National Native Title Tribunal

Registration Decision

Application name	James Minning on behalf of the Untiri Pulka Native Title Claim Group and State of Western Australia (Untiri Pulka)
Name of applicant	James Minning
Federal Court of Australia No.	WAD472/2019
NNTT No.	WC2019/011
Date of Decision	22 November 2019

Claim accepted for registration

I have decided that the claim in the Untiri Pulka 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)*
De Rose v South Australia [2002] FCA 1342 *(De Rose)*
Griffiths v Northern Territory (2007) 243 ALR 7; [2007] FCAFC 178 (*Griffiths FC*)
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*)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia [2016] FCA 910 (*Tjungarrayi 2016*)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938 (*Tjungarrayi 2017*)
Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (*Kanak*)
K.D. (deceased) on behalf of the Mirning People v State of Western Australia (no. 4) [2017] FCA 1225 (*WA Mirning People*)
Mark Anderson v State of Western Australia [2000] FCA 1717 (*Anderson)*
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*)
Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (no. 5) [2016] FCA 752 (*Murray*)
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)
Sampi v State of Western Australia [2005] FCA 777 (*Sampi*)
State of Western Australia v Willis on behalf of the Pilki People [2015] FCA 186 (*Willis*)
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 Untiri Pulka native title claim group (claim group). It covers land and waters in the north eastern portion of the Nullarbor Plain in Western Australia, with the eastern boundary abutting the border of South Australia (application area).

[2] The application was filed on 19 September 2019 and the Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 20 September 2019, pursuant to s 63 of the Native Title Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in

accordance with s 190A.[2] Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

Procedural fairness

[3] On 23 September 2019, a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the Western Australian government (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 27 September 2019.

[4] Also on 23 September 2019, the senior officer wrote to the applicant's representative to advise that any additional information the applicant wished me to have regard to should be provided by 27 September 2019.

[5] On 24 September 2019, the senior officer provided my preliminary assessment of the application to the representative of the applicant, which outlined my preliminary views as to deficiencies in the application which may impact the claim's ability to be registered.

[6] On 29 September 2019, the applicant provided the following documents for my consideration (additional material):

(a) Malcolm O'Dell, 'Applicant's Submissions on the Application of the Registration Test on native title determination application WAD 472 of 2019' (submissions); and

(b) Dr Scott Cane, 'Registration Test Report for the Untiri Pulka Native Title Claim WAD 472 of 2019' (anthropologist's report).

[7] On 1 October 2019, the senior officer wrote to the relevant minister of the state advising that the applicant had provided the additional material for my consideration, and that I had formed a view that the additional material contained information which was confidential in nature. Therefore, in order to receive a copy of the additional material, a confidentiality undertaking was required. The senior officer advised the state that a response was required by 9 October 2019.

[8] No response was received by the state and so in the absence of a signed confidentiality undertaking, the additional material was not provided. This concluded the procedural fairness process.

Information considered

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

[10] 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 23 September 2019 (geospatial report), in relation to the sufficiency of the map and description.

[2] Section 190A(1).
[3] Section 190A(3)(a).

[11] I have considered information from the Tribunal's geospatial database and from the Register of Native Title Claims (Register) in relation to the extent of any overlap with other claims.[4]

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

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.

[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 affidavit 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, Attachment A	Met

[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 affidavit filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	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, Attachment F	Met
s 62(2)(f)	Activities	Schedule G, Attachment G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA, Attachment HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

[4] Section 190A(3)(c).
[5] Section 190A(3)(b).
[6] Section 190A(3)(c).
[7] *Doepel* [16], [35]–[39].

Conclusion

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

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] Schedule O states that the Nanatadjarra People application (WAD348/2017) overlaps the current application, and that some of the members in the current application are also covered by the claim group description in that application. The geospatial report confirms this is the only application which overlaps the current application. This means s 190C(3)(a) is met.

[19] I have examined the Register and am satisfied that there is no entry for the Nanatadjarra People claim (WAD348/2017) on the Register, nor was there an entry at the time the current application was made on 19 September 2019. As the Nanatadjarra People claim has not been registered, s 190C(3)(b) is not met.

[20] Consequently, 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

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

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

[22] 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

(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.

