



## Registration Decision

<b>Application name</b>	Rowena Mouda & Ors on behalf of the Joombarn-buru Native Title Claim Group and State of Western Australia <b>(Joombarn-buru)</b>
<b>Name of applicant</b>	Rowena Mouda, Francesca Ishiguchi, Thalia Lorna Kelly, Rona Charles, Rosita Shaw, Richard Manado, Marie Manado, Bianca Cook, Wayne Bergmann, Mark Manolis, Nathan Lennard, Rosie Nunju, Lydia Clancy Skinner
<b>Federal Court of Australia No.</b>	WAD575/2019
<b>NNTT No.</b>	WC2020/002
<b>Date of Decision</b>	22 May 2020

### Claim accepted for registration

I have decided that the claim in the Joombarn-buru amended application satisfies all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration and will remain on the Register of Native Title Claims.

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Katy Woods

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

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

# Reasons for Decision

## Cases cited

*Drury v Western Australia* (2000) 97 FCR 169; [2000] FCA 132 (**Drury**)

*McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238 (**McGlade No 2**)

*Northern Land Council v Quall* [2019] FCAFC 77 (**Quall**)

*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (**Doepel**)

*Strickland v Native Title Registrar* [1999] FCA 1530 (**Strickland**)

## Background

- [1] This is an application filed on behalf of the Joombarn-buru native title claim group (**claim group**). It covers the land and waters in the West Kimberley region of Western Australia (**application area**).
- [2] The application was first filed on 7 November 2019 and on 26 November 2019 the Registrar of the Federal Court (**Court**) gave a copy of the application to the Native Title Registrar (**Registrar**), pursuant to s 63 (**original application**). This referral triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.<sup>2</sup> On 31 January 2020, in accordance with s 190A(6), I accepted the claim in the original application for registration as it satisfied all of the conditions in ss 190B–190C (**registration test**).
- [3] The original application excluded two small areas which were subject to the registered native title determination applications of WAD24/2019 Mount Jowlaenga (WC2013/005) and WAD331/2014 Mount Jowlaenga Polygon #2 (WC2014/005). On 20 February 2020, the Court ordered that the three proceedings be combined and continue under application number WAD575/2019. As a result of these orders, an amended Joombarn-buru application was filed on 3 March 2020 which includes the areas covered by the Mount Jowlaenga and Mount Jowlaenga Polygon #2 claims. A copy of this application was given by Court to the Registrar on 5 March 2020, pursuant to s 64(4). This is the application currently before me.
- [4] 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. The amendments to the original application are greater than the changes prescribed by s 190A(6A), so that provision 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.
- [5] As discussed in my reasons below, I consider that the claim in the amended application satisfies all of the conditions of the registration test and therefore it must be accepted for registration.<sup>3</sup> Attachment A contains information that will be included in the Register.

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

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

### *Procedural fairness*

- [6] On 12 March 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative for the State of Western Australia (**State**) to advise that I would be considering the information in the amended application when applying the registration test, and any submissions that the State wished to make should be received by 19 March 2020.
- [7] Also on 12 March 2020, the senior officer wrote to the applicant's representative to advise that any additional material to which the applicant wished me to have regard should be received by 19 March 2020.
- [8] On 14 March 2020, the applicant's representative confirmed that the applicant wished me to have regard to the following additional material provided directly to the Registrar in support of the original application (**additional material**):
- (a) 'Fraser River – Mount Jowlaenga – Deep Creek Research Report', by Craig Elliott, 11 November 2019 (**anthropologist's report**);
  - (b) Affidavit of [name removed], deposed 11 November 2014 (**connection affidavit 1**);
  - (c) Affidavit of [name removed], deposed 15 November 2019 (**connection affidavit 2**); and
  - (d) 'Registration test: Information submitted in relation to the Joombarn-Buru Claim which addresses the merit requirements (s190B)', undated.
- [9] As I had previously considered the additional material when I applied the registration test to the original application, which I subsequently accepted for registration on 31 January 2020 (**my previous reasons**), I was of the view that the additional material would be relevant to my consideration of the merit conditions of ss 190B(5)–(7). Therefore, on 18 March 2020, the senior officer wrote to the representative of the State to advise that I would be considering the additional material in my decision. The senior officer requested that the State sign a confidentiality undertaking in order to receive a copy of the additional material, as in my view it contained personal and sensitive information.
- [10] On 18 March 2020, the representative of the State advised the senior officer that the State would not be making any submissions in relation to the application of the registration test to the amended application, and so this concluded the procedural fairness process.

