



## Registration Decision

<b>Application name</b>	Jawoyn Bolmo, Matjba And Wurrkbarbar (ML(A) 32257 and ML(A) 32258)
<b>Name of applicant</b>	Bessie Coleman
<b>Federal Court of Australia No.</b>	NTD6/2020
<b>NNTT No.</b>	DC2020/002
<b>Date of Decision</b>	3 April 2020

### Claim accepted for registration

I have decided that the claim in the Jawoyn Bolmo, Matjba And Wurrkbarbar (ML(A) 32257 and ML(A) 32258) application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration and entered onto the Register of Native Title Claims.

---

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.

---

<sup>1</sup> 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**)  
*Corunna v Native Title Registrar* [2013] FCA 372 (**Corunna**)  
*Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177 (**Warrie**)  
*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**)  
*Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 (**Harrington-Smith**)  
*Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 (**Kanak**)  
*King v Northern Territory* [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**)  
*Noble v Mundraby* [2005] FCAFC 212 (**Noble**)  
*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (**Doepel**)  
*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**)  
*Wiri People v Native Title Registrar* [2008] FCA 574 (**Wiri People**)

## Background

- [1] This application covers the land and waters of a small area approximately 40 kilometres north of Pine Creek in the Northern Territory (**application area**). At the time of writing these reasons, the application area is subject to mineral lease applications 32257 and 32258.
- [2] The application was filed on 11 March 2020 and the Registrar of the Federal Court (**Court**) gave a copy to the Native Title Registrar (**Registrar**) on 13 March 2020, pursuant to s 63. This referral has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.<sup>2</sup> In accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.
- [3] As a s 29 notice was issued over the application area on 18 December 2019, in accordance with s 190A(2)(e), I must use my best endeavours to finish testing the application for registration by the end of four months of that date, being 18 April 2020.

---

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

- [4] For the reasons below, I consider the claim in the application meets all the conditions of the registration test. Attachment A contains the information which will be included on the Register of Native Title Claims (**Register**).

*Procedural fairness*

- [5] On 11 March 2020, the applicant provided the following additional information directly to the Registrar (collectively, the **additional material**):
- (a) Affidavit of Gareth Lewis, anthropologist, affirmed 10 March 2020 (**anthropologist's affidavit**);
  - (b) The anthropologist's curriculum vitae;
  - (c) The anthropologist's expert report filed in the Pine Creek Township native title determination application (NTD19/2018) (**anthropologist's report**);
  - (d) The anthropologist's supplementary expert report filed in the Pine Creek Township native title determination application (NTD19/2018) (**supplementary report**);
  - (e) A map of the application area;
  - (f) The native title claim group description;
  - (g) A copy of the Northern Territory 1957 Register of Wards;
  - (h) A copy of Northern Territory census data;
  - (i) A copy of the Jawoyn (Katherine area) Land Claim report by the Aboriginal Land Commissioner, 1988 (**Katherine Land Claim report**);
  - (j) A copy of the Jawoyn (Gimbat area) Land claim no 111, Alligator Rivers area III (Gimbat Resumption – Waterfall Creek) (No. 2) repeat land claim No. 142 report by the Aboriginal Land Commissioner, June 1995 (**Gimbat Land Claim report**);
  - (k) An affidavit of Lazuras Ford dated 9 October 2001 (**Claimant 1 affidavit**);
  - (l) An unsigned affidavit of Bessie Coleman, undated;
  - (m) An affidavit of Bessie Coleman, dated 21 November 2001 (**Claimant 2 affidavit**);
  - (n) A map depicting the locations described in the affidavits of Claimant 1 and Claimant 2;  
and
  - (o) A map used to interview witnesses in the Mary River Proceedings.
- [6] I reviewed the additional material and considered it contained information which was relevant to my consideration of ss 190B(5)–(7) and s 190C(4). Therefore, on 19 March 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative for the Northern Territory government (**NTG**), advising that I would be considering the information in the application and the additional material in my decision. The senior officer provided the NTG with a copy of the additional material and advised that, should the NTG wish to supply any information or make any submissions, it should do so by 26 March 2020.

- [7] Also on 19 March 2020, the senior officer wrote to the applicant’s representative to advise that any further additional information the applicant wished me to consider should be provided by 26 March 2020.
- [8] On 23 March 2020, the senior officer wrote to the applicant’s representative to advise Attachment R to the application referred to an annexure which had not been included with the filed application. The senior officer advised that, should the applicant wish me to consider that annexure, it should be provided by 24 March 2020. In setting this deadline I was mindful of the impending ‘future act’ date described above. I was of the view that any further additional material which the applicant provided would likely need to be provided to the NTG for comment, in accordance with the requirements of procedural fairness. Neither the annexure nor any further additional material was provided by the applicant.
- [9] On 25 March 2020, the representative for the NTG wrote to the senior officer and requested an extension of time to make submissions, on the grounds that the representative had been on leave and had not had sufficient time to consider the application. I considered the request and decided that a short extension of time was reasonable in the circumstances.
- [10] On 26 March 2020, the senior officer wrote to the representative of the NTG advising that the extension of time was granted and that the NTG now had until 30 March 2020 for submissions.
- [11] On 30 March 2020, the representative of the NTG provided submissions for my consideration (**NTG submissions**). I considered the NTG submissions and formed the view they would not prevent the claim in the application from meeting the conditions of the registration test. I therefore did not provide the NTG submissions to the applicant for comment.
- [12] This concluded the procedural fairness process.

