Registration Decision

National Native Title Tribunal

Application name	June Harrington-Smith & Ors and State of Western Australia (**Darlot**)
Name of applicant	June Harrington-Smith, Verna Vos, Richard Ashwin, Brett Lewis, James Calyun, Jodie Harris, Maria Meredith, Dorothy Cooper, Wayne Smith, Andrew Harris, Linden Brownley, Joan Tucker and Pearl Scott
Federal Court of Australia No.	WAD142/2018
NNTT No.	WC2018/005
Date of Decision	25 June 2020

Claim not accepted for registration

I have decided the claim in the amended Darlot application does not satisfy all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] 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 s 190C(4).

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Katy Woods[2]

[1] All legislative references are to the *Native Title Act 1993* (Cth) (Native Title Act), unless stated otherwise.

[2] 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.

Corrigendum

Paragraph 24 is amended to correct the date of the geospatial report from 14 November 2019 to 25 March 2020, as follows:

I have considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 25 March 2020 (**geospatial report**), a memo from Geospatial Services dated 31 March 2020 and information held in the Tribunal's geospatial database.

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Katy Woods 13 July 2020

Cases Cited

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (***Aplin***)
Ashwin on behalf of the Wutha People v State of Western Australia (No 4) [2019] FCA 308 (***Wutha)***
Bolton on behalf of the Southern Noongar Families v State of Western Australia [2004] FCA 760 (***Bolton***)
Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (***Burragubba***)
Corunna v Native Title Registrar [2013] FCA 372 (***Corunna***)
De Rose v South Australia [2002] FCA 1342 (***De Rose***)
Evans on behalf of the Koara People v The State of Western Australia [2008] FCA 1557 (***Koara***)
Evans v Native Title Registrar [2004] FCA 1070 (***Evans***)
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 Western Australia (No 9) [2007] FCA 31 (***Harrington-Smith No 9***)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia [2016] FCA 910 (***Tjungarrayi 2016***)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938 (***Tjungarrayi 2017***)
Kanak v National Native Title Tribunal (1995) 61 FCR 103 (***Kanak***)
Lawson on behalf of the `Pooncarie' Barkandji (Paakantyi) People v Minister for Land & Water Conservation for the State of New South Wales [2002] FCA 1517 (***Lawson***)
Martin v Native Title Registrar [2001] FCA 16 (***Martin***)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (***Yorta Yorta***)
Northern Territory of Australia v Doepel [2003] FCA 1384 (***Doepel***)
Quall v Native Title Registrar [2003] FCA 145 (***Quall v NTR***)
Risk v National Native Title Tribunal [2000] FCA 1589 (***Risk***)
Strickland v Native Title Registrar [1999] FCA 1530 (***Strickland***)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (***Wakaman***)
Ward v Northern Territory [2002] FCA 171 (***Ward v Northern Territory***)
Ward v Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (***Ward v Registrar***)
Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 (***Weribone***)
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] The claim in this application is made on behalf of the Darlot native title claim group (**claim group**). The application covers an area of the Goldfields region in Western Australia, ranging from Lake Darlot in the north to Menzies in the south, with a 20 kilometre-wide 'tail' extending approximately 193 kilometres across and beyond Lake Barlee from the south west corner in a north-westerly direction. The application covers approximately 39,562 square kilometres and includes the town of Leonora (**application area**).

[2] This application was first made on 10 April 2018. On 6 June 2018, a delegate of the Native Title Registrar (**Registrar**) decided the claim in the application did not meet all the conditions of ss 190B–190C (**registration test**).

[3] The applicant sought reconsideration of the application pursuant to s 190E and on 19 September 2018, the President of the National Native Title Tribunal (**Tribunal**) decided the claim in the application did not meet all the conditions of the registration test.

[4] An amended application was filed on 6 May 2019. On 26 June 2019, a delegate of the Registrar decided the claim in the amended application did not meet all the conditions of the registration test.

[5] A further amended application was filed on 13 March 2020. The Registrar of the Federal Court of Australia (**Court**) gave a copy of the further amended application to the Registrar that same day, pursuant to s 64(4). This has triggered the Registrar's duty to consider the claim in the further amended application. The further amended application is currently before me and I will refer to it as **the application** in my reasons below.

[6] The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. As the claim in this application is not on the Register of Native Title Claims (**Register**), s 190A(6A) does not apply. Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions of the registration test.

[7] The application area is affected by a s 29 notice. Therefore, in accordance with s 190A(2)(f), I must use my best endeavours to finish considering the claim for registration within 4 months of the notification date of that s 29 notice, that is, before 26 June 2020.

[8] As discussed in my reasons below, I consider that the claim in the application does not satisfy all of the conditions of the registration test and therefore it must not be accepted for registration.[3] Attachment A contains a summary of my decision.

Procedural fairness

[9] On 23 March 2020, a senior officer of the Tribunal (**senior officer**) wrote to the relevant minister of the State of Western Australia (**State**) advising that I would be considering the information in the application in my decision, and should the State wish to supply any information or make any submissions, it should do so by 27 March 2020.

[3] Section 190A(6).

[10] Also on 23 March 2020, the senior officer wrote to the representative of the applicant and advised that any additional material which the applicant wished the delegate to consider should be provided by 27 March 2020.

[11] On 26 March 2020, the representative of the State provided submissions on the application's ability to pass the registration test (**State's submissions**).

[12] Also on 26 March 2020, the applicant requested a two-week extension of time to provide additional material for my consideration when applying the registration test. I considered the request and decided that it was reasonable in the circumstances. Therefore, on 27 March 2020, the senior officer wrote the representative of the applicant and advised that I had granted the requested extension of time and that submissions should be provided by 3 April 2020. That correspondence also enclosed a copy of the State's submissions for the applicant's comment.

[13] On 31 March 2020, the Registrar received an email from [name removed] on behalf of the Barnes Family (**unsolicited information**). The email forwarded earlier correspondence addressed to Native Title Services Goldfields (**NTSG**) dated 8 March 2020.

[14] On 3 April 2020, the applicant provided submissions for my consideration (**Applicant's submissions**) and asked that I have regard to the following material (**additional material**):

(a) Neale Draper, 'WAD6064/1998 Raymond William Ashwin & Others v the State of Western Australia & Others (Wutha): Anthropology Connection Report', 4 October 2016 (**Draper 2016**);

(b) Neale Draper, 'WAD6064/98 Raymond William Ashwin & Others on behalf of the Wutha People: Second Supplementary Expert Anthropology Report for the Applicant', 5 May 2017 (**Draper 2017**);

(c) Neale Draper, 'Darlot Native Title Claim: Preliminary Anthropology Connection Report', 20 March 2018 (**Draper 2018 [A]**);

(d) Neale Draper, 'Darlot Native Title Claim WC2018/005: Anthropological Opinion on claim authorisation', 12 August 2018 (**Draper 2018 [B]**);

(e) Neale Draper, 'Darlot Native Title Claim (Part B) (WAD142/2018): Revised Claim Group Description Report', 3 October 2019, (**Draper 2019**);

(f) Brendan Corrigan, 'Revised report on the claim group description for the purpose of notification for an authorisation meeting in the Darlot native title determination application – Federal Court proceeding WAD142/2018', 7 January 2020, (**Corrigan 2020 [A]**);

(g) Brendan Corrigan, 'Anthropological report concerning amendments to the Claim Group Description in the Darlot native title determination application in Federal Court proceeding WAD142/2018', 3 April 2020, (**Corrigan 2020 [B]**);

(h) Claimant statements from the *Wutha* proceedings:

1. Geoffrey Ashwin, Witness Statement, 22 September 2015 (**Claimant 1 Witness Statement**);

2. June Rose Harrington-Smith, Witness Statement, 22 September 2015 (**Claimant 2 Witness Statement**);

3. John Ashwin, Witness Statement, 22 September 2015 (**Claimant 3 Witness Statement**);
4. Luxie Hogarth, Witness Statement, September 2015 (**Claimant 4 Witness Statement**);
5. Geraldine Hogarth, Witness Statement, 19 September 2015 (**Claimant 5 Witness Statement**);
6. Lorraine Barnard, Witness Statement, 22 September 2015 (**Claimant 6 Witness Statement**);
7. Gary Ashwin, Witness Statement; 18 November 2016 (**Claimant 7 Witness Statement**);
8. Statement of Evidence of Raymond Ashwin, 21 October 2002 (**Claimant 8 Statement of Evidence**);
9. Statement of Evidence of Lenny Ashwin (Ninardi), 27 March and 15 July 2002, (**Claimant 9 Statement of Evidence**);
10. Statement of Evidence of Ralph Ashwin, 24 June 2002 (**Claimant 10 Statement of Evidence**);
11. Transcript of Katherine Adams, 26 March 2002 (**Indigenous Witness 1 Transcript**);

(i) Claimant statements from the *Koara* proceedings:

1. Statement of Evidence of Luxie Hogarth, 12, 15-16 July 2002 (**Claimant 4 Statement of Evidence**)
2. Statement of Evidence of Myrtle Brennan, , 15–16 July 2002 (**Claimant 11 Statement of Evidence**);
3. Statement of Evidence of Geraldine Hogarth, 12, 15–16 July 2002, 12 August 2003 (**Claimant 5 Statement of Evidence**);

(j) Section 62 affidavits of the applicant members (**s 62 affidavits**):

1. Affidavit of Andrew Harris, 21 February 2020;
2. Affidavit of Brett Lewis, 21 February 2020;
3. Affidavit of Dorothy Cooper, 21 February 2020;
4. Affidavit of James Calyun, 21 February 2020;
5. Affidavit of Joadi [sic] Harris, 21 February 2020;
6. Affidavit of Joan Tucker, 21 February 2020;
7. Affidavit of June Harrington-Smith; 21 February 2020;
8. Affidavit of Linden Brownley, 21 February 2020;
9. Affidavit of Maria Meredith, 21 February 2020;
10. Affidavit of Pearl Scott, 21 February 2020;
11. Affidavit of Richard Ashwin, 21 February 2020;
12. Affidavit of Verna Vos, 21 February 2020;
13. Affidavit of Wayne Smith, 21 February 2020;

(k) First Affidavit of Anthony Beven, 20 February 2020; (**meeting notice affidavit**);

(l) Second Affidavit of Anthony Beven, 24 February 2020 (**authorisation affidavit 1**);

(m) Third Affidavit of Anthony Beven, 3 March 2020 (**authorisation affidavit 2**); and

(n) Fourth Affidavit of Anthony Beven, 3 April 2020; (**meeting register affidavit**).

[15] I considered the applicant's submissions and additional information and formed the preliminary view that there was insufficient information in the application to satisfy all the requirements of the registration test.

[16] Therefore, on 9 June 2020, the senior officer wrote to the applicant and provided my preliminary assessment of the application. The letter advised that submissions in response to my preliminary assessment should be provided by 16 June 2020. That correspondence also enclosed a copy of the unsolicited information for the applicant's comment, as I had formed the view that it contained information relevant to the registration test to which the applicant should be afforded an opportunity to respond.

[17] On 12 June 2020, the applicant requested an additional day to provide submissions in response to my preliminary assessment. I considered the request and decided that it was reasonable in the circumstances. Therefore, on 15 June 2020, the senior officer wrote the representative of the applicant and advised that I had granted the requested extension of time and that submissions should be provided by 17 June 2020.

[18] On 17 June 2020, the applicant provided the following information for my consideration (**further additional material**):

(a) 'Applicants' Response to Preliminary Assessment Against Conditions Of Registration Test For Native Title Determination Application: WAD142/2018 (WC2018/005) June Harrington-Smith & Ors And State Of Western Australia (Darlot)' (**authorisation submissions**);

(b) 'Darlot claim group meeting (WAD142/2018) Friday 21 February 2020, Leonora Recreation Centre, 25 Tower Street, Leonora, Western Australia, Minutes' (**authorisation meeting minutes**);

(c) Brendan Corrigan, 'Report concerning the NNTT's Preliminary Assessment of the Darlot claimant application against certain conditions of the registration test - Federal Court proceeding WAD142/2018' (**Corrigan 2020 [C]**).

[19] I considered the information in the further additional material and remained of the view that the applicant had not sufficiently addressed all of the conditions of the registration test. I therefore did not provide the applicant's submissions, additional material or further additional material to the State for comment.

[20] On 19 June 2020, a letter addressed to the Registrar from Mr James Calyun was provided to me, which had been received by post at the Tribunal's Perth registry (**further unsolicited information**). The further unsolicited information stated that the writer had been excluded from the Darlot claim group, and sought information from the Tribunal as to how to make a native title determination application for the Bardu People. As the writer is named as a member of the applicant, I did not consider that he had been excluded from the Darlot claim group. I also did not consider that the further unsolicited information was relevant to the

registration test, and so I would not take it into account in making this decision. I therefore did not provide the further unsolicited information to the applicant for comment.

[21] This concluded the procedural fairness process.

Information considered

[22] I have considered the information in the application, the additional material and further additional material, as outlined above.[4]

[23] I have considered the State's submissions and the unsolicited information.[5]

[24] I have considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 25 March 2020 (**geospatial report**), a memo from Geospatial Services dated 31 March 2020 and information held in the Tribunal's geospatial database.[6]

[25] I have considered information held in the Register.[7]

[26] There is no information before me from searches of State or Commonwealth interest registers.[8]

[27] I note that the applicant has sought to 'adopt as submissions' different sections of the reasons for registration decisions made in relation to previous versions of the application by other delegates of the Registrar and by the President of the Tribunal in his reconsideration of the application in September 2018.[9] Although s 190A(3) requires me to have regard to information provided by the applicant, I consider that as an independent decision maker, I am not bound by previous decisions made in relation to previous versions of the application, and am unable to simply adopt their reasoning at particular conditions without independently considering whether each condition of the registration test is met in relation to the application currently before me.

Section 190C: conditions about procedures and other matters

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

[28] 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.[10] I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

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

[4] Section 190A(3)(a).
[5] Section 190A(3)(c).
[6] Ibid.
[7] Ibid.
[8] Section 190A(3)(b).
[9] Applicant's submissions [9], [18], [38], [46]; authorisation submissions [5].
[10] *Doepel* [16], [35]–[39].

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A, Schedule A, s 62 affidavits	Met – see reasons below
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 61(1)

[30] The table in s 61(1) identifies that a claimant native title determination application may only be made by:

> (1) a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

[31] As noted above, I understand that my assessment at this condition does not require me to undertake a merit assessment, but only to consider the adequacy of the description for ascertaining whether any particular person is a member of the identified claim group.[11] Schedule A provides a description of the claim group, and Part A and the s 62 affidavits state that the applicant was authorised by all members of the claim group to make the application. In my view, it does not appear that the application, on its face, has not been made by or on behalf of all members of the claim group. I am therefore satisfied that s 61(1) is met.

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

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B2	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment B1	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, Attachment I	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

Conclusion

[33] 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.

[11] Ibid [37].

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

[34] 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 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.

[35] According to the Tribunal's geospatial database, at the time of making this decision there is one application which overlaps part of the current application, which is WAD91/2019 Nyalpa Pirniku. This means that s 190C(3)(a) is met.

[36] According to the Register, the Nyalpa Pirniku application was accepted for registration and entered onto the Register on 15 May 2019. It was therefore not on the Register when the current application was made on 10 April 2018, and so s 190C(3)(b) is not met.

[37] This means that Nyalpa Pirniku application is not a 'previous application' for the purposes of s 190C(3). I therefore do not need to consider whether there are claimants in common between the Nyalpa Pirniku application and the current application.

Conclusion

[38] I am satisfied that no member of the claim group for the current application was also a member of the native title claim group for the identified previous application, and so s 190C(3) is met.

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

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

(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 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 claim group.

[40] Schedule R indicates that the application is not certified and so I understand that I must assess the application against the requirements of s 190C(4)(b).

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

[41] 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.

[42] 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 which, 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.

[43] The case law also confirms that s 190C(4)(b) requires consideration of whether the native title holders have authorised the applicant to make the application in accordance with s 251B.[12]

[44] 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.

[45] 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 information

[46] In order to be satisfied that the necessary authorisation has been given by the claim group, I must inquire through the material available to the Registrar, including the anthropological material.[13] The information before me relevant to this condition is found in:

(a) Schedule R to the application;

(b) The s 62 affidavits accompanying the application, which were also provided as part of the applicant's additional material;

(c) The affidavits of the applicant's legal representative, specifically:

1. meeting notice affidavit;
2. authorisation affidavit 1;
3. authorisation affidavit 2;
4. meeting register affidavit;

(d) The authorisation submissions;

(e) The authorisation meeting minutes;

(f) The following anthropological reports:

[12] *Wiri People* [26]–[36].
[13] *Doepel* [78]; *Strickland* [57].

1. Draper 2018 [B];
2. Draper 2019;
3. Corrigan 2020 [A];
4. Corrigan 2020 [B];
5. Corrigan 2020 [C]; and

(g) The unsolicited information.

[47] I note that the State's submissions did not address the requirements of s 190C(4).

Does the application satisfy s 190C(5)?

[48] Schedule R states that each member of the applicant is a member of the claim group and that they were authorised at a meeting of the claim group in Leonora on 21 February 2020 (**authorisation meeting**), using an agreed to and adopted decision making process of consensus following discussion, and by majority vote by show of hands in the event of disagreement.[14]

[49] 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.'[15] I therefore consider that the information contained in Schedule R is sufficient to satisfy both limbs of s 190C(5).

Does the application satisfy s 190C(4)(b)?

Is the applicant a member of the claim group?

[50] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group. As noted above, Schedule R contains such a statement. The s 62 affidavits from the applicant members each state that they believe all of the statements made in the application are true.[16] It follows that I am satisfied that the members of the applicant are all members of the claim group.

Is the applicant authorised to make the application by all the other persons in the claim group?