[23] Schedule R refers to Attachment R, which is a document titled 'Certification of the Untiri Pulka Native Title Claimant Application'. It follows that s 190C(4)(a) is applicable and thus I must be satisfied that:

[8] Emphasis in original.

(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?

[24] Central Desert Native Title Services Ltd (CDNTS) has provided the certificate, which is dated 18 September 2019 and signed by the Chairman on behalf of the board of CDNTS. It states that the certification is given in accordance with s 203BE of the Native Title Act. The certificate also refers to CDNTS's functions under s 203FE(1). The geospatial report and the current data in the national map of Representative Aboriginal and Torres Strait Island Body areas confirm that CDNTS performs the functions of a representative body for the area covered by the application, pursuant to s 203FE(1). I am therefore satisfied the certificate identifies the relevant representative body.

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

[25] As CDNTS is funded to perform all of the functions of a representative body, pursuant to s 203FE, it can perform all of the functions listed in Part 11, including, relevantly, the certification functions in s 203BE. I am therefore satisfied CDNTS has the power under Part 11 to issue the certification.

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

[26] I have considered the certificate against each of the requirements of s 203BE(4) below.

Section 203BE(4)(a) – statements

[27] 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.

[28] 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.

[29] 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.

[30] As the certificate contains these required statements under the heading 'Statement of Opinion pursuant to section 203BE(4)(a) of the NTA', I am satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

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

[9] *Doepel* [80]–[81].

[32] Under the heading 'Reasons for the Opinion pursuant to section 203BE(4)(b) of the NTA', the certificate sets out CDNTS's reasons for its opinion that ss 203BE(2)(a)–(b) are met, which include that it considered:

(a) the proposed Untiri Pulka Form 1 application;

(b) an affidavit of an anthropologist attesting to the research undertaken about the decision making process of the claim group and the authorisation of the applicant;

(c) an affidavit of the applicant attesting to the decision making process of the claim group and his authorisation as the applicant;

(d) correspondence from the lawyers for the claim group;

(e) a map of the proposed application area;

(f) minutes of an authorisation meeting held on 12 June 2019; and

(g) information from the Chief Executive Officer, including about the provision of legal and anthropological services in the application area.

[33] As the certificate sets out the reasons for CDNTS'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

[34] 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).

[35] 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.

[36] The certificate states that CDNTS is aware of the overlapping application of Nanatadjarra People (WAD348/2017) and that it has not made efforts in the manner required by s 203BE(3) of the Native Title Act. In accordance with s 203BE(3), I do not consider this failure invalidates the certification.

Conclusion

[37] 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 applicable requirements of s 203BE(4), I am satisfied that s 190C(4)(a) is met.

Section 190B: merit conditions

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

[38] 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.

[39] 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.[10]

Does the information about the external boundary meet this condition?

[40] Schedule B refers to Attachment B, which describes the area covered by the application with reference to reserves, native title determinations, pastoral leases, the boundary of the area administered by CDNTS (the 'RATSIB boundaries'), and using geographical coordinates.

[41] Schedule C refers to Attachment C, which contains a map prepared by Geospatial Services titled 'Untiri Pulka' and dated 30 July 2019. The map includes:

(a) the application area depicted in bold dark-blue outline with the 'commencement point' identified and labelled in magenta;

(b) Tenure, depicted as displayed in the legend, labelled with pastoral lease number and name, reserve number and name, and lot on plan as appropriate;

(c) RATSIB boundaries, depicted as displayed in the legend;

(d) general colour topographic image background;

(e) scalebar, locality inset, and coordinate grid referencing GDA94;[11] and

(f) notes relating to the source, currency and datum of data used to prepare the map.

[42] 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?

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

[44] 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

[10] *Doepel* [122].

[11] Geocentric Datum of Australia 1994.

made as part of the hearing of the application'.[12] 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.

[45] Attachment B specifically excludes any area subject to the native title determinations of:

(a) WAD6020/1998 Ngadju, as determined on 21 November 2014;

(b) WAD6001/2001 WA Mirning People, as determined on 24 October 2017; and

(c) WAD6043/1998 Spinifex People, as determined on 2 December 2014.

[46] Attachment B also specifically excludes the area covered by the registered claim WAD460/2018 Nangaanya-ku.

[47] In my view, the specific exclusions are clear from the description in Attachment B.

