

Registration test decision

Application name	Kulyakartu # 2
Name of applicant	Muuki Taylor, Waka Taylor, Meridoo Walbidi, Daniel Walbidi, Simon Frank and Corina Jadai
NNTT file no.	WC2015/006
Federal Court of Australia file no.	WAD720/2015

I have considered this claim for registration against each of the conditions contained in ss 190B and 190C of the *Native Title Act 1993* (Cth).

For the reasons attached, I do not accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

For the purposes of s 190D(3), my opinion is that the claim does satisfy all of the conditions in s 190B. Nevertheless I cannot accept the claim for registration because the claim does not satisfy all of the conditions in s 190C.

Date of decision: 5 February 2016

Nadja Mack

Delegate of the Native Title Registrar ¹

¹ Pursuant to sections 190, 190A, 190B, 190C, 190D of the Act under an instrument of delegation dated 17 August 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to **not accept** the claim for registration pursuant to s 190A of the Act.

Application overview and background

[2] The application was filed in the Federal Court of Australia (Federal Court) on 4 December 2015. On 8 December 2015, the Registrar of the Federal Court gave a copy of the application to the Registrar pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] I note that the application covers the same claim area, a parcel of Unallocated Crown Land, as the Kulyakartu application (WC2005/007, WAD293/05), is brought by the same applicant on behalf of the same claim group and claims the same rights and interests. It is my understanding that the application is made with the view to meeting the requirements that will allow any extinguishment of native title to be disregarded pursuant to s 47B.

[4] Given that the application was made on 4 December 2015 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. Therefore, in accordance with subsection 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act.

[5] I have reached the view that the claim satisfies all of the conditions in s 190B, however, due to the overlap with the Kulyakartu application, does not satisfy the condition in s 190C(3) and as such not all of the conditions in s 190C. This document sets out my reasons, as the delegate of the Registrar, for my decision not to accept the claim for registration pursuant to s 190A of the Act.

Information considered when making the decision

[6] 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'.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[7] I have had regard to information in the application and its attachments. I have also had regard to the additional information provided by the applicant in this matter on 25 January 2016 and the Kulyakartu application on 8 September 2015.

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[8] There is no information before me of the kind identified in ss 190A(3)(b) and (c).

Section 190A(3): other information to which Registrar considers it appropriate to have regard

[9] I have also had regard to my reasons to register the Kulyakartu application and to information contained in an geospatial assessment and overlap analysis (geospatial report) prepared by the Tribunal's Geospatial Services on 11 December 2015 and a iSpatialView analysis undertaken by myself on 21 January 2016.

[10] I have not considered any information that may have been provided to the National Native Title Tribunal (Tribunal) in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act.

[11] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

[12] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23]–[31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 14 December 2015, the Tribunal wrote to the applicant's legal representative, informing her that the Registrar has appointed a delegate to apply the registration test to this matter and invited the applicant to provide any further information for consideration by 8 January 2015.
- Also on 14 December 2015, the Tribunal wrote to the State of Western Australia (State), advising that should the State wish to make any submissions in relation to the registration of this application, they should be provided by 8 January 2016.
- Based on my preliminary assessment of the application, the applicant provided additional material to the Tribunal on 25 January 2016.
- On 28 January 2016, the Tribunal wrote to the State providing a copy of the additional material and noting that the delegate would take into consideration the additional material

received in relation to the Kulyakartu application and inviting submissions by 3 February 2016.

- The State made no submissions.

Procedural and other conditions: s 190C

Subsection 190C(2)

Information etc. required by ss 61 and 62

The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

[13] The application satisfies the condition of s 190C(2), because it does contain all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

[14] This condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)².

[15] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of s 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s 61(5). The matters in ss 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s 190C(2). I already test these things under s 190C(2) where required by those parts of ss 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

[16] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s 61(1)

[17] The native title claim group is described in Attachment A to Schedule A of the application.

[18] I note that, if the description of the native title claim group was to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the requirement of s 61(1) would not be met and the claim could not be registered—*Doepel* at [36].

² *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35] to [39]

[19] On the face of the application, there is nothing to indicate that not all the persons in the native title claim group are included, or that it is in fact a sub-group of the native title claim group that brought this claim.

[20] The application **contains** all details and other information required by s 61(1).

