

Registration Decision

Application name	Josephine Farrer & Ors on behalf of the Ngarrawanji Native Title Claim Group #2 and State of Western Australia (Ngarrawanji #2)
Name of applicant	Josephine Farrer, Gregory Donald Tait, Matt Dawson, Marty Stevens, Phyllis Wallaby, Mark Bin Bakar
Federal Court of Australia No.	WAD569/2019
NNTT No.	WC2019/012
Date of Decision	20 December 2019

Claim not accepted for registration

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

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

Katy Woods²

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

² Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.

Reasons for Decision

Cases cited

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
Farrer on behalf of the Ngarrawanji Native Title Claim Group v State of Western Australia [2019] FCA 655 (*Ngarrawanji*)
Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)
Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (*Lawson*)
Martin v Native Title Registrar [2001] FCA 16 (*Martin*)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)
Northern Territory of Australia v Doepel [2003] FCA 1384 (*Doepel*)
Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26 (*Sampi FC*)
Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)
Ward v Northern Territory [2002] FCA 171 (*Ward v Northern Territory*)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

Background

- [1] This application was filed on behalf of the Ngarrawanji #2 native title claim group (**claim group**) on 29 October 2019. It covers two parcels of unallocated crown land near Halls Creek, in the East Kimberley region of Western Australia (**application area**).
- [2] The Registrar of the Federal Court (**Court**) gave a copy of the application and accompanying affidavits to the Native Title Registrar (**Registrar**) of the National Native Title Tribunal (**Tribunal**) on 20 November 2019 pursuant to s 63 of the Native Title Act. This has triggered the Registrar's duty to consider the claim under s 190A(1).
- [3] This application is wholly overlapped by the WAD41/2019 Ngarrawanji native title determination application. Part A of that application was determined by consent on 21 May 2019 in *Ngarrawanji*.³ I understand this application has been filed to claim the benefit of s 47B in the areas which have not yet been determined. Section 47B provides the circumstances under which extinguishment of native title in areas of vacant crown land must be disregarded.
- [4] If the claim in the application satisfies all the registration test conditions in ss 190B–190C, then the Registrar must accept the claim for registration.⁴ If it does not satisfy all the conditions, it must not be accepted for registration.⁵ I have decided the application does not satisfy all of the registration test conditions and my reasons on each condition follow below.

Procedural fairness

- [5] On 26 November 2019, a senior officer of the Tribunal (**senior officer**) wrote to the relevant minister of the State of Western Australia (**state**) advising that I would be relying on the

³ *Ngarrawanji* [2]–[3].

⁴ Section 190A(6).

⁵ Section 190A(6B).

information in the application for my decision, and should the state wish to make any submissions, it should do so by 3 December 2019.

- [6] Also on 26 November 2019, the senior officer wrote to the applicant advising that I would be relying on the information in the application for my decision, and provided my preliminary views on deficiencies in the application which would likely prevent the claim from passing the registration test. The senior officer advised that any additional information that the applicant wished to provide for my consideration should be received by 3 November 2019.
- [7] On 27 November 2019, the applicant's representative wrote to the senior officer advising that the applicant did not expect the claim to pass the registration test and would not be making any submissions to address the identified deficiencies.
- [8] No submissions were received from the state and so this concluded the procedural fairness process.

Information considered

- [9] I have considered the information in the application.⁶ I have had regard to information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 27 November 2019 (**geospatial report**) and information available through the Tribunal's geospatial database and the Register of Native Title Claims (**Register**).⁷
- [10] There is no information before me obtained as a result of any searches of state or Commonwealth interest registers,⁸ and as noted above, neither the applicant nor the state has supplied any information in relation to the application of the registration test.⁹

Section 190C: conditions about procedures and other matters

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

- [11] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.¹⁰

Section 61

- [12] I am satisfied the application contains the details required by s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group has authorised the applicant	Part A(2), Schedule A and affidavits filed with application	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

⁶ Section 190A(3)(a).

⁷ Section 190A(3)(c).

⁸ Section 190A(3)(b).

⁹ Section 190A(3)(a), (c).

¹⁰ *Doepel* [16], [35]–[39].

Section 62

[13] I am satisfied the application contains the information required by s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits filed with application	Met – see comment
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, 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	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, Attachment I	Met

Section 62(1)(a)

[14] Section 62(1)(a) sets out the information which must be included in the affidavits sworn by the members of the applicant. I have examined the affidavits from each of the applicant members and I am satisfied that they all contain the prescribed statements. For completeness, I note that there appears to be some text missing from paragraph 4 of the affidavit of Phyllis Wallaby, as the date of the authorisation meeting appears merely as '26', whereas the other affidavits specify 26 November 2018. There also appears to be a few other words missing from paragraph 4 of Ms Wallaby's affidavit. In my view, this is a typographical error which does not affect the application's ability to meet the requirements of s 61(1)(a).

