

Registration Decision

Application name	Kultju
Name of applicant	Keith Sceghi and Others on behalf of the Kultju Native Title Claim Group
Federal Court of Australia No.	WAD225/2018
NNTT No.	WC2018/007
Date of Decision	20 July 2018

Claim accepted for registration

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

*Delegate of the Native Title Registrar*²

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

² Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 23 August 2017 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*)

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

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] FCA 1384 (*Doepel*)

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

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

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

Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

BACKGROUND

- [1] This application was filed on behalf of the Kultju native title claim group. It covers land and waters in the central desert region of Western Australia east of the Goldfields Highway between Leinster and Wiluna.
- [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 28 May 2018 pursuant to s 64(4) of the Act.
- [3] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the claim made in this application.
- [4] If the claim in the application satisfies all the registration test conditions in ss 190B–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

³ Section 190A(6).

⁴ Section 190A(6B).

[5] I have decided that the application satisfies all of the registration test conditions and my reasons on each condition follow below.

Information considered

[6] Section 190A(3) sets out the information to which the Registrar must have regard when considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’. As required by s 190A(3), I have considered the information in the application and accompanying documents provided by the applicant, as well as the further information filed with the Court and/or provided to the Registrar by the applicant, as detailed below under ‘Procedural fairness’.

[7] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 7 June 2018 (the geospatial report) and have considered information available through Geospatial Services in relation to locations mentioned in the application.

[8] I note that I can consider material from outside of the application for some of the conditions of registration, however I do not consider it appropriate to engage in fact-finding, noting the guidance from Mansfield J that the Registrar’s task ‘is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application’.⁵

[9] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers.⁶

[10] The state of Western Australia (the state government) has not provided submissions in relation to the application of the registration test.⁷

Procedural fairness

[11] As noted above, I have considered the material within the application and accompanying documents filed by the applicant on 28 May 2018.

[12] On 30 May 2018 the practice leader for the matter (practice leader) wrote to the state government advising that I would be relying on this information for my decision, and that should it wish to make any submissions, it should do so by 15 June 2018. No response was received from the state government.

⁵ *Doepel* [16].

⁶ Section 190A(3)(b).

⁷ Section 190A(3)(c).

- [13] On 15 June 2018 the lawyer for the applicant provided additional material in support of the application to the Registrar, specifically ‘Submissions on the Application of the Registration Test’ (submissions), an anthropological report and affidavits from the members of the claim group containing information about the factual basis for the application.
- [14] On 29 June 2018 the s 62 affidavits accompanying the application were uplifted and replaced with new affidavits by consent order of the Court.
- [15] On 6 July 2018 the lawyer for the applicant provided further additional material to the Registrar, specifically an affidavit from himself regarding the authorisation of the applicant.
- [16] On 9 July 2018 the practice leader provided all the additional material provided by the applicant to the state government and advised that I would also be relying on this information for my decision, and that should it wish to make any submissions, it should do so by 13 July 2018.
- [17] On 17 July 2018 the state government confirmed that no submissions would be made.
- [18] This concluded the procedural fairness processes.

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

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

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

What is required to meet this condition?

- [20] 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 provide 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

⁸ *Doepel* [122].

Does the information about the external boundary meet this condition?

- [21] Attachment B includes a written description of the external boundary of the application area by reference to surrounding native title determinations and applications, cadastral boundaries and geographical coordinates to six decimal places.
- [22] Attachment C is a map prepared by the Tribunal's Geospatial Services dated 11 May 2018 and titled 'Kultju'. It includes:
- a. The application area depicted by a bold blue outline;
 - b. Cadastral boundaries colour coded and labelled;
 - c. Background topographic image;
 - d. Scalebar, legend, locality diagram and coordinate grid; and
 - e. Notes relating to the source, currency and datum of data used to prepare the map.
- [23] The assessment in the geospatial report is that the description and map are consistent and identify the application area with reasonable certainty.
- [24] Having considered the conclusions of the geospatial report, and the map and description in Attachments B and C, I agree with the assessment in the geospatial report and am satisfied that the external boundary of the application area can be identified on the earth's surface with reasonable certainty.

Does the information about excluded areas meet this condition?

- [25] Schedule B includes a description of areas within the boundaries that are excluded from the application area. This description adopts general clauses to identify the excluded areas, including areas in relation to which a previous exclusive possession act has been done, and areas where native title has been validly extinguished.
- [26] I note French J's comment in regard to the requirements of s 190B(2), that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions [in the Act] to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.⁹ Following this reasoning, I am satisfied that the description of the excluded areas is sufficiently clear for the purposes of s 190B(2), as historic tenure searches could identify the areas described in the general exclusion clauses in Schedule B.

⁹ *Strickland* [55].

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

[27] I am satisfied the claim sufficiently identifies the native title claim group and therefore meets the requirements of s 190B(3).

What is required to meet this condition?

[28] 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.

[29] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’: whether the application has been made on behalf of the correct native title claim group is not relevant.¹⁰

[30] I also note that the requirements of s 190B(3) ‘do not appear to go beyond consideration of the terms of the application’, which means that I cannot consider material outside of the application at this condition.¹¹ I note that I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’.¹²

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

[31] Schedule A refers to Attachment A, which provides the following description of the native title claim group:

40. The native title claim group comprises those persons from time to time:
 - a. who in accordance with Western Desert traditional laws and customs, have a connection to all or part of the application area through conception, birth, growing up or initiation on the area, burial of an ancestor on the area, acquisition of knowledge through long association, or through descent from a person who has had such a connection; and
 - b. in respect of whom that claim is recognised according to Western Desert traditional laws and customs.
41. At the date of this application, the persons referred to in paragraph 40 above are those who
 - a. have a connection through:

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

¹¹ *Doepel* [16].

¹² *Wakaman* [34].

- i. their own birth, or long association with part or all of the application area; or
 - ii. the birth, or long association with part or all of the application area, of their ancestors by which they claim country; and
 - b. in respect of whom that claim is recognised according to Western Desert traditional laws and customs.
42. At the date of this application, the persons referred to in paragraph 41(a)(i) above are [list of eight people].
43. At the date of this application, the persons referred to in paragraph 41(a)(ii) above are the descendants of the following ancestors as are recognised, according to Western Desert traditional laws and customs, by the other native title claimants as having rights in the application area
- a. the union of Tommy/*Kiiku* and Minnie
 - b. the union of Spider Narrier and Queenie;
 - c. Alfie Ashwin;
 - d. Lenny Ashwin;
 - e. *Manyila/Trilby*; and
 - f. *Miparl/Frank Wongawol*.

[32] I consider that paragraphs 40 and 41 provide a description of the types of associations that the native title claim group members have in relation to the application area. I consider that in order for an individual to qualify as a member of the group they must either be one of the persons named at paragraph 42, or be a descendant of the apical ancestors named at paragraph 43. These criteria provide objective starting points from which it could be determined who the members of the claim group are.

[33] Determining all the members of the group will require some genealogical research, however I note Carr J's view that the need to undertake a factual enquiry to determine the members of the group does not mean that the group has not been described sufficiently.¹³

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

[34] 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.'

¹³ *WA v NTR* [67].

What is required to meet this condition?

[35] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified, as required by s 62(2)(d).

