



## Registration

## Decision

|                                       |  |
|---------------------------------------|--|
| <b>Application name</b>               | Frederick Taylor & Ors on behalf of Yamatji Nation Claim and State of Western Australia (Yamatji Nation Claim) |
| <b>Name of applicant</b>              | Frederick Taylor, Garry Hodder, Leedham Papertalk, Lorraine Whitby, Yvette Harris                              |
| <b>Federal Court of Australia No.</b> | WAD345/2019  |
| <b>NNTT No.</b>                       | WC2019/008   |
| <b>Date of Decision</b>               | 12 July 2019   |
| <b>Date of Reasons</b>                | 16 July 2019   |

### Claim not accepted for registration

I have decided that the claim in the Yamatji Nation Claim application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> 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 190C(3)–(4). It also does not satisfy ss 190B(5)–(7).

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Katy Woods

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.

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<sup>1</sup> A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

# Reasons for Decision

## CASES CITED

*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*)  
*Gudjala People # 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)  
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)  
*Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*)  
*Martin v Native Title Registrar* [2001] FCA 16 (*Martin*)  
*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*)  
*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)  
*Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26 (*Sampi FC*)  
*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)  
*Wakaman People # 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*)  
*Ward v Northern Territory* [2002] FCA 171 (*Ward v Northern Territory*)  
*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

## BACKGROUND

- [1] This is an application filed on behalf of the Yamatji Nation native title claim group (claim group). It covers land and waters in the mid-west region of Western Australia, extending north and south of Geraldton on the west coast, and inland as far as the Mt Gibson and Murrura pastoral leases in the east.
- [2] The Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 28 June 2019 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.<sup>2</sup> Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

### *Information considered*

- [3] I have considered the information in the application and note the applicant has not provided any additional information for my consideration.<sup>3</sup>
- [4] I have considered information contained in a geospatial assessment and overlap analysis of the area covered by the application prepared by the National Native Title Tribunal's (Tribunal) Geospatial Services dated 5 July 2019 (geospatial report), and information available through the Tribunal's Geospatial Services in relation to the sufficiency of the map and description and the extent of any overlap with other claims.<sup>4</sup>

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<sup>2</sup> Section 190A(1).

<sup>3</sup> Section 190A(3)(a).

<sup>4</sup> Section 190A(3)(c).

[5] There is no information before me obtained as a result of any searches conducted by the Registrar of state or Commonwealth interest registers,<sup>5</sup> and the Western Australian government (state government) has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.<sup>6</sup>

### *Procedural fairness*

[6] On 1 July 2019, a senior officer of the Tribunal wrote to the representative of the relevant minister of the state government advising that I would be considering the information in the application in my decision, and should the state government wish to supply any information or make any submissions, it should do so by 5 July 2019. No submissions were made by the state government.

[7] This concluded the procedural fairness process.

## **Section 190C: conditions about procedures and other matters**

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

[8] 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.<sup>7</sup> I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

### *Section 61*

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

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

### *Section 62*

[10] The application contains the information specified in s 62.

| Section    | Details                                      | Form 1                            | 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, Attachment B          | Met    |
| s 62(2)(b) | Map of external boundaries of the area       | Attachment C                      | Met    |

<sup>5</sup> Section 190A(3)(b).

<sup>6</sup> Section 190A(3)(c).

<sup>7</sup> *Doepel* [16], [35]–[39].

|             |  |                              |     |
|-------------|--|------------------------------|-----|
| s 62(2)(c)  | Searches   | Schedule D                   | Met |
| s 62(2)(d)  | Description of native title rights and interests | Schedule E                   | Met |
| s 62(2)(e)  | Description of factual basis                     | Schedule F                   | Met |
| s 62(2)(f)  | Activities                                       | Schedule G                   | Met |
| s 62(2)(g)  | Other applications                               | Schedule H                   | Met |
| s 62(2)(ga) | Notices under s 24MD(6B)(c)                      | Schedule HA,<br>Attachment D | Met |
| s 62(2)(h)  | Notices under s 29                               | Schedule I,<br>Attachment D  | Met |

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

[11] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application’.<sup>8</sup> 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 of Native Title Claims (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.

