Registration Decision

Application name	June Harrington-Smith & Ors on behalf of the Darlot Native Title Claim Group and State of Western Australia & Ors (**Darlot**)
Name of applicant	June Harrington-Smith, Verna Vos, Pearl Scott, Wayne Smith, Murray Harris, Maria Meredith, James Calyun, Dorothy Cooper and Joan Tucker
Federal Court of Australia No.	WAD142/2018
NNTT No.	WC2018/005
Date of Decision	9 July 2021

Claim accepted for registration

I have decided the claim in the amended Darlot application satisfies all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] Therefore, the claim must be accepted for registration and entered onto the Register of Native Title Claims (**Register**).

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Katy Woods[2]

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

[2] Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 19 May 2021 and made pursuant to s 99 of the Native Title Act.

Reasons for Decision

Cases Cited

Attorney-General of the Northern Territory v Ward [2003] FCAFC 283 ***(Ward FC No 2)***
Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (***Aplin***)
Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (***Burragubba***)
Corunna v Native Title Registrar [2013] FCA 372 (***Corunna***)
De Rose v South Australia [2002] FCA 1342 (***De Rose***)
De Rose v State of South Australia (No 2) [2005] FCAFC 110 (***De Rose FC No 2***)
Drury v Western Australia [2000] FCA 132 (***Drury***)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (***Warrie***)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (***Gudjala 2007***)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (***Gudjala 2009***)
Griffiths v Northern Territory [2007] FCAFC 178 (***Griffiths FC***)
Harrington-Smith on behalf of the Wongatha People v Western Australia (No 5) [2003] FCA 218 (***Harrington-Smith No 5***)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia [2016] FCA 910 (***Tjungarrayi 2016***)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938 (***Tjungarrayi 2017***)
Kanak v National Native Title Tribunal [1995] FCA 1624 (***Kanak***)
Lawson on behalf of the `Pooncarie' Barkandji (Paakantyi) People v Minister for Land & Water Conservation for the State of New South Wales [2002] FCA 1517 (***Lawson***)
Martin v Native Title Registrar [2001] FCA 16 (***Martin***)
McLennan v State of Queensland [2019] FCA 1969 (***McLennan***)
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (***Yorta Yorta***)
Noble v Mundraby [2005] FCAFC 212 (***Noble***)
Northern Territory of Australia v Doepel [2003] FCA 1384 (***Doepel***)
Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26 (***Sampi FC***)
Sampi v State of Western Australia [2005] FCA 777 (***Sampi***)
Strickland v Native Title Registrar [1999] FCA 1530 (***Strickland***)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (***Wakaman***)
Ward v Northern Territory [2002] FCA 171 (***Ward v Northern Territory***)
Ward v Registrar, National Native Title Tribunal [1999] FCA 1732 (***Ward v Registrar***)
Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 (***Weribone***)
Western Australia v Native Title Registrar [1999] FCA 1591 (***WA v NTR***)
Western Australia v Strickland [2000] FCA 652 (***Strickland FC***)
Western Australia v Ward [2002] HCA 28 (***Ward HC***)

Background

[1] The claim in this application is made on behalf of the Darlot native title claim group (**claim group**). The application covers approximately 21,622 square kilometres and includes the towns of Leonora and Menzies in Western Australia (**application area**). The application takes its name from the ephemeral Lake Darlot, which extends across the application area from Leinster in the west towards Laverton in the east, and from the now abandoned town of Darlot, also known as Woodarra, located in the central northern part of the application area.

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

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

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

[5] A further amended application was filed on 13 March 2020. On 25 June 2020, in my capacity as a delegate of the Registrar, I decided the claim in the further amended application did not meet all the conditions of the registration test.

[6] The applicant sought reconsideration of the further amended application pursuant to s 190E and on 21 October 2020, a Tribunal Member decided the claim in the further amended application did not meet all the conditions of the registration test.

[7] A second further amended application was filed on 9 December 2020. Before the registration test was applied to the claim in that application, a third further amended application was filed on 28 April 2021. The Court gave a copy of that application to the Registrar on 29 April 2021 pursuant to s 64(4) and this is the version of the application currently before me, which I will refer to below as **the application** where appropriate and convenient to do so.

[8] 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), I must accept the claim in the application for registration if it satisfies all the conditions of the registration test.

[9] The application area is affected by a s 29 notice. This means that, in accordance with s 190A(2)(f), I must use my best endeavours to finish considering the claim for registration within 4 months of the notification date of that s 29 notice, that is, before 10 July 2021.

[10] For the reasons below, I consider the claim in the application satisfies all of the conditions of the registration test and so must be accepted for registration. Attachment A contains the information which must be entered on the Register.

Procedural fairness

[11] On 5 May 2021, a senior officer of the Tribunal (**senior officer**) wrote to the representative of the relevant minister of the State of Western Australia (**State**) advising that I would be considering the information in the application in my decision, and should the State wish to supply any information or make any submissions, it should do so by 12 May 2021.

[12] Also on 5 May 2021, the senior officer wrote to the applicant's representative and advised that any additional material which the applicant wished the delegate to consider should be provided by 12 May 2021.

[13] On 12 May 2021, the applicant's representative provided the following documents:

(a) 'Applicants' Submissions in Support of Registration Test', 12 May 2021 (**Submissions**);

(b) 'The Darlot Native Title Claim (WAD 142 of 2018) Anthropological Report Addressing Various Matters Identified by the WA State Solicitor's Office', Daniel Aimé Vachon, July 2020 (**Connection report 1**);

(c) 'The Darlot Native Title Claim (WAD 142 of 2018) Second Anthropological Report Addressing Various Matters Identified by the WA State Solicitor's Office', Daniel Aimé Vachon, November 2020 (**Connection report 2**); and

(d) 'The Darlot Native Title Claim (WAD 142 of 2018) Third Anthropological Report Addressing Various Matters Identified by the WA State Solicitor's Office', Daniel Aimé Vachon, February 2021 (**Connection report 3**).

[14] On 4 June 2021, the applicant's representative provided the following documents, which were referred to in the Submissions:

(a) Affidavit of Daniel Aimé Vachon, 5 March 2021 (**Vachon affidavit**);

(b) Affidavit of Darby Lincoln Thurtell, 5 March 2021 (**Thurtell affidavit**);

(c) Affidavit of Kelsi Morgan Joan Forrest, 10 March 2021 (**Forrest affidavit**); and

(d) Further affidavit of Darby Lincoln Thurtell, 16 March 2021 (**Further Thurtell affidavit**).

[15] On 4 June 2021, the senior officer sent the material provided by the applicant's representative on 12 May and 4 June 2021 (collectively, **the additional material**), to the State's representative. That letter also included a copy of the s 62 affidavit of Murray Harris, which accompanied this application and was provided by the Court to the Registrar on 14 May 2021, and copies of the s 62 affidavits of the other applicant members, which accompanied the amended application filed and provided to the Registrar on 13 March 2020. The letter advised that all these documents were before the delegate for consideration, and any comment or further information from the State should be received by 11 June 2021.

[16] On 10 June 2021, the State's representative wrote to the senior officer and advised that the State did not intend to make submissions in relation to the application of the registration test, and so this concluded the procedural fairness process.