[36] The question for this condition is whether the claimed rights are understandable and have meaning, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.¹⁴

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

[37] Schedule E states as follows:

12. In this SCHEDULE E, the following words and phrases have the following meanings:

exclusive rights means the exclusive rights of possession, occupation, use and enjoyment of land and waters to the exclusion of all others; and

non-exclusive rights means:

- a. the right to access, remain in and use that area;
- b. the right to access, take and use the resources of that area for any purpose;
- c. the right to engage in spiritual and cultural activities on that area; and
- d. the right to maintain and protect places and objects of significance on that area,

and does not confer possession, occupation, use and enjoyment of the lands and waters covered by the application to the exclusion of all others.

13. In the lands and waters covered by the application:

- a. where native title rights and interests are not partially extinguished, the native title rights and interests claimed are **exclusive rights**; and
- b. in all other areas, the native title rights and interests claimed are **non-exclusive rights**.

14. Both the exclusive rights and the **non-exclusive rights** are:

- a. exercisable in accordance with the traditional laws and customs of the native title claim group; and
- b. subject to the valid laws of the State of Western Australia and the Commonwealth of Australia, including the common law.

¹⁴ *Doepel* [99], [123].

[38] I note that s 62(2)(d) requires ‘a description of the native title rights and interests claimed in relation to particular land or waters... but not merely consisting of a statement to the effect that native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.’

[39] I consider that the list of rights and interests is not such a statement as that prohibited by s 62(2)(d). Further, I am satisfied that those rights and interests described may be understood as ‘native title rights and interests’ as defined by s 223, and are rights and interests which have ‘meaning’.¹⁵

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 three assertions of s 190B(5)(a)–(c).

What is required 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 laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to 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’.¹⁶

[43] I also note French J’s view that ‘[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the

¹⁵ *Doepel* [99].

¹⁶ *Doepel* [16]-[17]; *Gudjala 2008* [83], [92].

responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material'.¹⁷

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

[44] I understand that s 190B(5)(a) requires the factual basis material to address:

- a. that the claim group presently has an association with the area, and the claim group's predecessors have had such an association with the area since European settlement;¹⁸
- b. that there is 'an association between the whole group and the area', although not 'all members must have such association at all times';¹⁹ and
- c. that there is an association with the entire claim area, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.²⁰

[45] I understand that s 190B(5)(a) requires me to 'address the relationship which all members claim to have in common in connection with the relevant land'.²¹ In my view, Dowsett J's stated requirement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' is also relevant when considering whether this condition is met.²²

[46] I consider that these principles highlight the need for the factual basis material to explain the extent and nature of the association of the particular claim group and its predecessors with the application area.

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

[47] Schedule F refers to Attachment F, in which, under the heading 'Association with the area', the applicant asserts that the native title claim group has, and their predecessors had, a connection to the application area. This association is described as including 'spiritual, physical, historical, (customary) legal, economic and social elements'.²³ There follows a brief overview of each of these elements in general terms.²⁴

¹⁷ *Martin* [23].

¹⁸ *Gudjala 2007* [52].

¹⁹ *Ibid.*

²⁰ *Martin* [26]; *Corunna* [39], [45].

²¹ *Gudjala 2007* [40].

²² *Ibid* [39].

²³ Attachment F [51].

²⁴ *Ibid* [52]–[58].

[48] As discussed above, the lawyer for the applicant provided further information directly to the Registrar on 15 June 2018, which I have considered in reaching my decision. This further information, specifically the submissions, anthropological report and affidavits from members of the claim group, contain information that I consider is relevant to the assertion at s 190B(5)(a).

[49] The submissions state:

- a. Although the colony of Western Australia was founded in 1829, the first European presence in the application area was in 1892 with settlement occurring in the 1890s;²⁵
- b. The predecessors of the claim group had an association with the application area, with specific examples from the affidavits of the members of the claim group provided;²⁶ and
- c. Current members of the claim group have an association with the application area through their birth or time spent on the application area, despite there being no current community within the application area, with further examples from the affidavits of the members of the claim group provided.²⁷

[50] The anthropological report states:

- a. Effective sovereignty in the application area was between 1892 and 1897;²⁸
- b. There is one instance of an early explorer passing through the application area that the author has identified, being Frank Hann in 1902 on his way north from Darlot to Lake Carnegie, although there is no mention in his diaries of any encounters with Aboriginal people;²⁹
- c. There is evidence in the historical record of encounters between early explorers and settlers and Aboriginal people during the 1890s around Lake Darlot, which is less than 50 kilometres from the southern boundary of the application area;³⁰ and
- d. There is evidence of an encounter between Albert Gaston and an Aboriginal group, 'about 25 miles south east of Lake Way', which is at or near the western boundary of the application area.³¹

²⁵ Submissions [40]–[42].

²⁶ Ibid [45]–[49].

²⁷ Ibid [53].

²⁸ Anthropological report [3.1].

²⁹ Ibid 3.2–3.3.

³⁰ Ibid 3.8–3.15.

[51] The affidavits state:

- a. Claimant (name removed) who was born in 1944 on Barwidgee station,³² recalls:
 - i. meeting his 'nanna's father (name removed)' working at Barwidgee station when he was five or six years old, and that (name removed) would go walking in the bush, hunting with his spear and *bungarra*;³³
 - ii. apical ancestor (name removed), who was his 'Pop', spent a long time working on Barwidgee and 'was responsible for the law at Barwidgee in those days';³⁴
 - iii. while traveling by horse and cart through Barwidgee station, apical ancestor Minnie who was his 'Nanna', telling him that footprints they saw in a creekbed belonged to (name removed), who she said must have been walking to Lawlers;³⁵
 - iv. growing up on Barwidgee station at the camp at Bronzewing Well when the manager was (name removed), and working at Barwidgee and surrounding stations until he moved to Leonora when he was in his 20s;³⁶ and
 - v. returning to Barwidgee station in 1990 to work at Bronzewing mine until it shut down in 2001.³⁷
- b. Claimant (name removed) who was born in 1955 at Jundee Station,³⁸ recalls:
 - vi. his grandfather and father were from around Mangkili (Mungilli) 'and coming *yapurra* [west] into Wonganoo';³⁹ and
 - vii. working at Wonganoo station with his father and going hunting and camping for bush tucker, including kangaroo, emu, porcupine and goanna.⁴⁰
- c. Claimant (name removed) who was born at Meekatharra in 1965 recalls:
 - viii. that the first place his old people went to when they walked in from the desert was Wonganoo;⁴¹

³¹ Ibid 3.17.

³² Affidavit of (name removed), 8 June 2018 [4].

³³ Ibid [33].

³⁴ Ibid, [28].

³⁵ Ibid, [34].

³⁶ Ibid [9]–[14].

³⁷ Ibid [16]–[17].

³⁸ Affidavit of (name removed), 8 June 2018 [7].

³⁹ Ibid [14].

⁴⁰ Ibid, [25]–[29].

⁴¹ Affidavit of (name removed), 7 June 2018 [21].

- ix. that he lived at Wonganoo as a child as his mother and father both worked there, and while living there they would go hunting for kangaroo, emu, goanna and other bush tucker;⁴² and
- x. that he cleans out rockholes at Wonganoo and goes there every Easter for emu egg season.⁴³

d. Claimant (name removed) who was born in 1962 in Meekatharra recalls:

- xi. her 'Granny' (name removed) telling her stories about apical ancestor (name removed), including that she is buried on Barwidgee;⁴⁴
- xii. her grandfather, 'Pop' (name removed) was born at New England on Barwidgee station and worked there as well;⁴⁵
- xiii. her mother taking her camping on Barwidgee and showing her how to get bush tucker including honey ants;⁴⁶ and
- xiv. taking her mother and her three sons to Barwidgee 'all the time'.⁴⁷

Does the factual basis material support an association of the predecessors of the claim group previously with the area at sovereignty or European settlement and since that time?

