

Registration Decision

Application name	Palyku #2
Name of applicant	Kevin Stream, Tammy O'Connor, Peter Jaffrey, Cheryl Mackay and Walter Stream
Federal Court of Australia No.	WAD483/2018
NNTT No.	WC2018/022
Date of Decision	18 December 2018

Claim not accepted for registration

I have decided that the claim in the Palyku #2 application does not satisfy all of the conditions in ss 190C of the *Native Title Act 1993* (Cth), but that it does satisfy all of the conditions in ss 190B.¹ Therefore the claim must not be accepted for registration.

Heidi Evans

*Delegate of the Native Title Registrar*²

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

² Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.

Reasons for Decision

CASES CITED

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

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

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

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

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

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

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

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

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

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

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

BACKGROUND

- [1] The application is made on behalf of the members of the Palyku native title claim group. The application covers approximately 10,308 square kilometres of land and waters in Western Australia, south east of Port Hedland. The application sits immediately to the north of the area subject of the Palyku application (WAD6287/1998; WC1999/016), sharing its southern border with the northern border of that application area.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 30 October 2018 pursuant to s 63 of the Act.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁴
- [4] I have decided that the claim does not satisfy all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [5] 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'.

³ See s 190A(6).

⁴ See s 190A(6B).

- [6] I have had regard to information in the application. I have also considered information supplied by the applicant directly to the Registrar on 22, 23, 28 and 30 November 2018:⁵
1. Extracts from connection report, prepared by [Anthropologist 1 removed], dated 31 March 2014 ([Anthropologist 1 removed] report);
 2. Annexure 2, “Palyku Site Register”, to [Anthropologist 1 removed] report;
 3. Annexure 3, “Palyku Site Map”, to [Anthropologist 1 removed] report;
 4. Extracts from anthropological report prepared by [Anthropologist 2 removed] ([Anthropologist 2 removed] report);
 5. Site map from [Anthropologist 2 removed] report;
 6. Map overlaying Palyku Site Map with Palyku #2 claim area;
 7. Affidavit affirmed by [Deponent 2 removed] on 14 November 2018;
 8. Affidavit affirmed by [Deponent 1 removed] on 21 November 2018;
 9. Affidavit affirmed by [Name removed] on 27 November 2018;
 10. Affidavit affirmed by [Name removed] on 29 November 2018; and
 11. Letter and submissions of 30 November 2018 from [Deponent 1 removed].
- [7] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁶
- [8] The State of Western Australia (the State) has not provided submissions in relation to the application.⁷
- [9] I have considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 7 November 2018 (the geospatial report).

Procedural fairness

- [10] On 31 October 2018, the Tribunal’s Senior Officer for the matter wrote to the State advising of receipt of the application and inviting the State to comment on the application, which comments were to be provided by 7 November 2018. No comments were received from the State.
- [11] As above, on various dates, additional material was provided by the applicant for the purposes of applying the registration test to the application. However, upon forming the view that the application would not satisfy all of the conditions of the registration test, I did not provide the State with the material.
- [12] On 17 December 2018, the legal representative for an overlapping claim currently being considered for registration by another delegate of the Registrar contacted an officer of the Tribunal regarding the registration decision for this application. He explained his understanding that a decision was scheduled for 21 December 2018, and indicated that he may wish to provide submissions in relation to the application. The officer confirmed that the

⁵ See s 190A(3)(a).

⁶ See s 190A(3)(b).

⁷ See s 190A(3)(c).

decision date had been scheduled for 21 December 2018, however from my consideration of the remainder of what was said during that conversation (as relayed to me by the officer), I am satisfied that nothing the officer said gave rise to an expectation that the legal representative was either entitled to make submissions, or that if he did make submissions, the delegate would have regard to that information in making a registration decision for the application.

[13] Notwithstanding this, as I was of the view the application would not satisfy all of the conditions of the registration test, I did not consider there were any third party interests that would be adversely affected by my decision, such that the requirements of procedural fairness did not apply in the circumstances.

[14] This concluded the procedural fairness process.

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

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

[15] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

What is required to meet this condition?

[16] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed; and
- (b) any areas within the external boundary over which no claim is made.⁸

Does the information about the application area meet this condition?

[17] Schedule B refers to Attachment B which is a written description of the external boundary of the application area. It is a metes and bounds description which refers to coordinate points, native title determination Nyiyaparli and Nyiyaparli #3 (WAD6280/1998; WCD2018/008) and native title determination applications Palyku (WAD6287/1998; WC1999/016) and Kariyarra-Abydos (WAD47/2014; WC2014/001).

[18] A map showing the external boundary of the application area is contained in Attachment C. It has been prepared by the Tribunal’s Geospatial Services on 24 October 2018, and includes:

- the application area depicted with bold dark blue outline;
- tenure depicted as displayed in the legend, labelled with Reserve Number and Lease Number and Name;
- topographic background;

⁸ Doepe/ at [122].

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

- [19] Schedule B contains a list of general exclusions, describing those areas not included in the application. I do not consider that there is anything problematic in the use of general exclusion clauses to describe areas not covered by the application. This method is sufficient to satisfy the requirement at s 190B(2).⁹
- [20] Attachment B provides specific exclusions, namely that the areas of native title determination applications Palyku and Kariyarra-Abydos are excluded from the application area, as is the area covered by native title determination Nyiyaparli and Nyiyaparli #3.
- [21] The geospatial report concludes that the map and description are consistent and identify the area subject of the application with reasonable certainty. Having considered the information before me about the area, I agree with the assessment and am satisfied this condition is met.

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

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

What is required to meet this condition?

- [23] For the application to meet the requirements of s 190B(3), the Registrar must be satisfied that:
- (a) the persons in the native title claim group are named in the application; or
 - (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.
- [24] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’: whether the claim has been made on behalf of the correct native title claim group is not relevant.¹⁰

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

- [25] The description of the persons comprising the native title claim group in Schedule A is sufficiently clear so that it can be ascertained whether any particular person is in that group.
- [26] My understanding of the description in Schedule A is that there are three criteria that an individual must satisfy in order to qualify as a Palyku person, that is, a member of the Palyku People native title claim group.
- [27] The first criterion involves descent from one of twenty apical ancestors or ancestor couples. The wording of the criterion makes clear that persons descended by means of adoption are included in the group.
- [28] The second criterion is that persons ‘identify as Palyku and are recognized by a substantial number of the descendants of the above apical ancestors as Palyku.’

