



Registration Decision

Application name	Gajangana Jaru
Name of applicant	Bonnie Edwards, Tanba Banks, Lily Banks, Douglas Lannigan
Federal Court of Australia No.	WAD65/2019
NNTT No.	WC2019/001
Date of Decision	8 April 2019

Claim not accepted for registration

I have decided that the claim in the Gajangana Jaru application does not satisfy all of the conditions in s 190C of the *Native Title Act 1993* (Cth), and it does not satisfy all of the conditions in s 190B.¹ Therefore the claim must not be accepted for registration.

Heidi Evans

*Delegate of the Native Title Registrar*²

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

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

Reasons for Decision

CASES CITED

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

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

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

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

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

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

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

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

Stock v Native Title Registrar [2013] FCA 1290 (*Stock*)

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

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

BACKGROUND

- [1] The application is made on behalf of the members of the Gajangana Jaru native title claim group. The application covers about 2,438 square kilometres of land and waters in northern Western Australia, south of Kununurra and Lake Argyle, approximately 8 kilometres from the Northern Territory border, and bounded on the eastern edge by the Ord River.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (the Registrar) on 7 February 2019 pursuant to s 63 of the Act.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁴
- [4] I have decided that the claim does not satisfy all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [5] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

³ See s 190A(6).

⁴ See s 190A(6B).

- [6] I have had regard to information in the application. I have also considered information supplied by the applicant directly to the Registrar on 1 March 2019:⁵
1. Letter dated 1 March 2019 to the Tribunal Senior Officer from [Name removed] of Roe Legal Services;
 2. Affidavit of [Deponent 1 removed] sworn 1 March 2019;
 3. Affidavit of [Deponent 2 removed] sworn February 2019; and
 4. Affidavit of [Deponent 3 removed] sworn 28 February 2019.
- [7] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁶
- [8] The State of Western Australia (the State) has not provided submissions in relation to the application.⁷
- [9] I have considered information contained in two geospatial assessments and overlap analyses prepared by the Tribunal's Geospatial Services in relation to the area covered by the application, dated 18 February 2019 and 15 March 2019 (the geospatial assessments).
- [10] Section 190A(3) provides that I may have regard to such other information as I consider appropriate. In considering the locations referred to within the material addressing s 190B(5) of the registration test, I obtained historical tenure data for the application area, with the assistance of the Tribunal's Geospatial Services, which labelled and showed the boundaries of pastoral stations that existed in the area prior to the dedication of the application area as Purnululu National Park.
- [11] In addition, on 18 February 2019, the Kimberley Land Council (the KLC) provided submissions relating to the application of the registration test to the claim in the application. I have addressed these submissions at the relevant conditions below.

Procedural fairness

- [12] On 15 February 2019, the Tribunal's Senior Officer for the matter wrote to the State advising of receipt of the application and inviting the State to provide any comments in relation to registration of the claim made in the application, which comments were to be provided by 1 March 2019. No comments were received from the State.
- [13] On 20 February 2019 a preliminary assessment of the application against the requirements of the registration test was provided to the applicant, pointing to certain deficiencies with the application.
- [14] As above, on 1 March 2019, additional material was provided directly by the applicant to the Registrar for consideration in applying the registration test.
- [15] While this material addressed some of the deficiencies raised in the preliminary assessment, it remained my view that the application would not meet all of the conditions of the registration test. For that reason, I did not provide the additional material to the State for comment.

⁵ See s 190A(3)(a).

⁶ See s 190A(3)(b).

⁷ See s 190A(3)(c).

[16] As above, on 18 February 2019, the KLC provided submissions regarding the application of the registration test to the claim. These submissions addressed only the condition at s 190C(3). It was my view that the submissions did not contain any information beyond the information already included in the application before me, provided by the applicant. For this reason, I did not consider procedural fairness required the applicant be given the opportunity to comment on the submissions.

[17] This concluded the procedural fairness process.

Merits of the claim (s 190B) – Conditions not met

Identification of area subject to native title – s 190B(2): condition not met

[18] I am not satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are not 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?

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

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

Does the information about the application area meet this condition?

[20] Schedule B provides that the area covered by the application is ‘[a]ll that portion of land within the external boundaries of Reserve 39897.’