Conclusion

[48] As I consider that both the external boundary and the excluded areas of the application area 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

[49] 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.

[50] 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.[13] 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.[14]

[51] Schedule A refers to Attachment A, which describes the claim group as those persons who:

> 39. … hold native title rights and interests in part or all of the determination area according to traditional laws and customs through one or more of:
>
> (a) their own birth on the application area;
>
> (b) the birth of an ancestor on the application area;
>
> (c) having religious, sacred or ritual authority for the application area; or
>
> (d) long traditional association with the application area through occupation, custodianship or use by one's self and/or relevant kin.
>
> 40. At the date of this application, the persons referred to in paragraph 39(a), 39(b) and 39(d) above includes the descendants of the [six listed apical ancestors] who assert and are recognised

[12] *Strickland* [55].
[13] *Wakaman* [34].
[14] *Doepel* [16].

under the relevant traditional laws and customs by the other native title claimants as having rights in the application area …

[52] 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?

[53] 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'.[15]

[54] From the description in Attachment A, I understand that to qualify for membership of the claim group an individual must meet one of the criteria in paragraph 39. Those criteria state that membership may be by birth on the application area, birth of an ancestor on the application area, having religious, sacred or ritual authority for the application area, or long traditional association with the application area. Paragraph 40 specifies the apical ancestors from whom membership of the claim group by descent can be obtained, with the qualifier that such persons must also be recognised, under traditional laws and customs, by other members of the claim group as having rights and interests in the application area.

[55] The Court has previously accepted similar descriptions for native title claim groups within the Western Desert Cultural Bloc (WDCB), as this claim group asserts to be.[16] However I do not consider this relieves me of my task at s 190B(3) and I will consider each criterion for membership before deciding whether the requirements of s 190B(3)(b) are met.

Birth

[56] The first criterion in paragraph 39 is birth on the application area. I consider that requiring a person to demonstrate that they were born on the application area provides a clear objective starting point to commence an inquiry about whether the person is a member of the claim group. Describing a claim group with reference to birth is a method which has been accepted by the Court.[17] I am therefore of the view that with some factual enquiry it will be possible to identify the persons who meet this criterion of the claim group description.

Birth of an ancestor

[57] The second criterion in paragraph 39 is birth of an ancestor on the application area. I understand that the apical ancestors named in paragraph 40 were born in the application area and that the descendants of those ancestors can meet this criterion of the claim group description. I consider requiring a person to show descent from one of the ancestors identified in paragraph 40 provides a clear starting point to commence an inquiry about whether the person is a member of the claim group. The Court has also accepted the approach of describing a claim group with reference to named ancestors.[18]

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[15] *Gudjala 2007* [34].
[16] Attachment F [58]; Schedule 3 of *Tjungarrayi 2016* and *Tjungarrayi 2017*.
[17] *De Rose* [926].
[18] *WA v NTR* [67].

Recognition

[58] As discussed above, I understand that recognition is a qualifier to membership by descent from the ancestors listed in paragraph 40. I have reached this view by considering the placement of the recognition qualifier within paragraph 40 and not within paragraph 39, where it could be read as a qualifier on all four criteria for membership. I note that the Court has previous held that membership of a claim group is based on group acceptance, and that the claim group must determine its own composition.[19] Attachment F states that rights and interests in the application area can accrue through a person's connection with the application area, which requires the person to assert their connection, and have that assertion accepted by others.[20] I therefore understand that it is through a connection to the land that other members of the claim group recognise whether a descendant of the named apical ancestors is a member of the claim group. In my view, with some factual enquiry to the other claim group members and the individuals in question, it will be possible to identify the descendants of the named apical ancestors who are recognised as members of the claim group. In reaching this view I have also considered the judicial guidance that it is appropriate to construe the requirements of the Native Title Act beneficially.[21]

Religious, sacred or ritual authority

[59] The third criterion in paragraph 39 is having religious, sacred or ritual authority for the application area. For this criterion, I note in particular the reference to the traditional laws and customs of the claim group in the opening sentence of paragraph 39. I consider that the traditional laws and customs would provide the appropriate 'set of rules or principles' through which it can be ascertained whether a person meets this criterion. 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'.[22] I therefore consider that factual enquiries to other members of the claim group and to the individuals in question would enable the persons who meet this criterion to be ascertained.[23] I also note the Court has previously accepted forms of religious, sacred or ritual authority as a method of identifying members of a claim group.[24] Attachment F outlines the ways in which religious, sacred or ritual authority is measured under the claim group's laws and customs, which include looking after sacred places in the application area.[25] I am therefore of the view that with some factual enquiries it will be possible to identify the persons who meet this criterion of the claim group description.

