



## Registration Decision

<b>Application name</b>	Ivan Turner & Ors on behalf of the Jaru #3 Native Title Claim Group and State of Western Australia (Jaru #3)
<b>Name of applicant</b>	Ivan Turner, Angeline Flora Bedford, Rosemary Rosewood, John Hamilton, Susan Swan and Brenda Garstone
<b>Federal Court of Australia No.</b>	WAD330/2023
<b>NNTT No.</b>	WC2023/003
<b>Date of Decision</b>	14 March 2024

### Claim accepted for registration

I have decided that the claim in the Jaru #3 application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> 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.

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<sup>1</sup> 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')

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

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

*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')

*Jingle on behalf of the Jaru People #2 v Western Australia* [2022] FCA 1511 ('Jaru 2')

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

*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')

*North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2; (1996) 185 CLR 595 ('Waanyi')

*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')

*Sturt on behalf of the Jaru Native Title Claim v Western Australia* [2018] FCA 1923 ('Jaru')

*Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v Western Australia* [2016] FCA 910 ('Tjungarrayi')

*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')

*Wulgurukaba People #1 v Queensland* [2002] FCA 1555 ('Wulgurukaba')

## BACKGROUND

- [1] This decision concerns the third application filed on behalf of the Jaru People. It covers lands and waters of approximately 5,103 square kilometres over the Ord River Regeneration Reserve in Western Australia. One of the persons comprising the applicant describes the claim area as ‘river country’ that includes the Panton River and Ord River and that ‘used to be part of Flora Valley Station, we call it *Balngunna*. That is the name for Flora Valley, it means “wide open plain country, the valley”’.<sup>2</sup>
- [2] The area covered by the application is contiguous with the northern part of the determination made on 6 December 2018 in *Sturt on behalf of the Jaru Native Title Claim v Western Australia (‘Jaru’)*<sup>3</sup>. The Jaru #2 claim was determined on 21 December 2022 and comprises an area of approximately 131.5 square kilometres over a parcel of Unallocated Crown Land surrounded by the determination in *Jaru*.<sup>4</sup>
- [3] I note that the area covered by the application was previously included within the claim area in the first Jaru claim, however the parties agreed that no determination was to be made over this area in the *Jaru* determination.<sup>5</sup> Following amendments to the Act in 2021, this area is now claimed on the basis that the claim group seek the benefit of s 47C.<sup>6</sup>
- [4] The Registrar of the Federal Court (‘Court’) gave a copy of the application and accompanying affidavits to the Native Title Registrar (‘Registrar’) on 21 December 2023 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.<sup>7</sup>

## Registration conditions

- [5] Sections 190A(1A), (6), (6A) and (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 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.
- [6] Given that the application was made on 21 December 2023 and has not been amended, I am satisfied that neither s 190A(1A) nor s 190A(6A) apply.
- [7] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

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<sup>2</sup> Affidavit of Brenda Garstone dated 17 November 2023 [10].

<sup>3</sup> *Jaru*.

<sup>4</sup> *Jaru 2*.

<sup>5</sup> *Jaru*, Orders, Note D.

<sup>6</sup> Barritt Report, page 2 [2]–[3]; Form 1, Schedule L.

<sup>7</sup> Section 190A(1).

## Information considered

- [8] 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’.
- [9] I have had regard to information in the application. I have also considered documents provided by the applicant directly to the Registrar on 5 February 2024 (together referred to as the ‘additional material’):<sup>8</sup>
- Native Title Registration Test Report for the Jaru #3 Native Title Claim (WAD334/2023, WC2023/003) by Callista Barritt, Senior Anthropologist at the Kimberley Land Council (‘Barritt Report’)
  - Affidavit of [claim group member 1] affirmed 16 October 2011
  - Affidavit of [claim group member 2] affirmed 17 October 2011
  - Affidavit of [claim group member 3] affirmed 18 October 2011
  - Affidavit of [claim group members 4 and 5] dated 25 July 2018
  - Affidavit of [claim group member 6] affirmed 26 July 2018
  - Second affidavit of [claim group member 6] affirmed 29 June 2018
  - Affidavit of Brenda Garstone affirmed 17 November 2023
  - *Sturt on behalf of the Jaru Native Title Claim v Western Australia* [2018] FCA 1923
  - *Jingle on behalf of the Jaru People #2 v Western Australia* [2022] FCA 1511
  - Registration test decision dated 15 February 2012 in the Jaru #1 claim (WC2012/003; WAD45/2012)
- [10] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.<sup>9</sup>
- [11] The State of Western Australia (‘State’) has not provided any submissions in relation to the application of the registration test.
- [12] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 15 January 2024 (the ‘geospatial assessment’).

## Procedural fairness

- [13] A Senior officer of the Tribunal wrote to the State on 15 January 2024 to provide a copy of the application in accordance with s 66(2) and to request that any submissions that the State may wish to make on the application be provided by 29 January 2024.

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<sup>8</sup> Section 190A(3)(a).

<sup>9</sup> Section 190A(3)(b).

[14] As noted above, I have considered the additional material provided by the applicant on 5 February 2024. On 14 February 2024, a Senior Officer wrote to the State advising that the applicant had provided the additional material and noting that the Barritt Report and the affidavits contained confidential material. The State was required to enter into a confidentiality undertaking in order to receive copies of that material,<sup>10</sup> but did not do so. On 20 February 2024 the State wrote to the Tribunal to confirm that they would not be making any submissions in relation to the registration test.

[15] This concluded the procedural fairness process.

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

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

### ***What is required to meet this condition?***

[17] Section 190C(2) requires the Registrar to 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. I note the comments of Mansfield J in *Doepel* that this condition does not require the Registrar to undertake any merit assessment of the material.<sup>11</sup>

[18] In my view, s 190C(2) relates only to those parts of ss 61 and 62 that impose requirements relating to documents and information to be included in the application and accompanying documents. I note that s 61(2) provides that the persons authorised to make the application are jointly the applicant. I consider that this subsection does not impose any requirement for documents and information to be contained in the application or accompanying documents within the meaning of s 190C(2).

### ***Does the claim contain the prescribed information and is it accompanied by the prescribed documents?***

[19] The application meets this condition because it contains the prescribed information and is accompanied by the prescribed documents, as set out below.

#### ***Applications that may be made: s 61(1)***

[20] Section 61(1) provides that an application for determination of native title may be made by a person or persons authorised by the native title claim group, provided those persons are also members of the native title claim group.

[21] Part A of the application confirms that the applicant was authorised to make the application and that each member of the applicant is a member of the native title claim group. Schedule A of the application contains a description of the native title claim group and each of the six

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<sup>10</sup> *WA v NTR* [38].

<sup>11</sup> *Doepel* [35]–[39].

persons comprising the members of the applicant have deposed an affidavit stating that they are members of the claim group and were authorised to make the application.<sup>12</sup>

[22] I am satisfied that the application has been made in accordance with s 61(1).

*Applicant's name and address for service: s 61(3)*

[23] Section 61(3) requires an application to state the name and address for service of the applicant. The names of the persons comprising the applicant are included in the application and Part B of the application contains the address for service. As such, I am satisfied that the application meets this requirement.

*Applications authorised by persons: s 61(4)*

[24] Section 61(4) requires an application to name or otherwise describe the persons comprising the native title claim group who authorised the applicant. I consider that Schedule A contains a description of the native title claim group that is sufficient to meet this requirement.

*Prescribed form filed in the Federal Court: s 61(5)*

[25] 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. I consider this to be a matter for the Court, but note that the application is made on a completed Form 1 (the prescribed form) and was accepted for filing in the Court.

*Affidavits containing specified details: s 62(1)(a) and (1A)*

[26] Section 62(1)(a) requires an application to be accompanied by affidavits that state the matters contained in sub-s (1A). Each of the members of the applicant have provided two affidavits that accompany the application. I have reviewed each of these affidavits. I am satisfied that the affidavits deposed on 10 October 2023 contain the statements required by s 62(1A)(a)–(e), and the affidavits deposed on various dates between 8 and 13 December 2023 contain the statements required by s 62(1A)(f)–(g). I am satisfied that this requirement is met.

