

# Registration Decision

<b>Application name</b>	Nanda 2
<b>Name of applicant</b>	Derek Drage, Helen Nutter, Annette Pepper, Dougy Ryder, Delveen Whitby
<b>Federal Court of Australia No.</b>	WAD286/2018
<b>NNTT No.</b>	WC2018/010
<b>Date of Decision</b>	24 July 2018

## Claim not accepted for registration

I have decided that the claim in the Nanda 2 application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must not be accepted for registration.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy ss 190C(3)–(4). It also does not satisfy ss 190B(5)–(7).

*Delegate of the Native Title Registrar*<sup>2</sup>

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

<sup>2</sup> 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*)

*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] FCA 1384 (*Doepel*)

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

*Wakaman People No 2 v Native Title Registrar* [2006] FCA 1198 (*Wakaman*)

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

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

## BACKGROUND

- [1] This application was filed on behalf of the Nanda 2 native title claim group. It covers land and waters in the mid-west region of Western Australia including Kalbarri National Park.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the amended application and accompanying affidavits to the Native Title Registrar (Registrar) on 28 June 2018 pursuant to s 63 of the Act.
- [3] 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.<sup>3</sup> If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.<sup>4</sup>
- [4] I have decided that the application does not satisfy all of the registration test conditions and my reasons on each condition follow below.

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<sup>3</sup> Section 190A(6).

<sup>4</sup> Section 190A(6B).

## **Information considered**

- [5] 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.
- [6] 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 10 July 2018 (the geospatial report) and have considered information available through Geospatial Services in relation to locations mentioned in the application.
- [7] 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’.<sup>5</sup>
- [8] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.<sup>6</sup>
- [9] The state of Western Australia (the state government) has not provided submissions in relation to the application of the registration test.<sup>7</sup>

## ***Procedural fairness***

- [10] As noted above, I have considered the material within the application and accompanying documents filed by the applicant on 28 June 2018.
- [11] On 2 July 2018 the practice leader for the matter (practice leader) wrote to the lawyer for the applicant enquiring whether any further material would be provided and noted that Schedules M–S were missing from the application filed with the Court. On 2 July 2018 the lawyer for the applicant confirmed with the practice leader that the applicant would not be filing the missing schedules or providing any further material.
- [12] On 3 July 2018 the practice leader wrote to the state government advising that I would be relying on the application and accompanying documents filed on 28 June 2018 for my

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<sup>5</sup> *Doepel* [16].

<sup>6</sup> Section 190A(3)(b).

<sup>7</sup> Section 190A(3)(c).

decision, and that should the state government wish to make any submissions, it should do so by 10 July 2018.

[13] No submissions were received from the state government.

[14] This concluded the procedural fairness processes.

## Merits of the claim (s 190B) – Conditions not 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 is 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.<sup>8</sup>

#### ***Does the information about the external boundary meet this condition?***

[17] Schedule B refers to Attachment B, which includes a written description of the external boundary of the application area as metes and bounds referencing Lowest Astronomical Tide (LAT), road casement and reserve boundaries, pastoral lease boundaries, and geographic coordinates referenced to the Geocentric Datum of Australia 1994 (GDA94).

[18] Schedule C refers to Attachment C, which is a map prepared by Yamatji Marlpa Aboriginal Corporation (YMAC), titled ‘Attachment C – Nanda 2 claim’ dated 27 June 2018 and includes:

1. The application area depicted by a bold blue outline;
2. Colour topographic background;
3. Scalebar, northpoint, coordinate grid, locality diagram and map legend; and
4. Notes relating to the source, currency and datum of data used to prepare the map.

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<sup>8</sup> *Doepel* [122].

[19] The geospatial report considers the description in Attachment B and the map in Attachment C and concludes that the description and map are consistent and identify the application area with reasonable certainty.

[20] Having considered the conclusions of the geospatial report, and the description and map 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?***

[21] 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.

[22] Attachment B specifically excludes four native title determination applications and two native title determinations.

[23] 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'.<sup>9</sup> Following this reasoning, I am satisfied that the description of the excluded areas is sufficiently clear for the purposes of s 190B(2), as it provides an objective mechanism to identify the areas described in the general exclusion clauses in Schedule B.

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

[24] 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?***

[25] 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.