### *Information considered*

- [11] I have considered the information in the application and the additional material provided by the applicant, as outlined above.<sup>4</sup>
- [12] I have considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 16 March 2020 (**geospatial report**), in relation to the sufficiency of the map and description. I have considered information from the Tribunal's geospatial database regarding locations mentioned in the application and to ascertain whether this application overlaps any other claims. I have also considered information held in the Register of Native Title Claims (**Register**).<sup>5</sup>

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

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

[13] There is no information before me obtained as a result of any searches of State or Commonwealth interest registers,<sup>6</sup> and as noted above, the State has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.<sup>7</sup>

[14] I have compared the application currently before me with the original application which I previously tested for registration, as described above. I am satisfied that the substantive content of the two applications is identical, other than the content of the attachments to Schedules B, C, D, I and R. I have considered the statements of law which I included in my previous reasons. I am of the view that those statements remain accurate and were correctly applied, and so I refer to and rely on those statements of law at particular conditions in my reasons below. I have considered the application before me against each registration condition afresh, however, in the interests of brevity, I refer to and rely on my previous reasons at particular conditions where it is appropriate and convenient to do so.

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

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

[15] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.<sup>8</sup> I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

#### Section 61

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group has authorised the applicant	Part A(2), Schedule A, s 62 affidavits filed with application	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

#### Section 62

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits filed with original application	Met – see reasons below

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

<sup>7</sup> Section 190A(3)(c).

<sup>8</sup> *Doepel* [16], [35]–[39].

s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Schedule C, Attachment C	Met
s 62(2)(c)	Searches	Schedule D, Attachment D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

#### Section 62(1)(a)

[18] The amended application before me is not accompanied by affidavits from the persons comprising the applicant. In *Drury*, the Court held that there are circumstances where an amended application does not require fresh affidavits from the applicant.<sup>9</sup> In my view, this application presents such a circumstance, as the members of the applicant have not changed, and the applicant relies on the same factual basis as with the original application. I have considered the affidavits of the applicant members which accompanied the original application and remain satisfied that each affidavit meets the requirements of s 62(1)(a). Applying *Drury*, I am satisfied s 62(1)(a) is met.

#### Conclusion

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

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

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

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

[21] Schedule O, which asks applicants to detail the membership of any claim group member in any previous application, states ‘Not applicable’. The geospatial report states that the current application overlaps:

<sup>9</sup> *Drury* [11].

- (a) WAD575/2019 Joombarn-buru (WC2019/014);
- (b) WAD24/2019 Mount Jowlaenga (WC2013/005); and
- (c) WAD331/2014 Mount Jowlaenga Polygon #2 (WC2014/005).

[22] As discussed above, the Court ordered on 20 February 2020 that the above applications be combined. In light of these orders, I consider that none of the above applications are ‘overlapping’ because they are all the pre-combined applications which comprise the current application that I am currently considering.

[23] I understand that a combined application can be taken to be ‘made’ on the dates that the pre-combination applications were first filed. As discussed above, the original Joombarn-buru application was made on 7 November 2019 and entered on the Register on 31 January 2020. The Mount Jowlaenga application was made on 8 August 2013 and entered on the Register on 6 September 2013. The Mount Jowlaenga Polygon #2 application was made on 7 November 2014 and entered on the Register on 15 December 2014. My searches of the Register reveal that there were no relevant ‘previous applications’ for the purposes of s 190C(3) at the time any of the pre-combination applications were made or registered. There were therefore no registered native title applications over any of the pre-combination application areas when they were made.

