



Registration Decision

Application name	Terrence Riley & Ors and State of Western Australia (Nharnuwangga, Wajarri and Ngarla People #2)
Name of applicant	Terrence Riley, Dallene Michelle Riley, Georgina Riley, James Gilbert
Federal Court of Australia No.	WAD77/2023
NNTT No.	WC2023/001
Date of Decision	2 June 2023

Claim not accepted for registration

I have decided that the claim in the Nharnuwangga, Wajarri and Ngarla People #2 application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹

For the reasons attached, I do not accept this claim for registration pursuant to s 190A.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy all of the conditions in ss 190B and 190C.

Radhika Prasad

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

¹ All legislative sections are from the *Native Title Act 1993* (Cth) (Act), unless stated otherwise.

Reasons for Decision

Cases Cited

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (*Anderson*)

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*)

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)

Dann v Yamera [2017] FCA 513 (*Dann*)

Evans v Native Title Registrar [2004] FCA 1070 (*Evans*)

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) 171 FCR 317; [2008] FCAFC 157 (*Gudjala FC*)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (*Harrington-Smith (No 9)*)

Hazelbane v Doepel [2008] FCA 290 (*Hazelbane*)

Kanak v National Native Title Tribunal (1995) 61 FCR 103; [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*)

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (*Alyawarr*)

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

Risk v National Native Title Tribunal [2000] FCA 1589 (*Risk*)

State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)

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

Ward v Northern Territory [2002] FCA 171 (*Ward*)

Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 (*Weribone*)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

Western Australia and the Northern Territory of Australia v Patricia Lane, Native Title Registrar and Others [1995] FCA 1484 (*Lane*)

Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

Background

- [1] The claimant application has been made on behalf of the Nharnuwangga, Wajarri and Ngarla People on 6 April 2023 and accepted for filing on 11 April 2023. It covers land and waters over Kumarina Pastoral Lease, around the Collier Range in Western Australia.²
- [2] The Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 26 April 2023 pursuant to s 63 of the Act.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁴
- [4] As discussed in my reasons below, I consider that the claim in the application does not satisfy all of the conditions in ss 190B and 190C and therefore it must not be accepted for registration.⁵

Information considered

- [5] In reaching this decision, I have considered s 190A(3) which directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material:
 - the information contained in the application and accompanying documents;
 - the geospatial assessment prepared by the Tribunal's Geospatial Services on 3 May 2023;
 - applicant's email of 4 May 2023; and
 - the results of my own searches using the Tribunal's registers and mapping database.

Procedural fairness process

- [6] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness. Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication.⁶ I have followed the case law regarding procedural fairness requirements when applying the registration test and note that the following steps were undertaken to ensure procedural fairness has been observed:
 - On 4 May 2023, the senior officer for this matter sent a letter to the State of Western Australia (State) informing the State that any submission in relation to the registration of

² Attachment C.

³ Section 190A(6).

⁴ Section 190A(6B).

⁵ Section 190A(6B); see Attachment A which contains a summary of result for each condition.

⁶ *Hazelbane* [25].

⁷ See for instance *Hazelbane* [23] – [31]; *Bell* [73] – [84].

this claim should be provided by 12 May 2023. The State, that day, advised that it did not intend to make any submissions.

- The senior officer, also on 4 May 2023, wrote to inform the applicant that while their email of 21 April 2023 advised the applicant did not seek to make submissions, if the applicant now wished the delegate to consider any information additional to the application, that information should be provided by 12 May 2023. The applicant's representative, that day, confirmed by email, the applicant did not seek to make any submission other than to concede that the application is incapable of being registered. The applicant's representative included State representatives and the legal representative of WAD168/2021 Gingirana #3 native title determination application, which overlaps the application area, in their email.⁸

Procedural and other matters (s 190C)—Conditions not met

Information etc. required by sections 61 and 62 – s 190C(2): condition met

- [7] The application satisfies the condition of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

What is required to meet this condition?

- [8] In coming to the above conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2).⁹ Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).
- [9] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)).

Does the claim contain the prescribed information and is it accompanied by prescribed documents?

- [10] The claim meets this condition because it does contain the prescribed details and other information and is accompanied by the prescribed affidavits, as set out below.

Applications that may be made: s 61(1)

- [11] Schedule A of the application provides a description of the native title claim group and Attachment R indicates that the persons comprising the applicant are included in the native title claim group. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

⁸ Geospatial assessment; Schedule H.