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<sup>9</sup> *Strickland* [55].

[26] This condition requires consideration of ‘whether the application enables the reliable identification of persons in the native title claim group’, not whether the application has been made on behalf of the correct native title claim group.<sup>10</sup>

[27] 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’.<sup>11</sup>

[28] 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 I cannot consider material outside of the application at this condition.<sup>12</sup>

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

[29] Schedule A provides the following description of the native title claim group:

The application is brought on behalf of the Nanda people, who are the descendants of:

- Jilba
- Mary Jane Batt
- Alice McMurray
- Brindy
- Venus
- Polly

[30] From this description, I understand that in order for an individual to qualify as a member of the group they must be a descendant of the listed apical ancestors. I consider that this description provides a clear objective starting point, being descent from named persons. Determining all the members of the group from the six people 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.<sup>13</sup>

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

[31] 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.’

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<sup>10</sup> *Doepel* [51], [37]; *Gudjala 2007* [33].

<sup>11</sup> *Wakaman* [34].

<sup>12</sup> *Doepel* [16].

<sup>13</sup> *WA v NTR* [67].

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

[32] 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).

[33] 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.<sup>14</sup>

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

[34] Schedule E provides the following description of the native title rights and interests claimed:

The following native title rights and interests are claimed:

“Area A” means land within the application area that is landward of the high water mark and which comprises:

- (i) areas to which s47 of the Act applies;
- (ii) areas to which s47A of the Act applies; and
- (iii) areas to which s47B of the Act applies.

“Area B” means land and waters within the application area that is not included in Area A.

Rights in Area A:

1. Subject to paragraphs 3, and 4: in relation to Area A only, the applicant claims the native title rights and interests relating to exclusive possession, namely the right to possess, occupy, use and enjoy the area against the whole world.

2. Subject to paragraphs 3, 4 and 5: in relation to Area B only, the nature and extent of the native title rights and interests is that they confer the following non-exclusive rights on the Nanda People:

- (a) the right to enter and remain on the area, camp, erect temporary shelters and to travel over and visit any part of the area;
- (b) the right to hunt, fish, gather and use the resources of the area;
- (c) the right to take and use water; and
- (d) the right to engage in cultural activities on the area, including:
  - (i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity; and
  - (ii) conducting ceremony and ritual, including burial rites.
- (e) the right to be accompanied on to the area by those persons who, though not native title holders, are:
  - (i) spouses, partners, parents or children of the native title holders;

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<sup>14</sup> *Doepel* [99], [123].

(ii) people who are members of the immediate family of a spouse, partner, parent or child of a native title holder; or

(iii) people entering the area in connection with the performance of ceremonies or cultural activities in accordance with traditional laws and customs.

**Qualifications on the native title rights and interests**

3. The native title rights and interests are subject to and exercisable in accordance with:

- (a) the laws of the State and the Commonwealth, including the common law; and
- (b) the traditional laws and customs of the Nanda People.

4. Notwithstanding anything in this determination, there are no native title rights and interests in the Determination Area in relation to:

- (a) minerals as defined in the *Mining Act 1904* (WA) (repealed) and in the *Mining Act 1978* (WA);
- (b) petroleum as defined in the *Petroleum Act 1936* (WA) (repealed) and in the *Petroleum and Geothermal Energy Resources Act 1967* (WA);
- (c) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967* (WA); or
- (d) water lawfully captured by the holders of the Other Interests.

5. The native title rights and interests set out in paragraph 2 do not confer:

- (a) possession, occupation, use and enjoyment on the Nanda People to the exclusion of all others; or
- (b) a right to control the access to, or use of, those parts of the Determination Area or its resources.

[35] From this description, I understand that the native title claim group is claiming exclusive rights in areas that meet the description of 'Area A', and is claiming the non-exclusive rights listed in paragraph 2 in the areas that meet the description of 'Area B'.

[36] I am satisfied that the exclusive rights and interests in paragraph 1 and the non-exclusive rights and interests in paragraph 2 may be understood as 'native title rights and interests' as defined by s 223, which have 'meaning'.<sup>15</sup>

**Factual basis for claimed native title – s 190B(5) condition not met**

[37] I am not satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support any of the three assertions of s 190B(5)(a)–(c).

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<sup>15</sup> *Doepel* [99].

