



Registration Decision

(edited to remove culturally sensitive information)

Application name	Big Springs Claim Group
Name of applicant	Derek Oobagooma, Patricia Juboy, Elaine Laraia, Patrick Lawson, Nathan Lenard, Craig Oobagooma, Kirk Woolagoodja, Gary Umbagai
Federal Court of Australia No.	WAD144/2024
NNTT No.	WC2024/003
Date of Decision	30 August 2024

Claim accepted for registration

I have decided that the claim in the Big Springs Claim Group 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.

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

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

Reasons for Decision

Cases cited

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215; (2012) 297 ALR 660 ('Anderson')

Aplin on behalf of the Waanyi Peoples v Queensland [2010] FCA 625 ('Aplin')

Barunga v Western Australia [2011] FCA 518 ('Dambimangari Determination')

Carter on behalf of the Warrwa Mawadjala Gadjidgar and Warrwa People Native Title Claim Groups v Western Australia [2020] FCA 1702 ('Warrwa Combined Determination')

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

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177; (2019) 273 FCR 350 ('Warrie')

Griffiths v Northern Territory of Australia [2007] FCAFC 178; (2007) 165 FCR 391 ('Griffiths')

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

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

Gudjala People #2 v Native Title Registrar [2009] FCA 1572; (2009) 182 FCR 63 ('Gudjala 2009')

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

McLennan v Queensland [2019] FCA 1969 ('McLennan')

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

Northern Land Council v Quall [2020] HCA 33; (2020) 271 CLR 394 ('Quall HC')

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135; (2005) 145 FCR 442 ('Alyawarr')

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

Sampi v Western Australia [2005] FCA 777 ('Sampi')

Sampi on behalf of the Bardi and Jawi People v Western Australia [2010] FCAFC 26; (2010) 266 ALR 537 ('Sampi FC')

Strickland v Native Title Registrar [1999] FCA 1530; (1999) 168 ALR 242 ('Strickland')

Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198; (2006) 155 FCR 107 ('Wakaman')

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

Western Australia v Strickland [2000] FCA 652; (2000) 99 FCR 33 ('Strickland FC')

Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1 ('Ward HC')

Background

- [1] This decision relates to an application filed by Derek Oobagooma and Others on behalf of the Big Springs Claim Group ('Big Springs Claim'). The Big Springs Claim is made on behalf of the Warrwa and Worrora People ('Claim Group'). It covers land and waters over an area of approximately 32.2 square kilometres known as Winjidabil / Winjooddoorulpul (Big Springs), an area of permanent freshwater springs between the mouths of the Meda and Robinson Rivers.
- [2] The Big Springs Claim is surrounded to the east, south and west by a determination in favour of the Warrwa People ('Warrwa Combined Determination'),² and to the north by a determination in favour of the Wanjina-Wunggurr Community ('Dambimangari Determination'),³ which includes Worrora / Woddordda-speaking people.⁴ The claim area was formerly part of the claim in WAD33/2019, WC2014/004 ('Warrwa Combined Claim'), but was excised as 'Part C' from that claim on 11 September 2023,⁵ and then discontinued on 13 June 2024 on the basis that a new claim would be filed over that area on behalf of both the Warrwa and Worrora People.⁶
- [3] The Big Springs Claim was filed on 13 June 2024. The Registrar of the Federal Court ('Court') gave a copy of the application and accompanying affidavits to the Native Title Registrar ('Registrar') on 13 June 2024 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.⁷

Preliminary considerations

Registration conditions

- [4] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which the Act refers to as dealing mainly with the merits of the claim) and s 190C (which the Act refers to as dealing 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 13 June 2024 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.

² *Warrwa Combined Determination*.

³ *Dambimangari Determination*.

⁴ Native Title Registration Test Report for the Big Springs Claim by anthropologist Dr Heather Lynes ('Lynes Report'), page 5 [13].

⁵ Orders of O'Bryan J in *Carter & Ors on behalf of the Warrwa People v Western Australia* (Federal Court of Australia, WAD33/2019, 11 September 2023), paragraph 1(b).

⁶ Orders of Judicial Registrar McGregor in *Carter & Ors on behalf of the Warrwa People v Western Australia* (Federal Court of Australia, WAD33/2019, 13 June 2024). See also *Warrwa Combined Determination* [32]. I note that Worrora/Woddordda is a language grouping of Dambimangari.

⁷ Section 190A(1).

Procedural fairness

- [7] On 3 July 2024 a Senior Officer of the NNTT wrote to the applicant to request that any information that the applicant wished to be considered in addition to the application and accompanying documents be provided to the NNTT by 19 July 2024.
- [8] On 3 July 2024 a Senior Officer also wrote to the State of Western Australia ('State') to provide a copy of the application and accompanying documents under s 66(2) of the Act, and to request that any submissions in relation to the registration of the claim be provided to the NNTT by 19 July 2024.
- [9] On 3 July 2024 a copy of the application and accompanying documents was also provided to the relevant representative Aboriginal/Torres Strait Islander body (the Kimberly Land Council ('KLC')) in accordance with s 66(2A).
- [10] On 19 July 2024 the following additional material was received from the applicant:
1. Native Title Registration Test Report for the Big Springs Claim by anthropologist Dr Heather Lynes ('Lynes Report');
 2. a copy of the orders discontinuing Part C of WAD33/2019;
 3. affidavit of Ms Patricia Juboy affirmed 20 July 2023;
 4. affidavit of [claim group member 1] affirmed 7 November 2019;
 5. affidavit of [claim group member 2] affirmed 6 November 2019;
 6. affidavit of [claim group member 3] affirmed 1 November 2019;
 7. a copy of the front cover and an extract from pages 178 to 181 of a book titled 'Yornadaiyn Woolagoodja' (a biography of renowned Kimberley artist Yornadaiyn (Donny) Woolagoodja) ('Yornadaiyn Woolagoodja Extract');
 8. a copy of the Dambimangari Determination;
 9. a copy of the Warrwa Combined Determination; and
 10. Registration test decision (WAD33/2019) dated 26 November 2014 by Renee Wallace, delegate of the Native Title Registrar;
- (together referred to as 'Applicant's Additional Material').
- [11] Each of the above affidavits of members of the claim group (items 3 to 6) bear the file number for the Warrwa Combined Claim (WAD33/2019). The affidavits of claim group members 1 to 3 are stamped as being filed in the Court.
- [12] The applicant asserted that some of this material contained personal and confidential information. As such, a Senior Officer of the NNTT wrote to the State on 22 July 2024 to provide copies of the non-confidential information (items 2 and 8 to 10 listed above) and to invite the State to provide any comment in relation to the non-confidential material provided

by 9 August 2024. The State was advised that access to the confidential material (items 1 and 3 to 7) was subject to receipt of a signed confidentiality undertaking by 26 July 2024.⁸

[13] The State did not enter into any confidentiality undertaking and did not provide any comment on the non-confidential material or submissions in relation to the registration test.

[14] This concluded the procedural fairness process.

Information considered

[15] 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’.

[16] I have had regard to the information in the application and accompanying documents and the Applicant’s Additional Material.⁹

[17] There is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.¹⁰

[18] The State did not provide any submissions that I must have regard to in accordance with s 190A(3)(c).

[19] I have also considered it appropriate to have regard to a geospatial assessment and overlap analysis prepared by the NNTT’s Geospatial Services in relation to the area covered by the application, dated 4 July 2024 (‘Geospatial Assessment’).