Information considered

[17] In accordance with s 190A(3)(a), I have considered the information in the application, the accompanying documents and the additional material provided by the applicant. There is no information before me from searches of State, Territory or Commonwealth interest registers obtained by the Registrar under s 190A(3)(b). There is no information before me from the State which I must consider in accordance with s 190A(3)(c). Section 190A(3) also provides that the Registrar may have regard to such other information considered appropriate. Pursuant to that provision, I have considered:

(a) information in the geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 13 May 2021 (**geospatial report**);

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

(c) information on the Register.

Section 190C: conditions about procedures and other matters

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

What is required to meet s 190C(2)?

[18] 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.

Consideration

[19] I consider the application contains the details specified in s 61:

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

[20] I consider the application is accompanied by the information and documents required by s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits	Met – see reasons below
s 62(1)(d)	Section 47 agreements	-	Met – as no s 47 agreements accompany the application, I understand there are no such agreements
s 62(2)(a)	Information about the boundaries of the	Schedule B,	Met

[3] *Doepel* [16], [35]–[39].

	application area	Attachment B2	
s 62(2)(b)	Map of external boundaries of the application area	Attachment B1	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA, Attachment I	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

Section 62(1)(a) – affidavits in prescribed form

[21] As set out above, the s 62 affidavits for all but one of the applicant members were filed in the Court and provided to the Registrar on 13 March 2020. The s 62 affidavit of the only new applicant member, Mr Murray Harris, was filed in the Court on 5 March 2021 and provided by the Court to the Registrar on 14 May 2021. I understand there are circumstances in which it is not necessary for fresh affidavits to accompany an amended application.[4] As the Court has not required the existing applicant members to provide fresh affidavits, and the State has not made any comment in this regard, I consider it open and appropriate for me to consider these affidavits for the purposes of the registration test. In my view, all the s 62 affidavits are in the prescribed form and meet the requirements of s 62(1)(a).

Conclusion

[22] 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

What is required to meet s 190C(3)?

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

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

(b) there must be an entry for the 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.

[4] *Drury* [10]–[14].

Consideration

[24] According to the geospatial report and my searches of the Tribunal's geospatial database, there is one application which overlaps part of the current application, which is WAD4/2021 Jardu Mar People (**Jardu Mar**). The Jardu Mar application therefore meets the requirements of s 190C(3)(a). I have searched the Register and I am satisfied that there was no entry for Jardu Mar on the Register when this application was made on 10 April 2018.[5] This means that Jardu Mar is not a 'previous application' for the purposes of s 190C(3). I therefore do not need to consider whether there are claimants in common between the Jardu Mar application and the current application.

Conclusion

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

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

[26] Schedule R indicates that the application is not certified. Schedule R also states that the applicants were authorised on 24 November 2020, which I understand means that the recent amendments to s 190C(4)(b) do not apply and I must consider the application against s 190C(4)(b) as it stood prior to 25 March 2021.[6]

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

[27] Prior to the 2021 amendments, s 190C(4)(b) contained two limbs, both of which must be satisfied:

(a) that the applicant is a member of the claim group; and

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

[28] Following s 190C(4)(b) as it stood prior to 25 March 2021, a Note in the Native Title Act referred to the definition of 'authorising the making of applications' in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision making is utilised:

(a) a process which, under the traditional laws and customs of the claim group, must be complied with; or

(b) where there is no traditional process, a process agreed to and adopted by the claim group.

[29] Section 190C(5), prior to the 2021 amendments, stated that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) is met unless the application:

(a) includes a statement to the effect that s 190C(4)(b) has been met; and

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[5] *Strickland FC* [41]–[43].

[6] *Native Title Legislation Amendment Act 2021* (Cth), Schedule 1, Part 1, s 24(2).

(b) briefly sets out the grounds on which the Registrar should consider that s 190C(4)(b) has been met.

[30] I therefore understand that in order to be satisfied that s 190C(4)(b) is met, one of the decision making processes outlined in s 251B must be identified and complied with, and the requirements of s 190C(5) must also be met.

What information has been provided in support of s 190C(4)(b)?

[31] In order to be satisfied that the necessary authorisation has been given by the claim group, I must inquire through the material available to the Registrar.[7] The information before me which I consider addresses the requirements of s 190C(4)(b) is found in:

(a) Schedule R;

(b) The s 62 affidavits of the applicant members; and

(c) The Vachon, Forrest, Thurtell and Further Thurtell affidavits.

Consideration

Does the application satisfy s 190C(5)?

[32] Schedule R states that the applicant members are members of the claim group and were authorised at a meeting of the claim group in Leonora on 24 November 2020 (**authorisation meeting**). Schedule R also provides that the authorisation took place pursuant to an agreed to and adopted process of decision making by consensus, or majority vote through show of hands in the event consensus could not be reached.

[33] I understand the insertion of the word 'briefly' in s 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation was obtained at this condition.[8] I therefore consider that the information in Schedule R is sufficient to satisfy both limbs of s 190C(5).

Conclusion – s 190C(5)

[34] I am satisfied the requirements of s 190C(5) are met.

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

Is the applicant a member of the claim group?

[35] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group. As noted above, Schedule R contains such a statement. The s 62 affidavits from the applicant members also contain such a statement and state that the deponents believe all of the statements made in the application are true.[9] In the absence of any information to the contrary, it follows that I am satisfied that the members of the applicant are all members of the claim group.

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[7] *Doepel* [78].
[8] *Strickland* [57].
[9] Section 62 affidavits [1], [4].

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

[36] Section 190C(4)(b) also requires that the applicant is authorised to make the application, by all the other members of the claim group. This requires me to identify the decision making process used by the claim group and how it was applied to authorise the applicant to make the application.[10] I will first set out the information before me which I consider relevant to these enquiries and then consider whether the requirements of s 190C(4)(b) are met.

Decision making process

[37] As outlined above, Schedule R provides that the decision making process adopted by the claim group was one of consensus, and in the absence of consensus, by majority vote through show of hands. The application therefore identifies the type of decision making process provided for in s 251B(b).

[38] Where an agreed and adopted decision making process has been utilised, I must be satisfied that all members of the claim group were given reasonable opportunity to participate in the decision to authorise the applicant.[11] In deciding whether all members of the claim group have been given a reasonable opportunity to participate, I understand I must consider the notice and conduct of the authorisation meeting at which the applicant was authorised, the information about which I will summarise below.[12]

Notice of authorisation meeting

[39] The Forrest affidavit states that notice of the authorisation meeting was provided in the following ways:

(a) Public notice in the Kalgoorlie Miner newspaper on 4 and 17 November 2020;

(b) Public notice, requested by Native Title Service Goldfields (**NTSG**) to be displayed at community resource centres in Laverton, Leonora and Coolgardie, the Leonora Telecentre, the Wirrpanda Foundation office in Leonora, the council offices of Wiluna, Menzies and Coolgardie Shires, and Bega Garnbirringu Aboriginal Medical Service in Kalgoorlie; and

(c) Personal notice by mail to 68 Darlot native title claimants for whom addresses were held.[13]

[40] Annexed to the Forrest affidavit is a copy of the notices published in the Kalgoorlie Miner.[14] Those notices include the date, time and venue for the authorisation meeting, specifying that at 9am there would be a meeting of the existing Darlot claim group, as it was previously described (**Meeting #1**) and, depending on the outcome of that meeting, a second meeting at 11am for the newly described claim group (**Meeting #2**). The notice includes both the existing and proposed claim group descriptions, the agenda points for both meetings, a map of the application area (as it stood in November 2020), information about assistance with travel expenses and contact details for any enquiries.