[21] A map showing the area covered by the application is contained in Attachment C. It is dated 3 January 2019, and includes:

- the application area in light khaki fill;
- Purnululu National Park labelled;
- topographic background, roads, state borders, localities, spot heights;
- scalebar; and
- notes relating to the source of data used to prepare the map.

[22] The geospatial assessments conclude that the description and map are not consistent and do not identify the application area with reasonable certainty. This is on the basis that within the outer boundary of Reserve 39897, there are a further two small Reserves, 39900 and 39899. This means that the ‘external boundaries’ of Reserve 39897 could be understood as including

⁸ *Doepel* at [122].

two *internal* boundaries, which exclude the areas covered by Reserves 39900 and 39899. In effect, it is not clear from the written description whether use of the term ‘external boundaries of Reserve 39897’ is intended to include or exclude the areas covered by the two smaller internal Reserves, 39900 and 39899.

- [23] The map does not show the two internal Reserves, however nothing within the description provides that, in the event of an inconsistency, the map is to be relied upon. In addition to this, I note that the map does not include a label of Reserve 39897, which in my view creates further uncertainty about the area depicted.
- [24] By correspondence of 1 March 2019, the applicant submitted that ‘it is clear from the written description ... that reserves 39900 and 3989 [sic] are included in the claim area.’ At s 190B(2), however, my consideration is limited to the information contained in the application, specifically the map and description of the boundary of the area, as made clear in the wording of the condition. For that reason, I cannot have regard to this clarification provided by the applicant directly to the Registrar.
- [25] It follows that I do not consider the written description and the map of the application area are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

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

What is required to meet this condition?

- [27] 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.
- [28] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’: whether the claim has been made on behalf of the correct native title claim group is not relevant.⁹

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

- [29] The description of the persons comprising the native title claim group in Schedule A is sufficiently clear, so that it can be ascertained whether any particular person is in that group.
- [30] The description in Schedule A provides:

The claim group is comprised of those persons who are descended (including by way of adoption) from the following ancestors:

1. Bulugul;
2. Gagai;

⁹ *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

3. Mountain;
4. Wulmarriya;
5. Flora Mayilba;
6. Bungul;
7. Jalwarda; and
8. Nelson.

- [31] From the description, I understand that an individual only has to meet one criterion in order to satisfy the requirements of group membership. That is, they must be descended from one of the named ancestors. It is also clear that descendants by way of adoption are included in the group.
- [32] While determining which persons are and are not included in the native title claim group is likely to require some research or factual inquiry, I do not consider that this results in the description being unclear for the purposes of s 190B(3).¹⁰ The named ancestors provide an objective starting point for such an inquiry, which would in time allow for each person who is a member of the group to be ascertained.
- [33] It follows that I am satisfied the description of the Gajangana Jaru native title claim group is sufficiently clear such that it can be ascertained whether any particular person is in the group.

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

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

What is required to meet this condition?

- [35] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the description of the claimed native title rights and interests is sufficient to allow those 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.¹¹

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

- [36] The description of the native title rights and interests claimed by the native title claim group is clear and the rights claimed are understandable as native title rights and interests.
- [37] The description of the rights and interests claimed appears in Schedule E. I note that no claim is made to a right of exclusive possession of any part of the application area as against the whole world.
- [38] The first paragraph of the description provides that the rights claimed are subject to and exercisable in accordance with the common law, the laws of the Commonwealth and State of

¹⁰ *WA v NTR* at [67].

¹¹ *Doepel* at [99] and [123].

Western Australia and interests conferred under those laws, and in accordance with the traditional laws and customs of the Jaru People.

[39] The description then sets out a list of 14 non-exclusive rights and interests claimed by the claim group.

[40] I have considered the contents of the description together as a whole, including the stated qualifications, and am satisfied that there are no inherent or explicit contradictions within the description. In my view, the rights and interests set out in the description are clear, easily understood and have meaning as native title rights and interests, with reference to the definition of that term in s 223(1). I note, however, that I have not undertaken a consideration of whether each of the individual rights claimed satisfies the requirements of that definition, as I consider this more appropriate for the task at s 190B(6) in considering whether the rights and interests claimed can be established on a prima facie basis.

[41] The requirement at s 190B(4) is, therefore, met.

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

[42] 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 the assertion. In particular, there is not a sufficient factual basis for the assertions of ss 190B(5)(b) and (c).