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

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

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

[16] The geospatial report states, and my own searches confirm, the WAD41/2019 Ngarrawanji application entirely overlaps the current application. According to the Register, the claim in WAD41/2019 Ngarrawanji was entered on 25 June 1996 and has not been removed. Section 190A was introduced in the *Native Title Amendment Act 1998* (Cth) and the WAD41/2019 Ngarrawanji application was subsequently considered for registration under s 190A on 30 September 1999. I therefore consider it is a 'previous application' as it meets the

three conditions in s 190C(3). This means I must consider whether there are common claimants between the two applications.

- [17] Schedule O, which asks applicants whether any member of the claim group is also a member of any other native title claim group, states '[t]he members of the Ngarrawanji application (WAD41/2019) are the same members as in this application'. To confirm that there are common claimants, I have examined the Register extract for WAD41/2019 Ngarrawanji and note that all the members of the applicant in both claims are the same. In addition, one of the apical ancestors in the current application (Linmarji) is also named as an ancestor in WAD41/2019 Ngarrawanji. Given these commonalities, I am not satisfied that no member of the claim group for the current application is not also a member of the WAD41/2019 Ngarrawanji claim group. This means s 190C(3) is not met.

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

- [18] To meet s 190C(4), the Registrar must be satisfied that either:
- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions; or
 - (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
- [19] Schedule R, which asks applicants to provide information about the certification of the claim and/or authorisation of the applicant by the members of the native title claim group, states only 'See section 62 affidavits signed by each member of the Applicant filed contemporaneously with this Form 1'. Based on this statement, and as no certificate from a representative Aboriginal/Torres Strait Islander body has been provided, I understand the application has not been certified and I must therefore assess the application against the requirements of s 190C(4)(b).
- [20] Following s 190C(4)(b) there is a note in the Native Title Act referring to the definition of 'authorising the making of applications' in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision-making is utilised:
- (a) a process that, under the traditional laws and customs of the persons in the claim group, must be complied with; or
 - (b) where there is no traditional process, a process agreed to and adopted by the claim group.
- [21] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) is met unless the application:
- (a) includes a statement to the effect that the requirement in s 190C(4)(b) has been met; and
 - (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

Is s 190C(5) met?

[22] The affidavits of the members of the applicant depose the following (notwithstanding the typographical error in one of the affidavits discussed at s 62(1)(a) above):

1. I am a member of the native title claim group in the Ngarrawanji #2 native title determination application in the Federal Court of Australia.
2. I am a member of the Applicant.
3. I am authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to the application.
4. The process of decision-making which was complied with in authorising me and 5 other persons to make, and to deal with matters arising in relation to, the application at a meeting of the Ngarrawanji #2 native title claim group held at Halls Creek on 26 November 2018 was a process of decision-making agreed to and adopted at that meeting, whereby decisions were made by one person moving a motion which is seconded by a second person that is passed by majority decision of the native title claim group by a show of hands.

[23] I note French J's comment that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained'.¹¹ I therefore consider that paragraphs 1–3 of the affidavits is a sufficient statement for the purposes of s 190C(5)(a), and paragraph 4 is sufficient for the purposes of s 190C(5)(b), which means s 190C(5) is met.

Is s 190C(4)(b) met?

[24] I have examined the contents of the application and am satisfied that the s 62 affidavits contain the only information about the authorisation of the applicant. Based on the s 62 affidavits, I understand a claim group meeting was held to authorise the applicant, using an agreed and adopted decision-making process, which is one of the methods of authorisation stipulated in s 251B. However there is no information before me about either the notice or the conduct of the claim group meeting to enable me to consider whether all the persons in a native title claim group have authorised the applicant.

[25] I also understand that where an applicant is relying on s 190C(4)(b), I must be satisfied of the 'fact of authorisation' by all members of the native title claim group.¹² I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward v Northern Territory*:

Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?¹³

¹¹ *Strickland* [57].

¹² *Doepel* [78].

¹³ *Ward v Northern Territory* [25]–[26]; followed in *Lawson* [27]–[28].

[26] His Honour found that the substance of the above questions must be addressed.¹⁴ Based on the information in the application, I am not satisfied the substance of the above questions have been addressed, that all members of the claim group were given every reasonable opportunity to participate in the decision-making process,¹⁵ or that they have authorised the applicant to make the application and deal with all matters arising in relation to it. This means s 190C(4)(b) is not met.

