claim group received at least 4 weeks to decide if they wished to attend the 11 August meeting. In my view, the notice was 'proper' in the sense provided in *Burugabba* in that it allowed all the members of the claim group to decide whether or not to attend the authorisation meeting and 'have their say' in the decision to authorise the applicant to make the application.

⁴⁹ Ibid [50].

⁵⁰ Ibid [50].

⁵¹ Solicitor's affidavit [17].

⁵² Ibid [21].

⁵³ Section 251B.

- [74] I note the comment of Wilcox J in *Moran* that it is not necessary for the persons comprising the applicant to be individually authorised by every member of the claim group. Rather, 'it will be enough that the applicant has been authorised in accordance with a process of decision-making recognised under the traditional laws and customs of the claimant group'.⁵⁴ I consider that the material before me outlines the traditional decision-making process of the claim group and provides how it was applied in the decision to authorise the applicant. As discussed above I consider that the 11 August meeting was notified in such a way as to allow all members of the claim group to participate in the traditional decision-making process through choosing to attend the meeting. In my view, the material shows that those who did attend the 11 August meeting authorised the applicant to make the application pursuant to their traditional decision-making process.
- [75] I also note that Resolution 4(a) from the 11 August meeting outcomes authorised eight persons to form the applicant, however Part A of the application before me only lists seven of those individuals. The application is accompanied by s 62 affidavits from those seven people. The solicitor's affidavit provides that following the 11 August meeting one of the persons authorised to comprise the applicant advised that they wished to resign as a member of the applicant.⁵⁵
- [76] The solicitor's affidavit notes that the resolutions made by consensus at the 11 August meeting provide that the remaining members of the applicant continue to be authorised in the event one of them resigns, becomes incapacitated or passes away.⁵⁶ The record of the 11 August meeting shows that the terms for the appointment of the applicant were passed by the attendees by consensus at Resolution 4(b), summarised above.⁵⁷
- [77] In light of Resolution 4(b), I do not consider that the resignation of one of the persons authorised to comprise the applicant would affect the authorisation of the other members of the applicant. In forming this view I take note of the comments of Spender J in *Doolan* that 'an authorisation of a group of people to act has to be understood as meaning the authorisation of so many of them as continue to be willing and able to discharge their representative function.'⁵⁸

Conclusion

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

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

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

- [79] In order to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application are sufficient for it to be said with

⁵⁴ *Moran* [48].

⁵⁵ Solicitor's affidavit [27].

⁵⁶ *Ibid* [28].

⁵⁷ *Ibid* annexure "SLK 8".

⁵⁸ *Doolan* [59].

reasonable certainty, whether native title rights and interests are claimed in relation to particular land or waters.

[80] I understand that the question at this condition is whether the information and map contained in the application provide certainty about the:

- (a) External boundary of the area where native title rights and interests are claimed;
- (b) Any areas within the external boundary over which no claim is made.⁵⁹

Does the information about the external boundaries meet this condition?

[81] Schedule B refers to Attachment B. Attachment B describes the application area with reference to the external boundaries of two native title determination applications and one native title determination, the Central Desert Region Representative Aboriginal and Torres Strait Islander Body boundary, land tenure, and coordinate points expressed to six decimal places. Attachment B notes the coordinate points are referenced to the Geocentric Datum of Australia 2020.

[82] Schedule C refers to Attachment C. Attachment C contains a copy of a map prepared by the Tribunal, titled 'Kakarra Part A'. The map is dated 8 December 2020 and includes:

- The application area depicted with a bold dark-blue outline;
- Representative Aboriginal and Torres Strait Islander Body boundaries labelled and depicted in light-brown dashed line over dark brown line;
- Land parcels coloured by tenure type and labelled;
- Towns and settlements depicted with black dashed outline and labelled;
- Scalebar, locality map and coordinate grid; and
- Notes relating to the source, currency and datum of data used to prepare the map.

[83] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and agree with that assessment.

Does the information about the excluded areas meet this condition?

[84] Schedule B, paragraph b lists areas which are excluded from the application in general terms, such as areas subject to previous exclusive possession acts or areas where native title has been wholly extinguished. Paragraph b(5) of Schedule B notes that the applicant seeks to apply ss 47–47B of the Act, which provide for the extinguishment of native title to be disregarded in particular circumstances. I note the comments of French J regarding general exclusion clauses, such as those found in Schedule B, that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the

⁵⁹ Doepel [122].

hearing of the application'.⁶⁰ In light of those comments I am satisfied that the areas affected by the general exemption clauses can be ascertained during the hearing of the application.

[85] As noted above, Schedule B refers to Attachment B. Attachment B specifically excludes the following native title applications and determination:

- Native Title Determination Application WAD91/2019 Nyalpa Pirniku (WC2019/002);
- Native Title Determination Application WAD647/2017 Marlinyu Ghoorlie (WC2017/007); and
- Native Title Determination WAD6020/1998 Ngadju (WCD2014/004).

[86] In my view, those areas specifically excluded from the application area are clear from Attachment B.

Conclusion

[87] I consider that the external boundary of, and those areas excluded from, the application area can be identified from the description with reasonable certainty. The map at Attachment C shows the external boundary of the application area. I am therefore satisfied that s 190B(2) is met.

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

[88] To meet the requirements of s 190B(3), the Registrar must be satisfied that either:

- (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.

[89] Paragraph 1 of Schedule A provides that the claim group comprises the persons who hold native title rights and interests in the claim area through:

- a) an ancestor with a long association with the claim area in accordance with traditional law and custom; and
- b) their own long association with the claim area in accordance with traditional law and custom; and
- c) having religious, sacred and/or ritual knowledge of the area.

[90] Paragraph 2 provides that as at the date of the application, the persons referred to in paragraph 1 includes the descendants of twelve listed apical ancestors or apical pairs who have a connection with the claim area in accordance with traditional laws and customs.

[91] From the above description I understand that s 190B(3)(b) is applicable. I must therefore consider whether the description is sufficiently clear so that it can be ascertained whether any particular person is in the claim group.

⁶⁰ *Strickland* [55].

[92] In assessing the requirements of this provision, I understand I am neither required nor permitted to be satisfied about the correctness of the description of the claim group found in the application.⁶¹ Rather, my task is limited to ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group.’⁶² I understand that my consideration of this condition is limited to the information in the application itself.⁶³

Is the description sufficient to ascertain the members of the claim group?