### *Information considered*

- [13] I have considered the information in the application and the additional material provided by the applicant, as outlined above.<sup>3</sup>
- [14] I have considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal’s Geospatial Services dated 17 March 2020 (**geospatial report**), in relation to the sufficiency of the map and description. I have considered information from the Tribunal’s geospatial database regarding this claim’s location in relation to other claims in the vicinity and locations mentioned in the application and additional material.<sup>4</sup>
- [15] I have had regard to the information in the NTG submissions as to whether the registration test conditions are satisfied in relation to this claim.<sup>5</sup> I have addressed the NTG submissions at the relevant sections in my reasons below.
- [16] There is no information before me obtained from any searches of state or Commonwealth interest registers.<sup>6</sup>

---

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

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

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

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

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

[17] 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.

[18] 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	Met

[19] 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	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 – see reasons below
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

### Section 62(2)(c)

[20] The NTG submits that because Schedule D states that no searches have been carried out by the claim group, s 190C(2) is not satisfied.<sup>8</sup> My understanding is that s 62(2)(c) requires an application to contain the details of all searches carried out by the claim group to determine the existence of non-native title rights and interests in the application area. Section 62(2)(c) does not require a claim group to undertake such searches. In my view, it follows that if no

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

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

<sup>8</sup> NTG submissions [2(b)].

such searches have been carried out by the applicant, a statement to that effect is sufficient to meet the requirements of s 62(2)(c).

### *Conclusion*

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

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

[22] To meet s 190C(3), the Registrar must be satisfied that no person included in the claim group for the current application was a member of a native title claim group for any previous application. 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.

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

### *Conclusion*

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

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

[25] 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.

[26] As no certificate accompanies the application, I must consider whether the applicant has been authorised to make the application in accordance with s 190C(4)(b).

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

[27] Section 190C(4)(b) contains two limbs, both of which must be satisfied:

- (a) that the applicant is a member of the claim group; and
- (b) that the applicant is authorised to make the application, by all the other members of the claim group.

- [28] Following s 190C(4)(b) there is a note in the Native Title Act referring to the definition of ‘authorising the making of applications’ in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision-making is utilised:
- (a) a process that, under the traditional laws and customs of the persons in the claim group, must be complied with; or
  - (b) where there is no traditional process, a process agreed to and adopted by the claim group.
- [29] The case law confirms that s 190C(4)(b) requires consideration of whether the identified native title holders have authorised the applicant to make the application in accordance with s 251B.<sup>9</sup>
- [30] 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) has been met; and
  - (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.
- [31] I therefore understand that in order to be satisfied that s 190C(4)(b) is met, one of the decision making processes outlined in s 251B must be identified and complied with, and the requirements of s 190C(5) must also be met.

#### *Summary of the authorisation material*

- [32] The information I have before me which I consider relevant to this condition is:
- (a) Schedule R and Attachment R, which is a document titled ‘Details of Authorisation’;
  - (b) The s 62 affidavit of the applicant (**s 62 affidavit**);
  - (c) The anthropologist’s affidavit; and
  - (d) The NTG submissions.

#### *Is s 190C(5) met?*

- [33] I note French J’s comment that the insertion of the word ‘briefly’ in s 190C(5)(b) ‘suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained’.<sup>10</sup> In my view, the s 62 affidavit sufficiently addresses both limbs of s 190C(5) in the statements that the applicant is a member of the claim group and is authorised by the claim group through a decision making process which accords with the group’s traditional laws and customs.<sup>11</sup>

---

<sup>9</sup> *Wiri People* [26]–[36].

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

<sup>11</sup> Section 62 affidavit [2], [19].

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

[34] Firstly, I must be satisfied the person or persons comprising the applicant are members of the claim group. As noted above, the s 62 affidavit contains such a statement, so I am satisfied this requirement is met.

[35] Secondly, I must be satisfied the applicant is authorised to make the application, by all the other members of the claim group. I understand that the identification of the appropriate decision making process and whether it was complied with is a primary consideration for my task at s 190C(4)(b).<sup>12</sup> I also understand that this task ‘involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given’.<sup>13</sup>

Which decision making process under s 251B has been identified?

[36] The s 62 affidavit states that the deponent was authorised to make the application in accordance with decision making processes acknowledged and observed under the traditional laws and customs of the claim group at a meeting on 2 March 2020 (**authorisation meeting**).<sup>14</sup> That a traditional decision making process was used is reiterated in Attachment R.<sup>15</sup>

What does the traditional decision making process entail?

[37] The anthropologist’s affidavit provides the following information:

Because the Other Native Title Holders rights and interests are subject to the Jawoyn Bolmo, Matjba and Wurrkbarbar rights and interests, it is only the Jawoyn Bolmo, Matjba and Wurrkbarbar people who, under Jawoyn Bolmo, Matjba and Wurrkbarbar traditional laws and customs which bind the Jawoyn Bolmo, Matjba and Wurrkbarbar and the Other Native Title Holders, can speak for and make decisions about Jawoyn Bolmo, Matjba and Wurrkbarbar country. A decision which is made by Jawoyn Bolmo, Matjba and Wurrkbarbar people about Jawoyn Bolmo, Matjba and Wurrkbarbar country will bind and affect the Other Native Title Holders.

In making decisions about Jawoyn Bolmo, Matjba and Wurrkbarbar country about whether to make a native title claim or not, it is Jawoyn Bolmo, Matjba and Wurrkbarbar people (only) who are required and permitted to make those decisions.

All Jawoyn Bolmo, Matjba and Wurrkbarbar have a right to participate in making decisions about Jawoyn Bolmo, Matjba and Wurrkbarbar land and waters. Within Jawoyn Bolmo, Matjba and Wurrkbarbar however, there are persons who possess greater seniority or knowledge and whose views are afforded greater weight by other Jawoyn Bolmo, Matjba and Wurrkbarbar people.

