

Registration Decision

Application name	Brian Champion & Ors on behalf of the Marlinyu Ghoorlie Claim Group and State of Western Australia & Ors (Marlinyu Ghoorlie)
Name of applicant	Henry Richard Dimer, Maxine Patricia Dimer, James Champion, Raelene Peel, Darren Indich, Tania Champion, Simon Champion, Darryl Trott, Leechelle Hammat
Federal Court of Australia No.	WAD647/2017
NNTT No.	WC2017/007
Date of Decision	31 March 2022

Claim accepted for registration

I have decided the claim in the amended Marlinyu Ghoorlie 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 will remain on the Register of Native Title Claims.

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**)
Bell v Native Title Registrar [2021] FCA 229 (**Bell**)
Burrabungba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (**Burrabungba**)
Champion on behalf of the MG Claim Group v State of WA (No 2) [2022] FCA 65 (**Champion**)
Commonwealth v Yarmirr [2001] HCA 56 (**Yarmirr**)
Corunna v Native Title Registrar [2013] FCA 372 (**Corunna**)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (**Warrie**)
Griffiths v Northern Territory [2007] FCAFC 178 (**Griffiths FC**)
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 and 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**)
Strickland v Native Title Registrar [1999] FCA 1530 (**Strickland**)
State of Western Australia v Strickland [2000] FCA 652 (**Strickland FC**)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (**Wakaman**)
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**)

Background

- [1] The claim in this application is made on behalf of the Marlinyu Ghoorlie native title claim group (**claim group**). It covers approximately 95,025 square kilometres in the Goldfields and South West regions of Western Australia, including the towns of Southern Cross and Kalgoorlie (**application area**).
- [2] The application was first filed on 22 December 2017 and the Federal Court of Australia (**Federal Court**) gave a copy 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 under s 190A.

- [3] Before the claim in the original application was considered, an amended application was filed on 9 May 2018 and was given to the Registrar pursuant to s 64(4). This referral triggered the Registrar’s duty to consider the claim in the amended application under s 190A. On 3 August 2018, a delegate of the Registrar decided the claim in the amended application did not meet all the conditions in ss 190B–190C (**registration test**). On 16 October 2018, a member of the National Native Title Tribunal (**Tribunal**) reconsidered the claim in the amended application and similarly decided that it did not meet all the conditions of the registration test.
- [4] On 11 December 2018, a further amended application was filed which the Federal Court gave to the Registrar pursuant to s 64(4). On 28 March 2019, a delegate of the Registrar decided the claim in the amended application met all the conditions of the registration test. Accordingly, the claim was entered onto the Register of Native Title Claims (**Register**).
- [5] On 24 April 2020, a second further amended application was filed and given to the Registrar by the Federal Court pursuant to s 64(4). On 14 May 2020, in my capacity as delegate of the Registrar, I accepted the claim in the second further amended application pursuant to s 190A(6A).
- [6] On 11 February 2022, a third further amended application was filed and the Federal Court gave a copy to the Registrar, pursuant to s 64(4) and this is the application currently before me, which I will generally refer to as **the application** in my reasons below.
- [7] The granting of leave by the Federal Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. The amendments to the application include changes to the information about the authorisation of the applicant. As that type of amendment is not contemplated under s 190A(6A), I consider that provision does not apply. Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions of the registration test.
- [8] As discussed in my reasons below, I consider that the claim in the application satisfies all the conditions of the registration test and therefore it must be accepted for registration pursuant to s 190A(6). Attachment A contains the information that will be included on the Register.

Procedural fairness

- [9] On 23 February 2022, a senior officer of the Tribunal wrote to the representative of the State of Western Australia (**State**) and advised that any comments or submissions the State wished to make on the application should be received by 2 March 2022. Also on 23 February 2022, 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 2 March 2022.
- [10] The applicant’s representative provided the following the **additional material** in support of the application:
- (a) Covering letter, Simon Blackshield, 23 February 2022 (**submissions**); and
 - (b) Statement of Simon Blackshield, 27 November 2021 (**authorisation statement**);
 - (c) Affidavit of Mark Anthony Champion, 23 September 2021 (**authorisation affidavit**);
 - (d) Affidavit of Henry “Ricky” Dimer, 29 May 2018 (**Claimant 1 affidavit**);
 - (e) Statement of Maxine Dimer, undated (**Claimant 2 statement**);

- (f) 'Attachment M – Statement of Brian Champion as to the details of his traditional physical connection to the Claim', undated (**Claimant 3 statement**);
- (g) Affidavit of Raelene Peel, unsigned (**Claimant 4 affidavit**);
- (h) Affidavit of Nell Taylor, 18 September 2018 (**anthropologist's affidavit**);
- (i) Letter from Nell Taylor, 25 February 2019 (**anthropologist's report**);
- (j) 'Key Sites Distribution Map' , 22 February 2019 (**site map**);
- (k) 'Legend to the Key Sites Distribution Map', undated (**site map legend**);
- (l) 'The society in the Marlinyu Ghoorlie native title claim area', Ray Wood, 28 September 2021;
- (m) 'Southern Cross (Karratjibbin)', Daisy Bates, undated;
- (n) Death Certificate of Nellie (Cudgeman), 8 December 2017;
- (o) 'Native Welfare Record', Southern Cross Police Station, 5 August 1909;
- (p) 'Native Welfare Record' Colonial Secretary's Department – Aborigines and Fisheries, 6 August 1909;
- (q) 'Kalamaia Kalaako Kapurn Nation Stories', Clem Donaldson Snr and Brian Champion Snr, undated;
- (r) Affidavit of Brian Champion Snr, 16 November 2021;
- (s) Descendants of Nellie family tree, undated;
- (t) Descendants of Kaddee and Warada, undated;
- (u) Clipping from the Kalgoorlie Miner, undated;
- (v) NNTT WC2017/007 registration decision, 28 March 2019;
- (w) NNTT WC2017/007 registration decision, 4 April 2019; and
- (x) The *Champion* judgment.