⁹ *Strickland* at [50] to [55].

¹⁰ *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

- [29] The third criterion is that persons must ‘have a connection with the land and waters of the application area in accordance with Palyku traditional laws and customs.’
- [30] A description that identifies group members by reference to named apical ancestors is well-established by the Court as an acceptable method for describing a claim group. While ascertaining who the group members are would take some research, or factual ‘inquiry’ (for example by consideration of genealogies and family trees), I do not consider that this prevents the description from being sufficiently clear.¹¹
- [31] It is my view that this first criterion provides an objective starting point from which such an inquiry into the members of the group could be undertaken. Once the biological and adopted descendants were known, I am satisfied that through a process of interviewing and questioning those persons, it could be determined who the persons meeting the second two criteria are. That is, the persons meeting the first criterion could be approached, and asked questions such as whether they identify as Palyku, whether they recognise other certain individuals as Palyku, what the laws and customs surrounding ‘having a connection to country’ involve, and other relevant questions.
- [32] Through this inquiry process, I am satisfied the members of the group could be ascertained with sufficient clarity for the purposes of s 190B(3).

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

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

What is required to meet this condition?

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

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

- [35] The description of the native title rights and interests claimed by the native title claim group is clear and the rights claimed are understandable as native title rights and interests.
- [36] The description of the rights and interests claimed appears at Schedule E. The first paragraph specifically states that the rights claimed ‘do not confer possession, occupation, use and enjoyment of any of the application area to the exclusion of all others’, such that I understand there is no claim being made to exclusive possession of any part of the application area.
- [37] The remaining non-exclusive rights set out in the description I consider are clear and easily understood as ‘native title rights and interests’, having regard to the definition of that term in s 223(1) of the Act. I have not, however, undertaken an assessment of whether each right or

¹¹ *WA v NTR* at [67].

¹² *Doepel* at [99] and [123].

interest claimed meets the requirements of that definition as I consider that a more appropriate task for the condition at s 190B(6) regarding whether the rights can be established on a prima facie basis.

[38] The final paragraph of the description sets out qualifications or limitations on the exercise of the rights and interests claimed, including that the rights claimed are subject to and exercisable in accordance with the common law, the laws of the State and Commonwealth, and the body of traditional laws and customs acknowledged and observed by the native title claim group.

[39] In my view, the description is clear and comprehensible. I have read the contents of Schedule E together, and am satisfied there are no contradictions within the description.

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

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

What is needed to meet this condition?

[41] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:

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

[42] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.¹³

[43] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.¹⁴

[44] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.¹⁵

¹³ *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

¹⁴ *Gudjala 2008* at [92].

¹⁵ *Gudjala 2007* at [39].

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

[46] The factual basis material appears in Schedule F and in the additional material supplied directly to the Registrar by the applicant.

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

[47] To meet the requirement at s 190B(5)(a), the factual basis must support the assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area.' Generally, to satisfy this requirement:

- it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;¹⁷
- it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;¹⁸ and
- the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.¹⁹

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

[48] The factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of the group had, an association with the application area.

[49] As above, the application area is adjacent to the northern border of the existing Palyku application WAD6287/1998, in the Pilbara region in Western Australia. Various pastoral properties cover the extent of the present application area, including Corunna Downs, Hillside, Bonney Downs and Panorama.²⁰

[50] Regarding an association of the predecessors of the native title claim group with the application area around the time of sovereignty, or European settlement, Schedule F states '[i]n 1829, when British sovereignty was asserted over Western Australia, the application area was occupied and used by Palyku People, including ancestors of the people who comprise the native title claim group.'²¹

[51] The additional material gives further details about this occupation by the ancestors of the native title claim group. From the material, I understand that settlement in the region including the application area took place around the 1860s, with the establishment of pastoral runs.²² The [Anthropologist 1 removed] report provides that generally, there was not large

¹⁶ *Gudjala 2008* at [91] to [92].

¹⁷ *Gudjala 2007* at [52].

¹⁸ *Gudjala 2007* at [51] and [52].

¹⁹ See *Martin* at [23]–[26], affirmed in *Corunna* at [35]–[39] and [42]–[44].

²⁰ Map annexed to [Anthropologist 2 removed] report, 'Ethnographic and Historical sites within Palyku Northern Country', dated 31 May 2015.

²¹ At [1].

²² [Anthropologist 1 removed] report at [132].

scale conflict between early settlers of the region and the local Aboriginal people, and that these people were quickly engaged in employment in the pastoral industry, allowing them to remain on their traditional country.²³

- [52] The [Anthropologist 1 removed] report provides a summary of the ethno-historical literature relating to the application area, explaining that the earliest records and observations of the Palyku were made by pastoralist John Withnell, who arrived in the Pilbara as a young child in 1863.²⁴ Hillside, which covers the south western corner of the application area was one of the properties held by his family.²⁵ He wrote that the ‘Pulgoe’ were associated with the country bordered by the heads of the De Grey, Oakover and Fortescue Rivers.²⁶ Having considered the location of these rivers, I am satisfied the application area sits within this region described.
- [53] The report also discusses the work of anthropologists Bates (working in the Pilbara in 1900), Radcliffe-Brown (in the same region in 1910-11), Tindale, Birdsell and Epling (who spent time in Marble Bar just north of the application area in 1953), all of whom made observations of the laws, customs, language and culture of the Palyku. Various linguistic researchers who spent time with Palyku people in the early 1900s are also referred to.²⁷ Having considered this summary of the ethno-historic literature relating to the Palyku, I accept that the factual basis material supports the application area as forming part of their traditional country at around the time of settlement.
- [54] From the material, I understand that there are generally only two generations separating the apical ancestors named in Schedule A from elderly members of the claim group. It is further my understanding that those apicals were persons who would have been present in the application area around the time of settlement.
- [55] For example, in his affidavit, one claimant explains that he is Palyku through both his father and his mother.²⁸ He deposes that his father was born in the bush on Corunna Downs station in around 1912.²⁹ His father was raised by old Palyku men on the station, including apical ancestors Sandy McKenna (Kalurru) and Mullet (Pupu), and his father instructed him to call these men ‘grandfather’.³⁰ The claimant says he understood these men to be the brothers of his father’s mother, who is buried on Corunna Downs, as is the claimant’s father who passed away in 2007.³¹
- [56] The [Anthropologist 1 removed] report also provides information about other Palyku apical ancestors who are recorded as being associated with parts of the application area. For example, it states that a certain claimant’s grandmother, Fannie, and mother, Annie, and mother’s Aboriginal husband Chinaman Janjanamarlu (all named as apical ancestors in Schedule A), all lived at Corunna Downs from the 1890s,³² and that some claimants

²³ [Anthropologist 1 removed] report at [268] to [269].