These senior persons are also able to decide a disagreement where consensus, the favoured form of decision-making amongst the Jawoyn Bolmo, Matjba and Wurrkbarbar people, cannot be reached. It is therefore necessary and appropriate for sufficient senior persons to be present at, and to participate in, making decisions about Jawoyn Bolmo, Matjba and Wurrkbarbar country, including the land and waters the subject of ML(A) 32257 and ML(A) 32258 [the application area].<sup>16</sup>

[38] From this information, I understand that the traditional decision making process requires the Primary Native Title Holders for the application area to make the decision to authorise the applicant, and the Other Native Title Holders are bound by that decision. The Primary Native

---

<sup>12</sup> *Noble* [16].

<sup>13</sup> *Doepel* [78].

<sup>14</sup> Section 62 affidavit [4], [16].

<sup>15</sup> Attachment R [16]–[17].

<sup>16</sup> Anthropologist’s affidavit [43]–[46].



Title Holders for the application area are identified as the Jawoyn Bolmo, Matjba and Wurrkbarbar people.

- [39] The anthropologist deposes that he attended the authorisation meeting and that in his opinion, there were sufficient senior members of the Jawoyn Bolmo, Matjba and Wurrkbarbar group present to make a decision about the application area.<sup>17</sup> The anthropologist further deposes that, in his opinion, the decision made by the people present at the authorisation meeting was in accordance with the traditional decision making process of the Jawoyn Bolmo, Matjba and Wurrkbarbar.<sup>18</sup>

How was the traditional decision making process applied in the decision to authorise the applicant?

- [40] Attachment R outlines the preparation for and conduct of the authorisation meeting, which commenced when the Northern Land Council (**NLC**) received a notice pursuant to s 29(2)(b)(ii) of the Native Title Act of the proposed grant of mining leases over the application area, as I have discussed above.<sup>19</sup> According to Attachment R, NLC anthropologists advised that the holders of native title rights in the application area are the Jawoyn Bolmo, Matjba and Wurrkbarbar people, and produced a list of current members.<sup>20</sup> This advice was based on historical and current information held by NLC, specifically, the additional material which has been provided and is listed above, and information from the native title determination application for the adjacent areas of the Mary River and Ban Ban Springs pastoral leases (NTD6018/2000).<sup>21</sup>
- [41] Attachment R provides that the NLC scheduled the authorisation meeting in Pine Creek for 2 March 2020 and that members of the Jawoyn Bolmo, Matjba and Wurrkbarbar people for whom NLC had an address, were delivered a personal notice on 14, 19 and 26 February 2020.<sup>22</sup> Between 19 February and 2 March 2020, a notice of the meeting was displayed at NLC's Jabiru office and at the Victoria Daly Regional Council in Pine Creek.<sup>23</sup> Fuel vouchers and/or transport were provided by NLC for Jawoyn Bolmo, Matjba and Wurrkbarbar people who live outside of Pine Creek who wanted to attend the authorisation meeting.<sup>24</sup>
- [42] With regard to the conduct of the authorisation meeting, Attachment R provides that the attendees gave consideration about whether there was an appropriate level of Jawoyn Bolmo, Matjba and Wurrkbarbar people present.<sup>25</sup> The attendees also discussed that members of the neighbouring Warai group sometimes access the application area, but that Jawoyn Bolmo, Matjba and Wurrkbarbar people are the correct people to speak for the application area.<sup>26</sup> Following these discussions, the attendees passed the following resolution:

We must make a decision about making a native title claim, according to a process required by our traditional law and custom. This includes the following steps:

---

<sup>17</sup> Ibid [47].

<sup>18</sup> Ibid.

<sup>19</sup> Attachment R, [1].

<sup>20</sup> Ibid [2].

<sup>21</sup> Ibid [3].

<sup>22</sup> Ibid [6]–[7].

<sup>23</sup> Ibid [7].

<sup>24</sup> Ibid [8].

<sup>25</sup> Ibid [9]–[10].

<sup>26</sup> Ibid [11].

- i. Only Jawoyn Bolmo, Matjba and Wurrkbarbar people can make that decision for Jawoyn Bolmo, Matjba and Wurrkbarbar country.
- ii. Jawoyn Bolmo, Matjba and Wurrkbarbar people are invited to attend and participate in meeting where we listen to our senior people and attempt to reach consensus.
- iii. If consensus cannot be reached among everyone in our group, then our senior people will discuss the matter to reach consensus. Their decision decides the disagreement.
- iv. Jawoyn Bolmo, Matjba and Wurrkbarbar people, or senior Jawoyn Bolmo, Matjba and Wurrkbarbar people in the case of a disagreement, have authority to speak for (and thereby make decisions for) Jawoyn Bolmo, Matjba and Wurrkbarbar people and all the people who are described as “Other Native Title Holders”.<sup>27</sup>

[43] According to Attachment R, using the decision making process described above, the attendees decided by consensus to authorise the applicant to make the application.<sup>28</sup>

#### Consideration

[44] From the material before me, I understand the Jawoyn Bolmo, Matjba and Wurrkbarbar people have the right to make decisions and ‘speak for’ the application area, as they are the Primary Native Title Holders. A decision by the Jawoyn Bolmo, Matjba and Wurrkbarbar people binds the entire claim group, including those members of the claim group designated as Other Native Title Holders, whom, I understand from the material, includes the neighbouring Warai people.

