



# Registration Decision

<b>Application name</b>	Colin Saltmere & Anor v Northern Territory of Australia (Austral Downs Pastoral Lease)
<b>Name of applicant</b>	Colin Saltmere and Claude King
<b>Federal Court of Australia No.</b>	NTD26/2019
<b>NNTT No.</b>	DC2019/002
<b>Date of Decision</b>	13 September 2019

## Claim not accepted for registration

I have decided that the claim in the Austral Downs Pastoral Lease application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must not be accepted for registration.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy ss 190B(5)–(7). It also does not satisfy ss 190C(3)–(4).

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Katy Woods

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

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

# Reasons for Decision

## CASES CITED

*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*)  
*Gudjala People #2 v Native Title Registrar* [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*)  
*Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 (*Kanak*)  
*King v Northern Territory of Australia* [2007] FCA 944 (*King*)  
*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*)  
*Moran v Minister for Land & Water Conservation for New South Wales* [1999] FCA 1637 (*Moran*)  
*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)  
*Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26 (*Sampi FC*)  
*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)  
*Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*)  
*Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*)  
*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)  
*Wiri People v Native Title Registrar* (2008) 168 FCR 187; [2008] FCA 574 (*Wiri People*)

## BACKGROUND

- [1] This is an application filed on behalf of the Austral Downs native title claim group (claim group). It covers land and waters in the Austral Downs Pastoral lease in the Northern Territory, adjacent to the Queensland border and nearby to the community of Alpururulam.
- [2] The application was filed on 26 July 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 1 August 2019 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.<sup>2</sup> Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

### *Information considered*

- [3] I have considered the information in the application and note the applicant has not provided any additional information for my consideration.<sup>3</sup>
- [4] I have considered information contained in a geospatial assessment and overlap analysis of the area covered by the application prepared by the National Native Title Tribunal's (Tribunal) Geospatial Services dated 6 August 2019 (geospatial report), and information available

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

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

through 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.<sup>4</sup>

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

### *Procedural fairness*

- [6] On 6 August 2019, a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the territory government advising that I would be considering the information in the application in my decision, and should the territory government wish to supply any information or make any submissions, it should do so by 13 August 2019.
- [7] Also on 6 August 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 13 August 2019. No additional information was provided by the applicant.
- [8] On 13 August 2019, a representative from the territory government contacted the senior officer to advise that she had carriage of the matter and had only just received the senior officer's letter requesting submissions by 13 August 2019. The representative requested an extension of time to consider the application, until 20 August 2019. I decided to grant the extension of time, as I considered it was reasonable in the circumstances.
- [9] On 20 August 2019, the representative for the territory government wrote to the senior officer, submitting that this claim cannot be accepted for registration pursuant to s 190C(3), because part of the area covered by the application is already subject to another a claim. No further information or submissions were provided.
- [10] On 21 August 2019, the senior officer provided a copy of the territory's submission to the applicant and advised that any comment that the applicant wished to make should be provided by close of business Friday 23 August 2019. No comment or submission was received from the applicant.
- [11] This concluded the procedural fairness process.

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

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

- [12] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.<sup>7</sup> I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

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

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

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

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

### Section 61

[13] 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 A2, Schedule A, s 62 affidavits	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

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B	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	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	Met

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

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

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

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

- (b) there must be an entry for the claim in the previous application on the Register of Native Title Claims (the Register) when the current application was made; and
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