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

[38] 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.

[39] 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'.<sup>16</sup>

[40] 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 responsibility of the applicant. It is not a requirement that the Registrar or [her] delegate undertake a search for such material.'<sup>17</sup>

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

[41] As discussed above, Schedule E provides a description of the native title rights and interests claimed.

[42] Schedule F provides the following description of the native title rights and interests claimed:

The native title rights and interest are those of and flowing from the right to possession, occupation, use and enjoyment of the land pursuant to the traditional laws and customs of the claim group based on the following facts:

1. the native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area; and
2. such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:

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<sup>16</sup> *Doepel* [16]-[17]; *Gudjala 2008* [83], [92].

<sup>17</sup> *Martin* [23].

- a. descent from ancestors connected to the area;
  - b. conception in the area;
  - c. birth in the area;
  - d. traditional religious knowledge of the area;
  - e. traditional knowledge of the geography of the area;
  - f. traditional knowledge of the resources of the area;
  - g. knowledge of traditional ceremonies of the area;
3. such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group;
  4. the native title claim group continues to acknowledge and observe those traditional laws and customs;
  5. the native title claim group by those laws and customs have a continuing connection with the land in respect of which the claim is made;
  6. the rights and interests are capable of being recognised by the common law of Australia.

[43] Schedule G provides the following description of activities that the native title claim group have continuously carried out on the application area:

1. camping and living on the claim area and building structures thereon;
2. moving freely about and having access to the claim area;
3. hunting and gathering and fishing;
4. taking, using and trading the resources from the land and waters of the area, including forest products, water, minerals and other resources;
5. manufacturing tools and weapons from the resources of the land and waters;
6. disposing of the products of the land and waters or manufactured from the products of the land and waters by trade or exchange;
7. managing, conserving and caring for the land and waters and controlling access to the land and waters;
8. disposing of the products of the land and waters or manufactured from the products of the land and waters by trade or exchange;
9. managing, conserving and caring for the land and waters and controlling access to the land and waters;
10. conducting and taking part in ceremonies;
11. visiting and protecting sites;
12. passing on the knowledge of the country and of the traditional law and custom in accordance with custom and tradition.

[44] On reviewing the entirety of the information provided by the applicant, I consider that the information in Schedules E, F and G contain the only information that is relevant to the assertion at s 190B(5). I note that other schedules that often contain relevant information, such as Schedule M, have not been provided.

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

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

1. 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;<sup>18</sup>
2. that there is 'an association between the whole group and the area', although not 'all members must have such association at all times';<sup>19</sup> and
3. 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'.<sup>20</sup>

[46] 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'.<sup>21</sup> 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.<sup>22</sup>

[47] 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.

[48] In my view, the material does not provide a sufficient factual basis addressing that the predecessors of the claim group had an association with the land and waters covered by this application. There are no references to any locations inside the application area and no information about any association between the predecessors and the application area.

[49] For similar reasons, I consider that there is also insufficient factual basis to show the association the claim group currently has with the application area. There is no information about any association between any current claim group members and the application area, either generally or in relation to specific locations within the application area.

***Decision on s 190B(5)(a)***

[50] I consider that the factual basis material does not adequately address the association the claim group have, or their predecessors had, with the application area, in either a physical or spiritual sense. The information in the application does not explain the extent or nature of the

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<sup>18</sup> *Gudjala 2007* [52].

<sup>19</sup> *Ibid.*

<sup>20</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>21</sup> *Gudjala 2007* [40].

<sup>22</sup> *Ibid* [39].

association that claim group members have with the application area. I am therefore not satisfied that the application contains sufficient factual basis to meet the requirements of s 190B(5)(a).

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

[51] 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’.

[52] ‘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.

[53] Noting the similarity in language between the two provisions, 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).

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

1. ‘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;<sup>23</sup>
2. 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’;<sup>24</sup>
3. 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’;<sup>25</sup> and
4. those laws and customs have been acknowledged and observed ‘substantially uninterrupted’ since sovereignty, having been passed down the generations to the claim group.<sup>26</sup>

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<sup>23</sup> *Yorta Yorta* [46], [49].

<sup>24</sup> *Ibid* [47].

<sup>25</sup> *Ibid* [46].

<sup>26</sup> *Ibid* [87].

