Registration Decision

Application name	Malachy Hobbs & Ors on behalf of the Ngurrara D2 Claim Group and the State of Western Australia (Ngurrara D2)
Name of applicant	Malachy Hobbs; Harry Yungabun; Hector Hobbs; Percy Bulagardie; Cynthia Winawarl; James Yanawana; Mervyn Numbagardie; Victor Woia; Richard Pindan; Helen Thomas; Tony Yanawana
Federal Court of Australia No.	WAD394/2019
NNTT No.	WC2019/009
Date of Decision	8 November 2019

Claim accepted for registration

I have decided that the claim in the Ngurrara D2 application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] Therefore the claim must be accepted for registration and entered onto the Register of Native Title Claims.

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Katy Woods

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

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

Reasons for Decision

Cases cited

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)
Forrest on behalf of the Ngurrara People v State of Western Australia [2018] FCA 289 (*Forrest*)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)
Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)
Hobbs v State of Western Australia [2019] FCA 1255 (*Hobbs*)
Kogolo v State of Western Australia [2007] FCA 1703 (*Kogolo*)
Kogolo v State of Western Australia (No 3) [2012] FCA 1332 (*Kogolo #3*)
Martin v Native Title Registrar [2001] FCA 16 (*Martin*)
May v State of Western Australia [2012] FCA 1333 (*May*)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*)
Northern Land Council v Quall [2019] FCAFC 77 (*Quall*)
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)
Sampi v State of Western Australia [2005] FCA 777 (*Sampi*)
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 Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*)
Western Australia and Northern Territory v Lane (1995) 59 FCR 332; [1995] FCA 1484 (*Lane*)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28 (*Ward HC*)

Background

[1] This is an application filed on behalf of the Ngurrara D2 native title claim group (claim group). It covers the land and waters of a single lot of unallocated crown land, of approximately 34 square kilometres, in the Great Sandy Desert region of Western Australia (application area).

[2] The original application was filed on 6 August 2019 and an amended application was filed on 2 September 2019. The Registrar of the Federal Court (Court) gave a copy of the original application to the Native Title Registrar (Registrar) on 25 September 2019, pursuant to s 63. The Court also gave a copy of the amended application to the Registrar on 20 September 2019, pursuant to s 64(4). These referrals have triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.[2]

[3] The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. As the original application was not registration tested, s 190A(6A) does not apply. Therefore, in accordance with s 190A(6), I

[2] Section 190A(1).

must accept the claim in the amended application for registration if it satisfies all the conditions in ss 190B–190C.

Information considered

[4] I have considered the information in the application and the additional information provided by the applicant, as outlined below.[3]

[5] I have considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the National Native Title Tribunal's (Tribunal) Geospatial Services dated 3 October 2019 (geospatial report), in relation to the sufficiency of the map and description. I have considered information from the Tribunal's geospatial database regarding this claim's location in relation to other Ngurrara claims in the vicinity made by the claim group.[4] I have also accessed information in the National Native Title Register to ascertain the status of the surrounding Ngurrara claims.

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

Procedural fairness

[7] On 26 September 2019, a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the state advising that I would be considering the information in the application in my decision, and should the state wish to supply any information or make any submissions, it should do so by 3 October 2019.

[8] Also on 26 September 2019, the senior officer wrote to the applicant's representative to advise that any additional information the applicant wished me to consider should be provided by 3 October 2019.

[9] On 15 October 2019, the senior officer wrote to the applicant outlining my preliminary view as to deficiencies in the application that may affect the claim's ability to be registered, specifically, that the certification of the claim may be affected by the Full Federal Court's decision in *Quall*.

[10] On 22 October 2019, the applicant provided submissions in response to my preliminary views for my consideration when applying the registration test (certification submissions).

[11] Also on 22 October 2019, the senior officer wrote to the relevant minister of the state, providing a copy of the certification submissions and advising that any comments that the state wished to make on those submissions should be provided by 30 October 2019.

[12] On 23 October 2019, a representative of the state advised the senior officer that the state would not be providing any comments. This concluded the procedural fairness process.

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

Section 190C: conditions about procedures and other matters

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

[13] 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.[7] I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

Section 61

[14] The application contains the details specified in s 61:

Section	Details	Form 1	Result
s 61(1)	Native title claim group has authorised the applicant	Part A(2), Schedule A, s 62 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

[15] The application contains all the information specified in s 62:

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 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
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, Attachments F1–F6	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

Conclusion

[16] As the application contains all of the prescribed details and other information, as required by ss 61–2, I am satisfied s 190C(2) is met.

[7] *Doepel* [16], [35]–[39].

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

[17] 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'.[8] To be a 'previous application':

(a) the application must overlap the current application in whole or part;

(b) there must be an entry for the claim in the previous application on the Register when the current application was made; and

(c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[18] The geospatial report states and my own searches confirm there are no applications which overlap the current application, as required by s 190C(3)(a). Therefore, there are no applications which meet the definition of a 'previous application' under s 190C(3). This means that the issue of common claimants does not arise.

Conclusion

[19] I am satisfied that no person included in the claim group was a member of a native title claim group for any previous application, and so s 190C(3) is met.

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

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

> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or
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> (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.

[21] Schedule R refers to Attachment R, which is a document titled 'Certification'. It follows that s 190C(4)(a) is applicable and thus I must be satisfied that:

(a) the certificate identifies the relevant representative body;

(b) the representative body has the power under Part 11 to issue the certification; and

(c) the certificate meets the requirements of s 203BE(4).[9]

Is the relevant representative body identified?

[22] Kimberley Land Council (KLC) have provided the certificate, which is dated 17 May 2018 and signed by the Acting Chief Executive Officer (CEO). The geospatial report states KLC is the only representative body for the whole of the application area. I have verified this information against current data in the Tribunal's national map of Representative Aboriginal / Torres Strait Island Body areas. That map shows KLC to be the recognised representative body for the application area. I am therefore satisfied the certificate identifies the relevant representative

[8] Emphasis in original.
[9] *Doepel* [80]–[81].

body. I have addressed the issue of the CEO signing the certification, in light of *Quall*, separately below.