[11] On 11 March 2022, the senior officer provided the additional material to the State's representative and advised that any comments or further information should be received by 18 March 2022. No submissions were received from the State and so this concluded the procedural fairness process.

Information considered

[12] In accordance with s 190A(3)(a), I have considered the information in the application, the accompanying documents and the additional material. 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 2 March 2022 (**geospatial report**), information in the Tribunal's geospatial database and information held in the Register.

Section 190C: conditions about procedural and other matters

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

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

[13] 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

[14] 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(2), s 62 affidavits filed with application (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, Attachment A	Met

[15] I consider the application contains 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	-	Met – see reasons below
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Schedule C, Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights	Schedule E, Attachment 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 HA/I	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment HA/I	Met
S 62(2)(i)	Conditions on the applicant's authority	Attachment R	Met

Section 62(1)(d)

[16] Section 62(1)(d) states that, if the operation of s 47C has been agreed to in writing in accordance with s 47C(1)(b) or s 47C(5) in relation to all or part of the application area, then the application must be accompanied by a copy of the relevant agreement. As no s 47 agreement accompanies the application, I understand that no such agreement has been agreed to.

³ *Doepel* [16], [35]–[39].

Conclusion

[17] As the application contains 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 met

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

[18] 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

[19] The geospatial report advises and my own searches of the Tribunal’s geospatial database confirm that this application is overlapped by the following applications:

- (a) WAD186/2017 Maduwongga (WC2017/001) (**Maduwongga**); and
- (b) WAD38/2022 Karratjibbin People (WC2022/001) (**Karratjibbin**).

[20] The overlaps with the current application mean both the Maduwongga and Karratjibbin applications meet the requirements of s 190C(3)(a).

[21] There was no entry for the claim in the Karratjibbin application on the Register when the current application was made to the Federal Court on 22 December 2017.⁴ This means the Karratjibbin application does not meet the requirements of s 190C(3)(b) and is not a ‘previous application’ for the purposes of s 190C(3). Therefore I do not need to consider whether there are claimants in common between the current application and the Karratjibbin application.

[22] The claim in the Maduwongga application was entered onto the Register on 3 August 2017 following consideration under s 190A, and has not been removed. This means the Maduwongga application meets the requirements of ss 190C(3)(b)–(c) and is a ‘previous application’ for the purposes of this condition. Therefore I must consider whether there are claimants in common between the current application and the Maduwongga application.

[23] The Register shows that the Maduwongga application was made on behalf of the descendants of Kitty Bluegum. I have examined the claim group description in the current application and Kitty Bluegum is not listed as one of the ancestors of the claim group. There is no other information before me which indicates that there are individuals who are members of both claim groups.

⁴ *Strickland FC* [41]–[44].

Conclusion

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

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

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

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

- (a) the application has been certified under Part 11 by each representative body that could certify the application in performing its functions under that Part; or
- (b) the requirements of s 190C(4AA) are met.

[26] Schedule R indicates that the application has not been certified so s 190C(4)(a) does not apply. Therefore, pursuant to s 190C(4)(b), I must consider the application against the requirements of s 190C(4AA).

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

[27] The requirements of s 190C(4AA) are:

- (a) That the applicant is a member of the claim group and is authorised to make the application by all the other persons in the claim group; and
- (b) Either that there are no conditions under s 251BA on the authority of the applicant that relate to the making of the application, or that any such conditions have been satisfied.

[28] Following s 190C(4AA) there is a Note in the Native Title Act which refers to the definition of 'authorise' in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision making is utilised:

- (a) a process which, under the traditional laws and customs of the persons in the claim group, must be complied with; or
- (b) where there is no traditional process, a process agreed to and adopted by the claim group.

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

- (a) includes a statement to the effect that the requirement in s 190C(4AA) has been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4AA) has been met (other than in relation to s 190C(4AA)(b)(i), in cases where there are no conditions on the applicant's authority).

[30] I therefore understand that in order to be satisfied that the requirements s 190C(4AA) are met, one of the decision making processes outlined in s 251B must be identified and complied with in relation to the authorisation of the applicant. I must also be satisfied that if there are any conditions on the applicant's authority, those conditions are met, and that the

requirements of s 190C(5) are met. If all these requirements are met, then I can be satisfied that s 190C(4) is met.

Consideration

[31] Section 190C(4AA) and related amendments to s 190C(5) came into force on 25 March 2021.⁵ Other than the addition of the new limb in s 190C(4AA) requiring consideration of conditions placed on the applicant's authority, the wording of s 190C(4AA) replicates the wording of the previous s 190C(4)(b). That is, the requirement to be satisfied about the applicant's membership of the claim group and authorisation to make the application remain unchanged. I therefore consider it is appropriate to apply the judicial guidance previously given in relation to s 190C(4)(b) in my consideration of s 190C(4AA). Similarly, given s 190C(5) has been amended only to reflect the additional requirement pertaining to conditions on the applicant's authority, I consider the case law on s 190C(5) has continued application.

Is s 190C(5) met?

[32] Attachment R states that 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.⁶ Attachment R and the s 62 affidavits set out the conditions placed on the applicant's authority.⁷ The s 62 affidavits state that the conditions have been satisfied.⁸

[33] Attachment R and the authorisation statement describe the notice and conduct of two meetings of the claim group held at Coolgardie on 16 August 2021, with a video link to Ceduna, at the second of which the applicant was authorised by the other members of the claim group, using an agreed to and adopted decision making process of majority vote through show of hands.⁹ I understand that the insertion of the word 'briefly' in s 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained at this condition.¹⁰ I therefore consider that the information in Attachment R and the authorisation statement 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.