[52] In my view, the material provides a sufficient factual basis addressing the requirement that the predecessors of the claim group had an association with the land and waters covered by this application. My reasons for reaching this conclusion are as follows:

[53] As noted above, the submissions and anthropological report assert that European settlement occurred in the claim area in the 1890s. Claimant (name removed) recalls meeting his 'nanna's father' (name removed) working at Barwidgee station when he was five or six years old. Given that (name removed) was born in 1944, it is likely that his great-grandfather (name removed) was born just prior to or during the time of European settlement of the application area.

[54] Claimant (name removed) recalls being told stories about the apical ancestors from her 'granny' (name removed) who is buried at Barwidgee. As (name removed) was born in 1962, I can infer that her grandmother / great aunt (name removed) would have been born into one of the first generations after European settlement, in the early 20th century.

⁴² Ibid [20], [33].

⁴³ Ibid [36].

⁴⁴ Affidavit of (name removed), 8 June 2018 [10], [13].

⁴⁵ Ibid [28].

⁴⁶ Ibid [30].

⁴⁷ Ibid [26].

[55] Claimants (name removed) and (name removed) both recall their parents living and working at Wonganoo. Given the ages of both these men, born in 1955 and 1965 respectively, I can infer that their parents would have also been members of the first or second generations after European settlement to have a physical presence in the eastern part of the application area, specifically the area of Wonganoo station.

Does the factual basis material support an association of the claim group currently with the area?

[56] In my view, there is a sufficient factual basis to support a current association of the claim group with the application area. My reasons for reaching this conclusion are as follows:

[57] The submissions assert that the members of the claim group currently have an association with the application area through their birth, previous time spent living and working there, and/or their visits to the application area.

[58] As noted above, the affidavits of the members of the claim group state:

- a. (name removed) was born and grew up on Barwidgee station;
- b. (name removed) worked on both Barwidgee and Wonganoo;
- c. (name removed) goes to Wonganoo every year for emu egg season; and
- d. (name removed) camps on Barwidgee with her three sons.

Is there a sufficient factual basis that the association both past and present relates to the area as a whole?

[59] In my view, there is sufficient factual basis to show that the association both past and present relates to the area as a whole. I have reached this view by considering the locations mentioned in the materials using the Tribunal's geospatial database. There are many references to past and present physical associations that members of the claim group have with the stations that make up the vast majority of the application area, Barwidgee⁴⁸ and Wonganoo.⁴⁹

[60] With regards to locations inside Barwidgee, I note (name removed)'s statement that 'we moved all over Barwidgee station' when he was growing up.⁵⁰ I also note the references to places within Barwidgee station, including Mt Grey,⁵¹ Biddy Well,⁵² and Lake Maitland.⁵³

⁴⁸ Affidavit of (name removed), 8 June 2018 [4]–[11];

⁴⁹ Affidavit of (name removed), 8 June 2018 [8], affidavit of (name removed), 7 June 2018 [5].

⁵⁰ Affidavit of (name removed), 8 June 2018 [9].

⁵¹ Ibid [38].

⁵² Ibid [64], [87].

⁵³ Ibid [47], [82].

[61] With regards to locations in Wonganoo, I note the many references to Wonganoo station and (name removed)'s reference to Red Hill.⁵⁴ From reviewing the map of the application area, I note that there are fewer water sources in the northern part of Wonganoo station, compared with the southern part and with the number of water sources throughout Barwidgee station. It make sense to me that the claimants and their predecessors would have a stronger association to locations where water is present.

[62] I also note the following references to locations around the application area, which I have identified using the Tribunal's geospatial database:

- a. Mankili / Mungilli to the north-east;⁵⁵
- b. Granite Peak to the north;⁵⁶
- c. Melrose station to the south-west;⁵⁷
- d. Yandal to the south;⁵⁸
- e. Sir Samuel to the south-west;⁵⁹ and
- f. Jundee to the north-west.⁶⁰

[63] Finally, I note that the members of the claim group have affirmed that the contents of their affidavits are true and correct. I consider that I can rely on these affirmations with regards to remote locations that exist within the application area, even though they may not be recorded in the Tribunal's geospatial database.

Decision on s 190B(5)(a)

[64] I consider that the factual basis material adequately addresses the association the claim group have, and their predecessors had, with the application area. The factual basis material explains the extent and nature of the association, providing information about a physical and spiritual connection members of the group and their predecessors have and have had with locations within the application area. I am therefore satisfied that there is a sufficient factual basis to meet the requirements of s 190B(5)(a).

⁵⁴ Affidavit of (name removed), 7 June 2018 [22].

⁵⁵ Affidavit of (name removed), 6 June 2018 [12], [14].

⁵⁶ Affidavit of (name removed), 7 June 2018 [6].

⁵⁷ Affidavit of (name removed), 6 June 2018 [12].

⁵⁸ Affidavit of (name removed), 6 June 2018 [8].

⁵⁹ Affidavit of (name removed), 6 June 2018 [10].

⁶⁰ Affidavit of (name removed), 6 June 2018 [7].

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

[65] Section 190B(5)(b) requires me to be satisfied that the factual basis material is sufficient to support an 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’.

[66] ‘Native title rights and interests’ is defined in s 223(1)(a) as meaning those rights and interests ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders.

[67] Noting the similarity in language between s 190B(5)(b) and s 233(1)(a), I consider that it is appropriate to interpret s 190B(5)(b) in light of the case law regarding the definition of ‘native title rights and interests’ in s 223(1).

[68] The observations of the High Court in *Yorta Yorta* about the meaning of the word ‘traditional’ in relation to laws and customs include that:

- a. ‘the origins of the content of the law or custom concerned are to be found in the normative rules’ of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs;⁶¹
- b. the ‘normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty’;⁶²
- c. the law or custom ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’;⁶³ and
- d. those laws and customs have been acknowledged and observed ‘substantially uninterrupted’ since sovereignty, having been passed down the generations to the claim group.⁶⁴

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

⁶¹ *Yorta Yorta* [46], [49].

⁶² *Ibid* [47].

⁶³ *Ibid* [46].

⁶⁴ *Ibid* [87].

- a. that the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;⁶⁵
- b. that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestors and the pre-sovereignty society from which the laws and customs are derived;⁶⁶
- c. that the factual basis contains an explanation as to how the current laws and customs of the claim group are ‘traditional’ in how they relate to the rights and interests in the application area.⁶⁷

What information has been provided in relation to the society?

[70] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a society that existed at the time of European settlement, acknowledging and observing normative laws and customs.

[71] Under the heading ‘Continued native title’, Attachment F asserts:

‘The members of the native title claim group are, biologically and/or socially, recognised descendants of the people of the Western Desert Cultural Bloc at sovereignty. The people of the Western Desert were at sovereignty and are today, a body of persons united in and by their acknowledgement and observance of laws and customs (subject to regional variations), which at all such times have been continuously and are acknowledged and observed in their application to the application area, subject to adaptive change.’⁶⁸

[72] The submissions elaborate on the characteristics of the society of the Western Desert Cultural Bloc (WDCB), noting that:

- a. The characteristics include language, a kinship system, authority and responsibilities for Dreamings and connecting totems, and a land tenure system;⁶⁹
- b. The application area is bordered on the north and west by determinations of native title that were determined on the basis that those areas were part of the WDCB;⁷⁰

⁶⁵ *Gudjala 2009* [37], [52].