Does the representative body have the power to issue the certification?

[23] As a recognised representative body, KLC can perform all of the functions listed in Part 11, including, relevantly, the certification functions referred to in s 203BE. I am satisfied KLC has the power under Part 11 to issue the certification.

Does the certificate meet the requirements of s 203BE(4)?

[24] I have addressed each of the requirements of s 203BE(4) in turn below.

Section 203BE(4)(a) – statements

[25] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[26] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it.

[27] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[28] As the certificate contains these required statements, I am satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

[29] Section 203BE(4)(b) requires a representative body to briefly set out its reasons for being of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[30] Under the heading 'Reasons for opinion pursuant to section 203BE(2)(a) and (b)', the certificate sets out KLC's reasons for its opinion that ss 203BE(2)(a)–(b) are met, which includes the following:

(a) Authorisation of the applicant:

i. The applicant was authorised by the claim group at a meeting on 9 May 2018, pursuant to an agreed and adopted decision-making process of a majority vote;

ii. The authorisation meeting was advertised publically and widely, including in the Broome Advertiser, the Kimberley Echo and in relevant towns and communities;

iii. Personal notice of the meeting was given to the members of the claim group by post or email;

iv. KLC provided travel and accommodation assistance to all members of the claim group who requested it.

(b) Identification of the claim group:

i. KLC has undertaken extensive anthropological and genealogical research, and community consultations over a number of years; and

ii. The research and consultations have produced the claim group description for this application.

[31] As the certificate sets out the reasons for KLC's opinion that ss 203BE(2)(a)–(b) are met, I am satisfied s 203BE(4)(b) is met.

Section 203BE(4)(c) – overlapping applications

[32] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3).

[33] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

> (a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
> (b) minimise the number of applications covering the land or waters.
>
> However, a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[34] The certificate does not include any information about what KLC has done to meet the requirements of s 203BE(3). However as there are no overlapping applications, I do not consider this failure invalidates the certification.

Implications of the Quall decision

[35] As the certificate identifies the relevant representative body, the representative body has the power under Part 11 to issue the certification, and the certificate meets the requirements of s 203BE(4), the certificate likely meets the requirements of s 190C(4)(a). However, the Full Court in *Quall* considered the certification of applications for registration of indigenous land use agreements (ILUAs) under s 203BE(b) by representative bodies and held that a representative body may not delegate its functions under s 203B(1).[10]

[36] I have paraphrased below the certification submissions from the applicant:

(a) The *Quall* judgment distinguishes between a *delegate* who purports to act in the name of a principal, and an *agent* who may properly act under the name of the principal.[11]

(b) The principle of agency allows an agent to act in the principal's name, while a delegate who purports to do so is acting invalidly.[12]

(c) KLC is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act).[13]

(d) Section 274-1 of the CATSI Act states:

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[10] *Quall* [102]–[104].
[11] Certification submissions [1], citing *Quall* [25], [54].
[12] Certification submissions [1].
[13] Ibid [2].

1. The business of an Aboriginal and Torres Strait Islander corporation is to be managed by or under the direction of the directors.

2. The directors may exercise all the powers of the corporation except any powers that this Act or the corporation's constitution requires the corporation to exercise in general meeting.[14]

(e) The effect of s 274-1 is that the directors of KLC may exercise the certification function of KLC.[15]

[37] The certification submissions also provide the following regarding the delegation of the directors' powers:

(a) Rule 9.1 of the KLC Constitution states:

> (a) The business of the Corporation is to be managed by the Chief Executive Officer or the Deputy Chief Executive Officer under the direction of the Directors.
> (b) The Directors may exercise all the powers of the Corporation except any that the Act or the Constitution requires the Corporation to exercise in General Meeting.

(b) The effect of Rule 9.1 is that, insofar as certification is part of the 'business' of KLC, this business is to be managed by the Chief Executive Officer and Deputy Chief Executive Officer.

(c) On this basis, the certification made by the Acting Chief Executive Officer is a valid discharge of the certification function.[16]

[38] In my view, the applicant has sufficiently addressed the potential implications of the *Quall* decision on this claim. In the absence of any submissions from the state or further judicial guidance at the time of making this decision, I consider KLC has certified the application through the Acting CEO. This is because Rule 9.1 of the KLC Constitution enables the CEO to manage the business of KLC under the direction of the directors. The directors in turn have the capacity to act as agents of KLC under the CATSI Act.

[39] Finally, I note the earlier judicial guidance that s 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body'.[17] In my view, the information provided by the applicant about the validity of the certification, in light of *Quall*, is such that I can be satisfied of the fact of certification, and can proceed to decide whether or not the application meets the requirements of s 190C(4)(a).

Conclusion

[40] As the certificate identifies the relevant representative body, the representative body has the power under Part 11 to issue the certification, and the certificate meets the requirements of s 203BE(4), I am satisfied that s 190C(4)(a) is met.

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[14] Ibid.
[15] Ibid.
[16] Ibid [3].
[17] *Doepel* [78], [80]–[82].

Section 190B: merit conditions

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

[41] 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.

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

(a) the external boundary of the area where native title rights and interests are claimed; and
(b) any areas within the external boundary over which no claim is made.[18]

Does the information about the external boundary meet this condition?

[43] Schedule B refers to Attachment B, which describes the application area with reference to the surrounding native title determinations and a petroleum title, and uses geographical coordinates.

[44] Schedule C refers to Attachment C, which contains a map prepared by Geospatial Services titled 'Ngurrara D2' and dated 5 June 2018. The map includes:

(a) the application area depicted with bold blue outline and blue hatching;
(b) tenure, depicted as displayed in the legend, and labelled;
(c) commencement point, scalebar, locality inset, and coordinate grid referencing GDA94;[19] and
(d) notes relating to the source, currency and datum of data used to prepare the map.