[93] From the description provided at Schedule A, I understand that there are 3 criteria to qualification as a member of the claim group. Noting the use of the word ‘and’, I understand that a person must meet each of these criteria to qualify as a member.

[94] The first criterion for membership is descent from an ancestor possessing a long association with the claim area in accordance with traditional laws and customs. I understand that the apical ancestors listed at paragraph 2 can meet this criterion of the claim group description. I consider having a person show descent from one of the ancestors identified in paragraph 2 provides a clear starting point to commence an inquiry about whether the person is a member of the claim group. I consider that through factual inquiry, such as an examination of genealogical records or making enquiries of the person and other members of the group, it would be possible to determine whether any person is descended from an individual with an appropriate association with the claim area. In my view the traditional laws and customs of the claim group would provide an appropriate ‘set of rules or principles’ to assist with determining whether or not a person’s ancestor possessed an appropriate association with the claim area.⁶⁴

[95] The second criterion for membership is a person having a long association with the claim area. I consider that it would be possible through making enquiries of the person to ascertain whether that person possessed an appropriate association with the application area. As with the first criterion I consider that the claim group’s traditional laws and customs would provide an appropriate ‘set of rules or principles’ to assist with determining whether or not a person possessed an appropriate association with the claim area.⁶⁵

[96] The third criterion is having religious, sacred and/or ritual knowledge of the area. Schedule F provides further information regarding the spiritual beliefs of the claim group, which are rooted in the *Tjukurrpa* (Dreaming), which explain, and are evidenced by, the formation of the landscape.⁶⁶ In my view through putting factual enquiries to the other members of the claim group and to the individuals in question it would be possible to ascertain whether any particular person possesses the appropriate ritual or sacred knowledge. I also note the Court has previously accepted forms of religious, sacred or ritual knowledge as a method of identifying members of a claim group.⁶⁷ I am therefore of the view that with some factual

⁶¹ *Wakaman* [34].

⁶² *Ibid* [34].

⁶³ *Doepel* [16].

⁶⁴ *Ward v Registrar* [25].

⁶⁵ *Ibid* [25].

⁶⁶ Schedule F [5]-[6].

⁶⁷ *De Rose* [926]; *Tjungarrayi No 3* Schedule 3

enquiries it will be possible to identify the persons who meet this criterion of the claim group description.

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

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

[98] To meet the requirement of s 190B(4), the Registrar must be satisfied that the description contained in the application is sufficient to allow the native title rights and interests claimed to be readily identified. My consideration at this condition is limited to the information that is found in the application itself.⁶⁸

[99] The question of whether any of the claimed rights and interests can properly be considered ‘native title rights and interests’ pursuant to s 223 is, in my view, a question for consideration under s 190B(6), where my task is to consider whether each of the claimed rights or interests can be prima facie established as native title rights and interests.

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

[100] Paragraph 1 of Schedule E qualifies the rights and interests claimed by acknowledging that they are subject to, and exercisable in accordance with, the common law, the laws of the State of Western Australia and the Commonwealth of Australia, the valid rights and interest conferred under those laws and the traditional laws and customs acknowledged and observed by the claimants.

[101] From the description at paragraph 2 of Schedule E, I understand that exclusive possession is claimed in those parts of the application area where there has been no extinguishment of native title rights and interests or where extinguishment must be disregarded. I understand that a broad claim to exclusive possession such as this does not offend the requirements of s 190B(4).⁶⁹

[102] From the description at paragraph 3 of Schedule E, I understand that where exclusive possession cannot be claimed, certain non-exclusive rights are claimed. Paragraph 3 contains a list of 5 non-exclusive rights. In my view, the non-exclusive rights form an exhaustive list and there is no inherent or explicit contradictions within the description.

Conclusion

[103] I am satisfied that the description in Schedule E is sufficient for me to understand and identify the claimed rights and interests. As such the application meets the requirements of s 190B(4).

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

[104] In order to meet the requirements of s 190B(5) the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

⁶⁸ *Doepel* [16].

⁶⁹ *Strickland* [60].

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

[105] I understand that my task at s 190B(5) is to consider whether the asserted facts can support the existence of the claimed native title rights and interests.⁷⁰ My role is not to undertake an assessment of the ‘strength of the evidence’ which may ultimately be adduced to support those asserted facts.⁷¹

[106] Although the asserted facts are not required to be proven by the applicant, I understand that the factual basis must be ‘in sufficient detail to enable a genuine assessment’ of whether the factual basis material can support the assertions at ss 190B(5)(a)-(c).⁷²

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

[107] Schedule A provides information on the claim group and their connection to the apical ancestors. Schedule E sets out the claimed rights and interests. Schedule F provides a description of the factual basis for the claimed native title rights and interests. Schedule G lists the activities that members of the claim group carry out on the application area. The additional material provided by the applicant, particularly the anthropological report and affidavits of Claimant 1 and Claimant 2, more specifically addresses the assertions of s 190B(5). As such my reasons will focus on the information provided in those documents.

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

[108] I understand that s 190B(5)(a) requires a sufficient factual basis to support the following assertions:

- that there is ‘an association between the whole group and the area’ although not ‘all members must have such association at all times’;⁷³
- that the predecessors of the whole group have had an association with the application area over the period since sovereignty or European settlement;⁷⁴ and
- that there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’ having, for instance, ‘no geographical particularity’.⁷⁵

⁷⁰ Doepel [17].

⁷¹ Ibid [17].

⁷² Gudjala FC [92].

⁷³ Gudjala 2007 [52].

⁷⁴ Ibid [52].

⁷⁵ Martin [26]; Corunna [39], [45].

