National Native Title Tribunal

Registration Decision

Application name	Darlot
Name of applicant	Geoffrey Alfred Ashwin, Ralph Edward Ashwin, June Harrington-Smith
Federal Court of Australia No.	WAD142/2018
NNTT No.	WC2018/005
Date of Decision	26 June 2019
Date of Reasons	4 July 2019

Claim not accepted for registration

I have decided that the claim in the Darlot application does not satisfy all of 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 all of the conditions in s 190B.

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Lisa Jowett

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

[1] A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Reasons for Decision

Cases cited

Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland [2019] FCA 651 (*Akiba 2019*)
Ashwin on behalf of the Wutha People v State of Western Australia (No 4) [2019] FCA 308 (*Ashwin No. 4*)
Bolton on behalf of the Southern Noongar Families v State of Western Australia [2004] FCA 760 (*Bolton*)
Cadbury UK Ltd v Registrar of Trade Marks [2008] FCA 1126 (*Cadbury*)
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 FC*)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)
Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (*Harrington-Smith*)
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*)
Risk v National Native Title Tribunal [2000] FCA 1589 (*Risk*)
Ward v Registrar, National Native Title Tribunal [1999] FCA 1732 (*Ward v Registrar*)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)
Western Australia v Strickland [2000] FCA 652 (*WA v Strickland*)
Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

Background

[1] This is an amended application filed on behalf of persons described to be the Darlot native title claim group. It covers land and waters in the Goldfields region of Western Australia and includes the towns of Leonora and Menzies. The area covered by the application lies between the towns of Leinster to the west and Laverton to the east.

[2] The application was first filed in the Federal Court (the Court) on 10 April 2018. It was considered by a delegate of the Native Title Registrar (the Registrar) and not accepted for registration on 6 July 2018. The applicant sought a reconsideration of this decision pursuant to s 190E and the President of the National Native Title Tribunal (the Tribunal) made a fresh consideration of the original application. The President decided that the application did not satisfy the authorisation condition at s 190C(4) and the application was not accepted for registration on 19 September 2018.

[3] Since December 2018 the applicant has taken the following steps to amend the original application:

- 24 December 2018 – interlocutory application filed seeking to amend the original application to reduce the application area and amend the native title claim group description;

- 4 April 2019 – leave granted to amend the application to only reduce the application area;
- 6 May 2019 – amended application filed, amending Attachments B1 and B2 (map and description);
- 30 May 2019 – interlocutory application filed seeking to further amend the amended application of 6 May 2019 to change the description of the native title claim group; and
- 5 June 2019 – interlocutory application of 30 May 2019 adjourned to case management on 1 July 2019.

[4] The amended application reduces the area originally covered by the claim, removing a small triangular area of overlap with the Waturta claim (WAD297/2018) in the far north eastern part of the claim area; and to remove that part of the claim area falling within the RATSIB boundary of Central Desert Native Title Services (CDNTS) – an area over the Barwidgee and Wongamoo pastoral leases in the north of the claim area.

[5] The Registrar of the Court gave a copy of the amended application and accompanying affidavits to the Registrar on 9 May 2019 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.[2]

Registration conditions

[6] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.

[7] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The earlier Darlot application was not accepted for registration, therefore the prerequisite of entry on the Register of Native Title Claims (the Register) to consideration under s 190A(6A) is not met and consideration of all the conditions for registration are required.

[8] I have decided that the claim in the application must not be accepted for registration and this document sets out my reasons for that decision.

[9] Information considered

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'.

[2] Section 190A(1).

Information in the application and provided by the applicant

[10] I have had regard to information in the application and I have also considered the following additional material provided by the applicant directly to the Registrar on 23 May 2019: [3]

1. interlocutory application filed in the Federal Court on 24 December 2018, 3 pages;
2. affidavit of June Rose Harrington Smith sworn 18 December 2018, 250 pages;
3. affidavit of Geoffrey Alfred Ashwin sworn 18 December 2018, 3 pages;
4. affidavit of Ralph Edward Ashwin sworn 18 December 2018, 3 pages; and
5. explanatory email to the above documents.

[11] On 31 May 2019, the applicant confirmed by email to the Tribunal's Senior Officer for the Darlot application that I should have regard to the additional material it provided to the delegate of the Registrar in relation to the original application. The applicant had also provided additional material for the purposes of reconsideration pursuant to s 190E by the President of the Tribunal and requested I have regard to this material also.

[12] I have therefore had regard to the following material previously provided by the applicant:

1. N Draper, Anthropological opinion on claim authorisation, 12 August 2018 (4th Draper Report).
2. N Draper, Darlot Native Title Claim: Preliminary Darlot Anthropology Connection Report, 20 March 2018 (Draper 2018);
3. N Draper, WAD6064/1998 Raymond William Ashwin & Others on behalf of the Wutha People: Second Supplementary Expert Anthropology Report for the Applicant, 5 May 2017 (Draper 2017); and
4. N Draper, WAD6064/1998 Raymond William Ashwin & Others v the State of Western Australia & Others (Wutha): Anthropology Connection Report, 4 October 2016 (Draper 2016);

[13] I have had regard to the witness statements of:

1. [Claimant 1 name removed] dated 22 September 2015;
2. [Claimant 2 name removed] dated 22 September 2015;
3. [Claimant 3 name removed] dated 23 September 2015;
4. [Claimant 4 name removed] dated September 2015 and 11 June 2002;
5. [Claimant 5 name removed] dated 19 September 2015 and 12 June 2002;
6. [Claimant 6 name removed] dated 22 September 2015;
7. [Claimant 7 name removed] dated 18 November 2016; and
8. [Person A name removed] dated 21 October 2002.

[14] I have had regard to transcripts of evidence given by:

[3] Section 190A(3)(a).

1. [Person A name removed] on 11 November 2002;
2. Lenny Ashwin on 27 March and 15 July 2002;
3. [Claimant 8 name removed] on 24 June 2002;
4. [Claimant 9 name removed] on 26 March 2002;
5. [Claimant 4 name removed] on 12, 15 and 16 July 2002; and
6. [Claimant 10 name removed] on 15 and 16 July 2002.
7. [Claimant 5 name removed] on 12, 15 and 16 July 2002 and 12 August 2003

[15] The applicant also provided brief responses to submissions made by the State of Western Australia (the state government) on 31 May 2019 and the relevance of the Court's findings in *Ashwin No. 4* on 25 June 2019.