[10] *Noble* [16].
[11] *Lawson* [25].
[12] *Burragubba* [29]–[30].
[13] Forrest affidavit [5]–[8]; annexure KMJF2.
[14] Ibid, annexures KMJF1 and KMJF3.

Conduct of authorisation meeting

[41] The Thurtell and Further Thurtell affidavits include the following details:

(a) Meeting #1 was attended by 125 people.[15]

(b) Attendees signed a register upon arrival and Meeting #1 commenced at approximately 9.40am.[16]

(c) At Meeting #1, the attendees resolved that there was no mandatory traditional decision making process, and agreed to adopt a decision making process by consensus, in the absence of consensus, by majority vote.[17]

(d) Using the agreed decision making process, the attendees at Meeting #1 passed Resolution 4 to amend the claim group description to that which now appears in Schedule A.[18]

(e) Meeting #2 commenced at approximately 3.46pm and was attended by the same people as at Meeting #1, with no one leaving and no additional people joining.[19]

(f) At Meeting #2, the attendees passed the same resolution with regard to the adoption of an agreed decision making process.[20]

(g) By Resolution 7, the attendees confirmed the decision of Meeting #1 to amend the claim group description to that which appears in Schedule A.[21]

(h) By Resolution 9, the attendees resolved to replace the previous applicant group with the members of the current applicant group, which resulted in the addition of one new applicant member and the removal of six previous applicant members.[22]

[42] The Thurtell affidavit also records the names of the Chairperson and the movers and seconders of each motion, and whether each resolution passed by consensus or majority.[23]

[43] The Vachon affidavit provides:

(a) The registration process required attendees to confirm that their details were correctly recorded, including their descent from one of the apical ancestors in the claim group description where relevant.[24]

(b) In Mr Vachon's opinion as an anthropologist, the attendees were broadly representative of the claim group.[25]

(c) During the meeting, Mr Vachon presented his recommendations in relation to changes to the claim group description and the reasons for those recommendations.[26]

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[15] Further Thurtell affidavit, annexure DLT2.
[16] Thurtell affidavit [4]–[5].
[17] Ibid [6].
[18] Ibid.
[19] Ibid [8]–[9].
[20] Ibid [10].
[21] Ibid.
[22] Ibid [10]–[11].
[23] Ibid [6], [10].
[24] Vachon affidavit [8].
[25] Ibid [9].

(d) The attendees discussed certain proposed changes and in Mr Vachon's opinion, the claim group description ultimately agreed to by the attendees and which now appears in Schedule A, does not substantively change the claim group composition that his research recommended.[27]

Consideration

[44] When considering whether all members of a claim group have authorised an applicant to make an application pursuant to s 251B(b), I understand that the reference to 'all' is not to be interpreted literally and does not mean that every single member of the claim group must authorise the applicant.[28] Rather, it is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process, which can be ascertained by information about a well-attended meeting which was appropriately advertised.[29]

[45] In my view, the notice was sufficient to enable the members of the claim group to judge for themselves whether to attend the meeting and vote for or against the proposals set out in the notice.[30] The notice set out the relevant details of the authorisation meeting, provided a map of the application area and the agenda for Meeting #1 and Meeting #2. The invitation to Meeting #1 invited the existing members of the claim group. I consider the invitation to Meeting #2 was expansive and inclusive, insofar as it invited persons associated with the application area through their own birth, migration or authority, or that of one of their predecessors, as well as the descendants of the named apical ancestors. In my view, if a person who claimed to hold native title rights in the application area but did not meet the criteria of the claim group description, there was otherwise sufficient information in the notice, such as the map, meeting details and contact information, to enable them to decide whether to make enquiries or attend the meeting.

[46] I also consider the notice of the authorisation meeting was sufficiently broad, as both personal and public notices were employed. I note that there is no information to confirm that the notice was in fact posted at all the various locations requested by NTSG, however there is also no information before me to suggest that it was not. As the notice was published twice in a local newspaper in the weeks prior to the authorisation meeting and personal notice was given to the existing claim group members, in my view, even if the notice was not also posted at all of the venues requested, this does not detract from the overall sufficiency of the notice given. In my view, the content, publication and distribution of the meeting notice was such that 'fair notice' was given of the business to be dealt with at the authorisation meeting, to all the members of the claim group.[31]

[47] With regard to the conduct of the authorisation meeting, I understand the substance of the following questions must be addressed:

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[26] Ibid [10], annexure DAV3.
[27] Ibid [11]–[23].
[28] *Lawson* [25].
[29] Ibid [27].
[30] *Weribone* [40]–[41], followed in *Burragubba* [30].
[31] Ibid.

> Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? [32]

[48] In my view, the material before me addresses the substance of those questions. As discussed above, details of the notice and to whom it was given have been provided. The notice included the agenda for the meeting. The list of attendees has been provided. The resolutions which were passed and the details of whether they were passed by consensus or majority have been recorded. The names of the Chairperson and the mover and seconder of each resolution have been recorded. The material shows that the attendees authorised the applicant using the agreed to and adopted decision making process which was participatory and inclusive. In light of the information before me, I consider that the notice and conduct of the authorisation meeting was such that all members of the claim group were afforded a reasonable opportunity to participate in the decision to authorise the applicant.[33]

Conclusion – 190C(4)(b)

[49] I am satisfied that the applicant members are members of the claim group and are authorised to make the application by all the other members of the claim group, using an agreed to and adopted decision making process pursuant to s 251B(b). This means s 190C(4)(b) is met.

Conclusion

[50] As I consider s 190C(5) and s 190C(4)(b) are met, I am satisfied s 190C(4) is met.

Section 190B: conditions about merits of the claim

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

What is required to meet s 190B(2)?

[51] 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. 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.[34]

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[32] *Ward v Northern Territory* [25]–[26].
[33] *Burragubba* [29]–[30].
[34] Section 62(2)(a)–(b); *Doepel* [122].

Consideration

Does the information and map of the external boundary meet this condition?

[52] Attachment B2 to the application describes the external boundary of the application area with reference to a Commencement Point and to longitude and latitude coordinate points to six decimal places. The notes in Attachment B2 indicate that the coordinate points are referenced to the Geocentric Datum of Australia 1994 (**GDA94**). The description also references the Goldfields Highway, the town of Menzies, pastoral leases, reserves, road and railway corridors, and surrounding native title determination applications.

[53] Attachment B1 contains a map which shows the external boundary of the application in bold blue. The Commencement Point is labelled, as are the other features described in Attachment B2, including the Goldfields Highway, Menzies and the relevant pastoral leases. The map also includes a coordinate grid and the notes provide that the map data references GDA94.

