

Registration Decision

Application name	Dennis Forrest & Ors on behalf of the Nangaanya-ku Native Title Claim Group and State of Western Australia (Nangaanya-ku)
Name of applicant	Dennis Forrest, Bruce Smith, C.S. (deceased), Daniel Tucker, Darren Edward Polak, Delilha Leslie Thomas, Elvis Stokes, Fabian Tucker, Floyed Barnes, Gary Cooper, Janice Scott, Leonard Wells, Marilyn Janice Burton, Monica Winter Smith, Preston Thomas Jnr, Reece Rarrki Smith, Ross Victor Lynch, Thelma O'Loughlin, Tracy Johnston
Federal Court of Australia No.	WAD460/2018
NNTT No.	WC2018/019
Date of Decision	9 November 2018
Date of Reasons	19 November 2018

Claim accepted for registration

I have decided that the claim in the Nangaanya-ku application satisfies all of the conditions in ss 190B and 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.

Lisa Jowett

*Delegate of the Native Title Registrar*²

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

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

³ Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act

Reasons for Decision

CASES CITED

Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)

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*)

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

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

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

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

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

BACKGROUND

- [1] The application is filed on behalf of the Nangaanya-ku native title claim group. It covers land and waters in the Western Desert and includes areas covered by the Yeo Lake, Neale Junction and Plumridge Nature Reserves. Apart from the reserves, the claim area is otherwise comprised of unallocated crown land. The northern and eastern boundaries of the claim area are contiguous with the boundaries of the Yilka and Yilka #2 and Sullivan Family determinations, Ngaanyatjrra Lands determinations and the Pilki People determination.
- [2] The application was filed in the Federal Court of Australia (the Court) on 9 October 2018. On 11 October 2018, the Registrar of the Court gave a copy of the application and accompanying documents to the Native Title Registrar (Registrar) pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A⁴.
- [3] My consideration of the application is subject to the issuing under s 29 of a future act notice by the State of Western Australia in relation to the grant of mining lease application, M39/1131. The notification date for the notice is 11 July 2018. The Nangaanya-ku application was filed within the statutory three month time period over the area affected by the future act notice and I have used my best endeavors to finish considering the claim by the end of 4 months after the notification date (11 August 2018).⁵

Registration conditions

- [4] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the

⁴ See 190A(1).

⁵ See s 190A(2).

Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters).⁶ Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.⁷

- [5] Given that the claimant application was made on 9 October 2018 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.
- [6] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [7] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.
- [8] I have had regard to information in the application and accompanying documents. I have also considered additional material provided by the applicant directly to the Registrar on 24 October 2018:⁸
1. Applicant’s Submissions on the application of the registration test
 2. *A report for consideration in the application of the registration test in the matter of the Nangaanya-ku native title claim* by [anthropologist] dated October 2018
 3. Affidavit of [Claimant 1] affirmed 16 October 2018
 4. Affidavit of [Claimant 2] affirmed 19 October 2018
 5. Affidavit of [Claimant 3] affirmed 21 October 2018.
- [9] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁹
- [10] The State of Western Australia (the state government) has not provided any submissions in relation to the application of the registration test.¹⁰
- [11] I may also have regard to such other information as I consider appropriate¹¹. I have considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 18 October 2018 (the geospatial report).

Procedural fairness

- [12] As noted above, I have considered the additional material provided by the applicant. On 26 October 2018, I wrote to the state government advising that I would be relying on this information in my application of the registration test and that should they wish to make any submissions, they should do so by 5 November 2018. The state government has made no

⁶ See 190A(6).

⁷ See 190A(6B).

⁸ See s 190A(3)(a).

⁹ See s 190A(3)(b).

¹⁰ See s 190A(3)(c).

¹¹ See s 190A(3).

comments or submissions in relation to the additional material. 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

[13] 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.¹²

Description of the area covered by the application

[14] Schedule B refers to Attachment B for a description of the external boundaries. The application area is described in metes and bounds referencing reserve and UCL boundaries, geographic coordinates in decimal degrees to six (6) decimal places and existing native title determination and application boundaries.

[15] Schedule C refers to Attachment C which contains a colour copy of an A3 map prepared by Geospatial Services National Native Title Tribunal, titled ‘Native Title Determination Application Lake Rason’ dated 1 October 2018. The map includes the application area depicted by a bold blue outline described in the legend as ‘Application Area’; surrounding native title determinations shown and labelled; land tenure shown and labelled; topographic background image with lakes and roads shown and labelled; scalebar, coordinate grid, locality diagram and map legend and notes relating to the source, currency and datum of data used to prepare the map.

[16] To describe those areas not covered by the application Schedule B provides a list of general exclusions and Attachment B includes a statement that the application specifically excludes four (4) native title determinations.¹³

Consideration

[17] The information in relation to the external boundaries of the area covered by the application allows me to identify the location of those boundaries on the surface of the earth. The specific exclusions provide added certainty as to the identification of those boundaries. The general exclusions used to describe areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories listed.

¹² *Doepel* at [122].

¹³ At [43].

- [18] The geospatial report in relation to the application makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment.
- [19] I am therefore satisfied that the external boundary is identifiable and, along with the general and specific exclusions that set the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

[20] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. It is therefore necessary to consider whether the application satisfies the requirements of s 190B(3)(b). I note the comments of Mansfield J in *Doepel* that the focus of s 190B(3)(b) is:

1. whether the application enables the reliable identification of persons in the native title claim group; and is
2. not on 'the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'¹⁴.