*Section 47C agreement: s 62(1)(d)*

[27] 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. Part 2 of Schedule L of the application indicates that this is not applicable. I am satisfied that the application does not contravene s 62(1)(d).

*Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) and (b)*

[28] Sections 62(2)(a) and (b) provide that an application must contain a description and map of the area covered by the application. Schedule B of the application contains a written description of the boundaries of the area, as well a description of those areas that are excluded from the area covered by the application. Attachment C comprises a map showing

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<sup>12</sup> Affidavits of each member of the applicant deposed 10 October 2023, [1], [6].

the external boundaries. As such, I am satisfied that the application includes the details and information required by s 62(2)(a) and (b).

*Searches of any non-native title rights and interests carried out: s 62(2)(c)*

[29] Section 62(2)(c) requires an application to include details and results of any searches relating to non-native title interests. Schedule D indicates that no searches have been conducted on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the claim area. As such I am satisfied that the application complies with this requirement.

*Description of native title rights and interests claimed: s 62(2)(d)*

[30] Section 62(2)(d) requires an application to contain a description of the native title rights claimed that does 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 the application. As such I am satisfied that the application meets the requirements of this subsection.

*General description of factual basis for assertion that native title exists: s 62(2)(e)*

[31] 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 contains the following statements:

The factual basis of the claim is as follows:

- (a) the native title claim group and their ancestors have, prior to and since the assertion of British sovereignty, possessed, occupied, used and enjoyed the claim area;
- (b) such possession, occupation, use and enjoyment has been pursuant to and under the laws and customs of the native title claim group, comprising rights and interests in land and waters which the traditional laws and customs vest in members of the native title claim group on the basis of ancestral connection to the area;
- (c) such traditional laws and customs have been passed down from older generations of the native title claim group to younger generations, including the present generation, of the native title claim group;
- (d) the native title claim group continues to acknowledge and observe those traditional laws and customs;
- (e) the native title claim group by those laws and customs have continuing connection with the land and waters in respect of which the claim is made; and
- (f) the rights and interests are capable of being recognised by the common law of Australia.

[32] There is further information in the application at Schedule G relating to the activities carried out by the native title claim group. The description of the claim group at Schedule A also contains information relating to the connection of members of the claim group to the claim area through responsibilities for certain songs or ceremonies linked to significant sites in the area.

- [33] Under s 62(2)(e), I am confined to a consideration of the information in the application and accompanying documents.<sup>13</sup> I have reviewed the Commonwealth Courts Portal and formed the view that the additional material, including the Barritt Report and affidavits of members of the claim group bearing the file number for the Jaru #1 claim, was not filed in the Jaru #3 application. As such this material does not accompany the application for the purpose of my consideration of the condition at s 62(2)(e).
- [34] In *Wulgurukaba*, Drummond J noted that the general description of the factual basis can be ‘something less than the information necessary to make out’ the sufficient factual basis in the corresponding merit condition in s 190B(5).<sup>14</sup>
- [35] In *Gudjala FC*, the Full Court (French, Moore and Lindgren JJ) noted that while it is only necessary for the applicant to provide a ‘general description of the factual basis’, this 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’.<sup>15</sup>
- [36] In my view the information contained at Schedule F is at a high level of generality. However, when read together with the application as a whole, in particular the information contained at Schedules A and G, in my view the application contains a general description of the factual basis sufficient to meet the requirement of s 62(2)(e).

*Activities: s 62(2)(f)*

- [37] Section 62(2)(f) requires an application to include details of activities in relation to the land or waters. As noted above, the activities currently being undertaken by members of the native title claim group in the area covered by the application are listed at Schedule G. As such I am satisfied that this requirement is met.

*Other applications: s 62(2)(g)*

- [38] Section 62(2)(g) requires an application to include details of any other relevant court applications seeking a determination of native title. Schedule H states that the applicant is not aware of any other applications in relation to the whole or part of the area covered by the application, and as such I am satisfied that this requirement is met.

*Future act notices: ss 62(2)(ga) and (h)*

- [39] Sections 62(2)(ga) and (h) require an application to include details of any notices under ss 24MD(6B)(c) or 29.
- [40] Schedule HA states that the applicant is not aware of any notifications under s 24MD(6B)(c). Schedule I states that the applicant is aware of 162 section 29 or equivalent notices that have been given and relate to the whole or part of the area covered by the application. Schedule HA also refers to Attachment I, which comprises a list of the details of these 162 notices.

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<sup>13</sup> *Doepel* [39].

<sup>14</sup> *Wulgurukaba* [19].

<sup>15</sup> *Gudjala FC* [92].

[41] As such, I am satisfied that the application contains the details required by ss 62(2)(ga) and (h).

*Any conditions: s 62(2)(i)*

[42] If there are any conditions under s 251BA on the authority of the applicant to make the application and deal with matters arising in relation to it, s 62(2)(i) requires an application to contain details of those conditions. Schedule IA of the application sets out the conditions that were placed on the authority of the applicant. As such I am satisfied that the application contains the details required by this subsection.

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

[43] 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’.

[44] 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’.<sup>16</sup>

[45] Having regard to this, I understand that the purpose of s 190C(3) is to prevent overlapping claims from being on the Register of Native Title Claims (‘Register’) at the same time where those claims include persons who are members of each native title claim group. 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).

[46] I understand that in assessing this requirement I may have regard to information which does not form part of the application and accompanying documents.<sup>17</sup>

[47] The condition at s 190C(3) only arises where there is a previous application that meets the criteria set out in sub-ss (a) to (c).<sup>18</sup> These criteria are that any previous application covers at least some of the same area, was accepted for registration under s 190A and on the Register.

[48] The geospatial assessment indicates that there is no previous claim overlapping any of the area covered by the application within the meaning of s 190C(3). I have conducted my own searches of the Tribunal’s mapping database which have confirmed this.

[49] As there is no previous overlapping application which meets the conditions set out in ss 190C(3)(a) – (c), the application does not contravene this requirement.

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<sup>16</sup> Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25], emphasis added.

<sup>17</sup> *Doepel* [16].

<sup>18</sup> *Strickland FC* [9].

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

[50] For the reasons set out below, I am satisfied that the condition set out in s 190C(4) is met.

### *What is required to meet this condition?*

[51] In order for the condition in s 190C(4) to be met, I must be satisfied that either the application has been certified in accordance with s 190C(4)(a) or has met the authorisation requirements under s 190C(4)(b).

[52] Schedule R of the application indicates that the application has been certified by the Kimberley Land Council ('KLC'). A copy of the certificate is included at Attachment R. As such I will consider whether the requirements at s 190C(4)(a) is met.

[53] Section 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but does not require the Registrar to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body'.<sup>19</sup> Having regard to this, I consider that my task for the purpose of this condition is to identify the relevant representative body and be satisfied that the application is certified under s 203BE.

[54] I note that if the requirement at s 190C(4)(a) is met, it is not necessary to then address the condition at s 190C(4)(b).<sup>20</sup>

### **Does the certifying body have power to certify?**

[55] The geospatial assessment confirms that the KLC is the appropriate representative Aboriginal/Torres Strait Islander body for the area covered by the application. The certificate states that the KLC certify the application pursuant to s 203BE(1)(a) and includes the statements of opinion required by s 203BE(2).

[56] The certification at Attachment R has been signed by the Chief Executive Officer of the KLC. I understand that a Chief Executive Officer may perform the functions of a representative body under an instrument of delegation or as an agent.<sup>21</sup>

[57] Having regard to the above, I am satisfied that the KLC 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?**

[58] To meet the requirements of s 190C(4)(a), the certification must comply with the provisions of s 203BE(4)(a) to (c). For the reasons that follow, I find that these requirements are met and I am therefore satisfied that the claim meets the requirements of s 190C(4)(a).