Section 190C: conditions about procedural and other matters — conditions met

Section 190C(2) and ss 61 and 62: conditions about procedural and other matters – condition met

[20] I have examined the application and for the reasons set out below, I am satisfied that it contains all details and other information and is accompanied by affidavits and other documents as required by ss 61 and 62.

[21] 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 61–62. This condition does not require any merit assessment of the material to be undertaken, however it does seek ‘...to ensure that the application contains “all details” required by s 61...’.¹¹ As such, in my view s 190C(2) requires consideration of whether the application contains the required material and whether such material is sufficient to

⁸ *WA v NTR* [38].

⁹ Section 190A(3)(a).

¹⁰ Section 190A(3)(b).

¹¹ *Doepel* [35].

enable the Registrar to form an opinion about whether the claim satisfies all of the conditions in ss 190B and 190C.¹²

Section 61 – native title applications

- [22] **Section 61(1)** provides that only persons included in and authorised by the native title claim group may make a native title determination application for the particular native title claimed. Eight persons are named in the application as comprising the applicant. Schedule A contains a description of the native title claim group. Each of the persons comprising the applicant have deposed an affidavit for the purposes of s 62 and these have been filed in the Court and accompany the application ('Applicant Affidavits'). The Applicant Affidavits indicate that each deponent is a member of the native title claim group and is authorised to make the application by the persons in the native title claim group.¹³ From the material contained in Schedule A and the Applicant Affidavits, I am satisfied that the application has been made in accordance with s 61(1).
- [23] **Section 61(2)** provides that the persons authorised to make the native title determination application are jointly the applicant and none of the other members of the native title claim group is the applicant. I consider that there is nothing in the application or other material that I have considered that suggests otherwise.
- [24] **Section 61(3)** requires an application to state the name and address for service of the applicant. The names of each of the persons comprising the applicant are stated in the application and Part B states that the applicant is represented by the KLC and includes the address for service. As such, I am satisfied that the application contains the information required by s 61(3).
- [25] **Section 61(4)** requires a native title determination application authorised by persons in a native title claim group to name or describe the persons in that claim group so that it can be ascertained whether any particular person is one of those persons. In *Gudjala 2007*, Dowsett J emphasised the procedural nature of the exercise undertaken by a delegate under s 190C(2) regarding the details and information required by ss 61 and 62 in contrast to the merits exercise undertaken pursuant to s 190B(3).¹⁴ The description at Schedule A states that the claim group comprises Warrwa and Worrora members, each described as persons who are descended from named apical ancestors or are recognised by other members of the group as having rights and interests in the claim area under traditional laws and customs. I am satisfied that the application contains the information required by s 61(4) because Schedule A contains a description of the native title claim group that is sufficiently clear so that it can be ascertained whether any particular person is one of those persons.¹⁵
- [26] **Section 61(5)** provides that the application must be filed in the Court in a manner as prescribed and be accompanied by any prescribed fee. In my view, these are matters for the

¹² See also s 190D(3)(b).

¹³ Applicant Affidavits [1], [6].

¹⁴ *Gudjala 2007* [31]–[32].

¹⁵ Section 61(4)(b).

Court however I note that the application is made in the prescribed form and was accepted for filing by the Court on 13 June 2024.

Section 62(1), (1A) and (2): information etc. in relation to certain applications; claimant applications

[27] **Section 62(1)(a)** requires a claimant application to be accompanied by an affidavit sworn by the applicant stating each of the matters mentioned in subsection (1A). As noted above, each of the persons comprising the applicant has deposed an affidavit for the purpose of s 62 (the Applicant Affidavits). Although the Applicant Affidavits are not annexed to the application, they have been filed in the Court and I am satisfied that they accompany the application.¹⁶ These affidavits are in substantially identical terms, and include statements to the effect that:

- the deponent is an applicant and a member of the native title claim group in the Big Springs Claim;
- the deponent attended the authorisation meeting for the Big Springs Claim held on 1 and 2 May 2024 at Mowanjum Community;
- the deponent believes that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the application;
- the deponent believes that none of the area covered by the application is also covered by an approved determination of native title;
- the deponent believes that all of the statements made in the application are true;
- the deponent was authorised at the meeting at Mowanjum on 1 and 2 May 2024 by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, subject to certain conditions;
- the claim group agreed that the members of the applicant should be comprised of four Warrwa and four Worrora persons, with each deponent indicating which group they were authorised to be a member of the applicant for;
- there is no decision-making process under traditional laws and customs that must be followed, and that decisions would be made separately by each of the Warrwa and Worrora groups in accordance with a decision-making process that was agreed and adopted, each involving a resolution being put following discussion, the resolution being moved and seconded and the passed by majority vote on a show of hands;
- conditions were placed on the authority of the applicant, requiring members of the applicant to be eligible, willing and able to act, to act in good faith in the interests of the claim group as a whole and to instruct the KLC to lodge the Big Springs Claim and take all steps reasonably necessary to bring the claim to a consent determination as soon as possible; and
- that the conditions imposed on the authority have been satisfied, including because the deponent is eligible, willing and able to act, is acting in good faith and in the

¹⁶ Doepel [88].

interests of the claim group as a whole and has instructed the KLC to lodge the Big Springs Claim and take all steps reasonably necessary to bring the claim to a consent determination as soon as possible.

- [28] I am satisfied that the above statements in the Applicant Affidavits meet the description of each of the statements required by s 62(1A)(a)–(g), noting that because conditions were imposed s 62(1A)(f) is not applicable. I am therefore satisfied that the application is accompanied by the documents required by s 62(1)(a).
- [29] **Section 62(1)(d)** applies where an agreement has been entered into under s 47C and requires a copy of any relevant agreement to accompany the application. Schedule L of the application indicates that there is no agreement under s 47C in relation to the area covered by the application. As such, the requirement at s 62(1)(d) is not applicable.
- [30] **Section 62(2)(a)** requires that the application contain information that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application to be identified. Schedule B of the application refers to Attachment B, which contains a written description of the external boundaries of the claim area and confirms that for the avoidance of doubt the claim area does not include the areas covered by the Dambimangari Determination or the Warrwa Combined Determination. Paragraph 2 of Schedule B describes those areas within the external boundaries that are not covered by the application. As such, I am satisfied that the application contains the information required by s 62(2)(a).
- [31] **Section 62(2)(b)** requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Schedule C refers to Attachment C, which contains a map showing the external boundaries of the application. I am satisfied that the application contains the information required by s 62(2)(b).
- [32] **Section 62(2)(c)** requires that the application include details and results of searches of any non-native title rights and interests covered by the application. Schedule D of the application states that no searches were conducted by or on behalf of members of the claim group. As no searches have been conducted, s 62(2)(c) is not applicable to the application.
- [33] **Section 62(2)(d)** requires an application to contain a description of the native title rights claimed in relation to particular land or waters. This description must not consist merely of a statement that the native title rights and interests are all that may exist or have not been extinguished. Schedule E of the application contains a description of the native title rights and interests claimed in relation to the land or waters in the application area. I am satisfied that the application meets the requirements of s 62(2)(d) because Schedule E contains the required information.
- [34] **Section 62(2)(e)** requires an application to contain a general description of the factual basis on which it is asserted that the native title rights and interests are claimed to exist. Schedule F of the application contains a brief general description of the relevant factual basis. As such, I am satisfied that the application contains the information required by s 62(2)(e).