[51] Section 190C(4)(b) also requires that the applicant is authorised to make the application, by all the other members of the claim group. This requires me to identify the decision making process used by the claim group and how it was applied to authorise the applicant to make the application.[17] I am also required to consider the composition of the claim group and be satisfied 'that the claimants truly constitute a group'.[18] I will first set out the information before me which I consider relevant to these enquiries and then consider whether the requirements of s 190C(4)(b) are met.

[14] Schedule R (a)–(c).
[15] *Strickland* [57].
[16] Section 62 affidavits [4].
[17] *Noble* [16].
[18] *Risk* [60]–[62], *Wiri People* [28]–[36].

Information

Decision making process

[52] The s 62 affidavits state that the claim group agreed to and adopted a process of decision making to authorise the applicant.[19] This information is reiterated in Schedule R, as outlined above.

[53] Authorisation affidavit 1 states that at the authorisation meeting, the attendees unanimously passed resolutions confirming there is no traditional decision making process which the claim group must use in relation to authorising the applicant.[20]

[54] Draper 2018 [B] speaks to an earlier version of the application. It appears from this report, that the claim group has a decision making process under their traditional laws and customs which is used in relation to such matters as authorising the making of native title determination applications. From that report I understand the decision making authority 'falls upon the oldest person in a vigorous descent line from a local apical ancestor (most often a male)'.[21] The report concludes: 'there is no valid anthropological reason to doubt that the Darlot claim registration meeting decision making process was not valid in traditional cultural terms, or that it did not fall within the normative parameters of the Western Desert cultural system…'.[22]

[55] The authorisation meeting minutes provide that the attendees at the authorisation meeting passed resolutions confirming there is no traditional decision making process, and agreed to adopt the decision making process as set out in the s 62 affidavits and in authorisation affidavit 1.[23]

[56] Corrigan 2020 [C] reproduces the resolutions from the authorisation meeting and states that in the author's opinion, there is not a traditional decision making process which the claim group must follow.[24]

Notice of authorisation meeting

[57] The material provides that notice of the authorisation meeting was published in the West Australian and Kalgoorlie Miner newspapers on 22 January 2020.[25] Copies of the notice have been provided by the applicant.[26] The notice is titled 'Darlot Claim Group Authorisation Meeting (WAD142/2018)' and sets out the venue, date and time of the authorisation meeting.

[58] According to the notice, two successive meetings were scheduled. The first meeting was for 'the existing claim group' to consider, amongst other things, amendments to the claim group description (**first meeting**). The 'existing claim group' is described in the notice as 'those Aboriginal persons who are the descendants of:

(a) Telpha and her union with Arthur Cranbrook Ashwin;

[19] Thomson affidavit [19]–[22]; Bonner affidavit [8]–[13].
[20] Authorisation affidavit 1, [7], [10].
[21] Draper 2018 [B] [42].
[22] Ibid [43].
[23] Authorisation meeting minutes, 3–4, 16–17.
[24] Corrigan 2020 [C]
[25] Meeting notice affidavit [4]–[5].
[26] Ibid, annexures AB1, AB2, AB3.

(b) Lenny Ashwin (Ninardi);

(c) Daisy Cordella (Kugila);

(d) Inyarndi (Yinnardi); and

(e) Those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group'.[27]

[59] I understand from the notice that, if the amendments to the claim group description were authorised by the existing claim group, then the members of the amended claim group, as described in the notice, were invited to attend the second meeting to authorise the applicant, amongst other things (**second meeting**).

[60] Corrigan 2020 [A] provides that the author was engaged to undertake a desktop review of the anthropological research relating to the Darlot application and to provide a claim group description for the authorisation meeting.[28] The claim group description proposed by Corrigan for the authorisation meeting notice reads as follows:

> The Native Title Claim Group comprises those Aboriginal people who are recognised under traditional law and custom as having rights in some or all of the Claim Area on one or more of the following bases:
>
> (a) Biological and/or socially recognised descent from one or more of the owners, under traditional law and custom, of some or all of the Claim Area at the time of non-Aboriginal settlement;
>
> (b) their own or an ancestor's birth on the Claim Area;
>
> (c) their own or an ancestor's migration to and long association with the Claim Area; or
>
> (d) the holding of religious, sacred or ritual authority under traditional law and custom for one or more places on the Claim Area.
>
> **Any Aboriginal person who believes they fit any of the above description should arrange to be at this meeting should they wish to discuss their rights and interests further.**
>
> The descendants of the following ancestors are recognised under traditional law and custom as having rights in some or all of the Claim Area under categories (a) and (b): [list of ancestors].[29]

[61] This proposed description differs from that which appeared in the notice in that Corrigan's proposed description specifically invited 'any Aboriginal person' who believed they met one of the criteria for claim group membership to attend. With regard to this invitation, Corrigan states:

> I note that the notification of the proposed authorisation meeting will contain words to the effect that anyone who believes they have rights and interests in the claim area is welcome to attend and provide their understandings to the meeting. This has the effect of giving me confidence that persons in that category will be able to do precisely that. It is necessarily an artefact of the actual conduct of the meeting as to whether that effectively occurs.[30]

[62] In the meeting notice, the amended claim group is described as follows:

> 5. (a) Those Aboriginal people who are recognised under traditional law and custom as having rights in some or all of the Claim Area on one or more of the following bases:

[27] Ibid.
[28] Corrigan 2020 [A] [1]–[2].
[29] Ibid [19], emphasis added.
[30] Ibid [4].

(i) Biological and/or socially recognised descent from one or more of the owners, under traditional law and custom, of some or all of the Claim Area at the time of non-Aboriginal settlement;

(ii) their own or an ancestor's birth on the Claim Area;

(iii) their own or an ancestor's migration to and long association with the Claim Area; or

(iv) the holding of religious, sacred or ritual authority under traditional law and custom for one or more places on the Claim Area.

(b) The descendants of the following ancestors are recognised under traditional law and custom as having rights in some or all of the Claim Area under categories (i) or (ii) above:

i. **Matjika**–the mother of **Didardi** (aka **Darugadi**) and **Tjubung**, and grandmother of siblings Telpha aka Wonaton Ashwin and Jumbo Harris [descendant families include the Ashwin and Harris families];

ii. **Didardi** (aka **Darugadi**), **his wife Biddy and his other wives**–the parents of Telpha Ashwin, Kweelah, Tommy Geegu, Tommy Jones, Peter lnkie and Jilyu Fanny;

iii. **Billy and Mary Ann**–the parents of Daisy Cordella, Maggie (aka Wilgie), Julia aka Mundai, Amy aka Jinan Rex and Trilby aka Manuga Weeties and second wife Mary (mother of Annie, Maniwa and Winnie);

iv. **Ngoonjul** and his wife **lnyarndi**–the parents of Jimmy and Paddy Wheelbarrow, Alice (mother of Minnie Bubbamurra);

v. **Julia** (aka Bindinni), (the granddaughter of Ngoonjul and the mother of Sarah Brown and others);

vi. **Honeybee**–the mother of Frank Shepherd from Wongawol;

vii. **Mother of Ruby Shay, Lily**–[descendant families include Bingham];

viii. **Dididi and Yibadu**–parents of Spider and Minnie Narrier,

ix. **Wungal and Garudi** from Wongawol–the parents of Minne Green;

x. **Jenny**–the mother of Beaman (aka Charlie), Thadi, and Dinah Evans

xi. **Ruby**–the mother of Jessie Patterson;

xii. Siblings **Relia King**, **Aleck Barnard** and **Rita Thompson**–[descendant families include King, Barnard and Thompson];

xiii. Siblings **Ruby**–the mother of Genevieve Kilmurray–and Mary Anne Constable–the mother of Grace Regan nee Vernon;

xiv. Siblings **Andy Fisher**, **Fanny Wack Lloyd** and **Natha**–[descendant families include Redmond, Kelly and Scadden];

xv. **Rosie Jones** (aka Tjalajuti) (the mother of Alice);

xvi. Siblings **Nobby Nixon** and **Milibindi** (aka Alice)–the mother to Isobell and Ted Evans;

xvii. **Skipper Sandy** (aka Turada) and **Molly** (aka Beeku);

xviii. **Paddy Pjindarri** (aka Tjintarti) and Alice;

xix. **Willie Weeties**;

xx. **Hill siblings: Roly, Snowy, Maisie, Willie, Johnny, Matja/Maudie**;

xxi. **George Rex (Rix)**;

xxii. **Roger Clarke** (aka Roger Reid);

xxiii. **Tony Green**;

xxiv. **Dwyer siblings: Dinny and Vinegar**.[31]

[63] The notice includes a map of the application area, two contact numbers for enquiries and details of the travel assistance available to attendees.

[64] The amended claim group description in the notice differs from that which appears in Schedule A as follows:

(a) Mary Naringa appears on Schedule A but is not listed on the meeting notice;

(b) Rosie Jones, who was listed separately as ancestor (xv) on the meeting notice, is instead included as the daughter of Ngoonjul and Inyarndi in Schedule A;

(c) Grace Regan nee Vernon appears in the notice as the daughter of Mary Anne Constable but is not mentioned in Schedule A;

(d) The reference to Julia being the granddaughter of Ngoonjul appears in the notice but not in Schedule A.

