

Registration Decision

Application name	Pearl Gordon & Ors on behalf of the Malarngowem Native Title Claim Group Part B and State of Western Australia (Malarngowem Part B)
Name of applicant	Pearl Gordon, Bernard Stretch, Shirley Purdie, Rusty Peters, Mabel Peters, Gordon Barney, Mary Thomas, Queenie Malgil, Paddy McGinty
Federal Court of Australia No.	WAD568/2019
NNTT No.	WC2019/013
Date of Decision	20 December 2019

Claim not accepted for registration

I have decided the claim in the Malarngowem Part B 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

Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)
Martin v Native Title Registrar [2001] FCA 16 (*Martin*)
Northern Territory of Australia v Doepel [2003] FCA 1384 (*Doepel*)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)

Background

- [1] This application was filed on behalf of the Malarngowem native title claim group (**claim group**) on 29 October 2019. It covers two portions of unallocated crown land 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] The native title determination application WC1999/044 Malarngowem (WAD43/2019) (**Marlarngowem application**) wholly overlaps this application. I understand this application has been filed to claim the benefit of s 47B of the Native Title Act. That provision allows the extinguishment of native title in areas of vacant crown land to be disregarded in certain circumstances.
- [4] The same claim group previously claimed one of the two areas covered by this application in WC2019/003 Malarngowem #2 (WAD118/2019) (**Malarngowem #2 application**). On 22 March 2019, I applied the registration test to the claim in the Malarngowem #2 application and decided that it did not satisfy the conditions of ss 190C(3)–(4) and ss 190B(5)–(7) (**Malarngowem #2 reasons**). I have compared the Malarngowem #2 application with the current application and I am satisfied that they are identical, other than the increase in the application area to cover an additional portion of unallocated crown land. I am of the view that the statements of law in my Malarngowem #2 reasons remain correct. I have considered this application afresh, however in the interests of brevity, I have relied on my Malarngowem #2 reasons where it is appropriate and convenient to do so.
- [5] If the claim in the application satisfies all the registration test conditions in ss 190B–190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, it must not be accepted for registration.⁴ I have decided the application does not satisfy all of the registration test conditions and my reasons on each condition follow below.

Procedural fairness

- [6] On 22 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 Section 190A(6).

⁴ Section 190A(6B).

information in the application for my decision, and should the state wish to make any submissions, it should do so by 29 November 2019.

- [7] Also on 22 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 29 November 2019.
- [8] On 26 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.
- [9] No submissions were received from the state and so this concluded the procedural fairness process.

Information considered

- [10] I have considered the information in the application.⁵ 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**).⁶ As discussed above, I have had regard to my Malarngowem #2 reasons dated 22 March 2019.⁷
- [11] 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

- [12] 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

- [13] 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

⁵ Section 190A(3)(a).

⁶ Section 190A(3)(c).

⁷ Ibid.

⁸ Section 190A(3)(b).

⁹ Section 190A(3)(a), (c).

¹⁰ *Doepel* [16], [35]–[39].

s 61(4)	Native title claim group named/described	Schedule A	Met
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Section 62

[14] 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
s 62(2)(a)	Information about the boundaries of the area	Schedule B	Met: see reasons below
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(2)(a)

[15] Section 62(2)(a) has two limbs, requiring information which enables the identification of:

- (i) the boundaries of the area covered by the application, and
- (ii) any areas within the boundaries that are not covered by the application.

[16] Schedule B provides a description of the boundaries of the area covered by the application, sufficient for s 62(2)(a)(i). There is no information in Schedule B or elsewhere in the application about any areas which are excluded, so I understand the entire area within the external boundaries is covered by the application. I do not consider that claiming the entire area in this way affects the application's ability to meet s 62(2)(a)(ii), noting that provision only requires 'any areas' within the boundaries that are not covered by the application to be identified, rather than mandating that an application area must include such areas.

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

[17] 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.

[18] The geospatial report states, and my own searches confirm that the Malarngowem application entirely overlaps the current application. According to the Register, the claim in the Malarngowem application was accepted for registration under s 190A and entered onto the

Register on 4 February 2000, and has not been removed. 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.