[12] Schedule O to the application has not been provided. However the geospatial report shows that this claim is overlapped by the following applications to the following extents:

| Tribunal Number | Federal Court Number | Name                      | Status                    | Status Date | NTDA Area (sq km) | Overlap Area (sq km) | % NTDA Overlapping Separate Proceeding Area | % Separate Proceeding Area Overlapping NTDA |
|-----------------|----------------------|---------------------------|---------------------------|-------------|-------------------|----------------------|---|---|
| WC1996/093      | WAD21/2019           | Mullewa Wadjari Community | Accepted for registration | 19/8/1996   | 17665.283         | 1381.770             | 7.82  | 2.88  |
| WC1997/072      | WAD31/2019           | Widi Mob                  | Accepted for registration | 12/12/2011  | 19069.877         | 12054.721            | 63.21                                       | 25.13                                       |
| WC2000/001      | WAD27/2019           | Hutt River                | Accepted for registration | 7/7/2000    | 5884.444          | 5881.496             | 99.95                                       | 12.26                                       |
| WC2017/002      | WAD19/2019           | Southern Yamatji          | Accepted for registration | 27/10/2017  | 27843.535         | 27843.531            | 100.00                                      | 58.04                                       |

[13] I have checked the Register and am satisfied that each of the above overlapping applications was on the Register when this current application was made on 28 June 2019, and have not been removed. I therefore consider they are all ‘previous applications’ for the purposes of s 190C(3) and I must proceed to consider whether there are common claimants between the previous and the current applications.

[14] I have reviewed the Register extract for the Southern Yamatji claim and note that all the apical ancestors in that application are also named as apical ancestors in the current application. I

<sup>8</sup> Emphasis in original.

note the Hutt River application was brought on behalf of the descendants of Sarah Feast, who is also named as an apical ancestor in this current application.

- [15] When comparing this current application to the Mullewa Wadjari application, I note Leedham Papertalk is named as a member of the applicant in both claims. I note that the Widi Mob application is brought on behalf of some people with the surname 'Harris' and that Yvette Harris is named as a member of the applicant in this current application, however as 'Harris' is a common surname, this may or may not indicate a commonality of membership between the current application and the Widi Mob application.
- [16] In my view, there are at least claimants in common between the current application and the Southern Yamatji, Hutt River and Mullewa Wadjari previous applications. This means that s 190C(3) is not met.

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

- [17] 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.
- [18] 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, has not been provided, so I understand the application has not been certified and I must therefore assess the application against the requirements of s 190C(4)(b).
- [19] Following s 190C(4)(b) there is a note in the Act referring to the definition of 'authorising the making of applications' in s 251B, which reads as follows:
- ... for the purposes of this Act, all the persons in a native title claim group ... **authorise** a person or persons to make a native title determination application ... and to deal with matters arising in relation to it, if:
- (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group ... must be complied with in relation to authorising things of that kind—the persons in the native title claim group ... authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
  - (b) where there is no such process—the persons in the native title claim group ... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group ... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.<sup>9</sup>
- [20] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) is met unless the application:
- (a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met; and

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<sup>9</sup> Emphasis in original.

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[21] I note French J's comment that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained'.<sup>10</sup>

[22] The affidavits of the members of the applicant all depose the following:

1. I am a member of the applicant and a member of the Yamatji Nation native title claim group. ...
6. There is no process of decision-making for the claim group as a whole under traditional laws and customs that must be complied with to authorise an applicant to make a native title claimant application under the Native Title Act 1993 (Cth).
7. The native title group has an agreed and adopted decision-making process for decisions of the kind to authorise the making of an application and to deal with matters arising in relation to it. The agreed and adopted decision-making process incorporates traditional decision-making principles as far as possible.
8. Decisions are made by consensus of the claim group present at the meeting after discussions between members, with deference to the knowledge and seniority of the group's elders, with consensus being indicated by a show of hands. If no consensus can be achieved, decisions are made by majority vote used a show of hands of members of the native title claim group who are representative of the group and present.
9. This is the decision making process which the native title claim group used to authorise the applicant and make the application and to deal with all matters arising in relation to it.

[23] I consider paragraphs 1 and 9 of the affidavits provides a sufficient statement for the purposes of s 190C(5)(a), and paragraphs 6–9 are sufficient for the purposes of s 190C(5)(b), which means s 190C(5) is met.