Name and address for service: s 61(3)

[21] Part B provides the name and address for service of the persons who are the applicant.

[22] The application **contains** all details and other information required by s 61(3).

Native title claim group named/described: s 61(4)

[23] This section requires the applicant either to name all persons in the claim group or to describe them in a way so that it can be ascertained whether a person belongs to the group or not. This application does not name the persons in the claim group but it does contain a description of the persons (in Attachment A).

[24] The application **contains** all details and other information required by s 61(4).

Affidavits in prescribed form: s 62(1)(a)

[25] The application is accompanied by the affidavits required by s 62(1)(a) from each person jointly comprising the applicant, namely Muuki Taylor, Waka Taylor³, Meridoo Walbidi, Daniel Walbidi, Simon Frank and Corina Jadaí. I am satisfied that each of the affidavits sufficiently addresses the matters required by s 62(1)(a)(i)-(v).

[26] The application is accompanied by the affidavit required by s 62(1)(a).

Details required by s 62(1)(b)

[27] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

Information about the boundaries of the area: s 62(2)(a)

[28] Schedule B refers to Attachment B which sets out a description of the external boundary of the application area. Schedule B states that the applicant is not aware of any areas within the external boundaries that are not covered by the application. I understand this to mean that the application does not include areas within the external boundary that are not covered by the application.

³ I note that the application refers to 'Waka Taylor' while the s 62(1) affidavit refers to 'Wotkka Taylor'. When applying the registration test to the Kulyakartu application (WC2005/007, WAD293/05) which relied on the same affidavits, I sought clarification from the applicant's representative who advised that 'Waka Taylor alternates between various spellings of his name, but Wotkka, Waka, and Wokka are all Waka Taylor'.

Map of external boundaries of the area: s 62(2)(b)

[29] Schedule C refers to Attachment C which contains a map showing the application area and its external boundaries. Whilst the map titled 'Kulyakartu claim map' also, in the centre of the area under claim notes the Tribunal and Federal Court file numbers of the Kulyakartu application rather than this application, there is no doubt that the area depicted is (also) the application area for this application.

Searches: s 62(2)(c)

[30] Schedule D states that one local government authority falls within the external boundary of the application and refers to Schedules HA and I for additional information about non-native title rights and interests in the application area.

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

[31] Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

[32] I assess the adequacy of the description in the corresponding merit condition at s 190B(4) below.

Description of factual basis: s 62(2)(e)

[33] Kiefel J in *Queensland v Hutchinson* (2001) 108 FCR 575; [2001] FCA 416 notes that it is not enough to merely recite the general or the three particular assertions in s 62(2)(e); what is required to meet the requirement of s 62(2)(e) is a 'general description' of the factual basis for the three particular assertions — at [25].

[34] The Full Federal Court (French, Moore, Lindgren JJ) commented in obiter on the requirements of s 62(2)(e) in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*). Their Honours said:

The fact that the detail specified by s 62(2)(e) is described as a 'general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description to be true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality.

[35] Schedule F refers to Attachment F for a description of the rights and interests claimed and the factual basis for the assertions set out in s 62(2)(e). The description does more than recite the particular assertions and in my view, meets the requirements of a general description of the factual basis for the assertions identified in this section.

[36] I assess the adequacy of the description in the corresponding merit condition at s 190B(5) below.

Activities: s 62(2)(f)

[37] Schedule G sets out details of activities currently carried out by the native title claim group in relation to the area claimed.

Other applications: s 62(2)(g)

[38] Schedule H sets out that no other relevant applications have been made that seek a determination of native or compensation in relation to native title.

Section 24MD(6B)(c) notices: s 62(2)(ga)

[39] Schedule HA states that the applicant, as at 16 November 2015, is aware that no notifications under s 24MD(6B)(c) have been given that relate to the application area.

Section 29 notices: s 62(2)(h)

[40] Schedule I refers to Attachment I which contains a list of s 29 notifications that have been issued in relation to the whole or part of the application area as at 16 November 2015.

Conclusion

[41] The application **contains** the details specified in ss 62(2)(a) to (h), and therefore **contains** all details and other information required by s 62(1)(b).

Subsection 190C(3)

No common claimants in previous overlapping applications

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[42] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if all three of the conditions found in s 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9].