- [19] Schedule O, which asks applicants whether any member of the native title claim group is also a member of any other claim group, states '[t]he members of the Malarngowem application (WAD43/2019) are the same members as in this application'.
- [20] To confirm that there are common claimants, I have examined the Register extract for the Malarngowem application and note that particular members of the applicant in both claims have identical names. In addition, several of the apical ancestors in the current application are also named as ancestors in the Malarngowem application, including Bidy (Dirngorl), Lola Budbaria, Chinabi (Kargoyn) and Jungubany. 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 claim group for the Malarngowem application. This means s 190C(3) is not met.

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

- [21] 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.
- [22] 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 at Item 2: 'See section 62 affidavits signed by each member of the Applicant filed contemporaneously with this Form 1'. In light of this statement and as no certificate accompanies the application, I understand that I must assess the application against the requirements of s 190C(4)(b).
- [23] At paragraphs [21]–[24] of my Malarngowem #2 reasons I was not satisfied that the claim group had authorised the applicant in accordance with s 190C(4)(b), although there was sufficient information in that application to satisfy the requirements of s 190C(5). I held this view because although the accompanying affidavits identified that the applicant members were members of the claim group and that a meeting was held to authorise the applicant using an agreed and adopted decision making process, there was no information provided about either the notice or conduct of that authorisation meeting. The affidavits which accompany this application are identical to those which accompanied the Malarngowem #2 application, and no additional information has been provided with this application about the authorisation of the applicant. In my view, the statement of law at this condition in my Malarngowem #2 reasons is still correct and I correctly applied the law to the facts in my consideration of this condition in my Malarngowem #2 reasons. I therefore consider it is appropriate to adopt my Malarngowem #2 reasons at this condition.

Conclusion

- [24] I am not satisfied that the applicant is authorised to make the application and deal with all matters arising in relation to it, by all the other persons in the claim group. This means that s 190C(4) is not met.

Section 190B: conditions about merits of the claim

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

- [25] 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:

- (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.¹¹

- [26] Schedule B describes the application area as being two areas: Area 1 and Area 2. Area 1 is described as:

That portion of Lot 128 on Deposited Plan 39947 that falls north of a line commencing at the south western corner of Lot 96 on Deposited Plan 28264 and extending west to the prolongation northerly of the western boundary of Lot 76 on Deposited Plan 238428 (at approximately Longitude 128.245639° East Latitude 17.127004° South).

- [27] Area 2 is described as:

That portion of Lot 130 on Deposited Plan 39943 that falls north of a line commencing at the intersection of the eastern boundary of Reserve 39898 (Purnululu Conservation Reserve) with the prolongation easterly of the northern boundary of Reserve 2263; then westerly along that prolongation to the north eastern corner of that Reserve.

- [28] Schedule C refers to Attachment C which contains a map prepared by the Tribunal's Geospatial Services titled 'Malarngowem Part B' and dated 6 June 2019. It includes:

- (a) The application area depicted by bold dark-blue outline, labelled Area 1 and Area 2;
- (b) Tenure depicted as displayed in the legend, labelled with pastoral lease and number and reserve name and number as appropriate;
- (c) A topographic background showing roads, waterways, population centres and geographical features, labelled;
- (d) Scalebar, coordinate grid; and
- (e) Notes relating to the source, currency and datum of data used to prepare the map.

External boundaries

- [29] 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

¹¹ *Doepel* [122].

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

[30] As discussed above at s 190C(2), I consider that the failure to provide information about any areas within the external boundary not covered by the application does not mean the application does not meet s 62(2)(a), rather it leads me to conclude that the entire area within the external boundary is claimed. This same reasoning applies in relation to s 190B(2): I can conclude that the description of the boundaries provided in Schedule B identifies the areas where native title is claimed, being all of the area within the external boundaries of Area 1 and Area 2.

Conclusion

[31] 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

[32] 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.