[24] I have examined the contents of the application and am satisfied it contains no further information about the authorisation of the applicant. Based on the information in the affidavits, I understand a claim group meeting was held to authorise the applicant, using an agreed and adopted decision-making process, which is one of the methods of authorisation provided for in s 251B. I am satisfied from the information in the affidavits that the persons comprising the applicant are members of the claim group, as required by s 190C(4)(b). However there is no information before me about either the notice or the conduct of the claim group meeting to enable me to consider whether 'all the persons in a native title claim group' have authorised the applicant, which is also required by s 190C(4)(b).

[25] I understand that where an applicant is relying on s 190C(4)(b), I must be satisfied of the 'fact of authorisation' by all members of the native title claim group.<sup>11</sup> I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward v Northern Territory*:

Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed

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<sup>10</sup> *Strickland* [57].

<sup>11</sup> *Doepel* [78].

or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? <sup>12</sup>

[26] Based on the information in the application, I am not satisfied the above questions have been addressed, that all members of the native title claim group were given every reasonable opportunity to participate in the decision-making process,<sup>13</sup> or that they have authorised the applicant to make the application and deal with all matters arising in relation to it. This means the requirements of s 190C(4)(b) are not satisfied and so s 190C(4) is not met.

## Section 190B: merit conditions

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

[27] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application 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.

[28] I understand the questions for this condition are whether the information and map provide certainty about:

- (1) the external boundary of the area where native title rights and interests are claimed; and
- (2) any areas within the external boundary over which no claim is made.<sup>14</sup>

#### *Does the information about the external boundary meet this condition?*

[29] Schedule B refers to Attachment B which is titled ‘Separate Proceeding Area External boundary description’. It describes the application area as all land and waters within a boundary defined with reference to cadastral parcels, native title determination applications, native title determinations, the Shire of Dalwallinu and Shire of Coorow local government area boundaries, a line 10km seaward of the lowest astronomical tide, the 12 nautical mile sea limit, the Geraldton Mount Magnet Road and geographical coordinates to six decimal places (GDA94).<sup>15</sup>

[30] Schedule C refers to Attachment C, which contains a copy of a map prepared by the Tribunal’s Geospatial Services, titled ‘Separate Proceeding Area’ and dated 20 May 2019. It includes:

- a. The application area depicted by bold dark blue outline;
- b. Land Tenure shown and labelled as per legend;
- c. Maritime boundaries depicted as per legend;
- d. Roads and place names shown and labelled;
- e. Scalebar, coordinate grid, locality diagram, and
- f. Notes relating to the source, currency and datum of data used to prepare the map.

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<sup>12</sup> *Ward v Northern Territory* [25]–[26].

<sup>13</sup> *Lawson* [25].

<sup>14</sup> *Doepel* [122].

<sup>15</sup> Geocentric Datum of Australia 1994.

[31] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

*Does the information about excluded areas meet this condition?*

[32] Attachment B specifically excludes any area subject to the following native title determinations and determination applications:

- a. WAD6136/1998, WAD286/2018 Nanda People and Nanda #2 (WCD2018/011) as determined on 28 November 2018;
- b. WAD6033/1998 Wajarri Yamatji (WCD2017/007) as determined on 19 October 2017;
- c. WAD6123/1998 Badimia People (WCD2015/001) as determined on 25 May 2015;
- d. WAD28/2019 Wajarri Yamatji #1 (WC2004/010) as accepted for registration on 1 August 2017;
- e. WAD30/2019 Nanda People (WC2000/013) as accepted for registration on 17 August 2018;
- f. WAD647/2017 Marlinyu Ghoorlie (WC2017/007) as accepted for registration on 28 March 2019;
- g. WAD6192/1998 Yued (WC1997/071) as accepted for registration on 3 September 2010; and
- h. WAD6006/2003 Single Noongar Claim (Area 1) (WC2003/006) as accepted for registration on 31 October 2007.

[33] Schedule B lists general exclusions including areas where previous exclusive and non-exclusive possession acts have been done and areas where native title has been otherwise extinguished.

[34] I note French J's comment regarding s 190B(2): 'it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.<sup>16</sup> Following this reasoning, I have considered the general exclusion clauses in Schedule B and I am satisfied the description of the excluded areas will be sufficient to ascertain any such areas at the appropriate time.