[43] Schedule H (Details of any other applications) identifies the Kulyakartu native title determination application (WAD293 of 2005) as having been made in relation to the application area. Schedule O notes that the claim group and applicant for this and the Kulyakartu application are identical.

[44] The Tribunal's geospatial report confirms that the area covered by the application is also wholly covered by the Kulyakartu application which was accepted for registration on 16 November 2015. It was therefore on the Register at the time this application was made on 4 December 2015. The Kulyakartu application is a previous application in the sense discussed in s 190C(3)(a)–(c). All claim group members of this application are also claim group members of the previous application.

[45] For the above reasons the application **does not satisfy** the condition of s 190C(3).

Subsection 190C(4)

Authorisation/certification

Under s 190C(4) the Registrar/delegate must be satisfied that either:

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word *authorise* is defined in section 251B.

[46] I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met, in order for the condition of s 190C(4) to be satisfied.

[47] My consideration is governed by s 190C(4)(b) as the application is not certified.

[48] Section 190C(4)(b) requires that the Registrar must be satisfied that:

- the applicant is a member of the native title claim group; and
- is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

[49] Section 190C(5) adds that the Registrar can only be satisfied that the condition in s. 190C(4) has been met in circumstances where an application has not been certified, if the application:

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

Are the requirements of s. 190C(5) met?

[50] The application contains the relevant statements and briefly sets out the relevant grounds in Schedule R and in the applicant's s. 62(1)(a) affidavits as well as the affidavit of [Name deleted] at Central Desert Native Title Services Limited, the legal representative of the applicant. I am therefore satisfied that the requirements of s. 190C(5) have been met.

Are the requirements of s. 190C(4)(b) met?

[51] Firstly, the applicant is required to be a member of the native title claim group. The persons jointly comprising the applicant state in their s 62(1)(a) affidavits that they are a member of the native title claim group. I am therefore satisfied that the persons comprising the applicant are members of the native title claim group.

[52] Secondly, the applicant is required to be authorised to make and deal with the application. The term 'authorise' as used in s. 190C(4)(b) is defined in s. 251B. That is, an applicant's authority from the rest of the native title claim group to make the application and deal with related matters must be given in one of two ways:

- in accordance with a process of decision-making that must be complied with under the traditional laws and customs of the persons in the native title claim group; or
- where there is no such process, by a process agreed to and adopted by the group.

[53] The test under s. 190C(4)(b) requires me to ascertain from the material before me whether the claim group has a mandated traditional decision-making process and if this is the case, whether this mandated process was followed. If there is no mandated process that must be complied with, then I must consider whether the persons in the native title claim group agreed to and adopted a decision-making process and that they then followed it in authorising the applicant.

[54] The applicant in their respective affidavits state that 'the process of decision-making undertaken in authorising me as the applicant follows the way that people in the native title claim group have traditionally made decisions. This involves those people who are members of the native title claim group meeting to discuss who should be the applicant and then those people agreeing by consensus to appoint the applicant'. The affidavits further state that a decision-making process 'required under the system of traditional laws and customs recognised and observed by the native title claim group in relation to the authorising of matters of this kind has been complied with'.

[55] The claim group's legal representative in her affidavit confirms that the authorisation decision was made in accordance with the traditional laws and customs of the claim group that must be complied with. She notes that she has previous knowledge of, and experience witnessing, such a decision-making process, having been the legal representative of the claim group for four years and having been the legal representative of other desert groups with the same decision-making process.

[56] In summary, in relation to the authorisation meeting, *[Name of legal representative deleted]* states the following:

- The meeting was held on 16 October 2014 in Bidyadanga Community;

- Meeting notices for a meeting on 7 October 2014 were sent on or about 22 September 2014 by fax to a number of places where members of the claim group are known to reside including Parrngurr, Punmu, Bidyadanga and Yandeyarra communities. Further notices were faxed to the same locations on 1 October 2014 advising that the meeting had been re-scheduled to 16 October 2014.
- The meeting notice invited members of the claim group as well as persons who consider they have native title rights and interests in the area shown on a map attached to the notice (the claim area).
- At the authorisation meeting proposed amendments to the Kulyakartu application and the lodgement of a new (this Kulyakartu # 2 application), were discussed. After considerable discussion, a consensus decision was reached, in accordance with the traditional decision-making process of the claim group, by those present, to amend the Kulyakartu application and lodge this application.