What is needed to meet this condition?

[43] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is a 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; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[44] 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'.¹²

[45] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.¹³

¹² *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

¹³ *Gudjala 2008* at [92].

[46] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.¹⁴

[47] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) which accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true.¹⁵

[48] The factual basis material appears in Schedules F and G and in a statement of a claim group member at Attachment M. The additional material provided by the applicant does not address the condition of s 190B(5).

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

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

- it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;¹⁶
- it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;¹⁷ and
- the materials must support that the association both presently and by the group’s predecessors relates to the area as a whole.¹⁸

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

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

[51] The application area covers the area of Purnululu National Park in northern Western Australia, adjacent to the Northern Territory border. Based on information obtained by the Tribunal’s Geospatial Services, I am aware that the area was previously the subject of two pastoral stations, Turner Station and Ord River Station, with the border line between the stations running through the centre of the application area, cutting it roughly in half.

[52] Regarding an association of the native title claim group and its predecessors with the application area, Schedule F states:

...The claimant group are descended from the Aboriginal people who occupied the claim area at the time of sovereignty. The members of the claimant group and their ancestors have since sovereignty continuously lived on, occupied and enjoyed the claim area. The claim area is regarded as the traditional family lands of the claimant group by others as well as by themselves.

¹⁴ *Gudjala 2007* at [39].

¹⁵ *Gudjala 2008* at [91]–[92].

¹⁶ *Gudjala 2007* at [52].

¹⁷ *Gudjala 2007* at [51] and [52].

¹⁸ See *Martin* at [23]–[26], affirmed in *Corunna* at [35]–[39] and [42]–[44].

[53] Attachment M, a witness statement by a member of the claim group which appears to have been prepared in relation to the overlapping Purnululu application (WAD6007/1998), provides information about the association of the apical ancestors of the Gajangana Juru claim group with parts of the application area. In particular, the claimant explains that:

- Bulugul was from Turner Station and she would visit the claimant and her parents in a cave at Piccaninny where they were camping;¹⁹
- Bulugul was her father's mother, and her father was born west of Nicholson Station on the Nicholson River;²⁰
- Wulmarriya made coolamons at Piccaninny, and in a cave in the Bungle Bungles;²¹
- Mountain lived at Turner Station;²²
- Jalwarda/Jalwata was her grandfather, and he would come up from Gordon Downs to Turner Station at holiday time;²³
- Jalwarda/Jalwata held the law for Piccaninny, Island Yard and Blue Hole;²⁴
- Nelson lived in Turner and worked on Nicholson Station;²⁵
- Nelson's 'place was Burlmanyulu'.²⁶

[54] From the claimant's statements, I understand that Burlmanyulu is an outcamp or outstation that was used for moving cattle to Wyndham, and that it is located adjacent to the Bungle Bungles rock formation, close to a gorge that is a women's site, and a cave that is used for women's law.²⁷ This is within the western portion of the application area. From my consideration of information available through the Tribunal's geospatial database, and information obtained by the Tribunal's Geospatial Services, I note that Piccaninny Creek runs through the middle of the application area, and Nicholson Station is adjacent to the application area, to the east of Turner Station.

[55] While the witness statement at Attachment M does not include a date at which the ancestors were present in these places, or when settlement in the area took place, the claimant explains that when she was a child, and as an older woman, she rode camels, including on a trip between Burlmanyulu and Turner Station.²⁸ She also states that 'growing up we never had motorcar.'²⁹ I understand the claimant to be an elderly woman, and note her statements indicate she has living memory of the apical ancestors, who were two generations older (that is, some ancestors were her grandparents). Based on this information, I consider it reasonable to infer that her grandparents, or their parents, would have been persons who were living in the area at the time of settlement, which accordingly would have been sometime around the

¹⁹ Witness statement of [Name removed], 20 November 2018, at [26].

²⁰ At [21]-[22].

²¹ At [27].

²² At [29].

²³ At [35].

²⁴ At [38].

²⁵ At [44].

²⁶ At [44].

²⁷ At [13], [62], and [78].

²⁸ At [52].

²⁹ At [11].

late 1800s or early 1900s. In my view, this material is sufficient in addressing an association of the predecessors of the claim group with the area around the time of settlement.