Information as a result of searches

[16] There is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.[4]

Information provided by the State of Western Australia

[17] I have had regard to submissions provided on 27 May 2019 made by the state government in relation to my consideration of the amended application for registration.[5] The submissions rely in part on the findings in *Ashwin No. 4* and in part on the previous registration and reconsideration decisions.

Other information

[18] I may also have regard to such other information as I consider appropriate[6].

[19] I have considered technical information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the area covered by the application, dated 10 May 2019 (the geospatial report).

[20] The previous registration considerations of the original Darlot application and the recent Court decision in *Ashwin No. 4* all place this amended application in a particular context. In my view, it has been necessary for me to consider whether it is appropriate that I have regard to any of this information.

Registration and reconsideration decisions of the original application

[21] I am of the view that it is not appropriate that I have regard to the registration and reconsideration reasons for decision in relation to the original Darlot application. The applicant continues to rely on the same factual basis and authorisation material for the respective conditions at ss 190B(5)-(7) and 190C(4). However, the circumstances that arise in relation to the amended application differ:

[4] Section 190A(3)(b).
[5] Section 190A(3)(c).
[6] See s 190A(3).

- I have no unsolicited third party adverse submissions as arose in relation to the registration and reconsideration of the original application which formed part of both decision-makers' consideration; and
- the applicant has undertaken a process to authorise a change to the description of the native title claim group since the original application was not accepted for registration.

[22] In my view, it is appropriate that I consider the amended application on its own merits and not have regard to the reasons for decision of previous decision-makers.

Ashwin No. 4

[23] The state government's submissions rely on the applicability of the findings in *Ashwin No. 4* to the Darlot claim and I sought submissions from the applicant in relation to its view about the relevance of those findings.

[24] The Court's recent findings in *Ashwin No. 4* concerned the Wutha people's claim over areas contiguous with the area claimed in this Darlot application. There are resemblances between the Darlot and Wutha claims. The native title claim groups are analogous; the anthropology reports prepared for the Wutha claim group form part of the factual basis materials in the Darlot application and this connection material relates to the land and waters comprising the joint geographical extent of the two claims.

[25] Given the proximity of the Darlot claim area to the area dealt with in *Ashwin No. 4* and their comparable claim groups, it may seem reasonable to have regard to the Court's findings which resulted in the dismissal of the Wutha application. The state government's submissions attach weight to the Court's findings in so far as whether the Darlot application is brought on behalf of all the persons in the native title claim group. The applicant submits that the findings in *Ashwin No. 4* do not alter and even support the factual basis for the claim made in the application:

> …amendment of the Application is only a reduction of boundaries and, otherwise, the factual basis remains the same as that considered and accepted for registration by the delegate. The *Ashwin (No. 4)* judgement does not alter that factual basis. Indeed parts of the Judgement fortify the factual basis; for example with regard to Julia Sandstone and her birth place and connection to Menzies and surrounding country.[7]

[26] What the law requires of an administrative decision-maker when a similar issue has been before a Court, was canvassed in the decision in *Cadbury*.

> A tribunal may also accept as evidence the reasons for judgment given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error. The general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue … I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may, as I have said, be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627.

[7] Email of 25 June 2019.

> Of course, when the tribunal is required to decide the matter for itself it is entitled to have regard to the judge's findings. What weight it attaches to those findings will depend on a variety of considerations. Without in any way wishing to be exhaustive, the considerations can include: (a) whether the tribunal has available to it more evidence than was before the judge; (b) whether the arguments put to the tribunal were made to the judge; and (c) whether the tribunal is a specialist body with expert knowledge of the subject matter.
>
> Now, in this case I fear that the delegate was intending to place too much emphasis on the judge's or judges' findings. . . . To proceed on the basis that it is unlikely that the Registrar will depart from the court's findings and, that there is a public interest in avoiding inconsistent fact findings, indicates to me that there is a real risk that the delegate was not going to decide for herself the issues that must be decided to dispose of the opposition proceedings.[8]

[27] In my view, the statutory scheme set out in s 190A in relation to considering applications for registration against the conditions in ss 190B and 190C imposes a clear duty for me to decide for myself whether this application meets the statutory criteria to enable it to be accepted for registration. In respect of the factual basis and authorisation conditions (to which *Ashwin No. 4* is most relevant) my task is a confined one. While I do consider material outside the application itself, my task is not one that includes embarking 'upon some general fact finding exercise, balancing and weighing conflicting evidence'.[9] Further, it is not the Registrar's task to supplant the Court's role and it would not be correct for me to approach my task in assessing the sufficiency of the factual basis under s 190B(5) in the same way a Court approaches its task under s 223.[10]

[28] There are matters discussed in *Ashwin No. 4* that do have relevance to the claim made in the Darlot application, but I do not consider it appropriate for the purposes of my registration consideration to have regard to the Court's findings in *Ashwin No. 4*.

Procedural fairness

[29] On 15 May 2019, the state government was given notice of when I proposed to make my registration decision and provided an opportunity to make submissions in relation to the conditions for registration of the Darlot amended application. I provided the state government's submissions of 27 May 2019 to the applicant on 28 May 2019 and on 19 June 2019 the applicant advised that it would not make any submissions in response. The applicant later provided a brief response to the state government's submissions 31 May 2019.

[30] As noted above, on the request of the applicant I have considered material additional to the amended application – some of which had been previously provided and some specifically provided for the purposes of this current registration consideration. I did not provide the state government an opportunity to comment on this material. It was my view that the application would not be accepted for registration and the state government was therefore not owed procedural fairness in relation to that material.[11]

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[8] At [18]-[20].
[9] *Doepel* at [47].
[10] *Gudjala FC* at [22].
[11] See *WA v NTR* at [37]—[43].

[31] On 13 June 2019, I wrote to the applicant providing an opportunity to make submissions by 26 June 2019 as to the relevance of the Court's findings in *Ashwin No.4* to my registration consideration. On 25 June 2019, the applicant provided a brief submission. Again, on the basis that the application could not be accepted for registration, I did not provide this submission to the state government.

[32] This concluded the procedural fairness processes.

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

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

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

- 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.[12]

[34] To identify the area subject to native title the procedural condition of s 62(1)(b) requires that the application contain the details specified in:

- s 62(2)(a): information about the internal and external boundaries of the area; and
- s 62(2)(b): a map of the external boundaries of the area.

[35] The details about the internal and external boundaries of the claim area have been provided at Schedule B and Attachment B2. A map showing the external boundaries of that area is provided at Attachment B1.