⁹ *Doepel* [16], [35] – [37], [39].

Applicant's name and address for service: s 61(3)

[12] Part B of the application contains the name and address for service of the applicant's representative.

Applications authorised by persons: s 61(4)

[13] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

Affidavits in prescribed form: s 62(1)(a)

[14] The application is accompanied by affidavits affirmed by each of the persons who comprise the applicant. I consider the affidavits contain the statements required by s 62(1A).

Section 47C agreement: s 62(1)(d)

[15] Schedule L provides that there are no agreements made under s 47C.

Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)

[16] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. That Attachment and Schedule B contain information of areas within those boundaries that are not covered by the application.

[17] Attachment C contains a map showing the external boundary of the application area.

Searches of any non-native title rights and interests carried out: s 62(2)(c)

[18] Schedule D provides that no searches, of which the applicant is aware, have been conducted by or on behalf of the claim group to determine the existence of non-native title rights and interests in relation to the land or waters in the area covered by the application.

Description of native title rights and interests claimed: s 62(2)(d)

[19] Schedule E contains a description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

General description of factual basis for assertion that native title exists: s 62(2)(e)

[20] Schedules F, G and M contain information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[21] Schedule G contains details of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[22] Schedule H states that Gingirana #3 application has been made in relation to the whole of the application area.

Future act notices: ss 62(2)(ga) and (h)

[23] Schedule HA provides that the applicant is not aware of any notification given under paragraph 24MD(6B)(c) that relate to the whole or part of the application area.

[24] Schedule I provides the details of notifications given under s 29 that relate to the whole or part of the application area.

Any conditions: s 62(2)(i)

[25] Schedule IA states that no conditions under s 251BA have been placed on the authority of the applicant to make the application and to deal with matters arising in relation to it.

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

[26] As indicated in my reasons below, the application does not satisfy the condition of s 190C(3).

[27] In my view, this condition requires that the Registrar be satisfied that there are no common claimants where there is a previous application that comes within the terms of subsections (a) to (c).¹⁰

[28] I understand that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register of Native Title Claims (Register) at the same time.¹¹ That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied. I consider that this approach reflects the intention of the legislature.

[29] I note that in assessing this requirement, I am able to address information which does not form part of the application.¹²

[30] I also note that in reaching my view, I understand the nature of the Registrar's task here is not to find 'in all respects the real facts on the balance of probabilities, or on some other basis' or 'to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application'.¹³

[31] The geospatial assessment identifies the Gingirana #3 application as covering whole of the area covered by the current application. I have undertaken a search of the Tribunal's mapping database and confirm that this application overlaps the current claim area. In my view, this application meets the condition specified under subsection (a).

[32] Subsection 190C(3)(b) requires an entry relating to the claim in the overlapping application to be on the Register when the current application was made. The current application was made on 6 April 2023 when it was filed with the Court. I have undertaken a search of the Register and this revealed that the Gingirana #3 application has been accepted for registration and the entry for the claim in this application was added to the Register on 17 September 2021. I am satisfied that the Gingirana #3 application meets the condition identified in subsection (b).

¹⁰ *Strickland FC* [9].

¹¹ Explanatory Memorandum to *Native Title Amendment Bill 1997* 29.25, 35.38.

¹² *Doepel* [16].

¹³ *Doepel* [16]; *Dann* [21].

- [33] The condition at subsection (c) is only met where the application has been entered on the Register and has not been removed, as a result of being considered for registration pursuant to s 190A, at the time the registration testing of the current application takes place. My search of the Register revealed that the Gingirana #3 application has been entered on the Register and has not been removed from it at the time of applying the registration test to the current claim. Accordingly, in my view this application meets the requirements of subsection (c).
- [34] As the Gingirana #3 application meets all of the criteria for a ‘previous application’ stipulated by s 190C(3), I am therefore required to consider whether there are any members of the claim group for the previous application in common with the claim group for the current application.¹⁴
- [35] I have accessed from the Register, a description of the native title claim group for the previous application and compared it to the description of the claim group in the current application. There are some common last names in both descriptions, and of particular relevance, Schedule O of the current application specifically identifies a member of the current claim group who is also a member of the claim group for the Gingirana #3 application. In addition, the applicant’s representative in their email of 4 May 2023 notes that the current application will not pass the registration test due to the requirements of s 190C(3).
- [36] Given the above information, I am not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application for the purposes of s 190C(3).