*Conclusion*

[35] As I consider that both the external boundary and the excluded areas of the application can be identified from the map and description with reasonable certainty, I am satisfied that s 190B(2) is met.

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

[36] 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

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<sup>16</sup> *Strickland* [55].



(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[37] I understand 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’ at this condition.<sup>17</sup> I also understand that the requirements of s 190B(3) ‘do not appear to go beyond consideration of the terms of the application’, which means I have limited my consideration to the information in the filed application.<sup>18</sup>

[38] Schedule A states:

This claim is brought on behalf are [sic] those Aboriginal persons who satisfy (a) and (b) below (the “SPA People”). The Separate Proceeding Area (SPA) is the area of land and waters as identified in the External Boundaries Description in Schedule B and the map as shown in Schedule C.

[39] Paragraph (a) contains a list of apical ancestors and states that Aboriginal persons who have been adopted as children or raised (or grown up) as part of the ‘family of descendants’, are included as descendants of the apical ancestors.

[40] Paragraph (b) states:

In addition to (a), those descendants must also identify as Yamatji People who are connected under the traditional Yamatji laws and customs with the land and waters in the SPA and be accepted as such by other SPA People.

[41] It follows from the description in Schedule A that s 190B(3)(b) applies. From the description I understand that to qualify for membership an individual must:

1. be a descendant of one of the named apical ancestors including by adoption or ‘raised (grown up)’;
2. identify as a Yamatji person and be connected under traditional Yamatji laws and customs with the land and waters in the separate proceeding area (SPA); and
3. be accepted as part of the group by other SPA people.

[42] I have considered each of these criteria in turn below.

### *Descent*

[43] The Court has previously held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).<sup>19</sup> I consider that requiring a person to show descent from an identified ancestor provides a clear objective starting point from which to commence enquiries about whether a person is a member of the claim group. I consider that factual enquiries would lead to the identification of the people who meet this description.

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<sup>17</sup> *Wakaman* [34].

<sup>18</sup> *Doepel* [16].

<sup>19</sup> *WA v NTR* [67].

### *Self-identification and connection*

[44] I consider that determining whether a descendant of the ancestors listed in paragraph (a) meets the second criterion could be ascertained by undertaking factual enquiries with the individual in question, to determine whether they identify as a Yamatji person.

[45] I note Dowsett J's comments in *Aplin* that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs'.<sup>20</sup> I consider that if an individual is a descendant of a named apical ancestor and self-identifies as a Yamatji person, then the next stage of enquiry would be with people holding the relevant authority and expertise in the Yamatji traditional laws and customs, to determine whether the individual has the requisite connection to the land and waters of the SPA.

### *Group acceptance*

[46] Dowsett J further observed that membership of a claim group 'must be based on group acceptance'.<sup>21</sup> I note also the Full Court's comments in *Sampi FC*, that '[a] relevant factor... in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.<sup>22</sup> I therefore consider it is with reference to those laws and customs that an individual would need to be 'accepted' by other SPA people. In my view, as with the previous criterion, whether the individual is accepted as such by other SPA people could be determined by enquiries to SPA people holding the relevant authority and expertise in Yamatji traditional laws and customs.

### *Conclusion*

[47] I am satisfied the application describes the persons in the native title claim group sufficiently clearly such that it can be ascertained whether any 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**

[48] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights are established on a prima facie basis.

[49] Schedule E lists six rights which are described as 'non-exclusive'. Schedule E also describes the qualifications on the claimed rights, including that they do not extend to any minerals, petroleum or gas owned by the Crown or are exclusively claimed in relation to any offshore place. Paragraphs (iii)–(iv) explain that while exclusive rights are not claimed in relation to any areas to which a previous non-exclusive possession act has been done, the benefit of ss 47–

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<sup>20</sup> *Aplin* [256]–[261].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Sampi FC* [45].

47B is also claimed. Paragraph (v) expressly states that the claimed native title rights and interests are not claimed to the exclusion of any other rights and interests validly created.