Is 190C(4AA) met?

Is the applicant a member of the claim group?

[35] Section 190C(4AA) requires that all the persons comprising the applicant must be members of the claim group. As set out above, Attachment R contains such a statement. The s 62 affidavits from the applicant members each state that they believe all of the statements made in the

⁵ *Native Title Amendment Act 2021* (Cth), s 24(2).

⁶ Attachment R [1].

⁷ *Ibid* [6], s 62 affidavits [6].

⁸ Section 62 affidavits [6].

⁹ Attachment R [4]–[5]; authorisation statement [2], [7], [17].

¹⁰ *Strickland* [57].

application are true.¹¹ 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?

[36] Section 190C(4AA) also requires that the applicant be 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.¹² I will first set out the information before me which I consider relevant to these enquiries and then consider whether these requirements are met.

Decision making process

[37] As outlined above, the material provides that a decision making process of majority vote through show of hands was agreed to and adopted by the claim group. 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.¹³ 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.¹⁴

Notice of authorisation meeting

[39] The authorisation statement includes copies of the notices for two meetings held on 16 August 2021, which I understand were published in the Kalgoorlie Miner on 17 July 2021 and in The Koori Mail on 28 July 2021:

(a) **Authorisation meeting #1** held at 9am, for members of the claim group as it was then described, and

(b) **Authorisation meeting #2** held at 1:30pm, for members of the amended claim group.¹⁵

[40] The notice for authorisation meeting #1 invited all the members of the claim group, with reference to the previous claim group description, to attend the meeting and consider amending the claim group description. The notice for authorisation meeting #2 invited all the members of the newly described claim group, as described in Attachment A, to authorise the applicant to make the amended application. Both notices included the details of the venue, time and date for the meeting, a map of the application area and a contact phone number for enquiries.

[41] The authorisation affidavit states that copies of the meeting notices were also posted to 236 members of the claim group on 20 July 2021.¹⁶ Because of restrictions on entering Western

¹¹ Section 62 affidavits [4].

¹² *Noble* [16].

¹³ *Lawson* [25].

¹⁴ *Burragebba* [29]–[30].

¹⁵ Authorisation statement, Attachment A.

¹⁶ Authorisation affidavit [2].

Australia due to the COVID-19 pandemic, a video link from Ceduna was arranged.¹⁷ On 3 August 2021, the same 236 members of the claim group were notified by post of the details of the Ceduna venue.¹⁸

Conduct of authorisation meeting

- [42] The authorisation statement provides that at authorisation meeting #1, the attendees confirmed that there was no mandatory traditional decision making process and agreed to adopt a decision making process of majority vote by show of hands.¹⁹ The attendees then proceeded to vote to amend the claim group description to that which now appears in Attachment A.²⁰
- [43] With regard to authorisation meeting #2, the authorisation statement provides that the attendees agreed to adopt the same decision making process of majority vote by show of hands.²¹ Using the adopted decision making process, the attendees authorised the members of the applicant to make the application.²²
- [44] The authorisation statement documents the names of the facilitator and the legal advisor present at the meetings.²³ The registration lists for both the Ceduna and the Coolgardie venues have been provided.²⁴

Consideration

- [45] 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.²⁵ 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.²⁶
- [46] In my view, the notices of the authorisation meetings were sufficiently detailed, so as to enable the members of the claim group to judge for themselves whether to attend and vote for or against the proposals.²⁷ The meeting notices set out the relevant details of the two authorisation meetings and included a map of the application area. The invitation to authorisation meeting #1 invited the existing members of the claim group and the invitation to authorisation meeting #2 invited members of the proposed claim group, both with reference to a claim group description which included the names of the group's apical ancestors. In my view, if a person claimed to hold native title rights in the application area but did not fit within the claim group description, there was otherwise sufficient information in

¹⁷ Authorisation statement [18].

¹⁸ Authorisation affidavit [3].

¹⁹ Authorisation statement [12].

²⁰ *Ibid* [13].

²¹ *Ibid* [16].

²² *Ibid* [23].

²³ *Ibid* [7], [14].

²⁴ *Ibid*, Attachment D; authorisation affidavit [5], Annexure 'MAC-3'.

²⁵ *Lawson* [25].

²⁶ *Ibid* [27].

²⁷ *Weribone* [40]–[41], followed in *Burrugubba* [30].

the notice, such as the map, meeting details and contact information, to enable them to decide whether to make enquiries about attending the meetings.

[47] I note that the notices were published in a local newspaper and a special interest Aboriginal and Torres Strait Islander newspaper several weeks prior to the authorisation meeting. Personal notice to the existing members of the claim group was also provided by mail. 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 meetings, to all the members of the claim group.²⁸

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

Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?²⁹

[49] In my view, the material before me addresses the substance of those questions. As discussed above, the authorisation statement and authorisation affidavit describe how and to whom notice was given. The meeting notices included the purpose of each of the two meetings. The registration lists have been provided, which show who attended the meetings. Information about the resolutions which were passed have been provided, along with information about who facilitated the meetings. The material provides that the attendees authorised the applicant using the agreed to and adopted decision making process. In light of the information before me, I consider that the notice and conduct of the authorisation meetings was such that all members of the claim group were afforded a reasonable opportunity to participate in the decision to authorise the applicant.³⁰ I therefore consider that the applicant has been authorised to make the application, by all the other members of the claim group.

Have the conditions on the authority of the applicant been satisfied?