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

- [37] For the reasons set out below, I am not satisfied that the requirements set out in s 190C(4)(b) are met.
- [38] I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition of s 190C(4) to be satisfied.
- [39] Schedule R indicates that the application has not been certified. I must therefore consider whether the requirements of s 190C(4)(b) are met. That subsection provides that the Registrar must be satisfied that the following requirements, which are mentioned in subsection (4AA), are met:
- the applicant is a member of the native title claim group;
 - the applicant is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group; and
 - if there are any conditions under s 251BA on the authority that relate to the making of the application, then those conditions must be satisfied.

¹⁴ *Strickland FC* [9].

Does the application contain the information specified in s 190C(5)?

[40] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b). Section 190C(5) provides that the application must include a statement to the effect that the requirements set out in s 190C(4AA) have been met and briefly set out the grounds on which the Registrar should consider that the requirements in s 190C(4AA) have been met.

[41] In my view, Attachment R includes a statement to the effect that the requirements in s 190C(4AA) have been met and an outline of the grounds on which the applicant considers the Registrar should be satisfied in this regard. I assess whether the material provided addresses those requirements below.

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

[42] I understand that s 190C(4)(b):

- requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which ‘clearly ... involves some inquiry through the material available ... to see if the necessary authorisation has been given’;¹⁵
- requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group;¹⁶
- is not ‘to be met by formulaic statements in or in support of applications’;¹⁷
- does not permit a claim group to choose between the two decision making processes described in s 251B, and therefore if there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group.¹⁸

What information has been provided in support of this condition?

[43] Attachment R includes the following information:

1. The applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
2. There are no conditions under section 251BA of the Act on the authority that relate to the making of the application.
3. The grounds on which the Registrar should consider that the statement in [1] is correct are the following:
 - (a) Each of the persons who comprise “the applicant” are descendants of one or more of the ancestors listed in Schedule A to this application;
 - (b) The applicant was authorised to make, and to deal with matters arising in relation to, the application at a meeting of the native claim group which was convened for purposes

¹⁵ *Doepel* [78].

¹⁶ *Wirri People* [21], [29], [35]; *Risk* [60].

¹⁷ *Strickland* [57].

¹⁸ *Harrington-Smith (No 9)* [1230]; *Evans* [7].

including the express purpose of authorising an applicant to make, and to deal with matters arising in relation to, this application. The meeting was held at the Yulga Jinna Community Office, Meekatharra, Western Australia on 2 March 2023.

- (c) At the meeting, those members of the native title claim group who were present adopted a process for making decisions to authorise persons to make, and to deal with matters arising in relation to, applications for determinations of native title. This was a process where decisions were made by a majority vote on a show of hands.
- (d) The authorisation of named persons pursuant to the process outlined above at (c) above was limited to those of them who were "*willing and able to act as a member of the applicant*".
- (e) The persons who comprise the applicant are those persons referred to at (d) above who are willing and able to act as members of the applicant.

[44] The s 62 affidavits contain identical information and provide the following information:

Authorisation

- 4. I am authorised by all of the persons in the native title claim group to make the application and to deal with matters arising in relation to it. The basis on which I am so authorised is that I was authorised to make, and to deal with matters arising in relation to, this application, at a meeting of the native title claim group held in Yulga Jinni Aboriginal Community, Western Australia, on 2 March 2023, pursuant to a decision-making process which was agreed to and adopted by the members of the claim group present at that meeting. That process was one by which decisions were made by majority vote on a show of hands.

Conditions under s.251BA

- 5. There are no conditions under section 251BA of the Act on the authority of the applicant that relate to the making of the application.

Consideration

[45] As mentioned above, in order to be satisfied that the condition of s 190C(4)(b) has been met, the requirements of s 190C(4AA) must be met.

Is the applicant a member of the native title claim group?

[46] I note that the first limb of s 190C(4AA) requires that all the persons comprising the applicant must be members of the native title claim group.

[47] Attachment R provides that the persons who jointly comprise the applicant are members of the native title claim group.¹⁹ I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

Is the applicant authorised by all the other members of the claim group?

[48] In respect of the second limb of s 190C(4AA), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the material must identify the decision making process utilised at the authorisation meeting and I must consider how that process was applied.²⁰

¹⁹ Attachment R [1], [3].

²⁰ *Doepel* [78]; *Wiri People* [21], [29], [35].

What decision making process has been identified?