[50] From the description in Schedule E, I consider it is clear the six listed rights are claimed on a non-exclusive basis. Reading Schedule E as a whole, including the various qualifications, I do not consider there is any inherent contradiction between any of the rights claimed.<sup>23</sup>

### *Conclusion*

[51] I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

[52] To meet s 190B(5), the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to 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) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[53] 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'.<sup>24</sup> I also note French J's view that '[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or [her] delegate undertake a search for such material'.<sup>25</sup> As such I have not undertaken any searches for external material to support the applicant's claim.

[54] As discussed above, Schedule E provides a description of the native title rights and interests claimed. Schedule F provides only the following:

The native title rights and interests claimed in this Application exist on the basis that the SPA people have, and the predecessors of the SPA people had, an association with the area; that there exist traditional laws and customs which give rise to the claimed native title; and that the native title claim group has continued to hold native title in accordance with their traditional laws and customs, as supported by the following facts:

1. Since prior to the acquisition of sovereignty, the SPA people have had, and continue to have, a system of traditional laws and customs which they continue to acknowledge and observe. It was these SPA traditional laws and customs that governed the SPA people and the claim area at sovereignty and continue to the present day.

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<sup>23</sup> *Doepel* [92], [123].

<sup>24</sup> *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

<sup>25</sup> *Martin* [23].

2. SPA people have a strong connection to their land and water through their intrinsic local knowledge of its natural resources and the land and seascape. They believe that spirits including the spirits of their ancestors, the old people, still dwell on and in the land. Under these laws and customs, it is the SPA people who hold the rights and interests in the claim area and have responsibilities to it.
3. These laws and customs were observed by the SPA people at the time sovereignty was asserted and their descendants and successors are the SPA people today. These laws and customs have been acknowledged and observed and had a substantially continuous existence and vitality since prior to sovereignty. They were taught to the SPA people of today by their elders, and they in turn have passed it on to their children. The SPA people continue to follow and teach their children these ways and to exercise the rights and interests claimed in the claim area today.
4. Under the SPA traditional laws and customs, SPA people are descended from a SPA person. The SPA ancestors named in Schedule A are the ancestors of the SPA people today. Those ancestors are in turn descended from SPA people who, along with other SPA people at the time who may not have any SPA descendants today, formed part of the SPA society at the time of sovereignty. In this way, the SPA people today believe, and their laws and customs provide, that they are descendants of the SPA people who belonged to SPA country.
5. Under the traditional laws and customs of the SPA people, the area claimed in this application is, and has been since prior to sovereignty, the traditional country of the SPA people.

[55] Schedule G provides the following list of activities which the claim group assert to have continuously carried out on the claim area:

1. Hunting, gathering and fishing in the area;
2. Moving about, living, residing, erecting shelters and camping on and within the area;
3. Conducting and engaging in cultural activities, rituals, teaching and meetings on and within the area;
4. Visiting, maintaining and protecting places of importance within the area;
5. Maintaining and protecting significant objects located within the area;
6. Taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water and shells;
7. Using the resources of the area for food, shelter, cultural, religious, ceremonial, ritual, healing and decorative purposes and for the manufacture of items like tools, weapons and clothing; and
8. Trading in the resources of the area and goods manufactured using those traditional resources.

[56] On reviewing the entirety of the information provided by the applicant, I consider that only Schedules E, F and G contain factual basis material relevant to the assertion at s 190B(5). I note Schedule M has not been included in the application.

[57] I consider the material does not provide a sufficient factual basis to support an assertion that the predecessors of the group were associated with the application area over the period since sovereignty. There are no references to any locations inside the application area and no information about any association of the predecessors with the application area other than the general statement regarding their occupation of the area in the opening paragraph of Schedule F, quoted above. In my view, there is also insufficient information to demonstrate the association the claim group currently has with the application area. I consider the

information provided is of a very general nature and has no ‘geographical particularity’, which means the requirements of s 190B(5)(a) are not satisfied.<sup>26</sup>

- [58] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society, acknowledging and observing normative laws and customs. In my view, there is insufficient information to support an assertion that a pre-sovereignty society existed in the application area. I consider the broad statements in Schedule F to be ‘at a high level of generality’.<sup>27</sup> I also consider there is insufficient information to demonstrate any relationship between the ancestors of the claim group and a pre-sovereignty society.
- [59] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are ‘traditional’, that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society.<sup>28</sup> I am not satisfied the information in the application supports an assertion that laws and customs exist in the claim area, either in relation to a pre-sovereignty society or since that time. This means I cannot be satisfied that any such laws or customs could be considered ‘traditional’ and so the requirements of s 190B(5)(b) are not satisfied.
- [60] Meeting the requirements of s 190B(5)(c) relies on whether there is a factual basis sufficient to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests. Because I consider the factual basis is not sufficient to support the *existence* of traditional laws and customs I cannot be satisfied the factual basis is sufficient to support the *continuity* of traditional laws and customs, the requirements of s 190B(5)(c) are not satisfied.