Long traditional association

[60] The fourth criterion in paragraph 39 is long traditional association with the application area through occupation, custodianship or use by one's self and/or relevant kin. Attachment F indicates that the claim group today emphasises parental and grandparental connections to

[19] *Aplin* [256]–[261].
[20] Attachment F [65]–[66].
[21] *Kanak* [73].
[22] *Aplin* [256].
[23] *Ward v Registrar* [25].
[24] *De Rose* [926]–[928], Schedule 3 of *Tjungarrayi 2016* and *Tjungarrayi 2017*.
[25] Attachment F [66].

country, and long association with an area.[26] Describing a claim group with reference to long traditional association is also a method which has been accepted by the Court.[27] I therefore consider that with some factual inquiries it will be possible to ascertain the persons who meet this criterion.

Conclusion

[61] 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

[62] 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 claimed right is established as a native title right on a prima facie basis.

[63] In Schedule E, 'exclusive rights' is defined as 'the exclusive rights of possession, occupation, use and enjoyment of land and waters to the exclusion of all others'. 'Non-exclusive rights' is defined as not conferring possession, occupation, use and enjoyment of the lands and waters to the exclusion of all others. Four non-exclusive rights are listed.

[64] From the description in Schedule E, I understand that exclusive rights are claimed where native title rights and interests have not been partially extinguished. In all other areas, the non-exclusive rights are claimed.

[65] Schedule E also states that both the exclusive and non-exclusive rights are subject to qualifications, namely the traditional laws and customs of the claim group, and the laws of Western Australia and the Commonwealth, including the common law.

[66] 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.[28]

Conclusion

[67] 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

[68] 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:

[26] Ibid [70].
[27] *De Rose* [897], Schedule 3 of *Tjungarrayi 2016* and *Tjungarrayi 2017*.
[28] *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.

[69] 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'.[29]

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

[70] As discussed above, Schedule E provides a description of the native title rights and interests claimed. Schedule F refers to Attachment F, which provides a general description of the factual basis for the claimed native title rights and interests. Schedule G refers to Attachment G, which lists the activities that the members of the claim group carry out on the application area. I consider this is the extent of the information in the application which supports the assertions at s 190B(5).

[71] The additional material provided by the applicant more specifically addresses the assertions of s 190B(5) and so my reasoning will focus primarily on the information in those documents, being the submissions and the anthropologist's report.

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

[72] 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;[30]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[31] 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'.[32]

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

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

(a) The people within the application area and to the north of the Nullarbor identify as 'Spinifex People', a term first recorded by Tindale in 1934.[33]

[29] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[30] *Gudjala 2007* [52].
[31] Ibid.
[32] *Martin* [26]; *Corunna* [39], [45].
[33] Anthropologist's report [32]–[33].

(b) The northern half of the application area is fertile and known as the 'Woodlands' while the southern half is infertile and known as the 'Treeless Plain'.[34]

(c) The Treeless Plain is unlikely to have ever sustained permanent occupation as there are few waterholes or resources, although it contains walking trails which are defined by mythological pathways.[35]

(d) In 1875, Giles was the first European to enter the application area and recorded a 'small native dam', now known as Boundary Dam, which was constructed by predecessors of a particular family of the claim group who are from that area.[36]

(e) In 1893 and 1897, two expeditions were undertaken to Boundary Dam, where explorers observed tracks and 'hunting fences', and met 20 men and 40 women.[37]

(f) Sustained contact with Europeans in the application area did not occur until the 1950s–1960s, when Spinifex People were taken to Cundeelee mission, which lies approximately 100 km west of the application area's western border.