⁶⁶ *Ibid* [40].

⁶⁷ *Ibid* [29], [54], [69].

⁶⁸ Attachment F [70].

⁶⁹ Submissions [9].

⁷⁰ *Ibid* [13]–[15].

[73] The anthropological report states that the WDCB is the relevant society which gives rise to the traditional laws and customs of the native title claim group, noting that there are four relevant indicators:

- a. The location of the application area is within the boundary of the WDCB. A 'western group' was identified as early as 1938 by A.P Elkin, and this concept was built on by Ronald Berndt, Kenneth Leiberman and Robert Tonkinson, whose maps of the WDCB extend to west of Laverton and Wiluna and therefore include the application area;⁷¹
- b. Members of the current claim group identify as speakers of one or more of the dialects of the language associated with the WDCB: Tjupan, Mantjiltjarra and Martu;⁷²
- c. The claim group members follow the normative laws and customs of the WDCB; and
- d. The claim group members share the WDCB belief in the concept of *tjukurrpa*.⁷³

[74] The affidavits of the members of the claim group provide the following in relation to the existence of a relevant society:

- c. (name removed) recalls:
 - i. A camp at Bronzewing Well on Barwidgee station where 'lots of old people lived, including my mother and [apical ancestor] (name removed) and his family';⁷⁴
 - ii. (name removed) spoke Tjupan, one of the recognised dialects of the WDCB language, and that he would yell out to people in Tjupan to 'Run away!' when the police were coming, while telling the police that he was calling the people over to them;⁷⁵
 - iii. Seeing men painted up for dances at law time at Barwidgee, and that '[w]e seen them dance in white ochre, the other is red ochre that they would get from the Melrose windmill [south of the application area]... [and] [t]hat red ochre is still there today, they still collect it for law business';⁷⁶
 - iv. Seeing people trade things at law time like boomerangs (*walanu*) and nulla nullas (*tjuna*);⁷⁷

⁷¹ Anthropological report [5.1]–[5.17].

⁷² Ibid, [5.24].

⁷³ Ibid [5.17]–[5.23].

⁷⁴ Affidavit (name removed), 8 June 2018 [10].

⁷⁵ Ibid [30].

⁷⁶ Ibid [40]–[41].

⁷⁷ Ibid [42].

- v. Apical ancestors (name removed) and (name removed) were at Barwidgee at the same time and ‘I saw them going off to do law business together’;⁷⁸ and
 - vi. There are grinding stones used to make damper ‘everywhere’ on Barwidgee and that ‘[m]y nanna did that and these days we can do it if we have to’.⁷⁹
- d. (name removed) states:
- i. The ‘old people’ said that burning the country is good as it brings more plants and animals back, and that ‘[w]e still do this burning now’;⁸⁰
- e. (name removed) states:
- i. He grew up on Wonganoo station with his parents until his father passed away;⁸¹
 - ii. ‘I speak Martu language. My parents speak Mantjintjarra language. It’s the same language, we all speak that.’⁸²
- f. (name removed) states:
- i. When she was growing up, she spoke the Tjupan language, and that ‘these days people say they speak “Martu” or “Tjupan” but it’s the same language really’.⁸³

What information has been provided in relation to the laws and customs?

[75] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are ‘traditional’, that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society.

[76] I have summarised information from the materials regarding traditional laws and customs that I consider relevant to my task at s 190B(5)(b) below.

[77] Attachment F states that the ‘fundamental belief system’ of the WDCB is that of the *tjukurrpa*, which:

- a. ‘provides a moral, social and judicial guide to everyday life;

⁷⁸ Ibid [58].

⁷⁹ Ibid [67].

⁸⁰ Affidavit of (name removed), 8 June 2018, [31]–[32].

⁸¹ Affidavit of (name removed), 7 June 2018, [5].

⁸² Ibid [38].

⁸³ Affidavit of (name removed), 8 June 2018, [35].

- b. lays down the rules or principles by which members of the native title claim group both relate to and conduct themselves in relation to land and waters covered by the application area;
- c. explains the formation of the landscape; and
- d. is evidenced by the particular features of the landscape.’⁸⁴

[78] Attachment F also states that ‘[t]he traditional laws and customs and observed by the people of the [WDCB], including the members of the native title claim group, are given normative force by:

- a. widespread commitment to the *tjukurrpa* and the high value placed upon the sacred amongst the people of the [WDCB]; and
- b. a fear of being ostracised or otherwise punished (including socially and/or physically) for the breach of the traditional laws and customs.’⁸⁵

[79] The submissions assert:

- a. The concept of *tjukurrpa* is ‘both the foundation and the source of the traditional laws and customs of the WDCB’⁸⁶
- b. Traditional laws and customs are practiced in relation to the following aspects of the WDCB society including in the application area, including:
 - i. Kinship and marriage;⁸⁷
 - ii. Totems;⁸⁸ and
 - iii. ‘Law business’.⁸⁹

[80] The affidavits of the members of the claim group provide the following in relation to the existence and observance of traditional laws and customs and of the *tjukurrpa*:

[81] (name removed) recounts the following examples of traditional laws and customs:

- a. Punishment:
 - i. A relative named (name removed), who administered reciprocal justice on a man called (name removed) who had been involved in killing (name removed)’s family.

⁸⁴ Submissions [60]–[61].

⁸⁵ Attachment F [62].

⁸⁶ Submissions [19].

⁸⁷ Ibid [24]–[26].

⁸⁸ Ibid [31]–[32].

⁸⁹ Submissions [36]–[37].

As a result of (name removed)'s challenge, (name removed) 'stood out there and got punished and he got lucky to come out of that alive, he got a spear through the leg and that was enough for him.'⁹⁰

- ii. 'I seen that punishment a lot when I was little, Mum always said to get inside because we don't know where the spear is going to go! That's the same thing that happened to old (name removed)... After they get their punishment, that's it – they can't be punished again. This still happens for Aboriginal people today'.⁹¹

b. Law business:

- i. 'On Barwidgee there is a few *ngurlunga* places. Pop and (name removed) used to put them law things in the trees to keep them safe, those things are still there today... That law business that they do today is the same thing that my old people used to do.'⁹²
- ii. His Pop, apical ancestor (name removed) was a law man, and as a young boy he was forbidden from seeing the *marlulu* (law business) on the application area, and that another relative would tease him for being 'such a law abiding young fella'.⁹³

c. *Tjukurrpa* / Dreaming

- i. Stories taught to him by (name removed) and his mother, including particular eagle dreaming stories associated with features of the landscape in and nearby to the application area.⁹⁴

d. Access to country:

- i. 'It was (name removed)'s country because he was there most and he exercised his law there. The people who came to Barwidgee area had to see him first and get his permission before visiting or even walking through. We seen that several times, mum or someone else would sing out to him "Wongai coming" so he would go and check them out. It if was a stranger he had to stay where he came from and had to camp away from us on his side, on the side where their country is. They still do that today, in the bush'.⁹⁵

e. Transmission of knowledge:

⁹⁰ Affidavit of (name removed), 8 June 2018 [32].

⁹¹ Ibid [44].

⁹² Ibid [37]–[38].

⁹³ Ibid [40].

⁹⁴ Ibid [45]–[47].

⁹⁵ Ibid [49].