[59] 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 matters in relation to it, any conditions under s 251BA on the authority that relate to the making of the application have

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<sup>19</sup> *Doepel* [78], [80]–[82]; see also *Wakaman* [32].

<sup>20</sup> *Doepel* [80].

<sup>21</sup> *Quall HC* [48], [63] and [93].

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 states that KLC is of the opinion that:

- (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it;
- (b) any conditions under s 251BA on the authority that relate to the making of the application have been satisfied; and
- (c) 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.

[60] I consider that this statement meets the requirements of s 203BE(4)(a).

[61] Section 203BE(4)(b) then requires a certification to include brief reasons for the representative body's opinion. The certification at Schedule R of the application includes the following information:

- KLC have undertaken extensive anthropological, archival, genealogical and field research for the purpose of identifying all persons who are the native title claim group for the application. This has included community consultation with relevant families that assert native title rights and interests in the claim area. The claim group description for the application is based on this extensive anthropological research.
- The application was authorised at Halls Creek on 10 October 2023. Only members of the native title claim group participated in the decision-making at the authorisation meeting.
- At the authorisation meeting, the native title claim group confirmed that there was no traditional decision-making process which must be complied with, and a decision-making process was agreed to and adopted.
- The agreed decision-making process involved discussion before proposing a resolution, the proposed resolution being moved and seconded, and then conducting a vote by show of hands with the resolution being passed by a majority vote.
- The resolution to make the application was made at the authorisation meeting in accordance with that decision-making process.
- Three conditions were placed on the authority of the applicant to make the application, to the effect that each member of the applicant must be eligible, willing and able to act, must act at all times in good faith and in the interests of the whole claim group, and directing the members of the applicant to instruct the KLC to file the application and take all steps reasonably necessary to seek the recognition of native title.
- Each member of the applicant has confirmed that they are eligible, willing and able to act, have acted in good faith and instructed the KLC to file the application in satisfaction of the conditions imposed under s 251BA.

[62] In my view the certification includes the brief reasons for KLC's statements of opinion required under s 203BE(4)(b).

[63] Section 203BE(4)(c) applies where the application area is covered by an overlapping application for determination of native title. As mentioned above, there are no applications that cover the application area.

#### **Conclusion on s 190C(4)**

[64] In my view the certification at Schedule R satisfies the requirements of s 203BE of the Act. As such, I am satisfied that the application has been properly certified under s 190C(4)(a) and this condition is met.

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

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

[65] Section 190B(2) provides that the Registrar must be satisfied that the information and map contained in the application (as required by ss 62(2)(a) and (b)) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[66] Schedule B of the application describes the application area as all the lands and waters comprising part of Reserve 28538, and further describes the area as a listing of two Lots on deposited plan and a portion of Lot 350 on Deposited Plan 64837 that falls south of the southern bank of White Mountain Creek and south easterly of the southern bank of the Panton River. For the avoidance of doubt, Schedule B also specifically excludes two native title determinations.

[67] Schedule C refers to the map of the external boundaries of the area covered by the application contained at Attachment C. This map is an A4 sized colour copy of an A3 sized map prepared by the Tribunal's Geospatial Services, titled 'Jaru People #3' dated 5 October 2023. The map includes the application area depicted by a bold blue outline, land tenure, labelled towns and highways, the Western Australia–Northern Territory border, a legend, scalebar, locality map, coordinate grid and notes on relating to the source, currency and datum of data used to prepare the map.

[68] The geospatial assessment concludes that the description and map are consistent and identify the application area with reasonable certainty. Having considered the description and map, I agree with this assessment. I am satisfied that the information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed. As such, I am satisfied that the application meets the requirements of s 190B(2).

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

[69] For the reasons below, I am satisfied that the claim meets the requirements of s 190B(3).

### **What is needed to meet this condition?**

[70] In order to meet this condition, I must be satisfied that either the persons in the native title claim group are named in the application (s 190B(3)(a)) or are described sufficiently clearly so that it can be ascertained whether any particular person is a member of the claim group (s 190B(3)(b)).

[71] When considering whether the requirements of this consideration have been met, I understand that:

- I am required to address only the content of the application;<sup>22</sup>
- section 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification';<sup>23</sup>
- the conditions or rules set out in a claim group description can be sufficient for the purpose of s 190B(3)(b) notwithstanding where it is necessary to 'engage in some factual inquiry when ascertaining whether any particular person is in the group as described'.<sup>24</sup>

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

[72] Paragraph 1 of Schedule A sets out that the native title claim group is made up of those Aboriginal persons who:

- (a) are related through filiation (meaning a series of parent-child relationships, including by adoption) to one of the Apical Ancestors who held rights and interests in one of the local estate countries comprising the claim area; or
- (b) are affiliated to an Apical Ancestor and who have spirit conception and/or birth sites in one of the local estate countries in the claim area; or
- (c) are recognised by the persons described above as:
  - (i) holding rights and responsibilities for certain songs and ceremonies which make reference to important sites in the claim area; or
  - (ii) holding rights and interests in one of the local estate countries in the claim area under traditional law and custom.

[73] Paragraph 2 of Schedule A then lists 53 named Apical Ancestors.

[74] I note that Schedule A does not entail a list of the names of all the persons in the native title claim group. I therefore consider that s 190B(3)(b) is applicable.

[75] I understand that there are several elements to the claim group description. I will discuss these elements below before deciding whether I am satisfied that the persons in that group

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<sup>22</sup> *Doepel* [51]; *Gudjala 2007* [30].

<sup>23</sup> *Gudjala 2007* [33].

<sup>24</sup> *WA v NTR* [67].

are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. In my view the description is to be read as a discrete whole.<sup>25</sup>

#### *Descent*

[76] I understand that paragraph 1(a) of Schedule A provides that membership of the claim group may be ascertained through biological descent by way of a series of parent-child relationships from the ancestors named at paragraph 2, including descent by way of adoption. The Court has previously accepted the approach of identifying members of a native title claim group by reference to the descendants of named persons.<sup>26</sup> I consider that requiring a person to show descent from one of the named ancestors provides a clear starting point from which to commence an inquiry.

#### *Spirit conception and/or birth sites*

[77] Paragraph 1(b) of Schedule A provides that a person with an affiliation with one of the ancestors named in paragraph 2 is also a member of the claim group where that person also has a 'spirit conception and/or birth sites in one of the local estate countries in the claim area'. In my view this paragraph operates such that a person who has an affiliation with one of the ancestors but is not able to show biological or adoptive descent, may also be a member of the claim group where that person has a spirit conception or was born on one of the local estate countries in the claim area.

[78] I note that describing a claim group by reference to birth on the claim area is a method that has been accepted by the Courts.<sup>27</sup> In my view this provides a clear starting point or external reference point to commence an inquiry about whether a person is a member of the native title claim group.

[79] In my view, a person's spirit conception on the claim area also provides a sufficient reference point with which to commence an inquiry as to whether a person is a member of the claim group. I note that having a person's conception site on the claim area has also been accepted by the Courts as a method of identifying the claim group.<sup>28</sup>

#### *Recognition as a person holding rights and responsibilities for Country*

[80] The third element to the claim group description is contained at paragraph 1(c) of Schedule A and involves recognition by other members of the claim group that a person holds either rights and responsibilities for particular songs and ceremonies referencing significant sites in the claim area or rights and interests in one of the local estate countries in the claim area.

[81] 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'.<sup>29</sup> In *Sampi FC*, the Full Court noted that:

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<sup>25</sup> *Gudjala 2007* [34].

<sup>26</sup> *Ibid.*

<sup>27</sup> *De Rose* [926].

<sup>28</sup> *Tjungarrayi* [13].

<sup>29</sup> *Aplin* [260]; *Yorta Yorta* [108].

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.<sup>30</sup>

[82] I consider that this element of the claim group description involves recognition by reference to the traditional laws and customs of the Jaru People, in particular in relation to recognised responsibilities for particular songs and ceremonies associated with significant sites or recognition of rights and interests in relation to a particular local estate area.

