National Native Title Tribunal

# Registration Decision

| | |
|---|---|
| **Application name** | Peter Lansen & Ors v Northern Territory of Australia (**Nathan River Pastoral Lease**) |
| **Name of applicant** | Peter Lansen, Grace Daniels, Yvonne Forrest, Damien Tonson, Julie Limmen, Denis Watson and David John |
| **Federal Court of Australia No**. | NTD43/2017 |
| **NNTT No.** | DC2017/002 |
| **Date of Decision** | 23 October 2020 |

**Claim not accepted for registration**

I have decided that the claim in the amended Nathan River Pastoral Lease application does not satisfy all of 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(4)–(8). It also does not satisfy ss 190C(2)–(3).

_____

Katy Woods

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

[1] A section reference is to the *Native Title Act 1993* (Cth) (**Native Title Act**), unless otherwise specified.

# Reasons for Decision

## CASES CITED

*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (***Aplin***)
*Drury v Western Australia* [2000] FCA 132 (***Drury***)
*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (***Gudjala 2007***)
*Gudjala People # 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (***Gudjala 2008***)
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (***Gudjala 2009***)
*Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 (***Kanak***)
*King v Northern Territory of Australia* [2007] FCA 944 (***King***)
*Martin v Native Title Registrar* [2001] FCA 16 (***Martin***)
*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538; [2002] HCA 58 (***Yorta Yorta***)
*Northern Land Council v Quall* [2020] HCA 33 (***Quall HCA***)
*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (***Doepel***)
*Strickland v Native Title Registrar* [1999] FCA 1530 (***Strickland***)
*Wakaman People # 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (***Wakaman***)
*Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 (***Ward v Registrar***)
*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (***WA v NTR***)

## BACKGROUND

[1] This application was filed on behalf of the Guyal Manaburru, Burdal Mingkanyi, Burdal Riley, Murrungun Wunubari, Murrungun Baluganda/Langgabany, Mambali Walangara, Mambali Ngubayin and Mambali Nangguya estate groups (**claim group**). It covers land and waters in the Nathan River pastoral lease, an area of approximately 3,704 sq km, in the north east of the Northern Territory, extending from the Cox River in the west, encompassing Limmen National Park to the Gulf of Carpentaria (**application area**).

[2] The application was first filed on 1 August 2017 (**original application**) in the Federal Court of Australia (**Court**). On 22 September 2017, a delegate of the Native Title Registrar (**Registrar**) decided it did not meet all the conditions in ss 190B–190C and so it was not entered onto the Register of Native Title Claims (**Register**).

[3] An amended application was filed on 23 September 2020 and the Registrar of the Court gave a copy of the application and accompanying affidavits to the Registrar the same day, pursuant to s 64(4). This referral triggered the Registrar's duty to consider the claim in the amended application, which I will generally refer to as **the application** in my reasons below.[2] 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 is not currently on the Register, s 190A(6A) does not apply. Therefore, in accordance with s 190A(6), the claim must be accepted for registration if it satisfies all the conditions in ss 190B–190C (**the registration test**). For the reasons below, I consider the application does not meet all the conditions of the registration test and Attachment A contains a summary of my decision.

[2] Section 190A(1).

*Procedural fairness*

[4] On 28 September 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the Northern Territory government (**NTG**) advising that I would be considering the information in the application in my decision, and should the NTG wish to supply any information or make any submissions, it should do so by 5 October 2020.

[5] Also on 28 September 2020, the senior officer wrote to the applicant's representative to advise that any additional information the applicant wished me to consider should be provided by 5 October 2020. The senior officer advised that it was my preliminary view that there were deficiencies in the application which would likely affect the application's ability to be registered.

[6] No submissions were received from the applicant or the NTG and so this concluded the procedural fairness process.

*Information considered*

[7] In accordance with s 190A(3)(a), I have considered the information in the application and note there were no accompanying documents filed or additional information received from the applicant.

[8] There is no information before me from searches of State, Territory or Commonwealth interest registers obtained by the Registrar under s 190A(3)(b).

[9] As noted above, the NTG has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim. I have otherwise considered the following information in accordance with s 190A(3)(c):

(a) information in the original application;

(b) a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 1 October 2020 (**geospatial report**);

(c) information in the Tribunal's geospatial database; and

(d) information in the Register.