- i. Learning about who had been camping on the application area in the past from his mother who would bend a piece of wire into a particular shape as an adaptive practice to explain the story, and '[t]hey used to use a stick from the bush but my mum always used to use a wire'.⁹⁶

[82] (name removed) states:

a. *Tjukurrpa* / Dreaming

- i. His father told him '*tjukurrpa* [dreaming] from Mangkili and all over'⁹⁷
- ii. There are *tjukurrpa* locations with associated stories in and around the application area, which he knows because of his role as a senior law man or *wati*, including sacred law grounds, a fire dreaming site and rock painting sites.⁹⁸

b. Kinship / Justice

- i. That the 'skin system is still going today. If you break this skin law, people still get speared'.⁹⁹

[83] (name removed) states:

a. Spiritual responsibilities / justice

- i. He has responsibilities as a *wati* and there are severe consequences if he breaks the law, and 'I get nervous taking about mens business and the law'.¹⁰⁰
- ii. There are sacred places on the application area that he will only talk about with the elders that have been through the law.¹⁰¹

b. Transmission of knowledge:

- iii. 'My family all been grow up there [*sic*] at Wonganoo and my old fella, he showed me some of those important cultural places there. As a *wati* it's my job to protect those places at Wonganoo, me and other senior mens [*sic*] gotta do it'.¹⁰²

c. Totems:

- iv. 'My *tjarin* [Dreaming] is emu... I never used to eat them because they told me that's my *tjarinn* [*sic*]. That would be like eating yourself.

⁹⁶ Ibid [92].

⁹⁷ Affidavit of (name removed), 8 June 2018 [12].

⁹⁸ Ibid [18]–[23].

⁹⁹ Ibid [45].

¹⁰⁰ Affidavit of (name removed), 7 June 2018 [14].

¹⁰¹ Ibid [22].

¹⁰² Ibid [26].

[84] (name removed) states:

a. Law business:

- i. Apical ancestor (name removed) 'was a boss for sites at Albion Downs, Sir Samuel and also at Barwidgee... That's why it's important to us – their tools and their law stuff are still in the hills in Barwidgee today.'¹⁰³
- ii. There are law grounds on Barwidgee associated with men's business, and that her uncle would tell her about the places she couldn't go.¹⁰⁴

b. Transmission of knowledge:

- iii. 'My mother showed me some *tjukurrpa* places there on Barwidgee, she knew it and she had a lot of respect for her law and culture...from what she was shown by her mother and father.'¹⁰⁵

c. Kinship

- iv. The kinship system 'was put in place so that we didn't marry too close... These days people marry who ever [*sic*] they want but we still talk about it, and people still get growled at for marrying wrong skin'.¹⁰⁶

d. Totems

- v. 'My *tjukurrpa* is the goanna, my mother took me and showed me and told me the story of how she tracked me and dug the goanna up... I can't eat goanna! I don't even like people killing it, it makes me feel no good.'¹⁰⁷

Conclusion on factual basis addressing the assertion of s 190B(5)(b)

[85] I am satisfied that there is sufficient information in the application and accompanying documents to support the assertion that there was a society in the application area at settlement which observed traditional laws and customs.

[86] I have reached this conclusion by considering the historical information provided in the anthropological report summarised above, and the affidavits of the members of the claim group, who, as outlined above, provide information that demonstrates the existence of a society in and around the application area of which their predecessors were members.

¹⁰³ Affidavit of (name removed), 8 June 2018 [11].

¹⁰⁴ Ibid [19].

¹⁰⁵ Ibid [22].

¹⁰⁶ Ibid [41].

¹⁰⁷ Affidavit of (name removed), 8 June 2018 [42].

- [87] I consider the information in the affidavits relating to the use of dialects of the WDCB language by both the apical ancestors and current claim group members to be a significant indicator of an identifiable society. The use of WDCB dialects in the application area also supports the assertion that the application area forms part of a wider society, which is stated in Attachment F, the submissions and the anthropological report.
- [88] The information from the members of the claim group about living on the application area with their apical ancestors and other predecessors; and observing normative laws and customs such as the requirement to ask permission to enter the application area, the prohibition on boys seeing the *marlulu* (law business) and the administration of reciprocal justice further indicates to me that the application area was part of a functioning society at settlement.
- [89] The information I have included above from (name removed) about the use of red ochre by the apicals and other predecessors, sourced from an area to the south of the application area (Melrose) and used in ceremonies on the application area, is one salient example from which I can infer that the application area was part of a society at settlement. This accords with the information in the anthropological report which asserts that the historical record states that the application area was part of a society that existed at the time of European settlement.
- [90] I can infer from the information in Attachment F, the submissions, the anthropological report and the claimants' affidavits that the concept of *tjukurrpa* and 'the traditional laws and customs' of the claim group are essentially interchangeable terms, or at least are inextricably linked, insofar as the basis of the traditional laws and customs arises from the observance of the *tjukurrpa*.

Decision on s 190B(5)(b)

- [91] I consider that the factual basis is sufficient to support the assertion of the existence of a society in the application area 'united in and by its acknowledgement and observance of a body of law and customs' at settlement.¹⁰⁸
- [92] I consider that the information in the affidavits of the members of the claim group demonstrates that there is widespread observance of laws and customs connected to the *tjukurrpa*, and that these laws and customs are 'traditional' as they are rooted in the laws and customs of the pre-sovereignty society, and have been passed down through the generations since that time. The examples provided by members of the claim group about learning about

¹⁰⁸ *Yorta Yorta* [46], [49].

the *tjukurrpa* and related laws and customs from the apical ancestors and other predecessors indicates to me that the laws and customs observed by the claim group are ‘traditional’ in the *Yorta Yorta* sense.

[93] I am therefore satisfied that the factual basis material provided is sufficient to meet the requirements of s 190B(5)(b).

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

[94] This condition is concerned with whether the factual basis material is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[95] Meeting the requirements of this condition relies on whether there is a factual basis supporting the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.¹⁰⁹

[96] I also understand that if the applicant’s factual basis material relies upon the drawing of inferences, that ‘[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity’.¹¹⁰

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

[97] As discussed above in relation to s 190B(5)(b), I am satisfied the factual basis material demonstrates that the similarity between the laws and customs of the current claim group and those of the pre-sovereignty society justify an inference of continuity. This is because the material shows how laws and customs acknowledged and observed by the claim group’s predecessors have been passed down through the generations, with information about how successive generations acknowledged and observed those same laws and customs on and in relation to the application area.

[98] With regard to the guidance from Dowsett J in *Gudjala 2009* regarding genealogical links between the pre-sovereignty society and the claim group, it appears that some of the members of the claim group have genealogical links to some of the named apical ancestors. I note, however, the assertions in the material that according to the traditional laws and customs of the WDCB, this is not the only way that a member of the claim group can gain native title rights and interests.

¹⁰⁹ Ibid [29].

¹¹⁰ *Gudjala 2009* [33].