[54] The assessment in the geospatial report is that the written description and map are consistent and identify the application area with reasonable certainty. I have considered the written description and map and I am satisfied that they provide certainty about the external boundary of the application area.

Does the information about excluded areas meet this condition?

[55] Paragraph 2 of Schedule B states that the application does not cover areas subject to certain types of acts, such as previous exclusive possession acts, areas where native title has been wholly extinguished, and areas for which there is an approved determination of native title. In relation to general exclusion clauses such as these, I understand it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application, as their applicability to any area will require findings of fact and law to be made as part of the hearing of the application.[35] Following this reasoning, I am satisfied the areas affected by the general exclusion clauses can be ascertained at the appropriate time.

[56] Attachment B2 states, that for the avoidance of doubt, the application area does not include any areas subject to:

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

(b) WAD597/2018 Tjalkadjara, as filed on 17 December 2018;

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

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

(e) WAD225/2018 Kultju, as determined on 30 October 2019; and

(f) WAD228/2011 and WAD302/2015 Tjiwarl and Tjiwarl #2, as determined on 27 April 2017.

[57] In my view, the specifically excluded areas can be ascertained from the information in Attachment B2.

[35] *Strickland* [55].

Conclusion

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

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

What is required to meet s 190B(3)?

[59] 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.

[60] Schedule A states:

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

[61] It follows from the description that s 190B(3)(b) is applicable. I understand I am not required to do more than make an assessment of the sufficiency of the description for the purpose of facilitating the identification of any person as part of the group.[36] I also understand that where a claim group description contains a number of paragraphs, they should be read as one discrete passage and in such a way as to secure consistency between them, if such an approach is reasonably open.[37] My consideration at this condition is limited to information in the application.[38]

Consideration

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

[36] *Wakaman* [34].
[37] *Gudjala 2007* [34].
[38] *Doepel* [16].

traditional laws and customs of the claim group operates as a qualifier on all the options for membership.

Descent

[63] I understand that the first option for membership is to be a descendant of one of the ancestors named in paragraph (b). The Court has previously held that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).[39] I consider that requiring a person to show descent from an identified ancestor provides an objective starting point to commence an inquiry about whether a person is a member of the claim group. I consider that factual enquiries would lead to the identification of the people who meet this criterion.

[64] From the wording of paragraph (a)(i) of Schedule A, I understand 'socially-recognised' descendants are members of the claim group through application of the group's traditional laws and customs and that this introduces a subjective element. I consider the traditional laws and customs would provide the 'set of rules or principles' through which it could be ascertained whether an individual is a socially-recognised descendant.[40]

Birth or birth of an ancestor

[65] In my view, the second option for membership in fact comprises of two options – one's own birth, or the birth of an ancestor on the application area. Describing a claim group with reference to birth in an area is a method which has been previously accepted by the Court.[41] I understand from paragraph (b) that the named apical ancestors were born on the application area and that the descendants of those ancestors can consequently meet this criterion. I am therefore of the view that with some factual enquiry it will be possible to identify the persons who meet either of the 'birth' options for claim group membership.

Migration and long association or long association of an ancestor

[66] The third option for membership similarly comprises of two options – one's own migration to, and long association with, the application area, or that of an ancestor. Describing a claim group with reference to long traditional association is also a method which has been accepted by the Court, and for this option I note in particular the reference in paragraph (a) to the claim group's traditional laws and customs.[42] I consider that with reference to the traditional laws and customs and some factual enquiries it will be possible to ascertain the persons who meet either of the 'long association' options for claim group membership.

Religious, sacred or ritual authority

[67] The fourth option for membership is holding religious, sacred or ritual authority under traditional laws and customs for one or more places in the application area. As with the socially-recognised descent and long association options, I consider that the claim group's traditional laws and customs would provide the principles through which it could be ascertained whether a person meets the requirements of this membership option.[43] I consider

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[39] *WA v NTR* [67].
[40] *Ward v Registrar* [25].
[41] *De Rose* [926].
[42] Ibid [897]; *Tjungarrayi 2016*, Schedule 3; *Tjungarrayi 2017*, Schedule 3.
[43] *Ward v Registrar* [25].

that through reference to the traditional laws and customs, factual enquiries to other members of the claim group and to the individuals in question, the persons who hold religious, sacred or ritual authority could be ascertained.[44] I also note the Court has previously accepted forms of religious, sacred or ritual authority as a method of identifying members of a claim group.[45]

Recognition

[68] As noted above, I understand that recognition is a qualifier to all the membership options, considering its placement at the beginning of both paragraph (a) and paragraph (b) of the claim group description. The Court has previously held that membership of a claim group is based on group acceptance.[46] Schedule F states that the claim group have a connection to the land of the application area and that their traditional laws and customs give rise to native title rights and interests.[47] I therefore understand that a connection to the land enables other members of the claim group to recognise whether a person is a member of the claim group, in addition to meeting the requirements of the person's relevant membership option. In my view, through enquiries to the other members of the claim group, it would be possible to ascertain whether a person is recognised as a member under the traditional laws and customs. In reaching this view, I have also considered the judicial guidance that it is appropriate to construe the requirements of the Native Title Act beneficially.[48]

Conclusion

[69] 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

What is required to meet s 190B(4)?

[70] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed are 'native title rights and interests' in accordance with s 223, as I understand that is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis. I note that my consideration of this condition is confined to information found in the application.[49]

Consideration

Exclusive possession

[71] From the description in paragraph 1 of Schedule E, I understand that exclusive possession is claimed in areas within the application area where there has been no prior extinguishment, or

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[44] Ibid.
[45] *De Rose* [926]–[928]; *Tjungarrayi 2016*, Schedule 3; *Tjungarrayi 2017*, Schedule 3.
[46] *Aplin* [256]–[261].
[47] Schedule F [1]–[5].
[48] *Kanak* [73].
[49] *Doepel* [16].

where any such extinguishment must be disregarded, such as areas where s 238 applies. I understand that a broad claim to exclusive possession such as this does not offend s 190B(4).[50]

Non-exclusive rights

[72] From the description in paragraph 2 of Schedule E, I understand that the listed non-exclusive rights are claimed in areas where exclusive possession cannot be claimed. I consider the non-exclusive rights form an exhaustive list, and in my view there is no inherent or explicit contradiction within the description.[51]

Qualifications

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

Conclusion

[74] 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

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

[75] 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; and

(b) that there exist traditional laws acknowledged by, 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.

Consideration

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

[76] As discussed above, Schedule E describes the native title rights and interests claimed by the claim group. Schedule F includes some general statements about the claim group's association with the application area and their laws and customs. Schedule G lists activities which members of the claim group currently undertake on the application area. Schedule M contains a statement that certain claim group members have a traditional physical connection with the application area. In my view, the additional material more directly addresses the requirements of s 190B(5) and my reasons below will focus on the information in that material, particularly the Submissions and the three connection reports.

[50] *Strickland* [60].
[51] *Doepel* [123].