[50] The authorisation statement provides that the attendees at authorisation meeting #2 resolved to impose the conditions on the authority of the applicant set out in Attachment R, using the agreed to and adopted decision making process.³¹ In relation to the imposition of conditions on the authority of an applicant, s 251BA(b) permits the use of an agreed to and adopted decision making process, where there is no decision making process mandated under a claim group's traditional laws and customs. Attachment R states that the members of the applicant have undertaken to comply with the conditions imposed on their authority.³² In their s 62 affidavits, each member of the applicant deposes that they are subject to, and abide by, the conditions placed on their authority under s 251BA.³³

²⁸ Ibid.

²⁹ *Ward v Northern Territory* [25]–[26].

³⁰ *Burragubba* [29]–[30].

³¹ Attachment R [6]–[7]; authorisation statement [24].

³² Attachment R [6]–[7].

³³ Section 62 affidavits [6]–[7].

[51] In light of the information before me, and in the absence of any information to the contrary, I consider the conditions on the applicant's authority which relate to the making of the application have been satisfied.

Conclusion – s 190C(4AA)

[52] 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). I also consider that the conditions imposed under s 251BA on the authority of the applicant have been satisfied. This means the requirements of s 190C(4AA) are met.

Conclusion

[53] As the requirements of s 190C(5) and s 190C(4AA) are met, I am satisfied that s 190C(4)(b) is met. This means that 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)?

[54] 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.

[55] 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

Consideration

Do the information and map provide certainty about the external boundary?

[56] Attachment B describes the external boundary with reference to a Commencement Point, the boundaries of native title applications and determinations, a pastoral lease and longitude and latitude coordinate points.

[57] Attachment C contains a map titled 'WAD647/2017 Marlinyu Ghoorlie (WC2021/007)'. On the map, the external boundary of the application area is depicted in bold blue outline. The Commencement Point is labelled and the map includes a coordinate grid.

[58] 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

³⁴ Section 62(2)(a)–(b); *Doepel* [122].

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 enable identification of the excluded areas?

[59] Paragraph 2 of Schedule B describes the areas which are excluded from the application area, including areas affected by previous exclusive possession acts and areas where native title has been wholly extinguished. I understand it is unrealistic to expect a concluded definition of areas covered by general exclusion clauses to be given in the application and I am satisfied that the information in Schedule B would enable those areas to be ascertained at the appropriate time.³⁵

Conclusion

[60] As I consider that both the external boundary of the application area and the excluded areas can be identified from the information in the application with reasonable certainty, and that the map in the application 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)?

[61] 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.

[62] Attachment A states:

The persons on whose behalf the application is made are those Aboriginal people who:

1. are descended from one or more of the following ancestors (including by adoption in accordance with the traditional laws and customs of the rights-holding group): [list of apical ancestors];

or

though not descended from those ancestors, have been incorporated into the rights-holding group in accordance with the traditional laws and customs of the rights-holding group, or are descended from persons who have been so incorporated;

and

2. identify themselves as Kalamaia, Gubrun, Kapurn or Kalaako (including alternate spellings of these names) or any combination thereof;

and

3. are recognised by the other members of the rights-holding group as members of that group in accordance with the traditional laws and customs of the group.

Note: The inclusion of an ancestor's name in [1] above indicates that the ancestor's descendants are recognised as members of the rights-holding group either on the basis of descent or on the basis of incorporation.

³⁵ *Strickland* [55].

[63] In my view, it follows from the above description that s 190B(3)(b) is applicable. *Wakaman* provides that where a description is used, the task is limited to making an assessment of the sufficiency of the description for the purpose of facilitating the identification of any person as part of the group.³⁶

Consideration

[64] From paragraph 1 of Attachment A, I understand that members of the claim group must either be a descendant of one of the named apical ancestors or incorporated into the claim group in accordance with the group's traditional laws and customs. I understand from paragraphs 2 and 3 that all members must both self-identify as Kalamaia, Gubrun, Kapurn and/or Kalaako and be recognised by other members as a member of the claim group. I will consider each element of the claim group description in turn below.

Descent

[65] *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).³⁷ I consider that factual enquiries and genealogical research would ascertain the members of the claim group who are the descendants of the ancestors listed in paragraph 1(a) of Attachment A, which would be an objective enquiry.

Incorporation

[66] *Aplin* provides that, as to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs.³⁸ Paragraph 1(b) references the claim group's traditional laws and customs, and I consider that the traditional laws and customs would provide the appropriate 'set of rules or principles' through which it could be ascertained whether a person has been incorporated into the claim group or are descended from a person so incorporated, as specified in paragraph 1(b).³⁹

Self-identification

[67] I understand that self-identification can be ascertained either by assertion or by virtue of the way an individual conducts themselves.⁴⁰ I consider that enquiries to the person in question would confirm whether they self-identify as Kalamaia, Gubrun, Kapurn and/or Kalaako, which would be a subjective assessment.

Recognition

[68] I understand that membership of a native title claim group must be based on group acceptance, that being inherent in the nature of a society.⁴¹ *Sampi FC* held that '[a] relevant factor... in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the

³⁶ *Wakaman* [34].

³⁷ *WA v NTR* [67].

³⁸ *Aplin* [256]–[261].

³⁹ *Ward v Registrar* [25].

⁴⁰ *Aplin* [226].

⁴¹ *Ibid* [260]; *Yorta Yorta* [108].

group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.⁴²

[69] Schedule F states that the claim group observe laws and customs which vest rights and interests in the land and waters of the application area.⁴³ I therefore understand that the laws and customs operate so that members of the claim group can recognise whether a person has rights in the application area. In my view, enquiries to the other claim group members will reveal the people who are recognised as members of the claim group. 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.⁴⁴

Conclusion

[70] 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)?