# Section 190C: conditions about procedures and other matters

## Information etc. required by ss 61–2 – s 190C(2): condition not met

[10] 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.[3] I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

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

[3] *Doepel* [16], [35]–[39].

| Section | Details | Form 1 | Result |
|---|---|---|---|
| s 61(1) | Native title claim group has authorised the applicant | Part A(2), Schedule A | Met – see reasons below |
| s 61(3) | Name and address for service | Cover page | Met |
| s 61(4) | Native title claim group named/described | Schedule A | Met |

*Section 61(1)*

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

> 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.

[13] As indicated 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.[4] Schedule A provides a description of the claim group, and Part A(2) states the applicant is authorised by the 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 s 61(1) is met.

[14] The application does not contain all the information specified in s 62:

| Section | Details | Form 1 | Result |
|---|---|---|---|
| s 62(1)(a) | Affidavits in prescribed form | – | Not met – see reasons below |
| s 62(2)(a) | Information about the boundaries of the area | Schedule B | Met |
| s 62(2)(b) | Map of external boundaries of the area | Attachment A | 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 |

[4] Ibid [37].

| | | | |
|---|---|---|---|
| s 62(2)(g) | Other applications | Schedule H | Met |
| s 62(2)(ga) | Notices under s 24MD(6B)(c) | – | Not met – see reasons below |
| s 62(2)(h) | Notices under s 29 | Schedule I | Met |

*Section 62(1)(a)*

[15] Section 62(1)(a) requires an application to be accompanied by affidavits from the members of the applicant stating the matters set out in ss 62(1)(i)–(v). No affidavits from the applicant members accompany the application. The Court in *Drury* held that to require fresh affidavits from the same applicant members for all amended applications would be a 'pointless bureaucratic imposition'.[5] In this matter, there have been no changes to the applicant since the application was first filed, so I understand that I could apply the principles in *Drury* and consider any previously filed affidavits from the applicant members. However, as there were no affidavits filed with the original application which I might consider, s 62(1)(a) is not met.

*Sections 62(2)(ga)*

[16] Any information relevant to s 62(2)(ga) is usually found in Schedule HA, however no such schedule accompanies this application and I can find no information in the application which addresses this requirement. I therefore consider s 62(2)(ga) is not met.

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

[17] 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.

[18] Schedule O states: '[s]ome of the claimants are also members of the native title claim group in respect of the overlapping claims described in Schedule H to this Application'. Schedule H lists the following applications as overlapping the application area:

(a) NTD 6016 of 2000 (Lorella Downs);

(b) NTD 6030 of 2000 (Billengarrah);

(c) NTD 6031 of 2002 (Lorella-Nathan River).

[19] The geospatial report confirms these overlaps, which means they each meet the requirements of s 190C(3)(a).

[5] *Drury* [13].

[20] According to the Register, all three applications were on the Register when the current application was made on 1 August 2017, having been entered on the following dates:

(a) Lorella Downs on 4 January 2001;

(b) Billengarrah on 19 January 2001; and

(c) Lorella Nathan River on 8 May 2009.

[21] This means that they all meet the requirements of s 190C(3)(b).

[22] The Register entries for the three above applications were made as a result of consideration of the respective claims under s 190A and have not been removed, which means they meet the requirements of s 190C(3)(c).

[23] As the three above applications meet all the criteria in s 190C(3), they are 'previous applications' and so I must consider whether there are members of the respective native title claim groups who are also members of the claim group for the current application.

[24] I have examined the Register extracts for the three previous applications and note that there are several similarities which are indicative of common claimants. For example, one of the estate group in the current claim group description is 'Burdal Riley'. There are nine people in the Lorella Downs application and one person in the Billengarrah claim group descriptions with the surname 'Riley'. Additionally, the Lorella Nathan River claim group description includes the members of the 'Burdal' people. In light of these similarities I consider that there is sufficient information to show that there are common claimants between the current application and the three 'previous applications'.

*Conclusion*

[25] I am not satisfied that any member of the claim group for the current application is not also a member of the native title claim group for any previous application, which means s 190C(3) is not 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 by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions; or

(b) the applicant is a member of the 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.