- [16] Schedule H states that the NTD6016/2002 Burramurra application has been made over the whole of the area covered by the current application. The geospatial report confirms the Burramurra application wholly overlaps the current application.
- [17] According to the Register, Burramurra was accepted for registration and entered onto the Register on 2 August 2002. The Register entry was made as a result of consideration of the application under s 190A and it has not been removed from the Register.
- [18] As the Burramurra application meets all the criteria in s 190C(3), it is a 'previous application' and so I must consider whether there are members of the Burramurra claim group who are also members of the claim group for the current application.
- [19] Schedule O states: 'Members of the native title claim group in relation to this application are also members of the native title claim group in relation to the overlapping application identified in Schedule H'. I have examined the Register extract for Burramurra to confirm that there are common claimants in the current and previous applications.
- [20] Colin Saltmere, an applicant member in the current application, is also an applicant member for the Burramurra application. One of the groups which make up the current claim group is the Indjalandji Dhidhanu People, which is also one of the groups on whose behalf the Burramurra application was brought. I am therefore satisfied that there are common claimants between the current application and the Burramurra application.

### *Conclusion*

- [21] As I am not satisfied that no member of the native title claim group for the current application was not also a member of the native title group for any previous application, s 190C(3) is not met.

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

- [22] To meet s 190C(4), the Registrar must be satisfied that either:
  - (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions; or
  - (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
- [23] Schedule R states:
  - (a) Each of the two persons who jointly comprise the Applicant in relation to this application are members of the native title claim group and are 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.
  - (b) Each of the two members of the Applicant has made and affirmed an affidavit that will accompany this claimant application for a determination of native title. These affidavits are intended to meet the requirements of s 62(1)(a) of the Act. These

affidavits depose to matters that would constitute grounds on which the Registrar should consider that the statement at paragraph (a) above is correct.

[24] Both affidavits which accompany the application depose that the deponent is authorised to make this application as a result of an authorisation meeting on 8 June 2019 at Alpururulam Community.

[25] Given the information in Schedule R and the affidavits, I understand I must assess the application against the requirements of s 190C(4)(b).

*What is required to meet s 190C(4)(b)?*

[26] Following s 190C(4)(b) there is a note in the Act referring to the definition of ‘authorising the making of applications’ in s 251B, which reads as follows:

... for the purposes of this Act, all the persons in a native title claim group ... **authorise** a person or persons to make a native title determination application ... and to deal with matters arising in relation to it, if:

- (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group ... must be complied with in relation to authorising things of that kind—the persons in the native title claim group ... authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
- (b) where there is no such process—the persons in the native title claim group ... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group ... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.<sup>9</sup>

[27] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) is met unless the application:

- (a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

*Is s 190C(5) met?*

[28] The affidavits of the members of the applicant both depose the following:

2. I am a member of the Austral Downs Pastoral Lease native title claim group. On 8 June 2019, at a meeting in Alpururulam Community, I was authorised by the Austral Downs Pastoral Lease native title claim group to be a member of the Applicant in relation to the Austral Downs Pastoral Lease native title claim (the **application**). ...
5. At the authorisation meeting, in accordance with decision-making processes acknowledged and observed under our traditional laws and customs, the other named members of the Applicant and I were authorised by the claim group to make this claimant application for a determination of native title in the Federal Court and deal with matters arising in relation to it.

[29] I note French J’s comment that the insertion of the word ‘briefly’ in s 190C(5)(b) ‘suggests that the legislature was not concerned to require any detailed explanation of the process by which

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

authorisation is obtained'.<sup>10</sup> In my view, Schedule R, extracted above, and the affidavits contain sufficient information to satisfy both limbs of s 190C(5).