- [35] **Section 62(2)(f)** requires that if the native title claim group currently carry on any activities in relation to the land or waters claimed, details of those activities must be included in the application. Schedule G of the application lists the activities currently being undertaken by members of the claim group in the claim area. I am satisfied that the application contains the information required by s 62(2)(f).
- [36] **Section 62(2)(g)** requires an application to include details of any other court applications seeking a determination of native title or native title compensation over any of the area covered by the application. Schedule H of the application states that the applicant is not aware of any current applications and refers to the previous Warrwa Combined Claim and the discontinuance of Part C of that claim. As such, I am satisfied that the application contains the information required by s 62(2)(g).
- [37] **Section 62(2)(ga)** requires the application to include details of any s 24MD(6B)(c) notifications relevant to the claim area. Schedule HA of the application states that the applicant is not aware of any notices under s 24MD(6B)(c). As such, I am satisfied that the application contains the information required by s 62(2)(g).
- [38] **Section 62(2)(h)** requires that the application include details of any s 29 notifications relevant to the claim area of which the applicant is aware. Schedule I of the application states that the applicant is not aware of any notices under s 29. As such, I am satisfied that the application contains the information required by s 62(2)(h).
- [39] **Section 62(2)(i)** requires the application include details of any conditions under s 251BA on the authority of the applicant to make the application and to deal with matters arising in relation to it. Schedule IA of the application and the Applicant Affidavits set out the conditions that were imposed on the authority of the applicant for the purposes of s 251BA. As such, the application contains the information required by s 62(2)(i).

Conclusion on s 190C(2)

- [40] As set out above, I am satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, as required by ss 61–62, and as such, the condition at s 190C(2) is met.

Section 190C(3): no previous overlapping claim group – condition met

- [41] The condition at s 190C(3) requires 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’.
- [42] Although s 190C(3) is expressed in the past tense, the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) which inserted this provision indicates that its purpose is served if it is interpreted in the present tense, such that ‘no member of the claim group for the application ... *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test’.¹⁷ Having regard to this, I understand that the

¹⁷ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25], emphasis added.

purpose of s 190C(3) is to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. This purpose is achieved by preventing a claim from being registered if it includes members in common with an overlapping claim that is on the Register when the registration test is applied. I consider that taking this approach more accurately reflects the intention of the legislature, rather than a more literal reading of s 190C(3).

- [43] I understand that in assessing this requirement I may have regard to information which does not form part of the application and accompanying documents.¹⁸
- [44] The condition at s 190C(3) only arises where there is a previous application that meets the criteria set out in subsections (a) to (c).¹⁹ These criteria are that any previous application covers at least some of the same area, was accepted for registration under s 190A and is on the Register.
- [45] The Geospatial Assessment and my own searches of the Tribunal's mapping database indicate that there is no previous application overlapping any of the area covered by the application that meets the criteria set out in s 190C(3)(a)–(c). I note that Part C of the Warrwa Combined Claim was discontinued on the same date that the Big Springs Claim was filed (13 June 2024). Having regard to the background of the claim as set out at paragraph 2 above, and in particular Notes E and F of the Orders of Judicial Registrar McGregor made in the Warrwa Combined Claim on 13 June 2024,²⁰ I am satisfied that the Warrwa Combined Claim is not a previous application within the meaning of s 190C(3).
- [46] As there are no previous applications that meet the description of sub-ss (a)–(c), s 190C(3) does not require further consideration. I am satisfied that the application does not contravene this requirement.

Section 190C(4): identity of claimed native title holders – condition met

- [47] Under s 190C(4) the Registrar must be satisfied that either a certificate under s 203BE has been issued by the relevant representative Aboriginal/Torres Strait Islander body,²¹ or the requirements in subsection (4AA) are met.²² Schedule R of the application states that the application has been certified by the KLC and refers to Attachment R, which contains a certification under s 203BE. As such, I must consider whether the requirements of s 190C(4)(a) have been met.
- [48] Section 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification'.²³ As such, I understand that my task is to identify the

¹⁸ *Doepel* [16].

¹⁹ *Strickland FC* [9].

²⁰ Orders of Judicial Registrar McGregor in *Carter & Ors on behalf of the Warrwa People v Western Australia* (Federal Court of Australia, WAD33/2019, 13 June 2024).

²¹ Section 190C(4)(a).

²² Section 190C(4)(b).

²³ *Doepel* [78], [80]–[82]; see also *Wakaman* [32].

appropriate representative body and be satisfied that the application is certified under s 203BE.

Does the certifying body have power to certify?

- [49] The Geospatial Assessment indicates that the KLC is the relevant representative Aboriginal/Torres Strait Islander body responsible for the land and waters covered by the Big Springs Claim. The certification at Attachment R is signed by the Chief Executive Officer of the KLC and refers to the *Native Title (Recognition as Representative Body – Kimberley Land Council) Instrument 2023* (Cth), which confirms that the KLC is recognised under s 203AD(1) of the Act. I understand that a Chief Executive Officer may perform the functions of a representative body under an instrument of delegation or as an agent.²⁴
- [50] Page 1 of the certification indicates that the certification is made in accordance with the KLC's certification functions under s 203BE(1)(a) of the Act.
- [51] Having regard to the above, I am satisfied that the CLC is the relevant representative body for the area covered by the application and that it was within its power to issue the certification.

Have the requirements of s 203BE been met?

- [52] To meet the requirements of s 190C(4)(a), the certification must comply with the provisions of s 203BE(4)(a) to (c).
- [53] **Section 203BE(4)(a)** requires a certification to contain a statement of the representative body's opinion as per s 203BE(2), that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it, any conditions under s 251BA on the authority that relate to the making of the application have been satisfied, and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group. Page 1 of the certification contains a heading titled 'Statement of Opinion pursuant to section 203BE(2) of the *Native Title Act 1993* (Cth)' and statements that meet the requirement at s 203BE(4)(a).
- [54] **Section 203BE(4)(b)** requires a certification to include brief reasons for the representative body's opinion. The certification contains a heading titled 'Reasons for Opinion pursuant to section 203BE(2)(a), (aa) and (b) NTA' and the following information:
- the KLC have undertaken extensive anthropological, archival, genealogical and field research for the purpose of identifying all persons who are members of the claim group;
 - the description of the claim group in the Big Springs Claim is based on the extensive anthropological research;
 - the KLC have conducted community consultations with families who assert traditional connection to the claim area;
 - the KLC arranged a meeting on 1 and 2 May 2024 at Mowanjum Community Hall;

²⁴ *Quall HC* [48], [63] and [93].

- only members of the claim group participated in the decision-making at the meeting;
- the claim group confirmed that they do not have any mandatory traditional decision-making process which is relevant to the kind of decisions dealt with at the meeting;
- the claim group agreed that decisions would be made separately by each of the Warrwa and Worrora groups in accordance with decision-making processes that were agreed and adopted;
- the agreed and adopted decision-making process for both groups involved a resolution being put following discussion, the resolution being moved and seconded and then passed by majority vote on a show of hands;
- in accordance with the agreed and adopted process, each of the Warrwa and Worrora members of the claim group passed resolutions authorising the applicant to make the application and deal with matters arising in relation to it;
- conditions were placed on the authority of the applicant, requiring members of the applicant to be eligible, willing and able to act, to act in good faith in the interests of the claim group as a whole and to instruct the KLC to lodge the Big Springs Claim and take all steps reasonably necessary to bring the claim to a consent determination as soon as possible;
- these conditions have been satisfied as each member of the applicant confirmed that they are eligible, willing and able to act, each member of the applicant is acting in good faith in the interests of the claim group as a whole and the applicant has instructed the Principal Legal Officer of the KLC to file the Big Springs Claim and take all steps reasonably necessary to bring the claim to a consent determination as soon as possible.