- [56] The claimant also speaks of an association of the persons of the intervening generations with the application area. She names those persons, and explains the places where they lived, worked and travelled, and places for which they held the law. For example, the claimant says:

Burlmanyulu is [Name removed] [son of apical ancestor Nelson] camp and his son. It was an outstation for cattle, worked there all the time to send them to Wyndham.

The Burlmanyulu, that is the tree, [Name removed] he bin put a name. That is the outstation for cattle, where I bin working la that station all the time. To get a cattle and put em out for Wyndham, meatworks. He bin put him Burlmanyulu, [Name removed] bin putim, [Name removed]. That is his place. He is Jaru.³⁰

- [57] Regarding an association of the claim group members today with the area, the claimant talks about various activities the members of the group carry out at certain locations within the application area, including activities to protect sites from harm and desecration.³¹ For example, she explains:

We got women's place for [spiritual figure] Warlawurru, la gorge near Burlmanyulu. Women all dance there and the law from Warlawurru. We dance, I dance at that place.

Men dance in Piccaninny rockhole as well to the Warlawurru story. [Name removed]'s kids can do that dance.³²

- [58] The claimant also talks about a spiritual association the group have and its predecessors had with the area. She talks in particular about a spiritual creation figure known as Warlawurru:

Walawururu [sic] come from garliniyin (from the north), he went Red Hill, Turner. He never stop Djaralulu, he never stop Dixon Range, he been go to Piccaninny, he been come back to Turner. He been stop at Turner, that's his place.

Another place the Warlawurru flew was Turner station, the hill right next to the station. He was signing [sic] out to the Bungle Bungles. That Warlawurru got a camp, like a nest, he been come from Red Hill and went to Turner.³³

- [59] At s 190B(5)(a), the association of the group and its predecessors asserted by the material must be with the whole of the area claimed. In this instance, where the entirety of the application area is a national park, it is my understanding that there are relatively few named features within the boundaries of the area. Notwithstanding this, however, the material speaks to a number of places and natural features within the application area. It explains their approximate location,³⁴ and refers to paths travelled by claimants and their predecessors across the area³⁵ which allows me to consider the factual basis sufficient in supporting the assertion of association at s 190B(5)(a).

- [60] This requirement is met.

³⁰ At [49]-[50].

³¹ See for example at [85].

³² At [78]-[79].

³³ At [72]-[73].

³⁴ See for example at [62].

³⁵ See for example at [58].

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

- [61] To meet s 190B(5)(b), the factual basis must support the assertion ‘that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests’. The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of ‘native title rights and interests’ within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007*³⁶ by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court in *Yorta Yorta*.
- [62] According to the High Court’s decision in *Yorta Yorta*, a law or custom is ‘traditional’ where:
- (a) it ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’;³⁷
 - (b) the origins of the content of the law or custom concerned can be found in the normative rules of a society³⁸ which existed before the assertion of sovereignty by the Crown;³⁹
 - (c) the normative system has had a ‘continuous existence and vitality since sovereignty’;⁴⁰ and
 - (d) the relevant society’s descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.⁴¹
- [63] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group ‘have their source in a pre-sovereignty society and have been observed since that time by a continuing society.’ His Honour held that a ‘starting point must be identification of an indigenous society at the time of sovereignty’, and concluded that a sufficient factual basis must also establish a link between the native title claim group described in the application and the area covered by the application, which involves ‘identifying some link between the apical ancestors and any society identified at sovereignty.’⁴²
- [64] I understand that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).⁴³

³⁶ *Gudjala 2007* at [26] and [62]–[66].

³⁷ *Yorta Yorta* at [46].

³⁸ The term ‘society’ in this context is ‘understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs’—*Yorta Yorta* at [49].

³⁹ *Yorta Yorta* at [46].

⁴⁰ *Yorta Yorta* at [47].

⁴¹ *Yorta Yorta* at [87].

⁴² See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J’s evaluation of the factual basis materials, the Full Court did not disagree with his Honour’s assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether ‘there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs’—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

⁴³ See also *Stock* at [64] where His Honour held that ‘it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists’.

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

[65] I am not satisfied the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claim to native title.