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

[109] From the anthropological report I understand that the date of effective sovereignty in the region of the application occurred in the late 1890s with the arrival of significant numbers of European settlers to the wider Goldfields region, particularly to the west and north of the application area.⁷⁶

[110] The anthropological report places a number of the apical ancestors in the application area at, or around, the time of settlement in the region. For example:

- (a) Apical ancestor [Name removed] was born at Gngangara Rockhole to the north east of the application area.⁷⁷ She came to live in Karonie, located near the south eastern border of the application area, at 3 years old and lived in the application area for the rest of her childhood and early adult life.⁷⁸ She had 3 children, the eldest child being born in the early 1910s at Kambalda to the immediate south east of the application area, the second child being born in the bush near Karonie in the late the 1910s and the youngest being born in Mount Monger in the south eastern part of the application area in the late 1910s.⁷⁹ The anthropological report provides that [Name removed], along with her family, was removed from the application area in the 1930s.⁸⁰ Although [Name removed]'s grandchildren grew up outside the application area they continued to 'come back to their mum's Country during the summertime'.⁸¹
- (b) Apical ancestor [Name removed] was recorded at Karonie in 1928.⁸² [Name removed]'s granddaughter was born to the north of the application in the late 1910s and was recorded as being in the centre of the application area in 1925 and then working at Karonie in the 1930s.⁸³ The anthropological report goes on to provide that [Name removed]'s granddaughter lived in the Karonie region and possessed a 'strong attachment to the area'.⁸⁴
- (c) Apical ancestor [Name removed], is recognised by the claimants as having rights and interests in the claim area and her son was born in the Karonie area.⁸⁵ Her granddaughter was born in the early 1940s and as a child lived in Karonie with her parents.⁸⁶ [Name removed]'s granddaughter recalls her father cutting wood and working on various stations in and around the application area during her youth and her father's family would take her *Bardi* (witchetty grub) hunting in the Karonie area and surrounds.⁸⁷ At age 15 [Name removed]'s granddaughter began working at Mt Monger

⁷⁶ Anthropological report [31].

⁷⁷ Ibid [167].

⁷⁸ Ibid [167]-[168].

⁷⁹ Ibid [168].

⁸⁰ Ibid [170].

⁸¹ Ibid [309].

⁸² Ibid [173].

⁸³ Ibid [173]-[174].

⁸⁴ Ibid [173].

⁸⁵ Ibid [187]-[190].

⁸⁶ Ibid [188]-[190].

⁸⁷ Ibid [189]-[190].

Station in the southern part of the application area and recalls her father's mother visiting her there.⁸⁸

- (d) Apical Ancestors [Name removed] and [Name removed] were recorded with their two sons at Karonie in 1927.⁸⁹ [Name removed] is estimated to have been born in the early 1880s.⁹⁰

- [111] Similar information is provided about the other named apical ancestors, including the dates they were recorded within the application area, details of their descendants and information concerning those descendants' connection with the application area.⁹¹ The anthropological report provides that in the preliminary view of the authors, some of the apical ancestors were the descendants of the original inhabitants of the area, others were from neighboring country and moved into the area at the time of sovereignty and others came from the east or north east in the early decades of the 20th century.⁹² In accordance with the traditional laws and customs common to the people of the WDCB, 'processes of succession', particularly through long association and the possessing of religious, sacred and ritual knowledge, operated to allow later arrivals rights and interests to orphaned country in the application area.⁹³
- [112] The anthropological report provides that despite the enforced removal of Aboriginal people from the application area the claim group has maintained their connection through frequent visits and stories related by older people concerning the physical and mythological landscape of the area.⁹⁴ The anthropological report also provides examples of claim group members continuing to work in the application area, for example in the 1960s and 1970s on the railway line passing through the application area or at Pinjin Station in the northern part of the application area in the 1990s.⁹⁵ Claim group members discuss how their predecessors' walked over the application area relying on their knowledge of where and when to find food or water as they travelled.⁹⁶
- [113] Regarding the spiritual connection of the current members of the claim group and their predecessors, the factual basis identifies a number of sites of significance and related *Tjukurrpa*.⁹⁷ From the information provided in the anthropological report, the claimant affidavits, and my own searches of the Tribunal's geospatial database, I can see that these sites can be found throughout the application area and the surrounding region. The material explains the cultural importance of the *Tjukurrpa* to the claim group members and how they give rise to responsibilities in relation to the sites associated with them.⁹⁸ The material provides examples of several *Tjukurrpa* associated with the application area along with accompanying sacred sites, for example [Culturally sensitive information removed] which

⁸⁸ Ibid [190].

⁸⁹ Ibid [175].

⁹⁰ Ibid [175].

⁹¹ Ibid [154]-[192].

⁹² Ibid [144].

⁹³ Ibid [141]-[144].

⁹⁴ Ibid [308]-[312].

⁹⁵ Ibid [310].

⁹⁶ Ibid [223].

⁹⁷ Ibid [260]-[262].

⁹⁸ Ibid [210], [261]; Claimant 2 affidavit

travels through the application area and is associated with a number of sites in the north west and centre of the application area before continuing east.⁹⁹ The material also references a number of significant sites in the application area, particularly related to water sources, which are described as being ‘like a monument for the Dreamtime’.¹⁰⁰ Claimants discuss their responsibility to maintain and protect these water sources and how this has been passed down to them by their old people.¹⁰¹ The anthropological report provides that the authors were told about and shown a number of rock holes and other water sources throughout the application area, including one site in the north western corner of the application area where claim group members recall their old people telling them a prospector had been speared.¹⁰² There also a number of gender specific sites throughout the application area, for example a women’s birthing site associated with a lake on the western border of the application area.¹⁰³

[114] The affidavit of Claimant 1 provides that he is connected to the application area through his mother, who I understand is the granddaughter of apical ancestor [Name removed].¹⁰⁴ Claimant 1 recalls travelling around the application area as a child, camping, hunting and visiting family who lived and worked there.¹⁰⁵ He later managed Pinjin Station in the north east of the application area.¹⁰⁶ Claimant 1 continues to visit the application area and takes his wife, children and grandchildren out on country, showing them sites that are important to him.¹⁰⁷ Whilst visiting he hunts and collects the natural resources of the application area, for example collecting honey ants, particularly in the northern and north eastern parts of the application area.¹⁰⁸ He recalls being shown places associated with particular *Tjukurrpa* and being the taught the stories of those places by the old people.¹⁰⁹

[115] The affidavit of Claimant 2 provides that he is connected to the application area on his father’s side through apical ancestors [Name removed] and [Name removed] and on his mother’s side through apical ancestor [Name removed].¹¹⁰ He states that his maternal grandmother, who was [Name removed]’s granddaughter, and her father grew up in the application area, particularly near Karonie and Claimant 2 notes that his grandmother spent her whole life there.¹¹¹ They ‘followed the rockholes’ and travelled, hunted and gathered ‘all around’ the application area.¹¹² Claimant 2 has visited the application area to go hunting and camping since he was a child and now takes his own children to hunt in the application area.¹¹³ When taking younger generations out onto the application area, he teaches them about hunting and the *mamu* (evil spirits) which inhabit the area.¹¹⁴ He recalls his grandparents and other old

⁹⁹ Anthropological report [261].