[57] Based on the above information I am satisfied that the persons jointly comprising the applicant are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

[58] The requirements set out in s 190C(4)(b) are **met**.

Merit conditions: s 190B

Subsection 190B(2)

Identification of area subject to native title

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.

[59] Schedule B and Attachment B provide a description of the external boundary of the claim area and Attachment C a map depicting the boundary. The geospatial report which provides an analysis of the description and map, and advises whether the application area has been described with reasonable certainty, notes the following:

‘Description

Schedule B refers to Attachment B.

Attachment B describes the area covered by the application by an external boundary description referencing native title determinations and coordinate points, shown to six decimal points. Clause 7 states that - *“The external geographical boundaries of the Application*

Area of land and water covered by the application are clearly delineated and marked on the attached map at ATTACHMENT C"

No general exclusions are listed.

Map

Schedule C refers to Attachment C.

Attachment C contains a Colour copy of a map entitled Kulyakartu Claim Map 136.1 prepared by the Central Desert Native Title Services; dated 16 December 2014 and includes:

- The application area depicted by a bold outline and labelled "Kulyakartu WC2005/007 WAD293/2005";
- Surrounding native title determinations are shown and labelled;
- Surrounding native title registered claims are shown and labelled;
- Representative Body boundaries are shown and labelled;
- Scalebar, northpoint, coordinate grid, location diagram and legend;
- Notes relating to the source, currency and datum of data used to prepare the map.

Assessment

The application area is not clearly labelled so as to clearly identify the area subject to this claim.

The label "Kulyakartu WC2005/007 WAD293/2005" is confusing as it refers to an existing claim area, however the written description does match this area.

The description and map are consistent and identify the application area with reasonable certainty.'

[60] Having regard to the identification of the claim area at Schedule B's Part (A), Attachment B and the map in Attachment C, I am satisfied that the application area has been described such that the location of it on the earth's surface can be identified with reasonable certainty. In my view, the fact that the labelling of the claim area (Attachment C) is unclear is not significant as the technical description of the external boundaries (Attachment B) makes it clear what area the application covers.

[61] I therefore agree with the geospatial report and am satisfied that the information and the map required by s 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 areas of the land or waters.

[62] The application **satisfies** the condition of s 190B(2).

Subsection 190B(3)

Identification of the native title claim group

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application, or

- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[63] Schedule A refers to Attachment A for a description of the persons in the native title claim group. The group is described by reference to a list of eight ancestors which are set out at paragraph [56] in Attachment A as follows:

55. The native title claim group comprises those Kulyakartu persons who hold native title rights and interests in the Application Area according to traditional laws and customs, including through the birth on country of an ancestor.

56. The persons referred to in paragraph 55 above include those people who are the descendants of:

- (a) Japurtujukurr;
- (b) Walparti;
- (c) Kulurnanyuta/Tommy Gardiner;
- (d) Kupa Kupa;
- (e) Junamuya/Jimmy Gardiner;
- (f) Jutuparni;
- (g) Ngarti warta; and
- (h) Mukuly Mukuly.

[64] Pursuant to subsection 190B(3)(b) I must be satisfied that the description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

[65] In considering the operation of s 190B(3)(b) in *Doepel*, Mansfield J stated that the section's focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained—at [37].

[66] Further, Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 found, in the way native title claim groups were described, that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[67] In my view, describing the claim group as the 'descendants' of certain named persons provides a sufficiently reliable and objective means by which to ascertain a person's membership of the group. Some factual inquiry may be required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

[68] I note that the use of the word 'including' in paragraph 38 and 'include' in paragraph 39 may indicate that there are other, non-identified ways of becoming a member of the claim group and other ancestors not listed in paragraph 39 such rendering the description not sufficiently clear. However, this issue is, in my view, sufficiently addressed in the research report. The report

states that under the laws and customs of the WDCB, there are multiple 'pathways' by which people can assert their connection to the land and thereby acquire native title rights and interests. These 'pathways' may vary in number and specifics across the WDCB region. In this matter all claimants had an ancestor born on Kulyakartu country. This 'pathway' alone ensures that all claimants hold native title rights and interests in the claim area, but it is also the case that many claimants additionally hold native title rights through the 'pathway' of having religious, sacred, ritual, practical and historical knowledge of the claim area. Read together, in my view the description provides the required certainty.