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

[77] As confirmed in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:[52]

(a) the claim group presently has an association with the application area, and the claim group's predecessors have had an association with the application area since sovereignty or at least since European settlement;[53]

(b) 'there is an association between the whole group and the area, although not all members must have such association at all times';[54] and

(c) there is an association with the whole area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.[55]

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

Association of the predecessors of the claim group with the application area

[78] Schedule F and the Submissions assert that the claim group and their predecessors have had an association with the application area since the assertion of British sovereignty in 1829.[56]

[79] The Submissions explain that the predecessors of the claim group, as members of the Western Desert society or cultural bloc (**WDCB**), lived and travelled in and around the application area, camping, hunting and participating in ceremonies in accordance with their traditional laws and customs.[57]

[80] The connection reports provide:

(a) Settlement of the application area occurred with the establishment of the township of Woodarra (Darlot) in 1894 and the discovery of gold in the region the following year.[58]

(b) Major WDCB Dreaming tracks, including the Seven Sisters, and the presence of certain 'Dreamtime Beings' were documented at locations across the application area by ethnographers in the 1940s and 1970s.[59]

(c) Current claimants recall their predecessors, including some of the apical ancestors, living on the various stations of the application area, hunting and teaching them about the land, its resources and their relationship to it.[60]

(d) A number of men in the claim group worked at the State battery at Melrose, the station on which Darlot was located, from when it opened in 1898 until its closure in the 1980s.[61]

(e) The apical ancestors were alive around the time of settlement in and around the application area, for example:

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[52] *McLennan* [28].
[53] *Gudjala 2007* [52].
[54] Ibid.
[55] *Martin* [26]; *Corunna* [39], [45].
[56] Schedule F [1]; Submissions [24].
[57] Submissions [26]; see also Connection report 1 [162].
[58] Connection report 2 [18]–[19].
[59] Connection report 1 [184], [195]–[196], [200]; Connection report 2 [42], [52].
[60] Connection report 1 [35].
[61] Connection report 2 [18].

1. Telpha Ashwin was born at Wingara Soak in the northern part of the application area around 1887 and had six children between 1902 and 1918, living at various places in the application area including at Darlot in 1924;[62]
2. Kweelah, Telpha's sister, is remembered 'walking around the Weebo area', a station covering the central west part of the application area; her son was born at Weebo and raised his family in Leonora, in the south of the application area;[63]
3. Daisy Cordella grew up at Wongawol station, just to the north of the application area, and her daughter was born at Darlot in 1926; they lived on various stations in the application area including Tarmoola, Sturt Meadows and Weebo, and travelled across the area to participate in ceremonies;[64]
4. Beaman aka Charlie worked and married near Darlot, where his first child was born in the 1920s; he died at Yandal Station in the north of the application area in the 1950s and is remembered as a man who 'held the Law for Darlot';[65]
5. Mary Naringa was born in 1918 and is recalled as being 'from Darlot'; her daughter also lived in and around the application area including at Menzies on the southern border;[66] and
6. Nobby Nixon spent all his life around the application area, particularly Banjawarn Station on the eastern side, and belonged to the same generation as Telpha Ashwin.[67]

Association of the current claim group with the application area

[81] The connection reports provide that claimants know the Dreaming stories associated with particular locations in the application area, such as the Seven Sisters, and have actively taken on their custodial responsibilities in regards to the protection of sites.[68] One Dreaming site associated with a rockhole just to the north of the application area travels through the lakes of the application area before exiting in the south east at Lake Raeside.[69] Another Dreaming track enters the application area from the south near Menzies, and is avoided by claim group members who do not have the requisite knowledge or responsibility for that Dreaming track.[70]

[82] One senior claimant, the daughter of apical ancestor Annie, was born in a cave at Darlot after her mother walked there 'from the bush'.[71] Claimants describe how their forebears taught them when they were children how to utilise the resources on the application area, including collecting silky pears, fishing for fresh water turtle and hunting kangaroo.[72] The material provides that growing up on the application area, claimants learned from their senior kin how

[62] Connection report 1 [167], [191]; Connection report 2 [76].
[63] Connection report 2 [95]–[96].
[64] Ibid [117], [127].
[65] Ibid [35], [198].
[66] Ibid [206].
[67] Ibid [237].
[68] Connection report 1 [223]; Connection report 2 [44], [47].
[69] Connection report 2 [57].
[70] Ibid [52], [56].
[71] Ibid [135].
[72] Connection report 3 [6].

to prepare meat 'properly' and attended ceremonies with them.[73] These and other customs that were first recorded in the late 19th century, are practiced by the claim group members on the application area today.[74] Current claimants continue to protect places of significance on the application area pursuant to their laws and customs and through heritage clearances, including at Marshall Pool, Goanna Patch and around Leonora.[75] One claimant explains how she looks after rockholes and soaks on her country, including two on the 'Darlot road'.[76] Claimants continue to camp at locations on the application area previously used by their predecessors, with 'continuous occupation' at places including Wilson's Patch, Goanna Patch, Tarmoola Creek, Darlot and Darda Station.[77]

Consideration

Is the factual basis sufficient to support an association between the predecessors of claim group and the application area?

[83] The material provides that settlement in the application area occurred around the very end of the 19th century, and that some of the apical ancestors were alive and living in and around the application area at that time. The apical ancestors were observed in the application area in the early decades of settlement and some significant events are documented in the historical record, such as their marriages, deaths and burial locations. There is also information about the apical ancestors and other predecessors working on the application area and travelling across the area to participate in ceremonies. In my view, such information supports the assertion that the predecessors of the claim group were associated with the application area at the time of settlement. The material indicates that the descendants of the apical ancestors had the same or similar association with the application area as their parents. I can therefore infer that the predecessors alive at settlement likely had a similar association with the application area as their own predecessors, who would have been alive prior to British sovereignty. I understand that it is appropriate to make this retrospective inference and to construe the Native Title Act beneficially.[78]

[84] Given the relevantly recent date of settlement in the application area, it appears that only one or two generations separate the current claimants from the apical ancestors. Senior claimants recall their apical ancestors in the application area and information is recorded about the births of some members of the intervening generations in the area. From the material before me, I am satisfied that the factual basis is sufficient to support an association between the claim group and the application area, both at the time of sovereignty and since that time.

Is the factual basis sufficient to support an association between the claim group and the application area currently?

[85] In my view, the material before me contains sufficient information to support an association between the members of the claim group and the application area currently. Claimants continue to utilise the resources of the application area using the methods taught to them by

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[73] Ibid [6]–[7].
[74] Ibid [14].
[75] Ibid [48]–[49].
[76] Ibid [51].
[77] Ibid [59].
[78] *Harrington-Smith No 5* [294]–[296], *Kanak* [73].

their predecessors, know the stories and locations of the relevant Dreamings and protect the significant sites. I note the detailed information about particular locations in the application area where claimants continue to fish and camp, including Marshall Pool, Goanna Patch and Darda Station. In my view, the information before me describes, with the requisite geographic specificity, the association between current claim group members and the application area.

Is the factual basis sufficient to support an association, both past and present, with the whole application area?

