

Registration Decision

Application name	Elizabeth Jingle & Ors on behalf of the Jaru People #2 and State of Western Australia (Jaru People #2)
Name of applicant	Mrs Elizabeth Jingle, Mrs Rosemary Carey, Mr Frank Sampi, Mrs Margaret Rogers, Mrs Lena Carey
Federal Court of Australia No.	WAD288/2021
NNTT No.	WC2021/008
Date of Decision	25 February 2022

Claim not accepted for registration

I have decided the claim in the Jaru People #2 application does not satisfy all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must not be accepted for registration and will not be entered on the Register of Native Title Claims (**Register**).

For the purposes of s 190D(3), my opinion is that the claim does not satisfy ss 190B(5)–(7). It also does not satisfy ss 190C(3)–(4).

Katy Woods²

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

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (**Aplin**)
Burrabungba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (**Burrabungba**)
De Rose v South Australia [2002] FCA 1342 (**De Rose**)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (**Warrie**)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (**Gudjala 2007**)
Gudjala People #2 v Native Title Registrar [2008] FCAFC 157 (**Gudjala 2008**)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (**Gudjala 2009**)
Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31 (**Harrington-Smith No 9**)
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**)
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**)
Risk v National Native Title Tribunal [2000] FCA 1589 (**Risk**)
Strickland v Native Title Registrar [1999] FCA 1530 (**Strickland**)
Sturt on behalf of the Jaru Native Title Claim v State of Western Australia [2018] FCA 1923 (**Jaru**)
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 and Northern Territory v Lane [1995] FCA 1484 (**Lane**)
Western Australia v Native Title Registrar [1999] FCA 1591 (**WA v NTR**)
Western Australia v Strickland [2000] FCA 652 (**Strickland FC**)
Wiri People v Native Title Registrar [2008] FCA 574 (**Wiri People**)

Background

- [1] The claim in this application is made on behalf of the Jaru native title claim group (**claim group**). It covers an area of approximately 131 square kilometres, located in the East Kimberley region of Western Australia (**application area**).
- [2] The application was filed on 17 December 2021 and the Federal Court of Australia (**Federal Court**) gave a copy of the application to the Native Title Registrar (**Registrar**) pursuant to s 63. This referral triggered the Registrar's duty to consider the claim made in the application in accordance with s 190A. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C (**registration test**).

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

Procedural fairness

- [4] On 21 December 2021, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the State of Western Australia (**State**) to advise I would be applying the registration test to the application and any comments on the application should be received by 14 January 2022.
- [5] Also on 21 December 2021, the senior officer wrote to the applicant's representative and advised that any further information the applicant wished me to consider should be received by 14 January 2022.
- [6] No information or submissions were received from either the applicant or the State 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 accompanying documents. 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 information in the geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 10 January 2022 (**geospatial report**), information in the Tribunal's geospatial database and 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)?

- [8] 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 understand the matters covered by s 61(5) are matters for the Federal Court.

Consideration

- [9] 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	Part A(2), Schedule A,	Met

³ *Doepel* [16], [35]–[39].

	applicant	affidavits filed with application (s 62 affidavits)	
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

[10] I consider the application contains all the information specified in s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	s 62 affidavits	Met
s 62(1)(d)	Section 47 agreements	Schedule L(2)	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Attachment D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F, Attachments F1–F4	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Attachment I	Met
s 62(2)(i)	Conditions on authority	Schedule IA	Met

Conclusion

[11] As the application contains all the details and information specified in ss 61–2, I am satisfied s 190C(2) is met.

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

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

[12] 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.

Consideration

[13] The geospatial report advises that the application area is entirely overlapped by the WAD42/2019 Jaru (WC2012/003) application (**Jaru**). I have confirmed this overlap through my own searches of the Tribunal’s geospatial database. This means s 190C(3)(a) is met.