[69] For the above reasons I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

[70] The application **satisfies** the condition of s 190B(3).

Subsection 190B(4)

Native title rights and interests identifiable

The Registrar must be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

[71] Section 62(2)(d) provides that the application must contain:

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.

[72] The description of the claimed rights is found in Schedules E.

[73] In *Doepel*, Mansfield J agreed with the Registrar that s 190B(4) requires a finding as to 'whether the claimed native title rights and interests are understandable and have meaning' – at [99]. I am of the view that the description in Schedule E is sufficient to allow the native title rights and interests claimed to be readily identified. The claimed rights have been clearly and comprehensively described in a way that does not infringe s 62(2)(d). Further, the description is meaningful and understandable, having regard to the definition of the expression 'native title rights and interests' in s 223.

[74] Whether I consider that the claimed rights can be established prima facie is the task at s 190B(6), discussed below.

[75] The application **satisfies** the condition of s 190B(4).

Subsection 190B(5)

Factual basis for claimed native title

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

[76] Following Mansfield J at [17] of *Doepel*, I understand that my assessment is to 'address the quality of the asserted factual basis for [the] claimed rights and interests ... but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests' and that it 'is not for the Registrar to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'. This was endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*) at [83].

[77] Relevant information is contained in Attachments F, G, G1, G2 and G3 and T. In addition I have considered, as noted above, the factual basis material provided by the applicant directly to the Registrar in support of the Kulyakartu application, which, as noted above, covers the same application area and is brought by the same applicant on behalf of the same claim group members:

- Applicant's submissions on the registration test dated 8 September 2015 (submissions);
- Affidavit of [Name deleted], 3 December 2007;
- Affidavit of Muuki Taylor, November 2004 (sic);
- Affidavit of Muuki Taylor, 3 December 2007;
- Affidavit of Waka Taylor, 11 November 2004.

[78] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Reasons for s 190B(5)(a)

[79] The assertion in s 190B(5)(a) relates to the association of the native title claim group and that of their predecessors with the area covered by the application.

General principles

[80] I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for the assertion in s 190B(5)(a) needs to address that:

- the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times; and
- there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

Applicant's material

[81] The submissions and Attachment T relevantly state the following about the association of the claimants with the claim area:

- Travelling by road, the claim area is located in the western portion of the Great Sandy Desert, approximately 560 kilometers southeast of Bidjyadanga, 180 kilometers north of Punmu, 250 kilometers northwest of Kunawarriti, 715 kilometres northeast of Jigalong and 450 kilometers north-north east of Parnngurr;
- Currently there is no infrastructure to support a permanent population in the claim area;
- The term 'Kulyakartu' is more generally associated with a larger country area which fully encompasses the claim area; the extent of the larger country area is indicated on Map # 2, which is attached to the research report; this larger country area extends at least into the Martu and Ngurrara determination areas;
- The application is bordered on all sides by areas determined to be part of the Western Desert Cultural Bloc (WDCB);
- The claim group's relevant system of law and custom is that of the WDCB;
- First non-Aboriginal contact with the claim area was in 1896 when some members of the ill-fated Calvert Scientific Expedition passed through the area, followed by further contact in 1897 by William Rudall, a government surveyor, who led an exploration party in search of the members of the Calvert expedition. In his diaries, Rudall records encounters with Aboriginal people in the claim area whose assistance he seeks to locate waterholes. There is no discoverable evidence of further contact between 1897 until 1963, when an oil and gas exploration company constructed a track through the claim area. Other than this, the claim area has never been the subject of occupation or use by non-Aboriginal people. From the late 19th century to the 1940s, members of the claim group and their predecessors took up residence at pastoral stations some distance away from the claim area and/or La Grange mission (now Bidyadanga). By the 1960s, members of the claim group travelled away from the claim area to reside in surrounding towns or Aboriginal communities. Notwithstanding their physical absence since the 1960s, members of the claim group and their predecessors occasionally visited the claim area. They continued to acknowledge and observe their traditional laws and customs and retained, performed and passed on, songs, stories and

knowledge of the sites that form part of the dreaming associated with the claim area to their children and grandchildren. Some senior members of the claim group were living a wholly traditional life style within the application area up to and including the 1960s;