[36] Schedule B refers to Attachment B2. Attachment B2 describes the application area as a metes and bounds description referencing boundaries of pastoral leases and a former pastoral lease, town sites, roads, reserves, lots on plan and coordinate points identified by Latitude and Longitude to six (6) decimal places (GDA94). The description also references the Tjiwarl and Tjiwarl #2 (WAD228/2011 and WAD302/2015) and Badimia People (WAD6123/1998) native title determinations; the Wutha (WAD6064/1998), Maduwongga (WAD186/2017) and Kultju (WAD225/2018) native title determination applications.

[37] Schedule C refers to Attachment B1 which contains a colour A3 copy of a map prepared by the Tribunal's Geospatial Services, titled 'WAD142/2018 Darlot (WC2018/005) Proposed Amended Claim', dated 5 November 2018. The map includes the application area depicted with bold blue outline and fine blue hatched infill; land tenure shown as identified in the legend and labelled as appropriate; town site boundaries shown with a bold black dashed outline and identified by name; scalebar, coordinate grid (GDA94), locality map; and notes relating to the source and the currency and datum of data used to prepare the map.

[12] *Doepel* at [122].

[38] For those areas within the external boundary not covered by the application, Schedule B provides a list of general exclusions. Attachment B2 specifically excludes Areas 3 and 4 of the Wutha claim area and any area subject to the Waturta (WAD297/2018), Kultju, Maduwongga, Wutha native title determination applications and the Badimia People and Tjiwarl and Tjiwarl #2 native title determinations.

Consideration

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

[40] The geospatial report in relation to the application makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. Based on my own consideration of the map and description, I agree with that assessment.

[41] I am therefore satisfied that the external boundary is identifiable and, along with the general and specific exclusions that set the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[42] I am satisfied the claim meets the requirements of s 190B(2).

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

[43] 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.

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

[45] The only question for this condition is 'whether the application enables the reliable identification of persons in the native title claim group'. In answering this, my consideration is limited to 'the terms of the application'; that is, I am not to go beyond the information contained in the application itself but consider only whether the description adequately assists to ascertain whether a particular person is a member of the native title claim group. It is not a requirement at this condition for me to decide whether the claim has been made on behalf of the correct native title claim group.[13]

[13] *Doepel* at [16], [37] and [51]; *Gudjala 2007* at [33].

[46] Schedule A of the application describes the native title claim group as follows:

> The Claim is brought on behalf of the Darlot claim group comprising those aboriginal persons who are the descendants of:
> (a) Telpha and her union with Arthur Cranbrook Ashwin;
> (b) Lenny Ashwin (Ninardi);
> (c) Daisy Cordella (Kugila);
> (d) Inyarndi (Yinnardi); and
> (e) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.

[47] In my view, the description of the group is capable of being readily understood and is sufficiently clear, such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by biological descent from the persons named in the description. The final paragraph in respect of the principle of adoption is also sufficiently clear and does not, in my view, detract from the clarity of the preceding descent based description. I note that Carr J in *WA v NTR* accepted a description which included 'persons adopted by the named people and by the biological descendants of the named people', without any qualification indicating whether the adoption was according to traditional laws and customs, Australian law or otherwise.[14] The above description does more than this as it does provide that adoption is in accordance with traditional laws and customs and this indicates a 'set of rules or principles' under which it could be ascertained whether or not the claim group includes descendants by adoption.[15]

[48] It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors or their adoption, but that would not mean that the group has not been sufficiently described.[16]

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

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

[50] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. 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. My consideration of this condition is also limited to the terms of the application.[17]

[51] Schedule E of the application contains the description of native title rights and interests claimed in relation to the application area, as required by s 62(2)(d):

> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 of the *Native Title Act 1993* (Cth) applies), the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters covered by the native title

[14] At [63]-[69].
[15] *Ward v Registrar* [25].
[16] *WA v NTR* at [67].
[17] *Doepel* at [16].

application determination area (**application area**) as against the whole world ("**exclusive possession area**").

2. Over areas where a claim to exclusive possession cannot be recognised ("**non-exclusive possession area**"), the native title claim group claim the following rights and interests exercisable in accordance with the traditional laws and customs of the native title claim group:
    (a) The right of access to the application area;
    (b) The right to camp on the application area;
    (c) The right to erect shelters on the application area;
    (d) The right to live on, use and enjoy the resources of the application area;
    (e) The right to move about the application area;
    (f) The right to hold meetings on the application area;
    (g) The right to hunt on the application area;
    (h) The right to conduct ceremonies on the application area;
    (i) The right to participate in cultural activities on the application area;
    (j) The right to maintain and protect places of significance under traditional laws and customs in the application area;
    (k) The right to control access to, and use of, the application area by other aboriginal people who seek access to or use the lands and waters in accordance with traditional laws and customs.

[52] The description includes the statement that the rights are subject to the valid laws of the State of Western Australia and the Commonwealth as well as rights previously conferred on person pursuant to those laws. It also makes the statement that the rights and interests have been held by the native title claim group, and activities undertaken in exercise of them, since the assertion of British sovereignty in 1829.

[53] Whether any of these rights fall outside the scope of s 223 is, in my view, a matter for consideration under s 190B(6), that is, whether they can be established prima facie. The description of the claimed rights and interests are, in my view, readily identifiable in the sense of being intelligible and understandable. I am satisfied the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[54] I am satisfied the claim meets the requirements of s 190B(4).

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

[55] For the application to meet this condition for registration, the Registrar must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist. *Gudjala 2007* states that this 'is clearly a reference to the existence of rights vested in the claim group':

> Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, *it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)* (*emphasis added*).[18]

[56] In December 2018, the applicant sought to authorise changes to the description at Schedule A of the original application. The material evidencing this intention has been provided by the applicant for the purposes of registration of the amended application, being the affidavit of

[18] *Gudjala 2007* at [39].

June Harrington-Smith.[19] She states that the native title claim group authorised an amendment to the claim group description to include apical ancestors Jumbo Harris and Billy (and Mary-Ann and Mary-Ann's sister).[20] The Court is yet to grant leave for this amendment to be made. In my view, the proposed amendment is clearly one that will widen the composition of the Darlot claim group. As such, the current amended claim does not, but probably should, describe the native title claim group to include the descendants of Jumbo Harris and Billy's unions with Mary-Ann and her sister. Information in the Draper reports all support this proposition.[21]

[57] Based on the authority in *Gudjala 2007*, it is my view that significant issues arise in relation to my consideration of the factual basis for the claim where there is little to no certainty about the composition of the native title claim group.