[21] Carr J in *Western Australia v Native Title Registrar* was of the view that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'.¹⁵

[22] The native title claim group is described at Schedule A as follows:

39. The native title claim group comprises those persons who hold native title rights and interests in part or all of the determination area according to traditional laws and customs through one or more of:
- (a) their own birth on the application area;
 - (b) the birth of an ancestor on the application area;
 - (c) having religious, sacred or ritual authority for the application area; or
 - (d) long traditional association with the application area through occupation, custodianship or use by one's self and/or relevant kin.
40. At the date of this application, the persons referred to in paragraph 39(a), 39(b) and 39(d) above includes the descendants of the following persons who assert and are recognised under the relevant traditional laws and customs by the other native title claimants as having rights in the application area are:
- (a) Dingo Tom;
 - (b) Dulu;
 - (c) Binghi Lynch;
 - (d) Mungulu Harris;
 - (e) Withawarra / Ruby / Darga;
 - (f) siblings Nganampi / Jumbo Manning and Ngildiniri;
 - (g) Paratjanu Graham;
 - (h) Malgtjanu / Mulga Joe Mason;
 - (i) Biyuwarra;
 - (j) siblings Kitty / Nganyi and Yampi Alice;

¹⁴ *Doepel* at [51] and [37].

¹⁵ At [67].

- (k) Kulputjanu / Alec Bilsen;
- (l) siblings Ningu, Pangin and Ulan;
- (m) siblings Miiwa and Pluto Hicks;
- (n) siblings Tamalay / Noona Roundhead, Bulgu / Tjindardi / Peter Meredith / Merrill, Rupert Blizzard and Wiltjamata / Wilyamara;
- (o) Lakarra;
- (p) Nu:nanj / Maggie;
- (q) (Blind) Maggie;
- (r) Ginger Stokes;
- (s) Ginger Parker;
- (t) Mary;
- (u) Molly / Yowatji;
- (v) Roy Sinclair;
- (w) Kitty Lynch;
- (x) Gooranj / Lilly Anderson / Kuran; and
- (y) Raymond Wells)

- [23] Based on this description, I understand that membership of the native title claim group is in accordance with and regulated by traditional laws and customs defined at paragraph 39(a) to (d) and that a person will be a member of the group through descent of (one or more) identified ancestral lines. It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors or eligibility against the other principles for membership, but that would not mean that the group has not been sufficiently described.
- [24] I am satisfied the application describes at Schedule A the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

- [25] 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 in the application is sufficient to allow the rights and interests to be readily identified. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.¹⁶
- [26] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Schedule E of the application contains the description, as required by s 62(2)(d), of the native title rights and interests claimed in relation to the area covered by the application:

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,

¹⁶ *Doepel* at [99] and [123].

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.

- [27] When read together with the exclusion statements in the written description of the area covered by the application, I am of the view that the native title rights and interests claimed can be 'properly understood'. I understand the application to claim possession, occupation, use and enjoyment to the exclusion of all others only in those areas where native title has not been partially (or wholly) extinguished – that is, where exclusive possession can be recognised. In all other areas, the application claims the 4 listed non-exclusive rights.
- [28] Whether any of these rights fall outside the scope of s 223 is, in my view, a matter for consideration under s 190B(6), whether they can be prima facie established. The description of the claimed rights and interests are, in my view, readily identifiable in the sense of being intelligible and understandable.
- [29] I am satisfied the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

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

- [30] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel*¹⁷, Mansfield J stated that:

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.¹⁸

- [31] The decisions of Dowsett J in *Gudjala 2007* and *Gudjala 2009* also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*,¹⁹ including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5) and his approach in *Gudjala 2009* was in accord with this.

Information considered

- [32] In addition to the information contained in the application at Schedule E and Attachments F, G and M, the applicant has provided additional material directly to the Registrar, as listed above

¹⁷ Approved by the Full Court in *Gudjala FC* at [82] to [85].

¹⁸ *Doepel* at [17].

¹⁹ *Gudjala FC* [90] to [96].

at [8]. I have had regard to all of this material in my consideration of the factual basis for the claim made in the application.

- [33] Attachment F to the application provides a generalised but comprehensive overview addressing the factual basis requirements and this serves as the foundation of my discussion of the sufficiency of the material to support each of the three assertions. I refer in my reasons below primarily to the applicant submissions which have extracted and summarised the information contained in the [anthropologist] Report and the claimant affidavits. Where the factual basis requirements have necessitated further support than provided in the applicant submissions, I have turned to the source material directly.

The area covered by the application and the Western Desert Cultural Bloc

- [34] The Nangaanya-ku native title claim group assert to acknowledge and observe the traditional laws and customs of the larger system of the Western Desert Cultural Bloc (WDCB).²⁰
- [35] The area covered by the application is located approximately 200kms to the east of the town of Laverton in the Western Desert region. Native title has been determined on its boundaries on the basis that the respective claim areas were governed by the laws and customs of the WDCB:

The evidence provided with these submissions is also replete with examples of Nangaanya-ku Claim group members referring to the communities of Cosmo Newberry, Warburton, Tjuntjutjarra and the town of Wiluna as locations that share their laws and customs. These towns and communities are all located within determined areas where native title rights and interests were found to be sourced in the laws and customs of the WDCB.²¹

- [36] The [anthropologist] Report explores the early research in the region and concludes:

...Tindale's journal entries and genealogies from the late 1930s begin to provide detailed information regarding specific Aboriginal people and their associations with locations most likely within the Claim Area, as well as sociocultural information similar to that provided by Bates and Elkin regarding the society of said people. Taken together, some relatively solid conclusions can be drawn about the Aboriginal peoples of the Claim Area around the time of effective sovereignty. The evidence provided by Bates, Elkin and Tindale is consistent with what is known today about Western Desert Aboriginal people, and thus it is my opinion that the likely society of the Aboriginal people of the Claim Area at sovereignty was the Western Desert society.²²

s 190B(5)(a)

- [37] This subsection requires that I be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. Specific to the factual basis for the claim made in this application, it is not necessary for it to support an assertion that all members of the native title claim group have an association with the area all of the time. However, it is necessary to show that the claim group as a whole has an association with the area.
- [38] Further, Dowsett J also observed:

²⁰ Attachment F at [55]-[60].

²¹ Submissions at [20].

²² [anthropologist] Report at 5.29.

Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty.²³

[39] Attachment F states that the association (connection) of the native title claim group historically and currently includes spiritual, physical, historical, (customary) legal, economic and social elements.²⁴ Each of these elements are briefly extrapolated:

1. Spiritual – the belief system and customary and ritual life of members of the native title claim group is based on the WDCB precept of the *tjukurrpa* (Dreaming) which has force in the form and existence of the landscape and governs people’s rights and responsibilities to protect country, beliefs and practices. There are *tjukurrpa* specifically associated with the claim area.
2. Physical – comprises the physical presence on the claim area of the claim group and its predecessors on the claim area, their use of its resources, their activities associated with protecting and maintaining places, their intergenerational transfer of knowledge about the land and waters of their country.
3. Historical – the claim group and its predecessors have maintained a connection with the claim area that has endured for a long-established period of time.
4. Customary – the claim group acknowledges and observes traditional laws and customs that give status to the ‘proper’ people in relation to important and significant sites, the spiritual features and generally the land and the waters of the claim area.
5. Economic - visiting and utilising the resources of the land and waters of the claim area under traditional law and custom, including for sustenance, trade and exchange.
6. Social – the kinship relationships between people, between people and country and the association of people and country with the *tjukurrpa*.²⁵

[40] It is within the context of these elements that the claimant affidavits relate the stories and circumstances of their connection and their predecessor’s connection with the area covered by the application.

Association of the predecessors of the native title claim group with the application area

[41] The [anthropologist] report proposes effective sovereignty of the region in which the claim area falls to be 1890, with the first documented European exploration by David Carnegie 1894 traversing the western portion of the claim area and Frank Hann in 1903 traversing the northern and central portions over several trips. During much of the early part of the 20th century there are documented instances of Aboriginal people coming into the towns of Laverton, Mount Margaret and Burtville from the desert in the east. This coming in from the desert is illustrated by the stories recounted in the claimant affidavits.

[42] The [anthropologist] report refers to the early ethnographic and anthropological records collated by Daisy Bates in 1908 and 1911-1912 and A P Elkin during the 1930s. In her view it is reasonable to assume that Bates’ descriptions of Aboriginal people would have included those from the claim area and that ‘some of the Aboriginal peoples Elkin encountered at Mount

²³ *Gudjala 2007* at [52].

²⁴ At [47].

²⁵ At [48]-[54].

Margaret Mission were associated with country at least, in the western portions of the claim area.²⁶ She concludes:

The information recorded by the first explorers in or near the Claim Area, as well as the first two researchers (Daisy Bates and A.P. Elkin) to make observations about peoples likely from the Claim Area, provide socio-cultural details that begin to build a picture of the society of the Aboriginal peoples associated with the Claim Area around the time of effective sovereignty. The use of two complimentary four-class section or “skin” systems was noted, as was dialectical groupings and certain male initiation rites. Additionally, a mythology was noted that included beliefs about individuals’ ties to country.²⁷

- [43] In addition to the historical record is the contemporary evidence of the native title claim group in relation to the movements and lives of their predecessors. The submissions assert that the association of the claim group’s predecessors with the claim area between sovereignty and European settlement can be readily inferred:

Senior claim group members recall stories of their predecessors occupying and travelling through the area of the Nangaanya-ku Claim to exercise their native title rights and interests. For many of the claim group members, the association of their ancestors with the area is one of the primary methods by which rights in country were transferred to them.²⁸

- [44] The applicant submits that the ancestors of the native title claim group directly occupied the claim area and /or were born on that country. [Claimant 3] was born in Leonora in 1960 and grew up on the outskirts of the Mt Margaret Mission and Laverton Reserve. She says her grandparents and great grandparents spent most of their life around Lake Yeo and Lake Rason (in the central part of the claim area).²⁹ [Claimant 3] says she gets her ‘country from my parents, grandparents and great grandparents:

My country on my great-grandmother [name removed]'s side is around Lake Rason, around Lake Yeo all the way to Point Lillian. My country from my grandmother [name removed]'s side is south of Neal Junction, Lake Yeo, Pilki determination and this Claim Area. That is also Lakarra and Kurkurku's country. My great-grandfather [name removed]'s country is from Lake Yeo back to the area around his birthplace Mitutu.³⁰

- [45] [Claimant 2] was born in 1949, her father was born at Point Salvation north-west of the claim area. She describes how her father told her he would go camping and hunting in the Nangaanya-ku Claim Area and that her mother told her that her father would go there for law business too:

My father also went out camping and hunting in the Claim Area. That is what he told me and that is how we know about that country. We know that our father did men's business out there too. He never told us but our mother would tell us. Sometimes he would go off for three weeks at a time and I would ask where dad gone. My mum would say he gone for men's business.³¹

- [46] Her father’s mother was born between Toppin Hill and Kaarnka rockhole, she grew up and lived in the claim area with her parents and siblings, her country is Kaarnka and Lake Rason area because that is where they were all born.³² Her grandmother’s father was born near Lake Rason. [Claimant 2]’s mother was born around Lake Yeo. She explains that the claim area is

²⁶ { anthropologist] Report at 5.11 and 5.17.

²⁷ [anthropologist] Report at 5.28.

²⁸ Submissions at [40]-[43].

²⁹ At [26]-[29].

³⁰ At [71].

³¹ At [18].

³² At [19].

her ancestors' country – you get country because your mother gave birth there, being initiated, knowing the story lines can give you rights.³³

[47] [Claimant 1] was born in Mount Margaret, south west of the claim area and has lived most of his life between Kalgoorlie and Coolgardie.³⁴ [Claimant 1]'s mother was born south of the claim area and along with many of her family members lived at the Mount Margaret mission in the early to mid decades of the 20th century. His grandmother is one of the named apical ancestors – [name removed] – who was born 'at a rockhole near Jasper Hill on the edge of the western boundary of the Claim Area. His grandmother and great grandmother 'came from out that area in the middle of the Claim Area, I know that they lived all over the country in the Claim Area'.³⁵

[48] [Claimant 1]'s father was born near Linden and he knows that his country is the place where his parents and grandparents and great grandparents come from and where he was born. He describes his country as 'from Kookynie, then goes south to the Cundeelee area and then east past the middle of the Claim Area and back to Mount Margaret' – 'it's our *ngurra*'.³⁶ This area is a spread that extends beyond the western boundary of the claim area.