[45] The traditional decision making process is described as inclusive, as all Jawoyn Bolmo, Matjba and Wurrkbarbar people have a right to participate.<sup>29</sup> In my view, the personal and public notice of the authorisation meeting and the facilitation of attendance by way of transport and fuel vouchers, provided an appropriate opportunity to participate. Although the entire claim group did not attend the meeting, Attachment R and the s 62 affidavit provide that the attendees discussed and then confirmed that there were sufficient senior members present to make the decision to authorise the applicant.<sup>30</sup>

[46] In *Moran*, Wilcox J commented (albeit in the context of s 66B application to replace the applicant), that it is not necessary for the applicant to be individually authorised by each member of the claim group. Rather, ‘it will be enough that the applicant has been authorised in accordance with a process of decision-making recognised under the traditional laws and customs of the claimant group’.<sup>31</sup> In my view, the information before me outlines the traditional decision making process of the claim group and explains how it was applied in the decision to authorise the applicant to make the application, consistent with this judicial guidance.

[47] The NTG submits that ‘insufficient information has been provided about the authorisation of the claimant application to satisfy the requirements of section 190C(4)’.<sup>32</sup> The NTG submissions do not specify how exactly the information is insufficient. As discussed above, the

---

<sup>27</sup> Ibid [12].

<sup>28</sup> Ibid [12], [20].

<sup>29</sup> Anthropologist’s affidavit [45].

<sup>30</sup> Attachment R [10]–[11], s 62 affidavit [12]–[15].

<sup>31</sup> *Moran* [48].

<sup>32</sup> NTG submissions [2(a)].

senior officer wrote to the applicant to advise that the meeting notice, described in Attachment R as 'Annexure 2', did not accompany either the filed application or additional material. At the time of writing these reasons, a copy of the meeting notice has not been provided by the applicant. However, having regard to all the information currently before me, I do not consider that the omission of the meeting notice is a deficiency, which, on its own, means that the requirements of s 190C(4)(b) are not satisfied. In reaching this view, I note that the applicant has affirmed in the s 62 affidavit that she believes all the statements made in the application to be true.<sup>33</sup> The anthropologist has also provided information about the claim group's traditional decision making process and the authorisation of the applicant on affidavit.<sup>34</sup> For these reasons, and given my consideration of the authorisation material above, I do not agree with the NTG submission.

## Conclusion

[48] I consider there is sufficient information to show that the applicant is a member of the claim group, and has been authorised by all the members of the claim group using a traditional decision making process, in accordance with s 251B(a). This means the requirements of s 190C(4)(b) are satisfied. I also consider that the requirements of s 190C(5) are satisfied. Therefore, s 190C(4) is met.

## Section 190B: merit conditions

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

[49] 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.

[50] 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.<sup>35</sup>

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

[51] Schedule B describes the application area as 'all the land and waters within the area of land subject to Mineral Lease Applications 32257 and 32258'.

[52] Schedule C refers to Attachment C, which contains a map titled 'Native Title – ML32257 and ML32258'. The map is dated 10 March 2020 and includes:

- (a) The application area depicted by red outline and hachure, labelled;
- (b) Topographic background with locations, the McKinlay River and land tenure labelled;
- (c) Scalebar, northpoint and coordinate grid; and

---

<sup>33</sup> Section 62 affidavit [23].

<sup>34</sup> Anthropologist's affidavit [42]–[48].

<sup>35</sup> *Doepel* [122].

(d) Notes relating to the source and currency of data used to prepare the map.

[53] 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?*

[54] Schedule B states that areas where previous exclusive possession acts have been done are excluded from the application. With regard to these types of general exclusion clauses, French J commented that ‘it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application’.<sup>36</sup> Following this reasoning, I am satisfied the description of the areas covered by the general exclusion clause in Schedule B will be sufficient to ascertain any such areas at the appropriate time.

*Conclusion*

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

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

[56] 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.

[57] 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>37</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>38</sup>

[58] Schedule A states that the claim group is comprised of two groups – the ‘Primary Native Title Holders’ and the ‘Other Native Title Holders’.

[59] The ‘Primary Native Title Holders’ are described in paragraphs 2–5 of Schedule A.

[60] Paragraph 2 explains that the Primary Native Title Holders are those persons 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 the application area, from which rights and interests derive.

[61] Paragraph 3 states that the Primary Native Title Holders are the Jawoyn Bolmo, Matjba and Wurrkbarbar group.

---

<sup>36</sup> *Strickland* [55].

<sup>37</sup> *Wakaman* [34].

<sup>38</sup> *Doepel* [16].

- [62] Paragraph 4 states that the Jawoyn Bolmo, Matjba and Wurrkbarbar group are traditionally connected with the application area by reason of:
- (a) Patrilineal descent;
  - (b) His or her mother, father's mother or mother's mother being or having been a member of the group by reason of patrilineal descent; or
  - (c) Having been adopted or incorporated into the descent relationships referred to in paragraphs 4(a) and 4(b).
- [63] Paragraph 5 states that the persons described in paragraph 4(a) and 4(b) are descended from eleven named apical ancestors.
- [64] The 'Other Native Title Holders' are described in paragraphs 6–7 of Schedule A.
- [65] Paragraph 6 explains that the Other Native Title Holders are other Aboriginal persons who, in accordance with the Primary Native Title Holders' 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.
- [66] Paragraph 7 states that the Other Native Title Holders are members of neighbouring native title holding groups or estate groups, and the spouses of the Primary Native Title Holders.
- [67] It follows from the 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?*

- [68] 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'.<sup>39</sup>
- [69] From the description in Schedule A, I understand that to qualify for membership of the claim group an individual must meet the criteria for either a Primary Native Title Holder or an Other Native Title Holder.