*Is s 190C(4)(b) met?*

- [30] I am satisfied from the information in the affidavits that the persons comprising the applicant are members of the claim group, as required by s 190C(4)(b).
- [31] Section 190C(4)(b) also requires consideration of whether the identified native title holders have authorised the applicant to make the application in accordance with s 251B.<sup>11</sup> As cited above, s 251B states that 'all the persons' in the claim group authorise the applicant to make an application where one of the processes set out in subsection (a) or (b) of s 251B is used. Based on the information in the affidavits, I understand the applicant was authorised using a traditional decision-making process, which is the method of authorisation provided for in s 251B(a).
- [32] Section 190C(4)(b) 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given'.<sup>12</sup> This means that I must ascertain whether the applicant has in fact been authorised by the claim group in accordance with the asserted method of authorisation, in this case, through a traditional decision-making process.
- [33] Both affidavits provide the following in relation to the decision-making process used:
5. At the authorisation meeting, in accordance with decision-making processes acknowledged and observed under our traditional laws and customs, the other named members of the Applicant and I were authorised by the claim group to make this claimant application...
  6. Our traditional decision-making processes included splitting off into our subgroups, listening to our Elders, reaching consensus within our subgroups, then reconvening as a claim group and reaching an agreed position.
- [34] I therefore understand there was a meeting held to authorise the applicant, and the authorisation process included convening in subgroups and seeking advice from elders before reconvening as a larger group and making the decision to authorise the applicant. I note the decisions within the subgroups were made by 'consensus', however there is no information as to whether the traditional process mandates decisions by the larger claim group to be made unanimously or by majority. There is also no information about the content of the relevant traditional laws and customs.
- [35] I note Wilcox J's comment: 'a person who wishes to rely on a decision by a representative or other collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body's authority to make decisions binding the members of the group and that the body has authorised the making of the application'.<sup>13</sup>
- [36] Paragraph [4] of the affidavits states 'I believe that the right people were present at the meeting'. However there is no information as to who was entitled to participate in the

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

<sup>11</sup> *Wiri People* [26]–[36].

<sup>12</sup> *Doepel* [78].

<sup>13</sup> *Moran* [34].

decision to authorise the applicant, or whether the elders and/or the meeting participants constituted a body with the authority under traditional laws to make decisions which are binding on the members of the claim group.

[37] In my view, there is insufficient information to show that the participants of the meeting were in fact the 'right people' required to authorise the applicant under traditional laws and customs. There is no information before me as to who the relevant elders were, their authority or the 'advice' that they provided to the claim group. There is also no information about how the relevant traditional laws and customs were applied to the decision to authorise the applicant. In my view, there is insufficient information before me to be satisfied that the applicant is authorised by the claim group in accordance with s 251B(a). This means the requirements of s 190C(4)(b) are not satisfied and so s 190C(4) is not met.

## **Section 190B: merit conditions**

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

[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:

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

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

[40] Schedule B describes the area covered by the application as 'all the land and waters within Northern Territory Portion 1605 on Survey Plan CP5053 (Austral Downs)'.

[41] Schedule C refers to Attachment C, which contains a colour map prepared by the Tribunal's Geospatial Services titled 'Austral Downs' and dated 27 April 2017. The map includes:

- (a) The application area depicted with bold blue outline, labelled with NT Portion number and name;
- (b) Tenure as displayed in the legend, labelled with NT Portion and name or authority;
- (c) Settlements, highways and the Queensland/Northern Territory border;
- (d) A road reserve labelled 'Road 100 wide';
- (e) Scalebar, coordinate grid (GDA94);<sup>15</sup> 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.

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

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



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

[43] Schedule B states '[s]ubject to Schedule L of this application, any area in relation to which a previous exclusive possession act under section 23B of the Act has been done, is excluded from this application'.

[44] Schedule L states:

1. The applicant is not currently aware of any area covered by the application to which either s 47, s 47A or s 47B of the Act applies.
2. Members of the claim group occupy the claim area at the time this application is made. If subsequent tenure searches identify any part of the application area to which any of the above provisions apply, then extinguishment is to be disregarded.

[45] I understand from Schedules B and L that areas where previous exclusive possession acts have been done are excluded from the application area, except for areas where tenure searches reveal that ss 47–47B apply.

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

*Conclusion*

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

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

[48] 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.

[49] I understand I am not required to do more than make 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group' at this condition.<sup>17</sup> I also understand that the requirements of s 190B(3) 'do not appear to go beyond consideration of the terms of the application', which means I have limited my consideration to the information in the filed application.<sup>18</sup>

[50] Schedule A provides the following description:

1. The native title claim group in relation to the claim area described in Schedule B (the **application area**) is comprised of the Primary Native Title Holders and the Other Native Title Holders.