[24] Finally, I note that the geospatial report confirms that there are no other registered native title claims which overlap the area of the combined application. In light of this and given my findings in relation to the status of the three pre-combination applications, I consider that the issue of common claimants does not arise.

### *Conclusion*

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

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

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

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

[27] Schedule R states that the application has been certified by the Kimberley Land Council (**KLC**) and refers to Attachment R, which is a document titled ‘Certification’. It follows that s 190C(4)(a) is applicable and thus I must be satisfied that:

- (a) the certificate identifies the relevant representative body;
- (b) the representative body has the power under Part 11 to issue the certification; and
- (c) the certificate meets the requirements of s 203BE(4).<sup>10</sup>

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<sup>10</sup> *Doepel* [80]–[81].

[28] I note that the certification which accompanies this amended application differs from the certification which accompanied the original application, and so I do not rely on my previous reasons at this condition.

*Is the relevant representative body identified?*

[29] KLC has provided the certificate, which is dated 4 December 2019 and signed by the Chief Executive Officer (**CEO**). The geospatial report states KLC is the only representative body for the whole of the application area. I have verified this information against current data in the Tribunal's national map of Representative Aboriginal/Torres Strait Islander Body areas. That map shows KLC to be the recognised representative body for the application area. I am therefore satisfied the certificate identifies the relevant representative body.

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

[30] As a recognised representative body, KLC can perform all of the functions listed in Part 11, including, relevantly, the certification functions referred to in s 203BE. The certificate includes a note which states that the CEO is, under common law principles and under s 274-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**), an agent of the corporation, and as such, is authorised to sign a certification made by the corporation. I understand that this information has been provided in response to *Quall* and *McGlade No 2*. In *Quall*, the Full Court considered the certification of indigenous land use agreements by representative bodies incorporated under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALR Act**), and held that such representative bodies may not delegate their certification functions under s 203B(1).<sup>11</sup>

[31] Since the *Quall* decision was handed down, the Full Court in *McGlade No 2* has confirmed that a representative body incorporated under the CATSI Act (as opposed to the ALR Act) can perform its functions through its directors and/or its authorised employees and agents, and that '[a] function so performed is properly characterised as the performance of the function by the ATSI corporation itself, not a CEO or anyone else'.<sup>12</sup> Applying *McGlade No 2*, I understand that the certification of this application by the CEO, as an agent of KLC, is properly characterised as certification by KLC itself.

[32] In light of these recent case law developments, I am satisfied KLC has the power under Part 11 to issue this certification.

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

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

Section 203BE(4)(a) – statements

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

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<sup>11</sup> *Quall* [102]–[104].

<sup>12</sup> *McGlade No 2* [329].

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

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

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

#### Section 203BE(4)(b) – reasons

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

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

##### (a) Authorisation of the applicant:

- i. The applicant was authorised by the claim group at a meeting on 21–22 October 2019;
- ii. The claim group confirmed that they do not have a decision-making process under their traditional laws and customs which must be followed; and
- iii. The claim group agreed to and adopted a decision making process of a vote by a show of hands to authorise the applicant to make the application.

##### (b) Identification of the claim group:

- i. KLC has undertaken extensive anthropological and genealogical research, and community consultations over a number of years;
- ii. The research and consultations have produced the claim group description for this application; and
- iii. The claim group description was verified through field work and confirmed at a meeting of the claim group.

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

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

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

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

- (a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and



(b) minimise the number of applications covering the land or waters.

However, a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[43] The certificate does not include any information about what KLC has done to meet the requirements of s 203BE(3). However in accordance with s 203BE(3), this failure does not invalidate the certification.

### *Conclusion*

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

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

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

[45] 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.

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

- (a) the external boundary of the area where native title rights and interests are claimed; and
- (b) any areas within the external boundary over which no claim is made.<sup>13</sup>

[47] The information relevant to my consideration of this condition is found in Schedules B and C of the application. While the information in Schedules B and C are unchanged, their respective attachments, being the external boundary description and map of the application area, have been amended. Therefore, I do not rely on my earlier reasons at this condition.