(g) Many Spinifex People absconded from Cundeelee and walked back home across the application area during the 1950s–1960s, including predecessors of the claim group.[38]

(h) In 1960, predecessors of the claim group made a trip from Cundeelee through the application area to participate in a reburial.[39]

(i) Also in 1960, an expedition travelled through the application area and recorded an ochre mine, 'ceremonial houses', stone arrangements, Boundary Dam and a number of soaks to the immediate north of the application area.[40]

(j) In 1983, Cundeelee was closed and the Spinifex People who were resident there were moved to Coonana mission, a further 40 km south west of the application area.[41]

(k) In 1984, the Spinifex People walked out of Coonana and established communities at Double Pump, and later at Yakatunya, both within the application area.[42]

(l) In 1986, the returning members of the claim group was reunited with members who had remained in the Spinifex homelands.[43]

(m) Today, the majority of claimants live at Tjuntjuntjara, 15 km to the north, and access the application area regularly when travelling to Kalgoorlie and Boulder.[44]

(n) Claim group members also access the application area to visit sacred stone arrangements and major dreaming tracks which link the desert to the coast, specifically:[45]

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[34] Ibid [11].
[35] Ibid [12]–[13].
[36] Anthropologist's report [18].
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid [9], [76].

(i) the [name removed] dreaming, which is associated with the [location removed], and tells the story of its creation;[46]

(ii) the [name removed] mythological path, which passes through the [location removed] of the application area and is associated with important rockholes and stone arrangements;[47]

(iii) the [name removed] dreaming, which crosses the application area from [location removed], and is associated with an important rockhole on its [location removed];[48]

(iv) the tracks of the [name removed], which are associated with blowholes and underground limestone caverns that [location removed] the application area;[49]

(v) the [name removed] dreaming story, which extends across the WDCB and travels across the application area from [location removed].[50]

(o) Recent generations of the claim group were born within the application area, and one claimant alive today was born within its boundaries at Seemore Downs.[51]

(p) The apical ancestors and their descendants are all associated with particular parts of the application area in the northern 'Woodland' half, which are described as their 'estates', with the southern Treeless Plain half described as their 'range' on which people do not live, but where exist traditional access routes and religious locations.[52]

(q) Current claimants access the application area to hunt and gather food, collect wood for fires and making implements, and to fulfil their cultural obligations to specific sites or dreamings.[53]

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

[74] 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.[54] 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 application area, both at the time of sustained European contact and since that time. I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

[75] In considering the factual basis of this claim I note the application area is a particularly remote and marginal area of desert, with no permanent water sources in its southern half, according to the anthropologist's report. From the Tribunal's geospatial database I understand that over

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[45] Ibid [78].
[46] Ibid [63].
[47] Ibid [64].
[48] Ibid [65].
[49] Ibid [67].
[50] Ibid [39].
[51] Ibid [47].
[52] Ibid [49]–[51].
[53] Ibid [76]–[77].
[54] *Martin* [25].

three quarters of the application area is made up of unallocated crown land and reserves, and contains no towns or major roads. Pastoral leases cover only a very small percentage of the border areas. I understand that demonstrating an association to an area of desert, in the absence of many 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'.[55] I also note the comments in *Lane*, that the Registrar's statutory obligations should be performed with a degree of flexibility consistent with the beneficial nature of the legislation.[56] 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?

[76] According to the anthropologist's report, sustained European contact in the application area did not occur until the 1950s–1960s, which was well after the founding of the Western Australian colony in 1829. The submissions state that the association of the claim group's predecessors and the application area between sovereignty and sustained European contact can be readily inferred. Having regard to the information in the anthropologist's report, I agree that such an inference can be made. The limited contact by explorers prior to the 1950s supports such an inference, demonstrated by the recording of locations associated with specific predecessors of the claim group. Additionally, the traversing of the application area to return from missions, which began in the late 1950s, demonstrates a deep knowledge of the application area's physical and spiritual features. In my view, it is reasonable to infer that such knowledge, and the necessary association with the application area, would have existed prior to the 1950s.

[77] Despite the movement of Spinifex People to and from missions over the period since the 1950s, it is clear that the claim group have maintained their association with the application area, by leaving the missions for events such as reburials and frequently absconding, before finally making the permanent move back to country in the 1980s. I note the reunification of returning claim group members with a family of the claim group who have never left the area and have thus had an ongoing association with the application area since at least the time of sustained contact.

[78] There is barely a generation separating the current claim group from those who were alive at the time of settlement, which means I can more easily make an inference of continuity. Based on the information in the anthropologist's report, I consider the ancestors who were alive at the time of sustained European contact likely had the same or a similar association with the application area as their predecessors, 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?