[99] Attachment F asserts that, under the traditional laws and customs of the WDCB, the nature and extent of rights and interests exercisable by a person in relation to an area will depend on, amongst other things:

- a. Birth on the application area;
- b. Birth of an ancestor on the application area;
- c. Having religious, sacred, ritual, practical and/or historical knowledge of the application area;
- d. Having one's conception site on the application area;
- e. Having burial sites of ancestors on the application area;
- f. Having one's initiation site on the application area; and
- g. Long association with the application area.¹¹¹

[100] There are examples of the observation of this aspect of the law in the affidavits of the members of the claim group, including:

a. (name removed) statements:

- i. '[i]t was (name removed)'s country because he was there most and he exercised his law there',¹¹²
- ii. 'That old fella, (name removed), he should be on a claim for Wonganoo too, he has cultural knowledge for sacred sites and he helps us to look after them'.¹¹³

b. (name removed) statement:

- i. 'If baby born on country, that's his country. Of course it is.'¹¹⁴

c. (name removed)'s statement:

- i. 'My sister (name removed) was born at Wonganoo. That makes it special for her, it's her home, her *ngurra*. That's one way people get country, not just though [*sic*] the parents'.¹¹⁵

d. (name removed)'s statement:

¹¹¹ Attachment F, [66]–[67].

¹¹² Affidavit of (name removed), 8 June 2018 [49].

¹¹³ *Ibid* [56].

¹¹⁴ Affidavit of (name removed), 8 June 2018 [41].

¹¹⁵ Affidavit of (name removed), 7 June 2018 [29].

- i. 'The elders for that country at Barwidgee who passed on are still protecting that place and they could and visit us when we sleep, you can hear them crying a long time. It's very scary but when I hear that I will shout out my grandfathers name or my grandmothers name and they will leave me in peace, because they know that I'm from the country'.¹¹⁶

[101] I therefore consider that the factual basis material demonstrates that the native title rights and interests in the application area are held in accordance with the traditional law and customs of the WDBC, noting the above information which demonstrates that those laws enable the rights and interests to be acquired through methods other than genealogical links.

Decision on s 190B(5)(c)

[102] Given my finding that the factual basis is sufficient to support the assertion of the existence of traditional laws and customs at s 190B(5)(b), I am satisfied that the factual basis is sufficient to support the assertion of the continuity of traditional laws and customs as required by s 190B(5)(c).

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

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

What is required to meet this condition?

[104] 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 relation to this condition:

- a. It requires some measure of the material available in support of the claim;¹¹⁷
- b. 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);¹¹⁸
- c. Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.¹¹⁹

¹¹⁶ Affidavit of (name removed), 8 June 201, [23].

¹¹⁷ *Doepel* [126].

¹¹⁸ *Ibid* [127].

¹¹⁹ *Ibid* [132].

[105] 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’.¹²⁰

[106] I also note the comments by French J in relation to claims of exclusive rights: ‘the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation’.¹²¹

Which rights and interests can be established on a prima facie basis?

[107] Schedule E lists the rights claimed. It states at paragraph 13:

- a. Where native title rights and interests are not partially extinguished, the native title rights and interests claimed are **exclusive rights**; and
- b. In all other areas, the native title rights and interests claimed are **non-exclusive rights**.¹²²

[108] I have considered whether each of these rights can be established on a prima facie basis.

Exclusive rights

[109] Schedule E states that ‘**exclusive rights** means the exclusive rights of possession, occupation, use and enjoyment of the land and waters to the exclusion of all others’.¹²³

[110] Noting the above guidance from French J in *Sampi*, I consider that the information from (name removed) regarding outsiders seeking permission from apical ancestor (name removed) to enter his country,¹²⁴ and the statements from other members of the applicant regarding giving permission to outsiders to enter the application area¹²⁵ is sufficient to establish on a prima facie basis that the exclusive rights claimed exist and have been passed down to the claim group under traditional law and custom.

[111] I therefore consider there is sufficient information to demonstrate that the exclusive rights claimed can be established on a prima facie basis.

¹²⁰ Ibid [135].

¹²¹ *Sampi* [1072].

¹²² Schedule E [13] (emphasis in original).

¹²³ Ibid [12] (emphasis in original).

¹²⁴ Affidavit (name removed), 8 June 2018 [49].

¹²⁵ See for example, affidavit of (name removed), 8 June 2018 [34]–[36].

Non-exclusive rights

[112] Schedule E asserts four non-exclusive rights which I will address in turn below.

The right to access, remain in and use the area

[113] The affidavits of claimants provide examples of claim group members accessing, remaining in and using the application area. For example, Colleen Berry speaks of camping on the application area with her mother, her sons and other family members.¹²⁶

[114] I consider that the right to access, remain in and use the area is established on a prima facie basis.

The right to access, take and use the resources of the area for any purpose

[115] The affidavits of claimants provide examples of claim group members accessing, taking and using the resources of the application area. For example, (name removed) speaks of going to Wonganoo every Easter to look for emu eggs,¹²⁷ and (name removed) speaks of hunting various animals and harvesting fruits and vegetables from the application area;¹²⁸ and trading items with visitors to the area at law time, such as *walunu* (boomerangs) and *tjunas* (nulla nullas) made from particular trees in the application area.¹²⁹

[116] I consider that the right to access, take and use the resources of the area for any purpose is established on a prima facie basis.

The right to engage in spiritual and cultural activities on the area

[117] The affidavits of claimants provide that spiritual and cultural activities on the application area include:

- a. ceremonies such as corroborees¹³⁰ and burials;¹³¹ and
- b. learning and passing on *tjukurrpa* stories.¹³²

[118] I consider that the right to engage in spiritual and cultural activities on the application area is established on a prima facie basis.

The right to maintain and protect places and objects of significance on the area

[119] The affidavits of claimants provide that maintaining and protecting places and objects of significance on the area involves:

¹²⁶ Affidavit of (name removed), 8 June 2018 [26], [30]–[31].

¹²⁷ Affidavit of (name removed), 7 June 2018 [34].

¹²⁸ Affidavit of (name removed), 8 June 2018 [64]–[71].

¹²⁹ Affidavit of (name removed), 8 June 2018 [42].

¹³⁰ Affidavit of (name removed), 8 June 2018 [41]–[42].

¹³¹ Affidavit of (name removed), 8 June 2018 [28], [35].

¹³² Affidavit of (name removed), 8 June 2018 [12], affidavit of (name removed), 8 June 2018 [22].

- a. maintaining the places on the application area where sacred objects are kept;¹³³ and
- b. maintaining sacred *tjukurrpa* places on the application area such as rock carvings.¹³⁴

[120] I consider that the right to maintain and protect places and objections of significance on the application area is established on a prima facie basis.

Decision on s 190B(6)

[121] Because I am satisfied that there is sufficient factual basis material to support the assertion of the existence of traditional laws and customs as required by s 190B(5)(b), I am satisfied that there is sufficient information to show that, prima facie, the native title rights and interests claimed can be established. This is because, according to the definition provided in s 223(1), a native title right or interest is one that is held under traditional laws acknowledged and traditional customs observed.

[122] In addition to this, to meet the condition of s 190B(6), there must be information within the application that talks about each of the individual rights claimed. I am satisfied that the application contains sufficient information of this type, and that it speaks to all of the rights claimed, both exclusive and non-exclusive.

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

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

What is required to meet this condition?

[124] 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’.¹³⁵

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

- a. The material must satisfy the Registrar (or her delegate) of particular facts and evidentiary material is therefore required;

¹³³ Affidavit of (name removed), 8 June 2018 [37]; affidavit of (name removed), 8 June 2018 [11].

¹³⁴ Affidavit of (name removed), 7 June 2018 [22].

¹³⁵ Section 190B(7)(a).

- b. 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;¹³⁶
- c. The physical connection must be in accordance with the traditional laws and customs of the claim group;¹³⁷
- d. The material may need to address an actual presence on the application area.¹³⁸

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

[126] Given his birth on the application area at Barwidgee station, his knowledge of the *tjukurrpa* from his predecessors including apical ancestor (name removed), his adherence to the traditional laws and customs of the WDCB, such as the rules about sharing food on the application area,¹³⁹ and frequent visits to the application area, I consider that (name removed) currently has or previously had a traditional physical connection with the application area, and that his connection is held in accordance with the traditional laws and customs of the claim group.