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

[48] Schedule B refers to Attachment B, which describes the application area by metes and bounds referencing the Fraser River, pastoral leases and native title determination boundaries.

[49] Schedule C refers to Attachment C, which contains a map titled 'Joombarn-buru Combined' and dated 2 December 2019. It contains:

- (a) The application area depicted by bold dark-blue outline with the boundary description 'Commencement Point' identified and labelled in magenta;
- (b) Tenure depicted as displayed in the legend, labelled by pastoral lease name and number and reserve number as appropriate;
- (c) The Fraser River and the Great Northern Highway shown and labelled;
- (d) Scalebar, coordinate grid, locality map; and

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<sup>13</sup> *Doepel* [122].

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

[50] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

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

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

[52] With regard to these types of general exclusion clauses, French J commented that ‘it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application’.<sup>14</sup> Following this reasoning, I am satisfied the description of the areas covered by the general exclusion clauses will be sufficient to ascertain any such areas at the appropriate time.

[53] Attachment B specifically excludes the areas subject to the following determinations of native title:

- (a) WAD359/2013 Bindunbur (WCD2018/005);
- (b) WAD25/2019 Bindunbur Part B (WCD2019/015);
- (c) WAD6099/1998 Nyikina Mangala (WCD2014/003);
- (d) WAD6006/1998, WAD223/2004 Rubibi Community (WCD2006/001); and
- (e) WAD655/2015 Edarrbur (Rubibi #18) (on behalf of the Yawuru Community) (WCD2019/013).

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

### *Conclusion*

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

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

[56] At paragraphs [48]–[49] of my previous reasons, I set out my understanding of the Registrar’s task at this condition. I am satisfied that the law has not changed and that my understanding remains correct. I have compared Schedule A of the application before me with that of the original application and am satisfied that their content is identical. I therefore consider it appropriate to adopt my previous reasons at this condition.

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<sup>14</sup> *Strickland* [55].

[57] At paragraphs [51]–[54] of my previous reasons, I was satisfied that the description of the claim group in Schedule A met the requirements of s 190B(3)(b). I have considered the information in Schedule A afresh and remain of that view.

### *Conclusion*

[58] 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**

[59] At paragraph [55] of my previous reasons, I set out my understanding of the Registrar’s task at this condition. I am satisfied that the law has not changed and that my understanding remains correct. I have compared Schedule E of the application before me with that of the original application and am satisfied that their content is identical. I therefore consider it appropriate to adopt my previous reasons at this condition.

[60] At paragraphs [56]–[60] of my previous reasons, I was satisfied that the claimed rights and interests in Schedule E met the requirements of s 190B(4). I have considered the information in Schedule E afresh and remain of that view.

### *Conclusion*

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

### **Factual basis for claimed native title – s 190B(5) condition met**

[62] To meet s 190B(5), the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist, is sufficient to support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[63] In paragraph [62] of my previous reasons, I set out my understanding of the Registrar’s task at s 190B(5). I am satisfied that the law has not changed and that my understanding remains correct.

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

[64] In paragraphs [63]–[64] of my previous reasons, I considered the information provided in support of the assertions of s 190B(5) were found in Schedules E, F and G, as well as in the additional material. I have considered the application and additional material afresh and have formed the view that the additional material speaks to the area covered by all three of the pre-combination applications. I have also considered the location of the pre-combination

applications in the Tribunal’s geospatial database and note that two of those applications, Mount Jowlaenga and Mount Jowlaenga Polygon #2, cover very small areas of 0.07 square kilometres and 45.28 square kilometres respectively. The areas covered by both those applications sit well within the boundaries of the original Joombarn-buru application area.

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

[65] In paragraphs [65] and [69] of my previous reasons, I set out my understanding of the Registrar’s task at s 190B(5)(a). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[66] In my previous reasons, I considered the information provided in support of the assertion of s 190B(5)(a) was found in the additional material, specifically in the anthropologist’s report and the two connection affidavits. I set out the relevant information at paragraphs [66]–[68] of my previous reasons. I have read the information in the application before me and am satisfied it contains the same factual basis information. As discussed above, the additional material speaks to the entirety of the combined application area and I am of the view that it is appropriate for me to have regard to it.