[55] In my view the above information in the certification is sufficient to meet the requirements of s 203BE(4)(b).

[56] **Section 203BE(4)(c)** states that where applicable, a certification should briefly set out what the representative body has done to comply with s 203BE(3) (relating to achieving agreement and minimising the number of applications where the relevant area is or may be covered by an overlapping application for determination of native title). At the time that the certificate was executed (31 May 2024), the Warrwa Combined Claim had not yet been discontinued over the area overlapping the Big Springs Claim (Part C). As such, I consider that s 203BE(4)(c) is applicable to the certification. Although the certification does not include any direct statements about what the KLC has done to meet the requirements of s 203BE(3), having read the certification as a whole, I consider that it generally sets out the efforts of the KLC to achieve agreement and to minimise the number of applications covering the claim area by ensuring that the description of the claim group includes both Warrwa and Worrora People. I have also had regard to the background of the Big Springs Claim, including that it was filed to include both the Warrwa and Worrora People and that Part C of the Warrwa Combined Claim was discontinued prior to the filing of the claim. In any event, I note that s 203BE(3) sets out that a failure to comply with that provision does not invalidate a certification.

Conclusion on s 190C(4)

- [57] In my view the certification at Attachment R satisfies the requirements of s 203BE(4) of the Act. As such, I am satisfied that the application has been properly certified under s 190C(4)(a) and so this condition is met.
- [58] I note that once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)'.²⁵

Section 190B: conditions about the merits of the claim – conditions met

Section 190B(2): identification of area subject to native title – condition met

- [59] Section 190B(2) requires the Registrar to be satisfied that the written information and map contained in the application are sufficient to identify, with reasonable certainty, the land and waters in relation to which the native title rights and interests are claimed.
- [60] Attachment B of the application describes the application area by a metes and bounds description referencing the boundaries of two native title determinations and geographic coordinates to six decimal places. Attachment B also sets out that, for the avoidance of doubt, the area covered by the application excludes any area subject to the Dambimangari and Warrwa Combined Determinations. Schedule B also sets out general exclusions from the area covered by the application.
- [61] Attachment C of the application comprises a copy of a draft A3 colour map prepared by Landgate, titled 'Proposed New Warrwa/Worrora Claim (Big Springs) – Proposed Determination of Native Title' dated 25 March 2024. The map shows the boundary of the claim area depicted by bold blue outline, depictions of the areas of exclusive native title, non-exclusive native title, where native title does not exist and s 47B areas, annotated land tenure parcels, scalebar, northpoint, coordinate grid, legend, overview and locality map and notes relating to the source, currency and datum of data used to prepare the map.
- [62] The Geospatial Assessment concludes that although the map comprises a draft map depicting native title outcomes, the written description and map are consistent and identify the claim area with reasonable certainty. I agree with the conclusion of the Geospatial Assessment and note that paragraph 3 of Schedule B provides that in the event of any discrepancy between the map and written description, the written description prevails. As such, I am satisfied that the written description and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters, and therefore that the application meets the requirements of s 190B(2).

²⁵ *Doepel* [80].

Section 190B(3): identification of the native title claim group – condition met

[63] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,²⁶ or that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.²⁷

[64] When assessing the requirements under s 190B(3), I understand that:

- I am required to address only the content of the application;²⁸
- ‘only ... the members of the claim group are required to be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;²⁹
- where a claim group description contains a number of paragraphs, the paragraphs should be read ‘as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open’;³⁰ and
- to determine whether the conditions or rules specified in the application have a sufficiently clear description of the native title claim group, ‘[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described’.³¹

[65] The description of the native title claim group at Schedule A is as follows:

1. The native title claim group comprises the Warrwa and Worrora members.
2. The Warrwa members are:
 - (a) those Aboriginal persons who are:
 - (i) descended from one or more of the people listed in clause 3 of this Schedule; or
 - (ii) recognised by the descendants of the people listed in clause 3 of this Schedule as having traditional rights and interests in the Determination Area under traditional law and custom.
3. The people referred to in clause 2(a)(i) of this Schedule are those Aboriginal persons who are the biological or adopted descendants of the following apical ancestors:
 - (a) Topsy Mouwudjala;
 - (b) Gudayi and Bobby Ah Choo; and
 - (c) Nani.
4. The Worrora members are:
 - (a) those Aboriginal persons who are:
 - (i) descended from one or more of the people listed in clause 5 of this Schedule; or

²⁶ Section 190B(3)(a).

²⁷ Section 190B(3)(b).

²⁸ *Doepel* [51]; *Gudjala 2007* [30].

²⁹ *Gudjala 2007* [33].

³⁰ *Ibid* [34].

³¹ *WA v NTR* [67].

- (ii) recognised by the descendants of the people listed in clause 5 of this Schedule as having traditional rights and interests in the Determination Area under traditional law and custom.

5. The people referred to in clause 4(a)(i) of this Schedule are those Aboriginal persons who are the biological or adopted descendants of the following apical ancestors:

- (a) Gaana;
- (b) Ganbalya;
- (c) Charlie Ganbalya; and
- (d) Jangara.

[66] The description of the Warrwa People in the Warrwa Combined Determination is in substantially the same terms as set out in clauses 2 and 3 of Schedule A.³² In relation to the Worrora People, I note that Jangara (spelt as Janggara) is an apical ancestor in the Dambimangari Determination.³³

[67] I consider that for both the Warrwa and Worrora members, the description of the claim group allows for membership through two possible avenues, descent from the identified apical ancestors or recognition by other members of the claim group as a person with rights and interests in accordance with the traditional laws and customs.

[68] In relation to identifying members of the claim group by descent from named persons, I note that this has been accepted by the Court as satisfying the requirements of s 190B(3)(b).³⁴ In my view, requiring a member to show descent from an identified ancestor provides a clear starting or external reference point and that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group. I also note that the named apical ancestors for the Warrwa members in Schedule A are identical to those recognised in the Warrwa Combined Determination.

[69] In relation to recognition by other members of the claim group, I note that group acceptance has been previously held by the Court as 'inherent in the nature of a society'.³⁵ In *Sampi FC*, the Full Court noted that:

in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people who are bound by the one set of laws and customs or normative system.³⁶

³² *Warrwa Combined Determination*, Orders, Attachment A – Warrwa People Determination, Schedule 8. The Warrwa Combined Determination also includes one other named individual who is described as a custodian for the Part A determination area and as being recognised by the native title holders as having specific and non-transferrable rights and interests in that determination area.

³³ *Dambimangari Determination*, Attachment B Determination, Schedule 6, paragraph 2. See also Lynes Report, page 7 [18].

³⁴ *WA v NTR* [67].

³⁵ *Aplin* [260]; *Yorta Yorta* [108].

³⁶ *Sampi FC* [45].

- [70] I consider that this element of the claim group description involves recognition by reference to the traditional laws and customs of the Warrwa or Worrora People, in particular in relation to a person as having rights and interests in the claim area. The traditional laws and customs of the claim group are set out in the Applicant's Additional Material and have been recognised in the Warrwa Combined and Dambimangari Determinations.
- [71] Having regard to the description of the claim group at Schedule A as a whole, I consider that recognition of a person as a member of the claim group is linked to the traditional laws and customs of the Warrwa or Worrora People and that this provides sufficiently clear rules and principles to ascertain whether a particular person is a member of the claim group.
- [72] As such, I am satisfied that the description of the claim group is sufficiently clear such that it can be ascertained whether a particular person is a member of the claim group as required by s 190B(3). This condition is met.