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

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

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

2. The Primary Native Title Holders are those groups who, in accordance with their traditional laws and customs, have a connection with the land and waters of the application area; and who hold communal native title in this application area, from which rights and interests derive.
3. The Primary Native Title Holders are:
  - (a) The Indjalandji-Dhidhanu People; and
  - (b) The Ilperrelhelam estate group.
4. The Indjalandji-Dhidhanu People are those persons who are:
  - (a) Descended from any of the following ancestors [list of three people and their immediate descendants]; or
  - (b) Recruited by adoption in accordance with the traditional laws and customs of the Indjalandji-Dhidhanu People.
5. The Ilperrelhelam estate group comprises of those persons:
  - (a) Who are patrilineal descendants of any of the following ancestors: [list of five people and some of their immediate descendants]; or
  - (b) Whose mother or father's mother or mother's mother is or was a patrilineal descendant of the ancestors listed at (a) above; or
  - (c) Who have been adopted or incorporated into the descent based relationships referred to in (a) and (b) above in accordance with the traditional laws and customs of the Ilperrelhelam estate group; or
  - (d) Who are accepted as members of the Ilperrelhelam estate group by the senior descent based members of the group on the basis of non-descent based connections, including their:
    - (i) Birthplace and conception sites;
    - (ii) Acquisition of ceremonial and ritual knowledge;
    - (iii) Long term residence and historical associate with the area;
    - (iv) Seniority in traditional matters concerning the Ilperrelhelam estate;
    - (v) Kinship ties;
    - (vi) Shared subsection and/or moiety affiliation; and
    - (vii) Responsibility for shared Dreaming tracks and/or sacred sites connected with the area.
6. The Other Native Title Holders are other Aboriginal persons who, in accordance with their traditional laws and customs, have rights and interests in respect of the application area, subject to the rights and interests of the Primary Native Title Holders.
7. The Other Native Title Holders are:
  - (a) Members of neighbouring native title holding groups or estate groups; and
  - (b) Spouses of the Primary Native Title Holders.

[51] It follows from the description in Schedule A that s 190B(3)(b) applies. From the description I understand that to qualify for membership an individual must meet the criteria as a Primary Native Title Holder or as an Other Native Title Holder.

### *Primary native title holders*

[52] According to paragraph 3 in Schedule A, the Primary Native Title Holders comprise of two groups, the Indjalandji-Dhidhanu People and Ilperrelhelam estate group. Different membership criteria apply to each group.

[53] To be a member of the Indjalandji-Dhidhanu People, an individual must be descended from one of the named ancestors in paragraph 4, or be recruited by adoption in accordance with traditional laws and customs.

[54] To be a member of the Ilperrelhelam estate group, an individual, their mother or either of their grandmothers must be a patrilineal descendant of one of the named ancestors in paragraph 5. Membership may also be obtained through adoption or incorporation 'into the descent-based relationships' in accordance with traditional law and customs, or through acceptance by senior descent-based members of the group based on various types of connections, which are listed in paragraph 5(d).

### Descent

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

### Adoption and incorporation

[56] I note Dowsett J's comments in *Aplin* that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs'.<sup>20</sup> In relation to adoption and incorporation, paragraphs 4(b) and 5(c) reference the traditional laws and customs of the Indjalandji-Dhidhanu People and the Ilperrelhelam estate group respectively. I consider that the traditional laws and customs of each of the groups would provide a 'set of rules or principles' through which it could be ascertained whether an adopted or 'incorporated' person is a member of the claim group.<sup>21</sup>

### Non-descent

[57] Justice Dowsett observed in *Aplin* that membership of a claim group 'must be based on group acceptance'.<sup>22</sup> I note also the Full Court's comments in *Sampi FC*, that '[a] relevant factor... in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.<sup>23</sup> I consider that the information in

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

<sup>20</sup> *Aplin* [256]–[261].