[27] Schedule R to the application contains a certification so I will first assess the application against the requirements of s 190C(4)(a). If the requirements of s 190C(4)(a) are not met, I must consider the application against the requirements of s 190C(4)(b).

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

[28] Section 190C(4)(a) requires me to 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).[6]

*Is the relevant representative body identified?*

[29] According to paragraph 1 of Schedule R, the Northern Land Council (**NLC**) has provided the certificate pursuant to s 203BE. The geospatial report states and I have verified using information in the Tribunal's geospatial database, that the NLC is the representative body for the entirety of the application area. I am therefore satisfied that the certificate identifies the relevant representative body.

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

[30] As a recognised representative body, the NLC can perform all the functions listed in Part 11 of the Native Title Act, including the certification functions in s 203BE. I am satisfied the NLC has the power under Part 11 to issue the certification.

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

[31] The version of the certificate in the amended application before me is missing the signature of the person signing on behalf of the NLC and the date of certification. I understand the Native Title Act does not prohibit consideration of the certificate which accompanied an original application when applying the registration test to an amended application. Schedule S to the amended application does not indicate any change to the certification, and as the two versions of the certificate contain identical information, save for the inclusion of the signature and date, I am of the view that it is appropriate to consider the certificate that accompanied the original application, which I will refer to as **the certificate** in my reasons below.

[32] The certificate is signed by the Manager of the Anthropology Branch of the NLC and dated 31 July 2017. The High Court has held that the certification functions of a representative body can be performed by a delegate or authorised agent.[7] Section 190C(4)(a) confines the Registrar's task to being 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body'.[8] I therefore do not consider that is part of my role to look outside the certificate, but rather to confine my task to determining whether the requirements of s 203BE are met, which must be addressed by the terms of the certificate.[9]

Section 203BE(4)(a) – statements

[33] 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.

[34] Section 203BE(2)(a)–(b) prohibits a representative body from certifying an application unless it is of the opinion that:

(a) all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

[6] *Doepel* [80]–[81].
[7] *Quall HCA* [34].
[8] *Doepel* [78], [80]–[82].
[9] Ibid [80].

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[35] The certificate contains these required statements under the heading 'Statements (s.203BE(4)(a))'. I am therefore satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

[36] 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. The certificate sets out the NLC's reasons for its opinion, under the heading 'Reasons (s.203BE(4)(b))'. I am therefore satisfied s 203BE(4)(b) is met.

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

[37] 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).

[38] 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.

[39] The certificate contains information about what the NLC has done and intends to do, to minimise the number of overlapping claims over the application area. I therefore consider s 203BE(4)(c) is met.

*Conclusion*

[40] I am satisfied that the relevant representative body, the NLC, has been identified in the certificate and that it has the power under Part 11 to issue the certification. I also consider the requirements of s 203BE(4) are satisfied. The requirements of s 190C(4)(a) are therefore met and I do not need to consider the application against the requirements of s 190C(4)(b). This means s 190C(4) is met.

# Section 190B: merit conditions

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

[41] 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.

[42] I understand the questions for this condition are whether:

(a) the information and map provide certainty about the external boundary of the application area; and

(b) the information enables identification of any areas within the external boundary over which no claim is made.[10]

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

[43] Paragraph 1 of Schedule B describes the application area as the land and waters subject to:

(a) Northern Territory Portion 1334 Nathan River Pastoral Lease (Pastoral Lease 756); and

(b) Northern Territory Portion 7058.

[44] Schedule C refers to Attachment A, which contains a map titled 'Nathan River Pastoral Lease Native Title Claim'. The map is dated 26 March 2013 and includes:

(a) The application area depicted with bold purple outline labelled 'NT Por 1334' and 'NT Por 7058', identified in the legend as 'Claimed Parcels';

(b) Inset Locality Map, 'Mapsheet Guide', scalebar, northpoint and coordinate grid; and

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

[45] 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?*

[46] Paragraph 2 of Schedule B states '[s]ubject to Schedule L of this application, any area in relation to which a previous exclusive possession act under section 23B of the NTA has been done, is excluded from this application'.