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

1. 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;<sup>27</sup>
2. 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;<sup>28</sup>
3. 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.<sup>29</sup>

[56] Schedule F provides a brief description of the factual basis on which it is asserted that the claimed native title rights and interests exist. It includes general statements that the claim group and their ancestors have held native title rights and interests in the application area since sovereignty. From the description in Schedule A, I can infer that those ancestors include the six named apical ancestors, although there is no information provided to explain how those apical ancestors were connected to a pre-existing society in the application area at sovereignty.<sup>30</sup>

[57] Schedule F also includes statements that the claim group acknowledge and observe traditional laws and customs that have been passed down from preceding generations. Those laws and customs that link the claim group members to the application area are said to be based on descent, conception, birth and/or traditional knowledge of the application area.

[58] While the asserted facts indicate that the laws and customs have passed down through the generations and as such the claim group continues to acknowledge and observe those traditional laws and customs of the pre-sovereignty society, in my view, these assertions are not at a sufficient level of detail to enable a genuine assessment of whether the factual basis supports that assertion.<sup>31</sup>

[59] In addition, I consider the factual basis is insufficient in supporting the assertion that the relevant laws and customs are ‘traditional’ in the *Yorta Yorta* sense. In particular, the factual

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<sup>27</sup> *Gudjala 2009* [37], [52].

<sup>28</sup> *Ibid* [40].

<sup>29</sup> *Ibid* [29], [54], [69].

<sup>30</sup> *Gudjala 2007* [66].

<sup>31</sup> *Gudjala 2007* [62], [66]; *Gudjala 2009* [27], [29].

basis is insufficient in explaining the connection between a pre-sovereignty society and the claim group, and the connection between the laws and customs acknowledged and observed by a pre-sovereignty society and those acknowledged and observed by the claim group.

***Decision on s 190B(5)(b)***

[60] I note Dowsett J's view that the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).<sup>32</sup> I consider that the information provided in Schedule F is such an assertion, and that the other schedules in the application do not provide sufficient information to meet the requirements of this provision. Therefore, s 190B(5)(b) is not met.

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

[61] 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.

[62] 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.<sup>33</sup>

[63] 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'.<sup>34</sup>

***Decision on s 190B(5)(c)***

[64] Given my finding that the factual basis is not sufficient to support the assertion of the existence of traditional laws and customs at s 190B(5)(b), I cannot be 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 not met**

[65] I consider that none of the claimed rights and interests have been established on a prima facie basis. Therefore, the application does not satisfy the condition of s 190B(6).

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<sup>32</sup> *Gudjala 2009* [29], [54], [69].

<sup>33</sup> *Ibid* [29].

<sup>34</sup> *Gudjala 2009* [33].

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

[66] 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:

1. It requires some measure of the material available in support of the claim;<sup>35</sup>
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);<sup>36</sup>
3. Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.<sup>37</sup>

[67] 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’.<sup>38</sup>

### ***Decision on s 190B(6)***

[68] Because I am not 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 not 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.

[69] 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 not satisfied that the application contains any information of this type.

### **Physical connection – s 190B(7): condition not met**

[70] I am not satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

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<sup>35</sup> *Doepel* [126].

<sup>36</sup> *Ibid* [127].

<sup>37</sup> *Ibid* [132].

<sup>38</sup> *Ibid* [135].

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

[71] 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’.<sup>39</sup>

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

1. The material must satisfy the Registrar (or her delegate) of particular facts and evidentiary material is therefore required;
2. 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;<sup>40</sup>
3. The physical connection must be in accordance with the traditional laws and customs of the claim group;<sup>41</sup>
4. The material may need to address an actual presence on the application area.<sup>42</sup>

[73] Given that there is no material in the application about any of the members of the claim group, I cannot be satisfied that any member has or has had the requisite traditional physical connection to the application area. In addition, given that I am not satisfied that there is sufficient factual basis to satisfy the requirement of s 190B(5)(b), I cannot be satisfied that s 190B(7) is met.

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<sup>39</sup> Section 190B(7)(a).

<sup>40</sup> *Doepel* [18].

<sup>41</sup> *Gudjala 2007* [89].

<sup>42</sup> *Yorta Yorta* [184].