[66] The starting point at s 190B(5)(b) is the identification of a society of people living in the area around the time of European settlement, bound by common observance of normative laws and customs. The native title claim group refer to themselves as Gajangana Jaru. I note that the factual basis material includes statements from a claimant where she speaks about particular predecessors of the group being 'Jaru',⁴⁴ about her language being Jaru language,⁴⁵ and speaks about 'Gajangana country'.⁴⁶ There is not, however, any information before me about the persons comprising the society in occupation of the application area at the time of settlement, or the nature of that society and the way those persons held rights and interests in the application area pursuant to shared laws and customs.

[67] Where a claim group is described with reference to apical ancestors, it is also a requirement that the material explain the link between those ancestors and the relevant society. I do not consider the material before me provides that explanation.

[68] It follows that I am not satisfied the requirement at s 190B(5)(b) is met.

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

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

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.⁴⁷

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

[70] I am not satisfied the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title rights and interests in accordance with traditional laws and customs.

[71] The requirement at s 190B(5)(c) relates directly to that at s 190B(5)(b), such that where the factual basis is not sufficient to support the assertion regarding the existence of traditional laws and customs, it cannot be found sufficient to support the assertion at this condition

⁴⁴ For example at [43] and [50].

⁴⁵ At [8].

⁴⁶ At [2].

⁴⁷ *Gudjala 2007* at [82].

regarding the group continuing to hold their native title pursuant to those traditional laws and customs.⁴⁸

[72] I have already explained at s 190B(5)(b) above, the reasons why I am not satisfied the factual basis speaks to a society in the application area at settlement acknowledging and observing laws and customs from which the claim group's present laws and customs are derived. It follows that I am not satisfied the requirement at s 190B(5)(c) is met.

Prima facie case – s 190B(6): condition not met

[73] I do not consider any of the claimed rights and interests established on a prima facie basis. Therefore, the claim does not satisfy the condition of s 190B(6).

What is required to meet this condition?

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

1. It requires some measure of the material available in support of the claim;⁴⁹
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);⁵⁰
3. Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.⁵¹

[75] 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.'⁵²

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

- (a) possessed under the traditional laws and customs of the native title claim group;⁵³
- (b) a right or interest in relation to the land or waters of the application area;⁵⁴
- (c) not extinguished in relation to the entirety of the application area.⁵⁵

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

[77] I refer to my reasons above at s 190B(5)(b), explaining why I am not satisfied the factual basis is sufficient to support an assertion that there exist traditional laws and customs giving rise to the claim to native title rights and interests. Noting that a 'native title right or interest' must,

⁴⁸ *Martin* at [29].

⁴⁹ *Doepel* at [126].

⁵⁰ *Doepel* at [127].

⁵¹ *Doepel* at [132].

⁵² *Doepel* at [135].

⁵³ Section 223(1)(a).

⁵⁴ Section 223(1)(b).

⁵⁵ Section 223(1)(c).

as above, be one that is possessed under the traditional laws and customs of the native title claim group, it follows that I cannot consider any of the claimed native title rights and interests established on a prima facie basis.

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

[78] 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.

What is required to meet this condition?

[79] 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’.⁵⁶

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

- The material must satisfy the delegate of particular facts therefore evidentiary material is required;⁵⁷
- 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;⁵⁸
- The physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;⁵⁹ and
- The material may need to address an actual presence on the area.⁶⁰

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

[81] Again I refer to my reasons at s 190B(5)(b) above, setting out my view that the factual basis is not sufficient to support the existence of traditional laws and customs giving rise to the claim to native title. It follows that I cannot consider any member of the claim group to have a physical connection with part of the application area that is in accordance with any such traditional laws and customs of the group.

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

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

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination application if approved determination of native title	Geospatial assessment	Met
s 61A(2) claimant application not to be	Schedule B, paragraph (2)	Met

⁵⁶ See subsection (a).

⁵⁷ *Doepel* at [18].

⁵⁸ *Ibid.*

⁵⁹ *Gudjala 2007* at [89].

⁶⁰ *Yorta Yorta* at [184].

made covering previous exclusive possession over areas		
s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule E	Met

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

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

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

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

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

[84] 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?

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

Subsection 61

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A and s 62(1)(a) affidavits	Met
s 61(3)	Name and address for service	Part B	Met

⁶¹ *Doepel* at [16] and also at [35]–[39].