[49] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. While Attachment R and the s 62 affidavits do not state whether there is a mandatory process that must be complied with, they indicate that an agreed and adopted decision making process of majority vote on a show of hands, was used during the authorisation meeting.²¹ Given this information, I have considered the applicant's material in light of the requirements of s 251B(b). I note the Court has commented that the Act is remedial in nature and should be construed beneficially.²²

How has the decision making process been applied?

[50] I understand that one of the principles from the case law regarding s 251B is that the 'effect of the section is to give the word "all" [in s 190C(4AA)(a)] a more limited meaning than it might otherwise have' and that 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'.²³

[51] In *Weribone*, Rares J held that '[t]he notice must be sufficient to enable the persons to whom it is addressed ... to judge for themselves whether to attend the meeting and vote for a proposal' and that 'fair notice of the business to be dealt with at the meeting' must be given.²⁴ In *Burragubba*, Reeves J commented that 'it is necessary that all members be offered a reasonable opportunity to decide whether to attend'.²⁵

[52] I also understand that the following questions are required to be addressed about the authorisation process, although it is not required they be answered in any formal way as long as the substance of these questions are addressed:

Who convened it and why was it convened? To whom was notice given and why 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?²⁶

[53] In my view, the substance of those questions have not been addressed in the material provided. The information before me is limited to details of the purpose, date and location of the authorisation meeting and that the persons comprising the applicant, who are willing and able to act as members of the applicant, were authorised to make the application and deal with matters arising to it. No further information has been provided, including about the notification of the authorisation meeting or the conduct at the meeting.

²¹ Attachment R [3]; s 62 affidavits [4].

²² *Kanak* [73]; *Lane* [9].

²³ *Lawson* [25].

²⁴ *Weribone* [40] – [41].

²⁵ *Burragubba* [31].

²⁶ *Ward* [24], cited in *Lawson* [26].

[54] I am therefore not satisfied that there was fair notice of the business to be dealt with or that the members of the claim group were given every reasonable opportunity to participate in the decision making process.

[55] In light of the above, I am not satisfied that the applicant is authorised under s 251B(b) to make the application and to deal with matters arising in relation to it.

Have any conditions been satisfied?

[56] The last limb of s 190C(4AA) requires that if there are any conditions under s 251BA on the authority that relates to the making of the application, they have been satisfied.

[57] Schedule IA and the s 62 affidavits indicate that there are no conditions under section 251BA of the Act on the authority of the applicant that relate to the making of the application. As there are no conditions, I do not need to consider whether they were satisfied. In any event, given my conclusion in relation to the second limb in s 190C(4AA) that I am not satisfied the applicant is authorised to make the application, I would be unable to consider whether any conditions on that authority have been satisfied.

Merits of the claim (s 190B) – Conditions not met

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

[58] For the reasons set out below, the application satisfies the condition of s 190B(2).

What is needed to meet this condition?

[59] For the purposes of s 190B(2), I must be satisfied that 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.

What information has been provided about the boundaries of the application area?

[60] Attachment B is titled ‘Nharnuwangga Wajarri and Ngarla People’, dated 16 March 2023, and describes the external boundary of the application area with reference to native title determinations, land parcels and geographic coordinates, specifically excluding the WAD72/1998 Nharnuwangga and WAD6002/2003 Gingirana native title determinations. Schedule B lists general exclusions.

[61] Attachment C is a map titled ‘Nharnuwangga Wajarri and Ngarla People’, dated 16 March 2023 and shows the application area depicted by a bold blue outline, land parcels, the Great Northern Highway, topographic features, scalebar, geographic coordinate and notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[62] The geospatial assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[63] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with

reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

[64] For the reasons set out below, the application satisfies the condition of s 190B(3).

What is needed to meet this condition?

[65] I must be satisfied that either the persons in the native title claim group are named in the application (s 190B(3)(a)) or described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s 190B(3)(b)).

[66] When assessing the requirements of this provision, I understand that:

- I am required to address only the content of the application;²⁷
- section 190B(3) ‘requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;²⁸
- where a claim group description contains a number of paragraphs, the paragraphs should be read ‘as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open’;²⁹
- to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, ‘[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described’.³⁰

Does the description of the persons in the native title claim group meet this condition?

[67] Schedule A describes the native title claim group as the descendants of a list of apical ancestors.

[68] It follows from the description that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[69] I note that the Court has accepted the approach of identifying members of the native title claim group by descendants of named people.³¹

[70] I consider that requiring a member to show descent from an identified ancestor provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group.