[47] Schedule L states:

1. The claimants occupied the area claimed when the application was made.
2. Pursuant to s 47B of the Act, extinguishment is to be disregarded in relation to vacant Crown land.

[48] I understand from Schedules B and L that areas where previous exclusive possession acts have been done are excluded from the application area, except for areas where extinguishment is to be disregarded pursuant to s 47B.

[49] With regard to general exclusion clauses such as this, the Court has commented: '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'.[11] Following this reasoning, I am satisfied the description of the excluded areas will be sufficient to ascertain any such areas at the appropriate time.

[10] Section 62(2)(a)–(b); *Doepel* [122].
[11] *Strickland* [55].

*Conclusion*

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

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

[51] To meet s 190B(3), the Registrar must be satisfied that:

(a) the persons in the claim group are named in the application; or

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

[52] I understand I am not required to do more than make 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group' at this condition.[12] I also understand that the requirements of s 190B(3) 'do not appear to go beyond consideration of the terms of the application', which means I have limited my consideration to the information in the application.[13]

[53] Paragraph 1 of Schedule A describes the claim group as follows:

> 1. The native title claim group ("the claimants") in relation to the area claimed is comprised of the Primary Native Title Holders and Other Native Title Holders who, according to traditional laws acknowledged, and customs observed:
>
> (a) are traditionally connected with the area described in schedule B ("the area claimed") by reason of:
>
> (i) patrilineal descent;
>
> (ii) his or her mother, father's mother or mother's mother being or having been a member of the group by reason of patrilineal descent; or
>
> (iii) having been adopted or incorporated into the descent relationships referred to in (a) or (b) hereof; and
>
> (b) have a communal native title in the application area, from which rights and interests derive.

[54] I therefore consider that s 190B(3)(b) applies. I will consider the criteria in paragraph 1 and then consider the further criteria which apply specifically to the Primary Native Title Holders and the Other Native Title Holders which are set out in paragraphs 2–35 of Schedule A.

[55] From the above description I understand that to qualify as either a Primary or Other Native Title Holder, a person must be connected to the application area by reason of one of the avenues in subparagraphs (i)–(iii) and have a 'communal native title' in the application area.

### Descent

[56] The Court has previously held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).[14] I consider that requiring a person to show descent from an identified ancestor provides a clear objective starting point from which to commence enquiries about whether a person is a

[12] *Wakaman* [34].
[13] *Doepel* [16].
[14] *WA v NTR* [67].

member of the claim group. I consider that factual enquiries would lead to the identification of the people who meet either of the two descent criteria found in paragraph 1(a)(i)–(ii).

#### Adoption and incorporation

[57] I note the comments in *Aplin* that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs'.[15] In relation to adoption and incorporation, the opening sentence of paragraph 1 references traditional laws and customs. Therefore, in addition to factual enquiries, I consider that the claim group's traditional laws and customs would provide a 'set of rules or principles' through which it could be ascertained whether an adopted or 'incorporated' person met the criterion in paragraph 1(a)(iii) and is a member of the claim group.[16]

#### Communal native title

[58] Reading paragraph 1 as a whole, I consider that identifying whether a person holds communal native title in the application area could also be ascertained with reference to the traditional laws and customs articulated in the opening sentence. In this regard I note the information in Schedule F, that the claimants continue to acknowledge and observe traditional laws and customs, and possess and exercise their traditional rights and interests in the application area.[17]

### *Primary native title holders*

[59] Paragraph 2 of Schedule A provides that the Primary Native Title Holders are comprised of the members of eight named estate groups. Paragraphs 3–34 describe each of the eight descent groups in turn, with reference to the apical ancestors of each group and some of their descendants. From the wording of paragraphs 3–34, I understand that these are not exhaustive lists of all of the descendants of the apical ancestors, as each paragraph stipulates that the descendants of the relevant ancestor 'include' certain people.

### *Other native title holders*

[60] I understand from paragraph 2 that the term 'estate group members' refers to the Primary Native Title Holders and that it is appropriate to read the paragraphs of Schedule A as one discreet passage so as to secure consistency, where such an approach is reasonably open.[18] Applying this approach, I understand from paragraph 35 of Schedule A that the Other Native Title Holders hold rights in the application area 'subject to' the rights and interests of the Primary Native Title Holders. Paragraph 35 states that the Other Native Title Holders are members of estate groups from neighbouring estates, and spouses of the estate group members.