- The apical ancestors listed in Schedule A were born in the broader Kulyakartu country area, and at least two of the living claimants state that they were themselves born there. For example, Muuki Taylor was born circa 1950, within the broader country area. It is reasonable to suggest that his father's father, apical ancestor Junirrinja, and other ancestors were near the claim area when the Calvert and Rudall expeditions travelled through the claim area just over 50 years earlier;
- Attachment G sets out the activities that members of the claim group undertake on the claim area, which include all activities necessary for, or incidental to, the sustenance of human life and society; and
- The association of the predecessors of members of the claim group in the period between the date of sovereignty (being 1829) and the date of first contact with Europeans at the end of the 19th century can be readily inferred for the purposes of s 190B(5)(a).

[82] The material before me supports an association of the apical ancestors of the claimants with the claim area at the time of first European contact. In my view, if the factual basis supports the presence of relevant persons at first contact, it may be inferred that this reflects the situation at and before sovereignty. On the basis of the material before me, I am confident that I can make such an inference. Further, the factual basis material contains information about the association of current members of the claim group with areas and places within the claim area. The material also supports the assertion of a continuity or history of association.

[83] On the basis of the above, I am **satisfied** that the requirements of s 190B(5)(a) are met.

Reasons for s 190B(5)(b)

[84] For this requirement, the factual basis must identify the relevant pre-sovereignty society and the persons who acknowledged the laws and customs of that society. Where a native title claim group is defined in reference to an apical ancestor model, the factual basis must also explain the link between those persons (the ancestors) and the relevant society. The factual basis must contain a sufficient explanation of how laws and customs can be said to be traditional as well as details sufficient to support the assertion that there has been continuous acknowledgement and observance — see, for instance, *Gudjala* [2007] at [63], [65], [66]; *Gudjala* [2009] at [36], [37], [40].

[85] Schedule E, Attachment F and the additional factual basis material state that the pre-sovereignty society is that of the WDCB (also known as 'Western Desert Society'). Within the

claim area (and beyond, as noted above), the claimants observe the traditional customs associated with the larger system of WDCB laws and customs which apply in other parts of the Western Desert.

[86] In summary, from the submissions, Attachment T and Attachment F I understand that:

- There are three indicators that demonstrate that the WDCB is the relevant 'society' in the claim area: the claim area is firmly within the widely recognised 'boundary' of the WDCB; the languages spoken by members of the claim group are languages associated with the WDCB; and the claimants adhere to the normative laws and customs established by the WDCB and their shared belief in the dreaming (Tijukurrpa);
- The dreaming provides a moral, social and judicial guide to everyday life and lays down the rules or principles by which members of the claim group both relate to and conduct themselves in relation to land and waters in the claim area. It also explains the formation of the landscape and is evidenced in particular features of the landscape;
- The traditional laws and customs acknowledged and observed by the WDCB, including the claimants, include the following rules and principles: for the recognition of a person as holding rights and interests in the claim area and the nature and extent of these rights; the imposition of sanctions for wrongful presence on, or use of, country by strangers; the requirement that spiritual features of the landscape are cared for and respected; rules about social organisation such as kinship, marriage and avoidance rules; rules about foraging and preparation and distribution of food;
- Native title rights and interests in the claim area are acquired on the basis of a 'multiple pathways' model of connection to country by which the WDCB is characterized. Under this model claimants identify the following mechanisms as pathways to connection: birth of oneself or an ancestor on, or in the immediate vicinity of, the area of the claim and within the broader country area and/or having religious, sacred, ritual, practical and/or historical knowledge of the area of the claim and asserting connection with the application area and having that assertion accepted by others; and
- The claimants continue to observe and acknowledge the laws and customs observed by their ancestors, being laws and customs of the WDCB, including laws about
 - skin groups: the skin system described by current members of the claim group is the same as recorded by other researches in 1986 and 1974;
 - going through the law: Muuki Taylor, who is said to have been born in approximately 1950, went through the law when he was about 14 to 15 years old.