[71] I am of the view that with some factual inquiry it will be possible to identify the persons who fit the description of the native title claim group.

²⁷ *Doepel* [51]; *Gudjala 2007* [30].

²⁸ *Gudjala 2007* [33].

²⁹ *Ibid* [34].

³⁰ *WA v NTR* [67].

³¹ *Ibid*.

Decision

[72] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

[73] The application satisfies the condition of s 190B(3).

Identification of claimed native title – s 190B(4) condition met

[74] For the reasons set out below, the application satisfies the condition of s 190B(4).

What is needed to meet this condition?

[75] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning.³²

[76] The description referred to in s 190B(4), and as required by s 62(2)(d) is ‘a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law’.

[77] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are ‘readily identifiable’. While undertaking this task, I consider that a description of a native title right and interest that is broadly asserted ‘does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)’.³³

[78] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.³⁴

Does the description of the native title rights and interests meet this condition?

[79] Schedule E contains a description of the claimed native title rights and interests. I am satisfied that it is understandable and has meaning.

[80] I have considered the description of the native title rights and interests claimed and find that each right and interest is sufficient to fall within the scope of s 223 and is readily identifiable as a native title right and interest.

³² *Doepel* [91] – [92], [95], [98] – [101], [123].

³³ *Strickland* [60]; *Strickland FC* [80] – [87].

³⁴ *Doepel* [16].

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

[81] For the reasons set out below, the application does not satisfy the condition of s 190B(5).

What is needed to meet this condition?

[82] While assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified.³⁵

[83] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a ‘genuine assessment’ of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimants’ factual basis material.³⁶

[84] I also understand that the applicant’s material must be ‘more than assertions at a high level of generality’ and must not merely restate or be an alternate way of expressing the claim.³⁷

[85] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants’ factual basis material going to each of the assertions, before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[86] The factual basis material is contained in Schedules F, G and M.

[87] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

What information has been provided in support of the assertions at s 190B(5)(a), (b) and (c)?

[88] Schedule F contains the following information:

The native title rights and interests claimed (as listed in Schedule E) are held by the members of the native title claim group pursuant to the traditional laws and customs of the claim group. This assertion is based on the following facts:

- A. The native title claim group and their ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area;
- B. Such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that vest rights and interests in land and waters in members of the native title claim group on the basis of:
 - a) descent from ancestors connected to the area;
 - b) traditional religious knowledge of the area;
 - c) traditional knowledge of the geography of the area;
 - d) traditional knowledge of the resources of the area;
 - e) knowledge and use of traditional ceremonies of the area.
- C. Such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group.
- D. The native title claim group continues to acknowledge and observe those traditional laws and customs.

³⁵ *Doepel* [17]; *Gudjala FC* [57], [83], [91].

³⁶ *Gudjala FC* [92].

³⁷ *Gudjala 2009* [28] – [29]; *Anderson* [43], [48].

- E. The native title claim group by those laws and customs have a connection with the land in respect of which the claim is made.
- F. The rights and interests are capable of being recognised by the common law of Australia.

[89] Schedule G provides details of the current activities carried out by the claimants as follows:

Activities currently carried on by the native title claim group within the application area include, but are not limited to:

1. Accessing and camping in the area; and
2. Engaging in religious, ceremonial and cultural practices at various locations within the area of the claim including visiting sites of significance, performing dances and ceremonial activities, reciting songs and stories.

[90] Schedule M provides that a claimant ‘has performed ceremonies within the application area, pursuant to and in accordance with the traditional laws and customs of the native title claim group’.

What is needed to provide a sufficient factual basis for s 190B(5)(a)?

[91] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion:

- that there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;³⁸
- that the predecessors of the group were associated with the area over the period since sovereignty;³⁹ and
- that there is an association with the entire claim area, rather than an association with part of it or ‘very broad statements’, which for instance have no ‘geographical particularity’.⁴⁰

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

[92] I note that although the applicant is not required to provide proof of the asserted facts, the factual basis must provide sufficient detail to enable a ‘genuine assessment’ which do not primarily rely on general or formulaic assertions.⁴¹

[93] In my view, while the asserted facts provide that the claimants and their ancestors have possessed, occupied, used and enjoyed the claim area including current members having accessed, camped and engaged in religious, ceremonial and cultural practices, and by their traditional laws and customs have a connection with the claimed land, the statements in the schedules are at a high level of generality. In particular, I note that the factual basis does not:

- demonstrate the history of the association that the members of the claim group have, and that their predecessors had, with the application area;⁴²
- support the assertion of an association ‘between the whole group and the area’;⁴³ and

³⁸ *Gudjala 2007* [52]; *Bell* [41].