The description of the native title claim group

[58] That the Court has not granted leave to amend the description of the native title claim group means that I now have before me two descriptions of the Darlot native title claim group:

March 2018 authorisation: current amended application	**Dec 2018 authorisation: interlocutory application[22]**
The Claim is brought on behalf of the Darlot claim group comprising those aboriginal persons who are the descendants of: (a) Telpha and her union with Arthur Cranbrook Ashwin; (b) Lenny Ashwin (Ninardi); (c) Daisy Cordella (Kugila); (d) Inyarndi (Yinnardi); and (e) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.	All those aboriginal persons who are the descendants of: (a) Telpha and her union with Arthur Cranbrook Ashwin; (b) Lenny Ashwin (Ninardi); (c) Jumbo Harris; (d) Billy and Mary-Ann and Mary-Ann's sister (e) Inyarndi (Yinnardi); and (f) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.

[59] It is clearly established in Attachment F to the amended application and extrapolated on throughout all the Draper reports, claimant affidavits and transcripts that Jumbo Harris is Telpha Ashwin's brother, and Billy and Mary-Ann are Daisy Cordella's parents. The linkages between the two described groups are evident and acknowledged.

[60] The amended application includes the following at Attachment F about the ancestral family lines identified with the traditional country of the area covered by and proximate to the Darlot claim area:

> Duragadi and Murni, and their children Telpha and her brother Jumbo Harris, born in 1889 at Yelma, lived at Wongowol Station.

[19] Sworn 18 December, forming part of the December 2018 interlocutory application.
[20] At paragraph [3] and Annexure G, Minutes of Darlot Native Title Claim Authorisation Meeting.
[21] Draper 2016 at 5.3.1 and Draper 2018 at 2.2.1.
[22] Minutes of Darlot Native Title Claim Authorisation Meeting held at Leonora Recreation Centre on 4 December 2018, at 13.2.

> Jumbo Harris' daughter is Gay Harris. Like his sister Telpha, Jumbo Harris travelled widely across the claim area in the traditional country of their parents living at Darlot and other places in the claim area camping, hunting and for ceremony…
>
> Lenny Ashwin (Ninardi) was born at Mt Grey in the claim area in the early 1930s the son of Doris Ashwin (Foley) (Pikuru), the daughter of Telpha, and Jim Hennessy (Nguldak). Doris' father was an aboriginal man Tommy Wunal.
>
> Billy and Mary-Ann were born in and living on their traditional country and that of Duragadi, Murni and Matjika about the time of first contact and, by necessary inference, their predecessors were inhabiting that traditional country about the time of assertion of sovereignty.
>
> The oral and known history of descendants of Darugadi, Murni and Matjika, the Telpha (Ashwin) families, Sarah and Bill Ashwin's descendants, descendants of Billy and Mary-Ann (Hogarth) and the Inyarndi (Wheelbarrow / Barnard) descendant families is that they are western desert Tjupan and Pini people related biologically living and connected in association with each other as a traditional group within western desert society by Tjukurrpa and western desert traditional laws and customs to the Lake Carnegie/Wongowol region, the Darlot claim area and wider surrounds; including the traditional country described by Telpha and Daisy Cordella to Norman Tindale and further identified by the oral history of the Ashwin, Hogarth and Inyarndi (Wheelbarrow / Barnard) family claim group members.
>
> … Inyarndi as a western desert woman from Lake Carnegie / Wongowol whose traditional country extended to Darlot and beyond who had travelled like other claim group ancestors, after the Tommy Mellon shootings at Wongowol, to Darlot and surrounding areas. Her husband, Noon:jul was reputably, by oral history, Julia Sandstone's father or uncle and his traditional country extended from Sandstone to Darlot and beyond eastwards.[23]

[61] The genealogical discussion and charts about the ancestral lines referred to above are dealt with extensively in Draper 2016.[24] Draper 2016 also refers to the existence of Daisy Cordella's four other siblings from Billy's unions with Mary-Ann and her sister.[25] Further the Draper reports include details about other ancestors not included in either of the descriptions before me: for example, Julia Sandstone is the mother of Sarah Ashwin[26] and Lenny Ashwin is the grandson of Telpha from her union with another man, Wunal.[27]

[62] In my view, even the above brief impression of the genealogical details in Attachment F elicits concern that the composition of the group, as described in Schedule A, is provisional and does not reflect the 'native title claim group' that holds the common or group rights in relation to the area claimed in the application. The Draper reports provide more extensive detail confirming the summary in Attachment F. The Darlot native title claim group as described in the amended application clearly does not include the descendants of Jumbo Harris nor potentially those of the union between Telpha and Wunal, nor perhaps all of the descendants of Julia Sandstone or Billy and his union with Mary-Ann and her sister.

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[23] Attachment F at paragraphs [8], [11], [14], [20] and [27].
[24] Draper 2016 at 4.2 (paragraphs [73]-[80]); at 5.3.1 (paragraphs [147]-[154] and descendent reports); at 5.3.3 (paragraphs [167]-[175]) and Draper 2018 at 2.1.2; 2.1.3 (paragraphs [52]-[57]).
[25] Draper 2016 at 5.3.3 (paragraph [167]).
[26] Attachment F at paragraph [13]; Draper 2016 at 5.3.2.
[27] Attachment F at paragraph [11]; Draper 2016 at paragraphs [75]-[76] and [352].

State government's submissions

[63] While the state government's submissions do not directly address the factual basis condition, it makes commentary about the composition of the native title claim group described in the amended application. It submits that there has been no change to that description (from the original application) and it therefore remains that the application does not satisfy the requirement of s 61(1). That is, the amended application is not brought on behalf of 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'.[28] It is the state government's view that the native title claim group is comprised of more persons that those identified by the description contained in the amended application.

