

Registration Decision



Application name	Waturta
Name of applicant	Kalman Murphy, Kado Muir, Jennifer Narrier, Anthony Shaw, Lynette Shaw and Vanessa Thomas on behalf of the Waturta native title claimants
Federal Court of Australia No.	WAD297/2018
NNTT No.	WC2018/012
Date of Decision	17 August 2018

Claim accepted for registration

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

*Delegate of the Native Title Registrar*²

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

² Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.

Reasons for Decision

CASES CITED

Bolton v Western Australia [2004] FCA 760 (*Bolton*)

Commonwealth of Australia v Yarmirr (2001) 208 CLR 1; [2001] HCA 56 (*Yarmirr*)

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

Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)

Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)

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

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 Doepel [2003] FCA 1384 (*Doepel*)

Sampi v State of Western Australia [2005] FCA 777 (*Sampi*)

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

Ward v Registrar, National Native Title Tribunal [1999] FCA 1732 (*Ward v Registrar*)

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

Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28 (*Ward HC*)

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

BACKGROUND

- [1] This application was filed on behalf of the Waturta native title claim group. It covers land and waters in the central west region of Western Australia around Lake Wells.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 3 July 2018 pursuant to s 63 of the Act.

- [3] If the claim in the application satisfies all the registration test conditions in ss 190B–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] I have decided that the application satisfies all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [5] Section 190A(3) sets out the information to which the Registrar must have regard when considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’. As required by s 190A(3), I have considered the information in the application and accompanying documents provided by the applicant; and the additional materials provided by the applicant directly to the Registrar, detailed below under ‘Procedural Fairness’.
- [6] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 5 July 2018 (the geospatial report) and have considered information available through Geospatial Services in relation to locations mentioned in the application.
- [7] I note that I can consider material from outside the application for some of the conditions of registration, however I do not consider it appropriate to engage in fact-finding, noting the guidance from Mansfield J that the Registrar’s task ‘is not 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’.⁵
- [8] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁶
- [9] The state of Western Australia (the state government) has not provided submissions in relation to the application of the registration test.⁷
- [10] On 14 August 2018 the senior officer received unsolicited material from [name removed] regarding this application. [name removed] raised concerns about the identification of the native title claim group and the authorisation of the applicant. In short, [name removed] submit that the description of the native title claim group is insufficient. I have addressed the

³ Section 190A(6).

⁴ Section 190A(6B).

⁵ *Doepel* [16].

⁶ Section 190A(3)(b).

⁷ Section 190A(3)(c).

sufficiency of the claim group description in my reasons at s 190B(3) below. My decision on that condition is unchanged by [name removed]'s concerns. Regarding the authorisation of the applicant, I note that [name removed] do not have access to the additional material provided directly to the Registrar by the applicant. I consider that the additional material addresses the concerns raised by [name removed] regarding authorisation, and so my decision on authorisation at s 190C(4)(b) is not changed.

Procedural fairness

- [11] As noted above, I have considered the material within the application and accompanying documents filed by the applicant on 2 July 2018 and received by the Registrar on 3 July 2018.
- [12] On 16 July 2018 the applicant provided additional materials directly to the Registrar (the additional materials), specifically:
- (a) Affidavit of [name removed], affirmed 29 May 2018 ([name removed] affidavit);
 - (b) Affidavit of [name removed], affirmed 3 June 2018 (authorisation affidavit);
 - (c) Affidavit of [name removed], affirmed 13 July 2018 (connection affidavit);
 - (d) Affidavit of [name removed], affirmed 28 July 2018 ([name removed] affidavit); and
 - (e) Report entitled 'Waturta Native Tile Claim Preliminary Connection Research' by [name removed] (anthropological report).
- [13] On 30 July 2018 the senior officer provided the additional materials to the state government and advised that, should it wish to make submissions, it should do so by 3 August 2018.
- [14] On 1 August 2018 the state government confirmed with the senior officer that it would not be making any submissions.
- [15] On 10 August 2018 the applicant provided submissions directly to the Registrar on the condition at s 190B(6). Also on 10 August 2018, the senior officer provided these submissions to the state government, and advised that, should it wish to make submissions, it should do so by 13 August 2018. No submissions were received from the state government.
- [16] As discussed above, on 14 August 2018 the senior officer received unsolicited material from [name removed] regarding this application. As it is not a party to the matter, [name removed] is not entitled to comment on the application. Upon reading the unsolicited material, I considered that the additional materials provided by the applicant addressed the concerns raised by [name removed] and that the unsolicited material would not change any of my

conclusions on the conditions of the registration test. Therefore, I did not provide the unsolicited material to the applicant for comment.

[17] This concluded the procedural fairness processes.

Merits of the claim (s 190B) – Conditions met

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

[18] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas is sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

What is required to meet this condition?

[19] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed; and
- (b) any areas within the external boundary over which no claim is made.⁸

Does the information about the external boundary meet this condition?

[20] Schedule B refers to Attachment B. Attachment B includes a written description of the external boundary of the application area, which is made up of ‘Area 1’ and ‘Area 2’. The written description uses a metes and bounds description, referencing surrounding native title determinations and applications, cadastral boundaries and coordinate points to six decimal places.

[21] Attachment C is a map prepared by Geospatial Services titled ‘Waturta’ dated 22 June 2018 which includes:

- (a) The application area depicted in bold blue outline;
- (b) Cadastral boundaries colour coded according to tenure type and labelled;
- (c) Background topographical image;
- (d) An inset showing ‘Area 2’ in greater detail;

⁸ *Doepel* [122].

(e) Scalebar, legend, locality diagram and coordinate grid; and

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

- [22] The geospatial report concludes that the description and map are consistent and identify the application with reasonable certainty. It suggests that a small typographical error could be amended in relation to Area 1, so that a point on the external boundary is ‘further described as:

Then generally northerly and generally ~~easterly~~ **westerly** along the eastern and northern boundaries of that pastoral lease (Lot 62 on Deposited Plan 31270 and Lot 15 on Deposited Plan 31270 (Banjawarn Pastoral Lease (N050400)).’

- [23] The geospatial report also suggests two amendments to describe the external boundary ‘with greater clarity’, however these suggested amendments have not affected the conclusion of the report.
- [24] I have carefully read the description in Attachment B and consider that the typographical error highlighted in the geospatial report is not substantial and does not affect the external boundary from being identifiable with reasonable certainty. This is because it only forms part of a ‘further description’ of a point on the southern boundary which is primarily described with reference to the boundaries of the Darlot native title determination application (WAD142/2018) and to Longitude 122.339481° East. In addition, given that the description of Area 1 moves clockwise from the commencement point at the top of the area, it is clear to me that the external boundary moves generally northerly and generally westerly, rather than easterly, at that point.
- [25] Having considered the conclusions of the geospatial report, and the map and description in Attachments B and C, I am satisfied that the external boundary of the application area can be identified on the earth’s surface with reasonable certainty.