Wakka Taylor, born in the mid 1930s, also speaks about going through the law when he was a young man;

- avoidance relationships: examples include the mother-in-law avoidance rule;
- arrangement marriages: Wakka Taylor speaks about his promised wife which, under an arranged marriage, he would have married, had she not been 'stolen' by someone else;
- food preparation: Muuki Taylor gives examples of laws that need to be followed when preparing food which have been passed down to him and are derived from the dreaming;
- accessing and visiting country: examples are given of what is required when a stranger visits country, as well as information about what is required when a rock hole is visited and
- the intergenerational transfer of laws and customs: Muuki Taylor states that he has been taught by the old people and passes on the law to the young generations; the law must be adhered to and is non-negotiable; to go against the law will result in verbal berating or physical punishment.

[87] In my view, the factual basis material does sufficiently address the requirements of s 190B(5). It identifies the pre-sovereignty society, being the WDCB, and provides some facts in support of the existence of this society in the claim area. It also links some of the identified ancestors with parts of the claim area, thus allowing the favorable inference that those persons formed part of the relevant society, noting that the claimants and neighboring group member's oral history and historical records these persons as being of the claim area. The material also outlines facts that provide some explanation of how laws and customs of the current claim group are said to be traditional. This is evident in the explanation of the transmission and teaching from one generation to the next. I note that of itself, the assertion that laws have been handed down from generation to generation may not be sufficient to support the assertion at s 190B(5)(b), however, the application also provides some facts that elicit a similarity between the laws and customs recorded at sovereignty and those that are acknowledged and observed today.

[88] On the basis of the above, I am satisfied that the requirements of s 190B(5)(b) are met.

Reasons for s 190B(5)(c)

[89] Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs

acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta*—at [47] and [87].

[90] Dowsett J at [82] in *Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

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

[91] The Full Court in *Gudjala FC* at [96] agreed that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

[92] The factual basis in support of this assertion is provided in the application in the submissions, Attachment F and Attachment T as well as the submitted affidavits. From the information contained in these documents, I understand that the members of the claim group continue to acknowledge and observe the traditional laws and customs passed on to them by their ancestors. This continues today amongst claim group members. There are examples in the research report and affidavits such as the continued observance of rules about pathways to group membership and in Attachments G1, 2 and 3 which speak about trips in June and September 2015 by members of the claim group to the application area travelling along the Kidson Track and the burning of country and cleaning out of water holes following traditional laws and customs; – see also my summary of the material above at s 190B(5)(b).

[93] Having considered the material I am satisfied that the factual basis provided is sufficient to support an assertion that the members of the claim group and their predecessors have continued to hold native title in accordance with the traditional laws and customs.

[94] On the basis of the above, I am **satisfied** that the requirements of s 190B(5)(c) are met.

Conclusion

[95] The application **satisfies** the condition of s 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s 190B(5).

Subsection 190B(6)

Prima facie case

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[96] To meet the requirements of s 190B(6) only one of the native title rights and interests claimed needs to be established prima facie. Only established rights will be entered on the Register—see s 186(1)(g) and the note to s 190B(6).

[97] In relation to the consideration of an application under s 190B(6), I note Mansfield J's comment in *Doepel*:

Section 190B(6) requires some measure of the material available in support of the claim—at [126].

On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].

Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

[98] The definition of 'native title rights and interests' in s 223(1) guides my consideration of whether, prima facie, an individual right and interest can be established. In particular I take account of the interpretation of this section in:

- *Yorta Yorta* (see s 190B(5) above) in relation to what it means for rights and interests to be possessed under the traditional laws acknowledged and the traditional customs observed by the native title claim group; and
- The High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'.

[99] I also need to consider the case law relating to extinguishment when examining the right and interest claimed. Rights that clearly fall prima facie outside the scope of the definition of 'native title rights and interests' in s 223(1) cannot be established. In my consideration I take into account information contained in the application on activities conducted by the claim group. While current activities by claimants on the claim area which are said to be in exercise of the claimed native title rights and interests are not determinative of the existence of a right and interest, they can be supportive of it.

Consideration

[100] Paragraph 13 of Schedule E states that that the native title right and interest claimed in the whole of the application area, 'including any areas where extinguishment must be disregarded pursuant to section 47B of the NTA' is the right to possess, occupy, use and enjoy the claim area to the exclusion of all others.

[101] *Ward HC* is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded because of the Act.

[102] The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 indicates that the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community, including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – at [127].