[64] The submissions also reference the applicant's affidavit evidence annexed to the December 2018 interlocutory application,[29] showing its intention to amend the claim group description to include the descendants of Jumbo Harris and Billy and Mary-Ann and Mary-Ann's sister. The state government submits this further supports its contention that a wider claim group than that described in Schedule A exists in relation to the area covered by the Darlot claim.[30]

[65] The applicant provided a response only to the extent that the matters referred to in the state government's submission would be dealt with by the Court at a Case Management Hearing as part of an interlocutory application seeking leave to amend the claim group description.[31]

Consideration

[66] As articulated earlier in these reasons, my task in deciding whether or not to accept this claim for registration is not one that includes embarking 'upon some general fact finding exercise, balancing and weighing conflicting evidence'. To do so would be to begin a process of assessment that would not be straightforward nor confined, as Mansfield J envisages in *Doepel*:

> Is the Registrar to note the inconsistency of information in different documents, and so simply not be satisfied of the accuracy of the information in the application or of the other applications ... Is the Registrar to undertake some form of hearing to reach a state of satisfaction about which application accurately describes the native title claim group? If so, how is the inquiry to be conducted? Issues would then arise as to whether the Registrar's satisfaction requires the Registrar to make findings of fact, and whether the process of doing so involves the normal principles of procedural fairness to be proffered to potentially affected persons or groups...[32]

[67] Trying to establish what is the correct composition of the native title claim group, either through the materials available to me or by weighing the varying commentary and findings about that matter, and the basis under which traditional laws and customs dictate membership, is not my task for the purposes of registration.

[68] The uncertainty is, however, sufficient for me not to be able to perform the task of considering the factual basis upon which it is asserted that the claimed native title rights and

[28] This being the finding in the registration and reconsideration decisions of 2018.
[29] I understand that the state government would have been served a copy of the interlocutory application by the applicant.
[30] At paragraph [12].
[31] Provided by email on 31 May 2019.
[32] *Doepel* at [47].

interests exist. I have clear authority in *Gudjala 2007*[33] about the primacy of the identification of the native title claim group for the Registrar's consideration of the factual basis for the claim made in the application:

> There may be many ways in which to describe a claim group, any one of which may be sufficient to satisfy the requirements of subs 190B(3). However that task is undertaken, it will eventually be necessary to address the relationship which all members claim to have in common in connection with the relevant land.
>
> … Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. *The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship*. The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but *that step had to be undertaken for the purposes of subs 190B(5)* (*emphasis added*).[34]

[69] The state government has relied upon the inconsistency between the two descriptions of the native title claim group and that the flaws alerted to in the registration and reconsideration decisions remain. In my view, the submissions reflect my own concerns as to the composition of the native title claim group. The applicant has made no submissions in response to the state government's contention that the amended application is not brought on behalf of all of the persons in the native title claim group. I agree with the state government's submission that the later purported authorisation changing the description of the claim group, alludes to a wider claim group membership than contemplated by the description at Schedule A.

[70] I am not certain as to the 'identified claim group' and cannot therefore make an assessment about whether or not the factual basis is sufficient to support the assertion that the claim group is entitled to the claimed native title rights and interests. I have decided that the description of the claim group is sufficient to satisfy the requirements of s 190B(3), however, the factual basis and related conditions necessitate that I 'address the relationship which all members claim to have in common in connection with the relevant land'. That the 'native title claim group' is not sufficiently identified carries over into the consideration required at each of the three assertions that comprise the factual basis condition.

[71] Firstly, for the purposes of s 190B(5)(a), I must be satisfied that the factual basis provided is sufficient to support the assertion that the native title claim group have, and its predecessors had, an association with the area. A significant component of that assessment is, therefore, who comprises the group. The Draper reports and the claimant affidavit material extensively articulate the current and previous association of persons with the area covered by the Darlot application as well as with locations and sites proximate to it. However, without an understanding of the identity of the whole of the claim group, I cannot be satisfied that the factual basis material shows cumulatively an association between the whole group and the area of the claim, or that the current association of people has its origins in the preceding generations' association with the area.[35]

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[33] And this analysis was not criticised in *Gudjala FC*—see [68] and also [90]–[96].
[34] *Gudjala 2007* at [40] and [41].
[35] Ibid at [51] and [52].

[72] Secondly, for the purposes s 190B(5)(b), in order to be satisfied that there is a sufficient factual basis on which it is asserted that there exist traditional laws and customs, the identity of the native title claim group is also integral. These are the traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claim to native title rights and interests. The Draper reports address the holding of rights and interests under the traditional laws and customs of Western Desert Society in and around the Darlot claim area. However, without an understanding of the identity of the native title claim group, I cannot be satisfied by the explanation in the factual basis material about the body of persons united in, and by, its acknowledgement and observance of a body of laws and customs at sovereignty, nor that a connection can be made to the normative and contemporary society of the native title claim group.[36]

[73] Thirdly, for the purposes s 190B(5)(c), it follows from my conclusions above, that I cannot be satisfied the native title claim group has continued to hold native title in relation to the Darlot claim area. I cannot make an assessment about assertions that the claim group's traditional laws and customs have been transmitted through the generations, as I do not have an understanding of the identification and extent of those generations.

Conclusion

[74] The assertions in s 190B(5) require a factual basis that the 'native title claim group' observe traditional laws and customs that give rise to the claimed native title and that the 'native title claim group' have continued to hold the native title in accordance with those traditional laws and customs. It follows in my view that I am unable to make a 'genuine assessment'[37] of the application against the requirements for a sufficient factual basis because it appears that the description in Schedule A fails to include 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.'[38]

[75] Following *Gudjala 2007*, the applicant's factual basis must identify the relationship between its asserted native title claim group, the area covered by the application and the claimed native title rights and interests. In my view the applicant's factual basis for the assertions in s 190B(5) must ultimately fail because the description in the amended application differs from a description purportedly authorised in December 2018 and the anthropological and genealogical detail supports a wider group than described. As a consequence the amended application alludes to the distinct possibility that it excludes persons who are otherwise part of the real native title claim group, as defined in s 61(1).

[76] I am not satisfied about the sufficiency of the factual basis to support the assertion that the claimed native title rights and interests exist or the particular assertions in s 190B(5).

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

[77] Under s 190B(6) I must be satisfied that some of the native title rights and interests claimed by the native title group can be established, prima facie.

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[36] *Yorta Yorta* at [49].
[37] *Gudjala FC* at [92].
[38] See s 61(1).

[78] In my view the application cannot satisfy this requirement because of the conclusion I have formed in relation to the condition at s 190B(5). As Dowsett J stated in *Gudjala 2007*:

> As observed above, the High Court said in *Yorta Yorta* at [86]:
>
> > 'Yet again, however, it is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.'[39]

[79] I am therefore not satisfied that any of the claimed rights and interests can be established on a prima facie basis.

[80] The application does not satisfy the condition of s 190B(6).