Primary Native Title Holders

- [70] According to paragraph 3, the Primary Native Title Holders are the Jawoyn Bolmo, Matjba and Wurrkbarbar people, who I consider are identifiable through the application of the criteria found in paragraphs 4 and 5. In summary, a person, or their mother, father's mother or mother's mother, must be a descendant of one of the named ancestors, or be adopted in accordance with the traditional laws and customs of the Jawoyn Bolmo, Matjba and Wurrkbarbar group. I have considered these criteria below.

Descent

- [71] The Court has previously held that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).<sup>40</sup> I consider that requiring a

---

<sup>39</sup> *Gudjala 2007* [34].

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 qualify for membership by virtue of their descent under both paragraph 4(a) and 4(b).

#### Adoption

[72] The Court has also accepted the approach of describing a claim group with reference to named ancestors, including descent by adoption.<sup>41</sup> I also 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>42</sup> Paragraphs 2 and 4 of Schedule A references the traditional laws and customs of the Jawoyn Bolmo, Matjba and Wurrkbarbar group, and I consider that the traditional laws and customs would provide the appropriate 'set of rules or principles' through which it could be ascertained whether an adopted person is a member of the claim group.<sup>43</sup>

#### Other Native Title Holders

[73] I understand that to qualify for membership of the claim group as an Other Native Title Holder, an individual must be a member of a neighbouring native title holding group or estate group; or be a spouse of a Primary Native Title Holder.

#### Neighbouring groups

[74] In this application, the members of neighbouring estate groups are said to have rights and interests in the application area 'in accordance with the Primary Native Title Holders traditional laws and customs'. The Court has previously agreed that there is 'no issue' including neighbouring groups in a claim group description, and has otherwise stated that it is appropriate to construe the requirements of the Native Title Act beneficially.<sup>44</sup>

[75] I understand from the description that neighbouring estate groups follow the same or similar laws and customs to the Jawoyn Bolmo, Matjba and Wurrkbarbar group, which would mean that they would likely have similar methods of recruitment, being descent from a named ancestor by birth or adoption. Considering this information and applying the above judicial guidance, I am of the view that there is a sufficiently clear means which could be applied to identify the members of the neighbouring groups.

#### Spouses

[76] 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.

---

<sup>40</sup> *WA v NTR* [67].

<sup>41</sup> *Ibid.*

<sup>42</sup> *Aplin* [256]–[261].

<sup>43</sup> *Ward v Registrar* [25].

<sup>44</sup> *King* [12]; *Kanak* [73].

### *Conclusion*

[77] I am satisfied the application describes the persons in the 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

[78] 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 the claimed rights are established as native title rights on a prima facie basis.

[79] From the description in Schedule E, I understand all the listed rights are claimed on a non-exclusive basis. The Primary Native Title Holders claim a right to protect places, areas and things of traditional significance in the application 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, or extend to the water or resources which are the property of others. Paragraph 4 specifies that the claimed rights are subject to the traditional laws and customs of the Primary Native Title Holders as well as the laws of the Northern Territory and Commonwealth, and paragraph 5 makes further specifications with regard to the exclusion of minerals, petroleum and prescribed substances.

### *Conclusion*

[80] 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

[81] 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; 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.

[82] 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>45</sup>

---

<sup>45</sup> *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

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

[83] Schedule F briefly outlines the factual basis of the claim. Schedule G lists activities which the claim group currently carry out on the land and waters of the application area. Schedule M provides three brief examples of how the claim group maintain a physical connection to the application area. The s 62 affidavit outlines the deponent's connection to the application area, as well as that of her family and other claim group members. The additional material more specifically addresses the assertions of s 190B(5) and so my reasoning will focus primarily on the information in those documents. For convenience and in the interest of brevity, I will refer to the claim group as 'Jawoyn' in my reasons below where it is appropriate to do so, noting that the claim group is comprised of three Jawoyn clans – the Jawoyn Bolmo, Matjba and Wurrkbarbar.<sup>46</sup>

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

[84] 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;<sup>47</sup>
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';<sup>48</sup> 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'.<sup>49</sup>

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

[85] The anthropologist's report was written for the Pine Creek Township claim (NTD19/2018), which lies approximately 40 km south of the application area. Relevant to this application, it provides:

- (a) Settlement in the region began with the 1870s gold rush, the establishment of pastoral stations and the completion of a railway line from Palmerston to Pine Creek in 1889;<sup>50</sup>
- (b) Jawoyn people have been recorded in the vicinity of the application area since European records began with the Register of Wards in the 1950s, which included people with birthdates in the late 1890s and early 1900s;<sup>51</sup>
- (c) Census data from the 1960s onwards records Jawoyn people living around Goodparla, Mt Wells Mine and Jessop's Mine;<sup>52</sup>

[86] The anthropologist's affidavit provides:

---

<sup>46</sup> Anthropologist's report [2.3].

<sup>47</sup> *Gudjala 2007* [52].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>50</sup> Anthropologist's report [3].

<sup>51</sup> *Ibid* [6.16].

<sup>52</sup> *Ibid* [8.2].