²⁴ At [132] to [135].

²⁵ At [132].

²⁶ [Anthropologist 1 removed] report at [266].

²⁷ See at [132] to [135].

²⁸ Affidavit of [Name removed] affirmed 27 November 2018 at [6].

²⁹ Affidavit of [Name removed] affirmed 27 November 2018 at [7] to [8].

³⁰ At [10] and [12].

³¹ At [8], [9] and [12].

³² At [521].

understand this was Chinaman Janjanamarlu's traditional country.³³ It also states that one claimant's grandmother, apical ancestor Kijiempa, lived at Warrie station, which is now within Hillside, in the 1940s and is buried on the station.³⁴

- [57] In addition to this material, I have before me a large amount of information relating to sites within the application area, including a site register, which sets out the number and name of the site, its exact and general location within the application area, a description of the significance of the site, and the source of information by which the site was identified and described. The register also identifies whether the site is one that has been registered under the cultural heritage regulatory framework in Western Australia. A total of 190 sites appear in the register, and a map that accompanies the register shows all of the numbered sites in relation to the boundary of the existing Palyku application area and current Palyku #2 application area. In my view, the information given about the sites, indicates that many were used by the Palyku people prior to, or around the time of settlement.
- [58] For example, in relation to one site, it is stated '[t]here were corroborees here in the 19th century', and in relation to another site, it says '[o]utcamp during station era' and '[s]everal archaeological sites have been recorded by DAA [Department of Aboriginal Affairs] in the vicinity.'³⁵ In this way, I consider the factual basis to indicate that sites of significance to the Palyku that are within the application area, were used around the time of, and even prior to, settlement.
- [59] Having considered this information before me, and the places referred to within the material, I am satisfied the factual basis addresses an association of the predecessors of the group with the area at the time of settlement and prior to.
- [60] Regarding an association of the predecessors of the group since that time, and presently, I consider the statements deposed by members of the group in the affidavits forming part of the additional material, and included in the [Anthropologist 1 removed] report most illustrative.
- [61] For example, one claimant talks about his and his father's association the application area in the following way:

In my case I got my Palyku family tree through my father and his old Palyku ancestors, and also from my mother's Palyku side. My Dad had a very close connection to the claim area because his ancestors belonged to that country and he was raised up there and moved around all over that land when he was young, learning all about it.

I have spent most of my life on and around the claim area, learning from my Dad and other old Palyku people...

I always heard from our old Palyku people that Palyku country covered the top end of the Nullagine, Shaw, Coongan, Oakover and Fortescue rivers – which includes the country in the claim area. The people I heard this from were my Dad, my old grandfather Sandy McKenna (Kalurru) and Uncle Alec

³³ See at [551].

³⁴ At [1054].

³⁵ Site register, pp. 1, 4.

Weatherall. They used to say to me and my brothers ‘when we gone you got to look after the country’, meaning the claim area and other Palyku country.³⁶

[62] Elsewhere, this claimant says:

In the 1990s I built my own place at Boonamindie near Corunna Downs homestead. I got permission from the station owner to set up there. I wanted to spend as much time out on that country as I could because it’s my Palyku country where I feel good. I would not have set up a camp there if it wasn’t Palyku country.³⁷

[63] In the [Anthropologist 1 removed] report, one claimant who was born at Split Rock in the application area, states:

After Split Rock station closed we went to Hillside. My mother and father grew me up until I was 15 when I worked at Hillside riding horses. Then I went to Warrie working on the station mustering sheep stayed there for about a year and a half. At that time I went through the law at [Place removed].³⁸

[64] Speaking about an association today with the area, one claimant says:

Out in the eastern part of the claim area near our boundary is Billin Billin rockhole [site 116], near the junction of the Billin Billin and the Davis River. It’s a good fishing place. You can catch perch (millinja) and catfish and eels. I’ve been there fishing since I was a kid. I have taken my kids there fishing too.³⁹

[65] In light of this type of information before me, I am satisfied the factual basis speaks to an association of the group and its predecessors with the area over the period since settlement, and presently.

[66] The requirement at s 190B(5)(a) is that the material speaks to an association that is with the entirety of the area subject of the application. As explained above, I have a site register and accompanying map before me. In addition, I have a map annexed to the [Anthropologist 2 removed] report which provides details and locations of specific mythological and other significant sites within the application area. From this information, I understand that the sites and places referred to are generally spread across the entirety of the application area, such that I am satisfied the factual basis material supports both a physical and spiritual association of the group and its predecessors with the whole of the area.

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

[67] To meet s 190B(5)(b), the factual basis must support the assertion ‘that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests’. The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of ‘native title rights and interests’ within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007*⁴⁰ by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court in *Yorta Yorta*.⁴¹

³⁶ Affidavit of [Name removed], affirmed 27 November 2018, at [43] to [45].

³⁷ At [36].

³⁸ [Anthropologist 1 removed] report at [1054].

³⁹ Affidavit of [Name removed], affirmed 27 November 2018, at [77].

⁴⁰ *Gudjala 2007* at [26] and [62] to [66].

⁴¹ *Yorta Yorta*.