[86] I understand that s 190B(5)(a) requires a factual basis sufficient to support an association with the whole of the application area, however this does not mean that every member of the claim group must have an association with the whole application area at all times.[79] From the map in Attachment B1 and the Tribunal's geospatial database, I can identify many of the locations mentioned in the material. Melrose station, in which the town of Darlot / Woodarra was located, lies at the top of the application area. Yandal, Weebo and Sturt Meadows stations cover roughly the western half of the application area, with Menzies at the very south, and Leonora in the south east. Tarmoola station lies in centre of the application area and Banjawarn on the north eastern side. I understand Darda Station is now covered by Nambi station, located in the north east of the application area. There is information before me about the association that claim group members, past and present, had with all of these locations, including places where they were born, lived, worked, married, died and were buried. In my view, the material supports an assertion of a physical association between the claim group and the whole of the application area.

[87] I also note the information about particular Dreaming sites located in the application area, and about Dreaming tracks which traverse the length of the application area and continue beyond its boundaries. The material provides that these sites and stories were told to the early ethnographers by the claim group's predecessors, who also taught them to their descendants. The material shows that the current members of the claim group know the location of these same Dreaming sites and tracks, as well as the associated Dreaming stories. In my view, this information supports a spiritual association between the claim group and the whole application area.

[88] I therefore consider the factual basis is sufficient to support the asserted physical and spiritual association by the claim group, and their predecessors, with the entire application area.[80]

Conclusion – s 190B(5)(a)

[89] I am satisfied that the factual basis is sufficient to support the assertion that the claim group has, and its predecessors had, an association with the application area. This means s 190B(5)(a) is met.

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

[90] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that gives rise to the claim to native title rights and interests. 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws

[79] *Corunna* [31].
[80] Ibid [39].

acknowledged, and traditional customs observed,' by the native title holders. I understand from *Yorta Yorta* that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice, and in the context of the Native Title Act, 'traditional' also carries two other elements, namely:

> …it conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs* [and]
>
> …the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.[81]

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

> Where a rule, or practice or behaviour in relation to the identified land and waters arises from traditional law, and has normative content, then it can be capable of satisfying para (a) of s 223(1).
>
> *[A] claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character*, there is no further gloss or overarching requirement, and no further rigidity. The Native Title Act in terms does not require establishment of some overarching "society" that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.[82]

[92] *Gudjala 2009* held that if descent from named ancestors is the basis of membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.[83]

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

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

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

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

[94] In addition to the information summarised above in relation to s 190B(5)(a), the material provides the following information in support of s 190B(5)(b):

(a) The occupation, use and enjoyment of the application area by the claim group has been in accordance with their laws and customs.[84]

(b) The claim group are members of the society of the WDCB and as such, observe laws and customs which are common across the Western Desert region of Australia.[85]

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81 *Yorta Yorta* [46]–[47], emphasis added.
82 *Warrie* [105], [107], emphasis added.
83 *Gudjala 2009* [40].
84 Schedule F [2].
85 Submissions [30]–[32]; see also Connection report 1 [162].

(c) Prior to European contact and in the early decades of settlement in the application area, the predecessors of the claim group shared similar laws and customs with other groups in the Western Desert, spoke the same language, intermarried and traversed the region to fulfil kinship and ceremonial obligations and trade, which the current claim group continue to do today.[86]

(d) In the WDCB, laws and customs are underpinned by the mythological beliefs in the thukurr / tjukurrpa or Dreaming, which connects individuals and groups to ancestral beings within the landscape, including at places in the application area.[87]

(e) Through the WDCB Dreaming beliefs, the predecessors of the claim group were connected to the application area, which gave rise to their rights and interests in the application area; this meant that they were permitted, under the laws and customs, to 'speak for' sites in the application area and to transmit cultural knowledge about it to their descendants.[88]

(f) Early ethnographers observed that the Dreaming constituted a 'moral system' and governed people's behaviour, including normative rules of kinship, food taboos and preparation, and gender-restricted access to certain sites, which the current claim group continue to observe today in relation to the application area.[89]

(g) The apical ancestors, as members of the WDCB society, observed its laws and customs and participated in various activities, for example, Telpha Ashwin participated in ceremonies and engaged in hunting and gathering with her extended family and children.[90]

(h) Current claimants describe how they were taught by their predecessors the Dreaming stories which manifest in the application area and about certain places to avoid due to the presence of dangerous spiritual forces that can cause physical harm and even death, if the resident spirits are not correctly approached.[91]

(i) The current claim group continue to hold and participate in WDCB initiation ceremonies that were also recorded in the early decades of settlement, during which the stories of the Dreaming, including those linked to sites in the application area, are performed and passed on through song.[92]

(j) The predecessors taught the current claim group the rules pertaining to use and preparation of resources in the application area, including seeds, roots, grubs, lizards and emu eggs, as well as the hunting of kangaroo and emu, the meat of which must be prepared 'properly' and shared in accordance with particular rules. These same methods were also observed and recorded in the region as early as the 1890s.[93]

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86 Connection report 1 [127], [192]; Connection report 2 [26], [55]; Connection report 3 [32]–[33].
87 Connection report 1 [203], [206]; Connection report 2 [15].
88 Connection report 1 [85], [192], [224]; Connection report 2 [74].
89 Connection report 2 [40]–[42], [45], [59].
90 Ibid [84].
91 Ibid n 27, [45].
92 Connection report 2 [55]–[56].
93 Connection report 3 [6], [10]–[23], [25].

(k) The consumption of bardi grubs by people in the region was recorded in the 1890s and one claimant describes how she was taught by her father how to collect and prepare bardi grubs on Weebo station in the application area, including identification of the particular trees and careful extraction of the grubs, as he said 'they weren't allowed to destroy the trees'.[94]

(l) The procedure for preparing lizard for consumption, first observed in the 1890s, is still today 'strictly followed', with one claimant explaining '[w]e do it that way because it is passed down. Truth was absolute'.[95]

(m) Gender and age-based restrictions are observed by the claim group in relation to the collection and preparation of certain foods, which were taught to the current claim group by their predecessors and also recorded by early ethnographers, for example kangaroo must be prepared by men and joeys cannot be eaten by children.[96]

(n) Gender restrictions are also observed in relation to accessing certain named sites and their associated Dreaming stories, so that only those of the appropriate gender will be taught about them. For example, apical ancestor Daisy Cordella taught a particular women's Dreaming for the application area to her daughter, who in turn taught it to her daughter, who is now a senior member of the claim group.[97]

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

Does the factual basis support a link between the pre-sovereignty society, the apical ancestors and the current claim group?

[95] The material before me identifies that the pre-sovereignty society in the application area was the WDCB. I understand that it is possible for a claim group to be members of a broader society, without all the members of that society being members of the claim group. The Full Court has made the 'coarse analogy' between such a pre-sovereignty society and the society of Australia whose various members also observe their local and state-based laws.[98] In my view, the current application is similarly analogous – the claim group are members of the WDCB and follow the relevant laws and customs, as manifested through the Dreaming stories relevant to the application area. I therefore consider the material addresses the identity of the pre-sovereignty society, sufficient for the purposes of s 190B(5)(b).