Does the information about excluded areas meet this condition?

- [26] Schedule B includes a description of areas within the boundaries that are excluded from the application area at paragraph (b). This description adopts general clauses to identify the excluded areas, including areas in relation to which a previous exclusive possession act has been done, and areas where native title has been validly extinguished.
- [27] I note French J’s comment in regard to the requirements of s 190B(2), that ‘it is unrealistic to expect a concluded definition of the areas subject to these provisions [in the Act] to be given in the application. Their applicability to any area will require findings of fact and law to be

made as part of the hearing of the application’.⁹ Following this reasoning, I am satisfied that the description of the excluded areas is sufficiently clear for the purposes of s 190B(2), as it provides an objective mechanism to identify the areas excluded from the claim.

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

[28] I am satisfied the application sufficiently identifies the native title claim group and therefore meets the requirements of s 190B(3).

What is required to meet this condition?

[29] For the application to meet the requirements of s 190B(3), the Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[30] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’: whether the application has been made on behalf of the correct native title claim group is not relevant.¹⁰

[31] I note that I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’.¹¹ I also note that the requirements of s 190B(3) ‘do not appear to go beyond consideration of the terms of the application’.¹² I therefore cannot consider material outside of the application at this condition.

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

[32] Schedule A states:

- (a) The native title claim group comprises the persons who hold individual native title rights and interests in the claim area through one or more of the following:
 - i. their own birth or the birth of an ancestor on the claim area; or
 - ii. their own or an ancestor’s long association with the claim area; or
 - iii. having religious, sacred or ritual authority for land within the claim area;and who have a connection with the claim area in accordance with traditional laws and customs.

⁹ *Strickland* [55].

¹⁰ *Doepel* [51], [37]; *Gudjala 2007* [33].

¹¹ *Wakaman* [34].

¹² *Doepel* [16].

(b) As at the date of this application, the persons referred to above at 1 includes the descendants of the following persons who have a connection with the claim area in accordance with traditional laws and customs:

- i. the descendants of *Tjiku Tjiku*;
- ii. the descendants of *Maraputa* (Jenny Jones);
- iii. the descendants of *Rangka Rangka*; and
- iv. the descendants of *Yungkututu* (Kitty Hill).

[33] From this description, I understand that in order for an individual to qualify as a member of the group they must have a connection with the application area in accordance with traditional laws and customs and meet at least one of the criteria in paragraph 1, indicated by the use of the word ‘or’ between the three criteria.

[34] I understand that the people described in paragraph 1 include descendants of the named individuals in paragraph 2. The use of the word ‘includes’ in the opening sentence of paragraph 2 indicates to me that there may be apical ancestors additional to those listed in paragraph 2, and the criteria at paragraph 1(c) does not require a connection through an ancestor, as long as the authority for the land within the claim area is supplemented with a connection with the claim area in accordance with traditional laws and customs.

[35] Determining all the members of the group will require some research, however I note Carr J’s views that the need to undertake a factual enquiry to determine the members of the group does not mean that the group has not been described sufficiently,¹³ and that it is not necessary to identify ‘each and every member of the claim group’ at the time of registration testing.¹⁴ I consider that the information in Schedule A is sufficient to work out whether or not a particular individual is a member of the claim group at the appropriate time.

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

[36] I am satisfied the description in Schedule E is sufficient to allow the rights and interests to be readily identified.

What is required to meet this condition?

[37] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified, as required by s 62(2)(d).

¹³ *WA v NTR* [67].

¹⁴ *Ward v Registrar* [21]–[25].

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

- [38] Schedule E states that the applicant claims the right to possess, occupy, use and enjoy the lands and waters subject of the application ‘as against the whole world’, which I understand to be a right of exclusive possession. Schedule E also states that the applicant claims those same rights on a non-exclusive basis where native title rights have been ‘partially extinguished’.
- [39] I note that *Strickland* is authority that a broad claim to possession, occupation, use and enjoyment as against the whole world does not offend either s 62(2)(d) or s 190B(4).¹⁵
- [40] Given that my task at s 190B(6) is to consider whether these rights and interests can be prima facie established, I have not considered whether the rights and interests claimed can be considered ‘native title rights and interests’ in accordance with s 223 as part of my task at this condition. Noting the authority of *Strickland*, I am satisfied that the broad description of the claimed rights and interests is sufficient for the purposes of s 62(2)(d) and s 190B(4).

Factual basis for claimed native title – s 190B(5) condition met

- [41] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the three assertions of ss 190B(5)(a)–(c).

What is needed to meet this condition?

- [42] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:
- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
 - (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
 - (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.
- [43] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is ‘evidence that proves directly or by inference the facts necessary to establish the claim’.¹⁶

¹⁵ *Strickland* [60].

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

[44] I also note French J's view that '[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material.'¹⁷

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

[45] I understand that s 190B(5)(a) requires the factual basis material to address:

- (a) that the claim group presently has an association with the area, and the claim group's predecessors have had such an association with the area since European settlement;¹⁸
- (b) that there is 'an association between the whole group and the area', although not 'all members must have such association at all times';¹⁹ and
- (c) that there is an association with the entire claim area, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.²⁰

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

[46] Schedule F provides:

- (a) When British sovereignty was asserted in Western Australia in 1829, the application area was occupied and used by members of the Western Desert Cultural Bloc (WDBC) and in particular by the predecessors of the native title claim group.

[47] The anthropological report provides:

- (a) settlement occurred in the application area in circa 1900, based on early accounts of explorers including Larry Wells (1891) and David Carnegie (1896); and the dates that neighbouring pastoral leases were granted (Windidda in 1905 and Wongawol in 1906);²¹
- (b) apical ancestor Tjiku Tjiku, the grandmother of several members of the current claim group, was born near the northern boundary of the application area around 1900 and did not move into the settlements around Laverton until the 1930s or 1940s;²²
- (c) apical ancestor Maraputa, also the grandmother of several members of the current claim group, was born at Mangkili to the north east of the application area around 1903

¹⁷ Martin [23].

¹⁸ Gudjala 2007 [52].

¹⁹ Ibid.