- [14] *Strickland FC* provides that for the purposes of s 190C(3)(b), the date an application was ‘made’ is the date it was filed in the Federal Court.⁴ According to the Register, the Jaru application was on the Register when this application was filed in the Federal Court on 17 December 2021. The Jaru application therefore satisfies s 190C(3)(b).
- [15] The Register also shows that the Jaru application was entered onto the Register as a result of it being considered for registration under s 190A, and it has not been removed. The Jaru application therefore satisfies s 190C(3)(c).
- [16] As the Jaru application satisfies all the conditions in ss 190C(3)(a)–(c), it is a ‘previous application’ and so consideration must be given to whether there are members of the Jaru native title claim group who are also members of the claim group for the current Jaru People #2 application.
- [17] Schedule O states that the members of the Jaru native title claim group are the same as the members of the current application. I have also compared the description of the native title claim group for the Jaru application with the claim group description in Schedule A of the current application and I note a number of apical ancestors are named in both descriptions, including:
- (a) Camel Thompson;
 - (b) Dilin;
 - (c) Dinah;
 - (d) Goormalangana;
 - (e) Jawuda Ngarnaji; and
 - (f) Lineman.
- [18] In my view, the above information indicates that there are at least some apical ancestors common to both applications, which would mean that their descendants may be members of both claim groups.

Conclusion

- [19] I am not satisfied that no person included in the claim group was a member of a native title claim group for any previous application, and so s 190C(3) is not met.

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

Do the amendments to s 190C(4) apply?

- [20] Amendments to s 190C(4) came into effect on 25 March 2021.⁵ Item 24 of the Replacement Revised Explanatory Memorandum to the *Native Title Legislation Amendment Bill 2020* (Cth) provides:

⁴ *Strickland FC* [41]–[44].

⁵ *Native Title Legislation Amendment Act 2021* (Cth).

This item provides for application and transitional provisions for this Part. The effect of this item is that where a claim group authorises an applicant or an ILUA under sections 251A or 251B prior to the commencement of this item on Proclamation, the current registration provisions for the claim or agreement would continue to apply to that agreement or claim, even after the item commences. Where the authorisation of an applicant does not occur until after the commencement of this item, the new provisions would apply (provided the relevant claimant or compensation application, or native title agreement occurs after commencement).⁶

[21] Part A(2) of the application states that the applicant was authorised at a meeting at Halls Creek held on 21 and 22 August 2018 (**authorisation meeting**). Considering this information and the guidance in the Replacement Revised Explanatory Memorandum, I understand I must apply the requirements of s 190C(4) as that provision stood prior to the 25 March 2021 amendments.

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

[22] To meet the requirements of s 190C(4), prior to the amendments of 25 March 2021, the Registrar must be satisfied that either:

- (a) the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under Part 11; 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.

[23] As no certificate accompanies the application, I understand that s 190C(4)(a) is not applicable and the application must instead be assessed against s 190C(4)(b).

[24] 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.

[25] 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
- (b) briefly sets out the grounds on which the Registrar should consider that s 190C(4)(b) has been met.

[26] 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.

⁶ Native Title Legislation Amendment Bill 2020, Replacement Revised Explanatory Memorandum, Item 24 [46].

Consideration

Does the application satisfy s 190C(5)?

[27] Part A(2) states that the applicant members are members of the claim group and were authorised to make the application at the authorisation meeting held at Halls Creek in 2018. Part A(2) also provides that the authorisation took place pursuant to an agreed to and adopted decision making process. The s 62 affidavits state that this adopted decision making process was one whereby decisions were made by show of hands.⁷

[28] 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 Part A(2) and the s 62 affidavits is sufficient to satisfy both limbs of s 190C(5).

Conclusion – s 190C(5)

[29] 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?

[30] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group. As noted above, Part A(2) contains such a statement. The s 62 affidavits 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.

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

[31] 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 am also required to consider the composition of the claim group and be satisfied 'that the claimants truly constitute a group'.¹¹ 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.

Information

Decision making process

[32] As outlined above, the s 62 affidavits provide that the decision making process agreed to and adopted by the claim group was one of voting through show of hands. The application therefore identifies the type of decision making process provided for in s 251B(b).

[33] 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

⁷ Section 62 affidavits [7].

⁸ *Strickland* [57].

⁹ Section 62 affidavits [4].

¹⁰ *Noble* [16].

¹¹ *Risk* [60]–[62], *Wiri People* [28]–[36].

decision to authorise the applicant.¹² 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.¹³

Notice of authorisation meeting

[34] I have examined the application and accompanying documents and I can find no information about how or to whom notice of the authorisation meeting was given.