¹⁰⁰ Ibid [212]; Claimant 1 affidavit [33]-[34].

¹⁰¹ Claimant 1 affidavit [33]-[34].

¹⁰² Anthropological report [262].

¹⁰³ Ibid [262].

¹⁰⁴ Claimant 1 affidavit [3]; Anthropological report [179].

¹⁰⁵ Claimant 1 affidavit [6]-[9].

¹⁰⁶ Ibid [12].

¹⁰⁷ Ibid [10].

¹⁰⁸ Ibid [24].

¹⁰⁹ Ibid [13].

¹¹⁰ Claimant 2 affidavit [6]-[7].

¹¹¹ Ibid [7], [9]-[12].

¹¹² Ibid [10].

¹¹³ Ibid [3], [12].

¹¹⁴ Ibid [11], [41]-[42].

people teaching him about the natural resources of the application area, for example how to collect wood for the crafting of artefacts such as *tjuna* (digging sticks) as well as teaching him about the *Tjukurrpa*.¹¹⁵

Is the factual basis sufficient to support the assertion at s 190B(5)(a)?

[116] The material references numerous locations in the application area and surrounds which I have located using the Tribunal's geospatial database and the maps included throughout the anthropological report. I consider whether the information provided is sufficient to meet the requirements of s 190B(5)(a) below.

Is the factual basis sufficient to support an association between the claim group at sovereignty and since that time in the application area?

[117] In my view, the factual basis is sufficient to support the assertion that the predecessors of the claim group were associated with the application area at the time sovereignty was asserted. From the material I understand that some of the apical ancestors would have been alive in the 1890s at the time of European settlement in the application area. I infer that these ancestors would have had a similar relationship with the application area as did earlier generations of the claim group's predecessors who were alive at the time of sovereignty. In making such retrospective inferences I note the guidance provided by the Court in *Harrington Smith No. 9*.¹¹⁶ The material also explains how later arrivals to the application area 'succeeded' orphaned country in accordance with the traditional laws and customs of the WDCB.

[118] The factual basis also describes the ongoing association of the claim group. It details the connection of the apical ancestors to the application area and provides information regarding how subsequent generations have continued to access the application area in order to camp, hunt, gather natural resources and pass on traditional knowledge. Despite forced removals claimants recall their predecessors living and working on the application area. I therefore consider that the factual basis is sufficient to support the assertion of a continuing association with the application area from the time of sovereignty.

Is the factual basis sufficient to support an association between the claim group and the area currently?

[119] In my view the information is sufficient to support the assertion that the claim group currently has an association with the application area. Claimants maintain their connection with the application area through regular visits, often accompanied by their children and grandchildren. While visiting the application area they check on and maintain sacred sites, hunt and gather natural resources. The claimants also maintain knowledge taught to them by their predecessors about the application area, including knowledge concerning relevant *Tjukurrpa* and sacred sites. They pass this onto their children which, in my view, supports an ongoing spiritual association with the application area. I consider that the asserted facts are sufficient to support the assertion of an ongoing physical and spiritual association with the application area.

¹¹⁵ Ibid [15]-[18].

¹¹⁶ *Harrington Smith No. 9* [294]-[296].

Is the factual basis sufficient to support an association between the claim group and the whole area?

[120] I understand that my task at s 190B(5)(a) is limited to assessing whether the factual basis is sufficient to support the assertion that the current members of the claim group have, and their predecessors had, an association with the application area as a whole.¹¹⁷ It is not a requirement that every member of the claim group have an association with the entire application area at all times.

[121] In my view, there is sufficient information to support an association by the claim group with the whole of the application area. The factual basis contains references to locations within and surrounding the application area which the claim group members and their predecessors were and are associated with. For example there are references to sacred sites across the application area and Pastoral Stations which encompass parts of the northern and southern portions of the application area. Claimants recall their predecessors travelling across the application area relying on their knowledge of where to find food and water as they travelled. I also consider there is information to support a spiritual association with the whole area. The factual basis references a number of *Tjukurrpa* which run across the application area and their associated sacred sites which cover and surround the application area. The knowledge concerning, and the corresponding spiritual connection to, these *Tjukurrpa* has been passed down to the members of the claim group by their predecessors. In my view, this supports the spiritual association of the current members of the claim group, and their predecessors, to the whole of the application area.

Conclusion – s 190B(5)(a)

[122] In my view, the information before me is sufficient to support the assertion that the current members of the claim group presently have, and their predecessors had, a physical association with the whole of the application area. Considering the information provided concerning the claim group's connection to country I am also satisfied that there is a sufficient factual basis to support the assertion of an ongoing spiritual association with the application area. As such the requirements of s 190B(5)(a) are met.

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

[123] This condition requires that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group that give rise to the claim to native title rights and interests. The definition of 'native title rights and interests' in s 223(1)(a) provides that those rights and interests must be 'possessed under the traditional laws acknowledged and the traditional customs observed' by the native title holders.

[124] In *Yorta Yorta* the High Court held that a law or custom is 'traditional' where:

- the law or custom has been passed from generation to generation of a society, usually by word of mouth and common practice;¹¹⁸

¹¹⁷ *Corunna* [31].

¹¹⁸ *Yorta Yorta* [46].

- the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal or Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown and it is only those normative rules that are the traditional laws and customs;¹¹⁹ and
- the acknowledgement and observance of the laws and customs have continued without substantial interruption since sovereignty, being transmitted from generation to generation of the relevant society.¹²⁰

[125] In *Gudjala 2009*, Dowsett J considered some of the factors that may guide the Registrar, or her delegate, in assessing the factual basis, including:

- that the factual basis identifies, and demonstrates the existence of, the relevant pre-sovereignty society and those persons who acknowledged and observed the laws and customs of the pre-sovereignty society;¹²¹
- that where descent from named apical ancestors is the basis of membership to the claim group, the factual basis demonstrates some relationship between those ancestral persons and the relevant pre-sovereignty society;¹²² and
- that the factual basis contain some explanation of how the current rights and interests can be ‘traditional’. It is not sufficient to assert that the relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society from which the claim group descends, without any factual details concerning the pre-sovereignty society and its laws and customs.¹²³

[126] In *Warrie*, the Full Federal Court held that:

[A] claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character, there is no further gloss or overarching requirement, and no further rigidity. The Native Title Act in terms does not require establishment of some overarching “society” that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.¹²⁴

[127] I understand that my task in assessing the sufficiency of the factual basis at s 190B(5)(b) requires the identification of:

- (a) a link between the relevant pre-sovereignty society, the apical ancestors and the current claim group; and

¹¹⁹ Ibid [46].