Conduct of authorisation meeting

[65] The material provides that 86 people registered for and attended the first meeting and 117 people registered for and attended the second meeting.[32]

[66] Attendees were required to enter their details on a meeting register which recorded their name, address or telephone number, and 'Darlot apical'.[33] Approximately half the attendees at the first meeting identified a Darlot apical other than those named in the existing claim group description, such as Honey Bee, Willie Weeties, and Billy and Maryanne.[34]

[67] I understand from the affidavit material that the attendees at the first meeting 'unanimously' passed resolutions confirming there is no traditional decision making process which the claim group must use, and agreed to adopt the decision making process outlined above.[35] The authorisation meeting minutes provide that, these resolutions were passed 55:0 and 50:0 respectively, and any abstentions are not recorded.[36]

[68] Although heavily redacted, the authorisation meeting minutes provide that the claim group passed a resolution at the first meeting 55:0 to amend the claim group description to that which now appears in Schedule A.[37] The meeting minutes provide that a descendant of Jessie Patterson proposed an amendment to replace Ruby with Mary Naringa as the mother of Jessie Patterson, and to include Mary Naringa's other children – Ivy Wiluna and Grace Regan.[38] Whilst not evident from the meeting minutes, the authorisation submissions state that the other changes made to the claim group description at the authorisation meeting, which I have summarised above, were 'not substantive'.[39]

[31] Ibid, original emphasis.
[32] Authorisation affidavit 1 [6], [9];
[33] Meeting register affidavit, annexures AB6, AB7.
[34] Ibid, annexure AB6.
[35] Authorisation affidavit 1 [7].
[36] Authorisation meeting minutes, 3–4.
[37] Ibid, 7–8.
[38] Ibid, 6.
[39] Authorisation submissions [11].

[69] From the authorisation meeting minutes, I understand that the attendees at the second meeting passed the same resolutions with regards to the decision making process as were passed at the first meeting.[40] Although over 100 persons were present, these two resolutions are recorded as passing 57:0 and 54:0 respectively.[41] As the authorisation meeting minutes are heavily redacted, only one other resolution of the second meeting is before me, which states that if the Barnes family 'wish to be accepted in the Darlot claim group description they need to provide their genealogical evidence to the anthropologist for the Darlot claim'. This resolution passed 56:2 and if there were any abstentions, these have not been recorded.[42] The meeting minutes record that a descendant of Snowy Barnes stated that 'no anthropologist has spoken to her family and said Snowy Barnes needs to be included in the claim group description'.[43] The meeting minutes further record that another attendee 'said that Snowy Barnes was part of the Darlot claim area and the boundaries of the claim needed to be amended to exclude the overlap with the Nyalpa Pirniku claim'.[44] I understand this information has been included in response to the unsolicited information, which was provided to the Registrar 'on behalf of the Barnes family'.

[70] The s 62 affidavits state each applicant member was authorised in accordance with the agreed to and adopted decision making process.[45] The material does not provide any further information about the relevant resolution/s passed to authorise the applicant to make the application. If this information appears in the authorisation meeting minutes, then it has been redacted from the version that the applicant has provided to me.

Composition of the claim group

[71] As set out above, the meeting notice indicates that the claim group description has been altered from one containing three apical ancestors and one apical pair, to a list containing more than 40 ancestors with reference to numerous individual descendants and descendant families.

[72] The following ancestors are listed in Corrigan's description but do not appear in the notice:

(a) Wunga nulga aka Lobo the husband of Trailer;

(b) Marlibindi;

(c) Queenie Swan, wife of Spider Narrier;

(d) Lottie; and

(e) Dolly Hill/ Ward.[46]

[73] There are other differences, for example Corrigan's description lists Darugadi and Didardi as two separate individuals, whereas the meeting notice lists 'Didardi (aka Darugadi)'.[47] In Corrigan's description, Didardi and Biddy are described as 'the alternative parents of Telpha',

[40] Authorisation meeting minutes, 17.
[41] Ibid.
[42] Ibid, 16.
[43] Meeting notice affidavit, 15.
[44] Ibid.
[45] Section 62 affidavits [6]–[7].
[46] Corrigan 2020 [A] [19]; meeting notice affidavit, annexures AB1, AB2, AB3.
[47] Ibid.

which has been removed from the notice. Corrigan's description includes references to 21 different 'descendant families', however in the meeting notice, most of these have been removed.[48]

[74] No explanation has been provided by the applicant as to why the claim group description proposed by Corrigan was not used for the meeting notice or on what basis those changes were made prior to the publication of the notice.

[75] The concerns raised in the unsolicited information include that the desktop research for the claim group description was 'inadequate' and that '[f]amily names were added then deleted on the amended claim by the Service Provider'.[49] As noted above, the unsolicited information was provided on behalf of the Barnes family, and a resolution of the second meeting stated that if that family wished to be included in the claim group description, they would need to provide genealogical information to the anthropologist.

[76] With regard to the inclusion of the Barnes family, Corrigan 2020 [C] provides that Snowy Barnes and his mother 'Biddy (Bayura, Biyunga, Biyuwara)' are recorded in previous anthropological material as being 'from Minnie Creek and grew up in the Laverton, Minnie Creek area'.[50] Corrigan concludes that there is 'nothing currently preventing [the Barnes family] from pursuing their proposed interests in the Darlot claim area, on the basis of their connection to Mr Snowy Barnes, and providing further information which may confirm that'.[51]

Consideration

[77] I understand that the task at s 190C(4) differs from that at s 190C(2). Section 190C(2) only requires me to be satisfied that the application contains the details required by ss 61-2. The difference between s 190C(2) and s 190C(4) was summarised in *Wiri People*, where Collier J held:

> In relation to s 190C(2), the Registrar must be satisfied as to the *contents of the application* and that it contains the information required by ss 61 and 62… whereas in relation to section 190C(4) the Registrar must be satisfied as to the *identity* of the claimed native title holders including the applicant.[52]

[78] In *Harrington-Smith*, Lindgren J held:

> [T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4).[53]

[79] My task here also differs from that at s 190B(3), where I am not to consider the correctness of the claim group description or whether there is a 'cogent explanation' of the basis upon which individuals qualify for membership of the claim group.[54] In contrast, the Court has held that s 190C(4)(b) requires consideration of the composition of the claim group to ascertain whether the authorisation of the applicant has come from all the persons in the claim group,

[48] Ibid.
[49] Unsolicited information, 1.
[50] Corrigan 2020 [C] [35]–[39].
[51] Ibid [43].
[52] *Wiri People* [29], original emphasis.
[53] *Harrington-Smith* [1216].
[54] *Doepel* [37], *Gudjala 2007* [28]–[34].

as defined in s 61(1), as being the persons who hold common or group rights and interests in the application area. In *Risk*, O'Loughlin J held:

> A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute a group.[55]

[80] I understand from the case law that while the claim group description may be sufficient for the purposes of s 190B(3) (as I discuss below), this does not relieve me of my task at s 190C(4)(b) of ascertaining whether the applicant has been authorised by the persons who hold common or group rights and interests in the application area.

[81] At the outset of this consideration, I note it is not my task to embark upon a fact finding exercise, however if there is uncertainty as to the claim group composition, this affects my ability to be satisfied that the application meets the requirements of s 190C(4)(b) (as well as ss 190B(5)–(7), as discussed further below).[56] I will consider the decision making process, meeting notice and conduct of the authorisation meeting before turning to how these factors may affect my consideration of the claim group composition and whether all the members of the claim group have authorised the applicant to make the application.

Decision making process

[82] According to s 251B(a), if a traditional decision making process for such matters exists, a claim group must use it to authorise the applicant to make the application. In my view, I am unable to resolve the inconsistency in the information before me to identify whether or not the claim group has a mandatory traditional decision making process. If the claim group has a mandatory decision making process under its traditional laws and customs, whereby the eldest male holds the position of the ultimate decision maker, as indicated in Draper 2018 [B], then this process clearly has not been followed in relation to the authorisation of the applicant to make the application. It follows that s 190C(4)(b) would not be met.

[83] However if there is no traditional process, as indicated in Corrigan 2020 [C] and in other material which the applicant has provided, then I must consider whether the applicant has been authorised using an agreed to and adopted decision making process in accordance with s 251B(b). This requires close consideration of the meeting notice and conduct to ascertain whether all members of the claim group had every reasonable opportunity to authorise the applicant to make the application.[57]

Meeting notice

[84] I note that the meeting notice contains no invitation such as that proposed by Corrigan, to '[a]ny Aboriginal person who believes they fit any of the above description should arrange to be at this meeting should they wish to discuss their rights and interests further'.[58] As the 'above description' set out the four different avenues for claim group membership, Corrigan's invitation was, in my view, broad and inclusive. I understand that it was the inclusion of that broad invitation which gave Corrigan 'confidence' in his proposed claim group description,

[55] *Risk* [60].
[56] *Doepel* [47].
[57] *Lawson* [25].
[58] Corrigan 2020 [A] [19].

noting that he was otherwise required to draft the description under particular time constraints and with limited resources.[59]

[85] No explanation has been provided as to why the amended claim group description proposed by Corrigan was altered prior to the publication of the meeting notice, and it appears to me that the removal of the broad invitation may have had the consequence, whether intended or not, of excluding people from the authorisation meeting.