³⁹ *Gudjala 2007* [52].

⁴⁰ *Martin* [26]; *Corunna* [39], [45].

⁴¹ *Gudjala 2009* [28] – [29]; *Anderson* [43], [48].

⁴² *Gudjala 2007* [51].

⁴³ *Ibid* [52].

- provide geographical particularity which is sufficient to support the assertion that the group has an association with the entire application area.⁴⁴

[94] Given the information before me, it is my view that the factual basis is insufficient to support the assertion at s 190B(5)(a).

What is needed to provide a sufficient factual basis for s 190B(5)(b)?

[95] The definition of ‘native title rights and interests’ in s 223(1)(a) provides that those rights and interests must be ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of ‘native title rights and interests’ in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word ‘traditional’.⁴⁵

[96] In light of *Yorta Yorta*, I consider that a law or custom is ‘traditional’ where:

- ‘the origins of the content of the law or custom concerned are to be found in the normative rules’ of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs;⁴⁶
- the ‘normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty’;⁴⁷
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;⁴⁸
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.⁴⁹

[97] I note that in *Gudjala 2009*, Dowsett J also discussed some of the factors that may guide the Registrar in assessing the asserted factual basis, including that:

- the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;⁵⁰
- if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;⁵¹ and

⁴⁴ *Martin* [26].

⁴⁵ *Gudjala 2007* [26], [62] – [66].

⁴⁶ *Yorta Yorta* [46], [49].

⁴⁷ *Ibid* [47].

⁴⁸ *Ibid* [46], [79].

⁴⁹ *Ibid* [87].

⁵⁰ *Gudjala 2009* [37], [52].

⁵¹ *Ibid* [40].

- the factual basis contains an explanation as to how the current laws and customs of the claim group are traditional (that is, laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).⁵²

[98] In *Warrie*, the Full Federal Court observed that while ‘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’, the Act 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’.⁵³

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

[99] Schedules F, G and M provide a brief description of the factual basis on which it is asserted that the claimed native title rights and interests exist. Schedule F includes statements to the effect that the claim group has traditional laws and customs that vest rights and interests in members of the claim group on the basis of descent from ancestors connected to area, and traditional religious knowledge, traditional knowledge of the geography and resources, and knowledge and use of traditional ceremonies of the area. Further, such traditional law and custom has been passed by traditional teaching through the generations and the claim group continues to acknowledge and observe those traditional laws and customs. Schedules G and M include general statements of claimants accessing and camping in the area, and engaging in religious, ceremonial and cultural activities.

[100] In my view, however, these assertions are not at a sufficient level of detail to enable a genuine assessment of whether the factual basis supports the assertion that the claim group continues to acknowledge and observe traditional laws and customs of the pre-sovereignty society.⁵⁴

[101] I consider the factual basis is insufficient in supporting the assertion that the relevant laws and customs are ‘traditional’ in the *Yorta Yorta* sense. In particular, the factual basis lacks details of the pre-sovereignty society, and is insufficient in explaining the connection between the pre-sovereignty society and the existing claim group and the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and those acknowledged and observed by the existing claim group.

[102] Given the above, it is my view that the factual basis is insufficient to support the assertion at s 190B(5)(b).

What is needed to provide a sufficient factual basis for s 190B(5)(c)?

[103] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

⁵² Ibid [29], [54], [69].

⁵³ *Warrie* [107]; *Alyawarr* [78].

⁵⁴ *Gudjala 2007* [62], [66]; *Gudjala 2009* [27], [29].

[104] 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.⁵⁵ In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

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

[105] As mentioned above at s 190B(5)(b), the applicant has not provided sufficient factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with traditional laws and customs. Accordingly, s 190B(5)(c) cannot be satisfied.

[106] I am not satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(c).

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

[107] As set out below, the application does not satisfy the condition of s 190B(6).