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

[74] 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 and my own search of the Tribunal's mapping database	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 areas	Schedule B	Met

## No extinguishment etc. of claimed native title – s 190B(9): condition not met

[75] In my view the application does not meet all of the requirements of s 190B(9):

### ***Section 190B(9)(a) - no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown***

[76] I have reviewed the application and I am satisfied that there is no statement that expressly excludes a claim to minerals, petroleum or gas wholly owned by the Crown. Schedule E sets out a list of native title rights and interests claimed and includes a 'qualification' that 'no native title rights and interests' in relation to minerals, petroleum, geothermal resources or water captured by the holders of other interests 'exist'. It is not clear to me from this statement whether a *claim* to any of these resources is specifically excluded from either the claim to exclusive possession in Area A, or the claim to the non-exclusive rights in Area B. Schedule Q, which requires applicants to detail any claim of ownership of minerals, petroleum or gas wholly owned by the Crown, has not been provided.

[77] Given the wording of Schedule E and the lack of the requisite statement at Schedule Q, I consider that the applicant’s claim appears to include ownership of minerals, petroleum or gas.

***Section 190B(9)(b) - exclusive possession is not claimed over all or part of waters in an offshore place***

[78] I am satisfied that s 190B(9)(b) is met. Schedule E states that ‘Area A’ means land within the application area that is landward of the high water mark and which comprises areas to which ss 47, 47A and 47B applies, and that exclusive possession is claimed in Area A. Schedule B and Attachment B indicates that the claim of exclusive possession does not extend to any offshore place. Although Schedule P, which requires applicants to detail any claim of exclusive possession to an offshore place has not been provided, I am satisfied that the claim of exclusive possession does not include any offshore place.

***Section 190B(9)(c) - native title rights and/or interests in the application area have otherwise been extinguished***

[79] I am satisfied that s 190B(9)(c) is met, as there is no information before me that the native title rights and interests claimed have been otherwise extinguished.

## Procedural and other matters (s 190C)—Conditions not met

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

[80] 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?***

[81] 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.<sup>43</sup>

### ***Section 61***

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

Section	Details	Form 1	Result
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<sup>43</sup> *Doepel* [16], [35]–[39].

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

### **Section 62**

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

<b>Section</b>	<b>Details</b>	<b>Form 1</b>	<b>Result</b>
s 62(1)(a)	Affidavits in prescribed form	Affidavits	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 is blank, so I understand no searches have been carried out by or on behalf of the native title claim group	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)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

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

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

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

[85] 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’.<sup>44</sup> 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 (the Register) 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.

### ***Are there any relevant ‘previous applications’?***

[86] The geospatial report states that two applications fall within the external boundary of the application area. It identifies that the Mullewa Wadjari Community claim WC1996/093 was accepted for registration on 19 August 1996 and was therefore on the Register at the time this application was made. It also identifies that the Nanda People claim WC2000/013 was accepted for registration on 1 March 2001 and was therefore on the Register at the time this application was made. As the previous applications are described in the geospatial report as ‘accepted for registration’, their entry on the Register would have been made as a result of the applications being considered under s 190A.

[87] I have conducted my own searches to confirm the information in the geospatial report. Based on my searches of the Tribunal’s geospatial database I can see that the Mullewa Wadjari Community claim WC1996/093 and the Nanda People claim WC2000/013 overlap the current application. Based on my searches of the Register, I am satisfied that both these claims were on the Register at the time this application was made, being 19 August 1996 and 1 March 2001 respectively.

[88] I am therefore satisfied that the Mullewa Wadjari Community claim WC1996/093 and the Nanda People claim WC2000/013 are ‘previous applications’ for the purposes of s 190C(3).

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<sup>44</sup> Emphasis in original.

[89] I note that the land and waters covered by these two previous applications were not excluded by the applicant in the description of the application area found in Attachment B of the current application.

***Are there claimants in common?***

[90] Schedule O, which asks for details of the membership of the applicant or any member of the native title claim group in any other application made in relation to all or part of the application area, has not been provided by the applicant. I therefore rely solely on the information in the Register to determine whether there are claimants in common.