[86] There has also been no explanation provided as to why a number of the apical ancestors and descendant families identified by Corrigan and included in his proposed claim group description were not included in the meeting notice. In my view, this may also have had the consequence of excluding people from the authorisation meeting.

[87] I understand from the case law that the appropriate test is whether the meeting notice offered all the members of the claim group a reasonable opportunity to decide whether to attend the authorisation meeting.[60] In particular:

> ... The notice must be sufficient to enable the persons to whom it is addressed, namely members or potential members of the native title claim group, to judge for themselves whether to attend the meeting and vote for or against a proposal or whether to leave the matter to be determined by the majority who do attend and vote at the meeting.[61]

[88] In this regard, I consider the invitation to the second meeting in the meeting notice is somewhat confusing about whom it is addressed, as under the heading 'Who should attend the authorisation meeting?' it states '[d]epending on the outcome of 4 above, the Aboriginal people described in 4(a) and 4(b)'. '4 above' refers to one of the purposes of the first meeting, which was to consider whether to amend the claim group description. There is no 4(a) or 4(b) in the notice, and I understand those references should be to paragraphs 5(a) and 5(b), which contain the proposed claim group description.

Conduct of authorisation meeting

[89] I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward v Northern Territory*, the substance of which must be addressed:

> Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? [62]

[90] I have considered the information before me with these questions in mind. In my view, there appears to be some inconsistencies in the information about who attended the authorisation meeting and voted on the resolutions. The meeting register shows that 86 people attended the first meeting and 117 people attended the second meeting, however according to the minutes, each of the resolutions at both meeting were passed by only 50–55 people, with

[59] Ibid [4], [18].
[60] *Burragubba* [31].
[61] *Weribone* [40], followed in *Burragubba* [30].
[62] *Ward v Northern Territory* [25]–[26].

either no votes, or in one case, two votes, recorded against each resolution. No explanation has been provided as to why a large number of the meeting attendees did not vote on the resolutions, which means it is difficult to be satisfied that the attendees were afforded a reasonable opportunity to participate.

[91] The meeting register also indicates that a number of people attended the first meeting who did not identify as a descendant of one of the five apical ancestors named in the previous claim group description. It may be that those people claim descent from a number of Darlot apical ancestors including one of the original five, however no information has been provided about the control of the voting proceedings, and this adds to the overall uncertainty about the applicant's authorisation.

[92] As noted above, the authorisation meeting minutes which the applicant has provided are heavily redacted and do not contain any details about the resolution by which the applicant was authorised to make the application. Without such information, it is more difficult for me to be satisfied that the applicant is authorised by the claim group to make the application.

Composition of the claim group

[93] In *Quall v NTR,* Mansfield J discussed the requirements of s 190C(4)(b) in circumstances where the delegate was not satisfied that an application was made on behalf of a properly described or constituted claim group under s 61(1). His Honour held that '[s]ection 251B makes it clear that authorisation must be given by all the persons in the native title claim group in accordance with the process of decision making under traditional laws and customs, unless there is no such process. It followed, from the delegate's view that the claim group was not properly described or constituted, that the applicant was not authorised on behalf of all the persons in the native title claim group'.[63]

[94] As discussed above, the material before me does not address the question of why Corrigan's proposed claim group description or broad invitation was not used in the meeting notice. However the applicant's further additional material has addressed to some degree the replacement of Ruby with Mary Naringa and the other amendments made to the claim group description at the authorisation meeting, despite the concerns about the conduct of the authorisation meeting.

[95] With respect to the exclusion of Snowy Barnes from the claim group description, I note Corrigan has identified that his mother was 'Biddy (Bayura, Biyunga, Biyuwara)'.[64] In my view, this person appears to be the apical ancestor 'Biyuwara (aka Biddy Biyung)' named in the overlapping claim of WAD91/2019 Nyalpa Pirniku. The meeting minutes show that the attendees passed a resolution for the Barnes family to prove their membership to the claim group by providing genealogical material to the anthropologist. However as only 58 of the 117 present at the authorisation meeting voted on that resolution, (which passed 56:2), the exclusion of Snowy Barnes and/or Biddy (Bayura, Biyunga, Biyuwara) creates further uncertainty as to the composition of the claim group. I also note that an ancestor named

[63] *Quall v NTR* [35].
[64] Corrigan 2020 [C], [36].

Biddy is included in the meeting notice, however it is not clear whether this person is 'Biddy (Bayura, Biyunga, Biyuwara)'.[65]

[96] Finally, the applicant has put before me a large volume of anthropological material, to which I must have regard under s 190A(3). That material indicates that there may be additional people who hold rights in the application area on the basis of their descent from people who are described as being associated with the application area at the time of settlement, such as Murni, the mother of Telpha Ashwin.[66] It may be that her descendants are otherwise captured in the claim group description, but her omission, when many other predecessors mentioned in the anthropological material have been included in the claim group description, raises the possibility that particular families or persons have been excluded.

[97] In light of all of the above issues, I am unable to be satisfied that the claim group is properly described or constituted for the purposes of s 190C(4)(b).

Authorisation of the applicant by all the members of the claim group

[98] Justice Nicholson in *Evans* found that the requirements of s 190C(4)(b) were not met in circumstances where there was a 'genuine inconsistency in the information provided' to the delegate.[67] With regard to this application, I consider I am faced with several inconsistencies, including:

(a) Whether the claim group was required to use a traditional decision making process under s 251B(a) is complicated by the provision of the Draper 2018 [B] report which states that the claim group has a traditional process;[68]

(b) There is no explanation as to why the meeting notice omitted the broad invitation, some of the ancestors and many of the descendant families identified in Corrigan's proposed claim group description, which may have resulted in the exclusion of particular people including the Barnes family;

(c) More people appear to have attended the authorisation meeting than are recorded as voting on the resolutions and it is not clear that all the attendees had an opportunity to participate; and

(d) There is very limited information before me about the resolution of the meeting attendees at the second meeting to authorise the applicant to make the application.

[99] In light of the above inconsistencies, I am unable to be satisfied that the applicant has been authorised by all other members of the claim group. There is simply too much uncertainty at each step of my consideration for me to conclude that all the members of the claim group have authorised the applicant to make the application.

[100] I note the comments of French J in *Bolton*:

> [I]t is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The

[65] Meeting notice affidavit, annexures AB1, AB2, AB3.
[66] Draper 2016 [75].
[67] *Evans* [54].
[68] Applicant's submissions [6].

> authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title…[69]

[101] Noting the central importance of the authority of the claim group to the conduct of native title determination applications, I do not consider that I can be satisfied that the applicant is authorised by all the members of the claim group to make the application.

Conclusion

[102] I am satisfied that s 190C(5) is met. However, I am not satisfied that the applicant is authorised by all the other members of the claim group. This means that s 190C(4)(b) is not met.

Section 190B: conditions about merits of the claim

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

[103] 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.

[104] 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.[70]

Does the information about the external boundary meet this condition?

[105] Paragraph 1 of Schedule B states that the external boundary of the application area is shown on the map in Attachment B1 and is described in Attachment B2.

[106] Attachment B1 contains a map titled 'WAD142/2018 Darlot (WC2018/005)'. The map is dated 21 February 2020 and includes:

(a) The application area depicted with bold blue outline and blue hatched infill;

(b) Land tenure as identified in the legend and labelled as appropriate;

(c) Townsite boundaries shown with a bold black dashed outline;

(d) Scalebar, coordinate grid (GDA20)[71] and locality map; and

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

[107] Under the heading 'External Boundary Description', Attachment B2 describes the application area by metes and bounds, referencing boundaries of lots on deposited plans, pastoral leases,

[69] *Bolton* [43].
[70] *Doepel* [122].
[71] Geocentric Datum of Australia 2020.

reserves, roads, townsites, native title determinations and applications, and coordinate points identified by latitude and longitude expressed to six decimal places (GDA94).[72]

[108] The geospatial report states that map and external boundary description are consistent and identify the application area with reasonable certainty. I have considered the external boundary description and the map and agree with that assessment.

Does the information about excluded areas meet this condition?

[109] Paragraphs 2 of Schedule B states that particular areas within the external boundaries are excluded from the application area, such as areas where native title has been wholly extinguished.

[110] In relation to general exclusion clauses such as those found in Schedule B, French J has 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'.[73] Following this reasoning, I am satisfied the areas affected by the general exclusion clauses can be ascertained at the appropriate time.

[111] Under the heading 'Exclusions', Attachment B2 states that all the land and waters within 'Area 3' and 'Area 4' of the native title determination application WAD6064/1998 Wutha (WC1999/010) is excluded from the application. These areas are further described by metes and bounds, referencing pastoral lease boundaries and coordinate points identified by latitude and longitude to six decimal places.