[55] *Strickland* [55].
[56] *Lane* [9].

[79] The anthropologist's report explains how the claim group have maintained their association with the application area by establishing communities in the surrounding region, and continuing to visit the area to collect food, resources and fulfil their cultural obligations to specific sites. Claimants also continue to traverse the application area in order to reach the closest towns. In my view, the information in the anthropologist's report about the current claimants' continued physical presence on the application 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?

[80] I note that s 190B(5)(a) does not require all of the claim group to have an association with all of the application area at all times.[57] 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). In forming this view, I have had regard to the information in the anthropologist's report about claim group members traversing the application area from all directions, whether it be to return home from missions, to reach particular sites of spiritual significance, to hunt particular animals or to travel to nearby towns. I also note the detailed information about particular dreaming tracks that cross the application area, and the claim group's knowledge of these dreamings. I consider there is sufficient information to support both a physical and a spiritual association, with the whole area claimed.

Conclusion – s 190B(5)(a)

[81] 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 application area. I am satisfied there is sufficient factual basis to support an assertion of an association of the claim group to the whole application area. This means s 190B(5)(a) is met.

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

[82] 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.

[83] '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).[58]

[84] 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:

[57] *Corunna* [31].
[58] *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.

> [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.[59]

[85] 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.[60]

[86] 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 application 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?

[87] The anthropologist's report provides that the claim group is part of the WDCB. A.P Elkin first described the features of the WDCB in the 1930s and this was elaborated by the Berndts in their accounts from the 1940s.[61]

[88] The anthropologist's report states that the WDCB is identifiable through the following features:[62]

(a) Belief in, and observance of, the *Tjukurrpa*, which is the fundamental system on which the laws and customs of the claim group are founded;[63]

(b) Adherence to the 'multiple pathways' model, where connection to country can be established through birth, birth of an ancestor, religious authority or long association;[64]

(c) Knowledge of mythological tracks or 'dreamings' which underpin the accrual of rights to land and define social relationships.[65]

[89] In relation to the application area, the anthropologist's report states:

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[59] *Yorta Yorta* [46]–[47], emphasis added.
[60] *Gudjala 2009* [40].
[61] Ibid [26].
[62] Anthropologist's report [21].
[63] Ibid [22].
[64] Ibid [42].
[65] Ibid [37].

(a) in the absence of a linguistic label, the social-geographic label of 'Spinifex People' is used as an identifier for people of the WDCB in the application area and surrounding region; [66] and

(b) the existence of the WDCB society and specifically the Spinifex People in the region was confirmed in native title determinations adjacent to the application area in *Anderson, Willis*, *Murray*, and *WA Mirning People*.[67]

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

[90] The anthropologist's report explains that the religious teachings of the *Tjukurrpa* give normative force to the laws and customs of the WDCB. These manifest geographically through the mythological tracks which cross the application area, for example:

(a) the [name removed] dreaming, which establishes the system of generational moieties observed by the WDCB, and also teaches the socially responsible use of potable water;[68]

(b) the [name removed] dreaming, which extends across the entire Western Desert and passes through the application area, and establishes the WDCB's marriage rules and initiation practices.[69]

[91] The report explains that the *Tjukurrpa* underpins laws which mandate protocols relating to land management and access, and provides examples of particular families' rights and responsibilities in relation to particular parts of the application area, in accordance with the 'multiple pathways' model of the WDCB.[70]

[92] According to the anthropologist's report, transgression from the laws and customs can lead to various forms of punishment, including social punishment (shaming and exclusion), physical and metaphysical harm.[71] Claimants are initiated and attend 'regular revelatory ceremonies' to acquire knowledge, and over time increase their comprehension of the WDCB's laws and customs.[72] [text deleted].

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?

[93] In my view, the information before me addresses the identity of a pre-sovereignty society for the area, as being a particular group within the WDCB society now known as the 'Spinifex People'. Both the general features of the broader society and the particulars of its operation in relation to the application 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?

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[66] Ibid [31].
[67] Ibid [24]–[25].
[68] Ibid [38], [63].
[69] Ibid [39], [68].
[70] Ibid [51].
[71] Ibid [42].
[72] Ibid [69].