[83] 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 that person's connection to the land and that this provides sufficiently clear rules and principles to ascertain whether a particular person is a member of the claim group.

### **Conclusion on s 190B(3)**

[84] For the above reasons, 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.

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

[85] For the reasons below, I am satisfied the description in Schedule E of the application meets the requirements of this condition.

#### **What is needed to meet this condition?**

[86] The condition at s 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests is sufficient to allow those rights and interests to be readily identified. I consider that in order to meet this condition, the description in the application must be understandable and have meaning, and be without contradiction.<sup>31</sup>

[87] Section 190B(4) refers to the description required by s 62(2)(d), which provides as follows:

a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

[88] For the purpose of s 190B(4), I consider that the focus is only on whether the rights and interests as claimed are 'readily identifiable'. While undertaking this task, I consider 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)'.<sup>32</sup>

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<sup>30</sup> *Sampi FC* [45].

<sup>31</sup> *Doepel* [99], [123]

<sup>32</sup> *Strickland* [60]; *Strickland FC* [85] – [87].

[89] In assessing the requirements of this provision, I understand that I am confined to the material in the application itself.<sup>33</sup>

[90] I note that whether the claimed rights and interests can be prima facie established as native title rights and interests within the meaning of s 223 is considered in my reasons under s 190B(6).

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

[91] The application sets out a description of the claimed native title rights and interests at Schedule E, as follows:

In the whole of the claim area, 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 the whole world.

[92] I note the comments of French J in *Strickland* that a broadly described claim to possession, occupation, use and enjoyment as against the whole world complies with the requirements s 62(2)(d).<sup>34</sup> This was affirmed by the Full Court on appeal.<sup>35</sup>

[93] I am satisfied that the description at Schedule E is sufficient to allow the claimed native title rights and interests to be readily identified for the purpose of s 190B(4). This condition is met.

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

[94] For the reasons set out below, 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 set out in ss 190B(5)(a)–(c).

*What is needed to meet this condition?*

[95] I understand that when assessing the requirements of this condition I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been claimed.<sup>36</sup>

[96] Although the facts asserted are not required to be proven by the applicant, I consider that the factual basis must provide sufficient detail to enable a ‘genuine assessment’ of whether the assertions set out in ss 190B(5)(a) to (c) are supported by the applicant’s factual basis material.<sup>37</sup>

[97] I also understand that the applicant’s material must provide ‘more than assertions at a high level of generality’,<sup>38</sup> and cannot merely restate a claim or be an alternate way of expressing a

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<sup>33</sup> *Doepel* [16].

<sup>34</sup> *Strickland* [60].

<sup>35</sup> *Strickland FC* [80]–[87].

<sup>36</sup> *Doepel* [17]; *Gudjala FC* [57], [83].

<sup>37</sup> *Gudjala FC* [92].

<sup>38</sup> *Ibid.*

claim.<sup>39</sup> In my view, the condition at s 190B(5) requires the applicant's factual basis material to provide adequate specificity of particular and relevant facts going to each of the assertions.

[98] The factual basis material is contained in Schedules F and G of the application and the additional material provided by the applicant on 5 February 2024.

[99] I will consider the sufficiency of this material by addressing each of the assertions set out in s 190B(5) in turn.

*Association with the claim area: s 190B(5)(a)*

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

[100] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion that:

- a. there is 'an association between the whole group and the area', although not 'all members must have such association at all times';<sup>40</sup>
- b. the predecessors of the group were associated with the area over the period since sovereignty;<sup>41</sup> and
- c. there is an association with the entire claim area, rather than an association with part of it or 'very broad statements', which for instance have no 'geographical particularity'.<sup>42</sup>

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

[101] The factual basis material sets out that 'effective sovereignty' occurred in the area between 1884 and the early 1900s, through pastoralists taking up leases in the area and herding cattle, the Halls Creek gold rush and the establishment of the Turkey Creek ration and police depot.<sup>43</sup> In 1879, Andrew Forrest led an expedition from the Margaret River to the Ord River and would have passed through the claim area, and the first cattle stations were established in the claim area in 1884 (Ord River Station) and 1888 ((Old) Flora Valley Station).<sup>44</sup> Early records from European explorers indicate that Old Flora Valley, known in Jaru as *balngana*, was 'one of the main places where Jaru people were concentrated'.<sup>45</sup> The factual basis material sets out that the early relationships between Aboriginal people and Europeans in the claim area was marked by violence, with reprisal killings of Aboriginal People in the mid-1880s and 1890 along the Ord River and Ord River Station, and the massacre at Linnekar Gorge in 1896.<sup>46</sup>

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<sup>39</sup> *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

<sup>40</sup> *Gudjala 2007* [52].

<sup>41</sup> *Ibid.*

<sup>42</sup> *Martin* [26]; see also *Corunna* [45].

<sup>43</sup> Barritt Report, page 3–4, [11].

<sup>44</sup> *Ibid.*, page 4, [12]–[13].

<sup>45</sup> *Ibid.*, page 4 [15].

<sup>46</sup> *Ibid.*, page 4–5 [16]–[19].

[102] I note that current members of the claim group describe being told about the Linnekar Gorge massacre:

Well, we got (story) some of them people got shot [at] Linnekar Gorge (On former Turner Station). Kartiya [white people] bin [sic] come there to shoot blackfellas for no reason. Gather all the blackfellas and tie em up with chains. ... started shooting the blackfellas with the chains (still on).<sup>47</sup>

and:

My dad used to take me to the caves, there was a big massacre here near Turner, the police came in and shot them, and the managers they shot the blackfellas, my dad was there, he was young. There are too many burials there in those caves.<sup>48</sup>

[103] The Barritt Report concludes that:

Despite the violent history outlined above, the ethnohistoric record demonstrates ample evidence that the ancestors of the Jaru #3 claim group continued to occupy the claim area, use its resources, and observe their traditional laws and customs from before the time of effective sovereignty to the present day.<sup>49</sup>

[104] Police records indicate that by 1897 Aboriginal people were employed by settlers in the area,<sup>50</sup> and that from the early 1900s the parents and grandparents of current members of the claim group were living and working at stations in the claim area, including at (Old) Elvire, Ord River, Turner and Flora Valley.<sup>51</sup>

[105] The factual basis material indicates that the first ethnographic recordings made by Mathews and Elkin in the vicinity of the claim area in the early 1900s record the Jaru language group and the sub-section kinship system whereby a father “finds” his child by dreaming of it near the spirit home of one of the totems’.<sup>52</sup> More extensive records specific to the claim area and the Jaru People were then made by Kaberry at Flora Valley in 1936, including the genealogies referred to below and records relating to the traditional trade networks and connections between the groups in the area.<sup>53</sup> Based on these records, the Barritt report concludes that the older informants of Elkin and Kaberry ‘would have been born prior to or soon after effective sovereignty’ and that ‘their accounts of laws and customs reflect a highly reliable portrait of their society at-sovereignty’.<sup>54</sup>

[106] The material also describes more recent ethnographic and anthropological records relating to the Jaru People, including the genealogies and other ethnographic material recorded by Tindale and Birdsell at Flora Valley Station in 1953.<sup>55</sup> Tindale described Jaru Country as ‘extending along the Northern Territory border from Nicholson Station homestead to “the

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<sup>47</sup> Ibid, page 5, [19].

<sup>48</sup> Affidavit of [claim group member 3] dated 18 October 2011 [9].

<sup>49</sup> Ibid, page 6 [24].

<sup>50</sup> Barritt Report, page 5 [20].

<sup>51</sup> Ibid, page 5 [21].

<sup>52</sup> Ibid, page 7 [26]–[27].

<sup>53</sup> Ibid, page 7 [28].

<sup>54</sup> Ibid, page 8 [31].

<sup>55</sup> Ibid, page 8 [32].

headwaters of Ord River above the Dixon Range, keeping east of Alice Downs to Halls Creek and the Margaret River gorge”<sup>56</sup>.