[96] In my view, the material provides sufficient information about the participation of the claim group's predecessors in the society of the WDCB at the time of settlement in the application area, through their participation in trade and ceremony with neighbouring groups. As noted above, I consider it reasonable to infer that the earlier generations of the claim group had the same or similar association with the application area at the time of sovereignty. Further, only a few generations separate the senior members of the claim group from the apical ancestors and other predecessors alive at the time of settlement, and the material provides that the current claim group are the descendants of those predecessors and have inherited rights and interests in the application area pursuant to WDBC laws which materialise from the Dreaming.

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[94] Ibid [15], [22].
[95] Ibid [15], [19]–[20].
[96] Ibid [25]–[29].
[97] Ibid [25], [41]–[45].
[98] *Sampi FC* [69].

In light of the information before me, I consider the factual basis supports the assertion of a link between the pre-sovereignty society, the apical ancestors and the current claim group.

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

[97] As discussed above at s 190B(5)(a), the connection reports set out the association of each of the apical ancestors with the application area. Current claimants assert that they were taught the Dreaming stories for the application area from their predecessors, including from some of the apical ancestors. I understand from the material that it is knowledge of the Dreaming stories and spiritual connection to certain sites which gives rise to rights and interests in the application area, and that there has been transmission of the Dreaming stories and observance of its laws and customs through the generations of the claim group since before the time of settlement. According to the material, the current claimants know the rules which are set out in the Dreaming stories and the consequences of transgression, for example, that physical harm and even death can result from unlawful access to country or failure to appropriately communicate with resident spirits. I note the examples of gender-restricted knowledge in the WDCB, and that the knowledge and responsibility for certain women's sites in the application area has been passed down to current female members of the claim group, in accordance with those rules.

[98] In addition to rules pertaining to access to country, I also consider that the connection reports provide detailed information about other normative rules which the claim group continue to observe, such as rules about the correct methods of hunting, collecting and preparing different food sources. The material shows that gender-based restrictions also continue to be observed by the claim group in relation to food collection and preparation, in accordance with the normative rules of the WDCB. The claimants explain that they were taught these rules and methods by their predecessors whilst on the application area, and such information is also reflected in the historical record in relation to earlier generations' use of the application area and surrounds. In my view, there is sufficient information about how the laws and customs have been acknowledged and observed by successive generations of the claim group, to support the assertion that the laws and customs are 'traditional' in sense described in *Yorta Yorta*.[99]

Conclusion – s 190B(5)(b)

[99] I am satisfied the factual basis supports 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)?

[100] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests.[100] It also requires a sufficient factual

[99] *Yorta Yorta* [46]–[47].
[100] *Gudjala 2009* [29].

basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.[101]

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

[101] The connection reports provide that the rules for preparing certain foods are 'rigorously and meticulously followed' by the claim group members, who also state that they teach these methods to their children.[102] They also provide that the WDCB trade network continues to operate, with claimants recalling trading of spears and hair belts with people from Derby to the north in the 1920s, and describing regional gatherings where items such as rope were exchanged in recent decades.[103] As noted above, gender-based knowledge about particular sites and their associated Dreaming stories continue to be passed from men to their sons and by women to their daughters, nieces and granddaughters.[104] In my view, these examples and others found in the material support the assertion that the laws and customs have continued to be observed by the claim group, substantially uninterrupted, since at least the time of settlement in the application area.[105]

Conclusion – 190B(5)(c)

[102] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold the native title in accordance with traditional laws and customs. This means s 190B(5)(c) is met.

Conclusion

[103] I am satisfied that 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). This means that s 190B(5) is met.

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

What is required to meet s 190B(6)?

[104] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a 'native title right or interest' is one that is held under traditional laws acknowledged and traditional customs observed by the claim group.

[105] The Court has held that the words 'prima facie' mean that if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.[106] I therefore understand my task is limited to considering whether there is probative factual material which supports the existence of the claimed rights and interests. As long as some rights can be prima facie established, the requirements of

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[101] *Gudjala 2007* [82].
[102] Connection report 3 [28].
[103] Ibid [32].
[104] Ibid [45]–[47].
[105] *Yorta Yorta* [87].
[106] *Doepel* [132], [135].

s 190B(6) will be met.[107] Only those rights and interests I consider are established prima facie will be entered on the Register.[108] I have grouped certain claimed rights together where I consider it is appropriate and convenient to do so.

Consideration

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

*1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 of the Native Title Act 1993 (Cth) applies), the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters covered by the native title application determination area (**application area**) as against the whole world ("**exclusive possession area**").*

[106] I understand that the above claimed right is one of exclusive possession, and for such claims, there is significant judicial guidance. In *Ward HC*, the High Court commented:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.[109]

[107] The Full Court held in *Griffiths FC:*

> If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair".[110]

[108] In *Sampi*, the Court held:

> [T]he right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.[111]

[109] The material provides that Dreaming stories manifest at particular locations in the application area, such that a 'disciplined approach to country' is required so as to avoid harm.[112] In relation to certain water sources, specific actions must be performed before the water can be safely entered, including talking to the mythological snake which resides there.[113] The material also describes how certain claim group members are responsible for the protection of sacred sites on the application area and must be avoided by others.[114] In accordance with the laws and customs of the WDCB, claimants have the right to 'speak for' their country and as such, have the right to access their country 'without seeking the approval of anyone'.[115] The claimants speak for different parts of the application area and cannot 'speak for a story they

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107 Ibid [16].
108 Section 186(1)(g).
109 *Ward HC* [88].
110 *Griffiths FC* [127].
111 *Sampi* [1072].
112 Connection report 2 [49].
113 Ibid.
114 Ibid [56].
115 Connection report 3 [40], [61].

are not the custodian for'.[116] With regards to another's country, in earlier times fires were lit to signal one's presence and individuals would wait to be invited in.[117] Today, it remains important to ask the people who speak for country before going there to camp and hunt, and one claimant describes how she tells people where they can go on her country, explaining '[i]f they went to the wrong place the [spirits] would tell them that they are not supposed to be there'.[118]

[110] As discussed above at ss 190B(5)(b)–(c), I consider the factual basis supports the assertion that the laws and customs of the claim group have been handed down from the predecessors of the claim group and continuously observed since at least the time of settlement in the application area. In my view, there is also sufficient information in the material to show how the right of exclusive possession operates in the application area in accordance with those traditional laws and customs. The material describes the right that claimants have to 'speak for' certain places in the application area, based on their observance of the laws of the Dreaming, the negative consequences which are believed to befall transgressors, and how permission must be sought from the appropriate people in order to safely access country. In my view, the information before me accords with the judicial guidance about the right of exclusive possession outlined in *Ward HC*, *Sampi*, and *Griffiths FC*, extracted above. I therefore consider that the right of exclusive possession is prima facie established.