Section 190B(4): identification of claimed native title – condition met

- [73] Section 190B(4) requires the Registrar to be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified. I understand that I am confined to the material contained in the application itself in considering this condition.³⁷
- [74] I understand that my task pursuant to s 190B(4) is to identify whether the rights and interests claimed are 'readily identifiable'. Justice Mansfield noted in *Doepel* that the description of the native title rights and interests must be understandable, have meaning and be without contradiction.³⁸ It is also open to the Registrar to read the contents of the claimed rights and interests together with any stated qualifications or restrictions.³⁹ I note that a description of a native title right or interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)'.⁴⁰
- [75] The claimed rights and interests are set out in Schedule E as follows:

Native title where traditional rights are wholly recognisable

1. In every part of the claim area (if any) where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded, the right possessed under traditional law and customs is properly interpreted as, and the native title right recognised by the common law of Australia is, the right of possession, occupation, use and enjoyment of land and waters as against all others.

Native title where traditional rights are partially recognisable

2. In all other parts of the claim area, the right possessed under traditional law and customs is properly interpreted as the right of possession, occupation, use and enjoyment of land and waters as against all others, but the native title rights and interests recognised by the common law of Australia are the rights to do all such things as may be done under the right

³⁷ *Doepel* [16].

³⁸ *Ibid* [99], [123].

³⁹ *Ibid* [123].

⁴⁰ *Strickland* [60]. See also *Strickland FC* [85]–[87].

referred to above, save for controlling the access to or the use of land or waters by others; being the non-exclusive rights to:

- (a) have access to, remain on and use the land and waters;
- (b) access and take the resources of the land and waters; and
- (c) protect places, areas and things of traditional significance on the land and waters.

Area covered by the native title and who holds the rights

- 3. Each of the native title rights referred to in paragraph 1 and 2 in this Schedule E exist in relation to the whole of each part of the claim area to which those paragraphs respectively apply and is held by the members of the native title claim group subject to and in accordance with their traditional laws and customs.

Activities currently carried on

- 4. Activities in exercise of the native title rights referred to in this Schedule E are all such activities as are contemplated by those rights and interests and include the activities identified in Schedule G.

Rights subject to laws of Australia

- 5. The members of the native title claim group acknowledge that their native title rights and interests are subject to and exercisable in accordance with valid and current laws of the Commonwealth and the State of Western Australia including the common law.

[76] I note that in the Warrwa Combined Determination, exclusive rights to possession, occupation, use and enjoyment were determined to exist over areas identified in the determination as the 'Exclusive Area'.⁴¹ The non-exclusive rights and interests determined over the 'Non-Exclusive Area' were particularised in more detail than, but generally correspond with, the non-exclusive rights and interests claimed in paragraph 2 of Schedule E.⁴² This is also the case in relation to the Dambimangari Determination.⁴³

[77] In my view, the native title rights and interests described in Schedule E of the application are understandable and have meaning. In my view, the list of activities is consistent with the claimed rights and interests at Schedule E. I do not consider there to be any inherent contradictions in Schedules E or G. As such I am satisfied that the requirements of s 190B(4) are met.

[78] I note that I consider below whether the factual basis material is sufficient to establish the existence of these claimed rights and interests on a prima facie basis under s 190B(6).

Section 190B(5): factual basis for claimed native title – condition met

[79] Section 190B(5) requires the Registrar to be satisfied that the factual basis for the claimed native title rights and interests is sufficient to support the following assertions:

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

⁴¹ *Warrwa Combined Determination*, Orders, Attachment A – Warrwa People Determination, paragraph 4.

⁴² *Ibid*, paragraph 5.

⁴³ *Dambimangari Determination*, Orders, Attachment B Determination, paragraphs 5, 7.

- (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.

[80] Justice Mansfield stated in *Doepel* that the task under s 190B(5):

requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests... The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.⁴⁴

[81] As such, when assessing the requirements of this condition, I understand that I must treat the asserted facts as true and assess whether they are sufficient to support each of the relevant assertions.

[82] The guidance provided by the Full Court in *Gudjala FC* in respect of the details required under s 62(2)(e)(i) to (iii) ‘general description of the factual basis on which it is asserted that the native title rights and interests claimed exist...’ is also relevant to the task under s 190B(5):

The fact that the detail specified by s 62(2)(e) is described as “a general description of the factual basis” is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.⁴⁵

[83] In *Gudjala 2009*, Dowsett J further clarified the task under s 190B(5) as follows:

In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group’s 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 also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.⁴⁶

⁴⁴ *Doepel* [17]; *Gudjala FC* [57], [83].

⁴⁵ *Gudjala FC* [92].

⁴⁶ *Gudjala 2009* [29]; *Anderson* [43], [47]–[48].

- [84] From the above, it is my understanding that although the material provided by the applicant need not provide evidence to make out each claim, it must nevertheless provide sufficient factual details to enable a ‘genuine assessment’ of the factual basis for the assertions set out in ss 190B(5)(a) to (c) and at a minimum provide ‘an outline of the facts of the case’.⁴⁷
- [85] Schedule F provides material only at a high level of generality. For the purpose of this condition, I have also had regard to factual basis material contained in the Applicant’s Additional Material.
- [86] I have set out my consideration under each of the assertions at s 190B(5)(a) to (c) in turn below.

Section 190B(5)(a): the association of the native title claim group and their predecessors with the area

- [87] Section 190B(5)(a) was recently considered by Reeves J in *McLennan*. His Honour set out the relevant principles as follows:

To satisfy the condition in s 190B(5)(a) of the [Act], it will be sufficient if the applicant demonstrates that:

- (a) “the claim group presently has an association with the area, and the claim group’s predecessors have had an association with the area since sovereignty or European settlement” [*Gudjala 2007* [52]];
- (b) “there is an association between the whole group and the area, although not all members must have such association at all times” [*Gudjala 2007* [52]]; and
- (c) “there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’” [*Martin* [26] and *Corunna* [39]].⁴⁸

- [88] In addition, I note the comments of Dowsett J in *Gudjala 2007* that s 190B(5)(a) requires sufficient factual material to support the assertion that the identified claim group (and not some other group) hold the identified rights and interests (and not some other rights and interests).⁴⁹

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

- [89] [Culturally sensitive information redacted]
- [90] [Culturally sensitive information redacted]
- [91] Dr Lynes concludes from the above material that each of these apical ancestors had a traditional connection to the Winjidabil / Winjoooddoorulpul area at the time of effective sovereignty.⁵⁰
- [92] [Culturally sensitive information redacted]

⁴⁷ *Gudjala 2009* [29].

⁴⁸ *McLennan* [28], citations incorporated from original.

⁴⁹ *Gudjala 2007* [39].

⁵⁰ *Ibid*, pages 3–8.