[107] As noted above, the description of the claim group at Schedule A lists a large number of apical ancestors (53). I note that these apical ancestors are identical to those recognised in the *Jaru* and *Jaru 2* determinations. The factual basis material contains the following information in relation to some of these apical ancestors:

- **Dinah** is noted on a genealogy by Tindale as an unnamed “Djaru” woman of “Flora Station”<sup>57</sup>.
- **Dungarri** is noted on two of Kaberry’s genealogies taken at Flora Valley Station in 1936, with Dungarri’s country noted as being partly within the claim area (‘Elvire Junction Mindi Mindi’).<sup>58</sup> Descendants of Dungarri state that he lived and was buried on the claim area.<sup>59</sup>
- Current members of the claim group who are descendants of the **unnamed father of Guronbu Bamarlngana, Pamarra and Wajika** are connected to the area of the former Turner Station, the former community Kartang Rija at Eight Mile Yard and key waterholes along the Turner and Nicholson Rivers through their father, the grandson of this apical ancestor.<sup>60</sup>
- **Lineman’s** grandson is recorded at the Flora Valley Station in 1967,<sup>61</sup> and was described as belonging to ‘Saw pit gorge (Brockman country), Old Halls Creek, Palm Spring, Old Flora Valley to Rockhole at Six Mile Creek on Koongie PL’.<sup>62</sup>
- The descendants of **Nidi** recall camping in the claim area with Nidi’s daughter, and that Nidi’s daughter used resources, conducted ritual activities and granting permission in relation to the claim area.<sup>63</sup>
- **Ninjanung’s** granddaughter was recognised as having rights in the Palm Springs area.<sup>64</sup> An anthropologist described Ninjanung in 1999 as belonging to the ‘[e]astern portion of the claim area along the Elvire and Black Elvire Rivers, Palm springs, across to Old Flora Valley, south of Ngalawilli and north beyond Old Halls Creek. Includes all of Brockman Country’.<sup>65</sup>
- **Ngarntingeni/Nyandinyeri** was described as belonging to ‘Saw pit gorge (Brockman country), Old Halls Creek, Palm Spring, Old Flora Valley to Rockhole at Six Mile Creek on Koongie PL’.<sup>66</sup>

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid, page 8 [32].

<sup>58</sup> Ibid, page 7 [28].

<sup>59</sup> Ibid, page 15 [60].

<sup>60</sup> Ibid, page 18 [72].

<sup>61</sup> Ibid, page 5 [22].

<sup>62</sup> Ibid, page 18 [68].

<sup>63</sup> Ibid, page 17 [67].

<sup>64</sup> Ibid, page 16–17 [67].

<sup>65</sup> Ibid, page 17 [68].

<sup>66</sup> Ibid, page 18 [68].

- The grandson of **Ngurlkaji** recalls being taught by Ngurlkaji about the country relating and a major Dreaming within in the claim area going from ‘Pirriya (west of the Ord) to Doughboy Knob, Linnekar Yard, Brook Creek, Marnjarna Jartpurru, Pintayi’.<sup>67</sup>
- **Nyutindeni** was described as belonging to ‘Saw pit gorge (Brockman country), Old Halls Creek, Palm Spring, Old Flora Valley to Rockhole at Six Mile Creek on Koongie PL’.<sup>68</sup>
- The **unnamed father of Gimanoonja and Piebald** was described by an anthropologist in 1999 as belonging to country ‘from south of Bulka. Gurrmala. Pinnacle Station, and across Koongie PL, Elvire PL to Old Flora Valley’.<sup>69</sup>

[108] The factual basis material indicates that members of the claim group, their families and their ancestors are recorded as living on stations in the claim area, such as at Flora Valley in 1967.<sup>70</sup> In the 1970s many were removed to ‘overcrowded reserves’, and many Jaru People made submissions to the 1983 Aboriginal Land ‘Seaman’ Inquiry expressing ‘their desire to return to live on their country, including to areas inside the Jaru #3 claim area, showing their strong connections to their lands had not been broken by their forced displacement’.<sup>71</sup>

[109] The Barritt Report also summarises the more recent linguistic, ethnographic and anthropological studies of the Jaru People and the claim area and notes that such research resulted in the original Jaru claim and the recognition of native title for the Jaru People.<sup>72</sup>

[110] The factual basis material also includes affidavits deposed by current members of the claim group. This material demonstrates the association that current members of the claim group and their predecessors have with the area. [Claim group member 1] describes growing up at Flora Valley and that her grandmother would take her to her birth country at Moondabarri (18 Mile)<sup>73</sup> where:

[t]here were lots and lots of people there, many hundreds, this is where the river flows across 18 mile. My grandmother used to tell me stories about Moondabarri, they used to have corroborees here, groups would come from all around, from Turner, from Gordon Downs and all Jaru people would come here and celebrate and dance.<sup>74</sup>

[111] Another current member of the claim group describes how her father came from Mindi Mindi (in an area partly on the claim area),<sup>75</sup> and that when she was young her parents took her camping in this area, eating bush tucker and trapping fish using traditional methods.<sup>76</sup> As a further example, claim group members 4 and 5 describe living at *Kartang Rija* (near Turner

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<sup>67</sup> Ibid, page 20 [78].

<sup>68</sup> Ibid, page 18 [68].

<sup>69</sup> Ibid, page 17 [68].

<sup>70</sup> Ibid, page 5 [22].

<sup>71</sup> Ibid, page 6 [23].

<sup>72</sup> Ibid, page 8–9 [33]–[35].

<sup>73</sup> Affidavit of [claim group member 1] dated 16 October 2011 [2].

<sup>74</sup> Affidavit of [claim group member 1] dated 16 October 2011 [3].

<sup>75</sup> Barritt Report, page 7, [28].

<sup>76</sup> Affidavit of [claim group member 3] dated 18 October 2011 [3]–[4].

River on the Duncan Highway and within the claim area) all their lives and that '[w]e do not have to ask permission to go to [*Kartang Rija*] because that is our Country, it belongs to us'.<sup>77</sup>

[112] The factual basis material contains further examples of the contemporary association with the claim area, for example [claim group member 2] describes camping at the creeks in the area and hunting, fishing and taking the resources of the area including *jagee* (kangaroo), *jarambai* (goanna), *junda* (onion), *burrara* (bush potato).<sup>78</sup> [Claim group member 6] also describes hunting and fishing on the claim area:

I have been going to Old Flora Valley Station all my life, and I still go there today. I go hunting there for things like turkey, goanna, bush-cat, blue-tongue, sand frog, black head snake and kangaroo. I also go fishing in Elvire River at Old Flora Valley Station for brim, cat fish, turtle, herring, fresh water crab, fresh water mussel and fresh water prawn.

I have been going to Fox River Reserve all my life too, and I still go there today. I go hunting there too. I also collect bush banana, bush tomato, bush coconut, bush peanuts, bush onion, bush potato, bush cucumber and sugarbag. I collect bubble gum tree and sugar leaves as well as soap from wattle trees and bush tea.<sup>79</sup>

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

[113] I understand that for the purpose of this condition the Registrar's task is to 'address the relationship which all members claim to have in common in connection with the relevant land'.<sup>80</sup> This task is to be undertaken by assessing whether 'the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)',<sup>81</sup> and that there has been 'an association between the predecessors of the whole group and the area over the period since sovereignty'.<sup>82</sup> Consistently with these principles, I consider that the factual basis material must provide information relating to the identity of the native title claim group, their predecessors and the nature of the association with the area covered by the application.

[114] I have also had regard to the context of this claim, being over an area initially included within the original Jaru claim but not included in the *Jaru* determination at the time, and now claimed following the amendments to the Act in 2021.<sup>83</sup> As such, native title has been recognised in the adjoining *Jaru* determination, for the benefit of the same native title claim group. Noting this, I am satisfied that the factual basis material contains sufficient information in relation to the apical ancestors notwithstanding that it does not include information on each of those listed apical ancestors.