Section 190B: conditions about merits of the claim

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

[27] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application as required by ss 62(2)(a)–(b) 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. The two questions for this condition are whether the information and map provides certainty about the external boundary of the area where native title rights and interests are claimed; and any areas within the external boundary over which no claim is made.¹⁶

External boundaries

[28] Schedule B describes the application area as:

Two Unallocated Crown Land parcels, being Lot 360 on Deposited Plan 76780, and Lot 361 on Deposited Plan 76779.

[29] Schedule C refers to Attachment C which contains a map prepared by the Tribunal's Geospatial Services titled 'Ngarrawanji Part B' and dated 13 June 2019. It includes:

- (a) The application area depicted by bold dark-blue outline labelled with Lot on Deposited Plan descriptions;
- (b) A topographic background showing roads, waterways, population centres and geographical features labelled;
- (c) Scalebar, coordinate grid ; and
- (d) Notes relating to the source, currency and datum of data used to prepare the map.

[30] The assessment in the geospatial report is that the description and map are consistent and identify the application area with reasonable certainty. Having considered the information in Schedule B and Attachment C, I agree with the assessment in the geospatial report and am satisfied that the external boundary of the application area can be identified with reasonable certainty for the purposes of s 190B(2).

Areas within the external boundary over which no claim is made

[31] Schedule B specifically excludes the areas subject to:

- (a) WAD41/2019 Ngarrawanji Part A (WCD2019/004) as determined by the Federal Court on 21 May 2019;
- (b) WAD43/2019 Malarngowem (WCD2019/005) as determined by the Federal Court on 23 May 2019; and

¹⁴ Ibid.

¹⁵ *Lawson* [25].

¹⁶ *Doepel* [122].

(c) WAD45/2019 Koongie-Elvire (WC1999/040) as accepted for registration on 15 November 1999.

[32] In my view, the exclusions from the application area are clear from the wording of Schedule B.

Conclusion

[33] I am satisfied the information and map contained in the application identify with reasonable certainty the particular land or waters where native title rights and interests are claimed, such that s 190B(2) is met.

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

[34] To meet 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.

[35] Schedule A states:

1. The Native Title Claim Group are those Aboriginal people who:

- (a) are related through filiation (including by adoption) to one of the Ngarrawanji Apical Ancestors who held rights and interests in one of the local estate countries comprising the claim area; or
- (b) are affiliated to a Ngarrawanji Apical Ancestor and who have spirit conception and/or birth sites in one of the local estate countries in the claim area; or
- (c) are recognised by the persons described above as:
 - (i) holding rights and responsibilities for certain songs and ceremonies which make reference to important sites in the claim area; or
 - (ii) holding rights and interests in one of the local estate countries in the claim area under traditional law and custom.

2. The Ngarrawanji Apical Ancestors are: [list of 6 people].

[36] From the description in Schedule A, I understand a person must meet the requirements of paragraph 1(a), 1(b) or 1(c) in order to qualify for membership of the claim group. This means that s 190B(3) is applicable and I must make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’.¹⁷ I note that this same description was accepted by the Court on the basis of anthropologist’s report in the determination of Part A of the Ngarrawanji application.¹⁸

[37] I consider the description provides a clear objective starting point, being descent from the named ancestors listed in paragraph 2 who hold rights and interests in one of the local estate countries comprising the application area. That list provides a basis from which the people who qualify for group membership as descendants of the apical ancestors under paragraph 1(a) can be determined. This could be done through genealogical research.

[38] I consider the people who qualify for group membership under paragraph 1(b) could be ascertained through two stages of factual enquiry. Firstly, enquiries would need to be made as

¹⁷ *Wakaman* [34].

¹⁸ *Ngarrawanji* [24].

to a person's 'affiliation' to a Ngarrawanji apical ancestor. I understand 'affiliation' means a connection or an association with a Ngarrawanji apical ancestor, as opposed to 'filiation' in paragraph 1(a) which I understand refers to a person's family or descendants. The second stage of enquiry would be to determine the spirit conception or birth site of the person and whether that site falls within the application area. Individuals who meet both criteria would satisfy the membership requirements of paragraph 1(b), noting that paragraph requires affiliation with a Ngarrawanji apical ancestor and a spirit conception and/or birth site in one of the local estate countries in the application area.