²⁰ Martin [26]; Corunna [39], [45].

²¹ Anthropological report [16]–[20].

²² Ibid [61]–[66].

and lived most of her life around the application area and often undertook journeys through it along the *yiwara* (walking tracks);²³

- (d) apical ancestor Yungkututu, also the grandmother of several members of the current claim group, was the sister of apical ancestors Maraputa and Rangka Rangka, and so it is reasonable to assume that her connections were similar to those of her sisters;²⁴
- (e) apical ancestor Rangka Rangka was the grandmother of one member of the current claim group and information provided by her daughter indicates that Rangka Rangka's country included areas covered by the application area, as it extended from 'Cosmo Newbery, to Mulga Queen, Lake Wells, Empress Spring and Mangkili';²⁵ and
- (f) members of the claim group report spiritual associations, in the form of birth and conception sites, within the application area, with eight such associations provided in the anthropological report.²⁶

[48] The connection affidavit provides that:

- (a) the deponent's mother's birth certificate states she was born in 1939 although he thinks she was born 'a long time before that', in the early 1930s, given the age of his sister and his mother's physical health at the end of her life;²⁷
- (b) his grandparents, apical ancestor Maraputa and her husband Wongabu 'lived everywhere between Mulga Queen and Mangkili, including the country around Lake Wells and right across the claim area';²⁸
- (c) his mother passed down to him stories about how Wongabu and Maraputa would travel through their country following traditional routes and meet up with other families for ceremonies, and that his mother 'also walked with her old people following ceremonies, hunting and living on country';²⁹
- (d) the main traditional route through the application area crossed Lake Wells at a place called *Wartuta*, which was used by his mother to travel through her country;³⁰
- (e) his mother remembers walking to places in the application area like *Rirrti* and *Tort Tort* in the Ernest Giles ranges,³¹ *Nyirurru*, *Karu*, *Miltji*, *Tjampan* and *Parangu*;³²

²³ Ibid [67]–[76].

²⁴ Ibid [77]–[80].

²⁵ Ibid [83].

²⁶ Ibid [106]–[110].

²⁷ Connection affidavit [9].

²⁸ Ibid [11].

²⁹ Ibid [13].

³⁰ Ibid [13].

(f) he was born in Leonora and grew up in and around Red Well and Mulga Queen, due to his father's work as a dogger for the Agricultural Protection Board, and recalls spending time in a number of locations within the application area including *Lalalka* in the south and *Kuntapapa* in the north-west;³³

(g) that he learnt about country from his 'older people', including his mother and uncle, and when his children come home from university he always takes them out to visit country, including a trip to *Karrkun*, *Pilki*, *Tjarukati* and *Tilpitjarra* in the east and south of the application area in July 2018.³⁴

[49] The affidavit of applicant member [name removed] provides that she currently lives nearby to the application area at Mulga Queen.

Does the factual basis material support an association of the predecessors of the claim group with the area at sovereignty or European settlement and since that time?

[50] In my view, the material provides a sufficient factual basis to support the assertion that the predecessors of the claim group had an association with the land and waters covered by this application. My reasons for reaching this conclusion are based on the information in the anthropological report regarding the date of settlement in the application area, and the information about the birth dates and birth places of the apical ancestors, or places with which those persons were associated. I note also the information in the connection affidavit that the deponent was born in [date removed] and that his mother was born in the 1930s, so it is likely that his grandmother, apical ancestor Maraputa was born around 1900 or in the first decade of the century. In my view, this information speaks to the apical ancestors as being present in the area at the time of settlement.

[51] There is also information in the anthropological report to show that the generations since settlement maintained an association with the application area by spending time on and around the application area with the older generations of their families. For example, the connection affidavit talks about the deponent's mother, the daughter of apical ancestor Maraputa, 'walk[ing] with her old people following ceremonies, hunting and living on country' and that the main traditional route that she followed through the application area crossed Lake Wells at a place called *Waturta*.³⁵

³¹ Ibid [23].

³² Ibid [28].

³³ Ibid [34]-[35].

³⁴ Anthropological report [149] states that other claim group members also continue to take their children, nieces and nephews out on country to learn about the application area.

³⁵ Connection affidavit [13].

Does the factual basis material support an association of the claim group currently with the area?

[52] In my view, there is sufficient factual basis to support the assertion that claim group currently has an association with the application area. I have reached this conclusion by considering the information in the anthropological report about the spiritual association that members of the claim group have to specific birth or conception sites within the application area, as well as the physical association that members of the claim group maintain through frequent visits with their children, as described in both the connection affidavit and anthropological report, and summarised above.³⁶

Is there a sufficient factual basis that the association both past and present relates to the area as a whole?

[53] In my view, there is sufficient factual basis to show that the association both past and present relates to the area as a whole. I have reached this view by considering the locations mentioned in the materials using the Tribunal's geospatial database as well as the two maps provided with the connection affidavit, which I consider directly address this requirement. There are references to locations across the application area including *Waturta* on Lake Wells, *Tort Tort* on the eastern side, *Pilki* in the south, *Tjilpitjara* and *Tjarukati* in the west, and *Lalalka* in the centre. There are also references to locations surrounding the application area including Mangkili claypan to the north, Empress Springs in the east, Cosmo Newberry in the near south and Mulga Queen in the near west.

Decision on s 190B(5)(a)

[54] I consider that the factual basis material adequately addresses the association the claim group have, and their predecessors had, with the application area, in both a physical and spiritual sense. The factual basis material explains the extent and nature of the association that claim group members and their predecessors have and have had with the application area, and the maps provided with the connection affidavit provide relevant information to my task of ascertaining that the association is with the entire area claimed. I am therefore satisfied that there is sufficient information to meet the requirements of s 190B(5)(a).

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

[55] Section 190B(5)(b) requires me to be satisfied that the factual basis material is sufficient to support an assertion 'that there exist traditional laws acknowledged by, and traditional

customs observed by, the native title claim group that give rise to the claim to native title rights and interests’.

[56] ‘Native title rights and interests’ is defined in s 223(1)(a) as meaning those rights and interests ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders.

[57] Noting the similarity in language between s 190B(5)(b) and s 233(1)(a), I consider that it is appropriate to interpret s 190B(5)(b) in light of the case law regarding the definition of ‘native title rights and interests’ in s 223(1).