[45] 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?

[46] Schedule B lists general exclusions from the application area, including areas where previous exclusive possession acts have been done, and any areas where native title has been extinguished. I understand from Schedule B that the benefit of ss 47–47B is claimed, which means that extinguishment is to be disregarded in certain areas.

[47] With regard to these types of general exclusion clauses, French J commented that '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'.[20] Following this reasoning, I am satisfied the description of the areas covered by the general exclusion areas will be sufficient to ascertain any such areas at the appropriate time.

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[18] *Doepel* [122].
[19] Geocentric Datum of Australia 1994.
[20] *Strickland* [55].

[48] Attachment B excludes any area subject to the native title determination of WAD6077/98 Ngurrara Part A, as determined by the Court on 9 November 2007.

[49] In my view, the specific exclusion is clear from the description in Attachment B.

Conclusion

[50] As 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

[51] To meet s 190B(3), the Registrar must be satisfied that:

> (a) the persons in the native title claim group are named in the application; or
>
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[52] 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.[21] 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.[22]

[53] Schedule A states that the members of the claim group comprise the following:

> Those Aboriginal people who are
>
> a) the biological descendants of the following apical ancestors [list of named apical ancestors]; or
>
> b) are acknowledged by the native title claimants in (a) as having rights and interests in the claim area through a direct relationship by birth/finding and growing up in places ("Ngurrara") within the application area.

[54] It follows from the above description that s 190B(3)(b) is applicable. I must therefore consider whether the description is sufficiently clear, so as to ascertain whether any particular person is in the claim group.

Is the description sufficient to ascertain the members of the claim group?

[55] I understand that where a claim group description contains a number of paragraphs, the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open'.[23]

[56] From the description in Schedule A, I understand that to qualify for membership of the claim group an individual must meet the requirements of either paragraph a) or paragraph b).

[57] The Court has previously accepted similar, and in some cases identical, descriptions for native title claim groups in relation to other Ngurrara claims in the vicinity of the area covered by this application.[24] However this does not mean I am relieved of considering the claim group

[21] *Wakaman* [34].
[22] *Doepel* [16].
[23] *Gudjala 2007* [34].
[24] *Forrest* Schedule 6; *Kogolo* Schedule 3; *May* Schedule 3; *Kogolo #3* Schedule 3.

description for the purposes of this registration test. I will therefore consider each criterion for membership before deciding whether the requirements of s 190B(3)(b) are met.

Biological descent from named ancestors

[58] The Court has previously held that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).[25] I consider requiring a person to show descent from an identified ancestor provides a clear starting point to commence an inquiry about whether a person is a member of the claim group and that it will be possible to identify the people who meet this criterion for membership through factual enquiries.

Birth/finding and growing up in places in the application area

[59] The factual basis material for this claim, found in Schedule F and the attachments to that schedule, detail the relationship that claimants have to the places of their birth. Attachment F1 is a document titled 'Ngurrara Native Title Claim WC96/32 Supplementary Consent Determination Report' (anthropologist's report). Using the Tribunal's geospatial database, I understand that the claim for which this report was written covered the entirety of 'Ngurrara country', most of which has now been determined.[26] I can see from the geospatial database that the area covered by this application sits within the area for which the anthropologist's report was written. I am therefore of the view that it is relevant to the registration testing of this claim.

[60] The anthropologist's report contains a section on the identity of the Ngurrara claim group and the following statements which reflects the language of paragraph b) in Schedule A:

> Broadly speaking, certain life cycle events and actions establish connections between a person and places within the Claim Area. Two such events, spiritual conception or 'finding' and birth are acknowledged by claimants as creating a fundamental and enduring connection to place…
>
> In addition, in accordance with their laws and customs, the claimants acknowledge that other life-cycle events also establish a connection to places in the Claim Area. These events include occupation, initiation and death.[27]

[61] From the information in the anthropologist's report, I understand that the laws and customs of the claim group provide the basis on which connection to particular places can be established, and it is by this 'set of rules or principles' that it can be determined whether or not a person is accepted as a member of the group.[28] The anthropologist's report further states: '[p]roof that a person satisfies the criteria of claim group membership is found in the acceptance of that person by the claim group' and that the laws and customs provide that it is the older claimants who should be asked about such matters.[29]

[62] In *Aplin*, Dowsett J commented that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs', and membership of a claim group is based on group acceptance.[30]

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[25] *WA v NTR* [67].
[26] *Forrest*, *Kogolo*, *May*, *Kogolo #3, Hobbs*.
[27] Anthropologist's report [34], [36].
[28] *Ward v Registrar* [25].
[29] Anthropologist's report [43].
[30] *Aplin* [256].

[63] In light of this judicial guidance and having regard to the information in the anthropologist's report, I am of the view that factual enquiries to the members of the claim group who qualify under paragraph a), and who are empowered under the relevant laws and customs in relation to such matters, would enable the persons who meet the requirements of paragraph b) to be identified.[31]

Conclusion

[64] 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

[65] 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 as native title rights on a prima facie basis.

[66] I understand from Schedule E that exclusive possession is claimed in every part of the claim area where there has been no extinguishment of native title, where any extinguishment must be disregarded, and which is not subject to the public right to navigate or the public right to fish.

[67] I also understand from Schedule E that non-exclusive rights are claimed in those parts of the claim area where the right to exclusive possession cannot be recognised. Three non-exclusive rights are listed.

[68] Schedule E states that the rights claimed are held by the members of the claim group in accordance with their traditional laws and customs, and are subject to the laws of Western Australia and the Commonwealth, including the common law.

[69] 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.[32]

Conclusion

[70] 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 met

[71] 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:

[31] *Ward v Registrar* [25].
[32] *Doepel* [92], [123].

(a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the 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.

[72] 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'.[33]

What information has been provided in support the assertions of s 190B(5)?