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

[81] Under s 190B(7) evidentiary material is required, capable of satisfying the Registrar that at least one member of the claim group 'has or previously had a traditional physical connection' with any part of the application area. While the focus is not the same as that of the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area'.[40]

[82] *Gudjala 2007* is authority that an application which fails to satisfy the requirements for a sufficient factual basis under s 190B(5) will likewise fail this condition due to the requirement for material showing a 'traditional' physical connection to the application area. That is, 'such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'.[41]

[83] As it was my conclusion at s 190B(5) that the application does not satisfy the requirements for a sufficient factual basis, it must follow that the application cannot satisfy this condition.

[84] The application does not satisfy the condition of s 190B(7).

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

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

Requirement	**Information addressing requirement**	**Result**
Section 61A(1) No native title determination application if approved determination of native title	Schedule B, paragraph 2(c) Geospatial search on day of decision	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraphs 2 and 3	Met

[39] *Gudjala 2007* at [86].
[40] *Doepel* at [18].
[41] At [89].

Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule B, paragraph 2	Met

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

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

Requirement	**Information addressing requirement**	**Result**
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 2(b)	Met

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

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

[87] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.[42]

Section 61

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

Section	**Details**	**Form 1**	**Result**
s 61(1)	Native title claim group	Schedule A, Attachments A and F	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A, Attachments A	Met

S 61(1)

[89] The table in s 61(1) identifies that a claimant native title determination application may only be made by:

> (1) a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

[42] *Doepel* [16], [35]–[39].

[90] Under this section, I must consider whether the application sets out the native title claim group in the above terms. If the description of the native title claim group in the application indicates that not all persons in the native title claim group have been included, or that it is in fact a subgroup of the native title claim group, then the relevant requirement of s 190C(2) would not be met and I should not accept the claim for registration.[43] Specifically, Mansfield J stated in *Doepel* that the correct approach to s 61(1), being a condition under s 190C(2):

> … does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group…. Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration.[44]

[91] Mansfield J's explanation of s 190C(2) is clear that it is not the role of the Registrar to engage in a form of merit assessment for the purposes of being satisfied about the requirements of s 61(1). My task is straightforward and narrow in focus – I am to consider the application itself and form a view about whether it indicates the native title claim group as described in Schedule A is either a subgroup of a wider claim group or excludes persons who would otherwise be members of the claim group.

[92] Considering the information contained in the application alone, I see nothing in the application that demonstrates that the applicant does not intend to include any persons or group in the native title claim group as described at Schedule A. That is, there is nothing on the face of the application that would indicate that members of the claim group are being deliberately and consciously excluded.

[93] I am satisfied that the application contains the details and other information required of s 61(1).

Section 62

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

Section	**Details**	**Form 1**	**Result**
s 62(1)(a)	Affidavits in prescribed form	Attachment A	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B and Attachment B2	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment B1	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:	Attachment F	Met
s 62(2)(f)	Activities	Schedule G	Met

[43] Ibid at [36].
[44] Ibid at [37].

s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Attachment I	Met
s 62(2)(h)	Notices under s 29	Attachment I	Met

[95] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

No previous overlapping claim group – s 190C(3): condition met

[96] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim overlapped in any part by the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c).[45] Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that was a registered application when the current application was made.

[97] Relevant to the first requirement at s 190C(3)(a), the Darlot application covers parts of three native title determination applications:

- Marlinyu Ghoorlie (WAD647/2017)
- Nyalpa Pirniku (WAD91/2019)
- Talkadjara (WAD597/218)

[98] Only two of these claims have an entry on the Register - Marlinyu Ghoorlie and Nyalpa Pirniku. In accordance with the requirements of subsection (b), any entry on the Register relating to a previous application is required to have been made before the current application was made, that is, filed in the Court. This is not the case in either of these applications.

[99] Marlinyu Ghoorlie was entered on the Register on 28 March 2019, and Nyalpa Pirniku was entered on 15 May 2019. Therefore, neither application was on the Register when this current application was made (ie filed in the Court) on 10 April 2018. As neither of the previous applications meet all of the requirements of this condition I am not required to consider whether there may be members in common between the claim groups of the current and previous applications.

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

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

[101] To meet s 190C(4), the Registrar must be satisfied that either:

- the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions; or

[45] *WA v Strickland* at [9].

- 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.

[102] As the application does not purport to be certified under s 190C(4)(a), I must therefore consider whether the application provides sufficient information to satisfy me that the applicant is, firstly, a member of the native title claim group and secondly, has been authorised by all the persons in the native title claim group to make and deal with the application. In so doing, I must consider whether the application meets the authorisation requirements of ss 190C(4)(b) and 190C(5).

[103] The importance of the proper authorisation of a native title determination application has been considered by the courts on many occasions. For instance, in *Bolton*, Justice French said:

> As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title…[46]

The native title claim group on behalf of whom the application is made

[104] The matters of which I am required to be satisfied at s 190C(4)(b) are quite different to those in relation to ss 190B(3) or 190C(2). For the purposes of s 190B(3), my task was to consider whether there is clarity around the description of the native title claim group. For the purposes of that condition for registration, I was not to consider the correctness of the description or whether there was 'a cogent explanation of the basis upon' which members of the claim group qualify for their identification.[47] Nor did I consider these matters under s 190C(2), in relation to the requirements of s 61(1), which only requires me to be satisfied that the application contains the information required by ss 61 and 62. Collier J in *Wiri People* provides an explanation of 'the intersection between ss 190C(2) and (4)':

> …the matters of which the Registrar is required to be satisfied by each section are, in my view, quite different. In relation to s 190C (2), the Registrar must be satisfied as to the *contents of the application* and that it contains information required by ss 61 and 62 (cf Mansfield J in *Northern Territory of Australia v Doepel* [2003] FCA 1384; (2003) 133 FCR 112 at [35]), whereas in relation to section 190C (4) the Registrar must be satisfied as to the *identity* of the claimed native title holders including the applicant [*original emphasis*].[48]

[105] In examining the factual basis material provided by the applicant for the purposes of s 190B(5), I decided that its content alluded to the existence of a wider or larger native title claim group than that which is described in Schedule A. I noted there examples of the indicators that concern me that the application is not brought on behalf of the 'actual' native title claim group and came to the conclusion that the identification of the native title claim group is not certain.

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[46] At [43].
[47] *Doepel* at [37] and *Gudjala 2007* at [28]-[34].
[48] At [29].