¹²⁰ Ibid [87].

¹²¹ *Gudjala 2009* [40].

¹²² Ibid [40].

¹²³ Ibid [29].

¹²⁴ *Warrie* [107].

- (b) the existence and continued observance of normative rules by successive generations of the claim group, such that these normative rules could be considered ‘traditional laws and customs’.

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

Society

[128] The factual basis provides that the claim group is part of the WDCB, a broader regional social grouping with whom the claim group shares significant cultural ties and similarities.¹²⁵ The term WDCB was first used by Ronald Berndt in the 1950s, referring to a number of Western Desert groups united in and by their acknowledgment and observance of a common body of traditional laws and customs, with slight regional variances.¹²⁶ At the time that sovereignty was asserted the application area was occupied and used by members of the WDCB, with those people being the ancestors and predecessors of the current claim group.¹²⁷ These predecessors had significant cultural relationships with WDCB people in the region of the application area and shared a system of law and customs, with an emphasis on the *Tjukurrpa*, association with an area, and religious, spiritual and ritual knowledge.¹²⁸ The traditional laws and customs of the WDCB are and were acknowledged and observed by the claim group and their predecessors and have had a substantially continuous existence and vitality in the application area since prior to sovereignty.¹²⁹ The anthropological report notes that whilst there were dialect groupings within the WDCB, in this region there was little distinction and these groupings are typically not well defined geographically.¹³⁰ As is common in this region, claim group members rarely use language or ‘tribal’ names to describe themselves, instead collectively identifying as one group or mob, and state that their ancestors did so in the same way.¹³¹

Traditional laws and customs

Tjukurrpa

[129] The factual basis provides that many of the traditional laws and customs of the people of the WDCB are grounded in a belief in the *Tjukurrpa*.¹³² The *Tjukurrpa* is held to be the time when ancestral beings travelled and shaped the country, imbuing country with spiritual meaning, shaping human society and laying down laws and customs.¹³³ The *Tjukurrpa* explains the formation of, and is demonstrated by, the particular features of the landscape and the application area is defined by a number of *Tjukurrpa* tracks and associated sites.¹³⁴ Knowledge of the *Tjukurrpa* is maintained through stories passed down orally by the claim group’s predecessors and the *Tjukurrpa* provide the normative structure of the laws and customs of

¹²⁵ Schedule F [1]-[3]; Anthropological report [45]-[46].

¹²⁶ Anthropological report [107]-[108], [202].

¹²⁷ Schedule F [1], [4].

¹²⁸ Anthropological report [108], [139], [198].

¹²⁹ Schedule F [9]-[10]; Anthropological report [210], [224]-[226].

¹³⁰ Anthropological report [208].

¹³¹ Ibid [41]-[42].

¹³² Ibid [45], [209]-[210].

¹³³ Ibid [209], [230].

¹³⁴ Ibid [209]-[210].

the claim group.¹³⁵ Claimants explain that breaking these traditional laws will result in punishment.¹³⁶

Land Holding System

[130] Under the claim group's system of traditional laws and customs rights, interests and responsibilities in country are informed by a person's connection with that country. Such connection is established through the 'multiple pathways' model which provides for rights and interests through an ancestor's long association with an area, an individual's own long association with the area and the possessing of traditional knowledge of the application area.¹³⁷ Local groups which have effectively established territorial rights in an area are considered 'all one family' regardless of genealogical connection, and claim group members see themselves as jointly holding land in the application area.¹³⁸ The anthropological report provides that membership of a local group is 'achieved rather than assigned' with multiple layers of connection, such as birth or long term residence, strengthening a claim.¹³⁹ This group is then connected to a particular tract of land, as distinguished from areas associated with other local groups, on the basis of a 'network of personal and communal associations'.¹⁴⁰ Under this system intergroup boundaries are relatively fluid and flexible, with the focus instead being on particular sites associated with the claim group and the *Tjukurrpa* tracks which link them together.¹⁴¹ For the claim group their relationship to country involves both physical and metaphysical elements and members consider that their predecessors both physically and spiritually came from the application area and that their spirits continue to reside there.¹⁴²

[131] Just as the land holding system gives rise to rights and interests the anthropological report provides that it gives rise to responsibilities, typified by the care for country ethos.¹⁴³ These responsibilities continue to be expressed in various ways, for example visiting and protecting important and sacred places in the application area and participation in rituals associated with country.¹⁴⁴ Claimants discuss how laws and customs regarding their connection to country arise from the dreamtime and the role of elders in passing down this knowledge.¹⁴⁵ They discuss the particular rights and responsibilities that they hold in relation to country and how this connection has arisen over generations.¹⁴⁶

[132] From the anthropological report I understand that [Culturally sensitive information removed] also possess ritual authority in relation to certain portions of the application through their association with the *Tjukurrpa*.¹⁴⁷ The anthropological report provides that [Culturally

¹³⁵ Schedule F [6]; Anthropological report [210]-[216]; Claimant 2 affidavit [36]-[37].

¹³⁶ Claimant 2 affidavit [37].

¹³⁷ Anthropological report [259].

¹³⁸ Ibid [221], [258].

¹³⁹ Ibid [222].

¹⁴⁰ Ibid [259].

¹⁴¹ Ibid [259].

¹⁴² Ibid [247]-[249].

¹⁴³ Ibid [245]-[246], [259].

¹⁴⁴ Ibid [246]-[247].

¹⁴⁵ Anthropological report [247]; Claimant 2 affidavit [36]-[38].

¹⁴⁶ Claimant 2 affidavit [11]-[12], [29], [38]-[39].