[73] Schedule F provides a general description of the native title rights and interests claimed, and refers to Attachments F1–F6. Those attachments contain the following documents:

(a) Attachment F1: anthropologist's report

(b) Attachment F2: Reasons for decision: WC08/03 Ngurrara (Part B) (Ngurrara Part B registration test)

(c) Attachment F3: the *Forrest* judgment

(d) Attachment F4: the *Kogolo* judgment

(e) Attachment F5: the *May* judgment

(f) Attachment F6: the *Kogolo #3* judgment.

[74] I have contextualised the information in the attachments to Schedule F based on their content and from information available in the Tribunal's geospatial database and in the National Native Title Register. I understand the relevance of these documents to this claim is as follows:

(a) Attachment F1: as discussed above at s 190B(3), the anthropologist's report was written for the original Ngurrara 'country claim' of WC1996/032, and speaks to the entirety of Ngurrara country, including the area covered by this application.

(b) Attachment F2: in 2007, the Ngurrara country claim was split into Part A and Part B, with the Ngurrara Part B application covering the areas over which the benefit of s 47 could be claimed to disregard any extinguishment of native title. A delegate of the Registrar was satisfied the Part B application met all the conditions of the registration test, including the merit conditions of ss 190B(5)–(7), based on the anthropologist's report.

(c) Attachment F3: *Kogolo* recognised the same claim group's native title rights and interests, including the right to exclusive possession, in the Part A areas of the Ngurrara country claim.[34]

(d) Attachment F4: *May* recognised the same claim group's native title rights and interests, including the right to exclusive possession, in two reserves which lie to the east and

[33] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[34] *Kogolo* [2], [4].

south east of the area covered by the current application, known as 'Ngurrara 2 – Area C'.[35]

(e) Attachment F5: *Kogolo #3* recognised the same claim group's native title rights and interests, including the right to exclusive possession, in the Part B areas of the Ngurrara country claim, which lie to the east of the area covered by the current application.[36]

[75] I understand that the area covered by this application, being a single lot of unallocated crown land, was excluded from both the original country claim and the subsequent Part A determination of *Kogolo*, which surround the application area on all sides. For completeness, I note there is a small area of comparable size next to this application area to the immediate east and south, which is part of the area determined in *Hobbs*, known as 'Ngurrara D1' and brought by the same claim group. At the time of writing these reasons, that area is subject to a conditional determination of native title, pending the nomination of a prescribed body corporate to be the trustee or agent of the native title rights and interests.[37]

[76] I note that the claim group description for all of the Ngurrara determinations in the attachments to Schedule F is essentially the same as that used for the current claim, with some variations in language and in the ordering of the named apical ancestors.[38] The respective Judges note the anthropologist's report as the basis on which the native title rights and interests were determined to exist in several of the determinations.[39]

What is required to meet s 190B(5)(a)?

[77] To meet s 190B(5)(a) the factual basis must be sufficient to show:

(a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement;[40]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[41] and

(c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.[42]

What information has been provided in support of the assertion of s 190B(5)(a)?

[78] As discussed above, the anthropologist's report speaks to the area covered by the Ngurrara country claim, within which the area covered by this application is located. The references to the 'claim area' in the anthropologist's report are to the area covered by the country claim, and I have adopted this terminology in my reasons below. Using the Tribunal's geospatial database, I can see that the area covered by the current application sits in the north west of

[35] *May* [2], [4].
[36] *Kogolo #3* [2], [4].
[37] *Hobbs* [4].
[38] *Forrest* Schedule 6; *Kogolo* Schedule 3; *May* Schedule 3; *Kogolo #3* Schedule 3.
[39] *Forrest* [7]; *Kogolo* [20]; *Kogolo #3* [17].
[40] *Gudjala 2007* [52].
[41] Ibid.
[42] *Martin* [26]; *Corunna* [39], [45].

the country claim. I have therefore identified information in the anthropologist's report about the north west part of the country claim, as I consider this information is particularly relevant to my consideration of s 190B(5)(a). Where the information speaks directly to the area covered by the current application, I have noted this accordingly.

[79] The anthropologist's report provides the following information:

(a) The first explorer to traverse the claim area was Colonel Edgerton Warburton in 1873.[43]

(b) L. A. Wells was the first European to record indigenous place names in the claim area during his 1896-97 expeditions;[44] and many of the place names that were recorded historically, some of which came from informants who were alive before sovereignty, are still used by the current claimants.[45]

(c) Sustained European contact in the claim area did not start until around 1900.[46]

(d) Kaberry carried out the first study of people connected to the northern Great Sandy Desert in 1935-36, and two current claimants remember meeting her;[47] Kaberry records people having occupied the 'arid, sandhill and spinifex region' of the northern claim area.[48]

(e) Some of Kaberry's informants were senior men in 1935-36, so it is likely they were born in the 1860s-70s, well before European settlement.[49]

(f) Tindale and Birdsell interviewed people in the claim area in the 1950s, including the father of one of the current claimants.[50]

(g) Accounts given to the anthropologist indicated that before the mid-1960s, now senior claimants and their forebears lived in the marginal area of the pastoral stations (to the north) and travelled 'back and forth into the sandhill country of the north central claim area with their kin'.[51]

(h) Carnegie in 1898, and later Kaberry and Tindale, record details of the *winan* trading system, which operated across the Western Desert region. Tindale documents the trade routes, including one which started at Pikarangu (Joanna Springs) and 'went northwest and arrived on the coast between La Grange and Anna Plains'.[52]

(i) Akerman in 1980 describes the involvement of some of the claimants in the movement of objects along those same trade routes.[53]

(j) Since the 1970s, claimants have maintained their association with the claim area by establishing communities nearby, including Kadjina in the St George Ranges, Ngalapirta

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[43] Anthropologist's report [105].
[44] Ibid [112].
[45] Ibid [132].
[46] Ibid [105].
[47] Ibid [116], [118].
[48] Ibid [164].
[49] Ibid [124].
[50] Ibid [127].
[51] Ibid [163].
[52] Ibid [260]–[261].
[53] Ibid [262].