[112] Attachment B2 also states that the application excludes any area subject to:

(a) WAD91/2019 Nyalpa Pirniku (WC2019/002), as accepted for registration on 15 May 2019;

(b) WAD597/2018 Tjalkadjara (WC2018/025), as filed in the Court on 17 December 2018;

(c) WAD186/2017 Maduwongga (WC2017/001), as accepted for registration on 3 August 2017;

(d) WAD6064/1998 Wutha (WC1999/010), as accepted for registration on 13 January 2017; and

(e) WAD225/2018 Kultju (WCD2019/012), as determined by the Court on 30 October 2019.

[113] Geospatial Services advises in the memo of 31 March 2020, that the external boundary of this application overlaps part of WAD91/2019 Nyalpa Pirniku (WC2019/002) application area, specifically in the following part of the description:

> *… to a north eastern corner of Nambi Pastoral Lease (N049822); then generally southerly along the eastern boundaries of that pastoral lease to its easternmost south eastern corner; then south westerly to the northern corner of Lot 21 on Deposited Plan 220928 (Melita Pastoral Lease (N050241)); then southerly along the western boundary of that lot to the northern most north eastern corner of Lot 55 on Deposited Plan 238568 (Yerilla Pastoral Lease (N049930)); then southerly along the eastern boundaries of that lot to a north eastern corner of Lot 44 on Deposited Plan 220928 (Melita Pastoral Lease (N050241)); then southerly and westerly along boundaries of that lot to its southernmost south*

[72] Geocentric Datum of Australia 1994.
[73] *Strickland* [55].

western corner; then westerly to an eastern boundary of Jeedamya Pastoral Lease (N050457) at Latitude 29.464336° South; then generally southerly and easterly along boundaries of that pastoral lease to intersect the northern boundary of Native Title Determination Application WAD186/2017 Maduwongga (WC2017/001) (being a line joining Longitude 121.442881° East, Latitude 29.713428° South and Longitude 121.378008° East, Latitude 29.724636° South); then generally westerly along the northern boundary of that native title determination application, passing through the following coordinate points:

Longitude (East)	***Latitude (South)***
121.378008	*29.724636*
121.194433	*29.748483*
121.055603	*29.749014*

Then again westerly along that native title determination application towards Longitude 120.634694° East, Latitude 29.757139° South to its intersection with Longitude 121.044584° East; then north westerly to the southernmost corner of the western severance of the Menzies Townsite boundary.

[114] In my view, the description of that part of the external boundary which overlaps Nyalpa Pirniku is comprehensive and detailed. I have considered it against the map in Attachment B1 and I am of the view that they are consistent and enable identification of that part of the external boundary with reasonable certainty. I note that Schedule H to the application states that the applicant is aware that the Nyalpa Pirniku application covers part of the application area. Considering the external boundary description, map and Schedule H together, it appears that the application area includes the area overlapped by Nyalpa Pirniku, contrary to the specific exclusion of that claim found in Attachment B2.

[115] I understand that the test in s 190B(2) is one of 'reasonable certainty', and I consider that the external boundary description, map and the information in Schedule H, read together, provides that level of certainty with regard to the overlapping area of the Nyalpa Pirniku claim. I also note the guidance of French J, that '[t]he requirements of the registration test are stringent. It is not necessary to elevate them to the impossible'.[74] In my view, taking into account the other information in the application, the inconsistency which has arisen through the inclusion of Nyalpa Pirniku in the list of specific exclusions in Attachment B2, does not prevent the application area from being identifiable with reasonable certainty.

[116] I consider that the remainder of the specific exclusions in Attachment B2 are clear and do not affect the ability to identify the application area with reasonable certainty.

Conclusion

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

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

[118] 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

[74] *Strickland* [55].

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

[119] As discussed above at s 190C(4), I am not required or permitted to be satisfied about the correctness of the description at this condition.[75] 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'.[76] My consideration at this condition is also limited to information in the application.[77]

[120] Schedule A states:

> The Claim is brought on behalf of the Darlot claim group comprising:
>
> (a) Those Aboriginal people who are recognised under traditional law and custom as having rights in some or all of the Claim Area on one or more of the following bases:
>
> (i) Biological and/or socially recognised descent from one or more of the owners, under traditional law and custom, of some or all of the Claim Area at the time of non-Aboriginal settlement;
>
> (ii) their own or an ancestor's birth on the Claim Area;
>
> (iii) their own or an ancestor's migration to and long association with the Claim Area; or
>
> (iv) the holding of religious, sacred or ritual authority under traditional law and custom for one or more places on the Claim Area.
>
> (b) The descendants of the following ancestors are recognised under traditional law and custom as having rights in some or all of the Claim Area under categories (i) or (ii) above: [list of apical ancestors, apical pairs and apical siblings, some with reference to their immediate descendants and/or families of the current claim group].

[121] It follows from the description that s 190B(3)(b) is applicable. I am therefore required to be satisfied that the persons in the claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

[122] 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'.[78]

[123] From the description in Schedule A, I understand to qualify for membership of the claim group an individual must meet one of the criteria in paragraph (a). Those criteria state that membership may be by descent, one's own birth or birth of an ancestor, long association or an ancestor's long association with the application area, or having religious, sacred or ritual authority for one or more places within it. Paragraph (b) specifies that the list of ancestors are the people from whom descent or 'ancestor's birth' on the application area can be claimed. From the opening sentences of paragraphs (a) and (b), I understand that recognition under the traditional laws and customs of the claim group operates as a qualifier on all the options for membership.

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[75] *Wakaman* [34].
[76] Ibid.
[77] *Doepel* [16].
[78] *Gudjala 2007* [34].

Descent

[124] I understand that the first option for membership is to be a descendant of one of the ancestors named in paragraph (b). 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).[79] I consider that requiring a person to show descent from an identified ancestor provides a clear starting point to commence an inquiry about whether a person is a member of the claim group. I consider that factual enquiries would lead to the identification of the people who meet this criterion.

[125] From the wording of paragraph (a)(i) of Schedule A, I understand 'socially-recognised' descendants are members of the claim group through application of the group's traditional laws and customs. I consider it is by that 'set of rules or principles' that it could be ascertained whether an individual is a socially-recognised descendant.[80]

Birth or birth of an ancestor

[126] In my view, the second option for membership in fact comprises of two options – one's own birth, or the birth of an ancestor in the application area. Describing a claim group with reference to birth in an area is a method which has been previously accepted by the Court.[81] I understand from paragraph (b) that the named apical ancestors were born on the application area and that the descendants of those ancestors can therefore meet this criterion. I am therefore of the view that with some factual enquiry it will be possible to identify the persons who meet either of the 'birth' options for claim group membership.

Long association or long association of an ancestor

[127] The third option for membership similarly comprises of two options – one's own migration to, and long association with, the application area, or that of an ancestor. Describing a claim group with reference to long traditional association is also a method which has been accepted by the Court, and for this option I note in particular the reference in paragraph (a) to the claim group's traditional laws and customs.[82] I consider that with reference to the traditional laws and customs and some factual enquiries it will be possible to ascertain the persons who meet either of the 'long association' options for claim group membership.

Religious, sacred or ritual authority

[128] The fourth option for membership is holding religious, sacred or ritual authority under traditional laws and customs for one or more places in the application area. As with the socially-recognised descent and long association options, I consider that the claim group's traditional laws and customs would provide the principles through which it could be ascertained whether a person meets the requirements of this membership option.[83] I consider that through reference to the traditional laws and customs, factual enquiries to other members of the claim group and to the individuals in question, the persons who hold

[79] *WA v NTR* [67].
[80] *Ward v Registrar* [25].
[81] *De Rose* [926].
[82] *De Rose* [897], Schedule 3 of *Tjungarrayi 2016* and *Tjungarrayi 2017*.
[83] *Ward v Registrar* [25].

religious, sacred or ritual authority could be ascertained.[84] I also note the Court has previously accepted forms of religious, sacred or ritual authority as a method of identifying members of a claim group.[85]

Recognition

[129] As noted above, I understand that recognition is a qualifier to all the membership options, considering its placement at the beginning of paragraphs (a) and (b) of the claim group description in Schedule A. The Court has previously held that membership of a claim group is based on group acceptance.[86] Schedule F states that the claim group have a connection to the land of the application area and that their traditional laws and customs give rise to native title rights and interests.[87] I therefore understand that a connection to the land enables other members of the claim group to recognise whether a person is a member of the claim group, in addition to meeting the requirements of the person's relevant membership option. In my view, through factual enquiries to the other members of the claim group, it would be possible to ascertain whether a person is recognised as a member under the traditional laws and customs. In reaching this view, I have also considered the judicial guidance that it is appropriate to construe the requirements of the Native Title Act beneficially.[88]

Conclusion

[130] 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

[131] 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 are 'native title rights and interests' in accordance with s 223, as I understand that is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis. I note that my consideration of this condition is confined to information found in the application.[89]

Does the description of native title rights and interests meet this condition?