- [68] According to the High Court’s decision in *Yorta Yorta*, a law or custom is ‘traditional’ where:
- (a) it ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’;⁴²
 - (b) the origins of the content of the law or custom concerned can be found in the normative rules of a society⁴³ which existed before the assertion of sovereignty by the Crown;⁴⁴
 - (c) the normative system has had a ‘continuous existence and vitality since sovereignty’;⁴⁵ and
 - (d) the relevant society’s descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.⁴⁶
- [69] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group ‘have their source in a pre-sovereignty society and have been observed since that time by a continuing society.’ His Honour held that a ‘starting point must be identification of an indigenous society at the time of sovereignty’, and concluded that a sufficient factual basis must also establish a link between the native title claim group described in the application and the area covered by the application, which involves ‘identifying some link between the apical ancestors and any society identified at sovereignty.’⁴⁷
- [70] I understand that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).⁴⁸

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

- [71] I am satisfied the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claim to native title.
- [72] The starting point at s 190B(5)(b) is the identification of a society of people living in the area around the time of European settlement, bound by common observance of normative laws and customs. As above, the material asserts early European settlement to have taken place in around the 1860s.⁴⁹ In addressing the society in the area at that time, and its laws and customs, the factual basis material provides the following information:

⁴² *Yorta Yorta* at [46].

⁴³ The term ‘society’ in this context is ‘understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs’—*Yorta Yorta* at [49].

⁴⁴ *Yorta Yorta* at [46].

⁴⁵ *Yorta Yorta* at [47].

⁴⁶ *Yorta Yorta* at [87].

⁴⁷ See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J’s evaluation of the factual basis materials, the Full Court did not disagree with his Honour’s assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether ‘there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs’—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

⁴⁸ See also *Stock* at [64] where His Honour held that ‘it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists’.

⁴⁹ [Anthropologist 1 removed] report at [265].

- the archaeological record and the reports of explorers in the 1860s and early pastoralists show that the claim area and surrounding country was occupied by Aboriginal people at first contact;
- pioneer pastoralist John Withnell reported that the ‘Pulgoe’ were associated with the area at the head of the De Grey, Fortescue and Oakover Rivers – this information and other early ethnographic reports demonstrate that the Aboriginal people who occupied the claim area prior to settlement were, or at least included the Palyku people;
- the Palyku people occupying the area at and prior to sovereignty included the ancestors of the native title claim group;
- at settlement, the Palyku were a society of persons united by the common observance of laws and customs, pursuant to which they possessed rights and interests in the application area;
- this society of persons spoke the Nyiyaparli language and shared laws and customs with the Nyiyaparli people, however identified with different lands and waters and as a separate people.

[73] The [Anthropologist 1 removed] report gives further detail regarding the laws and customs acknowledged and observed by the Palyku people. For example, it provides that station records from the first half of the 20th century show that amongst the Palyku people living on the properties, traditional marriages took place, along with ceremonies and punishments for transgressions.⁵⁰ The report also states that Withnell observed that Palyku people performed ceremonies to cause children, fish, birds, animals, reptiles, insects, seeds and plants to increase at a particular type of site referred to as a *tal*.⁵¹ According to the [Anthropologist 1 removed] report, Radcliffe-Brown also wrote about the initiation ceremonies performed by the Palyku and other neighbouring groups.⁵² The report includes quotes from claimants recalling their knowledge of such ceremonies involving the ancestors of the claim group, including certain apical ancestors.⁵³

[74] In light of this information before me, I am satisfied the material is sufficient in supporting a society in the area at settlement, acknowledging and observing normative laws and customs.

[75] I am also satisfied that the material provides an explanation of the link between the claim group and the claim area, primarily through explaining the link between the apical ancestors named in Schedule A and the society in the area at settlement. In my reasons above at s 190B(5)(a), I set out some of the dates at which and places where apical ancestors of the claim group are recorded, as before me in the material.⁵⁴ From this information, I understand the material to assert that the apical ancestors were, in fact, persons who were present in the area around the time of settlement and consequently, they were members of the relevant society. That is, the material suggests they were full grown adults in the early 20th century,

⁵⁰ [Anthropologist 1 removed] report at [273].

⁵¹ [Anthropologist 1 removed] report at [808].

⁵² [Anthropologist 1 removed] report at [810].

⁵³ [Anthropologist 1 removed] report at [811].

⁵⁴ See at [52] and [53].

such that I can infer that they were born around the time settlement was taking place, or in the decade or so following.

[76] Section 190B(5)(b) also requires the factual basis to address the way in which the present laws and customs acknowledged and observed by the claim group are rooted in the laws and customs of the society at sovereignty, such that they can be considered 'traditional'. Schedule F states that 'Palyku traditional laws and customs are believed to stem from the time when the world was soft, before it was shaped by the Ancestral Beings in the *Manygunpa*, or Dreaming, who roamed and shaped the country imbuing it with spiritual meaning and power and laying down the laws and customs for the country.'⁵⁵ It further states that '[t]he laws and customs have been passed down from their ancestors, the 'old people', since time immemorial, and connect Palyku People to their country.'⁵⁶

[77] The affidavits sworn by members of the group and provided as additional material give further detail regarding the way in which the laws and customs of their ancestors have been handed down to them, by word of mouth and through observing their behavior and practices. For example, one claimant states that:

There are a lot of rivers and creeks in the claim area. My Dad told me that in the old days they were the main tracks for Palyku people walking around the country.

Knowing the rivers and creeks and springs and rockholes is really important in Palyku culture. It's a matter of survival. I learnt to travel in the claim area from water place to water place with my Dad. I always have choices and a back-up plan. If one place dries up I know where the next water place will be.⁵⁷

[78] As above, the material asserts that the laws and customs of the Palyku society at settlement involved the performance of ceremonies. In her affidavit, one claimant describes how, as a child, she participated in particular ceremonies with her elders:

The oldies, like [Name removed], [Name removed] and [Name removed] (all Palyku elders) and the [Name removed] mob from the desert like [Name removed] and [Name removed], used to take us hunting down the river from Nullagine. Our house was opposite town from the river. The old people used to camp along the river. They'd come and get us and we would do corroborees with them. We'd come back home covered in ashes. We would dance and the men would sing. Dad would lay down and he would sing and we would be quiet. He would sing in Nyiyaparli or Palyku. These were the Palyku old people.⁵⁸

[79] Elsewhere she describes her experience of going through the law, and the way in which members of the group today participate in law ceremonies:

I have also been through the law on the women's side. Palyku women's law is shared with the law in the western desert. [Name removed], an [Name removed] elder at Nullagine, is my mentor. I have special responsibilities to her from law business. When I came for the ceremony, I told the senior ladies who my Dad was and they cried for me because they knew him. This was at Punmu, in the desert.