¹⁴⁷ Anthropological report [217].

sensitive information removed] act as the custodians of the *Tjukurrpa* and associated sites and are responsible for their care.¹⁴⁸ This custodianship is distinguished from ownership of these sacred sites, however the ritual authority of [Culturally sensitive information removed] provides considerable influence.¹⁴⁹ The material identifies several claim group members as being [Culturally sensitive information removed] with particular responsibilities to, and detailed knowledge of, the *Tjukurrpa* in the application area.¹⁵⁰

Kinship

[133] Members of the claim group also observe a classificatory system of kinship relations which prescribe behavioral rules on the basis of an individual's 'Section' or 'Skin', derived from their mother's mother.¹⁵¹ Whilst the particular practice of such customs has evolved over time they continue to be observed by the claim group, particularly concerning relationships between individuals who are 'too close' in terms of familial relations.¹⁵² In the isolated cases where such relationships do arise there is significant disapproval and 'growling' from other members of the claim group and they are told off.¹⁵³ Claimants explain how knowledge of their 'skin groups' have been passed down from parents and ancestors, continues to be observed by claim group members and is passed down to their descendants.¹⁵⁴ The anthropological report also discusses avoidance relationships arising from kinship, marriage and initiation.¹⁵⁵

Traditional practices

[134] Claimants continue to hunt, fish, camp and gather natural resources on country in accordance with the traditional laws and customs of their predecessors. They discuss, for example, practices relating to the hunting preparation and consumption of traditional foods like *marlu* (red kangaroo), which are linked to and rooted in the *Tjukurrpa*.¹⁵⁶ Claimants recall being taught about these practices along with protocols relating to the collection and use of resources such as water and wood for the creation of artefacts by their parents, grandparents and other old people.¹⁵⁷ When accessing the resources of the application area they continue to do so in accordance with the protocols and practices taught to them by their predecessors, for example leaving meat for the *Tjukurrpa* beings associated with particular sites.¹⁵⁸ The factual basis discusses the responsibility claim group members have to look after sacred sites in the application area and ensure they are not disturbed.¹⁵⁹ When appropriate protocols in relation to these place are not followed spiritual and physical consequences may befall transgressors.¹⁶⁰ Claim group members explain that these practices arise from the *Tjukurrpa*

¹⁴⁸ Ibid [219].

¹⁴⁹ Ibid [218]-[219].

¹⁵⁰ Ibid [182], [218].

¹⁵¹ Ibid [240].

¹⁵² Ibid [241]-[242].

¹⁵³ Ibid [241]-[242].

¹⁵⁴ Claimant 2 affidavit [34]-[36].

¹⁵⁵ Anthropological report [243], [256].

¹⁵⁶ Claimant 2 affidavit [21]-[24]; Anthropological report [231]-[242].

¹⁵⁷ Anthropological report [234], [236], [238], [268], [280]; Claimant 2 affidavit [16]-[18].

¹⁵⁸ Claimant 1 affidavit [29]-[32].

¹⁵⁹ Anthropological report [244], [246].

¹⁶⁰ Claimant 1 affidavit [34]-[36].

and have been handed down from generation to generation through to the current claim group.¹⁶¹

Is the factual basis sufficient to support the assertion of s 190B(5)(b)?

Does the factual basis address the identity of a pre-sovereignty society for the area?

[135] In my view the factual basis is sufficient to support the assertion that there existed a pre-sovereignty society for the area. The factual basis identifies a regional pre-sovereignty society, being the WDCB, and addresses the broader features of this society. The factual basis provides that the predecessors of the claim group were members of the WDCB, who observed the traditional laws and customs of the WDCB and had significant cultural ties with the surrounding WDCB groups. I note the comments of Lindgren J in *Harrington Smith No. 5* that it is ‘conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, without that wider population being a part of the claim group.’¹⁶² The factual basis shows that the laws and customs of the claim group which are observed across a broader society, being the WDCB, give rise to rights and interests at the local level through the ‘multiple pathways’ model of connection to country.

Does the factual basis establish a link between the pre-sovereignty society, the apical ancestors and the current claim group?

[136] The factual basis provides information concerning how the claim group’s predecessors fit within the social organisation of the relevant pre-sovereignty society in the application area. The predecessors who were alive at settlement, or born to those alive at settlement, had forebears who were members of the pre-sovereignty society and, in my view, it is reasonable to infer that they existed within that society in a similar way as their descendants. I understand that the current claimants are the descendants of the identified apical ancestors. I therefore consider that the factual basis is sufficient to support the assertion of a link between the current claim group, the apical ancestors and the society which existed in the application area prior to the assertion of British sovereignty.

Does the factual basis support the existence of traditional laws and customs?

[137] I consider the material before me is sufficient to support the assertion that the laws and customs have been observed by successive generations of the claim group in the application area. Knowledge concerning the *Tjukurrpa* in the application area, and the associated sacred sites and cultural responsibilities, has been passed down to the claimants by their predecessors. Similarly, knowledge of traditional law and practice has been passed down to the claim group by their predecessors. The factual basis explains how these laws and customs are rooted in the *Tjukurrpa* and through this gain normative force. In addition to possessing knowledge concerning the *Tjukurrpa*, and the traditional laws and customs arising from it, the factual basis provides that the claim group continues to observe these practices. I consider that the information regarding protocols relating to the hunting, preparation and consumption of *marlu* which are provided in the factual basis is one such example.

¹⁶¹ Claimant 2 affidavit [18], [20], [36].

¹⁶² *Harrington-Smith No. 5* [53].

Transgressions of the traditional laws and customs may result in physical and spiritual consequences. Claimants continue to observe the ‘multiple pathways’ model of connection to country which the factual basis material identifies as a feature of the WDCB. Claimants discuss how their physical and spiritual association to the application area is informed by their ancestors and their own connection to country.

[138] In my view, the material supports the assertion that there are ‘traditional laws and customs’ in the *Yorta Yorta* sense observed by the claim group. Current members of the claim group describe how knowledge of the traditional laws and customs has been passed down to them by their predecessors through oral transmission and common practice. I consider it is reasonable to infer that previous generations of the claim group learned the laws and customs in much the same way as they transmitted them to the current claim group supporting an assertion that the laws are traditional.

Conclusion – s 190B(5)(b)

[139] I am satisfied that the factual basis supports a link between the pre-sovereignty society in the application area, the apical ancestors and the current members of the claim group. I am also satisfied that the factual basis supports the assertion that there exists traditional laws and customs observed by the claim group. As such s 190B(5)(b) is met.

What is required to meet the assertion at s 190B(5)(c)?