Current association of the native title claim group with the application area

[49] The applicant submits that the members of the native title claim group maintain an association with the claim area – having spent periods of their lives living within the area or regularly visiting the area camping, hunting and travelling through. The affidavit material demonstrates that members of the claim group have been born in, or adjacent to the claim area, some have spent periods of their childhoods travelling throughout in the claim area. The claimant affidavits evidence that members of the claim group continue to travel through and visit the claim area. They have an intimate knowledge of the *tjukurrpa* that travel through the claim area and acknowledge and observe the responsibilities associated with them.

[50] [Claimant 1] has a camp near Coggia Well and Jasper Hill (on the southern and eastern borders of the claim area) where he spends most of his time now:³⁷

I have an old bus out there and a caravan at my camp. My camp is in the Claim Area about 7 or 8 kilometres from the rock-hole where my grandmother was born. I picked that spot for my camp because I knew it was where my grandmother was born and I like the country there, it feels like home and not many people come out that way. Knowing that my grandmother's country is the same country that I both really like and frequently live in gives me a good feeling because her *ngurra* is also my *ngurra*.³⁸

[51] [Claimant 1] travelled all over the claim area when he worked for the Vermin Board in the mid-1960s – camping and living off the land.³⁹ [Claimant 1] speaks of his knowledge of sites and places in the claim area – a sacred dancing site, his mother knows the songs and the dances for *kurangarra* time (when people congregate from all over the desert for song and

³³ At [32]-[37].

³⁴ At [1]-[10].

³⁵ At [14]-[25].

³⁶ At [25]-[27].

³⁷ At [11].

³⁸ At [64].

³⁹ At [59].

dance) and she has kept that going; sites along the edges of Lake Rason which need protection; rock (water) holes and he regularly hunts in the Hope Campbell Lake area.⁴⁰

[52] [Claimant 3] has lived most of her life in towns and communities proximate to the eastern boundary of the claim area, she travels through the claim area often and knows that country well.⁴¹ She knows there are important women's places in the claim area, including a story which follows sites from outside the eastern boundary of the claim area past Lake Yeo.⁴² As a child she spent time in the central part of the claim area – camping near the Plumridge Lakes Nature Reserve, going 'around the breakaways around the top of Lake Rason visiting many of the rock holes in the Claim Area' and has been with senior members of her family who are knowledgeable about the area. She travels through the claim area all the time – camping and hunting, passing through on the way to funerals or business and taking children back to show them about their country.⁴³

[53] [Claimant 2] tries to go to the claim area at least once a year – travelling with other members of the claim group, initiated men and family members camping, hunting, showing children the country 'so they can learn the country'. She speaks of the places in and proximate to the claim area – Point Salvation (at Cosmo Newberry), Lake Yeo, Toppin Hill, Lake Rason, Burtville (south of the claim area), Kaarnka, Lilly Rockhole, Mallee Hen Rockhole. They clean out the rockholes as they hunt, they collect bush tucker, the men hunt for kangaroo, the women dig out goannas, teaching their children as they were taught by their own parents and grandparents. Her nephew regularly travels through the claim area.⁴⁴ She speaks of her country:

My country is my father's and my mother's country, my ancestors country. My country is Lake Yeo, Lake Rason down to Moon Rock which is near Lake Minigwal. It is my country because that was my ancestors' country which gives me rights there. That is why we go there all the time and show our kids all the places and camp there and everything because it's our home.⁴⁵

Consideration

[54] The [anthropologist] Report provides an evidentiary basis for each ancestor who has been identified by the research as having a traditional association with the country of the claim area. This association is a 'pathway to connection' that is said to 'clearly link ancestors with today's living claimants'.⁴⁶ This information is also illustrated in a map that plots the locations and spread of association across the claim area of descendant families of the claim group's ancestors.⁴⁷

[55] The extent to which the native title claim group's current association with the area is governed by its ancestral links to the predecessors of the group clearly demonstrates that the group has a previous association with the area of the application. The group's current association is evident to the degree it is because that connection has been passed down through the generations – to which the claimants all attest in their affidavits and which is clear

⁴⁰ At [40], [43], [56] and [68]-[69].

⁴¹ At [1]-[4].

⁴² At [43].

⁴³ At [52]-[57].

⁴⁴ At [39]-[49].

⁴⁵ Submissions at [50] and [Claimant 2] affidavit at [31].

⁴⁶ [anthropologist] Report at 10.

⁴⁷ Nangaanya-ku Claim Family Country Map 134.1.3.4.

in the overview of WDCB law and custom provided in the [anthropologist] Report and applicant submissions.

[56] I consider that the factual basis material is sufficient to demonstrate the association that members of the claim group have and its predecessors had with the area covered by the application. The extensive personal detail in the affidavits of the members of the native title claim group provides particular evidence to illustrate the claim group's abiding connection to the land and waters of the application area through birth, descent, long term association and/or ancestral connection to that area. In this way it is clear that this current association has its origins in the preceding generations' association with the area.

[57] For these reasons I am satisfied that the native title claim group has, and its predecessors had, an association with the area.

s 190B(5)(b)

[58] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group which give rise to the native title rights and interests it claims.

[59] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate⁴⁸:

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society;
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'.⁴⁹

[60] In the context of the registration test, and explicitly the task at s 190B(5)(b), there must be factual material capable of supporting the assertion that there exists 'traditional' laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests.⁵⁰ In my view, there is sufficient factual account in the application and claimant affidavits to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

The relevant society

[61] As referred to above, the [anthropologist] Report identifies that the native title claim group's system of laws and customs falls within the WDCB. Attachment F provides an overview of the traditional laws and customs of the native title claim group who are members of the larger society of the WDCB. The claim group is governed by a 'functioning set of laws, rules, customs,

⁴⁸ This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

⁴⁹ At [63]-[66].