- (a) The Land Commissioner recognised the Jawoyn Bolmo, Matjba and Wurrkbarbar people as the traditional owners of an area approximately 50 kilometres east of the application area in the Gimbat Land Claim report;<sup>53</sup>
- (b) Claim group members were interviewed by the anthropologist about their connection to the application area and its surrounds for the Mary River Pastoral Lease proceedings;<sup>54</sup>
- (c) The affidavits of Claimant 1 and Claimant 2, although they were initially deposed in relation to other matters, are relevant to this application because the area described in those affidavits includes the application area.<sup>55</sup>

[87] Claimant 1's affidavit states:

- (a) There is an important ceremony site on the banks of the Frances Creek;<sup>56</sup>
- (b) He and his family go hunting and fishing regularly in the area between Mount Wells and Mary River Station;<sup>57</sup>
- (c) All around the Frances Creek mine are places where the claim group collects ochre for ceremonies and artwork.<sup>58</sup>

[88] Claimant 2's affidavit states:

- (a) There are a lot of men's sites in area covered by the Ban Ban Springs pastoral lease;<sup>59</sup>
- (b) The deponent grew up on Mary River Station and her mother would take her fishing in the area; they would walk between Mount Wells to Frances Creek to Mary River, and as far north as Mount Harris mine;<sup>60</sup>
- (c) The deponent continues to visit and fish in the area, and will 'go up there all the time with the kids' to 'show country' to them;<sup>61</sup>
- (d) She recalls people camping around Frances Creek, Burrundie and Mount Wells when she was young.<sup>62</sup>

[89] The s 62 affidavit states:

- (a) The deponent's parents lived, worked and camped in the vicinity of the application area at the surrounding small mines;<sup>63</sup>
- (b) The deponent grew up in the vicinity of the application area and has visited and walked on it for various activities, including for cultural heritage and sacred site surveys, with family members and other members of the claim group.<sup>64</sup>

---

<sup>53</sup> Anthropologist's affidavit [17].

<sup>54</sup> Ibid [19].

<sup>55</sup> Ibid [27].

<sup>56</sup> Claimant 1 affidavit [3].

<sup>57</sup> Ibid [4]–[6].

<sup>58</sup> Ibid [6].

<sup>59</sup> Claimant 2 affidavit [1].

<sup>60</sup> Ibid [3], [7]–[8].

<sup>61</sup> Ibid [8]–[9].

<sup>62</sup> Ibid [7].

<sup>63</sup> Section 62 affidavit [6]–[7].

<sup>64</sup> Ibid [6], [8]–[10].

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

[90] 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.<sup>65</sup> 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'.<sup>66</sup> 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.<sup>67</sup> I have therefore assessed the sufficiency of the factual basis by applying this judicial guidance and taking into account the features of this application. In particular I note that the application area is very small, covering only 0.76 square kilometres, and is not near any established towns or other landmarks.

[91] The map annexed to the anthropologist's affidavit and information in the Tribunal's geospatial database reveals the following about the application area:

- (a) It is entirely covered by the Ban Ban Springs pastoral lease;
- (b) The Mary River Station lies approximately 20 kilometres to the east, with Goodparla a further 10–15 kilometres to the north east;
- (c) Frances Creek Mine is approximately 15 kilometres to the south;
- (d) Frances Creek runs north east to south west, approximately 14 kilometres to the south;
- (e) McKinlay River runs north to south, approximately 10 kilometres to the west;
- (f) Mount Wells and Burrundie lie approximately 30 kilometres to the south west; and
- (g) Jessop's Mine, Mount Jessop and Mount Harris Mine are approximately 25–30 kilometres to the north.

[92] I have assessed the sufficiency of the information summarised above against the requirements of s 190B(5)(a) below.

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

[93] According to the anthropologist's report, settlement in the vicinity of the application area occurred as late as the 1870s. A copy of the relevant Register of Wards is annexed to the anthropologist's affidavit, from which I can see that there were a number of Jawoyn (or 'Jauan') people in the region of the application area who were born in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries.<sup>68</sup> I consider it is reasonable to infer that those persons had the same or similar association to the area as their predecessors who would have been born prior to settlement. In making this retrospective inference, I have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith*, and of French J in *Kanak* on construing the Native Title Act beneficially.<sup>69</sup>

---

<sup>65</sup> *Martin* [25].

<sup>66</sup> *Strickland* [55].

<sup>67</sup> *Lane* [9].

<sup>68</sup> Register of Wards, 108–109, 119, 123–124, 128–129.

<sup>69</sup> *Harrington-Smith* [294]–[296], *Kanak* [73].

[94] In addition, the affidavits from the claimants provide examples of the association of some of their predecessors with the application area. For example, Claimant 2 describes fishing in the area with her mother and states that people camped in the vicinity of the application area when she was young. In my view, there is sufficient information before me to support an association between the predecessors of the claim group and the application area at sovereignty and since that time.

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

[95] From the map annexed to the anthropologist's affidavit, I can see that the locations described by the claimants in their affidavits surround the application area on all sides. I note in particular the information in the Claimant 1 affidavit, that he and his family continue to hunt in the area triangulated by Frances Creek Mine, Mount Wells and Mary River. I can infer that this area includes the application area. I also note the information about the important site at Frances Creek, which runs close to the application area. The Claimant 2 affidavit similarly describes the deponent's association with a large area which includes the application area, and how she would walk with her mother between locations. Both affidavits describe how the deponents and other claim group members continue to regularly visit the area, thus supporting an association between the claim group and application area currently. I also note the information in the s 62 affidavit about members of the claim group undertaking cultural heritage surveys in and around the application area.

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

[96] I note that s 190B(5)(a) does not require all of the claim group to have an association with the entirety of the application area at all times.<sup>70</sup> 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 application area, sufficient for the purposes of s 190B(5)(a). This is because there is information about past and present claim group members living, camping, hunting and fishing in areas which surround and include the application area. As noted above, the application area is particularly small. Noting the information about the claimants' association with nearby locations in all directions, including the McKinlay River and Frances Creek, and the surrounding mine sites and stations where past and current claim group members have lived and worked, in my view, the information before me is sufficient to support an association with the whole area claimed.

### *Conclusion – s 190B(5)(a)*

[97] 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.