Exclusive possession

[132] From the description in paragraph 1 of Schedule E, I understand that exclusive possession is claimed in areas within the application area where there has been no prior extinguishment, or where any such extinguishment must be disregarded, such as areas where s 238 applies. I understand that a broad claim to exclusive possession such as this does not offend s 190B(4).[90]

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[84] Ibid.
[85] *De Rose* [926]–[928], Schedule 3 of *Tjungarrayi 2016* and *Tjungarrayi 2017*.
[86] *Aplin* [256]–[261].
[87] Schedule F [1], [5].
[88] *Kanak* [73].
[89] *Doepel* [16].
[90] *Strickland* [60].

Non-exclusive rights

[133] From the description in paragraph 2 of Schedule E, I understand that the listed non-exclusive rights are claimed in areas where exclusive possession cannot be claimed. The non-exclusive rights form an exhaustive list, and in my view there is no inherent or explicit contradiction within the description.[91]

Qualifications

[134] Schedule E also describes the qualifications on the claimed rights, particularly that they are subject to the laws of Western Australia and the Commonwealth, and to the rights validly conferred upon persons pursuant to those laws. Schedule E also states that the listed rights and interests are held in accordance with the traditional laws and customs of the claim group.

Conclusion

[135] 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

[136] To meet s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must 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.

[137] In *Gudjala 2007*, Dowsett J was of the view that the reference in s 190B(5) to the factual basis upon which it is asserted that the claimed native title rights and interests exist 'is clearly a reference to the existence of rights vested in the claim group'.[92] In that matter his Honour held:

> …it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests).[93]

[138] Following *Gudjala 2007,* I understand that I must be satisfied that the alleged facts support the claim that the identified claim group in Schedule A holds the identified rights and interests in the application area. As discussed above at s 190C(4), I consider that the information before me raises uncertainties about the composition of the claim group.

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[91] *Doepel* [123].
[92] *Gudjala 2007* [39].
[93] Ibid (emphasis added).

[139] The resulting uncertainty is such that it is not possible for me to be satisfied that the factual basis upon which it is asserted that the claimed native title rights and interests exist. As I am uncertain of the composition of the claim group, I am limited in my ability to make an assessment about whether or not the factual basis is sufficient to support the assertion that the claim group is entitled to the claimed native title rights and interests. That the claim group is not sufficiently identified carries over into the consideration required at each of the three assertions of s 190B(5), which I will discuss below.

[140] Justice French has commented that:

> …the 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.[94]

[141] While s 190A(3)(a) requires me to have regard to information provided by the applicant, the nature of the applicant's additional material, much of which has been created for other applications entirely, has required me to search within the material for information relevant to this application. In my view, in addition to the issues with the claim group description, the absence of factual basis material which speaks directly to this claim group and this application area has consequences for the application's ability to meet s 190B(5).

Section 190B(5)(a)

[142] To meet s 190B(5)(a), the factual basis must be sufficient to support the assertion that the claim group have, and its predecessors had, an association with the application area. A primary consideration in this assessment is, therefore, who comprises the claim group? As discussed above at s 190C(4), the composition of the claim group is uncertain. This means it is difficult for me to proceed with the assessment at s 190B(5)(a) in order to be satisfied that the factual basis is sufficient to support an association between the claim group, as described in Schedule A, and the application area at sovereignty and since that time. There is information before me about people who may have been associated with the application area and/or the surrounding region at the time of settlement, who have not been included in the claim group description, such as Murni (the mother of Telpha), Biddy (aka Bayura, Biyunga, Biyuwara) and Snowy Barnes.[95]

[143] Even if the issues with the claim group description were overcome, to meet the requirements of s 190B(5)(a), the factual basis must be sufficient to show:

(a) the claim group presently has an association with the application area, and the claim group's predecessors have had an association with the application area since sovereignty or European settlement;[96]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[97] 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'.[98]

[94] *Martin* [23].
[95] Draper 2016 [75]; Corrigan 2020 [C] [39]–[41].
[96] *Gudjala 2007* [52].
[97] Ibid.

[144] The applicant has asked that I have regard to anthropological reports and witness statements from the WAD6064/1998 Wutha application, but states that the judgment in *Wutha* 'is of limited relevance to the Darlot claim as amended'.[99] In my view, it would follow that other material from that claim would also have limited relevance, as it speaks to a different application area and a differently-composed native title claim group. However, as noted above, I must have regard to the material provided by the applicant.[100]

[145] For the purposes of s 190B(5)(a), it is difficult to extract from the material sufficient information which supports the current claim. Draper 2016 understandably focusses on the association the apical ancestors in the Wutha claim had with the Wutha application area.[101] I understand that at the time Draper 2016 was written, the Wutha application named three apical ancestors and one apical pair. From information in the Tribunal's geospatial database, I also understand that the area covered by the Wutha application and described in Draper 2016, does not overlap the current application area. Despite these difficulties, I have identified some information in Draper 2016 about some of the apical ancestors who are named in this application, and their association with parts of this application area, for example:

> Billy and Mary-Ann are recorded as being born at Darlot... [they] had two daughters: Julia and Daisy Cordella. Daisy Cordella was born about 1909 in Darlot. Daisy had two daughters of her own, Myrtle Brennan and Luxie Hogarth. Billy and Mary-Ann's sister are recorded as parents of Trilby, Amy and Winnie Cordella.[102]

[146] I note the above information largely reflects information in paragraph (b)(ii) of Schedule A about this ancestral line. In my view, such examples are not sufficient to support the assertion at s 190B(5)(a), as they do not speak to the nature of the association these claimants have had with the Darlot area (in the north of the application area), since the birth of Daisy Cordella there in 1909. It is not surprising that the anthropological reports for the Wutha application did not focus on areas outside of the area of that claim, which demonstrates why the Wutha reports have limited relevance to the current application.

[147] Another example of the problems which arise in relying on the factual basis material from a different application lies in the requirement that the claim group has an association with the application area as a whole.[103] From the material, I understand that some claim group members have or have had associations with parts of the current application area, for example Claimant 1 states that his father was 'from around Darlot' and describes his own association as a teenager with Weebo station.[104] I can see from the map in Attachment B1 that Weebo station lies in the northern part of the application area. However, there is very limited information about the area covered by the long 'tail' of the application area, which extends nearly 200 kilometres to the west, crossing the southern part of Lake Barlee. I have located few references to that part of the application area in the material. Draper 2016 and Draper 2018 [A] provide that apical ancestor Sarah Brown travelled through Windsor Station,

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[98] *Martin* [26]; *Corunna* [39], [45].
[99] Applicant submissions [12].
[100] Section 190A(3)(a).
[101] Draper 2016 [5.3.1]–[5.3.5].
[102] Ibid [167], citations omitted.
[103] *Gudjala 2007* [52].
[104] Claimant 1 Witness Statement [20].

Sandstone and Cashmere Station to Lake Barlee, following rockholes.[105] Besides Lake Barlee, the places referenced in her travels appear to lie outside the application area. Other brief references indicate that there is a men's-only site at the north east corner of Lake Barlee, which again, appears to lie outside of the application area.[106] There also appears to be no information addressing the claim group's association with the remainder of the 'tail', which extends approximately 90 kilometres beyond Lake Barlee towards the north west.

[148] I otherwise note that there are few examples of the claim group's association south of Leonora, which lies in the centre of the application area. Draper 2018 [A] and Claimant 1 briefly mention dreaming sites located nearby to Menzies.[107] One claimant, in evidence given in the *Koara* proceedings in 2002, stated that she was living in Menzies but 'her country' is Murrin Murrin and Leonora.[108] Another claimant states:

> I do not know the names of the country to east or south of Leonora. I just refer to the south as Badimaya, on my mother's side. Because her country goes right down to Menzies.[109]

[149] Section 190B(5)(a) requires information about the association of the claim group as a whole has with the application area. In *Gudjala 2007*, Dowsett J held that the information from two claimants was insufficient for s 190B(5)(a), as it addressed only their own association and that of their predecessors, rather than that of the whole claim group.[110] In my view, the reports and statements for *Wutha* and *Koara* proceedings and reports for the earlier versions of this application are similarly deficient, as they describe the association of different, and seemingly smaller claim groups, and are not directed to the area covered by this application.[111]

[150] The uncertainty surrounding the claim group composition means it is difficult to ascertain whose association is relevant to my consideration at this condition. Separate to the problems raised by this uncertainty, and having had regard to the information before me, I consider the factual basis is insufficient to support an assertion that the claim group, as described in Schedule A, has had an association with the whole of the application area since settlement. This means that s 190B(5)(a) is not met.

Section 190B(5)(b)

[151] Without certainty as to the claim group composition, it is difficult for me to proceed with my consideration at s 190B(5)(b) as to whether the claim group observes traditional laws and customs which give rise to native title rights and interests in the application area. I understand that regard must also be had to the definition of 'native title rights and interests' in s 223(1)(a), being those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders.