Conduct of authorisation meeting

[35] The s 62 affidavits state that the attendees of the authorisation meeting confirmed that the 'right people' were present and voted by show of hands to authorise the applicant to make the application.¹⁴ I have examined the application and accompanying documents and I can find no other information about the conduct of the authorisation meeting.

Claim group composition

[36] Part A(2) of the application states that the application was authorised at a meeting 'of the native title claim group'. Schedule R refers to the s 62 affidavits, which describes the authorisation meeting as a meeting 'of the Jaru native title holders'.¹⁵ I have examined the application and accompanying documents and I can find no information which specifies that it was the claim group, as described in Schedule A, who authorised the applicant to make the application.

Consideration

[37] 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.¹⁶ 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.¹⁷

[38] As no information has been provided about any notice given about the authorisation meeting, I am unable to be satisfied that the members of the claim group were given fair notice of the business to be dealt with at the authorisation meeting,¹⁸ or a reasonable opportunity to participate in the decision making process.

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

¹² *Lawson* [25].

¹³ *Burragubba* [29]–[30].

¹⁴ Section 62 affidavits [6]–[7].

¹⁵ *Ibid* [1].

¹⁶ *Lawson* [25].

¹⁷ *Ibid* [27].

¹⁸ *Weribone* [40]–[41], followed in *Burragubba* [30].

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?¹⁹

[40] In my view, the material before me does not address the substance of those questions. As discussed above, there is no information about any notice provided to the claim group about the authorisation meeting. There is also no information about who attended the authorisation meeting, or the details of how it was conducted, such as the details of the resolutions voted on by the attendees, including the decision to authorise the applicant. In the absence of sufficient detail about the conduct of the authorisation meeting, I am unable to be satisfied that the applicant has been authorised to make the application, by all the other members of the claim group.

[41] With regard to the composition of the claim group, *Harrington-Smith No 9* provides:

[T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4).²⁰

[42] As I am unable to ascertain who was notified of the authorisation meeting or who attended, I am unable to be satisfied that there exists the requisite 'coincidence' between the claim group defined in Schedule A of the Form 1 and the persons who authorised the making of the application.

Conclusion – s 190C(4)(b)

[43] I am satisfied that the applicant members are members of the claim group, however I am not satisfied that the applicant has been authorised by all the members of the claim group. This means that s 190C(4)(b) is not met.

Conclusion

[44] I am satisfied that s 190C(5) is met. However as I consider that s 190C(4)(b) is not met, s 190C(4) is not 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)?

[45] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application are sufficient for it to be said with reasonable certainty, whether native title rights and interests are claimed in relation to particular land or waters.

¹⁹ *Ward v Northern Territory* [25]–[26].

²⁰ *Harrington-Smith No 9* [1216].

[46] 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.²¹

Consideration

[47] Schedule B describes the application area as all the land and waters within the external boundary of Unallocated Crown Land parcel Lot 350 on Deposited Plan 75846. Schedule B also refers to the description in Attachment B, which similarly describes the application area as covering 'all the land and waters being Lot 350 as shown on Deposited Plan 75846'.

[48] Attachment C contains a map titled 'Jaru 2' which depicts the external boundary of the application area with a bold blue outline and labelled 'UCL Lot 350 DP75846'.

[49] 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 information in Schedule B and Attachment B, and the map in Attachment C, and I consider they provide certainty about the external boundary of the application area.

Does the information about excluded areas meet this condition?

[50] Schedule B states that the application area excludes the native title determination of WAD45/2012, as determined by the Federal Court on 6 December 2018 in *Jaru*. In my view, this specific exclusion is clear from the wording of Schedule B.

Conclusion

[51] As I consider that the external boundary and the excluded areas of the application area can be identified from the description with reasonable certainty, and that the map shows the external boundary, I am satisfied 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)?

[52] 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.

[53] Schedule A states:

1. The native title holders are those Aboriginal people who:

²¹ Section 62(2)(a)–(b); *Doepel* [122].