[94] From the anthropological report, I understand that only a few generations separate the apical ancestors from the current claim group, as contact with Europeans in the application area occurred very recently and there has been very little European 'settlement', with most of the application area designated unallocated crown land and reserves. I can infer that informants to the anthropologist would have lived with claim group members who were born before sustained contact began in the 1950s. I understand from the application that the apical ancestors are the forebears of members of the claim group and have passed on their rights in the application area in accordance with the 'multiple pathways' model. I understand from the material that although situated within a wider society, rights and interests in the application area are only held by the claim group and not the wider society. In my view, the factual basis sufficiently addresses the link between the pre-sovereignty society, the apical ancestors and the claim group.

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

[95] The anthropologist's report contains examples of laws and customs which were observed prior to sustained European contact and which continue to be observed by the claim group today. These include knowledge of the *Tjukurrpa*-based dreaming tracks which cross the area, and the laws and customs pertaining to marriage and kinship which are connected to those tracks. The historical record shows people accessing those same tracks when absconding from missions, and when returning from the missions permanently in the 1980s. The information about the acquisition of rights to country, in accordance with *Tjukurrpa*-based laws, appears also to have been observed since before sustained contact, with the early explorers recording the association between a particular family and a particular area, the descendants of whom have inherited rights in that same area. In my view, there are sufficient examples about how the laws and customs have been acknowledged and observed by successive generations of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.[73]

Conclusion – s 190B(5)(b)

[96] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the application area. I am satisfied there is a link between the pre-sovereignty society in the application 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 by, and traditional customs observed by the claim group. This means s 190B(5)(b) is met.

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

[97] 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.[74] It also requires a sufficient factual

[73] *Yorta Yorta* [46]–[47].
[74] *Gudjala 2009* [29].

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.[75]

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

[98] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the application area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. The submissions point to the ongoing acknowledgement of the rules set down by the *Tjukurrpa* and knowledge of how it affects the application area.[76] The submissions also state that claim group members continue to teach their children and grandchildren stories and songs associated with the *Tjukurrpa*.[77] The anthropologist's report provides examples of how the laws and customs have been passed down to current members of the claim group by their predecessors, including through initiation and the annual ceremonies, at which knowledge is imparted to the initiates.[78] The report also describes how the majority of current claimants who live at Tjuntjuntjara, 15 km to the north of the application area, continue to access, occupy and use the application area in the manner of their predecessors. Described as 'effectively the backyard' of the Tjuntjuntjara community, the application area is utilised to teach traditional hunting and gathering techniques to the younger generations of the claim group.[79]

Conclusion – s 190B(5)(c)

[99] 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 the application area in accordance with traditional laws and customs since sovereignty. This is because the material before me demonstrates that claimants possess knowledge about how the previous generations acknowledged and observed their laws and customs in relation to the application area since the time of sustained European contact, so as to permit an inference that the claim group is a 'modern manifestation' of the pre-sovereignty society.[80] 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

[100] 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

[101] 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

[75] *Gudjala 2007* [82].
[76] Submissions [49].
[77] Ibid [50].
[78] Anthropologist's report [72].
[79] Ibid [76].
[80] *Gudjala 2009* [31].

or interest' is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group.

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

(a) it requires some measure of the material available in support of the claim;[81]

(b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;[82] and

(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'.[83]

[103] 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.

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

12 **exclusive rights** means the exclusive rights of possession, occupation, use and enjoyment to the exclusion of all others

13(a) In the lands and waters covered by the application, where native title rights and interests are not partially extinguished, the native title rights and interests claimed are **exclusive rights**.

[104] 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.[84]

[105] 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.[85]

[106] The Full Court held 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

[81] *Doepel* [126].
[82] Ibid [132].
[83] Ibid [135].
[84] *Ward HC* [88].
[85] *Sampi* [1072].

native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair".[86]

[107] The submissions state that the right to give permission to access country 'is a fundamental aspect of the acknowledgement of land ownership' in the WDCB.[87] The anthropologist's report describes how the traditional laws and customs mandate protocols for granting permission and conditions of access, and that there are consequences for transgressions, including 'metaphysical harm'.[88] It also explains that it is participation in initiation ceremonies and receiving instruction in relation to the application area, which gives rise to the right to speak for the 'sacred property' contained within it.[89]

[108] 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 the 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. Claimants acquire the right to 'speak for country', as described in *Ward HC* and *Sampi*, as a result of receiving revelatory ceremonial instruction about the laws and customs, and the *Tjukurrpa* which underpins them. 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.