[58] The observations of the High Court in *Yorta Yorta* about the meaning of the word ‘traditional’ in relation to laws and customs include that:

(a) ‘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;³⁷

(b) the ‘normative system under which the rights and interests are possessed is a system that has had a continuous existence and vitality since sovereignty’;³⁸

(c) the law or custom ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’;³⁹ and

(d) those laws and customs have been acknowledged and observed ‘substantially uninterrupted’ since sovereignty, having been passed down the generations to the claim group.⁴⁰

[59] In *Gudjala 2009*, Dowsett J discussed some of the factors that may guide the Registrar in assessing the factual basis, including:

(a) 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;⁴¹

³⁷ *Yorta Yorta* [46], [49].

³⁸ *Ibid* [47].

³⁹ *Ibid* [46].

⁴⁰ *Ibid* [87].

⁴¹ *Gudjala 2009* [37], [52].

- (b) that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestors and the pre-sovereignty society from which the laws and customs are derived;⁴²
- (c) that the factual basis contains an explanation as to how the current laws and customs of the claim group are ‘traditional’ in how they relate to the rights and interests in the application area.⁴³

What information has been provided in relation to the society?

[60] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society or a society that existed prior to European settlement, acknowledging and observing normative laws and customs.

[61] Schedule F asserts:

- 3. The society under whose laws and customs the claimed native title rights and interests were and are possessed in the application area is the Western Desert Cultural Bloc, being a body of persons united in and by its acknowledgement and observance of a common body of traditional laws and customs under which the claimed native title rights and interests are possessed. The Western Desert Cultural Bloc existed as a society at sovereignty and has existed at all times since sovereignty.

[62] The anthropological report asserts:

- (a) the application area falls ‘unambiguously’ within the WDCB society,⁴⁴ and that there are three criteria that are indicative to membership within the WDCB:

- i. Associations with country within the general area of the WDCB
- ii. Associations with a dialect or language of the WDCB
- iii. Knowledge and observance of WDCB laws and customs, in particular *tjukurrpa*⁴⁵

- (b) research about the WDCB society dates back to A.P. Elkin’s work in 1919 and continued through the work of Berndt in 1959 and Tindale in 1974;⁴⁶
Waturta claim group members identify with the socio-linguistic identities of Ngalia and Mantjintjarra, which were included by Berndt on a list of Western Desert dialogues in 1979;⁴⁷

⁴² Ibid [40].

⁴³ Ibid [29], [54], [69].

⁴⁴ Anthropological report [36].

⁴⁵ Ibid [34].

⁴⁶ Ibid [36]–[40].

⁴⁷ Ibid [48].

- (c) there are significant WDCB *tjukurrpa* or Dreaming stories which cut across the application area, which confirm the area as being part of the WDCB society;⁴⁸ and
- (d) 'although the country of the Waturta claim is environmentally "marginal" in the sense that it has few permanent waters large enough to support long-term occupation or significant numbers of game, it nevertheless retains an important place in the broader cultural and economic geography of the region'.⁴⁹

[63] The connection affidavit asserts:

- (a) In relation to the traditional laws and customs at settlement, that the deponent's grandparents, including apical ancestor Maraputa would travel through their country following traditional routes and meet up with other families for ceremonies;⁵⁰
- (b) In relation to the laws and customs of the intervening generations and currently, that his mother was multilingual and he speaks Ngalia and understands Tjupan;⁵¹
- (c) In relation to the laws and customs that he practices, that the 'old people' taught him about the *tjukurrpa*, which links the past, present and future;⁵² and
- (d) That '[t]he law from the *tjurkurrpa* is the same law that applies across the desert; places, which have the same law, are Alice Springs, Balgo, Warburton, Wiluna, Jigalong, Cosmo, Coonana and Mulga Queen. The desert law applies to the claim area'.⁵³

What information has been provided in relation to the laws and customs?

[64] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are 'traditional', that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society.

[65] Schedule F asserts:

- 5. [WDCB] traditional laws and customs are grounded in a fundamental belief in the *tjukurrpa*, or the Dreaming ...
- ...
- 8. The *tjukurrpa* lays down a number of laws and customs that relate to the manner in which rights and interests must be exercised, and that otherwise govern social interaction and daily life within the [WDCB], and in particular, in the application area...

⁴⁸ Ibid [95].

⁴⁹ Ibid [96].

⁵⁰ Connection affidavit [13].

⁵¹ Ibid [141].

⁵² Ibid [50]–[52].

⁵³ Ibid [54].

9. Western Desert traditional laws and customs have been acknowledged and observed and have had a substantially continuous existence and vitality in the application area since prior to sovereignty.

[66] The anthropological report asserts:

- (a) The *tjukurrpa* provides the 'normative' element in acknowledgement of laws and customs;⁵⁴
- (b) Normative laws derive from the *tjukurrpa* stories, such as the story which travels through the landscape of the application area of the 'Dragon Fly Man' who wastes food and which is used to enforce behaviours about the appropriate use of land and resources;⁵⁵
- (c) The *tjurkurrpa* stipulates a six-section system of classificatory kinship, and [text removed for cultural reasons];⁵⁶
- (d) With regards to laws and customs of the claim group that are asserted to be rooted in those of the society at settlement:
 - i. The ethno-historical literature records laws and customs in the WDCB about visiting other people's country, and the protocols continue to be observed by members of the current claim group;⁵⁷
 - ii. [text removed for cultural reasons];⁵⁸
 - iii. [text removed for cultural reasons];⁵⁹
 - iv. Traditional funerary customs of the WDCB are recorded in the ethno-historical literature including vacating the area where a person has died and establishing 'sorry camps'. Members of the claim group have relayed to the author how, at the funeral of the daughter of apical ancestor Maraputa a few years ago, the family set up a sorry camp near a significant women's *tjurkurrpa*;⁶⁰

[67] The connection affidavit asserts:

- (a) '[e]verything – the way you cook food, name your children, look after country – is all based on the *tjukurrpa*';⁶¹
- (b) '[i]f something happens to the *tjukurrpa* in my country then I will get in trouble from other *wati* [law men]';⁶²

⁵⁴ Anthropological report [91].

⁵⁵ Ibid [102]–[103].

⁵⁶ Ibid [120]–[127].

⁵⁷ Ibid [111]–[114].

⁵⁸ Ibid [115]–[116].

⁵⁹ Ibid [129]–[134].

⁶⁰ Ibid [135]–[139].

⁶¹ Connection affidavit [50].

⁶² Ibid [95].