### *Conclusion*

- [61] As 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 ss 190B(5)(a)–(c), s 190B(5) is not met.

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

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

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<sup>26</sup> *Martin* [26].

<sup>27</sup> *Gudjala 2008* [92].

<sup>28</sup> *Yorta Yorta* [46].

this type. I therefore consider none of the claimed rights and interests has been established on a prima facie basis, which means s 190B(6) is not met.

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

[64] 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.

[65] This condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and requires that the physical connection is in accordance with the traditional laws and customs of the claim group.<sup>29</sup>

[66] As noted above, Schedule M, which asks the applicant for information about any traditional physical connection that a claim group member has with the application area, has not been provided. This means that my consideration is limited to the information in the other schedules, particularly Schedules E, F and G, quoted above. I consider the information in these schedules is too general to satisfy the requirements of s 190B(7). In addition, given my finding at s 190B(5)(b), that there is insufficient information to demonstrate the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds the requisite physical connection with the application area in accordance with traditional laws and customs, which means s 190B(7) is not met.

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

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

| Requirement  | Information addressing requirement | Result |
|--|------------------------------------|--------|
| Section 61A(1) No native title determination application if approved determination of native title   | Geospatial report, my own searches | Met    |
| Section 61A(2) Claimant application not to be made covering previous exclusive possession act areas  | Schedule B, paragraph 2(a)–(b)     | Met    |
| Section 61A(3) Claimant applications not to claim possession to the exclusion of all others in previous non-exclusive possession act areas | Schedule B, paragraph 3(a)–(b)     | Met    |

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

[68] Section 190B(9) states that the application must not disclose, and the Registrar must not otherwise be aware that the claimed native title extends to cover the situations described in ss 190B(9)(a)–(c), as summarised in the table below.

<sup>29</sup> *Doepel* [18], *Gudjala 2009* [84].

| <b>Requirement</b>   | <b>Information addressing requirement</b> | <b>Result</b> |
|--|---|---------------|
| Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown   | Schedule E, paragraph (i)                 | Met           |
| Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place           | Schedule E, paragraph (ii)                | Met           |
| Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished | Schedule B, paragraph 4                   | Met           |

*End of reasons*

## Attachment A

### Summary of registration test result

|                                |  |
|--------------------------------|--|
| Application name               | Frederick Taylor & Ors on behalf of Yamatji Nation Claim and State of Western Australia (Yamatji Nation Claim) |
| NNTT No.                       | WC2019/008   |
| Federal Court of Australia No. | WAD345/2019  |
| Date of decision               | 12 July 2019   |

#### *Section 190B conditions*

| Test condition  | Sub-condition/requirement | Result                              |
|-----------------|---------------------------|-------------------------------------|
| Section 190B(2) |                           | <b>Met</b>                          |
| Section 190B(3) |                           | Overall result:<br><b>Met</b>       |
| Section 190B(4) |                           | <b>Met</b>                          |
| Section 190B(5) |                           | Aggregate result:<br><b>Not met</b> |
| Section 190B(6) |                           | <b>Not met</b>                      |
| Section 190B(7) |                           | <b>Not met</b>                      |
| Section 190B(8) |                           | Aggregate result:<br><b>Met</b>     |
| Section 190B(9) |                           | Aggregate result:<br><b>Met</b>     |

#### *Section 190C conditions*

| Test condition  | Sub-condition/requirement | Result                            |
|-----------------|---------------------------|-----------------------------------|
| Section 190C(2) |                           | Aggregate result:<br><b>Met</b>   |
| Section 190C(3) |                           | <b>Not met</b>                    |
| Section 190C(4) |                           | Overall result:<br><b>Not met</b> |