Section	Details	Form 1	Result
s 61(4)	Native title claim group named/described	Schedule A	Met

Subsection 62

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

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

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

What is required to meet this condition?

[89] 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**⁶²) was a member of a native title claim group for any previous application’. To be a ‘previous application’:

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

[90] It is only where there is an application meeting all three of the criteria above, that is, a ‘previous application’, that the requirement for me to consider the possibility of common claimants is triggered.⁶³

[91] The geospatial assessments provide that there is one application currently appearing in an entry on the Register of Native Title Claims (the Register) that overlaps the whole of the application area. This is the Purnululu application (WAD536/2018; WC1994/011). From my own research of the Tribunal’s databases, I have confirmed that the Purnululu application was

⁶² Emphasis in original.

⁶³ See *Strickland FC* at [9].

considered pursuant to s 190A(6) and accepted for registration on 15 October 1999. I have also confirmed that the entry on the Register has not been removed since that time.

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

[93] Schedule H of the Form 1 identifies that the Purnululu application overlaps the entirety of the current application. Schedule O then states:

The descendants of the apical ancestor Bulugul are included as members of the Purnululu Native Title Claim WAD 536/2018 which covers the whole of the claim area.

[94] I have considered the extract from the Register for the Purnululu application, and confirmed that the descendants of the 'Unnamed father of Bulugul and Mayilba' are included in the native title claim group for that previous application. As alluded to in Schedule O, Bulugul also appears as an apical ancestor of the claim group for the current application. Consequently, there are persons who satisfy the criteria for membership of the native title claim groups of both of the applications.

[95] As above, by letter of 18 February 2019, the KLC has provided submissions addressing this condition of the registration test. The KLC explains it is the legal representative for the Purnululu application, and that the requirement of s 190C(3) cannot be met as the KLC is aware that two of the apical ancestors listed in the claim group description for the Gajangana Juru application are also apical ancestors for the overlapping Purnululu application, which appears in an entry on the Register of Native Title Claims. The KLC also identifies particular persons whom it is aware are members of both claim groups.

[96] I consider these submissions to merely provide further confirmation of the information before me in the application, and in the geospatial assessment.

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

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

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

What is required to meet this condition?

[99] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions.⁶⁴ If the application has not been certified, the Registrar must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.⁶⁵

[100] As the application does not purport to be certified under s 190C(4)(a), it is necessary to consider whether it meets the requirements set out in s 190C(4)(b). I must also consider the

⁶⁴ See ss 190C(4)(a).

⁶⁵ See ss 190C(4)(b).

requirements as set out in s 190C(5); that is, that the application itself includes a statement to the effect that the requirement of paragraph 4(b) has been met and briefly sets out the grounds on which the Registrar should consider that it has been met.

[101] Having considered the information in Schedule R and in the s 62(1)(a) affidavits sworn by the applicant persons, I am satisfied the application contains the statement required by s 190C(5)(a), and the further 'brief' statement setting out the grounds upon which the Registrar can consider the requirement at s 190C(4)(b) is met. This includes information about an authorisation meeting held on 30 January 2019 in Halls Creek at which the applicant was authorised to make the application by the members of the native title claim group.

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

- (a) in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application) where one exists;⁶⁶ or
- (b) in any other case, by an agreed or adopted process in relation to authorising things of that kind.⁶⁷

[103] In light of this note, I consider the material must speak to the decision-making process used by the group to authorise the applicant to make the application.

[104] I note that Schedule R and the s 62(1)(a) affidavits refer to a process 'agreed to and adopted by the claim group'. The s 62(1)(a) affidavits describe this process as follows:

- (a) The claim group first heard from senior elders, who are culturally knowledgeable people with authority to speak for country; and
- (b) The decision was then made by consensus.

[105] The affidavit sworn by the legal representative for the claim group, who convened and chaired the meeting, states, however, that the following resolution was passed by consensus of those in attendance:

There is a process of traditional decision making that applies to decisions to authorise a native title claim.

- 1) The native title claim group will first hear from senior elders, who are culturally knowledgeable people with authority to speak for country.
- 2) Decisions will then be made by consensus.⁶⁸

[106] While this appears to indicate the existence of a traditional decision-making process, in my view, there is nothing within the material to suggest that it is, in fact, a mandatory process. That is, there is no information before me about the traditional laws and customs of the group supporting an assertion that there is a specific means or method by which this type of decision must be made.