<sup>21</sup> *Ward v Registrar* [25].

<sup>22</sup> *Aplin* [256]–[261].

<sup>23</sup> *Sampi FC* [45].

paragraph 5(d) about non-descent based members of the Ilperrelhelam estate group will mean that the identification of the relevant people will be ‘possible at any future point in time’.<sup>24</sup> In my view, making enquiries with the ‘senior descent based members’ of the Ilperrelhelam estate group will allow for identification of any non-descent based members who are accepted as members of the group, noting that s 190B(3) requires only a clear description, rather than a ‘cogent explanation’ of the basis on which individuals qualify as members of the claim group.<sup>25</sup>

### *Other native title holders*

[58] I understand that to qualify for membership as an Other Native Title Holder, an individual must:

- (a) be a member of a neighbouring native title holding group or estate group; or
- (b) be a spouse of a Primary Native Title Holder.

### Neighbouring groups

[59] The Court has previously held that there is ‘no issue’ in including neighbouring groups in a claim group description.<sup>26</sup> Schedule A references the traditional laws and customs of the groups which make up the Primary Native Title Holders. In this application, the members of neighbouring estate groups are said to have rights and interests in the application area ‘in accordance with their traditional laws and customs’. I understand that estate groups in the region likely follow common or similar laws and customs, which would mean that the neighbouring groups would have one or more ancestor from whom members are descended. I am therefore of the view that there is a sufficiently clear means which could be utilised to identify the members of the neighbouring groups. In reaching this view I have also considered the judicial guidance that it is appropriate to construe the requirements of the Act beneficially.<sup>27</sup>

### Spouses

[60] I consider that by making factual enquiries with the Primary Native Title Holders and the individuals in question, the spouses of the Primary Native Title Holders could be ascertained.

### *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

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<sup>24</sup> *Aplin* [256].

<sup>25</sup> *Gudjala 2007* [33].

<sup>26</sup> *King* [12].

<sup>27</sup> *Kanak* [73].

interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights are established on a prima facie basis.

- [63] From the description in Schedule E, I understand the listed rights are claimed on a non-exclusive basis. The Primary Native Title Holders claim a right to protect places of traditional significance in the claim area, which the Other Native Title Holders do not claim. Paragraph 3 specifies the limitations on the rights claimed, importantly, that the rights are not claimed to the exclusion of all others, nor do they extend to the water or resources belonging to others. Paragraph 4 specifies that the claimed rights are subject to the traditional laws and customs of the native title holders as well as the laws of the Northern Territory and Commonwealth, and paragraph 5 makes further specifications with regards to the exclusion of minerals, petroleum and prescribed substances.
- [64] Reading Schedule E as a whole, including the various qualifications, I do not consider there is any inherent contradiction between any of the rights claimed.<sup>28</sup>

### *Conclusion*

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

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

- [66] To meet s 190B(5), the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the following assertions:
- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
  - (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
  - (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.
- [67] I understand my task is to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.<sup>29</sup> I also note French J's view that '[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or [her] delegate undertake a search for such material'.<sup>30</sup> As such I have not undertaken any searches for external material to support the applicant's claim.
- [68] As discussed above, Schedule E provides a description of the native title rights and interests claimed. Schedule F states:

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<sup>28</sup> *Doepel* [92], [123].

<sup>29</sup> *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

<sup>30</sup> *Martin* [23].