#### Neighbouring estates

[61] The Court has previously held that there is 'no issue' in including neighbouring groups in a claim group description.[19] As noted above, paragraph 1 of Schedule A references the

[15] *Aplin* [256]–[261].
[16] *Ward v Registrar* [25].
[17] Schedule F [4].
[18] *Gudjala 2007* [34].
[19] *King* [12].

traditional laws and customs of the claim group. In paragraph 35 of Schedule A, the members of neighbouring estate groups are said to have rights and interests in the application area 'in accordance with traditional laws and customs'. From paragraph 1, I understand that the Other Native Title Holders, which would include members of neighbouring estates, follow the same traditional laws and customs as the claim group. I understand this would mean that the neighbouring groups would have one or more ancestor from whom their members are descended. I am therefore of the view that there is a sufficiently clear means which could be utilised to identify the members of the neighbouring groups. In reaching this view, I have also considered the judicial guidance that it is appropriate to construe the requirements of the Native Title Act beneficially.[20]

Spouses

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

### *Conclusion*

[63] 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 not met

[64] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights are established as native title rights on a prima facie basis. I note I am limited to the information in the application in my consideration of this condition.[21]

[65] Paragraph 1 of Schedule E states that the 'estate group members' claim particular non-exclusive rights in the application area, which are enumerated in paragraph 1(a)–(l), subject to the claim group's traditional laws and customs.

[66] Paragraph 2 of Schedule E states that 'the native title holders referred to in clause 7' also claim non-exclusive rights in the application area, which are enumerated in paragraph 2(a)–(g). There is no clause 7 in Schedule E and no information to explain which people claim the rights specified in paragraph 2.

[67] Paragraph 3 states that the claimed rights and interests are subject to the laws of the Northern Territory and the Commonwealth, and paragraph 4 indicates the rights are only for 'personal or communal needs … and not for any commercial or business purpose'.

[68] I understand it is appropriate to read Schedule E as a whole, including the various qualifications, to determine whether there is any inherent contradiction between any of the

[20] *Kanak* [73].
[21] *Doepel* [16].

rights claimed.[22] Despite taking this holistic approach, it is not clear to me how the two sets of rights in paragraphs 1 and 2 operate in the application area. In particular I am unable to ascertain the persons who are claiming the rights in paragraph 2 given there is no 'clause 7' in Schedule E to which paragraph 2 specifically refers.

[69] As noted above, I am unable to look outside the application at this condition for information which may clarify the operation of the two sets of rights and I do not consider it is open to me to presume that 'the native title holders referred to in clause 7' refers to either the Primary Native Title Holders or the Other Native Title Holders, to the entire claim group or to any other group of people.[23] Without clarity about who is claiming particular rights and interests, I am unable to be satisfied the description of the claimed rights is sufficient for the purposes of s 190B(4).

### *Conclusion*

[70] I am not satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is not met.

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

[71] 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 claim group have, and the predecessors of those persons had, an association with the area;

(b) that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests; and

(c) that the claim group have continued to hold the native title in accordance with those traditional laws and customs.

[72] I understand my task is to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[24] I also note the Court's comment that '[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or [her] delegate undertake a search for such material'.[25] As such I have not undertaken any searches for external material to support the applicant's claim.

[73] As discussed above, Schedule E provides a description of the native title rights and interests claimed. Schedule F states:

> **General**
>
> 1. The claimants are, traditionally, the owners of the land and waters subject to this application.

[22] *Doepel* [92], [123].
[23] *Doepel* [16].
[24] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[25] *Martin* [23].

2. The rights and interests described in schedule E, and the traditional laws acknowledged, and customs observed, have been possessed and exercised, and acknowledged and observed, by the claimants, since time immemorial, including:

   (a) at the time when sovereignty was asserted by the Crown of the United Kingdom; and

   (b) at the time of contact with non-Aboriginal people.

3. The traditional connection of the claimants with the claim area, and native title rights and interests, were inherited from their ancestors in accordance with traditional laws and customs.

4. The claimants continue to acknowledge traditional laws, observe customs, and possess and exercise their traditional rights and interests, in relation to their traditional country (including the area claimed).