[152] 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

[105] Draper 2016 [193], Draper 2018 [A] [139].
[106] Draper 2016 [377], [659]; Draper 2018 [A] [128].
[107] Draper 2018 [A] [141]–[145], Claimant 1 Witness Statement [16].
[108] Claimant 11 Statement of Evidence [687], [726].
[109] Claimant 10 Statement of Evidence [162].
[110] *Gudjala 2007* [52], which was not criticised by the Full Court on appeal.
[111] Draper 2018 [A] [28].

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.[112]

[153] 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.[113]

[154] In *Gudjala 2009*, Dowsett J held that if descent from named ancestors is the basis of membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.[114]

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

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

(b) the continued observance of normative rules by the successive generations of the claim group, such that the normative rules can be described as 'traditional laws and customs'.

[156] In my view, the factual basis material provided by the applicant presents similar difficulties for my consideration of s 190B(5)(b) as it does for s 190B(5)(a), discussed above, in that it does not speak directly to either the claim group or the application area for this claim. Furthermore, the information provided about the laws and customs of the claim group are not, in my view, sufficient to support the assertion at s 190B(5)(b). For example, with regard to prohibitions on eating particular foods, Draper 2018 [A] states that '[an] example of traditional law and culture as a basis for the control of food resources is the instruction that food should be avoided by particular people'. The author sites two claimants, one who recalls she was not allowed to eat porcupine or echidna as a child, and another who states that 'Mum taught me about what we could and could not eat'.[115]

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[112] *Yorta Yorta* [46]–[47], emphasis added.
[113] *Warrie* [105], [107], emphasis added.
[114] *Gudjala 2009* [40].
[115] Draper 2018 [A] [363]–[364].

[157] With regard to seeking permission to access particular places, Draper 2018 [A] states:

> The embedding of Thurkur spiritual power in the country by the travelling creation ancestors who shaped the land means that the country is potentially dangerous for strangers who are not guests of the traditional custodians.[116]

[158] Following this statement the author has extracted various testimonies from claimants from the *Wutha* proceedings, such as:

> *Our parents or family would tell us, when we were playing around, to stay away from certain places. We did not question them, and simply obeyed… When I was younger we were not allowed to swim in Malcolm Dam* [in Leonora] *unless we had our mother's permission, due to the snake there. My mother used to throw water in and talk in language. That was to tell the snake that we were visitors.* [117]

> *As I was growing up, I was not taught anything about seeking permission to hunt or camp in country around Leonora.*[118]

[159] In my view, such examples are not sufficient for the purposes of s 190B(5)(b). Although the prohibition on entering certain places without permission or eating certain foods may have had some normative content for some claimants as children, there is insufficient information to show that these rules have been observed by this claim group, as a whole, in the application area, since sovereignty. Without such information, I am unable to be satisfied that the claim group's laws and customs are 'traditional' in the *Yorta Yorta* sense of having their roots in a normative system under which the rights and interests are possessed.[119] In *Harrington Smith No 9*, Lindgren J held that 'in order to sustain the existence of rights and interests, the 'body' or 'system' of laws and customs must be one that is truly regarded by the members of the Claim group, on a fair overall view, as *still yielding norms* that are authoritative for them'.[120] In my view, there is insufficient information to show that the laws and customs observed at the time of settlement still yield authoritative norms which are followed by the claim group. This means that even if the issues arising from the claim group description were overcome, the factual basis material is such that s 190B(5)(b) is not met.

Section 190B(5)(c)

[160] 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.[121] As I am unable to be satisfied about the existence of traditional laws and customs for the purposes of s 190B(5)(b), it follows that I am unable to be satisfied as to the continuity of any such laws and customs, and so s 190B(5)(c) is not met.

[161] In my view, much of the information which the applicant has asked that I consider, does not support the assertion that the claim group has observed normative laws and customs, substantially uninterrupted, since settlement.[122] Some information which may support this assertion has been provided in relation to different claims with different claim groups, which

[116] Ibid [290].
[117] Ibid [294], original emphasis.
[118] Ibid [312], original emphasis.
[119] *Yorta Yorta* [46]–[47].
[120] *Harrington-Smith No 9* [975], emphasis added.
[121] *Gudjala 2009* [29].
[122] *Yorta Yorta* [87].

means it is difficult to ascertain whether, and to what it extent such information may be relevant to this application. An example is the information from Claimant 2, who stated in relation to the *Wutha* claim:

> We still go out bush every opportunity, to teach kids. We teach the children and grandchildren the way out parents taught us … We show them the food on the trees.[123]

[162] Furthermore, most of the information provided is over a decade, and in some cases nearly 20 years old. With regard to 'Skin Groups and Marriage Rules', Draper 2018 [A] cites information from claimants, including one who states 'I understand the skin system as much as I was taught by my parents and other family when I was growing up'.[124] Claimant 5, in her statement of evidence for *Koara* in 2002, explains that the skin system is used in funeral organisation in areas north of Leonora, Warburton and Wiluna.[125] Claimant 8, in his statement of evidence for *Wutha* in 2002, provides:

> However, I was not really taught about the skin system at all. I do not know if I would have the same skin group as my sister. … I understand that my parents were married wrong way according to the Aboriginal skin system. … I have seven children. They do not have skins.[126]

[163] The information extracted above demonstrates some of the problems with the information which arise from providing multiple and historical anthropological reports to support the factual basis of the claim. In my view, it is not surprising that different individuals have provided different information in relation to different native title claims at different times. However I do not understand that it part of my role to weigh the information before me and determine what is, and what is not, correct or relevant to this application.

Conclusion

[164] As there is uncertainty regarding the composition of the claim group, it follows that I am unable to make a 'genuine assessment' of the application against the requirements of s 190B(5).[127] As noted above, the applicant's factual basis must identify the relationship between the claim group, the application area and the claimed native title rights and interests. In my view, the application must fail at s 190B(5) because of the uncertainty as to the composition of the claim group. It is not open to me to weigh the information in order to overcome this uncertainty, or determine what parts of the factual basis material should be considered in relation to this application. Aside from the issue of the claim group composition, I am not satisfied that the factual basis is sufficient to support the assertions of this condition, as set out above. This means that s 190B(5) is not met.

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

[165] 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.

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[123] Claimant 2 Statement of Evidence [66].
[124] Draper 2018 [A] [265].
[125] Claimant 5 Statement of Evidence [2417]–[2419].
[126] Claimant 8 Statement of Evidence, [207]–[210], 41-42.
[127] *Gudjala 2008* [92].

[166] As discussed above, I am not satisfied that the factual basis is sufficient to support the assertion that traditional laws and customs exist, and I am unable to ascertain the composition of the claim group. This means the claimed rights and interests cannot be shown to be held by the claim group described in Schedule A, in accordance with traditional laws and customs, and thus cannot be established on a prima facie basis as 'native title rights and interests'. This means s 190B(6) is not met.

Traditional physical connection – s 190B(7): condition not met

[167] To meet s 190B(7), the Registrar must be satisfied 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.

[168] In *Gudjala 2009*, Dowsett J observed that it 'seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'.[128] Applying this guidance, and given my finding at s 190B(5)(b), that I am not satisfied of the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds, or previously held, the requisite physical connection with the application area in accordance with traditional laws and customs. This means s 190B(7) is not met.

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

[169] In my view the application complies with the provisions of ss 61A(1)–(3) and therefore satisfies the condition of s 190B(8):

Section	Requirement	Information	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 the application does not cover an area where there has been an approved determination of native title. Schedule B paragraph 2(c) also specifically excludes approved determinations of native title from the application area.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B paragraph 2 provides that the application does not cover areas where a previous exclusive possession act was done.	Met

[128] *Gudjala 2009* [84].

s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E paragraph 1 states that exclusive possession is only claimed where it can be recognised, such as areas where there has been no prior extinguishment of native title or where s 238 applies. It follows that no claim to exclusive possession is made in previous non-exclusive possession act areas.	Met

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

[170] In my view the application meets the requirements of s 190B(9):

Section	Requirement	Information	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, gas or petroleum 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 that the claim group does not claim exclusive possession of any off-shore place.	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Schedule B paragraph 2(b) states that the application does not cover areas where native title has been wholly extinguished. There is no information in the application that discloses to me that native title rights and interests in the claim area have otherwise been extinguished.	Met

End of reasons

Attachment A

Summary of registration test result

Application name	**Darlot**
NNTT No.	**WC2018/005**
Federal Court of Australia No.	**WAD142/2018**
Date of decision	**25 June 2020**

Section 190B conditions

Test condition	Sub-condition/requirement	Result
s 190B(2)		Met
s 190B(3)		Met
s 190B(4)		Met
s 190B(5)	ss 190B(5)(a)–(c)	Not met
s 190B(6)		Not met
s 190B(7)		Not met
s 190B(8)		Met
s 190B(9)		Met

Section 190C conditions

Test condition	Sub-condition/requirement	Result
s 190C(2)	ss 61–2	Met
s 190C(3)		Met
s 190C(4)	s 190C(4)(b)	Not met
s 190C(5)		Met