- [39] Once the people who qualify under paragraph 1(b) are determined, they, along with the people who have qualified under paragraph 1(a) could assist with identifying the people who qualify under paragraph 1(c), as the description in that paragraph requires 'recognition' by the two preceding groups. I consider there is no objective starting point to ascertain 'recognition' – it is a subjective criterion. I note that the Court has previously held that membership of a native title claim group must be based on group acceptance, that being inherent in the nature of a society.¹⁹ The Full Court in *Sampi FC* agreed with the submission that 'in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.²⁰ Schedule F asserts that the claim group's rights to the application area are in accordance with traditional law and custom, which the claim group continues to acknowledge and observe.²¹ I therefore consider it is with reference to those laws and customs that the people who qualify under paragraph 1(c) would need to be 'recognised' as members of the claim group by the other members of the claim group.
- [40] I consider the description in Schedule A will allow for the people who qualify for group membership under paragraphs 1(a), 1(b) or 1(c) to be ascertained at the relevant time. I am therefore satisfied that the persons in the group are described sufficiently clearly and so s 190B(3)(b) is met.

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

- [41] To meet s 190B(4), the Registrar must be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the claimed native title rights and interests to be identified.
- [42] I understand it is open to me to read Schedule E 'as a whole' so there is 'no inherent or explicit contradiction'.²² I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights can be established as a native title right on a prima facie basis.
- [43] Schedule E lists the native title rights and interests claimed under two headings: 'Native title where traditional rights are wholly recognisable' and 'Native title where traditional rights are partially recognisable'.

¹⁹ *Aplin* [260]; *Yorta Yorta* [108].

²⁰ *Sampi FC* [45].

²¹ Schedule F, para (c)–(d).

²² *Doepel* [92], [123].

- [44] Under the first heading, it states that the rights claimed apply to every part of the application area where there has been no extinguishment of native title or where any extinguishment is to be disregarded. The rights claimed are described as 'the right of possession, occupation, use and enjoyment of land and waters as against the whole world'. From this description I understand the right claimed under the first heading is one of exclusive possession.
- [45] Under the second heading, it states that the rights claimed apply to every part of the application area where the description under the first heading does not apply. Three rights are listed which are described as the rights:
- (a) to have access to, remain in and use the land and waters;
 - (b) to access and take for any purpose the resources of the land and waters; and
 - (c) to protect places, areas and things of traditional significance on the land and waters.
- [46] Based on the information in paragraph 5 of Schedule E, I understand the rights under the second heading do not confer possession, occupation, use and enjoyment to the exclusion of all others, or a right to control the access of others. I therefore consider the three rights under the second heading to be 'non-exclusive'.
- [47] Paragraphs 6 and 7 describe the limitations on the rights claimed, including that they are subject to the laws of Western Australia and the Commonwealth and do not exist in any minerals or in petroleum.
- [48] Having considered the wording of Schedule E, I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

- [49] To meet s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:
- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
 - (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
 - (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.
- [50] I understand my task is to 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'.²³ I also note French J's view that '[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or [her] delegate undertake a search for such material'.²⁴ Therefore I have not undertaken any searches for external material to support the applicant's claim.
- [51] Schedule F states:

²³ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

²⁴ *Martin* [23].

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

- (a) the native title claim group and their ancestors have, prior to and since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area;
- (b) such possession, occupation, use and enjoyment has been pursuant to and under the laws and customs of the claim group, comprising rights and interests in land and waters which the traditional laws and customs vest in members of the native title claim group on the basis of descent from ancestors connected to the area, including descent through adoption in accordance with traditional law and custom;
- (c) such traditional laws and customs have been passed down from older generations to younger generations by traditional teaching, through the generations of persons comprising the native title claim group preceding the present generations to the present generations of persons comprising the native title claim group;
- (d) the native title claim group continues to acknowledge and observe those traditional laws and customs;
- (e) the native title claim group by those laws and customs have continuing connection with the land and waters in respect of which the claim is made; and
- (f) the rights and interests are capable of being recognised by the common law of Australia.

[52] Schedule G states:

The native title claim group have continuously carried out on the land and waters all such activities as are contemplated by their rights and interests as and when they choose, informed by their rights and obligations under traditional law and custom including:

- (a) accessing and using the land and waters;
- (b) controlling the access and use of the claim area by others;
- (c) accessing and taking the resources of the land and waters; and
- (d) protecting places, areas and things of traditional significance on the land and waters.

[53] I have examined the application and I consider the information in these schedules is the extent of the factual basis material before me.