[115] In my view, the factual basis material clearly identifies the native title claim group and their predecessors and that the apical ancestors were recorded in the historical record as being Jaru People with an association over Jaru Country, including the area covered by this Jaru #3 claim.

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<sup>77</sup> Affidavit of [claim group members 4 and 5] dated 25 July 2018 [6]–[9].

<sup>78</sup> Affidavit of [claim group member 2] dated 17 October 2011 [3]–[6].

<sup>79</sup> Affidavit of [claim group member 6] dated 29 June 2018 [12]–[13].

<sup>80</sup> *Gudjala 2007* [40].

<sup>81</sup> *Ibid* [39].

<sup>82</sup> *Ibid* [52].

<sup>83</sup> Barritt Report, page 2 [2]–[3].

In my view the factual basis material set out above clearly demonstrates the association of current members of the claim group with the area, including for camping, hunting, fishing and collecting bush tucker and medicine.

[116] For the purpose of s 190B(5)(a), I must be satisfied that the factual basis material is sufficient to support the assertion of an association between the claim group and the whole of the area covered by the claim. From the above information, I consider that the factual basis material is sufficient, and provides sufficient geographical particularity, to support the assertion of an association between the whole group and the whole area since sovereignty.<sup>84</sup> As such, I am satisfied that the requirements of s 190B(5)(a) are met.

*Traditional laws and customs giving rise to the claimed native title rights and interests:  
s 190B(5)(b)*

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

[117] 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, and the traditional customs observed’ by the native title holders. Noting the similar wording between this provision and s 190B(5)(b), I consider it to be appropriate to have regard to the case law regarding the definition of ‘native title rights and interests’ in s 223(1) for the purpose of this condition.

[118] In *Yorta Yorta*, the High Court observed 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 sovereignty,<sup>85</sup> where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;<sup>86</sup>
- the normative system under which those traditional rights and interests are possessed is one which ‘has had a continuous existence and vitality since sovereignty’;<sup>87</sup>
- 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;<sup>88</sup>
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.<sup>89</sup>

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

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<sup>84</sup> *Gudjala 2007* [52].

<sup>85</sup> *Yorta Yorta* [46].

<sup>86</sup> *Ibid* [49].

<sup>87</sup> *Ibid* [47].

<sup>88</sup> *Ibid* [46], [79].

<sup>89</sup> *Ibid* [87].

- 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;<sup>90</sup>
- 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;<sup>91</sup> 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.<sup>92</sup>

[120] 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’.<sup>93</sup>

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

[121] The Barritt Report sets out that there are fundamental concepts to the traditional laws acknowledged and customs observed by the Jaru People in the claim area as part of a wider regional society that included Jaru-speaking peoples and mixed language areas in the claim area comprising ‘Malngin-identifying people in the north-eastern part of the claim area and Gija-identifying people in the south-west’.<sup>94</sup> The report continues:

The fundamental basis of landed rights and interests in the claim area is through filiation (parent-child relationships) to local estate areas referred to in Jaru as *ngurra*. The claimants’ rights and interests in tracts of country within the Jaru #3 claim area at localised levels is derived from the body of laws and customs that is held and reproduced at the wider regional group level of the claimants’ society that continues to be observed and has been accepted in the Jaru Determination. Fundamental to the origin and ongoing reproduction of these traditional laws and customs in the wider region that includes Jaru, Gija and Malngin people are cosmological beliefs that ancestral theriomorphic beings shaped the world and all within it, including human beings and their social institutions. These origins are believed to have occurred [sic] in the Dreaming time, known as *Ngarranggarni* [in Gija], *Waljiri* [in Malngin] or *Tjukurrpa* [in Jaru].<sup>95</sup>

[122] The factual basis material sets out the relationship of these ancestral beings with Country, for example a Jaru woman described Dreamtime narrative relating to the Blue Tongue Lizard (*Lunggurra*), ‘who swam across the Ord River, demarcating it as the boundary between Gija on the western side and Jaru country to the east before stopping at Gayngarri, a site in the northernmost part of the claim area’.<sup>96</sup> The material also sets out that current members of the

<sup>90</sup> *Gudjala 2009* [37], [52].

<sup>91</sup> *Ibid* [40].

<sup>92</sup> *Ibid* [29], [54].

<sup>93</sup> *Warrie* [107]; see also *Alyawarr* [78].

<sup>94</sup> Barritt Report, page 9 [37].

<sup>95</sup> *Ibid*, page 9 [38].

<sup>96</sup> *Ibid*, page 11 [45].

claim group continue to maintain customs such as speaking to ancestral spirits to demonstrate rights and responsibilities for particular country.<sup>97</sup>

[123] The Barritt Report sets out that interrelationships of kinship and marriage are the focal element of the regional society in the area, and that a ‘one or two-step filiation (including adoption) through a parent or grandparent’s association with a local estate (*ngurra*) is the primary mode of gaining rights and interests in Jaru country’.<sup>98</sup> As such, associations with particular tracts of country are created through bilateral filiation, with the origins of this principal arising from the traditional laws and customs of the society at sovereignty.<sup>99</sup> The Barritt report then describes the relevant estate groups, being Brockman – Palm Springs, Wanggu/Balngana (Flora Valley), Gardayn/Gardang/Gardayng Riyarr, Marrala – Jambij Jaru – Birriryorl – Nicholson, Linnekar Creek – Cattle Creek, Jupanyin / Pirlirr / Yalka and Jipilyuwun.<sup>100</sup>

[124] The affidavits of current members of the claim group demonstrate that the Jaru People maintain a deep respect for traditional laws and customs and the ancestral spirits. For example, [claim group member 1] describes that when she goes ‘to my country I call out to the spirits in Jaru language to let them know that we are home. I yell out to them, we are coming home to visit, we yell to let them know, if we don’t we will get punished. We [make] all our children do this’.<sup>101</sup>

[125] Current members of the claim group describe how they maintain the traditional laws and customs relating to Dreamings, for example [claim group member 3] describes that she is ‘Eagle Dreaming (Warri Warri), this comes from my mum, I can dance for that place, it is a special dance for that place and that Eagle. The Eagle came this way he came right up to Turner and made a nest at Turner, a round one, you can see it’.<sup>102</sup>

[126] The importance of maintaining the kinship system is also demonstrated in the factual basis material, for example [claim group member 3] describes that ‘[y]ou have to marry the right way, my skin is Nangari, my husbands was Jambin. I knew he was the right skin because his mother was from the right skin group, Nyajili. I would not have married if he was not the right skin. They could kill you if I married the wrong side that is no good’.<sup>103</sup>

[127] I also note that the information set out above with respect to my consideration of s 190B(5)(a) is also relevant to the consideration of this assertion.

### **Is the factual basis sufficient for the assertion of s 190B(5)(b)?**

[128] In my view the factual basis material is sufficient to demonstrate the existence of a pre-sovereignty society in the area. In my view this material shows the existence of a strong society that has maintained the traditional laws and customs from pre-sovereignty. I

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<sup>97</sup> Ibid, page 11 [47].

<sup>98</sup> Ibid, page 16 [63].

<sup>99</sup> Ibid.

<sup>100</sup> Ibid, page 16–21 [67]–[88].

<sup>101</sup> Affidavit of [claim group member 1] dated 16 October 2011 [15].

<sup>102</sup> Affidavit of [claim group member 3] dated 18 October 2011 [10].

<sup>103</sup> Affidavit of [claim group member 3] dated 18 October 2011 [14].

understand that this material asserts that the Jaru People are part of a regional society with strong connections to Country through cosmological beliefs in ancestral beings that are part of Country, and that the rights to particular tracts of land arise from these traditional laws and customs through filiation to local estate areas (*ngurra*). In my view the factual basis material clearly sets out the interrelationships by way of a kinship system involving recognised subsections that give rise to the rights to land that have their origin in the traditional laws and customs of the at-sovereignty society.