[106] The authority in *Risk* is that a consideration of the composition of the native title claim group, as defined in s 61(1), is required to be undertaken by the Registrar when assessing authorisation under s 190C(4)(b). O'Loughlin J held that:

> A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute a group.
>
> The task of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group.
>
> … The authorisation must come from **all** the persons who hold the common or group rights and interests [*original emphasis*].[49]

[107] Collier J agreed in *Wiri People* that consideration by the Registrar of the authorisation condition in s 190C(4)(b) requires a consideration of whether the applicant is authorised by a 'native title claim group', as that term is defined in s 61(1).[50]

Information in the application

[108] Schedule R provides the following statement:

> Each of the persons comprising the Applicant, Geoffrey Alfred Ashwin, Ralph Edward Ashwin and June Rose Harrington-Smith are members of the native title claim group authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group.
> The basis upon which the Native Title Registrar should be satisfied that the applicant is authorised by the native title claim group to make the applications [sic] and deal with matters arising in relation to it by all the other persons in the native title claim group is contained in the affidavits of each of the above named persons at "**Attachment A**".

[109] Attachment A is comprised of:

- Affidavit of June Rose Harrington-Smith, sworn 22 March 2018, describing the process that resulted in the purported authorisation of the persons comprising the applicant, including resolutions reached at the meeting that took place on 9 March 2018, copies of newspaper advertisements and attendance register.
- Affidavit of Geoffrey Alfred Ashwin, sworn 22 March 2018, describing the decision-making process to authorise the applicant and confirming the information set out in Ms Harrington-Smith's affidavit.
- Affidavit of Ralph Edward Ashwin, sworn 22 March 2018, confirming the information set out in the affidavits of Ms Harrington-Smith and Geoffrey Ashwin.

[110] Ms Harrington-Smith's affidavit annexes copies of the public notice advertising a meeting to be held on 23 February 2018 'to authorise an application on behalf of the Darlot Claim Group', described as follows:

> The Darlot Claim Group comprise the Aboriginal persons descended from:
> Telpha and her union with Arthur Cranbrook Ashwin
> Jumbo Harris Thampa (Aboriginal name)
> Daisy Cordella Kugila (Aboriginal name)

[49] At [60] and [62].
[50] At [28] to [36].

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And those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.[51]

[111] Resolution 2 detailed in the minutes of that meeting is the description of the native title claim group:

> The aboriginal persons comprising the native title claim group on whose behalf the application shall be made are the descendants of:
> (a) Telpha and her union with Arthur Cranbrook Ashwin;
> (b) Lenny Ashwin (Ninardi);
> (c) Daisy Cordella – (Kugila);
> (d) Inyarndi (Yinnardi); and
> (e) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.[52]

[112] Resolution 1 of that the meeting is an acknowledgement that:

- Telpha is the daughter of Duragadi and Murni.
- Lenny Ashwin is the grandson of Telpha.
- Daisy Cordella is the daughter of Billy and Mary-Ann.[53]

[113] In my view, this account of family ancestry accords with what is said in Attachment F and in the Draper reports – as quoted and referred to earlier in my consideration of the factual basis condition.

Information provided by the applicant in the additional material

[114] The applicant's additional material includes documents that speak to an authorisation process and meeting that took place on 4 December 2018. The affidavit of June Rose Harrington-Smith, sworn 18 December 2018, describes the process that resulted in the purported authorisation of the applicant, and annexes copies of newspaper advertisements publicising a 4 December 2018 authorisation meeting, a register showing 12 people in attendance and minutes of that meeting. Two resolutions were reached at that meeting:

- to agree and adopt a decision-making process, and
- to amend the application to reduce the claim area and change the description of the native title claim group ('…to include Jumbo Harris and Billy and Mary-Ann and Many-Ann's sister as apical ancestors of the Darlot claim group members').[54]

State government's submissions

[115] The state government submits that the amended application does not meet the authorisation requirements because s 61 is not satisfied. The submissions set out the two descriptions of the native title claim group – as at Schedule A and as resolved at the 4 December meeting. It is of the view that on the basis of June Harrington-Smith's affidavit as annexed to the December

[51] Dated 17 February 2018 and annexed to June Harrington-Smith's affidavit as JHRS1.
[52] At paragraph [15.2].
[53] At paragraph [14].
[54] Minutes of Darlot Native Title Claim Authorisation Meeting held at Leonora Recreation Centre on 4 December 2018, Annexure G to Ms Harrington-Smith's affidavit of 18 December 2018.

2018 interlocutory application '[the] amended application (as filed) has not been properly authorised in accordance with s 61 of the NTA'.[55]

Consideration

[116] The same issues arise in relation to authorisation as arose in relation to my consideration of the factual basis condition. There is not sufficient clarity around the identification and composition of the native title claim group.

[117] Firstly, I refer to my discussion above at paragraphs [58]-[62] regarding the two descriptions of the Darlot native title claim group and the consequent effect on my being satisfied about the identification of that group.

[118] Secondly, while I am of the view that the application itself does not contravene s 61(1), the additional material (all of which I have referred to above in my reasons for the factual basis condition) reveals that the native title holding group may not be limited to the descendants of those ancestors listed in Schedule A. Further, the description of the native title claim group at Schedule A is not the same description that appeared in the notice inviting people to attend the March 2018 meeting to authorise the applicant to file the Darlot native title claim. Specifically, Jumbo Harris is not included in the description of ancestors whose descendants bring the Darlot claim. It is clear to me that, had the description been based on those preceding generations of the current ancestors (who are acknowledged in Resolution 1 and whose details appear in Attachment F), there could potentially be other ancestors and predecessors whose descendants would otherwise be members of the native title claim group. No explanation is provided in the application or additional material for the obvious exclusion of Jumbo Harris from the list of apical ancestors (and thereby his descendants) nor the basis on which ancestors who are clearly not at the apical of the ancestral lines have been chosen to describe the native title claim group.

[119] Thirdly, it is the applicant's intention to correct the original description of the native title claim group to reflect a wider composition and potentially the 'actual native title holding group' (as required by s 61(1)). In *Harrington-Smith*, Lindgren J found that:

> [T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4).[56]

[120] In this case, as the amended application is clearly not brought on behalf of the group described in the minutes of the 4 December 2018 meeting annexed to Ms Harrington-Smith's affidavit, there is very likely no coincidence between the 'actual native title claim group' and the authorising group. In my view, this leads to confusion about who the actual authorising group is and therefore which authorisation process has primacy such that <u>all</u> the persons in the native title claim group have authorised the applicant.