and Yakanarra, or living on the neighbouring Aboriginal-owned pastoral stations, including Mowla Bluff and Cherrabun, which lie to the north of the area covered by the current application.[54]

(k) Noting the 'near total absence of permanent surface waters', the author emphasises that occupation of the claim area has depended upon knowledge of the location of sub-surface aquifers and of the different routes utilised to cross the country during 'hot weather time' and 'cold time', and that current claimants have gained this knowledge by walking the country with their forebears.[55]

(l) Claimants maintain physical and spiritual knowledge of the claim area by painting their particular country. For example, one claimant states:

> When I was a child, my mother, father, two sisters and one brother used to travel together. We used to move back and forth between the waterholes that are in my paintings… [A location in the claim area] is a living water spring [*jila*]. The water serpent [*kalpurtu*] lives in this one. There is water here all year round. We dance and sing a corroboree about this place. My father and two other old men got this song and dance in a dream.[56]

(m) Claimants continue to access the claim area, particularly in 'cold time' to collect food and other resources, such as quartz, and to undertake land management activities. One claimant explains: 'We fire the country and clean the water [holes]'.[57]

Is the factual basis sufficient to support the assertion at s 190B(5)(a)?

[80] I understand that in assessing the factual basis for the purposes of s 190B(5)(a), I am not obliged to accept very broad statements which have no geographical particularity.[58] I do not consider this application is of that nature. In my view, the information before me describes in a sufficient level of detail the association of the claim group with the area of the Ngurrara country claim, including the area covered by this application, both at the time of settlement and since that time. I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

[81] In considering the factual basis of this application I have observed two salient features, the first being the location of the area covered by this application in relation to the surrounding Ngurrara country claim, where the same claim group's native title rights and interests have been recognised in several positive determinations, as discussed above. Another feature is that within this desert region, the area covered by the application appears to be particularly marginal, with no permanent water sources or sub-surface aquifers within its boundaries or in the immediate surrounding area, according to the anthropologist's report. I understand that demonstrating an association to an area of desert, in the absence of any distinguishing features, can be difficult. I note the comments in *Strickland*, that '[t]he requirements of the registration test are stringent. It is not necessary to elevate them to the impossible'.[59] I also note the comments in *Lane*, that the Registrar's statutory obligations should be performed

[54] Ibid [176].
[55] Ibid [201], [210].
[56] Ibid [201].
[57] Ibid [211]–[214].
[58] *Martin* [25].
[59] *Strickland* [55].

with a degree of flexibility consistent with the beneficial nature of the legislation.[60] I have therefore assessed the sufficiency of the factual basis by taking into account the particular features of this application, and applying this judicial guidance.

Does the application support an association between the claim group at sovereignty and since that time?

[82] According to the anthropologist's report, settlement in the Ngurrara country claim area did not occur until comparatively recently, with sustained European contact occurring around 1900. Using the Tribunal's geospatial database I can see that pastoral leases have only ever been granted in relation to areas in the far north and east of the country claim area. The early explorers and ethnographers record the forebears of the current claim group as being in the claim area, and having deep knowledge of its physical and spiritual features. I note some of the immediate forebears of the current claim group were informants of Kaberry in the 1930s and claimants interviewed by the anthropologist were also alive at that time. There is therefore only one or two generations separating the current claim group from those who were alive at the time of settlement, which means that an inference of continuity of association can more easily be made. In my view, the ancestors who were alive at settlement likely had the same or a similar association with the claim area as their parents and grandparents, who would have been alive in the pre-settlement era, including at the time of sovereignty.

Does the application support an association between the claim group and the area currently?

[83] The anthropologist's report explains how the claim group have maintained their association with the claim area by establishing communities in the surrounding region, and visiting the area to collect food, resources and undertake land management activities. I also note the information about the importance of painting as a way of maintaining a spiritual association with particular locations, and as a means of recording knowledge of the area's physical features. The information in the historical record and from current claimants about walking across country to trade and to reach known water sources, supports an assertion that the connection to country has been sustained. The anthropologist notes: '[e]ven today, when travelling by vehicle in the desert, the claimants will attempt (as best they can given the conditions) to travel according to the way they did when they lived permanently in the Claim Area'.[61] In my view, the information in the anthropologist's report about the current claimants' continued physical presence on the claim area, and their knowledge of its physical and spiritual features, supports the assertion of a current association.

Does the application support an association, both past and present, with the whole area claimed?

[84] Using the Tribunal's geospatial database I can infer that the trade route described by Carnegie in 1898, and later by Tindale, as going from Joanna Springs to the coast between La Grange and Anna Plains, would likely cross over, or pass very near to, the area covered by the current application. I also consider it is reasonable to infer that the descriptions of claimants, past and present, travelling from the pastoral stations in the near north, to the southern parts of the

[60] *Lane* [9].

[61] Anthropologist's report [210].

country claim area, would more than likely involve traversing the particular area covered by this application. I note that s 190B(5)(a) does not require all of the claim group to have an association with all of the claim area at all times.[62] Following this judicial guidance and noting the nature of this particular application area, I consider there is information in the application to support an association by the claim group, past and present, with the whole of the area claimed, sufficient for the purposes of s 190B(5)(a).

Conclusion – s 190B(5)(a)

[85] I consider that the information before me is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the claim area. I am satisfied there is sufficient factual basis to support an assertion of an association of the claim group to the whole claim area. This means s 190B(5)(a) is met.

What is required to meet s 190B(5)(b)?

[86] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests.