⁵⁵ At [5].

⁵⁶ At [5].

⁵⁷ Affidavit of [Name removed], affirmed 27 November 2018, at [73] to [74].

⁵⁸ Affidavit of [Name removed], affirmed 29 November 2018, at [62].

I participate in women's law ceremonies right around the place – at Roebourne and out at Punmu in the desert. All around, I have the same cultural responsibilities towards other women in law business. This doesn't mean I have rights to do things in the country of these other places. I still only have rights in Palyku country, including the Palyku #2 claim area, as a Palyku person.⁵⁹

[80] And elsewhere, she talks about her experience of Palyku marriage laws:

Even though I married a white man, when I was a younger woman, I had promised boyfriends that the old Palyku people arranged. They did this to make sure I didn't marry "wrong way".⁶⁰

[81] From the material, it is my understanding that there are only two generations separating elderly members of the claim group from the apical ancestors in the area around settlement. Throughout the affidavit material, claimants describe the way they were taught by their parents, and also by the 'old people', who they identify by name and who include certain Palyku apical ancestors.⁶¹ In addition, they share their knowledge of how their ancestors acknowledged and observed certain laws and customs.⁶²

[82] In my view, the laws and customs asserted within the material as those acknowledged and observed by the claim group today, appear relatively unchanged from those acknowledged and observed by their ancestors, namely, the Palyku society at settlement. The material describes the process by which the ancestors' laws and customs have been passed down through the generations to the members of the claim group today, and also how the claim group continue to pass on this knowledge. It follows that I am satisfied the factual basis is sufficient in supporting an assertion of traditional laws and customs.

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

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

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.⁶³

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

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

[85] The requirement at s 190B(5)(c) relates directly to that at s 190B(5)(b), such that where the factual basis is not sufficient to support the assertion regarding the existence of traditional

⁵⁹ Affidavit of [Name removed], affirmed 29 November 2018, at [76] and [77].

⁶⁰ Affidavit of [Name removed], affirmed 29 November 2018, at [52].

⁶¹ See for example affidavit of [Name removed], affirmed 27 November 2018, at [45].

⁶² See for example affidavit of [Name removed], affirmed 27 November 2018, at [62] to [63].

⁶³ *Gudjala 2007* at [82].

laws and customs, it cannot be found sufficient to support the assertion at this condition, regarding the group continuing to hold their native title pursuant to those traditional laws and customs.⁶⁴

[86] I have already explained above at s 190B(5)(b), the reasons for which I am satisfied the factual basis speaks to a society in the application area at settlement acknowledging and observing laws and customs from which the claim group's present laws and customs are derived. In my view, the factual basis is also sufficient in addressing the way in which the system of traditional laws and customs has been acknowledged and observed since settlement without substantial interruption.

[87] As above, there are only two generations separating elderly members of the claim group with the Palyku apical ancestors occupying the application area around settlement. Noting claimants' detailed knowledge of the way in which their ancestors acknowledged and observed laws and customs in relation to the application area, and the way they recall their parents doing the same, while at the same time teaching the claimant those laws and customs, I consider the factual basis sufficient in supporting a system of traditional law and custom that has continued without interruption. In addition to this, the [Anthropologist 1 removed] report provides various historical information about the claim area, concluding that the impacts of settlement did not result in a loss of physical connection of the Palyku people with their traditional country.⁶⁵

[88] It follows that I am satisfied the factual basis is sufficient to support the assertion at s 190B(5)(c).

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

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

What is required to meet this condition?

[90] For the application to meet the requirements of s 190B(6), the Registrar 'must consider that, prima facie, at least some of the native title rights and interests claimed can be established.' I note the following comments by Mansfield J in *Doepel* in relation to this condition:

1. it requires some measure of the material available in support of the claim;⁶⁶
2. although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);⁶⁷
3. s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.⁶⁸

⁶⁴ *Martin* at [29].

⁶⁵ See for example the [Anthropologist 1 removed] report at [265] to [275].

⁶⁶ *Doepel* at [126].

⁶⁷ *Doepel* at [127].

⁶⁸ *Doepel* at [132].

[91] Mansfield J found that the use of the words ‘prima facie’ in s 190B(6) means that ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.’⁶⁹

[92] Noting the definition of ‘native title rights and interests’ in s 223(1) of the Act, in order for me to consider a right or interest prima facie established, it must be shown to be a right or interest that is:

- (a) possessed under the traditional laws and customs of the native title claim group;⁷⁰
- (b) a right or interest in relation to the land or waters of the application area;⁷¹
- (c) not extinguished in relation to the entirety of the application area.⁷²

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

Non-exclusive right to enter and remain on the land, camp, erect temporary shelters and travel over and visit any part of the land and waters

[93] There is sufficient information before me to allow me to consider a right of the claim group to enter and remain on, travel across, camp on and erect temporary shelters, established on a prima facie basis.

[94] The following statement by a claim group member is an example of this type of information:

Dad taught my brothers and me a lot about the claim area and our Palyku culture. We used to travel with him all over the claim area and other parts of Palyku country when he was out dogging, and on holiday time. We did lots of hunting, fishing and camping with Dad on the claim area back then. I still do these things today. Most of the time I live on the claim area at my camp at Corunna Downs.⁷³

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

[95] There is sufficient information before me to allow me to consider a right of the claim group to hunt, fish, gather, take and use traditional resources of the area, established on a prima facie basis.

[96] The following statement by a claim group member is an example of this type of information:

The old Palyku people taught us how to use paperbark from the cadjibut or paperbark tree to carry babies, make art and to carry food and water. Paperbarks are all over Palyku country, including the Palyku #2 claim area.

We also use leaves from the trees, paperbark and reeds in our cooking traditionally. We lay leaves first on the hot coals, lay meat on top and then paperbark on the top. When we are at a spring or water hole and we are fishing, we thread fish on a reed, and then it stays clean and put it on the leaves.⁷⁴

⁶⁹ *Doepel* at [135].

⁷⁰ Section 223(1)(a).

⁷¹ Section 223(1)(b).

⁷² Section 223(1)(c).

⁷³ Affidavit of [Name removed], affirmed 27 November 2018, at [21].