- (c) The laws around food preparation are linked to particular *tjurkurrpa* sites and ‘dreamtime stories’ in and around the application area;⁶³ and failure to prepare food correctly leads to serious consequences and ‘the elders told me about this, if you broke this law you could be killed. These days if you break that law you don’t get killed, but you do get frowned upon and there could be spiritual punishment’;⁶⁴
- (d) With regard to laws and customs of the claim group that are asserted to be rooted in those of the society at settlement:
- i. the first husband of apical ancestor Maraputa speared the man she eloped with in the legs ‘to satisfy his need for revenge’, and Maraputa was required to fight that man’s first wife in order to live alongside as the ‘second wife’;⁶⁵
 - ii. his mother eloped with a man who became her second husband, and that such elopement is a traditional custom;⁶⁶
 - iii. he was initiated ‘under desert law’ when he was 24 in Jigalong, to the north of the application area. One of the consequences of being initiated is that he is now allowed to access areas that his mother told him he was prevented from visiting as a ‘child’ (while he was uninitiated). Another consequence is that he can learn secret knowledge about places that ‘the old people’ told him are sacred;⁶⁷
 - iv. The custom of refraining from using the name of a person who has died continues to be practiced, as does the custom of moving out of an area after people had died, like people of his mother’s generation did after a number of old people died around Mulga Queen, which meant that the community was not re-established until the 1980s. Other traditional funerary customs also continue to be practiced.⁶⁸
- (e) With regards to how the traditional laws and customs were passed down between generations:
- i. His mother taught him a custom that he practices on the application area, of ‘spend[ing] a night first wandering around. This gives the country time to recognise you if you haven’t been there for a while’;⁶⁹

⁶³ Ibid [110].

⁶⁴ Ibid [116].

⁶⁵ Ibid [17]–[19].

⁶⁶ Ibid [31].

⁶⁷ Ibid [55].

⁶⁸ Ibid [154]–[159].

⁶⁹ Ibid [102].

- ii. His mother taught him the laws and customs about food collection and preparation including specific rules for preparing bush turkeys⁷⁰, kangaroo,⁷¹ and collecting emu eggs; and that he has passed on this knowledge to his children who killed their first bush turkey on the application area.⁷²

(f) With regards to laws and customs around responsibility for country:

- i. 'I can't just go digging and cleaning out a waterhole without first meeting with the people who can speak for that country';⁷³
- ii. Punishments are 'scaled from getting growled at through to death' for harm to country, administered by either spiritual forces or the *wati*.⁷⁴

Conclusion on factual basis addressing the assertion of s 190B(5)(b)

[68] I am satisfied that there is sufficient information in the application and additional materials to support the assertion that there was a society in the application area at settlement who were bound by the observance of shared laws and customs.

[69] I have reached this conclusion by considering the information provided in the anthropological report based on historical research and interviews with claim group members, and the connection affidavit which I consider provides information that demonstrates the existence of a society in and around the application area of which the predecessors of the claim group were members.

[70] I consider the information relating to the use of dialects of the WDCB language by both the apical ancestors and current claim group members to be an indicator of an identifiable society. The use of WDCB dialects in the application area also supports the assertion that the application area forms part of a wider regional society, as stated in Schedule F, the anthropological report and the connection affidavit.

[71] I consider that there is sufficient information to show how laws and customs are 'traditional', in that they have been handed down from members of the society at settlement through the intervening generations to the current claim group. The information about members of the claim group continuing to observe normative laws and customs taught to them by preceding generations, such as the rules around hunting and preparing food, [text removed for cultural reasons] and funerary practices, and [text removed for cultural reasons] further indicates to

⁷⁰ Ibid [108].

⁷¹ Ibid [112]–[117].

⁷² Ibid [107]–[110].

⁷³ Ibid [91].

⁷⁴ Ibid [97].

me that the application area has continued to be part of a functioning society since settlement.

- [72] I can infer from the information in Attachment F, the anthropological report and the connection affidavit that the concept of *tjukurrpa* and ‘the traditional laws and customs’ of the claim group are essentially interchangeable terms, or at least are inextricably linked, insofar as the basis of the traditional laws and customs arises from the observance of the *tjukurrpa*.

Decision on s 190B(5)(b)

- [73] I consider that the factual basis is sufficient to support the assertion of the existence of a society in the application area ‘united in and by its acknowledgement and observance of a body of law and customs’ at settlement.⁷⁵
- [74] I consider that the information in the application demonstrates that there was and is widespread observance of laws and customs connected to the *tjukurrpa*, and that these laws and customs are ‘traditional’ as they are rooted in the laws and customs of the pre-sovereignty society, and have been passed down through the generations since that time. The examples provided about learning about the *tjukurrpa* and related laws and customs from the apical ancestors and other predecessors indicates to me that the laws and customs observed by the claim group are ‘traditional’ in the *Yorta Yorta* sense.
- [75] I am therefore satisfied that the factual basis material provided is sufficient to meet the requirements of s 190B(5)(b).

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

- [76] This condition is concerned with whether the factual basis material 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.
- [77] Meeting the requirements of this condition relies on whether there is a factual basis supporting 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.⁷⁶
- [78] I also understand that if the applicant’s factual basis material relies upon the drawing of inferences, that ‘[c]lear evidence of a pre-sovereignty society and its laws and customs, of

⁷⁵ *Yorta Yorta* [46], [49].

⁷⁶ *Ibid* [29].

genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'.⁷⁷

Is the factual basis sufficient for the assertion of s 190B(5)(c)?

- [79] As discussed above in relation to s 190B(5)(b), I am satisfied the factual basis material demonstrates that the similarity between the laws and customs of the current claim group and those of the pre-sovereignty society justify an inference of continuity. This is because the material shows how laws and customs acknowledged and observed by the claim group's predecessors have been passed down through the generations, with information about how successive generations acknowledged and observed those same laws and customs on and in relation to the application area.
- [80] For example, the information about the funerary practices of the WDCB of moving away from the area where someone had died and setting up 'sorry camps' is recorded in the ethno-historical record, according to the anthropological report.⁷⁸ The connection affidavit talks about how members of the deponent's parents' generation moved out of the area around Mulga Queen as a result of many old people dying and as a result the community there was not re-established until the 1980s.⁷⁹ The anthropological report records interviews with members of the current claim group about recent funerals, including one in 2017, where the practice of setting up a sorry camp was observed.⁸⁰

Decision on s 190B(5)(c)

- [81] Given my finding that the factual basis is sufficient to support the assertion of the existence of traditional laws and customs at s 190B(5)(b) and the information provided to show how the intervening generations continued to practice those laws and customs and have passed them onto the current claim group, I am satisfied that the factual basis is sufficient to support the assertion of the continuity of traditional laws and customs as required by s 190B(5)(c).