---

<sup>70</sup> *Corunna* [31].

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

[98] 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.

[99] ‘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. 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).<sup>71</sup>

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

[I]t conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs;*

[T]he normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.<sup>72</sup>

[101] In *Warrie*, the Full Court held that:

Where a rule, or practice or behaviour in relation to the identified land and waters arises from traditional law, and has normative content, then it can be capable of satisfying para (a) of s 223(1);

*[A] claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character, there is no further gloss or overarching requirement, and no further rigidity. The Native Title Act in terms does not require establishment of some overarching “society” that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.*<sup>73</sup>

[102] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of the continued observance of normative rules by successive generations of the claim group since at least the time of settlement in the application area, such that the normative rules can be described as ‘traditional laws and customs’.

### *What information has been provided in support of the existence of traditional laws and customs?*

[103] Schedule F outlines the factual basis for the claim to native rights and interests in the application area and states that the claim group observe traditional laws and customs, including:

---

<sup>71</sup> *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.

<sup>72</sup> *Yorta Yorta* [46]–[47], emphasis added.

<sup>73</sup> *Warrie* [105], [107], emphasis added.

- (a) Observance of interdependent familial ties which determine rights of land and waters;
- (b) Sanctions and prohibitions relating to relationships, access to land and waters and custodianship;
- (c) Ceremonial responsibilities;
- (d) Spiritual obligations with regard to the land and waters; and
- (e) Restrictions to land and waters imposed by gender, age, ritual experience and/or the presence of Dreamings.

[104] The anthropologist's report provides:

- (a) The three Jawoyn clans which make up the claim group observe a descent-based system of shared ownership of their country and are part of broader Jawoyn language based group;<sup>74</sup>
- (b) Senior claimants, now deceased, previously described to the author a dreaming track which passes through Frances Creek, and the associated dreaming story which prescribes the trade of the ochre found there and its use in ceremony;<sup>75</sup>
- (c) The above-mentioned dreaming track forms part of a trade network which travels from south west of Pine Creek through to Kakadu National Park to the north east of the application area and allows for the coordination of trade and ceremonial activities;<sup>76</sup>
- (d) Strict endogamous marriage rules are observed by the claim group and a claimant described to the author how the trade route is also used for marriage exchanges;<sup>77</sup>
- (e) Claimants know the location of traditional ceremonial grounds in the area and continue to participate in regional initiation ceremonies.<sup>78</sup>

[105] The supplementary report provides:

- (a) The claim group continue to observe a complex sub-section system of social organisation which was first recorded by Spencer in 1933;<sup>79</sup>
- (b) Claimants maintain their connection to land through their continued observance of religious belief in beings or Dreamings who created the land and the laws of social organisation and behaviour that Jawoyn follow;<sup>80</sup>
- (c) Claimants continue to observe protocols such as ritual evocations and observances at specific places and the head wetting of strangers as their introduction to country as well as rules pertaining to the use of resources.<sup>81</sup>

[106] The Claimant 1 affidavit describes the collection of ochre at Frances Creek and its use in ceremonies, reflecting the information provided to the anthropologist.<sup>82</sup>

---

<sup>74</sup> Anthropologist's report [5.7], [6.9].

<sup>75</sup> Ibid [7.3].

<sup>76</sup> Ibid [9.17].

<sup>77</sup> Ibid [6.20], [9.22].

<sup>78</sup> Ibid [7.7].

<sup>79</sup> Supplementary report 4.

<sup>80</sup> Ibid 6.

<sup>81</sup> Ibid 8.

[107] The Claimant 2 affidavit describes how the deponent learnt from her mother how to dig yam, hunt porcupine and kangaroo, catch fish and turtle, and navigate their country (including the application area) on foot.<sup>83</sup>

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

[108] I consider that there is sufficient information before me to show that the predecessors of the claim group were members of a regional Jawoyn society, at the time of settlement in the application. From the anthropologist's affidavit, I understand that only a few generations separate the apical ancestors from the current claim group, which includes the great grandchildren of the apical ancestors.<sup>84</sup> I also understand that those ancestors were alive in the early years of settlement and that they would have lived with forebears who were members of the pre-sovereignty society. I therefore consider that the material demonstrates a link between the current claim group, the apical ancestors and that pre-sovereignty society.<sup>85</sup>

[109] In my view, there is sufficient information about how the laws and customs have been acknowledged and observed by the current members of the claim group as well as the previous generations, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.<sup>86</sup> There are stories and protocols which pertain to particular sites that the current claimants have learnt from their predecessors and continue to observe. There is also information about the ongoing normative force of the endogamous marriage rules and the sub-section system, which were recorded in the early years of settlement and have continued to be observed by successive generations of the claim group. The information about the regional trade network and the claimants' knowledge of the operation of that network and the associated Dreaming stories around the application area, reflects information told to the anthropologist and also recorded historically. The continuation of fishing and hunting practices, which the current claim group members learned from their immediate predecessors, and other such examples provided in the additional material, also support the assertion that the laws and customs of the claim group are 'traditional'.

*Conclusion – s 190B(5)(b)*

[110] I am satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged, 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)?**

[111] 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.<sup>87</sup> It also requires a sufficient factual

---

<sup>82</sup> Claimant 1 affidavit [6].

<sup>83</sup> Claimant 2 affidavit [3]–[8].

<sup>84</sup> Anthropologist's affidavit [39].

<sup>85</sup> *Gudjala 2009* [40].

<sup>86</sup> *Yorta Yorta* [46]–[47].