[71] 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.⁴⁵

Consideration

[72] From paragraphs 1 and 2 of Attachment E, I understand that exclusive possession is only claimed in areas of land where it can be recognised, and that exclusive possession is not claimed in relation to any waters in those areas. In relation to the waters in those areas, I understand from paragraph 2(b) that two non-exclusive rights are claimed, specifically the right to hunt, fish, take and use the natural resources of the water, and to take and use the flowing and underground water. From paragraphs 3 and 4 of Attachment E, I understand four non-exclusive rights are claimed where exclusive possession cannot be recognised.

[73] In my view, having considered the information in Schedule E, the nature, extent and limitations on the claimed rights are clear and there is no inherent or explicit contradiction within the description.⁴⁶

[74] 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.

⁴² *Sampi FC* [45].

⁴³ Schedule F [B].

⁴⁴ *Kanak* [73].

⁴⁵ *Doepel* [16].

⁴⁶ *Ibid* [123].

Conclusion

[75] 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)?

[76] 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) the claim group have, and their predecessors had, an association with the area; and
- (b) 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) the claim group have continued to hold the native title in accordance with those traditional laws and customs.

[77] I understand my task is limited to assessing whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determining whether there is evidence that proves directly or by inference the facts necessary to establish the claim.⁴⁷ I am not required by s 190B(5) to determine whether the asserted facts will or may be proved at a hearing.⁴⁸

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

[78] As set out above, Attachment E describes the native title rights and interests which are claimed. Schedule F provides a brief outline of the factual basis of the claim, Schedule G describes the activities undertaken by the claim group on the application area and Schedule M outlines the traditional physical connection that a claim group member has with the application area. The additional material provides more detailed information about the factual basis of the claim and so my reasons below will focus on those documents.

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

[79] *McLennan* confirmed that to meet s 190B(5)(a), the factual basis must be sufficient to show:⁴⁹

- (a) the claim group presently has an association with the application area, and the claim group's predecessors have had an association with the application area since sovereignty or European settlement;⁵⁰
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';⁵¹ and

⁴⁷ Ibid [16]–[17]; *Gudjala 2008* [83], [92].

⁴⁸ *Bell* [98].

⁴⁹ *McLennan* [28].

⁵⁰ *Gudjala 2007* [52].

⁵¹ Ibid.

- (c) there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’.⁵²

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

- [80] The material provides that European settlement in the region of the application area occurred with the gold rush of the 1890s.⁵³ Prior to settlement, early explorers had observed, over the period from the 1830s–1880s, predecessors of the claim group in and around the application area, engaging in various ceremonies.⁵⁴ According to the material, people regularly travelled through the northern part of the application area for meetings and ceremonies, although this area was less regularly inhabited due to its aridity and lack of fresh water.⁵⁵
- [81] The apical ancestors of the claim group are asserted to have been associated with the application area around the time of settlement.⁵⁶ For example, apical ancestor Kaddee is estimated to have been born in the period 1820–1845 and was recorded by Bates as associated with the Coolgardie area.⁵⁷ Apical ancestor Lucy Sambo’s estimated birth year is 1894 and her children were born in the Kalgoorlie/Coolgardie region.⁵⁸ Apical ancestor Nellie Champion was born in the 1840s and died in 1929 and she is associated with the Mt Burgess region of the application area.⁵⁹
- [82] The material also provides information about the intervening generations of the claim group, including, for example, that some of the children and grandchildren of the apical ancestors were recorded in the application area at Coolgardie, the Southern Cross ‘natives’ camp’ and at Mt Burgess station in the early 1900s.⁶⁰ Ceremonies were also recorded during this period, including initiations which took place at both Southern Cross in the centre of the application area and Mount Jackson to the north.⁶¹ Five generations of claim group members, including apical ancestors Kaddee and Warada, have worked at Mt Burgess station and members of the claim group have also worked at Credo, Black Flag, Mount Vettors, Mount Carnage, Carbine and Mount Jackson stations, since the time of settlement.⁶²
- [83] Members of the current claim group describe their association and that of their families, for example Claimant 3, the grandson of apical ancestor Nellie Champion, was born in 1937 and has lived and worked almost all of his life in the application area, as have his siblings.⁶³ Claimant 1, born in 1952, lived with his family at Credo station before moving to Coolgardie and later working at Mt Burgess station along with other claim group members.⁶⁴

⁵² *Martin* [26]; *Corunna* [39], [45].

⁵³ Anthropologist’s affidavit [4].

⁵⁴ *Ibid* [5]–[7], [40].

⁵⁵ *Ibid* [35]–[36].

⁵⁶ Anthropologist’s affidavit [13]; anthropologist’s report [2].

⁵⁷ *Ibid* [9].

⁵⁸ Submissions, 4–5.

⁵⁹ Claimant 3 statement [7], [11].

⁶⁰ Anthropologist’s affidavit [10]–[13].

⁶¹ *Ibid* [41].

⁶² *Ibid* [44].

⁶³ Claimant 3 statement [1], [6]–[8].

⁶⁴ Claimant 1 affidavit [2]–[3], [7].

[84] Specific information is provided with regard to the spiritual association of the claim group to the application area. For example, a large number of ceremonial and burial sites have been recorded as well as spiritually significant rockholes at Kalgoorlie and Coolgardie.⁶⁵ Various dreaming tracks traverse the application area, the location and related stories of which the current claimants learnt from their predecessors, including the Seven Sisters dreaming.⁶⁶ Claimant 4 describes significant places in the application area including ceremonial grounds near Kalgoorlie and Boulder, and massacre sites which she was taught to avoid at night.⁶⁷ She learnt from her father the responsibilities she has in caring for particular spiritual sites which she is now teaching to her children.⁶⁸ She also explains that the spirits of the claim group's predecessors are believed to remain in the country and communicate with their living descendants.⁶⁹

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

[85] *Strickland* provides that the requirements of the registration test are stringent and it is not necessary to elevate them to the impossible.⁷⁰ I will consider whether the information before me is sufficient for the purposes of s 190B(5)(a), taking into account this judicial guidance.