[91] With regards to the Mullewa Wadjari Community claim WC1996/093, the Register includes the following description of the persons claiming to hold native title:

The Mullewa Wadjari Native Title claimants are members of the Collard, Merritt, Flanagan, Hannah, Joseph, Jones, Green, Papertalk, Comeagain and Collins families, all originally from the Mullewa region, whose adult living members are hereunder listed in their entirety. The native title claim group is those people here listed and their biological descendants [list of 56 people].

[92] The information on the Register about the Mullewa Wadjari Community claim WC1996/093 does not include the names of any apical ancestors. In comparison, the description of the native title claim group in the current application includes only the names of the apical ancestors. As none of the members of the applicant in the current application appear to be members of the families listed in the description of Mullewa Wadjari Community claim WC1996/093, there is nothing before me to suggest that there are members that are common to both claims.

[93] With regards to the Nanda People claim WC2000/013, the Register includes the following description of the persons claiming to hold native title:

The claim is brought on behalf of the biological descendants of four apical ancestors, namely Jilba, Mary Jane Batt, Sara Feast and Alice McMurry.

[94] Relevantly, three of the apical ancestors listed in Schedule A of the current application are Jilba, Mary Jane Batt and Alice McMurray. Notwithstanding the variation in spelling of McMurry / McMurray, I consider that there are three apical ancestors common to the Nanda People claim WC2000/013 and the current application. I therefore am not satisfied that no person included in the current application was not also a member of a previous application, and so s 190C(3) is not met.

## Identity of claimed native title holders – s 190C(4): condition not met

[95] I am not satisfied that the requirements of s 190C(4)(a) are met.

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

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

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;<sup>45</sup> 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.<sup>46</sup>

[97] 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.<sup>47</sup>

[98] 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.

[99] 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.’<sup>48</sup>

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<sup>45</sup> Section 190C(4)(a).

<sup>46</sup> Section 190C(4)(b).

<sup>47</sup> Emphasis in original.

<sup>48</sup> *Strickland* [57].

[100] 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'.<sup>49</sup>

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

[101] Schedule R, which asks for information in relation to either s 190C(4)(a) or (b), has not been provided by the applicant. As there is no certificate from a representative Aboriginal / Torres Strait Islander body as required by s 190C(4)(a), I understand that the applicant is relying on s 190C(4)(b). While there is no information in the application, the accompanying affidavits from the members of the applicant include statements which in effect show that the requirement in s 190C(4)(b) have been met. I consider that the affidavits also briefly set out the grounds on which I should consider that s 190C(4)(b) has been met, as paragraphs 6 and 7 of each affidavit states:

6. The agreed and adopted decision-making process for authorising the applicant is a resolution passed by a majority vote, where a vote is conducted by a show of hands of those members of the native title claim group present at a claim group meeting.
7. Through the agreed and adopted decision-making process, the applicant is authorised by all persons in the native title claim group to make the application and to deal with the matters arising in relation to it.

[102] I consider that this information sets out the grounds 'briefly' and so s 190C(5) is met.

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

[103] The affidavits from the members of the applicant include a statement that the deponent is a member of the native title claim group and contain the following paragraphs:

6. The agreed and adopted decision-making process for authorising the applicant is a resolution passed by a majority vote, where a vote is conducted by a show of hands of those members of the native title claim group present at a claim group meeting.
7. Through the agreed and adopted decision-making process, the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it.

[104] Based on this information, I understand that a claim group meeting was held in order to authorise the applicant in an agreed and adopted decision-making process, as contemplated in s 251B(b). However there is no information before me about the claim group meeting to enable me to consider that 'all the persons in a native title claim group' have authorised the applicant in accordance with the requirements of s 251B.

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<sup>49</sup> Ibid.

[105] I note O’Loughlin J’s theoretical questions in *Ward* about the meeting at which the applicant was authorised:

Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?

It may not be essential that these questions be answered on any formal basis such as in terms of the convening and conducting of a meeting in a commercial atmosphere, but the substance of those questions must be addressed.<sup>50</sup>

[106] Based on the information in the application, I cannot be satisfied that all members of the native title claim group were given every reasonable opportunity to participate in the decision-making process<sup>51</sup> and that they have authorised the applicant to make the application and deal with all matters arising in relation to it. I am therefore not satisfied that the requirement in s 190C(4) is met.

*End of reasons*

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<sup>50</sup> *Ward* [25]–[26].

<sup>51</sup> *Lawson* [25].