12 [N]on-exclusive rights means:

(a) the right to access, remain in and use that area;

(b) the right to access, take and use the resources of that area for any purpose;

(c) the right to engage in spiritual and cultural activities on that area; and

(d) the right to maintain and protect places and objects of significance on that area,

and does not confer possession, occupation, use and enjoyment of the lands and waters covered by the application to the exclusion of all others. …

13(b) In the lands and waters covered by the application, in all other areas, the native title rights and interests claimed are non-exclusive rights.

[109] The anthropologist's report details the claimants' access to the application area, when travelling to and from nearby towns, and from their community at Tjuntjuntara to collect the area's resources. The claimants' use of kangaroo, bustard and emu, and 'collectable foods' such as lerps and witchetty grubs are described. Wood is collected for fires and to make implements.[90] In addition to the ceremonies described above, the report also describes how claimants access the application area to maintain and protect sites and areas of significance,

[86] *Griffiths FC* [127].
[87] Submissions [60].
[88] Anthropologist's report [42].
[89] Ibid [73].
[90] Ibid [76].

including sacred stone arrangements and water holes associated with the area's dreaming tracks.[91] As discussed above, those dreaming tracks were known to, and utilised by, the previous generations of the claim group, as both a manifestation of the laws and customs of the *Tjurkurrpa* and as paths by which they could safely cross the country. Based on the information in the anthropologist's report, I consider all the non-exclusive rights are prima facie established.

Conclusion

[110] 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 the 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 by previous generations and are currently observed. 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

[111] 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.

[112] 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.[92]

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

[113] Based on the information before me, I consider at least one claim group member currently has or had a traditional physical connection to the application area. There is sufficient information in the additional material to demonstrate how the members of the claim group continue to access the application area to hunt, collect food and other resources, and undertake cultural responsibilities related to the dreaming tracks. As discussed above, the anthropologist's report describes a particular family who were never removed from country during the missionary period, and has thus maintained a physical connection with the application area.

[114] I also consider the claim group members' connection is 'traditional' in the sense required by s 190B(7). As I am satisfied the factual basis is sufficient to support an assertion that the laws

[91] Ibid [77].
[92] *Doepel* [18], *Gudjala 2009* [84].

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 application area is in accordance with those traditional laws and customs.

Conclusion

[115] I am satisfied at least one member of the native title claim group currently has a traditional physical connection with a part of the application 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

[116] To meet s 190B(8), the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, the application should not have been made because of s 61A. That section forbids the making of application where there have been previous native title determinations, or exclusive or non-exclusive possession acts.

Requirement	**Information addressing requirement**	**Result**
Section 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
Section 61A(2) Claimant application not to be made covering previous exclusive possession act areas	Schedule B para 9(c)–(d) states that any area within the external boundary of the claim which is covered by a previous exclusive possession act is excluded from the application.	Met
Section 61A(3) Claimant applications not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E para 13(a) states that exclusive possession is only claimed in areas where native title rights and interests have not been partially extinguished.	Met

Conclusion

[117] I am satisfied the application does not disclose that the application should not have been made because of s 61A. I am not otherwise aware that the application should not have been made because of s 61A. This means that s 190B(8) is met.

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

[118] 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).

Requirement	**Information addressing requirement**	**Result**
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that the claim group do not claim any minerals, petroleum or gas wholly owned by the Crown.	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states no offshore places comprise part of the application area.	Met

Section 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

Conclusion

[119] I am satisfied the application does not disclose that the claimed native title extends to cover the situations described in s 190B(9)(a)–(c), and I am not otherwise aware that these provisions are not met. This means that s 190B(9) is met.

End of reasons

Attachment A

Summary of registration test result

Application name	James Minning on behalf of the Untiri Pulka Native Title Claim Group and State of Western Australia (Untiri Pulka)
NNTT No.	WC2019/011
Federal Court of Australia No.	WAD472/2019
Date of decision	22 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:

19 September 2019

Date application entered on Register:

22 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

_____

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.

22 November 2019