Is the factual basis sufficient to support an association between the claim group and the application area, at sovereignty and since that time?

[86] As summarised above, the material provides that European settlement in the application area occurred as recently as the 1890s and that the apical ancestors of the claim group were either already living in the application area at that time, or were born in the early decades of settlement. In my view, it is reasonable to infer that the predecessors of the apical ancestors were alive at the time of British sovereignty and had a similar association as their descendants at the time of settlement. I understand it is appropriate to construe the Native Title Act beneficially and to make this particular retrospective inference.⁷¹

[87] The material also provides examples of the association between the intervening generations of the claim group and the application area, with reference to the places they lived, worked and participated in ceremonies. In my view, the information provided is sufficient to support the assertion that there has been an association between the application area and the predecessors of the claim group, 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?

[88] Examples are provided of current claimants living and working on the application area, and caring for its significant sites. The claimants describe how they and other claim group members worked on the stations which were established over the application area, and were taught about the area's significant features by their predecessors, which they are now

⁶⁵ Anthropologist's affidavit [47].

⁶⁶ Ibid [48]; anthropologist's report [7].

⁶⁷ Claimant 4 affidavit [16]–[18].

⁶⁸ Ibid [30]–[31].

⁶⁹ Ibid [46].

⁷⁰ *Strickland* [55].

⁷¹ *Harrington-Smith No 9* [294]–[296]; *Kanak* [73]; *Lane* [9].

teaching to their descendants. In my view, this information supports the assertion of an association between the current claim group and the application area.

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

[89] I understand the task at s 190B(5)(a) is limited to assessing whether the factual basis is sufficient to support the assertion that the claim group have, and their predecessors had, an association over the application area as a whole.⁷² It is not a requirement that every member of the claim group have an association with the entire application area at all times. From the Tribunal's geospatial database, I can see that the locations mentioned in the material are located across the application area, including Kalgoorlie and Coolgardie in the east, Southern Cross in the centre and Mount Jackson near the western boundary. I also note the information about the particularly arid nature of the northwest part of the application area which cannot support regular habitation, but that claim group members traditionally traverse this area in order to participate in ceremonies with their northern neighbours. I also understand from the material that claim group members, past and present, have sustained their association with the application area by working on the pastoral stations established over it, including Credo and Mt Burgess. In my view, this information supports the assertion of a physical association with application area as a whole.

[90] In addition to the information summarised above about the claim group's spiritual association with the application area, a site map has been provided which is helpful to my consideration at this condition. The site map shows that there are spiritually important sites spread across the application area, some of which are described in the material. For example, I can see from the site map that the Seven Sisters dreaming manifests at places located across the north and eastern parts of the application area. Ceremonial grounds are identified in the east, central and western parts of the application area and significant rockholes and water sources are also identified, including several nearby to the northern and southern borders. In my view, the information before me supports a spiritual association with the whole application area.

Conclusion - s 190B(5)(a)

[91] I consider the information before me is sufficient to support the assertion that the claim group have, and their predecessors had, an association with the application area. I am satisfied there is sufficient factual basis to support an assertion of a physical association of the claim group with the whole application area. I am also satisfied there is a sufficient factual basis to support an assertion of a spiritual association. This means s 190B(5)(a) is met.

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

[92] 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 acknowledged, and traditional customs observed,' by the native title holders.

⁷² *Corunna* [31].

[93] *Yorta Yorta* held that a ‘traditional’ law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. *Yorta Yorta* further held that in the context of the Native Title Act, ‘traditional’ also carries two other elements, namely:

[I]t conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are “traditional” laws and customs.*

[T]he normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.⁷³

[94] *Warrie* held:

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.⁷⁴

[95] *Gudjala 2009* held that the factual basis must demonstrate some relationship between the claim group, their predecessors and the pre-sovereignty society from which the laws and customs of the claim group are derived.⁷⁵ 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)?

[96] In addition to the information summarised above at s 190B(5)(a), the material provides that the pre-sovereignty society in the application area featured moiety systems which prescribed marriages and a hereditary totemic system through which individuals were identified.⁷⁶ The predecessors of the claim group were members of this society and observed its rules, for example apical ancestor Nellie Champion and her son were documented by Bates as both marrying in accordance with their region’s moiety system.⁷⁷ The totemic identities of some of the predecessors were recorded, including that of apical ancestor Kaddee, and associated

⁷³ *Yorta Yorta* [46]–[47], emphasis added.

⁷⁴ *Warrie* [105], [107], emphasis added.

⁷⁵ *Gudjala 2009* [40].

⁷⁶ Anthropologist’s affidavit [15], [18], [20].