⁷⁴ Affidavit of [Name removed], affirmed 29 November 2018, at [58] to [59].

Non-exclusive right to take and use water

[97] There is sufficient information before me to allow me to consider a right of the claim group to take and use water from the application area, established on a prima facie basis.

[98] The following statement by a claim group member is an example of this type of information:

Knowing the rivers and the creeks and springs and rockholes is really important in Palyku culture. It's a matter of survival. I learnt to travel in the claim area from water place to water place with my Dad. I always have choices and a back-up plan. If one place dries up I know where the next water place will be.⁷⁵

Non-exclusive right to engage in cultural activities and the transmission of cultural knowledge on the area, also to maintain and protect places, and to conduct ceremony and ritual on the area

[99] There is sufficient information before me to allow me to consider a right of the claim group to engage in cultural activities and the transmission of cultural knowledge on the area, to maintain and protect places, and to conduct ceremony and ritual on the area, established on a prima facie basis.

[100] The following statements by claim group members are an example of this type of information:

We believe it's important to bury our old people on Palyku country. We never cremate in traditional Palyku culture. My Dad wanted to be buried at Corunna Downs. That was his special place in Palyku country. It's in the Palyku #2 claim area. So when he died, even though he was in care in Port Hedland at the time, we buried him near his birth place, which is near the homestead at Corunna Downs [site 148].⁷⁶

[101] And also:

I help look after the country and the sites. That's one of the main reasons I set up my camp on Corunna Downs so I could be on the land and keep an eye out. Under Palyku law and culture it's my responsibility and I do my best.⁷⁷

[102] And also:

Even when I'm away from my country I still teach them [my children]. I'm not the only one. There's a lot of us older Palyku people passing on our culture and connection to the land so the next generations can take over when we are gone.⁷⁸

Non-exclusive right to be accompanied onto the application area by non-native title holders

[103] There is sufficient information before me to allow me to consider a right of the claim group to be accompanied onto the area by non-native title holders, including non-Palyku spouses and relatives, and persons entering in connection to the performance of ceremonies, established on a prima facie basis.

[104] The following statement by a claim group member is an example of this type of information:

My Dad and the other old Palyku people around when I was growing up taught me this. The old Wanman ladies from the desert who live at Nullagine and who spent a lot of time with Palyku elders

⁷⁵ Affidavit of [Name removed], affirmed 27 November 2018, at [74].

⁷⁶ Affidavit of [Name removed], affirmed 29 November 2018, at [63].

⁷⁷ Affidavit of [Name removed], affirmed 27 November 2018, at [135].

⁷⁸ Affidavit of [Name removed], affirmed 27 November 2018, at [144].

who have passed away also taught me these things. They know about the old Palyku ways because they were brought in to Nullagine and given permission to live there by the old Palyku elders. They spent a lot of time with the old Palyku people from the past.⁷⁹

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

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

What is required to meet this condition?

[106] For the application to meet the requirements of s 190B(7), the Registrar ‘must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application’—see subsection (a).

[107] The following principles have emerged from the case law about what is required at s 190B(7):

- the material must satisfy the delegate of particular facts;
- evidentiary material is, therefore, required; and
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;⁸⁰
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;⁸¹
- the material may need to address an actual presence on the area.⁸²

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

[108] Pursuant to the wording of s 190B(7), the focus of the condition is upon at least one member of the claim group. I am satisfied that claim group member [Name removed] has a traditional physical connection with the some part of the application area.

[109] In his affidavit, [Name removed] explains that he is a Palyku man through his father and through his mother, and that his father was raised by Palyku ancestors including Sandy McKenna Pupu. His mother had connections to apical ancestor Julimanga.

[110] It is clear from the information in his affidavit, that [Name removed] has spent the most part of his life living within the application area. He talks about travelling throughout the area with his father,⁸³ who showed him sites and places of importance, including law grounds⁸⁴ and burial sites.⁸⁵ He also explains how he established his outstation camp on the application area so he could keep an eye on his country.⁸⁶ He tells of the various Dreaming stories and spirit forces associated with the area, and explains how his father taught him these things.⁸⁷

⁷⁹ Affidavit of [Name removed], affirmed 29 November 2018, at [32].

⁸⁰ *Doepel* at [17].

⁸¹ *Gudjala 2007* at [89].

⁸² *Yorta Yorta* at [184].

⁸³ At [21].

⁸⁴ At [120].

⁸⁵ At [121].

⁸⁶ At [135].

⁸⁷ See at [52].

[111] From the material, it is clear [Name removed] has spent time on the application area being taught by his father and other elders about his country and the laws and customs associated with his country, in accordance with traditional patterns of teaching. In addition, he is aware of sites associated with various aspects of the Palyku system of traditional laws and customs that I have discussed above in my reasons at s 190B(5)(b), for example, law ceremonies. On this basis, I am satisfied [Name removed] has a traditional physical connection with part of the application area.

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

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

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

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

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

Requirement	Information addressing requirement	Result
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph [3]	Met

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

Information etc. required by sections 61 and 62 – s 190C(2): condition met

[114] 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?

[115] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken.⁸⁸

Subsection 61

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

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

Subsection 62

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

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

No previous overlapping claim group – s 190C(3): condition not met

[118] I am not satisfied that no person included in the native title claim group for this application was a member of the native title claim group for any previous overlapping application.

⁸⁸ *Doepel* at [16] and also at [35] to [39].

What is required to meet this condition?

[119] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**⁸⁹) was a member of a native title claim group for any previous application’. To be a ‘previous application’:

1. the application must overlap the current application in whole or part;
2. there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
3. the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[120] It is only where there is an application meeting all three of the criteria above, that is, a ‘previous application’, that the requirement for me to consider the possibility of common claimants is triggered.⁹⁰

[121] The geospatial report provides that there is one application currently appearing in an entry on the Register of Native Title Claims (the Register) that overlaps part of the application area. It is the Nyamal #1 application (WAD6028/1998; WC1999/002). The geospatial report provides that the Nyamal #1 application was accepted for registration and entered onto the Register on 3 June 1999. From my own research of the Tribunal’s databases, I have confirmed that this entry was made following the application being considered pursuant to s 190A(6).

[122] There is, therefore, a previous application meeting the criteria set out above. It follows that I must consider whether there are any common claimants between the claim group for that previous application, and the claim group for the current application.