[33] I note I am not required to do more than make 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group'.¹²

[34] 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 Malarngowem Apical Ancestors who held rights and interests in one of the local estate countries comprising the claim area; or
 - (b) are affiliated to a Malarngowem 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 Malarngowem Apical Ancestors are: [list of 32 people].

[35] At paragraphs [34]–[38] of my Malarngowem #2 reasons, I considered the claim group description met the requirements of s 190B(3)(b) because it was written in such a way that, with some factual enquiry, it would be possible to ascertain whether or not any particular person is a member of the claim group. In my view, the statement of law at this condition in

¹² *Wakaman* [34].

my Malarngowem #2 reasons is still correct and I correctly applied the law to the facts in my consideration of this condition in my Malarngowem #2 reasons. I therefore consider it is appropriate to adopt my Malarngowem #2 reasons at this condition, as Schedule A of this application describes the claim group in identical terms.

Conclusion

[36] I am satisfied that the persons in the native title claim group are described sufficiently clearly such that it can be ascertained whether an particular person is a member of the group as required by s 190B(3)(b). This means s 190B(3) is met.

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

[37] 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.

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

[38] The rights and interests described in Schedule E of the current application are the same as those described in Schedule E of the Malarngowem #2 application. At paragraphs [39]–[46] of my Malarngowem #2 reasons, I was satisfied, reading Schedule E as a whole, that the description of the claimed rights was sufficient. In my view, the statement of law at this condition in my Malarngowem #2 reasons is still correct and I correctly applied the law to the facts in my consideration of this condition in my Malarngowem #2 reasons. I therefore consider it is appropriate to adopt my Malarngowem #2 reasons in relation to this condition.

Conclusion

[39] I am therefore 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

[40] 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.

[41] 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'.¹³ 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

¹³ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

applicant. It is not a requirement that the Registrar or [her] delegate undertake a search for such material'.¹⁴ Therefore I have not undertaken any searches for external material to support the applicant's claim.

[42] Schedule F states:

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.

[43] 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.

[44] I have examined the application and I consider the information in these schedules is the extent of the factual basis material before me. This information is identical to that which was provided in the Malarngowem #2 application. At paragraphs [52]–[56] of my Malarngowem #2 reasons I considered that the factual basis was not sufficient to support any of the assertions at s 190B(5). I have reviewed the information and my Malarngowem #2 reasons and remain of that view. I also consider the statement of law in my Malarngowem #2 reasons in relation to s 190B(5) remains correct. I therefore consider it is appropriate to adopt my Malarngowem #2 reasons at this condition.

¹⁴ *Martin* [23].

Conclusion

[45] I am 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

[46] 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.

[47] The rights and interests claimed in this application are identical to those claimed in Malarngowem #2. At paragraphs [57]–[58] of my Malarngowem #2 reasons, I considered that there was insufficient information to establish any of the claimed rights and interests on a prima facie basis. I consider the statement of law in my Malarngowem #2 reasons in relation to s 190B(6) remains correct, and so it appropriate to adopt my Malarngowem #2 reasons at this condition.

Conclusion

[48] I have reviewed my Malarngowem #2 reasons and remain satisfied the application contains insufficient information about the rights claimed such that they cannot be said to be established on a prima facie basis. I am not satisfied the claimed rights can be considered ‘native title rights and interests’. This is because, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am not satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as required by s 190B(5)(b). This means s 190B(6) is not met.

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

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

- (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.

[50] 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 be in accordance with the traditional laws and customs of the claim group.¹⁵

[51] 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. At paragraph [61] of my Malarngowem #2 reasons, I considered the information in these schedules was too general to satisfy the requirements of s 190B(7). In addition, given my finding at s 190B(5)(b), that there is

¹⁵ *Doepel* [18], *Gudjala 2009* [84].

insufficient information to demonstrate the existence of traditional laws and customs, I considered that I could not 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. Given the identical information in this application, I remain of this view, which means s 190B(7) is not met.

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

[52] 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

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

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	Malarngowem Part B
NNTT No.	WC2019/013
Federal Court of Australia No.	WAD568/2019
Date of decision	20 December 2019

Section 190B conditions

Test condition	Sub-condition/requirement	Result
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

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