⁷⁷ *Ibid* [17].

rules, such as the prohibition on eating one's totem animal, continue to be observed by the claim group.⁷⁸ Current claimants also continue to observe the marriage rules.⁷⁹

- [97] The claimants also provide specific examples of laws and customs which have been continuously observed and passed down to them by their predecessors in relation to the application area. For example, Nellie Champion's son was a law man who is remembered for his 'strict implementation' of the law and handing out of penalties for transgressions, including against those who travelled into his country, located around Kalgoorlie, without permission.⁸⁰ Claimant 1 describes how he and other claim group members were taught by his grandfather how to hunt kangaroo, emu, smaller birds and lizards.⁸¹ He recalls his father seeking permission from senior people to access certain places in the application area and significant punishment occurring for improper access on one particular occasion.⁸² Claimant 1 explains that he now teaches these same rules of access to his younger siblings, children and grandchildren, along with rules pertaining to the hunting, preparation and apportionment of food hunted in the application area, such as kangaroo.⁸³ Claimants 2 and 3 similarly recall being taught how to utilise the resources of the application area, including plants, animals, honey and ochre, and that they continue to take their descendants onto the application area to teach them these same skills and the associated rules of preparation and apportionment.⁸⁴ Claimant 4 explains that she was taught about her country by her father, including the associated dreaming stories and as the resident spirits know who she is, she does not need to seek anyone's permission to go there.⁸⁵ Claimant 4 explains that just as her grandfather passed on his knowledge to her father about his rights and obligations to protect his country, she is now teaching these same things her own children.⁸⁶

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 predecessors and the claim group?

- [98] The material identifies the pre-sovereignty society in the application area as featuring certain systems pertaining to moieties and totems, which underpin the identities and social rules observed by the society's members. I consider the material addresses the identity of the pre-sovereignty society, sufficient for the purposes of s 190B(5)(b).
- [99] The material also provides information about the participation of the claim group's predecessors in the society, shown through their observance of the marriage rules of the moiety system and totemic identities. I understand from the material that the predecessors of the claim group had rights in the application area recognised under the laws of the pre-sovereignty society. I also understand that, pursuant to those same laws, the current claim group have inherited rights in the application area. I therefore consider the factual basis

⁷⁸ Anthropologist's affidavit [20]–[21].

⁷⁹ Anthropologist's report [10].

⁸⁰ Claimant 4 affidavit [7].

⁸¹ Claimant 1 affidavit [10]–[14].

⁸² Ibid [18], [21]–[22].

⁸³ Ibid [24].

⁸⁴ Claimant 2 statement [7]–[9], [14]; Claimant 3 statement [17]–[21], [25], [33]–[34], [36].

⁸⁵ Claimant 4 affidavit [38]–[39], [42].

⁸⁶ Ibid [42]–[44].

supports the assertion of a link between the pre-sovereignty society, the predecessors and the current claim group.

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

[100] I consider there are sufficient examples in the material before me to show that the current claim group is a modern manifestation of the pre-sovereignty society.⁸⁷ The claimants explain that they continue to observe the moiety and totemic systems and the associated rules about marriage and food prohibitions which their ancestors observed at the time of settlement. Examples are provided about how predecessors of the claim group had rights and obligations in relation to places in the application area which have been inherited by their descendants. The claimants also provide a number of examples of how they were taught by their predecessors how to hunt animals, harvest plants and collect other resources such as ochre from the application area, and that they now teach these same skills to their descendants. 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 the sense described in *Yorta Yorta*.⁸⁸

Conclusion – s 190B(5)(b)

[101] 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)?

[102] 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.⁸⁹ 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.⁹⁰

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

[103] As set out above at ss 190B(5)(a)–(b), I am satisfied that material supports the assertions that the claim group have an association with the application area and that there exist traditional laws and customs. I understand from the material that the current claim group includes some of the grandchildren and great-grandchildren of the apical ancestors. In these circumstances, I consider that an inference of continuity can more easily be made. In my view, the material before me demonstrates that the claimants possess knowledge about how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the application area, so as to support the assertion of the continuity of traditional laws and customs.

⁸⁷ *Gudjala 2009* [31], [54]–[55], *Sampi FC* [15].

⁸⁸ *Yorta Yorta* [46]–[47].

⁸⁹ *Gudjala 2009* [29].

⁹⁰ *Gudjala 2007* [82].

Conclusion – s 190B(5)(c)

[104] I am satisfied the factual basis is sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

Conclusion

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

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

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

[106] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a ‘native title right or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group. I understand the condition of s 190B(6) requires some measure of the material available in support of the claim and imposes a more onerous test to be applied to the individual rights and interests claimed.⁹¹ I also understand that the words ‘prima facie’ mean that if a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.⁹² It is therefore my task to consider whether there is probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register.⁹³ I have grouped rights together in my consideration below where it is convenient to do so.

Consideration

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

2.(a)... the right to possession, occupation, use and enjoyment to the exclusion of all others;

[107] I understand that the above claimed right is one of exclusive possession. *Yarmirr* provides that a claim of exclusive possession is not required to be supported by some enforceable means of excluding from its enjoyment those who are not its holders, and that an inquiry into how a right is observed seems directed more to identifying practices that are regarded as socially acceptable.⁹⁴ *Griffiths FC* held that demonstrating the existence of exclusive rights depends on the consideration of what the evidence discloses about the right’s content under the traditional laws and customs, and that the relationship to country is essentially a spiritual affair.⁹⁵ I therefore understand that I must consider what the material discloses about how a

⁹¹ *Doepel* [126].

⁹² *Ibid* [135].

⁹³ Section 186(1)(g).

⁹⁴ *Yarmirr* [16].

⁹⁵ *Griffiths FC* [127].

right of exclusive possession operates in relation to the application area, pursuant to the claim group's traditional laws and customs.

[108] Claimant 1 describes how his uncle was responsible for telling people where they could and could not go in the application area, and that on one occasion, unauthorised access to an important men's site resulted in significant punishment of the transgressors.⁹⁶ Claimant 4 recalls that if any strangers came to Kalgoorlie, they would have to speak to her father, who had responsibilities in the area.⁹⁷ She explains that these responsibilities have been passed to her and that she and her family can safely access their country because the resident spirits know who they are.⁹⁸ She further explains the protocols she observes, including singing out to the resident spirits when she visits.⁹⁹ From the material before me, I understand that claim group members are considered the 'gatekeepers' for the purpose of preventing harm caused by unauthorised entry to the application area.¹⁰⁰ In my view, the material describes how the right of exclusive possession operates in the application area pursuant to the claim group's traditional laws and customs. I therefore consider this right is prima facie established.