- [93] Ms Juboy also deposes that her grandmother ‘used to dig up bush yams, bush banana (magabala)’ in the claim area,⁵¹ and that Big Springs was her father’s hunting ground, where he would go ‘just about every weekend in the good season’.⁵²
- [94] A further example is that [claim group member 1] refers to growing up on Meda Station and that apical ancestor Bobby Ah Choo used to come out to Meda, where he met [claim group member 1]’s son in the late 1970s.⁵³ [Claim group member 1] refers to the old people camping at the spring at Wallamor Bore, near Radawal Station on the claim area.⁵⁴ [Claim group member 1] also refers to an uncle getting water from the spring country in the claim area when he worked on the station.⁵⁵
- [95] The affidavits also contain information about the association of the contemporary members of the claim group to Winjidabil / Winjoooddoorulpul. For example, Ms Juboy deposes that she and her family go out to the Big Springs area often, usually in the cold season when the river is lower, hunting for bush turkey or goanna.⁵⁶ [Claim group member 1] describes growing up on Meda Station, where he would go hunting and fish for catfish, barramundi and sawfish.⁵⁷ [Claim group member 2] states that when he worked on Meda Station, there were also many other Warrwa people working there at the time.⁵⁸ The Lynes Report also notes how opportunities for Warrwa people to work on Meda Station allowed them to access and move about on their traditional Country and to maintain their physical presence at Winjidabil / Winjoooddoorulpul.⁵⁹
- [96] [Culturally sensitive information redacted]
- [97] Although the factual basis material does not contain direct material from Worrora-identifying members of the claim group, the Lynes Report provides material in relation to their association with the claim area. Worrora / Woddordda-identifying informants pointed out locations and shared cultural knowledge to Dr Kruse during a helicopter trip over Winjidabil / Winjoooddoorulpul.⁶⁰ Worrora People also maintain an association with the area through the ranger and heritage programs run through the Dambimangari Aboriginal Corporation.⁶¹
- [98] [Culturally sensitive information redacted]

⁵¹ Ibid [12].

⁵² Ibid [7].

⁵³ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 7 November 2019 [9], [20].

⁵⁴ Ibid [38].

⁵⁵ Ibid [79].

⁵⁶ Applicant’s Additional Material, Affidavit of Patricia Juboy affirmed 20 July 2023 [4], [8].

⁵⁷ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 7 November 2019 [28].

⁵⁸ Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 6 November 2019 [56].

⁵⁹ Lynes Report, page 11 [29].

⁶⁰ Lynes Report, page 12 [32].

⁶¹ Ibid.

[99] The Applicant's Additional Material also includes the adjacent determinations recognising the Warrwa and Worrora People.⁶² In my view these support an inference that both the Warrwa and Worrora People have an association to the Winjidabil / Winjooddoorurlpul area.

Consideration of the assertion at s 190B(5)(a)

[100] From the above information, I consider that the factual basis material is sufficient to enable a 'genuine assessment' of the assertions that members of the claim group have an ongoing association with the claim area. Although the information at Schedule F is at a high level of generality, the material in the Lynes Report and the affidavits of the members of the claim group contain a significant amount of detail to support the assertion at s 190B(5)(a).

[101] In my view, the factual basis material set out in the Lynes Report demonstrates that each of the apical ancestors of the claim group have an association to the claim area, with such association existing prior to effective sovereignty. The affidavits of members of the claim group demonstrates direct links from the ancestors and predecessors to current members of the claim group and provides many examples of the association of Warrwa People to the Winjidabil / Winjooddoorurlpul area.

[102] I note that each of the affidavits contained in the Applicant's Additional Material is deposed by a Warrwa-identifying person, and as such there is no direct material pertaining to this assertion from a Worrora-identifying member of the claim group. Nevertheless, there is material in the Lynes Report, as set out at paragraph 97 above, to support the assertion that the Worrora People have an association to the claim area.

[103] I consider that the material, read together with the Warrwa Combined and Dambimangari Determinations, demonstrates that the claim group and their predecessors have an association with the entire claim area. I also consider that the factual basis material provides sufficient geographical particularity to support the assertion of an association between the whole group and the claim area.⁶³ As such, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(a).

Section 190B(5)(b): traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests

[104] Section 190B(5)(b) requires the factual basis material to be sufficient to support the assertion of the existence of the traditional laws and customs giving rise to the native title rights and interests claimed. 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 by, and traditional customs observed' by the native title holders.

[105] The High Court observed in *Yorta Yorta* that laws and customs are 'traditional' where:

- 'the origins and content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to the assertion of British

⁶² Warrwa Combined Determination, Dambimangari Determination.

⁶³ *Gudjala* 2007 [52].

sovereignty,⁶⁴ where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;⁶⁵

- the normative system under which those traditional rights and interests are possessed is one which ‘has had a continuous existence and vitality since sovereignty’;⁶⁶
- the laws and customs have been passed from generation to generation, and must be rooted in the traditional laws and customs that existed pre-sovereignty;⁶⁷
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.⁶⁸

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

- it is necessary for the factual basis material to identify the relevant pre-sovereignty society of persons who acknowledged and observed the laws and customs;⁶⁹
- where the basis for membership of the claim group is descent from named ancestors, the factual basis material must demonstrate some relationship between the ancestors and the pre-sovereignty society from which the laws and customs are derived;⁷⁰ and
- the factual basis material must provide an explanation, beyond a mere assertion, of how the current laws and customs of the claim group are traditional and derived from the pre-sovereignty society.⁷¹

[107] I also note the observations of the Full Court in *Warrie*, that although

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’, the Act 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.’⁷²

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

[108] [Culturally sensitive information redacted]

[109] [Culturally sensitive information redacted]

⁶⁴ *Yorta Yorta* [46].

⁶⁵ *Ibid* [49].

⁶⁶ *Ibid* [47].

⁶⁷ *Ibid* [46], [79].

⁶⁸ *Ibid* [87].

⁶⁹ *Gudjala 2009* [37], [52].

⁷⁰ *Ibid* [40].

⁷¹ *Ibid* [29], [54].

⁷² *Warrie* [107]; see also *Alyawarr* [78].

[110] [Culturally sensitive information redacted]

[111] The Lynes Report also refers to Dreamtime stories maintained by Worrorra People in relation to Winjidabil / Winjooddoorurlpul and recorded by Blundell in 2017 and Dr Vachon in the 1990s and 2000s.⁷³ The report concludes that

the same rights and interests in country are shared between both groups, and according to any age, gender and/ or knowledge restrictions as prescribed under each traditional body of law and custom. In other words, while both Warrwa and Worrorra/ Woddordda -identifying people have rights and interests in the Winjidabil/ Winjooddoorurlpul (Big Springs) area under their own distinct bodies of law and custom⁹, due to the fact that Warrwa and Worrorra/ Woddordda people are neighbours, there is a mutual respect for, and participation in, each groups' traditional cultural world.⁷⁴

[112] In addition, I note that the existence of the traditional laws and customs of both the Warrwa and Worrorra People have been recognised in the adjacent Warrwa Combined and Dambimangari Determinations.

[113] I also consider that the material set out in my above consideration of the assertion at s 190B(5)(a) is relevant to the existence of the traditional laws and customs giving rise to the native title rights and interests claimed.

Consideration of the assertion at s 190B(5)(b)

[114] I am satisfied that the material outlined above is sufficient to enable a genuine assessment of whether there exist traditional laws acknowledged and customs observed by the Warrwa and Worrorra People that give rise to the claim to native title rights and interests.

[115] In my view, the factual basis material contained in the Lynes Report and the affidavits of members of the claim group, together with the Warrwa Combined and Dambimangari Determinations, demonstrates the existence of the traditional laws and customs of the Warrwa and Worrorra People. I consider that these laws and customs are supported by the examples given by the members of the claim group as set out above.

[116] Having regard to this, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b).

Section 190B(5)(c): the native title claim group have continued to hold the native title in accordance with those traditional laws and customs

[117] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the native title claim group continues to hold native title in accordance with traditional laws and customs. The traditional laws and customs referred to in s 190B(5)(c) are those referred to under s 190B(5)(b).⁷⁵

⁷³ Lynes Report, page 13 [35].