- (a) are related through filiation (meaning a series of parent-child relationships, including by adoption) to one of the Apical Ancestors who held rights and interests in one of the local estate countries comprising the claim area; or
 - (b) are affiliated to an Apical Ancestor and who have spirit conception and/or birth sites in one of the local estate countries in the claim area; or
 - (c) are recognised by the persons described above as:
 - (i) holding rights and responsibilities for certain songs and ceremonies which make reference to important sites in the claim area; or
 - (ii) holding rights and interests in one of the local estate countries in the claim area under traditional law and custom.
2. The Apical Ancestors are: [list of apical ancestors].

[54] It follows from the above 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.²² My consideration at this condition is limited to information in the application.²³ I 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.²⁴ I also understand that it is appropriate to construe the requirements of the Native Title Act beneficially.²⁵ I have followed this judicial guidance in my reasons below.

Consideration

[55] From paragraph 1 of Schedule A, I understand that to qualify for membership of the claim group, an individual must meet one of the criteria in subparagraphs 1(a)–(c). That is, they must be a descendant of one of the apical ancestors, be affiliated with an apical ancestor who has a conception or birth site in the application area, or be recognised by such persons as holding rights and interests in the application area. Paragraph 2 of Schedule A lists the apical ancestors and I understand that it is these ancestors who either held rights and interests, or had their conception or birth site located, in the application area.

Descent

[56] I understand from paragraph 1(a) of Schedule A that ‘filiation’ means ‘a series of parent-child relationships, including by adoption’. I therefore understand that ‘filiation’ as it appears in the description is analogous to ‘descent’. *WA v NTR* provides that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).²⁶ I consider that requiring a person to show descent from one of the apical ancestors 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.

²² *Wakaman* [34].

²³ *Doepel* [16].

²⁴ *Gudjala 2007* [34].

²⁵ *Kanak* [73].

²⁶ *WA v NTR* [67].

Conception or birth site

[57] Describing a claim group with reference to conception or birthplace is also a method which has previously been accepted.²⁷ I note the reference to the traditional laws and customs of the claim group in Schedule A and the judicial guidance to read the description so as to secure consistency between the paragraphs.²⁸ In my view, enquiries to the individual in question and the other members of the claim group would ascertain whether a person has the requisite affiliation with one of the apical ancestors whose conception or birth site is on the application area, in accordance with the claim group's traditional laws and customs.

Recognition

[58] *Aplin* provides that membership of a claim group is based on group acceptance and I consider this criterion contains a subjective element.²⁹ I understand from the description that the claim group's traditional laws and customs will provide the appropriate set of rules or principles to determine whether a person is recognised as holding rights in the application area.³⁰ 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 of the claim group under this criterion.

Conclusion

[59] 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)?

[60] 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. My consideration of s 190B(4) is confined to information found in the application.³¹ I have not considered at this condition 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 is established as a native title right on a prima facie basis.

Consideration

[61] Paragraph 1 of Schedule E states that exclusive possession is claimed in those parts of the application area where it can be recognised. Paragraph 2 provides that four non-exclusive rights are claimed in areas where exclusive possession cannot be recognised.

²⁷ *De Rose* [926].

²⁸ *Gudjala 2007* [34].

²⁹ *Aplin* [256]–[261].

³⁰ *Ward v Registrar* [25].

³¹ *Doepel* [16].

[62] In my view, having considered the information in Schedule E, I consider the nature, extent and limitations on the claimed rights are clear and there is no inherent or explicit contradiction within the description.³²

Conclusion

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

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

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

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

- (a) that the claim group have, and their predecessors 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.

[65] *Gudjala 2007* held that the reference in s 190B(5) to the factual basis upon which it is asserted that the claimed native title rights and interests exist 'is clearly a reference to the existence of rights vested in the claim group',³³ and that:

...it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests).³⁴

[66] Following *Gudjala 2007*, I understand that I must be satisfied that the factual basis supports the claim that the claim group described in Schedule A holds the identified rights and interests in the application area. As discussed above at s 190C(4), I consider that the information before me raises uncertainties about the composition of the claim group. This means I am limited in my ability to make an assessment about whether or not the factual basis is sufficient to support the assertion that the claim group, as described in Schedule A, is entitled to the claimed native title rights and interests. That the claim group is not sufficiently identified carries over into the consideration required at each of the three assertions of s 190B(5).

Consideration

[67] To meet s 190B(5)(a), the factual basis must be sufficient to support the assertion that the claim group have, and its predecessors had, an association with the application area. A primary consideration in this assessment is, therefore, who comprises the claim group? Schedule F and Attachments F1–F4 outline the factual basis for the claim. However, as I am

³² Ibid [123].