2.(b)(i) the right to hunt on, fish from, take and use the traditional resources of the flowing and underground waters;

2.(b)(ii) the right to take and use the flowing and underground waters;

4.(b) the right to hunt, fish, gather and use the traditional resources of the claim area;

4.(c) the right to take and use water on the claim area;

[109] Claimant 3 describes hunting kangaroo and bush hens, using certain trees to make spears and collecting ochre.¹⁰¹ He states that he and his family continue to hunt and fish in the application area.¹⁰² Claimant 4 also describes using the resources of the application area, including witchetty grubs and goannas.¹⁰³ The site map shows numerous rockholes and soaks in the application area, which the site map legend explains are used by the claim group to access fresh water.¹⁰⁴ In my view there is sufficient information in the material to be satisfied that these rights are prima facie established.

4.(a) the right to live, being to enter and remain, camp and erect temporary shelters and other temporary structures for that purpose and to travel over and visit any part of the claim area;

[110] As discussed above at s 190B(5)(a), the material contains a number of examples of past and present claim group members living at various places in the application area.¹⁰⁵ Claimant 3 recalls living at a camp outside of Kalgoorlie as a child and states that he and his family continue to camp on the application area.¹⁰⁶ Claimant 4 recalls her father and grandfather

⁹⁶ Claimant 1 affidavit [18], [21]–[22].

⁹⁷ Claimant 4 affidavit [33].

⁹⁸ Ibid [39].

⁹⁹ Ibid.

¹⁰⁰ *Griffiths FC* [127].

¹⁰¹ Claimant 3 statement [[20], [25].

¹⁰² Ibid [33].

¹⁰³ Claimant 4 affidavit [23].

¹⁰⁴ Site map; site map legend, 1–17.

¹⁰⁵ Claimant 1 affidavit [3]; Claimant 2 affidavit [4]; Claimant 3 statement [11], [15]–[16].

¹⁰⁶ Claimant 3 statement [16], [33].

travelling over the application area for law business.¹⁰⁷ She explains that she frequently travels over the application area.¹⁰⁸ I consider this right is prima facie established.

4.(d) *the right to engage in cultural activities and the transmission of cultural knowledge on the claim area, including:*

(i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity; and

(ii) conducting burials, ceremony and ritual.

[111] Claimant 4 describes how she learnt about places of spiritual importance from her father, and that she has the responsibility to protect those places.¹⁰⁹ She explains that she has taken her children to these sites to pass on her cultural knowledge and to teach them their responsibilities.¹¹⁰ She describes the rituals she undertakes when arriving at certain sites and explains that there are important places in the application area which are gender restricted and that the knowledge of these places continues to be transmitted to the younger generations.¹¹¹ I consider this right is prima facie established.

Conclusion

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

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

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

[113] 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.

[114] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.¹¹²

¹⁰⁷ Claimant 4 affidavit [5], [7].

¹⁰⁸ Ibid [19], [21].

¹⁰⁹ Ibid [31].

¹¹⁰ Ibid.

¹¹¹ Ibid [39], [44].

¹¹² *Doepel* [18]; *Gudjala 2009* [84].

Consideration

[115] Schedule M sets out the physical connection that a particular claim group member has with the application area, including his frequent visits for hunting and to look after significant sites. In light of this information and the other information about the claim group's association with the application area that I have summarised above at s 190B(5)(a), I consider that members of the claim group have a physical connection to the application area.

[116] I also consider the claimants' connection with the application area 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, as discussed above at s 190B(5)(b), it follows that I am satisfied their connection with the application area is in accordance with those traditional laws and customs.

Conclusion

[117] I am satisfied at least one member of the native title claim group currently has a traditional physical connection with a part of the claim area as required by s 190B(7)(a), and so s 190B(7) is met.

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

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

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

Consideration

[119] 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	Paragraph (2)(c)–(d) of Schedule B state that any area to which a previous exclusive possession act has been done is excluded from the application	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Paragraphs (1)–(2) of Schedule E provides that exclusive possession is only claimed where it can be recognised	Met

Conclusion

[120] 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)?

[121] 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

[122] 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 'None', so understand no claim is made of ownership of any minerals, petroleum or gas 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 'None', so I understand no claim of exclusive possession is made of any offshore place	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Paragraph (2)(e) of Schedule B states the application does not cover any areas where native title has been wholly extinguished	Met

Conclusion

[123] 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	Marlinyu Ghoorlie
NNTT No.	WC2017/007
Federal Court of Australia No.	WAD647/2017
Date of Registration Decision	31 March 2022

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:	As per Schedule of Native Title Determination Applications (Schedule)
Date application entered on Register:	As per Schedule
Applicant:	As per Schedule
Applicant's address for service:	As per Schedule
Area covered by application:	As per Schedule
Persons claiming to hold native title:	As per Schedule
Conditions on the applicant's authority:	Add the following text from Attachment R: "THE REPLACEMENT APPLICANT MAY MAKE DECISIONS ON ANY MATTER ARISING IN RELATION TO THE MARLINYU GHOORLIE NATIVE TITLE APPLICATION WAD 647 OF 2017 ("THE MG CLAIM") BY MAJORITY VOTE, INCLUDING BY WAY OF CIRCULAR EMAILS (WITH A MAJORITY BEING ABLE TO CONFIRM A DECISION BY AFFIRMATIVE EMAILS)."
Registered native title rights and interests:	As per Schedule

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.