[87] 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Applying the approach of Dowsett J in *Gudjala 2007*, I have interpreted s 190B(5)(b) in light of the judicial consideration of the meaning of those same words in s 223(1)(a).[63]

[88] In *Yorta Yorta* the plurality of the High Court held that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. The High Court further held that in the context of the Native Title Act, 'traditional' also carries two other elements, namely:

> [I]t conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs*;
>
> [T]he normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.[64]

[89] In *Gudjala 2009*, Dowsett J provided further guidance to the Registrar in assessing the asserted factual basis, including that if descent from named ancestors is the basis of membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.[65]

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[62] *Corunna* [31].
[63] *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.
[64] *Yorta Yorta* [46]–[47], emphasis added.
[65] *Gudjala 2009* [40].

[90] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of:

(a) a society which existed at sovereignty in the claim area, the members of which were united through their observance of normative rules;

(b) a link between the pre-sovereignty society, the apical ancestors and the claim group; and

(c) the continued observance of normative rules through the generations down to the current claim group, such that the normative rules can be described as 'traditional laws and customs'.

What information has been provided in support of the assertion of a society at settlement?

[91] The anthropologist's report asserts that the Ngurrara people are part of the society known as the Western Desert Cultural Bloc (WDCB).[66]

[92] Key cultural features of the WDCB described by A.P. Elkin in the 1930s and later by R. Berndt, include:

(a) belief in the *tjukurr* or Dreaming;

(b) a distinctive criss-crossing network of mythological tracks, with segments of the tracks 'in possession of one or more local descent groups';

(c) overlapping 'zones or networks' of people who meet regularly and have reciprocal duties and obligations.[67]

[93] In the author's opinion, the claimants and their predecessors comprise one such 'network' of the WDCB, which overlaps with others, and the features of the WDCB are present in the society of the Ngurrara people, with some variations, including that the *tjukurr* or Dreaming is described using the word *waljirri*.[68]

What information has been provided in support of the assertion of traditional laws and customs?

[94] The anthropologist's report explains that the *jila* law, associated with a ritual of group rainmaking and certain distinctive protocols at specific sites, is a characteristic law of the Ngurrara people not found elsewhere in the WDCB, such that the claimants are known as the '*jila* people', or 'rainmakers' throughout the wider region.[69] *Jila* translates loosely as 'living water'.[70] The anthropologist's report provides the following information about the observance of the *jila* law:

[66] Anthropologist's report [133].
[67] Ibid [133]–[139].
[68] Ibid [139], [143].
[69] Anthropologist's report [144], [20].
[70] Ibid [59], [247].

(a) The Ngurrara country claim area encompasses all the *jila-kalpurtu* rainmaking sites, which are associated with ritual rainmaking and the *kalpurtu* (snake) (variously spelled).[71]

(b) Warburton in 1875, Wells in 1896-97 and Canning in 1908, recorded the names of ephemeral water sources and the inhabitants' use of them, in particular shallow wells which required digging out to access water, reflecting the claimant's accounts and practices of extracting water from those same water sources.[72]

(c) Kaberry also recorded details of rainmaking practices in the 1930s, including that rainmaking 'seems to involve the digging of these *jila/jaramarra*'.[73]

(d) The *jila* rainmaking practices were described to the author by the claimants and observed by the author at ceremonies on three occasions, and in the author's view had a 'close correspondence' to Kaberry's accounts.[74]

(e) Tindale describes a *jila* ritual told to him by a senior claimant, (now deceased) of 'throwing out sand … to make the tjila [sic] bigger … they shout out very loudly with special cries to tell the … snake they need water', which also matches the details of ceremonies the author has observed.[75]

(f) Claim group members are associated with particular *jila-kalpurtu* sites and consequences can befall other people who approach these sites including serious harm and even death. One claimant explains: '*Kalpurtu* know what people for that area', and particular protocols must be followed when approaching such sites, including calling out to the snake and lighting fires.[76]

[95] The anthropologist's report also describes local variations on laws and customs found across the WDCB, including marriage rules, a kinship system and connection to other Western Desert areas and people through the mythological tracks or 'song-lines'.[77]

[96] The author has observed senior claimants teaching younger claimants about their predecessors, their own connections to the claim area, the names of places where water, ochre, plant and animal species can be found, places associated with various Dreaming stories and *jila* sites, and traditional techniques of hunting, gathering and burning.[78] A senior claimant who grew up in the desert described passing down laws and customs as follows:

> They [young people] have to learn everything. They need to know bush foods, all the seeds and fruit and meat. In the hot weather we used yakapiri [a plant used to make bush sandals], they need to know all of this. It is important for young people [to learn] or they migh-go wrong [sic]. I tell them 'you need to take this road from old people' you have to follow where we traveled when we were young'.[79]

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[71] Ibid [6], [22].
[72] Ibid [113].
[73] Ibid [122].
[74] Ibid [123]–[124].
[75] Ibid [131].
[76] Ibid [82], [86].
[77] Ibid [144]–[145].
[78] Ibid [147].
[79] Ibid *Inset E.*

[97] The author describes the laws and customs pertaining to paintings, that there are prohibitions on painting certain areas depending on gender and one's connection to an area, and that painting another person's country can result in sickness.[80] One claimant states 'it is strong [law]: you can't paint another person's country'.[81]

[98] Social sanctions also exist in relation to sacred objects, which cannot be touched by women at *jila* sites;[82] and in relation to speaking for a place that is acknowledged as another person's country.[83]

Is the factual basis sufficient to support the assertion of s 190B(5)(b)?

Does the factual basis address the identity of a pre-sovereignty society for the area?

[99] In my view, the information before me addresses the identity of a pre-sovereignty society for the area, as being a particular network within the society known as the WDCB, recognisable by the observance of *jila* law and the existence of *jila* sites, and the identification of the people associated within that network as *jila* people or 'rainmakers'. Both the general features of the broader society and the particulars of its operation in relation to the claim area are, in my view, sufficiently addressed.

Does the factual basis address the link between the pre-sovereignty society, the apical ancestors and the claim group?