⁷⁴ Ibid, page 10 [26].

⁷⁵ Martin [29].

[118] I understand that continuity may be inferred where there is '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs'.⁷⁶

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

[119] [Culturally sensitive information redacted]

[120] This is also demonstrated in the other affidavits of members of the claim group, for example [claim group member 2] describes that his father 'taught me a lot of what I know about our traditional ways',⁷⁷ including rules about marriage and kinship.⁷⁸

[121] The Lynes Report also includes material that supports this assertion. For example, Dr Lynes sets out that the Warrwa and Worrora People maintain mutual respect for each group's traditional laws and customs and that each group

continue to observe said laws and customs through to the present-day, as evidenced by the active discussions held and consensus reached regarding who the correct people for country are and why that was the case during the various research and authorisation meetings.⁷⁹

[122] The Lynes Report also refers to specific rules, such as relating to control and access to lands, as set out in the Warrwa Combined and Dambimangari Determinations, that 'most certainly extends into the Winjidabil/ Winjooddoorurlpul (Big Springs) area' for both the Warrwa and Worrora People, and that 'these rules continue to be observed today amongst claimants'.⁸⁰

[123] I also refer to the factual basis material set out above in relation to the consideration of the assertions at ss 190B(5)(a) and (b), as well as the adjacent Warrwa Combined and Dambimangari Determinations.

Consideration of the assertion at s 190B(5)(c)

[124] In my view, the factual basis material contains sufficient detail relating to the transmission of traditional laws and customs from generation to generation to enable a genuine assessment of the extent to which the Warrwa and Worrora People have continued to hold the native title in the Winjidabil / Winjooddoorurlpul area under those traditional laws and customs.

[125] Having regard to the information set out above, as well as the Warrwa Combined and Dambimangari Determinations, I consider that the factual basis material demonstrates that the Warrwa and Worrora People have maintained continuing connection to and respect for their traditional laws and customs that existed in the pre-sovereignty society and continue to this day. I consider that the material demonstrates the genealogical links between the ancestors and predecessors of the claim group and current members of the claim group such that it can be said that the traditional laws and customs of the society at sovereignty have continued to be acknowledged and observed by the current members of the claim group.

⁷⁶ *Gudjala 2009* [33].

⁷⁷ Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 6 November 2019 [60].

⁷⁸ *Ibid* [137].

⁷⁹ Lynes Report, page 10 [26].

⁸⁰ *Ibid* [28].

[126] As such, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(c).

Section 190B(6): prima facie case – condition met

[127] Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.⁸¹

[128] I understand that I may consider material additional to the application for the purpose of my assessment of this condition.⁸² Because a ‘more onerous test [is] to be applied to the individual rights and interests claimed’ than under s 190B(5),⁸³ I consider that the task involves some weighing of the factual basis for the claimed rights and interests. It follows that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.⁸⁴

[129] In *Gudjala 2007*, Dowsett J indicated that s 190B(6) is to be considered having regard to the definition of ‘native title rights and interests’ in s 223(1).⁸⁵ As such, I must consider whether, on a prima facie basis, the claimed native title rights and interests:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[130] In *Ward HC*, Kirby J observed that ‘for a native title right to be recognised under the [Act], the critical threshold question is whether it is a right or interest “in relation to” land or waters’.⁸⁶ The term “in relation to” is here to be given a ‘wide import’.⁸⁷

[131] The claimed native title rights and interests are set out above at paragraph 75. As mentioned at paragraph 76, each of the claimed exclusive and non-exclusive rights and interests were generally recognised in both the Warrwa Combined and Dambimangari Determinations.⁸⁸ I consider that each of the claimed native title rights and interests are ‘in relation to lands or waters’.

[132] I have set out my consideration under s 190B(6) of each of the claimed exclusive and non-exclusive rights and interests below.

⁸¹ Section 186(1)(g) of the Act requires the Register of Native Title Claims to include a description of the native title rights and interests that, in applying s 190B(6), could be established on a prima facie basis.

⁸² *Doepel* [16].

⁸³ *Ibid* [127], [132].

⁸⁴ *Yorta Yorta* [86]; *Gudjala 2007* [86].

⁸⁵ *Gudjala 2007* [85]–[87].

⁸⁶ *Ward HC* [577].

⁸⁷ *Alyawarr* [93].

⁸⁸ *Warrwa Combined Determination*, Orders, Attachment A – Warrwa People Determination, paragraphs 4, 5; *Dambimangari Determination*, Orders, Attachment B Determination, paragraphs 5, 7.

Exclusive rights to possession, occupation, use and enjoyment of the lands and waters

[133] Paragraph 1 of Schedule E provides that where recognisable, the Warrwa and Worrora People claim ‘the right of possession, occupation, use and enjoyment of land and waters as against all others’.

[134] I note the comments of the High Court in *Ward HC*, that exclusive rights are ‘the rights under traditional law and custom to be asked permission and to “speak for country” that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others’.⁸⁹

[135] In *Griffiths*, the Full Court held that:

It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is “their country”. 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’. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.⁹⁰

[136] Justice French (as his Honour then was) noted in *Sampi* that:

The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.⁹¹

[137] The affidavits of members of the claim group contained in the Applicant’s Additional Material include material that is relevant to rights to control access to country. A strong example of this is the statement from [claim group member 2] that

[i]n the old days, if people came on Warrwa country without asking, we had a right to defend our territory.

You weren’t allowed to go onto another man’s country ... People couldn’t come across that boundary into Warrwa country. If they did come across, they came across at the risk of being speared by Warrwa people. That’s why the tribes swapped family members over for marriages. That would mean there was no fighting between the groups.⁹²

[138] A further example is from [claim group member 1], who states as follows:

⁸⁹ *Ward HC* [88].

⁹⁰ *Griffiths* [127].

⁹¹ *Sampi* [1072].

⁹² Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 6 November 2019 [103]–[104].

If Ngarinyin people want to come on to Warrwa country, they have to ask us if they want to come in and hunt. If people come from outside Warrwa country, we tell them where they can go, where they won't get hurt by something dangerous, like those sacred objects. My father cleared areas of sacred objects to make them free for people to go. People from outside Warrwa country used to ask my father where they could go on Warrwa country. He made sure they were in the right place.⁹³

[139] [Culturally sensitive information redacted]

[140] The Lynes report refers to the Dr Kruse connection report for the Warrwa Combined Claim and the Dambimangari Determination and states that the rules regarding the control of access and use of lands and waters continue to be observed by the Warrwa and Worrora People and that these rules extend to Winjidabil / Winjoooddoorulpul.⁹⁴

[141] In my view, this material contains strong examples which demonstrates the exercise by Warrwa and Worrora People of rights to speak for the land and to make decisions about its use and enjoyment by others as set out in *Sampi* and to control access in order to protect places and sacred objects within the claim area, and to avoid spiritual harm as described in *Griffiths*. As noted above, exclusive rights were recognised in both the Warrwa Combined claim and the Dambimangari Determinations.⁹⁵

[142] Having regard to the material set out above, I am satisfied that the factual basis material demonstrates that the claimed exclusive rights and interests can be prima facie established.

Non-exclusive rights and interests

[143] Paragraph 2 of Schedule E lists three claimed non-exclusive rights and interests, generally relating to access to the lands and waters, use of resources and protection of places and things of significance. I refer to the above factual basis material set out above in my consideration of the condition at s 190B(5), which contains information that is relevant to the claimed non-exclusive rights and interests.