⁵⁰ *Gudjala 2007* at [62] and [63].

practices and beliefs that allow the members of the native title claim group to live their daily lives according to shared physical, social and cultural norms'. These are underpinned by the 'fundamental belief system' of the *tjukurrpa* which provides moral, social and judicial guidance, the rules and principles that govern relationships and conduct of people in relation to country and explains the formation of, and is evidenced in, the landscape of the claim area. The traditional laws and customs acknowledged and observed by members of the claim group is given normative force through commitment to the *tjukurrpa* – through the value of the sacred; the operation of sanctions for breaches of law and custom; linking the past and present, people and the natural environment. *Tjukurrpa* shapes the claim group's relationship to country, the experience and understanding of people's socio-cultural system and provides a framework for engaging with and accessing country, sites and dreaming tracks.⁵¹

[62] The applicant's submissions assert that despite some small differences, the fundamental system of law and custom followed and practiced by the Nangaanya-ku claimants are the same as other WDCB native title holders. The accompanying [anthropologist] Report supports the conclusion that it is the normative rules of the WDCB that give rise to the rights and interests claimed the Nangaanya-ku application, being evidenced by such things as:

- claim area is located within the boundaries of what is known as the WDCB;
- ethnographic records supports the conclusion that the WDCB was the society at sovereignty in the claim area and that Nangaanya-ku claimants continue to belong to the WDCB;
- members of the claim group express a shared belief in the *tjukurrpa* and normative laws and customs consistent with those recognised as WDCB law and custom; and
- members of the claim group speak a variety of different languages associated with the WDCB.⁵²

Traditional laws and customs

[63] The claim group is said to acknowledge and observe the traditional laws and customs of the WDCB which includes:

- rules and principles for the recognition of rights and interests held in relation to an area;
- the nature and extent of those rights governed by such matters as birth on the claim area, birth of an ancestor, having religious, sacred, ritual, practical and/or historical knowledge, having one's conception, initiation or burial site on the application area, long association with or identification with the area, having an accepted assertion of connection to the area;
- imposition of sanctions for wrongful presence on or use of country;
- respect and care for the spiritual features of the landscape, observance of rituals and practice, transmission and maintenance of restrictions in relation to those places and features;

⁵¹ At [55]-[59].

⁵² At [22].

- social organisation;
- acknowledgement and respect for the seniority and authority of knowledgeable people;
- ceremonies and rituals and life stages;
- activities associated with the foraging, preparation and distribution of resources.⁵³

[64] The applicant’s submissions refer to the “multiple pathways” model of connection to country which is a characteristic of the WDCB, asserting that native title rights interests in the Nangaanya-ku claim area are acquired on the same basis. That is, pathways to connection to country can be through a number of mechanisms:

- (a) their own birth on the application area;
- (b) the birth of an ancestor on the application area;
- (c) having religious, sacred or ritual authority for the application area;
- (d) having been initiated on the application area;
- (e) long traditional association with the application area through occupation, custodianship or use by one’s self and/or relevant kin; or
- (f) asserting connection with the application area and having that assertion accepted by others.

Significantly, the pathways to connection (and therefore native title rights and interests) do not require those who currently hold native title to be biologically descended from those who occupied the claim area at sovereignty. The members of the Nangaanya-ku Claim group do not place an emphasis upon any one particular pathway as a means of acquiring connection.⁵⁴

[65] Each of the claimant affidavits demonstrate these mechanisms in operation, with each explaining the basis on which they claim their connection to the claim area. [Claimant 3] and [Claimant 1] also describe the ways people ‘get country’: you can get country because of where you are born even if your parents or grandparents are not from that area; or from spending time, getting knowledge of country and practicing law and culture over a long time (though maybe not full rights) or through adoption. The place where his grandmother is born is special to [Claimant 1], and when he goes there he knows that he is in his country, it is his family’s *ngurra*.⁵⁵

[66] The accounts in the claimant affidavits also illustrate the content of the claim group’s traditional laws and customs – the rules that pertain to kinship through skin grouping; the rules that pertain to the authority held by certain persons and elders; the responsibilities that come with dreaming stories shared with an animal or plant. Law and custom governs hunting and harvesting and the access to and use of the natural resources of the claim area – that cooking is done correctly, that the resources are shared and conserved and sometimes traded. Access to country is integral to looking after *ngurra* and is governed by rights to ‘speak for country’, knowing about places and sites and the right people with the knowledge to make decisions about who can and cannot access the claim area.

[67] The [anthropologist] Reports includes information about the socio-territorial principles of land ownership and *tjukurrpa* – the Law, the Dreaming. *Tjukurrpa* is the ‘all-encompassing mythology or belief system that explains the landscape and is evidenced in it via various

⁵³ Attachment F at [60]-[64].

⁵⁴ Submissions at [64]-[66].

⁵⁵ [Claimant 1] at [27]-[31]; [Claimant 3] at [72]-[76].

landforms that feature in songlines, which tell the stories of the mythological *Tjukurrpa* beings and their travels throughout the country'.⁵⁶

[68] [Claimant 1] explains in his affidavit the meaning and system that applies to *tjukurrpa* and law business, that people know country through the songs and *tjukurrpa*.⁵⁷ [Claimant 3] describes *tjukurrpa* in her affidavit:

Our law and culture is from the *tjukurrpa* and is about how we do things everyday, how we marry, how we associate with people from other areas, how we survive. It is all about our *tjukurrpa* that goes through our country. Even though we living in town we have to be aware, protect what is out there, look after it. We know other people practicing law culture are watching. If we don't we know that when we go to participate with them in ceremony we might get in trouble, we might pay with our life even though it is our country because we have to look after the *tjukurrpa*. It's a big responsibility.⁵⁸

[69] [Claimant 2] describes and explains the Seven Sisters *tjukurrpa*. She knows where it starts and the places it goes through, that it is a women's story 'handed down from grandmother to mother to daughter to grandchildren'.⁵⁹

[70] The [anthropologist] Report states that claimants continue to be aware of the use and operation of the section/ 'skin' system.⁶⁰ The claimant affidavits support this: [Claimant 1] knows his skin names and the rules that must be followed in accordance with the skin system; [Claimant 3] describes how the skin system operates and [Claimant 2] speaks of the right way to marry according to 'skin'.⁶¹

[71] The claimant affidavits speak of a variety of laws and customs acknowledged and observed by members of the Nangaanya-ku claim group. [Claimant 2] describes the continuing practice of initiation of young men, the seniority held by her father in 'law business' and the law grounds used by the groups of the region. [Claimant 1] explains the funeral rites that continue to be acknowledged and observed by the claim group. [Claimant 3] was taught 'how to do burial the proper way under our laws when I was a teenager in Cundeelee' and although the method has changed the principles under law and custom remain the same. He acknowledges the rules that apply to his *tjukurr* (totem). [Claimant 3] speaks of cooking and preparing and sharing food 'the right way'.⁶²

Consideration

[72] The factual basis material supports the proposition that there was a society comprised of the predecessors of the native title claim group acknowledging and observing traditional laws and customs in the area of the application at the assertion of British sovereignty in Australia, and at the time of first European contact. The application asserts that this is the society that has continued, largely uninterrupted, since that time. That is, the predecessors of the native title claim group acknowledged and observed the laws and customs of the WDCB, the society that

⁵⁶ [anthropologist] Report at 9.