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

- [82] As noted above, the applicant has made submissions on how the application meets the condition at s 190B(6). I have considered those submissions, in addition to the material in the application and the material provided directly to the Registrar, in reaching my decision on this condition.

⁷⁷ *Gudjala 2009* [33].

⁷⁸ Anthropological report [135]–[136].

⁷⁹ Connection affidavit [156].

⁸⁰ Anthropological report [138]–[139].

[83] I consider that one of the claimed rights and interests has been established on a prima facie basis. Therefore, the application satisfies the condition of s 190B(6). My findings in relation to each claimed right follow below.

What is required to meet this condition?

[84] For the application to meet the requirements of s 190B(6), the Registrar ‘must consider that, prima facie, at least some of the native title rights and interests claimed can be established.’ I note the following comments by Mansfield J in relation to this condition:

- (a) It requires some measure of the material available in support of the claim;⁸¹
- (b) Although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);⁸² and
- (c) Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.⁸³

[85] Mansfield J found that the use of the words ‘prima facie’ in s 190B(6) means that ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’.⁸⁴

[86] I note the comments by French J in relation to claims of exclusive rights: ‘the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation’.⁸⁵

[87] I also note the comments of the majority of the High Court in *Yarmirr*, referred to in the applicant’s submissions, that a claimed right 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, rather than looking to whether the practices were supported or enforced through a system for the organised imposition of sanctions by the relevant community’.⁸⁶

⁸¹ *Doepel* [126].

⁸² *Ibid* [127].

⁸³ *Ibid* [132].

⁸⁴ *Ibid* [135].

⁸⁵ *Sampi* [1072].

⁸⁶ *Yarmirr* [16].

- [88] I also note the comments of the Full Federal Court in *Griffiths*, also referred to in the applicant's submissions, that '[i]t is not a necessary condition of the exclusivity of native title rights and interests in land or waters that native title holders should, in their testimony, frame their claim to exclusivity as some sort of analogue of a proprietary right', but rather, '[i]f, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... what the common law will recognise as an exclusive right of possession, use and occupation'.⁸⁷
- [89] I also note the comments of the High Court in *Ward HC* that where 'native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms'.⁸⁸
- [90] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be prima facie established the requirements of s 190B(6) will be met. Only those rights and interests I consider prima facie can be established will be entered on the Register.⁸⁹ An element of that task requires me to consider whether there is some material which prima facie supports the existence of the claimed rights and interests under the traditional laws and customs acknowledged and observed by the native title claim group.

Which rights and interests can be established on a prima facie basis?

Exclusive possession - established

- [91] I consider that the right claimed in paragraph 2 of Schedule E is a right of exclusive possession:
2. Where there has been no extinguishment of native title rights and interests, or where any extinguishment must be disregarded, the applicant claims the right to possess, occupy, use and enjoy the lands and waters the subject of the application as against the whole world.
- [92] The applicant's submissions draw my attention to two particular sites within the application area to demonstrate the claimed right of exclusive possession, being [location removed for cultural reasons] and *Miltji* rockhole.

⁸⁷ *Griffiths* [127].

⁸⁸ *Ward HC* [51].

⁸⁹ Section 186(1)(g).

[93] With regards to [location removed for cultural reasons], the applicant submits as follows, with references to the anthropological report:

In [name removed]'s words:
[text removed for cultural reasons]⁹⁰

[94] The applicant's submission that the reference to 'other men of ritual authority from other areas of the Western Desert Cultural Bloc' are members of the claim group by virtue of their ritual or spiritual authority, is helpful to my consideration as to whether a prima facie claim to exclusive possession is established. I note that the description of the native title claim group includes persons who hold individual native title rights and interests in the claim area through 'having religious, sacred or ritual authority for land within the claim area'.⁹¹ With this description in mind, I can infer that the *wati* from the Ngaanyatjarra Lands referred to in the anthropological report are members of the claim group by virtue of their religious authority for the lands associated with the [location removed for cultural reasons] in the application area, despite not claiming the application area as their 'home country'.

[95] The applicant also submits the following in relation to the [location removed for cultural reasons]:

[text removed for cultural reasons]⁹²

[96] I consider that this information provided speaks to practices about to access to the [location removed for cultural reasons] that are deemed 'socially acceptable' by the members of the claim group in the sense described in *Yarmirr*.

[97] With regards to *Miltji* rockhole, the applicant's submissions direct me to the following passage from *Griffiths*:

If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive.⁹³

[98] The applicant submits as follows, again with references to the anthropological report:

[name removed]'s discussion of *Miltji* Rockhole is also an example of the Full Federal Court's exploration of spiritual repercussions in *Griffiths*, referenced above, for strangers who access Waturta country without being invited to do, or without permission from the Waturta claimants, "Miltji is 'danger' country for some, but because of their ancestral connections there, for Waturta families it is a benevolent place that recognises them as familiars:

⁹⁰ Applicant's submissions, 10 August 2018 (Submissions) 8.

⁹¹ Schedule A [1](c).

⁹² Submissions 7–8.

⁹³ *Griffiths* [127].

For us it's not exclusion country. We can go there, but.. yeah, I mean it's funny though, we live in mamu [devil] country. [187]

[99] I also consider the following information from the connection affidavit, highlighted in the submissions from the applicant, is relevant:

When you go to springs you've got to alert the *tjila* [water snake] if one lives there. If it's your country then you don't need to fear the *tjila* [water snake], but if you are a stranger and you don't follow the protocol then a storm might pick up or the wind might change. Then the *tjila* will follow you and swallow you up ... This is also why it's important that strangers seek our permission to come onto our *ngurra* [country].⁹⁴

[100] I consider that it is reasonable to infer that the 'springs' referred to in the connection affidavit would include the *Miltji* rockhole, noting both the importance of water sources to the claim group given the application area is 'environmentally "marginal" in the sense that it has few permanent waters';⁹⁵ and because for Waturta claimants it is asserted that it is 'not exclusion country', the inference being that for outsiders, it is 'exclusion country' and so permission should be sought to access *Miltji* in accordance with the traditional laws and customs described in the connection affidavit.

[101] Noting the information that failure to follow the access protocol could lead to spiritual repercussions ('the *tjila* will follow you and swallow you up'), and the need for strangers to seek permission in order to avoid such repercussions, I consider that the information provided about the *Miltji* rockhole supports a characterisation of the native title rights and interests held in relation to it as 'exclusive' in accordance with meaning of the term articulated in *Griffiths*.