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

[67] I note that the apical ancestors of the claim group in this application are the same as those named in the original application. The same factual basis material is relied on for this application, which speaks to the area covered by all three of the pre-combination applications, not just the area covered by the original Joombarn-buru application. Only a short period of time has passed since I considered the original application. It is therefore my view that it is appropriate to adopt my previous reasons in relation to this fresh consideration of the condition of s 190B(5)(a).

[68] At paragraphs [69]–[73] of my previous reasons, I considered that the factual basis was sufficient to support the assertion at s 190B(5)(a). In reaching that view I considered the factual basis supported:

- (a) an association between the claim group and the area at sovereignty and since that time;
- (b) an association between the claim group and the area currently; and
- (c) an association, both past and present, with the whole area claimed.

### *Conclusion – s 190B(5)(a)*

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

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

[70] In paragraphs [74]–[78] of my previous reasons I set out my understanding of the Registrar’s task at s 190B(5)(b). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[71] In my previous reasons, I considered that the information provided in support of the assertion of s 190B(5)(b) was primarily found in the anthropologist’s report and connection affidavits. I summarised that information at paragraphs [79]–[92] of my previous reasons.

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

[72] I consider it appropriate to adopt my previous reasons in relation to s 190B(5)(b) for the same reasons identified in relation to s 190B(5)(a) above: that the factual basis material speaks to the entire area of the combined application, only a short period of time has passed since I applied the registration test to the original application, and because the very small Mount Jowlaenga and Mount Jowlaenga Polygon #2 claims sit within the Joombarn-buru application area.

[73] At paragraphs [93]–[95] of my previous reasons, I considered there was sufficient information to:

- (a) address the link between the pre-sovereignty society, the apical ancestors and the claim group; and
- (b) support the assertion of the existence of ‘traditional laws and customs’.

### *Conclusion – s 190B(5)(b)*

[74] I have reviewed my previous reasons and remain satisfied there is a link between the pre-sovereignty society in the application area, the apical ancestors and the current members of the claim group. I also remain satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed, by the claim group. This means s 190B(5)(b) is met.

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

[75] In paragraph [97] of my previous reasons I set out my understanding of the Registrar’s task at s 190B(5)(c). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[76] At paragraph [98] of my previous reasons, I noted that the relevant factual basis material for s 190B(5)(c) was the same as that which I considered relevant for ss 190B(5)(a)–(b). I also considered there was sufficient information to support the assertion of continuity of traditional laws and customs, which I set out at paragraphs [99]–[101]. Having reviewed the

information before me, I am of the view that it is appropriate to adopt my previous reasons in my fresh consideration of this condition.

### *Conclusion – s 190B(5)(c)*

[77] I have reviewed my previous reasons and remain satisfied that the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the application area. This means s 190B(5)(c) is met.

### **Conclusion**

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

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

[79] In paragraphs [104]–[106] of my previous reasons I set out my understanding of the Registrar’s task at s 190B(6). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

1. In every part of the claim area (if any) where there has been:

(a) no extinguishment to any extent of native title or where any extinguishment is required to be disregarded; and

(b) which is not subject to the public right to navigate or the public right to fish,

The right possessed under traditional law and customs is properly interpreted as, and the native title right recognised by the common law of Australia is, the right of possession, occupation, use and enjoyment of the land and waters as against all others.

[80] In paragraphs [107]–[109] of my previous reasons, I set out my understanding of the case law relevant to claims of exclusive possession. I am satisfied that the law has not changed and my understanding of such claims remains correct.

[81] In paragraphs [110]–[114] of my previous reasons, I considered that there was information in the application which supported the existence of a right of exclusive possession which enabled me to conclude it was prima facie established. Having considered the application and additional material afresh, I remain of that view and therefore consider it is appropriate to adopt my previous reasons in relation to this claimed right.