⁵⁷ At [35]-[37].

⁵⁸ At [41].

⁵⁹ At [26]-[30].

⁶⁰ [anthropologist] Report at 11.4.

⁶¹ [Claimant 1] at [32]-[34]; [Claimant 3] at [94]-[99]; [Claimant 2] at [52].

⁶² [Claimant 2] at [59]-[64]; [Claimant 1] at [41]-[42] and [86]-[93]; [Claimant 3] at [62].

existed at sovereignty in the region of the claim area. It is this society from which the claim group's current traditional laws and customs are derived.⁶³

- [73] Information in the application and additional material provides details that pertain to the group's traditional law and custom in respect of the area of the application: pertaining to family and ancestors, rules of affiliation to country, special places and stories, hunting and gathering and the passing on of traditional and cultural knowledge. The personal detail in the claimant affidavits demonstrate how the claim group has handed down its laws and customs from generation to generation, in the sense defined in *Yorta Yorta*—showing an inter-generational transmission of traditional law and custom from the predecessors of the claim group.
- [74] I am satisfied that the factual basis for the claim supports that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

s 190B(5)(c)

- [75] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. To be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala 2007*.⁶⁴
- [76] Attachment F states that members of the native title claim group are the biological and social descendants of members of the WDCB society that existed at the time sovereignty was asserted in the region of the claim area. It is asserted that the claim group's acknowledgement and observance of WDCB traditional laws and customs has adapted but has continued since that time. Members of the claim group and their predecessors have at all times since sovereignty occupied and used the land and waters of the claim area and maintained their spiritual connection to the area and under those WDCB traditional laws and customs, possessed the rights and interests they claim in the application.⁶⁵
- [77] The applicant submissions state that the knowledge and understanding of the *tjukurrpa* demonstrated in the claimant affidavits 'evidences that the Nangaanya-ku Claim group have continued to hold native title in accordance with traditional laws and customs'. Members of the claim group continue to acknowledge and observe the rules of the *tjukurrpa* and see its effects on the landscape. They continue to teach their children and grandchildren 'the traditional laws and customs prescribed by the *tjukurrpa* and the stories and songs associated with the *tjukurrpa* in relation to the claim area'.⁶⁶
- [78] The claimant affidavits are replete with examples of how WDCB laws and customs, through the belief system of the *tjukurrpa*, have been passed from generation to generation such that they continue to be acknowledged and observed today amongst the current generations of the claim group. [Claimant 1] takes his children and grandchildren out hunting for kangaroo

⁶³ *Gudjala 2009* at [66].

⁶⁴ At [63], [65] and [66] (as summarized above).

⁶⁵ At [65]-[71].

⁶⁶ Submissions at [74]-[75].

and teaches them how to do things properly in the desert; [Claimant 3] goes with her family to participate in cultural ceremonies travelling a long way, cooking and dancing in the cultural way she learnt from the old ladies, that she has been doing forever.⁶⁷

[79] Traditional law and custom continues to regulate the group's decision-making processes. [Claimant 3] states that 'not one single person can make a decision that affects country, you need to get the okay from everyone', sensitive areas will involve *watis* with knowledge of *tjukurrpa* and decisions will be about looking after country, protecting sites and the environment. Protecting country and sites includes the claim group conducting clearance surveys, for example so a gas line corridor doesn't 'disturb any cultural things or sites along the dreaming track'.⁶⁸

[80] [Claimant 3] speaks of the importance of travelling through the claim area to continuing acknowledgement and observance of traditional law and culture:

When we go to Warburton there are two ways we can go, either along the Great Central Road or the Anne Beadell Highway through Lake Yeo. It depends on our mood and whose country we want to go through. We travel through Lake Yeo because I feel a connection back to my *tjamu* and my *kaparli* and family left behind. I feel like I have a responsibility back to that place, I can't just leave it and forget it. Take the next generation, so if something happens to me they will have a story.⁶⁹

[81] The importance of intergeneration transfer of knowledge and the *tjukurrpa* is expressed by [Claimant 2]:

We won't be here forever so they need to know about their ancestors, where we all come from in the first place. I have showed them those places, that country. Point Salvation, Bishop Riley's Pulpit, Kaarnka, Lilly Rockhole, Mallee Hen Rockhole and Lake Rason ... It's our job to now do that with our kids to pass on that knowledge to our kids and their kids again. That's how they learn.⁷⁰

[82] [Claimant 3] speaks of affiliation to country and acknowledgement and observance of the *tjukurrpa* is not diminished by physical absence from country:

Although a lot of people have had to go away from their country, it is still their country. For a lot of people it's not their fault that their circumstances meant that they had to leave their country. It is still their country, they still have rights to it and they worry for it still.⁷¹

[83] All of the material sufficiently demonstrates that the native title claim group has continued in such matters as its cultural practices and use of the natural resources of the land and that this knowledge has been passed down from their ancestors and continues to be passed down to successive generations. It is in this way that the claim group continues to acknowledge and observe the traditional law and custom of their ancestors in relation to the claim area.

Conclusion

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

⁶⁷[Claimant 1] at [50]; [Claimant 3] at [38].

⁶⁸ [Claimant 3] at [50]-[51].

⁶⁹ [Claimant 3] at [58].