⁶⁶ Section 251B(a).

⁶⁷ Section 251B(b).

⁶⁸ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [11].

[107] Also addressing this matter, is a statement from a senior elder of the claim group in her affidavit which comprised part of the additional material provided by the applicant on 1 March 2019. The claimant states:

The decision making process which was agreed at the meeting was a process of consulting the senior elders present and then making decisions by consensus. This process was agreed to by a unanimous resolution and is consistent with our traditional law and custom.⁶⁹

[108] In my view, this statement provides clarity that the process used at the meeting to authorise the applicant to make the application was one 'agreed to' by the persons present. The statement further clarifies that there was no mandatory process which dictated either a specific process, or persons of authority who had to attend the meeting and participate in the elders consultation that took place as the first step in the decision-making process. It is clear that the process decided upon by the group involves elements of, or is 'consistent with', traditional laws and customs. But again, noting that the information does not refer to this process as a mandatory one for this particular type of decision, I am satisfied that the group were able to agree to and adopt the process described in the material for the purposes of satisfying the requirement at s 251B. Further, from the material about the conduct of those at the meeting, I am satisfied that the group proceeded to make decisions about the claim in accordance with the process described above, including the decision to authorise the applicant to make the application and deal with all matters arising in relation to it.

[109] Where it is an agreed to and adopted decision-making process at a meeting of members of the native title claim group that is the basis of the applicant's authority to make the application, there is no requirement for all of the members of the group to be involved in the decision-making process. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate.⁷⁰

[110] Regarding whether all of the members of the native title claim group were given every reasonable opportunity to participate in the decision-making process, the material before me provides the following information:

- A copy of a notice for the meeting appeared in the Kimberley Echo on 10 January 2019.⁷¹
- The notice set out the details and purpose of the meeting, a map of the proposed application area and the persons invited to attend, being the descendants of the apical ancestors for the claim group.⁷²
- The notice included a name and contact details for anyone wishing to make inquiries.⁷³
- A copy of the same notice was posted on 10 January 2019 to all (13) persons listed in a database of respondent parties to the Purnululu application, maintained by the legal representative for the proposed application.⁷⁴

⁶⁹ Affidavit of [Deponent 3 removed] affirmed 28 February 2019, at [8].

⁷⁰ *Lawson* at [25].

⁷¹ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [3].

⁷² Annexure 'PAS2' to the affidavit of [Deponent 1 removed] affirmed 1 March 2019.

⁷³ *Ibid.*

- A copy of the notice was also emailed to a number of community and government organisations in the East Kimberley region, including Halls Creek, and the Mulan, Ringer Soak, Bililuna and Balgo communities.⁷⁵
- It was requested that these organisations place a copy of the notice at their premises and/or on notice boards.⁷⁶
- A copy was also placed on the notice board at the Halls Creek IGA and Poinciana service station.⁷⁷
- Notice of the meeting was also given in a daily announcement on the local Halls Creek radio station, from about 10 January 2019.⁷⁸
- A prominent elder of the claim group who is 'closely related to and know[s] most of the members of the claim group' drove around Halls Creek the day prior to the meeting inviting members of the group to attend.⁷⁹
- It was this claimants' view that the meeting was attended by persons who were broadly representative of the proposed claim group, 'including elders and younger people'.⁸⁰
- A number of phone calls and emails were received by the office of the claim group's legal representative between 11 January 2019 and 29 January 2019 from people making inquiries about the meeting.⁸¹
- On the day of the meeting, there was a change to the venue, to a location approximately 400 metres away from the original venue.⁸²
- A sign was placed at the original venue directing people to the replacement venue.⁸³
- The legal representative for the group assigned someone to remain at the original venue until 11am (the meeting was to commence at 10am) and direct people to the replacement venue as needed.⁸⁴
- Each person who arrived at the meeting was required to undertake a registration process, where their apical ancestor was noted.⁸⁵
- Those present at the meeting comprised descendants of seven of the eight apical ancestors named in the claim group description.⁸⁶

⁷⁴ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [4].

⁷⁵ Affidavit of [Deponent 2 removed] affirmed February 2019, at [4]–[5].