[140] In order to meet the requirements of s 190B(5)(c), the factual basis must support an assertion that the claim group have continued to hold the native title in accordance with those traditional laws and customs. I understand that s 190B(5)(c) requires me to be satisfied that there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exists traditional laws and customs which give rise to the claimed native title.¹⁶³ I also understand there must be a continuity in the observance of traditional laws and customs going back to sovereignty or at least European settlement.¹⁶⁴

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

[141] As discussed above in relation to ss 190B(5)(a)-(b) the material before me is sufficient to support the assertion of an ongoing association with the application area, identifies a relevant pre-sovereignty society and supports the assertion of traditional laws and customs. The factual basis shows the continued importance of the *Tjukurrpa*, and accompanying cultural obligations, to the claim group. The claimants maintain knowledge of how the *Tjukurrpa* shapes the landscape and provide examples of how this information has been passed down to them by their predecessors over generations as well as how they pass this information down to future generations. Claimant 2, for example, describes how he was taught about the *Tjukurrpa* and the laws and customs arising from it by the old people, including his grandparents.¹⁶⁵ He now takes younger generations out on the application area himself, teaching them how to hunt and about the spiritual dangers which can arise around the

¹⁶³ *Gudjala* 2009 [29].

¹⁶⁴ *Gudjala* 2007 [82].

¹⁶⁵ Claimant 2 affidavit [18]-[24], [33]-[36].

Tjukkurpa.¹⁶⁶ He explains the importance of passing this information on to the claim group's descendants.¹⁶⁷ I also consider that the information relating to the continued observance of the 'multiple pathways' model of connection to country and the classificatory kinship and avoidance relationships systems support the assertion that claim group continue to observe traditional laws and customs. In my view, these examples and others in the factual basis are sufficient to support the assertion that the laws and customs of the claim group have been observed in the application area, substantially interrupted, since the time of settlement.

Conclusion – s 190B(5)(c)

[142] I am satisfied that the factual basis is sufficient to support the assertion that the claim group has continued to hold their native title rights in accordance with traditional laws and customs, which means s 190B(5)(c) is met.

Conclusion

[143] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is a sufficient factual basis for the three assertions of ss 190B(5)(a)–(c) and as such s 190B(5) is met.

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

[144] In order to meet the requirement of s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. A 'native title right or interest' is defined at s 223(1), as a right which has not been extinguished over the whole of the area, held in relation to land and waters under the traditional laws acknowledged and traditional customs observed by the native title claim group.

[145] In relation to the requirements of s 190B(6), I understand that my task involves some weighing of the material provided in support of the application.¹⁶⁸ I note the guidance of the Court that the words 'prima facie' ought to be taken to mean 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'.¹⁶⁹

Native title rights and interests prima facie established

2. Where there has been no extinguishment of native title rights and interests, or where any extinguishment must be disregarded, the applicant claims the right to possess, occupy, use and enjoy the lands and waters the subject of the application as against the whole world.

[146] In relation to the right to possession, occupation, use and enjoyment of the application area to the exclusion of all others, I note the comments in *Ward HC* 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 to 'speak for country'

¹⁶⁶ Ibid [11], [41]–[42].

¹⁶⁷ Ibid [31], [36].

¹⁶⁸ *Doepel* [127].

¹⁶⁹ Ibid [135].

that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.¹⁷⁰

- [147] In *Griffiths FC*, the Full Court held that the question does not depend on formal classification of rights. Rather consideration is required of what the factual basis discloses about the content of the claim group's rights under traditional laws and customs.¹⁷¹ The Full Court noted that:

If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair".¹⁷²

- [148] Regarding the right to give permission to access to country for the people of the WDCB the anthropological report provides that a 'person's country remains their country and another would not dream of accessing it without first asking permission.'¹⁷³ One claimant states that:

Generally, we expect people to ask permission to go to our country if they're not from there. If we denied someone permission then we would expect them to respect that.¹⁷⁴

- [149] The material provides that claimants discuss their ability to authoritatively 'speak for country' and how such a right arises from their own birth on country and the connection of their families over generations.¹⁷⁵ They discuss the metaphysical consequences and spiritual danger that will befall people who go to 'places they shouldn't'.¹⁷⁶

- [150] In my view the factual basis shows how the traditional laws and customs of the claim group give rise to an exclusive right of possession, occupation, use and enjoyment to the exclusion of all others. The factual basis shows how pursuant to the claim group's traditional laws members of the claim group have a right to govern access to their country. Harmful spiritual consequences can befall those who enter in transgression of those laws. Permission must be sought from the appropriate people in order to access the country safely, in accordance with the comments of the Full Court in *Griffiths FC*, which supports a characterisation of the native title right as exclusive. Claimants gain the right to speak for country, as discussed in *Ward HC*, as a result of their connection to country and the connection to country of their predecessor's in accordance with the 'multiple pathways' model, discussed in greater detail above in relation to s 190B(5).

- [151] Considering the guidance in the case law, in my view the information before me prima facie establishes a right to possession, occupation, use and enjoyment to the exclusion of all others.

¹⁷⁰ *Ward HC* [88].

¹⁷¹ *Griffiths FC* [71].

¹⁷² *Ibid* [127].

¹⁷³ Anthropological report [297].

¹⁷⁴ Claimant 2 affidavit [13].

¹⁷⁵ Anthropological report [284]; Claimant 2 affidavit [33], [39].

¹⁷⁶ Anthropological report [291]; Claimant 2 affidavit [30].

3. Where native title rights and interests have been partially extinguished, the applicant claims the following non-exclusive native title rights and interests:

a) to enter and remain on the land, camp, erect temporary shelters and travel over and visit any part of the land and waters;

b) to hunt, fish, gather, take and use traditional resources of the land for any purpose;

c) to take and use water;

[152] The factual basis provides that the claim group accesses the application area in order to camp, hunt and gather the natural resources of the application area.¹⁷⁷ Claimants recall camping on the application area with their predecessors and making bough sheds for shelter from the elements.¹⁷⁸ Wood is collected for use in the creation of artefacts such as boomerangs and natural resources are collected for use in bush medicine in accordance with the practices taught to the claimants by their predecessors.¹⁷⁹ The material makes reference to claim group members digging for water or making use of ‘water trees’ in the application area.¹⁸⁰

[153] In my view, these rights are *prima facie* established pursuant to traditional laws and customs.

d) to make decisions regarding the use and enjoyment of the land and waters by Aboriginal peoples who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title claim group; and

[154] As a right asserting control over the use and enjoyment of land this could appear to express a non-exclusive right in the terms of a right of exclusive possession, which would ‘seldom be appropriate’. ¹⁸¹ The Full Court has however previously recognised this as a non-exclusive right where control is only directed to other Aboriginal people governed by the claim group’s traditional laws and customs.¹⁸² I consider that this is the case here.