⁷⁰ [Claimant 2] at [45].

⁷¹ [Claimant 3] at [77].

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

[85] 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;⁷²
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);⁷³
3. s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.⁷⁴

[86] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against the rights and interests claimed in the application to determine whether prima facie, they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s 223(1)); and
- are rights and interests that have not been extinguished over the whole of the application area.

*(a) where native title rights and interests are not partially extinguished, the native title rights and interests claimed are **exclusive rights***

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

[87] This right is evidenced in the material before me, suggesting it exists under the traditional laws and customs of the native title claim group.

[88] The majority decision in *Ward HC* considered that ‘[t]he expression “possession, occupation, use and enjoyment ... to the exclusion of all others” is a composite expression directed to describing a particular measure of control over access to land’. Further, it considered that the expression (as an aggregate) conveys ‘the assertion of rights of control over the land’ which necessarily flow ‘from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country’.⁷⁵ *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

[89] The decisions of the Full Court in *Griffiths* and *Banjima People* indicate that for this right to be established, it must be accompanied by evidence that the practice of seeking permission to go onto another’s country is grounded in a spiritual imperative that gives the practice normative force. This may be expressed by way of ‘spiritual sanction visited upon unauthorised entry’ and as the ‘gatekeepers for the purpose of preventing harm and avoiding injury to country’.⁷⁶

⁷² *Doepel* at [126].

⁷³ *Doepel* at [127].

⁷⁴ *Doepel* at [132].

⁷⁵ At [89] and [93].

⁷⁶ *Griffiths* at [127].

In the more recent case of *Banjima*, the Full Court referred to these statements from *Griffiths* and held that ‘controlling access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction ... is readily recognisable as a right of exclusive possession’.⁷⁷

[90] [Claimant 1] speaks of the permissions that must be sought when accessing country - If it's your *ngurra* then you can have a say about what can happen, it's your country. [Claimant 3] relates the system of permissions and access to country as it occurred in the ‘early days – ‘outsiders’ could only come to country if they were invited. ‘Nowadays’ permission to access country both in the claim area and proximate to it is still required by her family – for tourists it takes the form of a permit. [Claimant 2] also explains the operation of permission to access her country and its resources:

We can take what we like from the Claim Area. There is no padlock on it for us. If someone from outside were to come they wouldn't know where the water sources are, where to go, where not to go. If they want to go they should consult with the Aboriginal people from the area who know the area, get their permission to go there and maybe hunt.⁷⁸

[91] The [anthropologist] Report concludes that the claimants continue to expect that visitors to their country will seek to receive permission from the claimants. In the conduct of heritage surveys, members of the claim group ‘are exercising their rights to protect their land, resources and sacred sites from the presence of ‘strangers’... believing that the spirits of their ancestors reside in country and that trespassers will be harmed if they do not seek the proper permissions’.⁷⁹

[92] I consider that the exclusive right can be prima facie established.

(b) in all other areas, the native title rights and interests claimed are non-exclusive rights.

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.

[93] These rights are evidenced in the material before me, suggesting they exist under the traditional laws and customs of the native title claim group.

[94] All of the claimant affidavits illustrate the continuing practice of these activities in accordance with the claim group's traditional laws and customs. [Claimant 1] has continued throughout his life to live on and travel through parts of the claim area – working as a ‘dogger’ he travelled throughout the claim area. [Claimant 1] speaks in his affidavit of knowing about the properties of plants used for medicine and hunting kangaroo in accordance with traditional methods; knowing how to access water in the claim area from the rock holes and through the

⁷⁷ *Banjima* at [38].

⁷⁸ [Claimant 1] at [72]; [Claimant 3] at [44]-[46]; [Claimant 2] at [46].

⁷⁹ [anthropologist] Report at 11.10.

roots of trees; He goes hunting from his camp (in the south east corner of the claim area) – kangaroo, emu, porcupine, ducks from the Hope Campbell Lake area.⁸⁰

[95] [Claimant 3] speaks of going to Lake Rason to camp, going out on country always collecting 'lots of types of food.... we take bardi [Witchetty Grubs], walukara, which are ants' nests with the cocoons around the leaves, which we eat and which is sweet like honey. Ngappa is another sweet, it is a little bush with little yellow flowers all over it. ... Yurltukurn is a bush with leaves like needles and with an orange blossom that you can suck on to get nectar out... some of the bush foods that I can get in the Claim Area'. [Claimant 3] was taught by her mother about bush foods and how to prepare them; she collects bush medicine in the claim area and describes their application for various ailments and conditions.⁸¹

[96] Burning country is a cultural activity, in accordance with rules regulated by traditional law and custom. [Claimant 3] describes burning to make fresh grass grow, to support plentiful bush food, that 'the old people have been burning forever'. [Claimant 3] collects resources from the claim area – at Lake Rason and Tropicana way (near Lake Plumridge Nature Reserve) – spinifex, blackboy gum, ochre, kangaroo sinew all of which are used to repair tools, for law business and to make artefacts.⁸²

[97] [Claimant 2] speaks of trips out on country:

We also dig out goannas when we go out on the Claim Area. Our old ladies taught us how to get them and all the food we collect. My mother was a champion goanna digger... We know the rockholes for the Claim Area. When we are out hunting, if you see a rockhole you got to clean it out for when the rain comes.⁸³

[98] Members of the claim group have continuously occupied, used and enjoyed the areas of and proximate to the claim area through camping, hunting, gathering; collecting resources for a multitude of purposes; caring for country and protecting and maintaining places of importance; conducting ceremony; and the passing on of the *Tjukurrpa* to the younger generations. As referred to above in relation to my consideration of the factual basis, the claimant affidavits are replete with references to their life-long association with the country of the claim area which is embedded in the traditional laws and customs of the WDCB passed onto them by ancestors.

[99] I consider that all the claimed non-exclusive rights can be prima facie established.

Conclusion

[100] I consider that the claimed rights can be established on a prima facie basis and the application satisfies the condition of s 190B(6).

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

[101] 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'.

⁸⁰ [Claimant 1] at [47]-[50] and [68]-[69].