[103] The application area is, on the map attached to Schedule C, marked as unallocated crown land. The submissions state that for members of the WDCB, including the claimants, the right to receive or give permission to access country is a fundamental aspect of the acknowledgement of land ownership. The submissions make reference to affidavits by senior claimants and state that this evidence establishes that the claimants have the right to exclusive possession.

[104] Similarly, the research report (Attachment T) refers to traditional laws and customs recognised by the WDCB in relation to accessing country, quoting Muuki Taylor's affidavit of 2007 where he states that he must accompany a stranger, sing out to the country or burn the country as a means to alerting the country to his presence and that he must seek permission to visit a strange country and expects others to follow this rule when visiting the claim area. Affidavits by other claimants, also quoted in the research report, support this. The research report further states that claimants 'attempt to maintain control of access by others, whether it be an Aboriginal person or a mining company undertaking exploration'.

[105] Reference to outsiders having to receive permission before they can go onto the claim area is also made in the affidavits attached to Attachment G.

[106] In my view the material before establishes that, prima facie, the claim group members have a right under their traditional laws and customs to effectively exclude from their country people not of their community.

[107] The application **satisfies** the condition of s 190B(6).

Subsection 190B(7)

Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

- (i) the Crown in any capacity, or
- (ii) a statutory authority of the Crown in any capacity, or
- (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[108] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application. I take 'traditional physical connection' to mean a physical connection in accordance with the particular laws and customs relevant to the claim group, being 'traditional' in the sense discussed in *Yorta Yorta*.

[109] The applicant provides sufficient material regarding the traditional physical connection, current and past, of members of the native title claim group. As noted above, some members of the claim resided in the claim area until the 1960s and current members of the claim group such as Muuki Taylor continue to access the claim area, following protocols prescribed by traditional laws and customs.

[110] I am therefore satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

[111] The application **satisfies** the condition of s 190B(7).

Subsection 190B(8)

No failure to comply with s 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

- (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
- (2) If:
 - (a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
 - (b) either:
 - (i) the act was an act attributable to the Commonwealth; or
 - (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;a claimant application must not be made that covers any of the area.
- (3) If:
 - (a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
 - (b) either:
 - (i) the act was an act attributable to the Commonwealth, or
 - (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:

- (a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and
- (b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[112] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[113] 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. In my view the application does not offend the provisions of s. 61A(1) because the geospatial report dated 11 December 2015 reveals that there are no approved determinations of native title over the application area.

Section 61A(2)

[114] 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 subparagraph (4) apply. In my view the application does not offend the provisions of s 61A(2) because Schedule B, Part C excludes from the application area any areas covered by previous exclusive possession acts as defined in s 23B.

Section 61A(3)

[115] 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 s 61A(4) apply. In my view, the application does not offend the provisions of s 61A(3). As noted above the claim area consists of a parcel of Unallocated Crown Land and the applicant claims the protection of s 47B.

Conclusion

[116] In my view the application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application **satisfies** the condition of s 190B(8).

Subsection 190B(9)

No extinguishment etc. of claimed native title

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

[117] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[118] The application at Schedule Q states that no ownership of minerals, petroleum or gas wholly owned by the Crown, in the right of the Commonwealth or the State of Western Australia, is claimed.

Section 190B(9)(b)

[119] The application at Schedule P states that no offshore places comprise part of the application area. This is confirmed by the geospatial report.

Section 190B(9)(c)

[120] There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Conclusion

[121] In my view the application does not offend the provisions of ss 190B(9)(a), (b) and (c) and therefore the application **meets** the condition of s 190B(9).

[End of reasons]

Summary of registration test result

Application name	Kulyakartu # 2
NNTT file no.	WC2015/006
Federal Court of Australia file no.	WAD720/2015
Date of registration test decision	5 February 2016

Section 190C conditions

Test condition	Subcondition/requirement	Result
s 190C(2)		Aggregate result: met
	re s 61(1)	met
	re s 61(3)	met
	re s 61(4)	met
	re s 62(1)(a)	met
	re s 62(1)(b)	met
s 190C(3)		Not met
s 190C(4)	re s 190C(4)(b)	met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s 190B(2)		met
s 190B(3)	re s 190B(3)(b)	met
s 190B(4)		met
s 190B(5)		met
s 190B(6)		met
s 190B(7)(a) or (b)		met
s 190B(8)		met
s 190B(9)		met

[End of document]