[54] I consider that the material does not provide a sufficient factual basis to support an assertion that the predecessors of the group were associated with the application area over the period since sovereignty. There are no references to any locations inside the application area and no information about any association of the predecessors with the application area other than the general statement regarding their occupation of the area in Schedule F. In my view, there is also insufficient factual basis to demonstrate the association the claim group currently has with the application area. I consider that the information provided is of a very general nature and has no 'geographical particularity', which means s 190B(5)(a) is not met.²⁵

[55] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society, acknowledging and observing normative laws and customs.²⁶ In my view,

²⁵ *Martin* [26]; *Corunna* [39], [45].

²⁶ *Gudjala 2009* [37], [52].

there is an insufficient factual basis to support an assertion that a pre-sovereignty society existed in the application area. I consider the broad statements in Schedule F to be ‘at a high level of generality’.²⁷ I also consider there is insufficient factual basis to demonstrate any relationship between the ancestors of the claim group and a pre-sovereignty society.²⁸

[56] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are ‘traditional’, that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society.²⁹ I am not satisfied the information in the application supports an assertion that laws and customs exist in the application area, either in relation to a pre-sovereignty society or since that time. This means I cannot be satisfied that any such laws or customs could be considered ‘traditional’ and so s 190B(5)(b) is not met.

[57] Meeting the requirements of s 190B(5)(c) relies on whether there is a factual basis supporting the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.³⁰ Because I consider the factual basis is not sufficient to support the assertion of the existence of traditional laws and customs at s 190B(5)(b), I cannot be satisfied that the factual basis is sufficient to support the assertion of the continuity of traditional laws and customs, which means s 190B(5)(c) is not met.

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

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

[59] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a ‘native title right or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group. As discussed above at s 190B(5)(b), I am not satisfied there is information in the application to support the assertion that such traditional laws and customs exist. This means the claimed rights and interests cannot be shown to be held in accordance with traditional laws and customs, and thus cannot be established on a prima facie basis as ‘native title rights and interests’.

[60] In addition, there must be information within the application which talks about each of the individual rights claimed. I am not satisfied the application contains sufficient information of this type. I therefore consider none of the claimed rights and interests have been established on a prima facie basis, which means s 190B(6) is not met.

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

[61] To meet s 190B(7), the Registrar must be satisfied that at least one member of the native title claim group:

²⁷ *Doepel* [102].

²⁸ *Ibid* [40].

²⁹ *Yorta Yorta* [46], [49].

³⁰ *Gudjala 2009* [29].

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- (b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[62] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and requires that the physical connection is in accordance with the traditional laws and customs of the claim group.³¹

[63] No information has been provided at Schedule M, which asks the applicant for information about any traditional physical connection that a claim group member has with the application area, which means that my consideration is limited to the information in the other schedules, particularly Schedules F and G, quoted above. I consider the information in these schedules is too general to satisfy the requirements of s 190B(7). In addition, given my finding at s 190B(5)(b), that there is insufficient information to demonstrate the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds the requisite physical connection with the application area in accordance with traditional laws and customs, which means s 190B(7) is not met.

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

[64] I am satisfied the application complies with ss 61A(1)–(3) and so s 190B(8) is met:

Section	Requirement	Information	Result
s 61A(1)	No native title determination application if approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule E provides that native title rights are only claimed where there has been no extinguishment of native title or where any extinguishment is required to be disregarded	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E provides that exclusive possession is only claimed where there has been no extinguishment of native title or where any extinguishment is required to be disregarded	Met

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

[65] I am satisfied s 190B(9) is met:

³¹ *Doepel* [18], *Gudjala 2009* [84].

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states no claims of ownership of minerals, petroleum or gas wholly owned by the Crown are made	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states no claims of exclusive possession to any offshore places are made	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	There is no information in the application that discloses to me that native title rights and interests in the application area have otherwise been extinguished	Met

End of reasons

Attachment A

Summary of registration test result

Application name	Ngarrawanji #2
NNTT No.	WC2019/012
Federal Court of Australia No.	WAD569/2019
Date of decision	20 December 2019

Section 190B conditions

<i>Test condition</i>	<i>Sub-condition/requirement</i>	<i>Result</i>
s 190B(2)		Met
s 190B(3)		Met
s 190B(4)		Met
s 190B(5)	ss 190B(5)(a)–(c)	Not met
s 190B(6)		Not met
s 190B(7)		Not met
s 190B(8)		Met
s 190B(9)		Met

Section 190C conditions

<i>Test condition</i>	<i>Sub-condition/requirement</i>	<i>Result</i>
s 190C(2)	ss 61–2	Met
S 190C(3)		Not met
s 190C(4)	s 190C(4)(a)–(b)	Not met