[123] Schedule H of the Form 1 identifies that the Nyamal #1 application overlaps the current application. Schedule O then states:

In respect of the Nyamal #1 claim (WAD6028/1998), which has been included on the register of claims, the applicant is aware that some of the persons who are members of the native title claim group, as described in Schedule A, may also be described as being members of the native title claim group in the Nyamal #1 claim (WAD6028/1998).

[124] In light of this information before me, I cannot be satisfied that no member of the native title claim group for the current application is a member of the claim group for a previous application.

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

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

What is required to meet this condition?

[126] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions.⁹¹ If the application has not been certified, the Registrar must be satisfied that the applicant is a member of the native title

⁸⁹ Emphasis in original.

⁹⁰ See *Strickland FC* at [9].

⁹¹ See subsection 190C(4)(a).

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.⁹²

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

[128] Having considered the information in Schedule R, I am satisfied that it contains the statement required by s 190C(5)(a), and that the affidavits sworn by each of the applicant persons pursuant to s 62(1)(a) that accompany the application (which are all in identical terms) contain a further 'brief' statement setting out the grounds upon which the Registrar can consider the requirement at s 190C(4)(b) met. This includes information about an authorisation meeting held 18 September 2018 in Port Hedland at which the applicant was authorised to make the application by the members of the native title claim group.

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

- (a) in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists;⁹³ or
- (b) in any other case, by an agreed or adopted process in relation to authorising things of that kind.⁹⁴

[130] In light of this note, I consider the material must speak to the decision-making process used by the group to authorise the applicant to make the application. The applicant persons' affidavits depose that under the traditional laws and customs of the group, there is no decision-making process that must be followed when making decisions about things like making native title claims, and that on that basis, at the meeting in September, the group first decided to adopt a process by which decisions at the meeting and about the claim would be made. The affidavits set out this adopted decision-making process as follows:

- (a) *That decisions are to be made by consensus, after discussion between Palyku People, with deference to the knowledge and seniority of the Palyku People's elders, with consensus being shown by a show of hands; or*
- (b) *If no consensus can be achieved, then the decision will be made by way of resolutions by a majority vote, using a show of hands.*

[131] In my view, this information is sufficient in addressing the requirement at s 251B.

[132] Where it is an agreed to and adopted decision-making process at a meeting of members of the native title claim group that is the basis of the applicant's authority to make the application, there is no requirement that all of the members of the group be involved in the decision-

⁹² See subsection 190C(4)(b).

⁹³ Section 251B(a).

⁹⁴ Section 251B(b).

making. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate.⁹⁵

- [133] The additional material provided by the applicant includes an affidavit sworn by the legal representative for the applicant, Ms [Deponent 1 removed] (the [Deponent 1 removed] affidavit), and an affidavit sworn by an anthropologist employed by Yamatji Marlpa Aboriginal Corporation (YMAC) assigned to the Palyku claim, Ms [Deponent 2 removed] (the [Deponent 2 removed] affidavit). Both affidavits contain information about the authorisation of the applicant persons to make the application, by the members of the native title claim group.
- [134] The affidavits explain that the meeting held 18 September 2018 for the purposes of the claim group authorising the applicant to make the application (the authorisation meeting) followed a meeting of the group held on 17 September 2018 (the day prior) at the same venue (the earlier meeting). The purpose of that earlier meeting was for the group to consider amending the description of the native title claim group to bring it into line with the most recent anthropological advice, set out in the [Anthropologist 1 removed] report, about the persons who hold native title rights and interests in the application area (and in the area of the existing Palyku application, WAD6287/1998) as Palyku people.⁹⁶
- [135] Annexed to the [Deponent 1 removed] affidavit and the [Deponent 2 removed] affidavit are copies of various documents relating to the authorisation meeting, and the application itself. I have before me an extract from the [Anthropologist 1 removed] report setting out the author's findings regarding the named apical ancestors from whom the claim group are descended.⁹⁷ I also have before me a copy of the personal and public notices used to advertise the authorisation meeting, which are essentially in the same terms.⁹⁸ Having considered these documents, I am satisfied that the description contained in the [Anthropologist 1 removed] report is the same description that appears in the notice, and also the same description that appears in Schedule A of the Form 1.
- [136] I note that there is little information before me about the earlier meeting held 17 September 2018, and/or the resolutions passed by the Palyku people in attendance at that meeting. Further, I do not have before me a copy of the notice used to advertise that meeting, nor do I have any information about the way the Palyku claim group was described prior to the description proposed in the [Anthropologist 1 removed] report. In the absence of this information, but with a clear statement in the [Deponent 1 removed] and [Deponent 2 removed] affidavits that the purpose of the earlier meeting was for the group to consider amending the claim group description to bring it into line with the [Anthropologist 1 removed] report findings, I consider it reasonable to infer that at the earlier meeting, the group resolved to amend the claim group description.
- [137] In the [Deponent 2 removed] affidavit, the deponent explains that the intent and purpose with which she attended the authorisation meeting on 18 September 2018, was to oversee registration of attendees at the meeting, and ensure that those persons were eligible to participate, by way of being persons who satisfied the claim group description that appeared

⁹⁵ *Lawson* at [25].

⁹⁶ See for example the [Deponent 2 removed] affidavit at [8]; the [Deponent 1 removed] affidavit at [4].

⁹⁷ Annexure SLK1 to the [Deponent 1 removed] affidavit.