[121] I agree with the state government's submissions that contend the same argument.

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[55] At paragraph [13].

[56] *Harrington-Smith* at [1216].

[122] All of the information I have considered indicates to me that membership of the native title claim group is not settled and the group cannot be sufficiently identified. I therefore cannot be satisfied that the applicant is authorised to make the application and to deal with the matters arising in relation to it.

December 2018 authorisation

[123] Given the confusing and provisional status of the composition of the native title claim group and thus the proper authorisation of the applicant, I do not, in my view, have a solid foundation on which to consider whether or not the asserted authorisation process undertaken in December 2018 might satisfy the requirements of s 190C(4)(b). However, it is clear to me that the details about the resolution to change the description of the native title claim group may not be sufficient to demonstrate proper authorisation. Annexed to Ms Harrington-Smith's affidavit are the minutes of the meeting held on 4 December 2018 which provide the following resolution:

> Resolution
> 13. After discussion amongst members, including elders Geoffrey Ashwin, Ralph Ashwin and June Rose Harrington-Smith, the meeting resolved unanimously to authorise the proposed amendments to the Darlot claim application as follows:
> 13.1 to reduce the Darlot claim area to the area shown in the map ….
> 13.2 the amended Darlot claim be made on behalf of….
> 13.3 the applicants Geoffrey Ashwin, Ralph Ashwin and June Rose Harrington-Smith be authorised to make the amended Darlot application...[57]

[124] The meeting held on 4 December 2019 was preceded by public notices that a change to the description of the Darlot native title claim group was proposed. Ms Harrington-Smith's affidavit states that she personally spoke to members of the families of the descendants of the apical ancestors named in the claim group description in the public notice to advise them of the proposed authorisation meeting. The minutes of the meeting explain that a change to the description was required based on the findings in the Tribunal's reconsideration decision, discussions with the anthropologist, Mr Draper, and discussions with descendants of Daisy Cordella. It is not explicit that discussion also occurred with the descendants of Jumbo Harris.[58]

[125] Where changes to the description of the native title claim group will result in a change to the composition of that group, it must be shown that a distinct process has been undertaken to ensure proper authorisation. This has recently been articulated in the Court's decision in *Akiba 2019* by reference to other Court decisions:

> The authorities show that an amendment to the description of a claim group so as to alter the composition of the group requires authorisation by the claim group. In *Lovett on behalf of the Gunditjmara People v State of Victoria (No 3)* [2011] FCA 867 (*Lovett*) at [9] North J said that while it was not entirely clear whether the requirement under s 251B that an application be authorised by the claim group applied to an amendment to the description of the claim group, the "better view" was that it did. In *Atkins v State of*

[57] Ms Harrington-Smith's affidavit of 18 December 2018 (annexed to the interlocutory application).
[58] Ibid at [9].

> *Western Australia* [2013] FCA 773 (*Atkins*) at [14] McKerracher J agreed with the view expressed by North J on this point. His Honour said that s 251B is a useful guide to the process to be used by a claim group to approve an amendment to its composition: *Atkins* at [14] citing *Lovett* at [8]. In *Doctor on behalf of the Bigambul People v State of Queensland (No 2)* [2013] FCA 746 at [57] Reeves J said:
>
> > Section 61 of the Act makes it clear that the authority vested in the authorised applicant comes exclusively from the native title claim group on whose behalf the native title determination application is made. Further, the validity of that authority fundamentally relies upon the native title claim group following the authorisation process set out in s 251B of the Act. It follows that, *if an existing claim group wishes to alter its composition, it must first meet as a whole and resolve to do that. If it does, then the new or reconstituted native title claim group must then meet and resolve in accordance with the process set out in s 251B to authorise an applicant to make a claim on its behalf under s 61…*
>
> The two-step process proposed by Reeves J was approved and adopted in *Forrest v State of Western Australia* [2014] FCA 876 at [7], [12]-[13] and [22] (Gilmour J).[59] (*emphasis added*)

[126] The details outlined in Ms Harrington-Smith's affidavit and annexures do not indicate that such a two-step process as outlined above was followed. In my view, the affidavit and minutes of meeting are unlikely to sufficiently support that a decision was made by the group currently described in Schedule A, nor the group proposed by the December 2018 interlocutory application.

Conclusion

[127] It is my view that for the purposes of the authorisation condition, I must give the term 'native title claim group' in s 190C(4)(b) the meaning found in s 61(1):

> all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

[128] As discussed above, the case law clearly supports that there must be a 'coincidence' between:

- the native title claim group defined in s 61(1);
- the claim group defined in schedule A of the application; and
- all of the persons who authorised the making of the application.[60]

[129] To conclude, I am not satisfied that the application meets the requirements of the authorisation condition in s 190C(4)(b) because:

- the native title claim group as described at Schedule A is not the same as the group later purportedly authorised to replace it; and
- this indicates that the amended application may not be brought on behalf of all the persons in the 'actual' native title claim group; and
- this creates anomalies and potential exclusions that fails to support authorisation of the applicant by all the persons in the Darlot native title claim group.

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[59] *Akiba 2019* at [26].
[60] *Harrington-Smith* at [1216].

[130] I am therefore not satisfied that the group described in this amended application comprises, in accordance with s 61(1) 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests'. It is the cumulative effect of the recent additional material (the December 2018 interlocutory application), the anthropological and genealogical material summarised in Attachment F and detailed in the Draper reports, that leads to me being not satisfied that all the persons in the native title claim group have authorised the applicant to make and deal with the application.

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

End of reasons

Attachment A

Summary of registration test result

Application name	Darlot
NNTT No.	WC2018/005
Federal Court of Australia No.	WAD142/2018
Date of decision	26 June 2019

Section 190B conditions

Test condition	**Sub-condition/requirement**	**Result**
Section 190B(2)		Met
Section 190B(3)		Met
	Section 190B(3)(a)	N/A
	Section 190B(3)(b)	Met
Section 190B(4)		Met
Section 190B(5)		Not met
Section 190B(6)		Not met
Section 190B(7)		Not met
Section 190B(8)		Met
Section 190B(9)		Met

Section 190C conditions

Test condition	**Sub-condition/requirement**	**Result**
Section 190C(2)		Met
Section 190C(3)		Met
Section 190C(4)		Not met
	Section 190C(4)(a)	N/A
	Section 190C(4)(b)	Not met