<sup>87</sup> *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.<sup>88</sup>

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

[112] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis supports the assertion of an ongoing association with the application area, and supports the existence of traditional laws and customs. The additional material provides examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through oral transmission and common practice. In addition to the examples cited in my reasoning above at s 190B(5)(b), I note the detailed information given to the Land Commissioner by claimants about the descent-based system of shared ownership of their country inherited from their predecessors.<sup>89</sup> I understand from the anthropologist’s affidavit that this system continues to be observed by the claim group across their traditional country, including the application area.

[113] In my view, these examples support the assertion that the laws and customs of the claim group have been observed in the application area, as well as in the surrounding area of Jawoyn country, since at least settlement, and that these laws and customs continue to be observed and passed down to younger members of the claim group. I consider the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the application area. The material before me demonstrates that claimants know how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the application area since the time of settlement. This permits an inference that the claim group is a ‘modern manifestation’ of the pre-sovereignty society.<sup>90</sup>

*Conclusion – s 190B(5)(c)*

[114] 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

[115] 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

[116] 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 claim group.

---

<sup>88</sup> *Gudjala 2007* [82].

<sup>89</sup> Gimbat Land Claim report [3.5]–[3.9].

<sup>90</sup> *Gudjala 2009* [31].

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

- (a) it requires some measure of the material available in support of the claim;<sup>91</sup>
- (b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;<sup>92</sup> 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’.<sup>93</sup>

[118] 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 as native title rights will be entered on the Register.

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

[The non-exclusive rights to:]

Access, remain on and use the area

[119] The additional material provides numerous examples of members of the claim group, past and present, accessing, remaining on and using the lands and waters of the region surrounding the application area, some of which I have summarised above at s 190B(5). I note the information in the Claimant 2 affidavit of the deponent and her mother walking through the area bounded by Mount Wells, Frances Creek and the Mary River, to hunt, fish and camp, and that she and her descendants continue to undertake these activities.<sup>94</sup> In my view it is reasonable to infer that her description includes the specific lands and waters of the application area. I therefore consider that this right is prima facie established.

Access and take for any purpose the resources of the area

[120] At s 190B(5)(b) above, I have summarised the information, both historical and recent, about the regional trade network, of which the application area forms a part. In my view, the information about the collection of ochre from around the application area for trading purposes supports the existence of this right. The Claimant 1 affidavit describes taking kangaroo, pigs and turkey, as well as ochre for ceremonial purposes and artwork.<sup>95</sup> The Claimant 2 affidavit describes taking animals, fish and sugarbag.<sup>96</sup> I therefore consider this right is prima facie established.

---

<sup>91</sup> *Doepel* [126].

<sup>92</sup> *Ibid* [132].

<sup>93</sup> *Ibid* [135].

<sup>94</sup> Claimant 2 affidavit [7]–[9].

<sup>95</sup> Claimant 1 affidavit [6].

<sup>96</sup> Claimant 2 affidavit [9].



Protect places, areas and things of traditional significance

[121] Unlike the two claimed rights discussed above, paragraph 1(c) of Schedule E specifies that this right is only claimed by the Primary Native Title Holders. It is not claimed by the Other Native Title Holders. I understand from the anthropologist's report that there are rituals (such as head-wetting) and protocols which are performed by the Primary Native Title Holders to protect both the visitors and significant places.<sup>97</sup> The report further explains that it is the Primary Native Title Holders who hold the responsibility, and thus the right, to protect such places.<sup>98</sup> In addition, the s 62 affidavit describes the deponent and other members of the claim group participating in cultural heritage and sacred site surveys in and around the application area.<sup>99</sup> In my view, such activities demonstrate the exercise of this right. I therefore consider this right is prima facie established.

## Conclusion

[122] I am satisfied the application contains sufficient information about all 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 in recent times. Additionally, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

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

[123] To meet s 190B(7), the Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- (b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[124] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.<sup>100</sup>

*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?*

[125] Based on the information before me, I consider at least one claim group member currently has or had a traditional physical connection to the application area. In my view, the information I

---

<sup>97</sup> Anthropologist's report [9.7].

<sup>98</sup> Ibid [9.9].

<sup>99</sup> Section 62 affidavit [8]–[10].

<sup>100</sup> *Doepel* [18], *Gudjala 2009* [84].

have extracted above at ss 190B(5)–(6), about claim group members accessing the application area for camping, hunting and fishing, and using its resources, supports the existence of a physical connection.

[126] I also consider the claim group members’ connection is ‘traditional’ in the sense required by s 190B(7). I consider the claimants’ knowledge of the application area has been passed to them from the predecessors of the claim group while spending time on and around the application area. As I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, it follows that I am satisfied the current claim group members’ connection with the application area is in accordance with those traditional laws and customs.

## Conclusion

[127] I am therefore satisfied at least one member of the 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

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

Section	Requirement	Information addressing requirement	Result
s 61A(1)	No native title determination application if approved determination of native title	The geospatial report states and my own searches confirm that there are no approved determinations of native title in the area covered by this application.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, para (b) states that any area in relation to which a previous exclusive possession act has been done, is excluded from the application.	Met
s 61A(3)	Claimant applications not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E para (3) states that the rights claimed do not confer possession, occupation, use and enjoyment to the exclusion of all others.	Met

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

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

Section	Requirement	Information addressing requirement	Result
---------	-------------	------------------------------------	--------

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

*End of reasons*

# Attachment A

## Summary of registration test result

Application name	Jawoyn Bolmo, Matjba And Wurrkbarbar (ML(A) 32257 and ML(A) 32258)
NNTT No.	DC2020/002
Federal Court of Australia No.	NTD6/2020
Date of decision	3 April 2020

### 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:

11 March 2020

#### Date application entered on Register:

3 April 2020

#### 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.

3 April 2020