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

[127] In my view the application complies with the provisions of ss 61A(1)–(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 report	Met
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B	Met
s 61A(3) claimant applications not to claim certain rights and interest in previous non-exclusive possession act	Schedule E	Met

¹³⁶ *Doepel* [18].

¹³⁷ *Gudjala 2007* [89].

¹³⁸ *Yorta Yorta* [184].

¹³⁹ Affidavit of (name removed), 8 June 2018 [65]–[66].

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

[128] In my view the application meets the requirements of s 190B(9):

Requirement	Information addressing requirement	Result
s 190B(9)(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
s 190B(9)(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
s 190B(9)(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B	Met

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

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

[129] 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?

[130] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material.¹⁴⁰

Section 61

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

¹⁴⁰ *Doepel* [16], [35]–[39].

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

Section 62

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Replacement affidavits filed 29 June 2018	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, Attachment D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Attachment F	Met
s 62(2)(f)	Activities	Attachment 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 I	Met

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

[133] I am satisfied that no person in the native title claim group for this application was also a member of the native title claim group for any previous overlapping application.

What is required to meet this condition?

[134] 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**) was a member of a native title claim group for any previous application’.¹⁴¹

[135] To be a ‘previous application’:

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

Are there any relevant ‘previous applications’?

[136] The geospatial report states that no applications which fall within the external boundary of this application appear on the Register as at 7 June 2018. I have also conducted my own search of the Register and am satisfied that there were no relevant ‘previous applications’ on 25 May 2018 when this application was made. I understand ‘made’ in s 190C(3)(b) means the date on which the current application was filed in the Court.¹⁴² I therefore do not need to determine whether there are any claimants in common between this application and any other applications.

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

[137] I am satisfied that the requirements of s 190C(4) are met, my reasons for which follow below.

What is required to meet this condition?

[138] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that either:

¹⁴¹ Emphasis in original.

¹⁴² *Strickland*, [12]–[22], [35], [41]–[52].

- a. the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;¹⁴³ 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.¹⁴⁴

[139] Following s 190C(4)(b) there is a note in the Act referring to the definition of ‘authorising the making of applications’ in s 251B, which reads as follows:

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

- (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group ... must be complied with in relation to authorising things of that kind—the persons in the native title claim group ... authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
- (b) where there is no such process—the persons in the native title claim group ... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group ... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.¹⁴⁵

[140] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:

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

[141] I note French J’s comments in *Strickland* that the insertion of the word ‘briefly’ in s 190C(5)(b) ‘suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.’¹⁴⁶

[142] I also note French J’s comments in relation to the importance of authorisation, that it is ‘fundamental to the legitimacy of native title determination applications’ and ‘is not a condition to be met by formulaic statements in or in support of applications’.¹⁴⁷

¹⁴³ Section 190C(4)(a).

¹⁴⁴ Section 190C(4)(b).

¹⁴⁵ Emphasis in original.

¹⁴⁶ *Strickland* [57].

Is the requirement of s 190C(5) met?

[143] Schedule R of the application refers to Attachment R, which states that the applicant does not seek certification of the application under s 190C(4)(a), relying instead on s 190C(4)(b).

Attachment R also briefly sets out the grounds on which the applicant asserts that s 190C(4)(b) is met, which I have summarised below:

- a. There was a claim group meeting on 8 May 2018 at Bronzewing Well on Barwidgee station, where the members of the applicant were authorised in relation to this claim;
- b. Authorisation was made in accordance with a process derived from traditional law and custom, under which decisions are made by consensus.
- c. Further information about the authorisation process is in the affidavits of the members of the applicant dated 8 May 2018 and the affidavit of (name removed) dated 28 May 2018.

[144] I consider that this information is sufficient to satisfy the requirements of s 190C(5).

Does the material address the decision making process required by s 251B?

[145] As discussed above, the affidavits of the members of the applicant dated 8 May 2018 were uplifted and replaced by consent order of the Court on 29 June 2018. I have therefore considered these replacement affidavits in reaching my decision on s 251B and s 190C(4)(b). Each affidavit affirms that the deponent believes that he or she is authorised by all of the persons in the native title group to make the application and to deal with the matters arising in relation to it.¹⁴⁸ Each affidavit also affirms that, in regards to the authorisation of the applicant, the process of decision making required under the system of traditional laws and customs has been complied with.¹⁴⁹

[146] (name removed)'s affidavit affirms that the traditional decision-making process is one of consensus, with elders having more authority on certain questions, and the whole group making the final decision on the matter being discussed.¹⁵⁰ This accords with the information affirmed by the members of the applicant in their affidavits, which state that the traditional

¹⁴⁷ Ibid.

¹⁴⁸ Affidavit of (name removed), 20 June 2018 [5]; affidavit of (name removed), 20 June 2018 [5]; affidavit of (name removed), 19 June 2018 [5]; affidavit of (name removed), 19 June 2018 [5].

¹⁴⁹ Affidavit of (name removed), 20 June 2018 [7]; affidavit of (name removed), 20 June 2018 [7]; affidavit of (name removed), 19 June 2018 [7]; affidavit of (name removed), 19 June 2018 [7].

¹⁵⁰ Affidavit of (name removed), 28 May 2018 [26]–[27] ('(name removed) affidavit').

decision-making process is one of discussion and consensus, and that this process was used to authorise the members of the applicant to make the claim.¹⁵¹

[147] (name removed) concludes his affidavit with the statement: ‘In my opinion, the decisions made in relation to the proposed Kultju claim at the authorisation meeting held on 8 May 2018, including the decision about which claim group members would be named as the “Applicant” to make the native title claim, were done in accordance with [the] traditional decision-making process’.¹⁵²

[148] I consider that there is sufficient information to demonstrate that the applicant is authorised in accordance with the traditional laws and customs of the native title claim group, and that the requirements of s 251B are therefore met.

Does the material show that every member of the group was given every reasonable opportunity to participate in the decision to authorise the applicant?

[149] The affidavit of (name removed) provides information about the background to the claim and the notification of the authorisation meeting, including that:

- a. Anthropological research was undertaken by Central Desert Native Title Services Ltd (Central Desert);¹⁵³
- b. A community meeting was held on 7 March 2018 to discuss the findings of that research in relation to the area described as ‘Barwidgee / Wonganoo unclaimed area’;¹⁵⁴
- c. Potential claimants were notified of the 8 May 2018 authorisation meeting in the following ways:
 - i. Copies of the meeting notice and a map of the proposed area were mailed to all of the proposed claimants identified by the anthropological research;¹⁵⁵
 - ii. The meeting notice was posted on message boards in the towns of Wiluna and Leonora and in the communities of Mulga Queen and Cosmo-Newberry;¹⁵⁶
 - iii. The proposed claimants were telephoned by Central Desert’s Community Engagement Officer in the weeks leading up to the authorisation meeting to

¹⁵¹ Affidavit of (name removed), 20 June 2018 [8]; affidavit of (name removed), 20 June 2018 [8]; affidavit of (name removed), 19 June 2018 [8]; affidavit of (name removed), 19 June 2018 [8].

¹⁵² (name removed) affidavit [27].

¹⁵³ (name removed) affidavit, 28 May 2018 [9]–[12].