[102] I also note the applicant's submissions on the concept of permission, referring to information in the anthropological report in relation to the laws and customs at settlement and today which outline how the right to be asked permission operates, and the consequences that flow from failure to respect that right. The submissions refer to the following from the anthropological report:

Members of the Waturta claim expect to be asked when others come to their country, and they observe the same protocols when travelling to the country of others...Failing to ask, [Waturta claimant [name removed]] said, would be perceived as 'very ignorant and disrespectful' and would lead to 'a perception in the community that [the transgressor] has no understanding of law and culture'. People who don't seek appropriate permission are seen as 'not properly Aboriginal', that is, 'someone who has forgotten who he really is'⁹⁶

⁹⁴ Connection affidavit [100].

⁹⁵ Anthropological report [96].

⁹⁶ Ibid [114].

[103] I consider that the information about the laws and customs relating to the seeking of permission to access the application area demonstrates that the right that is claimed accords with a right of exclusive possession as described in *Sampi* quoted above, and also *Ward HC*, where the High Court held:

It is the rights under traditional law and custom to be asked permission and to ‘speak for country’ that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.⁹⁷

[104] I consider that the information about [location removed for cultural reasons] and *Miltji* rockhole are examples of how the right to ask permission operates in the application area. Noting the information in the anthropological report, the connection affidavit and the submissions that claim group members have an obligation to manage and regulate access in accordance with the traditional laws and customs of the WDCB, I consider that a right of exclusive possession is prima facie established.

Non-exclusive rights – not established

[105] Schedule E claims non-exclusive rights in the following terms:

3. Where native title rights and interests have been partially extinguished, the applicant claims the non-exclusive right to possess, occupy, use and enjoy the lands and waters the subject of the application.

[106] The applicant submits in relation to the finding in *Ward HC*:

The High Court ... is not concerned particularly about whether the non-exclusive rights are framed “in the same terms as” the exclusive rights, but rather, whether a right to make decisions about use and enjoyment of country is being claimed, and that claim is masked by a composite non-exclusive claim as opposed to expressing the rights “by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.”⁹⁸

[107] The applicant then submits:

If exclusive possession is established prima facie... then it is arguable that in respect of any partial extinguishment of native title (for example via the valid grant of a pastoral lease), the only native title right or interest that has been extinguished is the right of exclusivity (including the right to manage or control access to country). All other composite rights of possession, occupation, use and enjoyment, survive in the Waturta Claim area separate to notions of control of access.⁹⁹

[108] The submissions then frame the claimed non-exclusive right of possession, occupation, use and enjoyment in terms of the following activities:

- c) *sharing and teaching knowledge of country;*
- d) *using and trading resources, including plants and animals;*

⁹⁷ *Ward HC* [88].

⁹⁸ Submissions 12–3, quoting *Ward HC* [49]–[52].

⁹⁹ *Ibid* 14.

- e) *living/residing/camping in the area;*
- f) *interacting with the sacred aspects of country, to visit and care for sites and to perform ceremonies;*
- g) *conducting funerals and burials on country; and*
- h) *managing or caring for the physical environment.*¹⁰⁰

[109] I note that these activities are similar to many of the activities in Schedule G, although worded differently. It is not clear to me why the list starts from '(c)' although I do not believe this has any particular meaning or importance, as the submissions proceed to expand on each of the activities in the same order as in the list.

[110] I have considered the applicant's interpretation of *Ward HC* and whether I can be satisfied that a non-exclusive right to possess, occupy, use and enjoy the application area is prima facie established based on the information that the predecessors undertook, and the claim group continues to undertake, the listed activities on and in relation to the application area. I consider that the content of the composite non-exclusive right claimed in Schedule E – to possession, occupation, use and enjoyment – is greater than the sum of the activities described in the submissions. As a single composite non-exclusive right is claimed, I do not consider that I can assess only the use and enjoyment of the application area by reference to the activities of the claim group. While the applicant has described the activities undertaken by the claim group and their predecessors, a right to undertake those activities has not been claimed. As s 62(2)(d) requires a description of the native title rights and interests claimed to be contained in the application, I do not consider it appropriate for me to consider any rights other than those described in the application. If, for example, a right to conduct funerals and burials on country was claimed in the application, then the information in the anthropological report, connection affidavit and submissions would likely support the existence of that right to the extent that it could be established on a prima facie basis. As rights to undertake the described activities are not claimed in the application, I cannot proceed to consider whether they are prima facie established for the purposes of s 190B(6). For these reasons, I do not consider that the non-exclusive right to possess, occupy, use and enjoy the lands and waters of the application area is prima facie established.

Decision on s 190B(6)

[111] I am satisfied that there is sufficient information to show that the right of exclusive possession claimed in the application can be established prima facie. This is because, according to the definition provided in s 223(1), a native title right or interest is one that is held under traditional laws acknowledged and traditional customs observed and I am satisfied that there

¹⁰⁰ Ibid.

is sufficient information in the anthropological report, connection affidavit and submissions, that speaks to this requirement.

Physical connection – s 190B(7): condition met

[112] I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

What is required to meet this condition?

[113] For the application to meet the requirements of s 190B(7), the Registrar ‘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’.¹⁰¹

[114] The following principles have emerged from the case law about what is required at s 190B(7):

- (a) The material must satisfy the Registrar (or her delegate) of particular facts and evidentiary material is therefore required;
- (b) The focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;¹⁰²
- (c) The physical connection must be in accordance with the traditional laws and customs of the claim group;¹⁰³
- (d) The material may need to address an actual presence on the application area.¹⁰⁴

Is there evidence that a member of the claim group has a traditional physical connection?

[115] I am satisfied that applicant member [name removed] has or has had a traditional physical connection with parts of the application area in accordance with the requirements of s 190B(7) because of the following information provided in the application:

- (a) The time spent with his parents and ‘old people’ on parts of the application area as a child;¹⁰⁵

¹⁰¹ Section 190B(7)(a).

¹⁰² *Doepel* [18].

¹⁰³ *Gudjala 2007* [89].

¹⁰⁴ *Yorta Yorta* [184].

¹⁰⁵ Connection affidavit [35].

- (b) His knowledge of *tjukurrpa* sites across the application area which have been passed to him as a result of his standing as a *wati* in accordance with the traditional laws and customs of the WDCB;¹⁰⁶
- (c) His ongoing visits to the application area including with his children to teach them to hunt;¹⁰⁷ and
- (d) [text removed for cultural reasons].