### **General**

1. The claimants are, traditionally, the owners of the land and waters subject to this application.
2. The rights and interests described in Schedule E, and the traditional laws and customs have been possessed and exercised, and acknowledged and observed, by the claimants, since time immemorial, including:
  - (a) At the time when sovereignty was asserted by the Crown of the United Kingdom; and
  - (b) At the time of contact with non-Aboriginal people.
3. The traditional connection of the claimants with the claim area, and native title rights and interests, were inherited from their ancestors in accordance with traditional laws and customs.
4. The claimants continue to acknowledge traditional laws, observe customs, and possess and exercise their traditional rights and interests, in relation to their traditional country (including the area claimed).

### **Historical, archaeological and site information**

5. Since time immemorial, and in accordance with traditional laws and customs, the area claimed has been regarded as belonging to the claimants.
6. The area claimed is a part of a larger area of land and waters which continued to be owned and occupied by the claimants after the assertion of sovereignty by the Crown of the United Kingdom. The claimants retain a traditional connection both to the area claimed and to their traditional country generally. The traditional connection of the claimants to the area claimed is shown both by matters relating directly to it, and by matters relating to other areas of their traditional country.
7. There are many sites of significance on the claimants' traditional country, including on the area claimed.
8. Material evidence of physical connections by the ancestors of the claimants exists in their traditional country, and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation.

### **Particulars of Traditional Laws and Customs**

9. The claimants respectively observe common traditional laws and customs. These include a common kinship system, observance of common laws relating to land tenure, and traditional usage of land and waters.
10. The kinship system respectively includes:
  - (a) Recognition of common ancestors;
  - (b) Common and interdependent familial ties which determine traditional rights and customs regarding land and waters;
  - (c) Recognition of group and individual responsibilities towards land and waters;
  - (d) Recognition and acceptance of common patterns of descent;
  - (e) Recognition of sanctions and prohibitions relating to relationships, access to land and waters, and custodianship;
  - (f) Recognition of individual or group connection to land and waters;
  - (g) Affiliation, on a group and individual basis, with totemic beings which relate to land/waters and law;
  - (h) Participation in, and responsibility for, ceremony;
  - (i) Recognition of individuals' connection to land and waters through their place of conception, place of birth, their mother's place of birth, and their father's place of birth; and
  - (j) Transmission of traditional knowledge from one generation to the next.

11. Common laws relating to land tenure respectively include:
  - (a) Fulfilment of spiritual obligations with regard to the land and waters;
  - (b) The observation of restrictions imposed by gender, age and ritual experience;
  - (c) The observation of restrictions imposed by the presence of sites of significance on the land and waters;
  - (d) The observation of restrictions imposed by the presence of Dreamings on the land and waters.
12. Examples of traditional usage in relation to the land and waters are contained in Schedule G.

[69] Schedule G provides the following list as examples of the activities which the claim group assert are currently being carried out by the claim group in the claim area:

1. Residing on the land;
2. Hunting and collecting animals, fish, and other foods from the land and waters;
3. Building and using shelters on the land;
4. Using waters from the land;
5. Using, sharing, trading, and exchanging resources derived from the land and waters;
6. Collecting materials including timber, stones, minerals, ochre, resin, grass and shell from the land and waters;
7. Burning the land;
8. Building and using traps on waterways;
9. Travelling across the land and waters;
10. Camping on the land;
11. Conducting ceremonies on the land;
12. Observing laws and sanctions restricting access to areas of the land and waters according to divisions of gender, age, and ritual experience;
13. Restricting the access of outsiders to the land and waters;
14. Caring for the land and waters in accordance with spiritual, economic and social obligations;
15. Burying the dead on the land;
16. Bearing, rearing and teaching children on and about the land and waters;
17. Maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

[70] Schedule M provides the three following examples of how members of the claim group maintain a traditional physical connection to the claim area:

1. Entering, remaining on and travelling across the application area;
2. Hunting, fishing and collecting resources from the application area; and
3. Visiting and protecting sites of significance on the application area.

[71] On reviewing the entirety of the information provided by the applicant, only Schedules E, F, G and M contain factual basis material relevant to the assertion at s 190B(5).