**Historical, archaeological and site information**

5. Since time immemorial, and in accordance with traditional laws and customs, the area claimed has been regarded as belonging to the claimants.

6. The area claimed is a part of a larger area of land and waters which continued to be owned and occupied by the claimants after the assertion of sovereignty by the Crown of the United Kingdom. The claimants retain a traditional connection both to the area claimed and to their traditional country generally. The traditional connection of the claimants to the area claimed is shown both by matters relating directly to it, and by matters relating to other of [sic] areas of their traditional country.

7. There are many sites of significance on the claimants' traditional country, including on the area claimed, and including sites recorded under the *Northern Territory Aboriginal Sacred Sites Act*.

8. Material evidence of physical connections by the ancestors of the claimants exists in their traditional country, and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation. The evidence includes artefact fragments, rock art and traditional occupancy sites.

**Particulars of Traditional Laws and Customs**

9. The claimants respectively observe common traditional laws and customs. These include a common kinship system, observance of common laws relating to land tenure, and traditional usage of land and waters.

10. The kinship system respectively includes:

    (a) recognition of common ancestors;

    (b) common and interdependent familial ties which determine traditional rights and customs regarding land and waters;

    (c) recognition of group and individual responsibilities towards land and waters;

    (d) recognition and acceptance of common patterns of descent;

    (e) recognition of sanctions and prohibitions relating to relationships, access to land and waters, and custodianship;

    (f) recognition of individual or group connection to land and waters;

    (g) affiliation, on a group and individual basis, with totemic beings which relate to land/waters and law;

    (h) participation in, and responsibility for, ceremony;

    (i) recognition of individuals' connection to land and waters through their place of conception, place of birth, their mother's place of birth, and their father's place of birth;

    (j) transmission of traditional knowledge from one generation to the next.

11. Common laws relating to land tenure respectively include:

(a) fulfilment of spiritual obligations with regard to the land and waters;

(b) the observation of restrictions imposed by gender, age and ritual experience;

(c) the observation of restrictions imposed by the presence of sites of significance on the land and waters;

(d) the observation of restrictions imposed by the presence of Dreamings on the land and waters.

12. Traditional usage in relation to the land and waters is contained in schedule G.

[74] Schedule G lists the following activities undertaken by the claim group in their traditional country, including the application area:

(a) residing on the land;

(b) hunting and collecting animals, fish, and other foods from the land and waters;

(c) building and using shelters on the land;

(d) using waters from the land;

(e) using, sharing, trading, and exchanging resources derived from the land and waters;

(f) collecting materials including timber, stones, minerals, ochre, resin, grass and shell from the land and waters;

(g) burning the land;

(h) building and using traps on waterways;

(i) travelling across the land and waters;

(j) camping on the land;

(k) conducting ceremonies on the land;

(l) observing laws and sanctions restricting access to areas of the land and waters according to divisions of gender, age, and ritual experience;

(m) restricting the access of outsiders to the land and waters;

(n) responsibility for caring for the land and waters in accordance with spiritual, economic and social obligations;

(o) burial of the dead on the land;

(p) bearing, rearing and teaching children on and about the land and waters;

(q) maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

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

(a) entering and travelling across the area claimed;

(b) hunting, fishing and collecting resources from the area claimed;

(c) visiting and protecting sites of significance on the area claimed.

[76] On reviewing the entirety of the application, I consider the information in Schedules E, F, G and M is the extent of the factual basis material relevant to the assertion at s 190B(5).

[77] I consider the material does not provide a sufficient factual basis to support an assertion that the predecessors of the group were associated with the application area over the period since sovereignty. There are no references to any locations inside the application area and no

information about any association of the predecessors with the application area other than the general statements in Schedule F, quoted above. In my view, there is also insufficient information to demonstrate the association the claim group currently has with the application area. I consider the information provided is of a very general nature and has no 'geographical particularity', which means the requirements of s 190B(5)(a) are not satisfied.[26]

[78] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society, acknowledging and observing normative laws and customs. In my view, there is insufficient information to support an assertion that a pre-sovereignty society existed in the application area. I consider the broad statements in Schedule F to be 'at a high level of generality'.[27] I also consider there is insufficient information to demonstrate any relationship between the ancestors of the claim group and a pre-sovereignty society.