[108] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be prima facie established. Thus, ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’.⁵⁶ Nonetheless, it does involve some ‘measure’ and ‘weighing’ of the factual basis and imposes ‘a more onerous test to be applied to the individual rights and interests claimed’.⁵⁷

[109] I understand that the requirements of s 190B(6) are to be considered in light of the definition of ‘native title rights and interests’ at s 223(1).⁵⁸ I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[110] I also understand that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.⁵⁹

[111] Accordingly, the condition at s 190B(6) cannot be met in the absence of a sufficient factual basis to support the assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group, which give rise to the claimed native title rights and interests. As noted above, my view is that the factual information supporting the assertions at s 190B(5) is insufficient.

⁵⁵ *Martin* [29].

⁵⁶ *Doepel* [135].

⁵⁷ *Ibid* [126], [127], [132].

⁵⁸ *Gudjala* 2007 [85].

⁵⁹ *Yorta Yorta* [86]; *Gudjala* 2007 [86].

[112] As I consider that the conditions in s 190B(5) have not been met, I cannot therefore be satisfied, prima facie, that at least some of the claimed native title rights and interests can be established.

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

[113] For the reasons set out below, the application does not satisfy the condition of s 190B(7).

[114] This condition requires that I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[115] The Courts have observed that it ‘seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.⁶⁰ In interpreting connection in the ‘traditional’ sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that ‘the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... “traditional” in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty’.⁶¹

[116] It follows, in my view, that there must be sufficient factual material to satisfy the conditions of s 190B(5) before the Registrar can be satisfied that the requirement of s 190B(7) is met.

[117] As a result of my findings in s 190B(5), in particular that the application does not contain a sufficient factual basis supporting the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed native title rights and interests, I am unable to be satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any land or waters within the application area.

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

[118] As set out in my reasons below, in my view the application does not offend any of the provisions of ss 61A(1), (2) and (3) and therefore the application satisfies the condition of s 190B(8).

[119] Section 190B(8) requires that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

[120] I understand s 61A(4) specifically provides that s 61A(2) or (3) do not apply to an application in circumstances where the application states that ss 47, 47A, 47B or 47C applies to it.

⁶⁰ *Gudjala 2009* [84].

⁶¹ *Yorta Yorta* [86].

[121] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

No native title determination application if approved determination of native title (s 61A(1))

[122] The results of my search of the Tribunal's mapping database indicates that there are no determinations of native title within the external boundaries of the application area. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

Claimant application not to be made covering previous exclusive possession over areas (s 61A(2))

[123] Paragraph 2 of Schedule B provides that any area in relation to which a previous exclusive possession act is done is excluded from the application, subject to paragraphs 3 and 4, which state that there is no admission as to extinguishment by the applicant and the non-extinguishment principles applying respectively.

Claimant application not to claim certain rights and interests in previous non-exclusive possession act areas (s 61A(3))

[124] Schedule E provides a list of non-exclusive rights and interests being claimed. I am therefore satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act.

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

[125] The application satisfies the condition of s 190B(9), because it meets all three subconditions, as set out in the reasons below.

[126] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not be aware of, the matters set out in subparagraphs (a) to (c).

No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown (s 190B(9)(a))

[127] Schedule Q provides that no claim is made to ownership of minerals, petroleum or gas wholly owned by the Crown.

Exclusive possession is not claimed over all or part of waters in an offshore place (s 190B(9)(b))

[128] Schedule P indicates that no claim is made for exclusive possession of all or part of an offshore place. My understanding of the application area is that it does not include an offshore place.

Native title rights and interests in the application area have otherwise not been extinguished (s 190B(9)(c))

[129] Paragraph 2 of Schedule B provides that any areas where native title rights and interests have otherwise been wholly extinguished is not covered by the application area.

End of reasons

Attachment A

Summary of registration test result

Application name	Nharnuwangga, Wajarri and Ngarla People #2
NNTT No.	WC2023/001
Federal Court of Australia No.	WAD77/2023
Date of decision	2 June 2023

Section 190B conditions

Test condition	Sub-condition/requirement	Result
Section 190B(2)		met
Section 190B(3)	Section 190B(3)(b)	met
Section 190B(4)		met
Section 190B(5)	Subsections 190B(5)(a) – (c)	not met
Section 190B(6)		not met
Section 190B(7)		not met
Section 190B(8)		met
Section 190B(9)		met

Section 190C conditions

Test condition	Sub-condition/requirement	Result
Section 190C(2)	Sections 61 – 62	met
Section 190C(3)		not met
Section 190C(4)	Section 190C(4)(b)	not met
Section 190C(5)		met

End of document