[100] From the anthropological report, I understand that only a few generations separate the apical ancestors from the current claim group, as settlement in the claim area occurred comparatively recently. Senior informants to the anthropologist, born in the 1920s and 1930s, would have lived with claim group members born before sustained European settlement occurred from 1900. I understand from the application that the current claim group are the descendants of the apical ancestors, thus demonstrating the requisite link.

Is the factual basis sufficient to support the assertion of the existence of 'traditional laws and customs'?

[101] I consider the material in the application demonstrates how the laws and customs have been passed down to, and observed by, successive generations of the claim group in the claim area. There is information about the observation and practice of the *jila* law which is described in the historical records and is also described by the claimants as knowledge which they have received from their predecessors through observance, oral transmission and common practice.

[102] In my view, there is sufficient information about how the laws and customs were acknowledged and observed by the apical ancestors, the intervening generations and the current members of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.[84] This is because there are examples provided about the observation of various laws and customs by successive generations in the claim area. In my

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[80] Ibid [93].
[81] Ibid *Inset E*.
[82] Ibid [89].
[83] Ibid [92].
[84] *Yorta Yorta* [46]–[47].

view, there is also sufficient information about how the laws and customs have been passed down to the members of the current claim group. In this regard, I note many of the claimants have lived, or continue to live, in or near to the claim area and continue the practices taught to them by their predecessors, such as rules pertaining to speaking for, and painting another's country. In the *Forrest* determination, Bromberg J concluded that '[i]t was only in the 1960's that some members of the claim group walked out of the desert. Therefore, an entirely traditional way of life is … within the memory and lived experience of claim group members alive today'.[85] I consider that the information provided by the current claimants about their laws and customs, particularly the observance of the *jila* laws, closely correlates with information about those same laws in the historical record, demonstrating that the 'traditional way of life', as described by Bromberg J, is remembered and significant aspects of it continue to be observed. In my view, this supports the assertion that the laws and customs of the claim group are 'traditional'.

Conclusion – s 190B(5)(b)

[103] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the Ngurrara claim area, including the area covered by the current application. I am satisfied there is a link between the pre-sovereignty society in the claim area, the apical ancestors and the current members of the claim group. I am also satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed, by the native title claim group. This means s 190B(5)(b) is met.

What is required to meet s 190B(5)(c)?

[104] Meeting the requirements of this condition relies on whether there is a sufficient factual basis 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.[86] It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.[87]

Is the factual basis sufficient to support the assertion of the continuity of traditional laws and customs?

[105] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the claim area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. The application provides examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through oral transmission and common practice. The anthropologist's report states the following which is relevant to s 190B(5)(c):

> From communities within and close to the Claim Area, the claimants have been able to access the deeper *jilji* country … [T]his has enabled senior claimants to teach their children the cultural values of their traditional lands. This includes the names of the places and the resources that can be found

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[85] *Forrest* [47].
[86] *Gudjala 2009* [29].
[87] *Gudjala 2007* [82].

> there; the proper procedures to follow when approaching *jila-kalpurtu* sites, avoidance of *waljirri* places that carry gender restrictions. Children are being introduced to the 'snake' that is their countryman, and I have witnessed this on more than one occasion. The adopting of new technologies – motor vehicles, video cameras and acrylic paints – has facilitated the transmission and maintenance of the claimants' cultural traditions.[88]

[106] The author explains that some senior claimants 'teach country while they paint' and that young people are recruited to do work on country, thus facilitating their learning about particular areas.[89] Laws and customs are also passed down through the inclusion of young people in ceremonies and story telling.[90]

[107] In my view, there are sufficient examples of how the laws and customs have been observed by the claim group since at least settlement in the claim area, including the area covered by the current application, and that these laws and customs continue to be observed and passed down to younger members of the claim group.

Conclusion – s 190B(5)(c)

[108] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the claim area, including the area covered by the current application. The material before me demonstrates that claimants possess knowledge about how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the claim area around the time of settlement. This permits an inference that the claim group is a 'modern manifestation' of the pre-sovereignty society.[91] I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

Conclusion

[109] As I am satisfied the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertions of ss 190B(5)(a)–(c), s 190B(5) is met.

Prima facie case – s 190B(6): condition met

[110] 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.

[111] I note the following judicial guidance about s 190B(6):

(a) it requires some measure of the material available in support of the claim;[92]

(b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;[93] and

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[88] Anthropologist's report [178].
[89] Ibid [150]–[151].
[90] Ibid [151].
[91] *Gudjala 2009* [31].
[92] *Doepel* [126].

(c) the words 'prima facie' mean 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.[94]

[112] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register of Native Title Claims. I have grouped rights together in my consideration below where it is convenient to do so.

Which of the claimed rights and interests are established on a prima facie basis

1. The exclusive right of possession, occupation, use and enjoyment of land and waters against all others

[113] There has been significant judicial guidance in relation to claims of exclusive possession. I note in particular the comments in *Ward HC*, that:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.[95]

[114] In *Sampi*, French J held:

> [T]he right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.[96]

[115] The Full Court also held the following in *Griffiths FC:*

> If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair".[97]

[116] The anthropologist's report contains a section on the rights claimed by the claim group over the Ngurrara country claim. As I discussed above in relation to s 190B(5), I consider this report is relevant to the area covered by the current application, noting its location within the country claim. The anthropologist's report explains that the right to control access to the land by others 'is based on the *jila* law, specifically the belief that the original occupiers of the *jila* country continue to exist … as a kind of self-willed Being called *kalpurtu*'.[98] I have noted the belief in the *kalpurtu* / snake by the claim group in my consideration of s 190B(5)(a) above, and further note the belief that the *kalpurtu*:

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[93] Ibid [132].
[94] Ibid [135].
[95] *Ward HC* [88].
[96] *Sampi* [1072].
[97] *Griffiths FC* [127].
[98] Anthropologist's report [248].