³³ *Gudjala 2007* [39].

³⁴ Ibid.

uncertain about the claim group composition, I am unable to proceed with the assessment at s 190B(5)(a) and be satisfied that the factual basis is sufficient to support an association between the claim group and the application area at sovereignty and since that time. This means that s 190B(5)(a) is not met.

[68] Without certainty as to the claim group composition, I am also unable to proceed with my consideration at s 190B(5)(b) as to whether the claim group, as described in Schedule A, observes traditional laws and customs which give rise to the claimed native title rights and interests in the application area.³⁵ This means s 190B(5)(b) is not met.

[69] Meeting the requirements of s 190B(5)(c) 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.³⁶ It also requires a sufficient factual 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.³⁷ As I am unable to be satisfied about the existence of traditional laws and customs for the purposes of s 190B(5)(b), it follows that I am unable to be satisfied as to the continuity of any such laws and customs. This means s 190B(5)(c) is not met.

Conclusion

[70] As there is uncertainty regarding the composition of the claim group, I consider I am unable to make a 'genuine assessment' of the application against the requirements of s 190B(5).³⁸ In my view, the application must fail at s 190B(5) because of the uncertainty as to the composition of the claim group. This means that s 190B(5) is not met.

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

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

[71] 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.

Consideration

[72] As discussed above, I am unable to ascertain the composition of the claim group. This means the claimed rights and interests cannot be shown to be held by the claim group described in Schedule A, in accordance with traditional laws and customs, and thus cannot be established on a prima facie basis as 'native title rights and interests'.

Conclusion

[73] I do not consider that the native title rights and interests claimed in the application are established on a prima facie basis. This means s 190B(6) is not met.

³⁵ *Yorta Yorta* [46]–[47]; *Warrie* [105], [107].

³⁶ *Gudjala 2009* [29].

³⁷ *Gudjala 2007* [82].

³⁸ *Gudjala 2008* [92].

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

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

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

Consideration

[75] *Gudjala 2009* found that it ‘seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.³⁹ Applying this guidance, and given my finding at s 190B(5)(b), that I am not satisfied of the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds, or previously held, the requisite physical connection with the application area in accordance with traditional laws and customs.

Conclusion

[76] I am not satisfied at least one member of the claim group currently has or had a traditional physical connection with a part of the application area and so s 190B(7) is not met.

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

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

[77] Section 190B(8) requires the application comply with ss 61A(1)–(3).

Consideration

[78] In my view, the application complies with each of the requirements of ss 61A(1)–(3):

Section	Requirement	Information	Result
s 61A(1)	Claimant application not to be made covering areas of approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule L(1)	Met – see reasons below
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E provides that exclusive possession is only claimed where it can be recognised	Met

³⁹ *Gudjala 2009* [84].

Section 61A(2)

[79] Schedule L(1) claims the benefit of s 47B. I therefore understand the intention of the applicant is to claim native title only where extinguishment can be disregarded through the application of that provision. Such a claim would necessarily exclude any areas where native title has been extinguished by previous exclusive possession acts. I understand that the requirements of the registration test are already stringent and that it is appropriate to construe the Native Title Act in a way that renders it workable in the advancement of its main objectives.⁴⁰ I therefore consider it is appropriate to interpret the application beneficially and as such, I am satisfied the requirements of s 61A(2) are met.

Conclusion

[80] 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)?

[81] 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).

Consideration

[82] 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 no claim of ownership of minerals, petroleum or gas wholly owned by the Crown is made	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that no claims of exclusive possession to any offshore places are made	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished, except where required to be disregarded under ss 47(2), 47A(2), 47B(2) or 47C(8)	Schedule L(1) states that the applicant claims the benefit of 47B, such that any prior extinguishment of native title is required to be disregarded	Met

Conclusion

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

End of reasons

⁴⁰ *Strickland* [55].

Attachment A

Summary of registration test result

Application name	Jaru People #2
NNTT No.	WC2021/008
Federal Court of Australia No.	WAD288/2021
Date of Registration Decision	25 February 2022

Section 190B conditions

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

Section 190C conditions

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