[129] The factual basis material sets out that the traditional laws and customs have been passed down from the predecessors to current members of the claim group. This is demonstrated in the statements from claim group members about the importance of passing down cultural knowledge to their children and grandchildren, as they have been taught from their old people.<sup>104</sup>

[130] Having regard to the material set out above, I consider that the factual basis material is sufficient to show that the laws acknowledged and the customs observed by the native title claim group are traditional in the sense required by the case law set out above, including *Yorta Yorta*.

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

#### *Continuity of native title rights and interests: s 190B(5)(c)*

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

[132] 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 the traditional laws and customs. These traditional laws and customs are those identified for the purpose of s 190B(5)(b).<sup>105</sup> As such, in my view, s 190B(5)(c) requires the factual basis material to demonstrate that the claim group has continued to hold native title through the continued observance of these traditional laws and customs.

[133] I also 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'.<sup>106</sup>

#### **Is the factual basis material sufficient for the assertion at s 190B(5)(c)?**

[134] In my view there is sufficient information in the factual basis material relating to the transmission and continuity of the native title rights and interests held by the native title claim group in accordance with the relevant traditional laws and customs.

[135] The Barritt report concludes that the 'apical ancestors, their descendants and the native title claim group today, have at all times comprised a group of people united in their observance

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<sup>104</sup> Affidavit of [claim group member 1] dated 16 October 2011 [11]; Affidavit of [claim group members 4 and 5] dated 25 July 2018 [14]–[15].

<sup>105</sup> *Martin* [29].

<sup>106</sup> *Gudjala 2009* [33].

and acknowledgement of the system of law and custom’ and the ‘[k]nowledge of the laws and customs observed by the apical ancestors are known and understood primarily as a result of their transmission orally to the current generation’.<sup>107</sup>

[136] This is borne out in the affidavits of the current members of the claim group, for example [claim group members 4 and 5] depose that:

We bring our younger kids and grandkids to [*Kartang Rijia*] with us so they don’t lose sight of the importance of being on Country. We pass on to them what we were told by our old people. We tell the kids stories when we take them to [*Kartang Rijia*]. It’s the traditional knowledge for our country ... We have a responsibility to look after that country, and also make the kids aware of the rules that are a part of it.<sup>108</sup>

[137] Also, [claim group member 1] describes being taught by her grandfather about hunting for kangaroos by placing traps at the places where they would come down to the waterholes, traditional methods for cooking kangaroo, about how the ‘old people taught us’ to make fish traps using spinifex and that she now will ‘teach our children and our grandchildren about bush tucker and how to get it.’<sup>109</sup>

[138] As a further example, [claim group member 2] describes the use of bush medicine:

if a baby is sick we get the Konker berry, *bundanna*, dig a hole make a fire in the hole, put in *bundanna* and the white eucalypt leaf and we smoke the baby, we do this if they are sick and this will also help the baby to stay strong, I did this for all my children and all my grandchildren.<sup>110</sup>

[139] In my view, this material, as well as the factual basis material set out in my above consideration of s 190B(5)(a) and (b), strongly demonstrates that the Jaru People have continued to hold native title in accordance with the traditional laws and customs of the society that has existed in the area since before the assertion of sovereignty.

[140] In my view the factual basis material demonstrates the continuity of the traditional laws and customs of the Jaru People, in accordance with those laws and customs, and as such I am satisfied that the factual basis material provided is sufficient to support the assertion at s 190B(5)(c).

### *Conclusion on s 190B(5)*

[141] For the above reasons, I am satisfied that the condition at s 190B(5) is met.

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

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

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<sup>107</sup> Barritt Report, page 10 [40].

<sup>108</sup> Affidavit of [claim group members 4 and 5] dated 25 July 2018 [14]–[15].

<sup>109</sup> Affidavit of [claim group member 1] dated 16 October 2011 [6]–[8], [10], [11].

<sup>110</sup> Affidavit of [claim group member 2] dated 17 October 2011 [9].

### What is required to meet this condition?

[143] Section 190B(6) requires that the Registrar must consider that at least some of the claimed native title rights and interests can be established on the face of the application and supporting material. A claim may be accepted on a prima facie basis if it is arguable on its face and notwithstanding any disputed issues of fact or law that may be involved.<sup>111</sup> The Registrar's task involves some weighing of the factual basis and imposes a 'more onerous test to be applied to the individual rights and interests claimed' than at s 190B(5).<sup>112</sup>

[144] I understand that I may consider material outside of the application itself in my assessment of s 190B(6).<sup>113</sup>

[145] I note the comments of Kirby J in *Ward HC*, 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'.<sup>114</sup> The term "in relation to" is here to be given a 'wide import'.<sup>115</sup>

[146] I also understand that s 190B(6) is to be assessed having regard to the definition of 'native title rights and interests' in s 223(1).<sup>116</sup> 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.

[147] 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.<sup>117</sup>

[148] My below reasons in relation to this condition should also be read in conjunction with, and in addition to, my above reasons and the relevant factual basis material outlined for the purpose of s 190B(5).

### *Native title rights and interests prima facie established*

[149] At the outset, I note that having considered the claimed native title rights and interests at Schedule E of the application, in my view they are "in relation to" lands or waters.

[150] As noted above in my consideration of s 190B(4), the claimed native title rights as interests set out at Schedule E is 'the right of possession, occupation, use and enjoyment of land and waters as against the whole world'.

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<sup>111</sup> *Waanyi* 638–641, cited with approval in *Doepel* [135].

<sup>112</sup> *Doepel* [127], [132].

<sup>113</sup> *Ibid* [16].

<sup>114</sup> *Ward HC* [577].

<sup>115</sup> *Alyawarr* [93].

<sup>116</sup> *Gudjala 2007* [85]–[87].

<sup>117</sup> *Yorta Yorta* [86]; *Gudjala 2007* [86].

[151] As such I understand that the Jaru People claim exclusive rights in relation to the claim area. There is considerable judicial guidance with respect to claims for exclusive native title rights and interests. 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’.<sup>118</sup>

[152] In *Griffiths*, the Full Court held:

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.<sup>119</sup>

[153] In *Sampi*, French J noted 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.<sup>120</sup>

[154] The Barritt Report describes that the Jaru People’s rights and interests to the lands and waters of the claim area arising though ‘their relationships to ancestral spirits in the country, and to mediate access to others entering the country through a process of granting permission by introducing strangers to these spirits’.<sup>121</sup> The Barritt report further states that:

Outsiders must adhere to the system of permissions for controlling access to and authorising others’ rights to country in the claim area to avoid dangerous spiritual consequences. Senior members of the claim group with connections to particular sites and estates are those with authority to grant rights to enter into and conduct activities in the claim area. This right to grant permission or to exclude others from using particular tracts of country was historically observed in the region by Kaberry demonstrating their continuity.<sup>122</sup>

[155] There are many examples in the factual basis material of the importance of being able to control access to country and spiritual sanctions. One member of the claim group stated that:

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<sup>118</sup> *Ward HC* [88].

<sup>119</sup> *Griffiths* [127].

<sup>120</sup> *Sampi* [1072].

<sup>121</sup> Barritt Report, page 10 [42].

<sup>122</sup> *Ibid*, page 12 [48].

White people and strangers must ask for permission before coming onto my country because we have got a lot of very special places on my country, from our old-time people and from the early days. That's why we are frightened if strangers arrive in our country uninvited. They might get sick or paralysed if they touch any sacred site.<sup>123</sup>

[156] The Barritt Report contains extensive examples of further statements from claim group members in relation to the rights to grant permission and exclude others from country.<sup>124</sup> [Claim group members 4 and 5] also describe the importance of maintaining the protocol of other people asking permission to go onto country.<sup>125</sup>

[157] The factual basis material also describes the respect that the Jaru People have for maintaining rules that contain spiritual sanctions. [Claim group member 1] describes how she cannot talk about a particular ceremony, because under Jaru law if she does, 'you might go numb in your mouth or the spirit would get you and make you sick'.<sup>126</sup> Similarly, [claim group member 2] describes how there is a ceremony that only certain people can attend and that '[i]f you go you would get sick or even die'.<sup>127</sup>

[158] In my view, this material clearly establishes on a prima facie basis that the Jaru People maintain rights and interests to control access through granting permission and having regard to the importance of spiritual sanctions that may be imposed under the traditional laws and customs of the Jaru People. The respect of the Jaru People for the ancestral spirits and these rights to control access and exclude persons from the lands and waters is evident, and I am satisfied that the right to exclusive possession and occupation is prima facie established.