[79] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are 'traditional', that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society.[28] I am not satisfied the information in the application supports an assertion that laws and customs exist in the application area, either in relation to a pre-sovereignty society or since that time. This means I cannot be satisfied that any such laws or customs could be considered 'traditional' and so the requirements of s 190B(5)(b) are not satisfied.

[80] Meeting the requirements of s 190B(5)(c) relies on whether there is a factual basis sufficient to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests. Because I consider the factual basis is not sufficient to support the *existence* of traditional laws and customs, I cannot be satisfied the factual basis is sufficient to support the *continuity* of traditional laws and customs. Therefore, the requirements of s 190B(5)(c) are not satisfied.

### *Conclusion*

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

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

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

[26] *Martin* [26].
[27] *Gudjala 2008* [92].
[28] *Yorta Yorta* [46].

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

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

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

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

[85] This condition requires information to satisfy the Registrar of particular facts such that evidentiary material is required, and requires that the physical connection be held in accordance with the traditional laws and customs of the claim group.[29]

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

## No failure to comply with s 61A – s 190B(8): condition not met

[87] I am not satisfied the application complies with all the conditions in ss 61A(1)–(3) and so s 190B(8) is not met:

| **Requirement** | **Information addressing requirement** | **Result** |
|---|---|---|
| Section 61A(1): No native title determination application if approved determination of native title | – | Not met – see reasons below |
| Section 61A(2): Claimant application not to be made covering previous exclusive possession act areas | Schedule B, paragraph 2 states that subject to Schedule L, any area in relation to which a previous exclusive possession act has been done is excluded from the application. Schedule L claims the benefit of s 47B to allow for extinguishment to be disregarded in the applicable areas. | Met |

[29] *Doepel* [18], *Gudjala 2009* [84].

| | | |
|---|---|---|
| Section 61A(3): Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas | Schedule E, paragraphs (1)–(2) state that the claimed rights do no confer possession to the exclusion of all others on the native title holders. Therefore, no claim of exclusive possession is made in previous non-exclusive possession act areas. | Met |

*Section 61A(1)*

[88] Section 61A(1) prohibits the making of native title determination application in relation to an area for which there is an approved determination of native title. The geospatial report states that the application overlaps the following approved determination of native title, to the following extent:

| Tribunal Number | Federal Court Number | Name | Determination Area (sq km) | Overlap Area (sq km) | % Determination Overlapping DC2017/002 | % DC2017/002 Overlapping Determination |
|---|---|---|---|---|---|---|
| DCD2000/002 | NTD6001/1997 | St Vidgeon's (Roper River) | 6472.048 | 6.537 | 0.10 | 0.18 |

[89] My own searches of the Tribunal's geospatial database confirm this overlap. The geospatial report advises, and I am also of the view, that the extent of this overlap is such that it cannot be considered of a 'technical' nature. In light of this overlap, and as there is no statement in the application which would indicate that areas covered by an approved determination of native title are excluded, s 61A(1) is not met.

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

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

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

*End of reasons*

# Attachment A

**Summary of registration test result**

| | |
|---|---|
| **Application name** | Nathan River Pastoral Lease |
| **NNTT No.** | DC2017/002 |
| **FCA No.** | NTD43/2017 |
| **Date of decision** | 23 October 2020 |

*Section 190B conditions*

| **Test condition** | **Sub-condition/requirement** | **Overall / Aggregate Result** |
|---|---|---|
| Section 190B(2) | | Met |
| Section 190B(3) | Section 190B(3)(b) | Met |
| Section 190B(4) | | Not met |
| Section 190B(5) | Section 190B(5)(a)–(c) | Not met |
| Section 190B(6) | | Not met |
| Section 190B(7) | | Not met |
| Section 190B(8) | | Not met |
| Section 190B(9) | | Met |

*Section 190C conditions*

| **Test condition** | **Sub-condition/requirement** | **Result** |
|---|---|---|
| Section 190C(2) | Sections 61–2 | Not met |
| Section 190C(3) | | Not met |
| Section 190C(4) | Section 190C(4)(a) | Met |