[155] The factual basis discusses sites of avoidance on the application area where access is restricted. For example the anthropological report and claimant affidavits discusses gender restricted sites which may only be talked about and visited by individuals of the appropriate gender.¹⁸³ The factual basis also provides that the ‘degree of freedom of access’ to the application area of any claim group member is governed by a number of factors including age, gender, ritual status and condition.¹⁸⁴ Claimants explain how these traditions have been passed down to them by their predecessors.¹⁸⁵

[156] In light of the information above I consider this right is *prima facie* established according to traditional laws and customs.

¹⁷⁷ Claimant 2 affidavit [11], [16]–[27]; Anthropological report [268].

¹⁷⁸ Anthropological report [266]–[267].

¹⁷⁹ Ibid [268]–[273].

¹⁸⁰ Ibid [276]–[277].

¹⁸¹ *Ward HC* [51].

¹⁸² *De Rose FC No 2* [169]–[170].

¹⁸³ Anthropological report [253], [284], [291]; Claimant 2 affidavit [33].

¹⁸⁴ Anthropological report [252].

¹⁸⁵ Ibid [253], [261].

e) to engage in cultural activities and the transmission of cultural knowledge on the determination area including:

(i) visiting places of cultural or spiritual importance and maintaining, caring for, and protecting those places by carrying out activities to preserve their physical or spiritual integrity; and

(ii) conducting ceremony and ritual, including burial and burial rites.

[157] The factual basis provides that claim group members access the application area to maintain, protect and ‘look after’ sites of significance in the application area.¹⁸⁶ Claimants discuss the importance of burial on country as well as traditional customs relating to burial sites in the application area and practices such as smoking ceremonies, which are conducted at the passing of a person.¹⁸⁷ They access the application area to collect resources such as wood for the creation of artefacts to be used in cultural activities such as dances.¹⁸⁸ Claimants recall their predecessors taking them onto the application area to be taught about particular sites associated with *Tjukurrpa*.¹⁸⁹ They discuss how the old people took care of significant sites, such as rock holes, and how this responsibility has been passed down to them.¹⁹⁰ Claimants now take younger claim group members out onto the application area and teach them about the *Tjukurrpa* and the physical and metaphysical features of country.¹⁹¹

[158] In my view, this right is prima facie established pursuant to traditional laws and customs.

Conclusion

[159] 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).

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

[160] In order to meet the requirements of s 190B(7), the Registrar must be satisfied that at least one member of the claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- (b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[161] From the use of the word ‘traditional’, I understand that the connection must be in accordance with the laws and customs of the claim group which have their origin in the relevant pre-sovereignty society.¹⁹² I understand that for the purposes of section 190B(7) I

¹⁸⁶ Anthropological report [287]; Claimant 1 affidavit [33].

¹⁸⁷ Anthropological report [290]; Claimant 2 affidavit [39].

¹⁸⁸ Anthropological report [288]; Claimant 2 affidavit [15]-[16].

¹⁸⁹ Anthropological report [257], [288]; Claimant 2 affidavit [13].

¹⁹⁰ Claimant 1 affidavit [33].

¹⁹¹ Anthropological report [287]-[288]; Claimant 2 affidavit [41]-[42].

¹⁹² *Gudjala* 2007 [89]

must be satisfied of a particular fact or facts, from the material provided, that one or more of the claim group has the necessary traditional physical association with the application area.¹⁹³

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

[162] Based on the information before me I am satisfied that at least one member of the claim group currently has or had a traditional physical connection to the application area. The factual basis provides examples of the claim group members' accessing the application area to hunt, to look after sacred sites, to gather natural resources, food and medicine for cultural purposes. Claimant 2 for example provides that he has continued to visit the application area throughout his life.¹⁹⁴ He now takes his children and other young people out onto the application area and teaches them how to hunt and about the metaphysical attributes of the application area.¹⁹⁵ He accesses the resources of the application area for the making of artefacts and bush medicine.¹⁹⁶

[163] I refer to my reasons in relation to s 190B(5), which provide that I am satisfied there is a sufficient factual basis to support the assertion that members of the claim group acknowledge and observe the traditional laws and customs of the relevant pre-sovereignty society. As such it follows that I am satisfied that at least one of the claim group members possesses a 'traditional' physical connection with the application area, in accordance with traditional laws and customs, as is required by s 190B(7).

Conclusion

[164] I am therefore satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with a part of the application area. As such, s 190B(7) is met.

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

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

Requirement	Information addressing requirement	Result
Section 61A(1) No native title determination application if approved determination of native title	The geospatial report states, and my own searches have confirmed, that the application area does not include any area where there has been an approved determination of native title.	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraph b(2) states that areas covered by valid previous exclusive possession acts are excluded from the application.	Met

¹⁹³ DoepeI [18].

¹⁹⁴ Claimant 2 affidavit [3], [11].

¹⁹⁵ Ibid [11], [36], [42].

¹⁹⁶ Ibid [15]–[16], [27].

Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule B, paragraph b(3) states that exclusive possession is not claimed over areas subject to valid previous non-exclusive possession acts.	Met
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No extinguishment etc. of claimed native title – s 190B(9): condition met

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

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q provides that to the extent that the Crown wholly owns any minerals, petroleum or gas within the application area, the native title claim group does not claim them.	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that ‘No offshore place is included in the application area.’ I have confirmed using the Tribunal’s geospatial database that the application area is in an entirely inland area and as such I am satisfied that no claim of exclusive possession is made in regard to any offshore place.	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraphs b(4) and b(5) exclude from the application area any area in relation to which native title rights and interests have otherwise been wholly extinguished unless ss 47, 47A and 47B are applicable.	Met

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Kakarra Part A
NNTT No.	WC2020/005
Federal Court of Australia No.	WAD297/2020

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

As per Schedule

Date application entered on Register:

3 March 2021

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

As per Schedule

Bryn Hughes

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

3 March 2021