[159] I also note that the factual basis material also demonstrates other rights and interests exercised by the Jaru People in accordance with their traditional laws and customs, in relation to conducting ceremonies,<sup>128</sup> being buried on Country and protection of burial sites,<sup>129</sup> hunting and fishing on the claim area<sup>130</sup> and collecting bush tucker and bush medicine.<sup>131</sup> As such, in my view the factual basis material also sets out that the Jaru People have maintained their rights to use and enjoy the land and waters of the claim area as claimed.

[160] I consider that the requirement at s 190B(6) is met.

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

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

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<sup>123</sup> Ibid, page 13 [52].

<sup>124</sup> Ibid, pages 12–15 [48]–[58].

<sup>125</sup> Affidavit of [claim group member 4 and 5] dated 25 July 2018 [23].

<sup>126</sup> Affidavit of [claim group member 1] dated 16 October 2011 [3].

<sup>127</sup> Affidavit of [claim group member 2] dated 17 October 2011 [11].

<sup>128</sup> Barritt Report, page 15 [59].

<sup>129</sup> Ibid, page 15 [60].

<sup>130</sup> Affidavit of [claim group member 6] dated 29 June 2018 [12].

<sup>131</sup> Affidavit of [claim group member 3] dated 18 October 2011 [3]–[4]; Affidavit of [claim group member 2] dated 17 October 2011 [9].

### **What is needed to meet this condition?**

[162] 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 currently to have a traditional physical connection with any part of the land or waters but for certain things done.

[163] Justice Dowsett observed in *Gudjala 2009* that the ‘traditional physical connection’ for the purpose of this condition ‘must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.<sup>132</sup> In interpreting connection in the traditional sense as required by s 223, the joint judgment in *Yorta Yorta* stated 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’.<sup>133</sup>

[164] I also note the observations of Mansfield J in *Doepel* that the task imposed by s 190B(7) requires the Registrar to be satisfied of this condition based on a particular fact or facts.<sup>134</sup> I consider that there must be factual material to demonstrate that at least one member of the native title claim group has or had the necessary traditional physical association with the area covered by the application.

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

[165] I note my above reasons with respect to s 190B(5) that the factual basis material supports the assertion that the native title claim group acknowledges and observes the traditional laws and customs of the pre-sovereignty society.

[166] In my view, the factual basis material demonstrates that members of the native title claim group have a traditional physical connection with the claim area, through living, camping, hunting, fishing and gathering resources on the claim area. There are many examples of current claim group members continuing to use and access the area, camping on Country, hunting, fishing and collecting bush tucker and bush medicine, including a current member of the claim group deposing that she has been going onto the Country all her life, and continues to do so.<sup>135</sup>

[167] Having regard to the information in the application and additional material, I am satisfied that at least one member of the native title claim group has a traditional physical connection with the land or waters in the area covered by the application within the meaning of s 190B(7). As such, I consider that this condition is met.

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<sup>132</sup> *Gudjala 2009* [84].

<sup>133</sup> *Yorta Yorta* [86].

<sup>134</sup> *Doepel* [18].

<sup>135</sup> Affidavit of [claim group member 6] 29 June 2018 [12]–[13].

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

[168] In my view the application does not contravene the provisions of ss 61A(1)–(3) for the reasons set out below, and therefore the application satisfies the condition at s 190B(8).

### **What is required to meet the condition in s 190B(8)?**

[169] Section 190B(8) requires 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 due to the operation of s 61A. Section 61A provides that an application must not be made over an area where there is an approved determination of native title, or where previous exclusive or non-exclusive possession acts have been made.

### **Does the application meet the requirements of s 190B(8)?**

#### *Section 61A(1)*

[170] 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.

[171] The geospatial assessment shows that there is no approved determination of native title over the area covered by the application. I have also conducted my own searches of the Tribunal's mapping database to confirm this. I also note that Schedule B indicates, for the avoidance of doubt, that the claim does not include any areas that fall within the boundaries of neighbouring determinations.

[172] As such, I am satisfied that the application does not contravene s 61A(1).

#### *Section 61A(2)*

[173] 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 sub-s (4) apply.

[174] Schedule L of the application states that:

If the vesting of Reserve 28538 is a previous exclusive possession act, which the applicant disputes, the native title claim group claims the benefit of section 47C in relation to the entire claim area.

[175] Having regard to this, I am satisfied that the application does not contravene s 61A(2).

#### *Section 61A(3)*

[176] 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 in sub-s (4) apply.

[177] I have had regard to the material contained in the application and the nature of the claimed native title rights and interests, including at Schedule L. In my view the application does not contravene s 61A(3).

### **Conclusion on the condition at s 190B(8)**

[178] I am satisfied that the condition in s 190B(8) is met because the application has not been made contrary to s 61A.

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

[179] Section 190B(9) provides three sub-conditions that restrict the extent of the native title rights and interests that may be claimed. As set out below I consider that the application and accompanying documents do not contravene any of the provisions of ss 190B(9)(a)–(c) and therefore the application meets the condition of s 190B(9).

#### **Section 190B(9)(a)**

[180] The sub-condition at s 190B(9)(a) requires that an application does not include a claim of ownership of minerals, petroleum or gas wholly owned by the Crown.

[181] Schedule Q of the application confirms that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown. As such this sub-condition is met.

#### **Section 190B(9)(b)**

[182] The sub-condition at s 190B(9)(a) requires that an application does not claim exclusive possession over all or part of waters in an offshore place.

[183] Schedule P of the application confirms that the native title claim group does not include a claim for exclusive possession over all or part of waters in an offshore place. As such I am satisfied that this sub-condition is met.

#### **Section 190B(9)(c)**

[184] The sub-condition at s 190B(9)(c) requires that the native title rights claimed must not have otherwise been extinguished.

[185] Having regard to the material contained in the application, including Schedule L, in my view the application does not contravene this requirement. I am satisfied that this sub-condition is met.

### **Conclusion on the condition at s 190B(9)**

[186] In my view the application and accompanying documents do not disclose that the sub-conditions of s 190B(9) have been contravened. I am therefore satisfied that this requirement is met.

*End of reasons*

## Attachment A

### Information to be included on the Register of Native Title Claims

Application name	Ivan Turner & Ors on behalf of the Jaru #3 Native Title Claim Group and State of Western Australia
NNTT No.	WC2023/003
Federal Court of Australia No.	WAD330/2023

#### 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:

21 December 2023

#### Date application entered on Register:

14 March 2024

#### Applicant:

Ivan Turner, Angeline Flora Bedford, Rosemary Rosewood, John Hamilton, Susan Swan and Brenda Garstone

#### Applicant's address for service:

Justine Toohey  
Kimberley Land Council  
PO Box 2145  
Broome WA 6725

Phone: 08 9194 0100

Email: justine.toohey@klc.org.au

#### Conditions on Applicant's authority

The members of the Applicant must be eligible, and willing and able to act, and the authority of the members of the Applicant is subject to the following conditions.

- A. The Applicant is to act at all times in good faith in the interests of the claim group as a whole;

- B. The Applicant is directed to instruct the Principal Legal Officer of the Kimberley Land Council to file the native title claim in the Federal Court and take all steps reasonably necessary to have exclusive possession native title recognised in the claim area.
- C. Unless expressly authorised by a decision of the title claim group, the Applicant may not:
- discontinue the claim; or
  - change legal representatives.

**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.

14 March 2024