⁷⁶ Affidavit of [Deponent 2 removed] affirmed February 2019, at [5].

⁷⁷ Affidavit of [Deponent 2 removed] affirmed February 2019, at [5].

⁷⁸ Affidavit of [Deponent 2 removed] affirmed February 2019, at [7].

⁷⁹ Affidavit of [Deponent 3 removed] affirmed 28 February 2019, at [5].

⁸⁰ Affidavit of [Deponent 3 removed] affirmed 28 February 2019, at [7].

⁸¹ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [5].

⁸² Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [7].

⁸³ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [7].

⁸⁴ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [8].

⁸⁵ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [9].

⁸⁶ Affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [9]; affidavit of [Deponent 3 removed] affirmed 28 February 2019, at [7].

- No descendant of apical ancestor Bungul was present, however one claimant has sworn in her affidavit that she spoke with particular descendants of Bungul about the meeting in mid-January and informed them of the details.⁸⁷

[111] It is clear from the material that personal and public notice of the meeting was given. I understand that the personal and public notice given was in identical terms, except for where it was given by word of mouth or on the radio. I consider the notice makes clear who was invited to attend, by setting out the claim group description and the apical ancestors for the group. I have considered the list of apical ancestors in the notice and it is identical to those apical ancestors listed in the claim group description in Schedule A of the Form 1.

[112] The notice also sets out the details for and purpose of the meeting, such that I consider any person viewing the notice who fell within the claim group description could make an informed decision as to whether their attendance was necessary. Such persons had approximately three weeks to make arrangements to attend the meeting if they decided to participate, which I consider sufficient time.

[113] While there was a last minute change to the venue for the meeting, noting that the replacement venue was only 400 metres away, and that a person remained at the original venue until well after the meeting commenced to direct and assist others to get to the replacement venue, I do not consider that this fact resulted in persons not having every reasonable opportunity to participate in the decision-making process.

[114] Regarding the persons who attended the meeting, while the material does not state how many were present, it is clear that descendants from seven of the eight apical ancestors were there. It is also clear that descendants of the eighth ancestor were aware of the meeting, as a claimant relayed the conversation she had had with that family in mid-January. I note that no person has provided me with any information to suggest that families were excluded from the meeting or the authorisation decision-making process.

[115] In light of this information before me, I am satisfied that all the persons in the native title claim group were given every reasonable opportunity to participate in the decision to authorise the applicant to make the application.

[116] I note that the material must provide sufficient details of the meeting and the way it was conducted. In *Ward, O'Loughlin J* posed a number of hypothetical questions His Honour held 'the substance of which' must be addressed by the authorisation material.⁸⁸ In my view, those questions are addressed. The material explains who convened the meeting, how it was notified, who chaired the proceedings, the information given to persons at the meeting about the application, the registration process undertaken at the commencement of the meeting, and the way the group proceeded to agree to and adopt the decision-making process set out above for making decisions about the application. The material also explains the various issues about the claim discussed by those present.⁸⁹ There is nothing to indicate there was any major dissent or disagreement about the resolutions passed.

⁸⁷ Affidavit of [Deponent 2 removed] affirmed February 2019, at [8].

⁸⁸ *Ward* at [24] and [25].

⁸⁹ See affidavit of [Deponent 1 removed] affirmed 1 March 2019, at [10].

[117] The affidavit of the senior claimant, and the s 62(1)(a) affidavits, confirm that during the meeting, using the agreed to and adopted process, the persons in attendance resolved to authorise the four applicant persons to make the claim and deal with all matters arising in relation to it.

[118] Consequently, I am satisfied of the fact of authorisation, and that the requirement at s 190C(4)(b) is met.

End of reasons

Attachment A

Summary of registration test result

Application name	Gajangana Jaru
NNTT No.	WC2019/001
Federal Court of Australia No.	WAD65/2019
Date of decision	8 April 2019

Section 190B conditions

<i>Test condition</i>	<i>Result</i>
s 190B(2)	Not met
s 190B(3)	Overall result: Met
s 190B(4)	Met
s 190B(5)	Aggregate result: Not met
s 190B(6)	Not met
s 190B(7)(a) or (b)	Not met
s 190B(8)	Aggregate result: Met
s 190B(9)	Aggregate result: Met

Section 190C conditions

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