In all other parts of the claim area, the right possessed under traditional law and customs is properly interpreted as the right of possession, occupation, use and enjoyment of land and waters as against all others, but the native title rights and interests recognised by the common law of Australia are the rights to do all such things as may be done under the right referred to above, save for controlling the access to or the use of land or waters by others; being the (non-exclusive) rights to:

- a) have access to, remain on and use the land and waters;
- b) access and take for any purpose the resources of the land and waters; and
- c) protect places, areas and things of traditional significance on the land and waters.

[82] In paragraphs [115]–[118] of my previous reasons, I considered there was sufficient information in the additional material for me to be satisfied that the claimed non-exclusive rights were all prima facie established. Having considered the information afresh in relation to the application currently before me, I remain of that view and therefore consider it is appropriate to adopt my previous reasons in relation to the claimed non-exclusive rights.

## Conclusion

[83] I have reviewed my previous reasons and remain satisfied the application contains sufficient information about all of the rights claimed, such that they can be said to be established on a prima facie basis. I also remain satisfied those claimed rights can be considered ‘native title rights and interests’. This is because, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

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

[84] At paragraphs [120]–[121] of my previous reasons, I set out my understanding of the Registrar’s task at this condition. I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[85] At paragraphs [122]–[123] of my previous reasons, I considered at least one claim group member currently has or had a traditional physical connection to the land and waters covered by the application. I was satisfied that the information in the connection affidavits demonstrated that members of the claim group have a physical connection to the application area. I also considered the claim group members’ connection is ‘traditional’ in the sense required by s 190B(7). Because I was satisfied the factual basis was sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors at s 190B(5)(b), I was of the view that the current claim group members’ connection with the application area is held in accordance with those traditional laws and customs.

[86] I have considered the information in the application and additional information afresh and remain of the view that there is evidence that at least one member of the claim group has or had a traditional physical connection to the application area. I therefore consider it is appropriate to adopt my previous reasons at this condition.

## Conclusion

[87] Having reviewed my previous reasons, I remain satisfied at least one member of the claim group currently has a traditional physical connection with a part of the application area as required by s 190B(7)(a), and so s 190B(7) is met.

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

[88] At paragraph [125] of my previous reasons, I considered that the application complied with the provisions of ss 61A(1)–(3), and thus met the requirements of s 190B(8). I have reviewed my previous reasons and consider it is appropriate to adopt my conclusions at this condition, as the content of the relevant Schedules is identical in the application currently before me. I also consider that my understanding of the Registrar’s task was correct, the law has not changed and that I correctly applied the facts to the law. In addition, the geospatial report states, and I have verified, there has been no determination over any part of the application area, which is relevant to this fresh consideration of s 61A(1). I am therefore satisfied that the application meets the requirements of s 190B(8).

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

[89] At paragraph [126] of my previous reasons, I considered that the application met the requirements of s 190B(9). I have reviewed my previous reasons and consider it is appropriate to adopt my conclusions at this condition, as the content of the relevant Schedules is identical in the application currently before me. I also consider that my understanding of the Registrar’s task was correct, the law has not changed and that I correctly applied the facts to the law. I am therefore satisfied that the application meets the requirements of s 190B(9).

*End of reasons*



# Attachment A

## Summary of registration test result

Application name	Rowena Mouda & Ors on behalf of the Joombarn-buru Native Title Claim Group and State of Western Australia
NNTT No.	WC2020/002
Federal Court of Australia No.	WAD575/2019
Date of decision	22 May 2020

### Section 186(1): Mandatory information

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

#### Application filed/lodged with:

Federal Court of Australia

#### Date application filed/lodged:

3 March 2020

#### Date application entered on Register:

22 May 2020

#### Applicant:

As per Schedule

#### Applicant's address for service:

As per Schedule

#### Area covered by application:

As per Schedule

#### Persons claiming to hold native title:

As per Schedule

#### Registered native title rights and interests:

As per Schedule

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Katy Woods

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

22 May 2020

Reasons for decision: WC2020/002—Rowena Mouda & Ors on behalf of the Joombarn-buru Native Title Claim Group and State of Western Australia—WAD575/2019

Page 17

Decided: 22 May 2020