⁸¹ [Claimant 3] at [59]-[63].

⁸² [Claimant 3] at [64]-[68].

⁸³ [Claimant 2] at [45] and [48].

[102] Mansfield J decided that the condition of s 190B(7) imposes a different task upon the Registrar to that found in s 190B(5), saying that:

It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration.⁸⁴

[103] Attachment M provides a general summary of the conduct of activities undertaken by members of the native title claim group who currently visit the claim area: accessing, travelling through, and camping in the application area, cleaning out rock holes, hunting and gathering bush foods, performing ceremonies, and activities aimed at inter-generational transfer of knowledge. Specifically:

Portions of the application area are regularly traversed when claimants travel back and forth between the Aboriginal communities of Cosmo Newberry (north and west of the application area), Tjuntjuntjara (to the east of the application area) and Warburton (to the northeast of the application area), and the regional centres of Kalgoorlie (to the southwest of the application area), Laverton and Leonora (both to the west of the application area). Such trips provide opportunities, indeed, often make necessary, the sourcing of different bush foods from within, and adjacent to, the application area. These trips require, and further develop and disseminate, the specific knowledge and technologies pertaining to hunting, food collection, and burning practices that have been transmitted to senior claimants from their antecedents. Kangaroos, emus, and goannas are some of the larger game that is hunted. The present-day adherence by members of the native title claim group to traditional methods of killing, preparing and cooking hunted animals demonstrates a continuance of traditional physical connection to the application area.⁸⁵

[104] It is stated that the extensive skills and knowledge held by members of the claim group are founded on the acknowledgement and observance of their traditional laws and customs as they exist in relation to *tjukurrpa* stories and the physical connection they have to the claim area. The claimant affidavits demonstrate that members of the claim undertake activities in exercise of the rights and interests claimed in the application and illustrate the extent of their physical and spiritual connection to the claim area. Sufficient material is provided to show that, in their acknowledgement and observance of WDCB traditional laws and customs, members of the native title claim group have a traditional physical connection with the land and waters of the application area. The material is referred to and quoted extensively in the consideration above for both ss 190B(5) and 190B(6).

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

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

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

⁸⁴ *Doepel* at [17].

⁸⁵ Attachment F at [78].

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, Part C	Met
s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule E, paragraph 13(a)	Met

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

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

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

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

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

[108] 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?

[109] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken⁸⁶.

Subsection 61

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

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

⁸⁶ *Doepel* at [16] and also at [35] to [39].

Subsection 62

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	19 filed	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	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

[112] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim in relation to the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c).⁸⁷ Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made.

[113] The geospatial report confirms that one claimant application falls within the external boundaries of the current application. The Nanatadjarra People claim (WAD348/2017; WC2017/003) is wholly overlapped by the area covered by the current Nangaanya-ku application. The Nanatadjarra People claim was made on 7 July 2017 but as a result of consideration under s 190A on 9 November 2017, it was not accepted for registration. It is therefore not a 'previous' application as it does not meet all of the conditions set out in the subparagraphs (a) to (c) of s 190C(3), specifically an entry on the Register when the current application was made.

[114] As such, the Registrar is not required to consider whether any person in the Nangaanya-ku native title claim group is also a member of the underlying Nanatadjarra People claim.

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

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

[116] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met. Schedule R refers to Attachment R which comprises a certification made by Central Desert Native Title Services (Central Desert). As the application purports to be certified by the representative body for the

⁸⁷ *Strickland* at [9].

area, the relevant consideration for me is at s 190C(4)(a). This imposes upon the Registrar conditions which, according to Mansfield J, are straightforward. All the task requires is that I be 'satisfied about the fact of certification by an appropriate representative body' which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s 203BE.

Identification of the representative body

[117] The geospatial report confirms that Central Desert is the only representative body for the whole of the area covered by the application. It is therefore the only body that could certify the application under s 203BE.

[118] The certificate provides that its statements and reasons are made pursuant to s 203AD, that Central Desert is funded to perform all the functions of a representative body pursuant to s 203FE(1). The certificate is dated 9 October 2018 and is signed by the Chief Executive Officer for Central Desert.

Does the certificate meet the requirements of 203BE

[119] For the purposes of s 203BE(4)(a), the certificate contains statements in relation to the requirements of paragraphs 203BE(2)(a) and (b), that is Central Desert certifies:

- that all the persons in the native title claim group have authorised Dennis Forrest, Bruce Smith, Celia Sullivan, Daniel Tucker, Darren Edward Polak, Delilha Leslie Thomas, Elvis Stokes, Fabian Tucker, Floyed Barnes, Gary Cooper, Janice Scott, Leonard Wells, Marilyn Janice Burton, Monica Winter Smith, Preston Thomas Jnr, Reece Rarrki Smith, Ross Victor Lynch, Thelma O'Loughlin and Tracy Johnston (collectively, the applicant) to file the application and to deal with all matters arising in relation to it; and
- that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the other persons in the native title claim group.

[120] For the purposes of s 203BE(4)(b), the certificate briefly sets out the reasons for Central Desert being of that opinion, namely:

- staff members of Central Desert have attended various meetings of the native title claim group and thereby observed the decision-making process it follows and taken instructions arising from that process;
- Central Desert is confident that the requirements for authorisation have been met with the applicant authorised to make and deal with the application in accordance with the native title claim group's traditional decision-making processes; and
- Central Desert has provided legal and anthropological services in the area covered by the application since 2007, with Central Desert satisfied that the anthropologists who have worked with the native title claim group have made all reasonable efforts to ascertain and identify all the members of the group.

- [121] In my view, the statements made in the certificate, as summarised above, are sufficient for it to be said that the certificate briefly sets out the reasons for Central Desert being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.
- [122] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3), providing for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. As referred to above, the application overlaps the Nanatadjarra People claimant application. The certificate provides the statement that Central Desert is aware of this application and has made efforts in the manner required by s 203BE(3).
- [123] I am satisfied that the application has been certified under Part 11 by the representative Aboriginal/Torres Strait Islander body that could certify the application and that it complies with requirements of s 190C(4)(a).

End of reasons