[144] The factual basis material contains many examples of members of the claim group accessing, remaining on and using the lands and waters. One example of this is that member of the applicant Ms Juboy refers to regularly travelling over the claim area, including to camp: '[t]here's a beautiful wide area out there which is a beautiful spot to camp'.⁹⁶

[145] In relation to accessing and taking the resources of the land and waters, Ms Juboy refers to tracking and hunting goanna on the claim area, and also collecting bushtucker such as conkerberry, bush yams, magabala (bush banana), mardood (bush fruit) and kile (green peach).⁹⁷ [Claim group member 2] describes that '*Lungumbagudang* is the name of another

⁹³ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 7 November 2019 [72].

⁹⁴ Lynes Report, page 11 [28].

⁹⁵ *Warrwa Combined Determination*, Orders, Attachment A – Warrwa People Determination, paragraphs 4; *Dambimangari Determination*, Orders, Attachment B Determination, paragraphs 5.

⁹⁶ Applicant's Additional Material, Affidavit of Patricia Juboy affirmed 20 July 2023 [11].

⁹⁷ Ibid [10], [12].

fruit tree that grows on Meda, including at Big Springs’.⁹⁸ Other members of the claim group also describe hunting for goanna, crocodiles, turkey and kangaroo and fishing for catfish, barramundi, sawfish and salmon.⁹⁹ [Claim group member 2] also describes that ‘[t]urtles lay eggs on the beach at Big Springs, across from Radawarl. I got turtle eggs there. I got turtle there too’.¹⁰⁰

[146] [Culturally sensitive information redacted]

[147] Further, Dr Lynes refers to statements from the claim group about ‘their on-going obligations to protect the large site of significance in the Winjidabil/ Winjooddoorurlpul (Big Springs) area’.¹⁰¹

[148] I consider that the material set out above is sufficient to establish each of the claimed non-exclusive rights and interests on a prima facie basis.

Conclusion on s 190B(6)

[149] Having regard to the above, I am satisfied that the requirements of s 190B(6) are met in respect of each of the claimed exclusive and non-exclusive rights and interests set out at Schedule E of the application. This condition is met.

Section 190B(7): physical connection – condition met

[150] Section 190B(7) requires the Registrar to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[151] In *Gudjala 2009*, Dowsett J observed that the traditional physical connection under s 190B(7) ‘must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.¹⁰² ‘Traditional’ as that term is used under s 223 of the Act, was considered by the members of the joint judgment in *Yorta Yorta* who noted that:

the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... “traditional” in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.¹⁰³

⁹⁸ Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 6 November 2019 [114].

⁹⁹ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 7 November 2019 [28], [30]; Affidavit of [claim group member 2] affirmed 6 November 2019 [106], [109]–[110]; Affidavit of [claim group member 3] affirmed 1 November 2019 [84]–[87].

¹⁰⁰ Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 6 November 2019 [112].

¹⁰¹ Lynes Report, page 11 [28].

¹⁰² *Gudjala 2009* [84].

¹⁰³ *Yorta Yorta* [86].

- [152] Justice Mansfield stated in *Doepel* that the task of the Registrar under s 190B(7), requires ‘some measure of substantive (as distinct from procedural) quality control upon the application, if it is to be accepted for registration’.¹⁰⁴
- [153] Having regard to this, I understand that I must be satisfied that the material provides a factual basis from which I can establish that at least one member of the claim group has or had the necessary ‘traditional’ physical association with the application area.
- [154] I refer to my reasons and conclusions regarding the requirements of s 190B(5) and s 190B(6). I consider that the factual basis material contains many examples of the traditional physical connection that members of the claim group continue to maintain with the lands and waters in the claim area. Ms Juboy deposes that she and her family ‘go out to the Big Springs area often’,¹⁰⁵ hunting for bush turkeys and goannas and to ‘just go and visit the country, visit Big Spring itself, to see if there’s any damage or anything like that’.¹⁰⁶ I also refer to the other examples of camping, hunting and gathering on the claim area set out at paragraph 144 to 145 above.
- [155] Having regard to the above, I am satisfied that the application establishes that at least one member of the claim group currently has a traditional physical connection with the lands and waters of the claim area. As such, I am satisfied that the application meets the requirements of s 190B(7).

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

- [156] Section 190B(8) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that the application should not have been made because it does not comply with s 61A.
- [157] **Section 61A(1)** provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. Paragraph 3 of each of the Applicant Affidavits state that none of the area covered by the application is also covered by an approved determination of native title. This is confirmed in the Geospatial Assessment and my own searches of the Tribunal’s database. Attachment B of the application confirms that the application excludes any of the lands and waters within the external boundaries of the Warrwa Combined and Dambimangari Determinations.
- [158] **Section 61A(2)** provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in s 61A(4) apply. Paragraphs 2(c) and (d) of Schedule B of the application confirm that the application excludes any areas where a previous exclusive possession act was done, subject to ss 47, 47A or 47B.
- [159] **Section 61A(3)** provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described

¹⁰⁴ *Doepel* [18].

¹⁰⁵ Applicant’s Additional Material, Affidavit of Patricia Juboy affirmed 20 July 2023 [4].

¹⁰⁶ *Ibid* [8].

in s 61A(4) apply. I am satisfied that the terms of Schedules B and E indicate that exclusive rights and interests are not claimed over areas where there has been a previous non-exclusive possession act.

[160] Having regard to the information contained in the Applicant Affidavits, the Geospatial Assessment and Schedules B and E, I am satisfied that there is no failure to comply with s 61A. As such, the application meets the requirements of s 190B(8).

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

[161] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that claimed native title rights and interests include claims to ownership of minerals, petroleum or gas wholly owned by the Crown, exclusive rights to waters in an offshore place or extinguished native title rights and interests (except where such extinguishment can be disregarded under certain provisions of the Act).¹⁰⁷

[162] Schedules Q and P to the application do not include claims under s 190B(9)(a) and (b) to minerals, petroleum or gas or to any waters in an offshore place.

[163] Paragraph 2(e) of Schedule B of the application confirms that the application does not cover any areas where native title rights and interests have otherwise been wholly extinguished.

[164] In the absence of evidence to the contrary, having regard to Schedules B, Q and P, I am satisfied that the application meets the requirements of s 190B(9).

End of reasons

¹⁰⁷ See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Big Springs Claim Group
NNTT No.	WC2024/003
Federal Court of Australia No.	WAD144/2024

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:

13 June 2024

Date application entered on Register:

30 August 2024

Applicant:

Derek Oobagooma, Patricia Juboy, Elaine Laraia, Patrick Lawson, Nathan Lenard, Craig Oobagooma, Kirk Woolagoodja, Gary Umbagai

Applicant's address for service:

Justine Toohey
Kimberley Land Council
11 Gregory Street
Broome WA 6725

Email: justine.toohey@klc.org.au
Phone: 08 9194 0100

Conditions on Applicant's authority

The applicant's authority to make the application and to deal with matters arising in relation to it is subject to the following conditions imposed by the native title claim group in accordance with a process of decision-making agreed to and adopted by the native title claim group.

1. The members of the Applicant must be eligible, and willing and able to act.
2. The Applicant is to act at all times in good faith in the interests of the claim group as a whole.
3. The Applicant is directed to instruct the Principal Legal Officer of the Kimberley Land Council to file the Big Springs Claim in the Federal Court and take all steps reasonably necessary to

bring the consent determination before the Federal Court for determination as soon as possible.

Area covered by application:

[As per the Schedule]

Persons claiming to hold native title:

[As per the Schedule]

Registered native title rights and interests:

[As per the Schedule]

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

30 August 2024