> …can have a concrete effect on human beings. Thus, by the claimants' accounts, people fear them, can be made well by them, can be forced from a place by them, can be injured or killed by them. The claimants also say that they can speak to the snake and make it 'quiet'… People who know a particular *kalpurtu* and are countryman with it are able to go safely to the area of the *jila* where it lives. Such countrymen can introduce others like *jila* 'visitors' and 'strangers' to the snake and thereby protect them from harm by this Being'.[99]

[117] The anthropologist's report also outlines how particular individuals associated with or 'belonging' to particular locations, have the right to 'speak for' that location.[100] For example, when claimants relayed particular stories to the author they would stop upon reaching the boundaries of *jila* country, and advise: '"That's another area, we can't touch im [sic]"'.[101] There are also spiritual and practical consequences for speaking for another's country, as the relevant spiritual beings can 'get jealous' and the offending person may 'get bush' as a result.[102]

[118] In my view, the information in the application demonstrates how the claim group's traditional laws and customs give rise to a right of exclusive possession. Spiritual consequences can befall those who access or speak for country in ways that transgress those laws. Permission must be sought from those who have the appropriate association in order to access the country safely, supporting a characterisation of the native title right as exclusive, as discussed in *Griffiths FC*, extracted above. Applying the principles found in the case law, I consider that the exclusive right to possession, occupation, use and enjoyment of land and waters against all others is prima facie established.

2. The non-exclusive rights to:

a) have access to, remain on and use the land and waters;

b) access and take for any purpose the resources of the land and waters; and

c) protect places, areas and things of traditional significance on the land and waters.

[119] As discussed above at s 190B(5), the anthropologist's report contains numerous examples of the claim group members accessing the Ngurrara country claim area and using the land and waters for the purposes of performing rainmaking ceremonies around the *jila* sites and accessing sub-surface aquifers. I also note the information that resources of the claim area, including ochre, gypsum, quartz and white clay, are quarried from the claim area and used in ritual contexts.[103] Lizard and kangaroo are mentioned as two protein resources which are taken from the claim area, with the author noting that 'foods are prepared in a certain way because that is how the old people did it, and not only immediate predecessors but also those of very long ago'.[104] Carbohydrate sources found in the claim area and used by the claimants include bush yam, bush onion and desert walnut.[105]

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[99] Ibid [249].
[100] Ibid [245].
[101] Ibid [88].
[102] Ibid [90].
[103] Ibid [233].
[104] Ibid [232].
[105] Ibid [233].

[120] As discussed above, the claimants care for and maintain the claim area through the use of fire and regularly clean out waterholes. I understand these practices, especially the latter, are undertaken in accordance with *jila* law and include particular rainmaking ceremonies at those waterholes.[106] Other ways of protecting places include culling feral animals and participating in clearance projects and land management strategies.[107]

[121] I am satisfied the non-exclusive rights described in the anthropologist's report are relevant to the area covered by the application as well as the surrounding country claim area, given the location of the application area, and in the absence of any information to the contrary. I am also satisfied that the non-exclusive rights are all prima facie established.

Conclusion

[122] I am satisfied the application contains sufficient information about all of the rights claimed, such that they can be said to be established on a prima facie basis. I am also satisfied those claimed rights can be considered 'native title rights and interests'. This is because there is information in the application to show how those rights were observed at the time of settlement, throughout the 20th century and in recent times. Additionally, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

Physical connection – s 190B(7): condition met

[123] 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.

[124] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.[108]

Is there evidence that at least one member of the claim group has or had a traditional physical connection to any part of the claim area?

[125] Based on the information before me, I consider at least one claim group member currently has or had a traditional physical connection to the land and waters covered by the application. In my view, the descriptions in the anthropologist's report, some of which I have extracted above at ss 190B(5)–(6), of claim group members accessing the claim area and undertaking activities

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106 Ibid [265].

107 Ibid.

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

pursuant to their laws and customs, such as hunting and gathering various food resources, demonstrate that there is a physical connection to the area covered by the application. I consider the claimants' knowledge of the *jila* law and the associated water holes, and the specific tracks between locations within Ngurrara country, imparted by predecessors while 'walking the country', further supports the existence of such a connection.

[126] I also consider the claim group members' connection is 'traditional' in the sense required by s 190B(7). I consider the claimants' knowledge of the claim area has been passed to them from the predecessors of the claim group while spending time on the lands and waters of the claim area, as well as learning about it through activities such as painting country. As I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, it follows that I am satisfied the current claim group members' connection with the claim area is in accordance with those traditional laws and customs.

Conclusion

[127] I am therefore satisfied at least one member of the native title claim group currently has a traditional physical connection with a part of the claim area as required by s 190B(7)(a), and so s 190B(7) is met.

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

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

Section	**Requirement**	**Information addressing requirement**	**Result**
s 61A(1)	No native title determination application if approved determination of native title	The geospatial report states and my own searches confirm that there are no approved determinations of native title in the area covered by this application.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, para 2(b)–(c) states that any area which is covered by a previous exclusive possession act is excluded from the application.	Met
s 61A(3)	Claimant applications not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E, para 1 states that exclusive possession is only claimed in areas where there has been no extinguishment or where any such extinguishment is required to be disregarded; and is not subject to the public right to navigate or the public right to fish.	Met

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

[129] 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. I am satisfied that s 190B(9) is met.

Section	**Requirement**	**Information addressing requirement**	**Result**
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that no claims of ownership of minerals, petroleum or gas wholly owned by the Crown are made.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states no claims of exclusive possession of any offshore places are made.	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	There is nothing in the application which discloses that the native title rights in the application area have otherwise been extinguished.	Met

End of reasons

Attachment A

Summary of registration test result

Application name	Malachy Hobbs & Ors on behalf of the Ngurrara D2 Claim Group and the State of Western Australia (Ngurrara D2)
NNTT No.	WC2019/009
Federal Court of Australia No.	WAD394/2019
Date of decision	8 November 2019

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

6 August 2019

Date application entered on Register:

8 November 2019

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

As per Schedule

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Katy Woods

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

8 November 2019