⁹⁸ Annexures SLK3, SLK5, SLK6, SLK7 to the [Deponent 1 removed] affidavit.

in the notice for the authorisation meeting, and in the [Anthropologist 1 removed] report.⁹⁹ On this issue, Ms [Deponent 2 removed] explains in detail the process she followed in conducting an assessment of whether the persons in attendance were eligible to participate in voting at the meeting. This included confirming whether persons were included in a database of Palyku people held by YMAC. Where persons were not known to fall within the claim group description in the notice, they were asked to complete a family tree form to verify their descent line. Where the person could not be identified as a member of the group, they were identified alternatively as an observer.¹⁰⁰

[138] Annexed to the [Deponent 1 removed] affidavit is a copy of the registration sheet for the authorisation meeting.¹⁰¹ It provides that a total of 36 people attended the meeting, 19 of whom were identified as members of the native title claim group, and 17 of whom were identified as observers. In addition to this, in the [Deponent 1 removed] affidavit, the deponent explains how she was in attendance for the entirety of the authorisation meeting, and ‘closely observed and made note of who participated in decision-making during the meeting, and how decisions were made during the meeting.’¹⁰² Specifically regarding those persons identified through the registration process conducted by Ms [Deponent 2 removed] as observers, Ms [Deponent 1 removed] deposes ‘[n]one of those persons participated in the decision-making of the meeting.’¹⁰³

[139] Regarding whether all of the members of the native title claim group, as described in Schedule A of the Form 1, were given every reasonable opportunity to participate in the decision-making process, having considered the material before me, I am satisfied that they were. The material before me gives the following information about how the meeting was notified:

- on 24 August 2018, notices for the proposed authorisation meeting were mailed to 203 Palyku People known to YMAC and whose details were held by YMAC;¹⁰⁴
- on 25 August 2018, a copy of a notice advertising the authorisation meeting appeared in the West Australian newspaper;¹⁰⁵
- on 29 August and 12 September 2018, copies of the same notice appeared in the North West Telegraph;¹⁰⁶
- on 7 September 2018, the notice was again mailed to Palyku persons, along with a cover letter detailing the travel assistance available to persons wishing to attend, and encouraging persons to tell their family members about the authorisation meeting;¹⁰⁷
- copies of the notice were placed on notice boards at the Ashburton Aboriginal Corporation and Wangka Maya Language Centre in Port Hedland, and the Aboriginal Legal Service in South Hedland;¹⁰⁸ and

⁹⁹ [Deponent 2 removed] affidavit at [13].

¹⁰⁰ [Deponent 2 removed] affidavit at [16].

¹⁰¹ Annexure SLK8 to the [Deponent 1 removed] affidavit.

¹⁰² [Deponent 1 removed] affidavit at [23].

¹⁰³ [Deponent 1 removed] affidavit at [25].

¹⁰⁴ [Deponent 1 removed] affidavit at [11].

¹⁰⁵ [Deponent 1 removed] affidavit at [13].

¹⁰⁶ [Deponent 1 removed] affidavit at [14].

¹⁰⁷ [Deponent 1 removed] affidavit at [12].

- enquiries were made by two persons who had seen the notice, which were handled by the legal representative for the applicant, Ms [Deponent 1 removed].¹⁰⁹

[140] As above, the authorisation meeting was notified publicly and personally, to a large number of persons known to be members of the Palyku native title claim group. Copies of the public and personal notices are annexed to the [Deponent 1 removed] affidavit. The notices include the purpose of, and details about the meeting, the claim group description and a map of the proposed claim area, information about travel assistance, and details of a contact person. In my view, this broad notification of the meeting allowed persons invited to make an assessment of whether their attendance was necessary and to make arrangements to attend if so.

[141] The description of the claim group that appears in the notice is consistent with the [Anthropologist 1 removed] report which I understand presents the most recent findings on the members of the Palyku claim group. Through the efforts applied by Ms [Deponent 2 removed] at the authorisation meeting, in the process of registering those who attended, I am satisfied that it was only members of the native title claim group who participated in decisions at the meeting, including the decision to authorise the applicant to make the application.

[142] While I do not know who was invited to the earlier meeting on 17 September 2018 (potentially a larger or smaller group of people), the [Deponent 1 removed] affidavit and the [Deponent 2 removed] affidavit each refer to meetings leading up to the earlier meeting and the authorisation meeting, where the views of, and instructions from, a Palyku working group (comprising representatives from each of the family groups descended from the Palyku ancestors), were sought regarding the issues of amending the claim group description and filing a new claim adjacent to the existing Palyku claim.¹¹⁰ From the material, I understand that the two meetings were convened and conducted in accordance with those views and instructions already obtained from the Palyku working group. In light of this, I am satisfied that the members of the native title claim group were given every reasonable opportunity to attend the meeting where the applicant was authorised to make the application.

[143] I note that the material must provide sufficient details of the meeting and the way it was conducted. In *Ward*, O’Loughlin J posed a number of hypothetical questions His Honour held ‘the substance of which’ must be addressed by the authorisation material.¹¹¹ In my view, those questions are addressed. The material before me about the authorisation meeting held 18 September 2018 is detailed and comprehensive. Copies of all relevant documents have been provided, including an extract of the meeting outcomes, which sets out all of the resolutions passed by those in attendance, and the way in which they decided upon a process by which those resolutions would be carried.¹¹² The extract shows that all resolutions were passed by consensus, including a resolution that the applicant persons be appointed to make the Palyku #2 claim.

¹⁰⁸ [Deponent 1 removed] affidavit at [15].

¹⁰⁹ [Deponent 1 removed] affidavit at [16] to [20].

¹¹⁰ See [Deponent 1 removed] affidavit at [6] to [9]; [Deponent 2 removed] affidavit at [6] to [8].

¹¹¹ *Ward* at [24] and [25].

¹¹² Annexure SLK9 to the [Deponent 1 removed] affidavit.

[144] Five applicant persons are named in the resolution that appears in the meeting outcomes extract, and it is those same five persons whose names appear as the applicant in the Form 1, and who have sworn s 62(1)(a) affidavits that accompany the application. In those affidavits, each of the deponents affirms that they are members of the native title claim group. Nothing in the material indicates that there was any disagreement or dissent amongst any of the persons in attendance following these decisions of the group.

[145] It follows that I am satisfied the applicant is a member of the native title claim group and is authorised to make the application and to deal with matters arising in relation to it.

End of reasons

Attachment A

Summary of registration test result

Application name	Palyku #2
NNTT No.	WC2018/022
Federal Court of Australia No.	WAD483/2018
Date of decision	18 December 2018

Section 190B conditions

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190B(2)		Met
s 190B(3)		Overall result: Met
s 190B(4)		Met
s 190B(5)		Aggregate result: Met
s 190B(6)		Met
s 190B(7)(a) or (b)		Met
s 190B(8)		Aggregate result: Met
s 190B(9)		Aggregate result: Met

Section 190C conditions

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190C(2)		Aggregate result: Met
s 190C(3)		Not met
s 190C(4)		Overall result: Met