¹⁵⁴ Ibid [13].

¹⁵⁵ Ibid [15].

¹⁵⁶ Ibid [16].

provide details of the meeting and ask whether travel assistance was required.¹⁵⁷

[150] Paragraph 16 of (name removed)'s affidavit refers me to an attachment marked 'MA-1'. That annexure is a copy of the meeting notice which I understand from (name removed)'s affidavit was both mailed to the proposed claimants and displayed on various community notice boards. The meeting notice issue date is 18 April 2018 and it sets out the date and time of the authorisation meeting, as well as the agenda and a map of the application area.

[151] Under the heading 'People who should attend this meeting', the meeting notice includes two lists:

- a. 'Descendants of the following people...' and
- b. 'And the following individuals...'

[152] I note that the list of ancestors accords with the list of apical ancestors included in the description of the claim group at paragraph 43 of Attachment A of the application, and that the named individuals asked to attend accords with those named at paragraph 42 of Attachment A.

[153] There follows the below statement in bold lettering:

If you think you have native title rights and interests in the area of the map but you (or your family) are not sure if you are included on the list above, please contact the Central Desert office...

[154] Although the dates that the meeting notice was mailed and displayed on the noticeboards are not provided, I have no reason to believe that this would have occurred long after the notice was issued. The content of the notice summarised above, the communication of the notice by mail and message board, combined with the telephone calls from Central Desert's Community Engagement Officer demonstrate to me that potential claimants were given adequate notice of the authorisation meeting.¹⁵⁸

[155] I note also that the meeting notice provides the telephone numbers for Central Desert, including a freecall number. (name removed)'s affidavit affirms that when proposed claimants were contacted by the Community Engagement Officer, assistance with travelling to the authorisation meeting was offered. I am therefore satisfied that potential claimants had adequate opportunity to either make their views about the claim known to Central Desert by

¹⁵⁷ Ibid [17].

¹⁵⁸ See for example, the comments from French J in *Bolton*, [45], regarding the inadequacies of a meeting notice, which although made in relation to a s 66B application, I believe are relevant here.

way of a telephone call, or to attend the meeting in person by taking up the offer of travel assistance.

[156] Based on the information in (name removed)'s affidavit and its annexures, I am satisfied that every member of the group was given every reasonable opportunity to participate in the decision to authorise the applicant.

Does the material make clear who the persons required to authorise the applicant are?

[157] I understand that part of my task at s 190C(4) is to assess whether or not the claim group is a properly constituted 'native title claim group' as defined in s 61(1).¹⁵⁹

[158] I note that the bolded statement in the meeting notice directed people to contact Central Desert if they thought they 'have native title rights and interests in the area of the map', and that a map of the 'Proposed Claim Area BARWIDGEE WONGANOO' was included in the notice.¹⁶⁰

[159] I consider that the wording of the meeting notice and map of the application area, and the provision of a contact point for potential claimants in that notice demonstrates that a process was undertaken to ensure that all members of the native title claim group were given an opportunity to participate, and as a consequence of that process, the native title claim group was properly constituted.

[160] To my mind this is further demonstrated by the discussion that occurred at the authorisation meeting about the inclusion of (name removed) as an apical ancestor, if the (name removed) family consented to his inclusion, as described in the affidavit (name removed).¹⁶¹

[161] (name removed)'s affidavit explains that after the authorisation meeting he discussed the claim with members of the (name removed) family, who confirmed that they did not consider it appropriate to be included in the claim group description, and as a result have not been included in this application.¹⁶²

[162] I consider that the information in the affidavit of (name removed) provides sufficient information to show that the native title claim group was properly constituted, noting the steps taken prior to the authorisation meeting, including through the wording of the meeting notice inviting people who believe they have rights in the application area and the inclusion of a map of the application area in the notice; and the steps taken at and after the authorisation

¹⁵⁹ *Wiri People*, [26]–[29].

¹⁶⁰ (name removed) affidavit, 28 May 2018, Annexure MA-1.

¹⁶¹ *Ibid* [17].

¹⁶² *Ibid* [21].

meeting to confirm that (name removed) should not be included in the application as an apical ancestor.

Does the material provide sufficient detail of the conduct of the meeting?

[163] (name removed)'s affidavit includes the following statements about the authorisation meeting:

- a. It was well attended and a file note marked 'MA-2' attached to the affidavit records the attendance and apologies;¹⁶³
- b. At least one descendant from each of the proposed apical ancestors attended and some of the applicant members attended;¹⁶⁴
- c. Conversations with meeting attendees and colleagues at Central Desert has led (name removed) to believe that claimants who did not attend the meeting were aware of it being held and did not object to it going ahead, so long as their rights and interests were discussed at the meeting;¹⁶⁵
- d. The members of the applicant were authorised in accordance with the traditional decision-making processes of the claim group;¹⁶⁶
- e. The authorisation meeting confirm the proposed claim group as recorded on the meeting notice, but to include (name removed) as an apical ancestor, if the (name removed) family consented to his inclusion.¹⁶⁷

[164] I note Mansfield J's comments in *Doepel* that the Registrar must be satisfied 'of the fact of authorisation by all members of the native title claim group' and that s 190C(4)(b) clearly involves 'some inquiry through the material available to the Registrar to see if the necessary authorisation has been given'.¹⁶⁸ I have therefore considered the material available to me in the application and note the following:

- a. With regards to the statement that the meeting was well attended, I note that the annexure marked 'MA-2' records that 56 people attended the authorisation meeting, and there were nine apologies.
- b. With regard to the statement that some of the applicant members attended, I note that this is consistent with the information in the affidavits of the claim group members, for

¹⁶³ Ibid [20].

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid [18].

¹⁶⁷ Ibid.

¹⁶⁸ *Doepel* [78].

example (name removed) affirms that he attended the authorisation meeting and was chosen 'as one of the applicant'¹⁶⁹ and (name removed) affirms that he could not attend the meeting but '[t]hat mob came back and talked to me about it'.¹⁷⁰

- c. I consider the above information from (name removed)' affidavit also accords with the third statement, that claimants who did not attend the meeting were aware of it being held and did not object to it going ahead, so long as their rights and interests were discussed at the meeting. (name removed)' affidavit states that after authorisation meeting '[t]hey came back they let me know that I was on [as a member of the claim group], which is good because that's my country there at Wonganoo and I gotta talk for it, protect it'.¹⁷¹
- d. With regards to the fourth and fifth statements, the authorisation of the applicant in accordance with traditional law and custom, and the confirmation of the members of the claim group, I have addressed the content of these statements above in my discussions of s 251B and s 61(1).

[165] Having inquired through the information in the application before me, I consider that there is sufficient detail about the conduct of the meeting, as well as subsequent actions taken in order to confirm the constitution of the claim group and the authorisation of the applicant, to enable me to be satisfied of the fact of authorisation.

Decision on s 190C(4)

[166] Given my above reasons for finding that the requirements of s 190C(5) are met, that the authorisation process accords with s 251B, that claim group members were given every reasonable opportunity to participate in the decision making process, that the native title claim group was properly constituted in accordance with s 61(1), and that the application contains sufficient detail of the conduct of the meeting, I am satisfied that s 190C(4)(b) is met.

End of reasons

¹⁶⁹ Affidavit of (name removed), affirmed 8 June 2018 [99].

¹⁷⁰ Affidavit of (name removed), affirmed 8 June 2018 [38].

¹⁷¹ Ibid.