[72] I consider the material does not provide a sufficient factual basis to support an assertion that the predecessors of the group were associated with the application area over the period since

sovereignty. There are no references to any locations inside the application area and no information about any association of the predecessors with the application area other than the general statements in Schedule F, quoted above. In my view, there is also insufficient information to demonstrate the association the claim group currently has with the application area. I consider the information provided is of a very general nature and has no ‘geographical particularity’, which means the requirements of s 190B(5)(a) are not satisfied.<sup>31</sup>

- [73] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society, acknowledging and observing normative laws and customs. In my view, there is insufficient information to support an assertion that a pre-sovereignty society existed in the application area. I consider the broad statements in Schedule F to be ‘at a high level of generality’.<sup>32</sup> I also consider there is insufficient information to demonstrate any relationship between the ancestors of the claim group and a pre-sovereignty society.
- [74] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are ‘traditional’, that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society.<sup>33</sup> I am not satisfied the information in the application supports an assertion that laws and customs exist in the claim area, either in relation to a pre-sovereignty society or since that time. This means I cannot be satisfied that any such laws or customs could be considered ‘traditional’ and so the requirements of s 190B(5)(b) are not satisfied.
- [75] Meeting the requirements of s 190B(5)(c) relies on whether there is a factual basis sufficient to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests. Because I consider the factual basis is not sufficient to support the *existence* of traditional laws and customs I cannot be satisfied the factual basis is sufficient to support the *continuity* of traditional laws and customs. Therefore, the requirements of s 190B(5)(c) are not satisfied.

### Conclusion

- [76] As I am not satisfied the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support any of the assertions of ss 190B(5)(a)–(c), s 190B(5) is not met.

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

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

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<sup>31</sup> *Martin* [26].

<sup>32</sup> *Gudjala 2008* [92].

<sup>33</sup> *Yorta Yorta* [46].



[78] In addition, there must be information within the application which talks about each of the individual rights claimed. I am not satisfied the application contains sufficient information of this type. I therefore consider none of the claimed rights and interests has been established on a prima facie basis, which means s 190B(6) is not met.

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

[79] 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.

[80] This condition requires information to satisfy the Registrar of particular facts such that evidentiary material is required, and requires that the physical connection is in accordance with the traditional laws and customs of the claim group.<sup>34</sup>

[81] The information in Schedules E, F, G and M, quoted above, is relevant to my consideration at this condition. I consider the information in these schedules is too general to satisfy the requirements of s 190B(7). In addition, given my finding at s 190B(5)(b), that there is insufficient information to demonstrate the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds the requisite physical connection with the application area in accordance with traditional laws and customs, which means s 190B(7) is not met.

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

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

Requirement	Information addressing requirement	Result
Section 61A(1) No native title determination application if approved determination of native title	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 states that subject to Schedule L, any area in relation to which a previous exclusive possession act has been done is excluded from the application. Schedule L claims the benefit of ss 47–47B to allow for extinguishment to be disregarded in the applicable areas.	Met

<sup>34</sup> *Doepel* [18], *Gudjala 2009* [84].

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 (3) states that only non-exclusive rights are claimed. Para (3) also states that the claimed rights do not confer possession to the exclusion of all others on the native title holders.	Met
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### No extinguishment etc. of claimed native title – s 190B(9): condition met

[83] 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 s 190B(9) is met.

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 does not claim ownership of 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 'not applicable'. Based on this and the inland location of the application area, I understand no offshore place is claimed.	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

*End of reasons*

# Attachment A

## Summary of registration test result

<b>Application name</b>	Colin Saltmere & Anor v Northern Territory of Australia (Austral Downs Pastoral Lease)
<b>NNTT No.</b>	DC2019/002
<b>Federal Court of Australia No.</b>	NTD26/2019
<b>Date of decision</b>	13 September 2019

### *Section 190B conditions*

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

### *Section 190C conditions*

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