*2. Over areas where a claim to exclusive possession cannot be recognised ("**non-exclusive possession area**"), the native title claim group claim the following rights and interests exercisable in accordance with the traditional laws and customs of the native title claim group:*

(a) The right of access to the application area;

(b) The right to camp on the application area;

(c) The right to erect shelters on the application area;

(d) The right to live on, use and enjoy the resources of the application area;

(e) The right to move about the application area;

(g) The right to hunt on the application area;

[111] There are a number of examples in the material of claim group members, past and present, living on, accessing and moving about the application area for various activities and camping at specific locations within it, some of which I have extracted above at s 190B(5)(a)–(b).[119] I understand from the material that shelters are erected by the claim group members when temporarily camping on the application area.[120] I have also extracted above some examples of claimants hunting on the application area and using and enjoying other resources, including lizards and grubs, in accordance with traditional laws and customs which prescribe the

[116] Ibid [61].
[117] Ibid [70].
[118] Ibid [63], [73].
[119] See for example, Connection report 3 [48]–[59].
[120] Ibid [58]–[59].

methods and certain gender-restrictions on these activities.[121] For example, hunting kangaroo and emu is prohibited to women, while digging for honey ants must not be done by men.[122]

[112] I consider these rights are prima facie established.

(f) The right to hold meetings on the application area;

(h) The right to conduct ceremonies on the application area;

(i) The right to participate in cultural activities on the application area;

[113] There are examples in the material of claimants past and present engaging in cultural activities, meetings and ceremonies on the application area, some of which I have extracted above.[123] I note the information about initiation ceremonies and other meetings which were recorded in the early settlement period and which claimants continue to participate in today, and that predecessors would travel across the region to participate in such ceremonies.[124]

[114] I consider these rights are prima facie established.

(j) The right to maintain and protect places of significance under traditional laws and customs in the application area;

[115] Connection report 3 contains a section which explains in detail how this right operates with respect to the application area.[125] It specifies that the claim group's religious beliefs in the Dreaming manifest in certain places and objects such as stones, trees and rockholes, and that claim group members are obligated to protect those places and objects under the laws which materialise from those beliefs.[126] In accordance with WDCB laws, these obligations are gender-based and 'cannot be ignored'.[127] A number of places in the application area are listed in accordance with their designation as either a men's or women's place, and examples are provided of how the claimants protect these places, including practical actions such as cleaning and caring for the physical condition of the sites, and through spiritual actions of singing and participating in rituals.[128] One claimant describes looking after rockholes and soaks in her country by maintaining the water lilies and covering the holes with branches.[129] Further protection of places of significance occurs through participation in heritage clearances.[130]

[116] I consider this right is prima facie established.

(k) The right to control access to, and use of, the application area by other aboriginal people who seek access to or use the lands and waters in accordance with traditional laws and customs.

[117] The Full Court has recognised the existence of native title rights where control is only directed at other Aboriginal people who are governed by the claim group's traditional laws and

[121] Ibid [24]–[26].
[122] Ibid [24].
[123] See for example, Connection report 1 [127]; Connection report 3 [7], [33].
[124] Connection report 1 n 38, n 175, [101], n 188, [104]–[105], [116]–[117]; [153]; Connection report 2 [26], n 11, [55], [84], [127]; Connection report 3 [7], [33], [81].
[125] Connection report 3 [38]–[53].
[126] Ibid [39].
[127] Ibid [39]–[40].
[128] Ibid [42]–[44].
[129] Ibid [51]–[52].
[130] Ibid [48]–[49].

customs, as I consider is the case with this claimed right.[131] The right is also specifically addressed in Connection report 3, which provides examples of how control of access operates pursuant to traditional laws and customs, under which permission must be sought to access country from the relevant owners, this interaction being more than 'proper manners' but rather a 'fundamental aspect of being a person' in the WDCB society'.[132]

[118] I consider this right is prima facie established.

Conclusion

[119] I am satisfied that all of the rights and interests claimed in the application are established on a prima facie basis. As I am satisfied that the factual basis is sufficient to support the existence of traditional laws and customs, in my view it follows that the rights are held pursuant to those traditional laws and customs, and can therefore be described as 'native title rights and interests'. This means s 190B(6) is met.

Traditional physical connection – s 190B(7): condition met

What is required to meet s 190B(7)?

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

(a) currently has or previously had a traditional physical connection with any part of the application area; or

(b) previously had and would reasonably have been expected currently to have such a connection, but for certain things done.

[121] Section 190B(7) requires the material to satisfy the Registrar of particular facts such that evidentiary material is required and the physical connection must be in accordance with the traditional laws and customs of the claim group.[133]

Consideration

[122] Schedule M identifies certain individuals who are asserted to have a traditional physical connection to the land and waters of the application area. I consider that the information I have extracted above in relation to ss 190B(5)–(6), demonstrates the physical connection that claim group members have with the application area, shown through their ongoing use of it to camp, hunt, collect food and other resources. Based on the material before me, I consider at least one claim group member currently has or had a physical connection to the application area.

[123] I also consider the claim group members' connection is 'traditional' in the sense required by s 190B(7). As I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, it follows that I am satisfied the current claim group members' connection with the application area is in accordance with those laws and customs, such that it can be described as 'traditional'.

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[131] *Ward FC No 2* [11]; *De Rose FC No 2* [169]–[170].
[132] Connection report 3 [60]–[75].
[133] *Doepel* [18]; *Gudjala 2009* [84].

Conclusion

[124] I am satisfied at least one member of the claim group currently has or had a traditional physical connection with a part of the application area, as required by s 190B(7)(a). This means s 190B(7) is met.

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

What is required to meet s 190B(8)?

[125] Section 190B(8) requires the application to comply with the requirements of ss 61A(1)–(3). Section 61A restricts the making of applications over areas covered by approved determination of native title and exclusive possession act areas; and also prohibits claims of exclusive possession to be made over previous non-exclusive possession act areas.

Consideration

[126] I consider the application complies with each of the requirements of ss 61A(1)–(3):

Section	Requirement	Information	Result
s 61A(1)	No native title determination application if approved determination of native title	Schedule B paragraph 2(c) states that approved determinations of native title are excluded from the application area. The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B paragraph 2(a) provides that the application does not cover areas where a previous exclusive possession act was done.	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E paragraph 1 states that exclusive possession is only claimed where it can be recognised, such as areas where there has been no prior extinguishment of native title or where s 238 applies. It follows that no claim to exclusive possession is made in previous non-exclusive possession act areas.	Met

Conclusion

[127] As the application complies with s 61A, I am satisfied the requirements of s 190B(8) are met.

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

What is required to meet s 190B(9)?

[128] 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). These include claims to ownership of certain resources wholly owned by the

Crown, claims to exclusive possession over offshore places, and claims where native title rights and interests have been wholly extinguished.

Consideration

[129] In my view, the application does not contravene any of the restrictions found in s 190B(9):

Section	**Requirement**	**Information**	**Result**
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that the claim group does not claim ownership of minerals, gas or petroleum wholly owned by the Crown.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that the claim group does not claim exclusive possession of any off-shore place.	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Schedule B paragraph 2(b) states the application does not cover areas where native title has been wholly extinguished. There is no information in the application that discloses to me that native title rights and interests in the claim area have otherwise been extinguished.	Met

Conclusion

[130] I am satisfied the requirements of s 190B(9) are met.

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Darlot
NNTT No.	WC2018/005
Federal Court of Australia No.	WAD142/2018
Date of Registration Decision	9 July 2021

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:

10 April 2018

Date application entered on Register:

9 July 2021

Applicant:

As per Schedule of Native Title Claims (**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 19 May 2021 and made pursuant to s 99 of the Native Title Act.