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

[116] In my view the application complies with the provisions of ss 61A(1)–(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination application if approved determination of native title	Geospatial report and my own assessment	Met
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B	Met
s 61A(3) claimant applications not to claim certain rights and interest in previous non-exclusive possession act areas	Schedule B	Met

¹⁰⁶ Ibid [60]–[71].

¹⁰⁷ Ibid [164]–[165].

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

[117] In my view the application meets the requirements of s 190B(9):

Requirement	Information addressing requirement	Result
s 190B(9)(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
s 190B(9)(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
s 190B(9)(c) native title rights and/or interests in the application area have otherwise been extinguished	There is no information in the application that discloses that the native title rights in the application area have otherwise been extinguished.	Met

Procedural and other matters (s 190C)—Conditions met

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

[118] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

What is required to meet this condition?

[119] To meet s 190C(2), the Registrar must be satisfied that 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.¹⁰⁸

Section 61

[120] The application contains the details specified in s 61.

¹⁰⁸ *Doepel* [16], [35]–[39].

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 62

[121] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits accompanying application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B and Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D states that no search has been conducted	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F, additional materials	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H and Attachment H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA and Attachment HA	Met

Section	Details	Form 1	Result
s 62(2)(h)	Notices under s 29	Schedule I and Attachment HA	Met

No previous overlapping claim group – s 190C(3): condition met

[122] I am satisfied that no person in the native title claim group for this application that was not also a member of the native title claim group for any previous overlapping application.

What is required to meet this condition?

[123] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application’.¹⁰⁹ 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 of Native Title Claims (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.

Are there any relevant ‘previous applications’?

[124] The geospatial report states there were no applications on the Register of Native Title Claims which fell within the external boundary of this application area as at 5 July 2018, when the geospatial report was completed.

[125] My own assessment is that there were no relevant ‘previous applications’ that were on the Register when the current application was made to the Court on 2 July 2018. This means that I do not need to consider whether there are any claimants in common between the current claim group and any overlapping group, and so s 190C(3) is met.

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

[126] I am satisfied that the requirements of s 190C(4)(b) and my reasons follow below.

What is required to meet this condition?

[127] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that either:

¹⁰⁹ Emphasis in original.

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;¹¹⁰ or
- (b) 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.¹¹¹

[128] Following s 190C(4)(b) there is a note in the Act referring to the definition of ‘authorising the making of applications’ in s 251B, which reads as follows:

For the purposes of this Act, all the persons in a native title claim group **authorise** a person or persons to make a native title determination application ... and to deal with matters arising in relation to it, if:

- (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group ... must be complied with in relation to authorising things of that kind—the persons in the native title claim group ... authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
- (b) where there is no such process—the persons in the native title claim group ... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group ... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.¹¹²

[129] 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) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[130] I note French J’s comments in *Strickland* 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.’¹¹³

[131] I also note French J’s comments in relation to the importance of authorisation, that it is ‘fundamental to the legitimacy of native title determination applications’ and ‘is not a condition to be met by formulaic statements in or in support of applications’.¹¹⁴

¹¹⁰ Section 190C(4)(a).

¹¹¹ Section 190C(4)(b).

¹¹² Emphasis in original.

¹¹³ *Strickland* [57].

¹¹⁴ *Ibid.*

Is the requirement of s 190C(5) met?

[132] Schedule R states that the application has not been certified and sets out at section 2 that:

- (a) All of the persons who comprise the applicant are members of the native title claim group and are 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.
- (b) The grounds of which the Registrar would consider that the above statement is correct are set out in the affidavits of [the members of the applicant], filed with this application...

[133] The affidavits of the members of the applicant state '[a]uthorisation of the applicant was made at a meeting held on 28 March 2018 at the Walkatjurra Cultural Centre in Leonora', and that the a decision making process under traditional law and custom is one of consensus, 'listening in particular' to the senior people or *wati*.¹¹⁵

[134] I consider that the information in Schedule R and the affidavits of the members of the applicant is sufficient to satisfy the requirements of s 190C(5).

Does the material address the decision making process required by s 251B?

[135] Each affidavit from the members of the applicant affirms that the deponent believes that he or she is authorised by all of the persons in the native title group to make the application and to deal with the matters arising in relation to it. Each affidavit also affirms that, in regards to the authorisation of the applicant, the process of decision making required under the system of traditional laws and customs has been complied with.

[136] As discussed above, the additional materials provided directly to the Registrar include an affidavit from anthropologist [name removed] dated 29 May 2018 (the [name removed] affidavit). The [name removed] affidavit affirms that '[b]ased on my knowledge, training and experience, it is my view that the traditional decision-making processes among groups associated with the Western Desert Cultural Bloc are predicated on consensus, but not all individuals hold the same level of authority in relation to speaking for country'.¹¹⁶ This accords with the information in the affidavits of the members of the applicant.

[137] The [name removed] affidavit describes the authorisation meeting on 28 March 2018 and addresses the decision making at that meeting under a specific heading. According to the deponent, she observed a number of decisions made at that meeting following the consensus model prescribed by the traditional law and custom of the claim group, including the identity of the right people for the application area, the claim group description and the description of

¹¹⁵ The affidavits of all the members of the applicant provided with the application in accordance with s 62 ('Section 62 affidavits') contain this information at [3]–[5].

¹¹⁶ [name removed] affidavit [9].

the native title rights and interests claimed.¹¹⁷ With regard to the authorisation of the applicant, the deponent states:

[text removed for cultural reasons]

[138] Based on the information in the [name removed] affidavit and in the affidavits of the members of the applicant, I consider that there is sufficient information to demonstrate that the applicant is authorised in accordance with a decision making process mandated by the traditional laws and customs of the native title claim group, and that the requirements of s 251B are therefore met.

Does the material show that every member of the group was given every reasonable opportunity to participate in the decision to authorise the applicant?

[139] The additional materials provided directly to the Registrar also include an affidavit from applicant member [name removed], dated 3 June 2018 (authorisation affidavit). The authorisation affidavit affirms that the deponent began compiling a list of native title claimants and in January and February 2018, which were then provided to Cross Country Native Title Services for the purposes of mailing out a meeting notice.¹¹⁸

[140] The deponent also affirms that, after consultation with ‘a number of Waturta claimants’, the authorisation meeting was scheduled to be held on 28 March 2018 at Nambi, an Aboriginal community in Leonora.¹¹⁹

[141] The deponent affirms that he faxed the meeting notice to a number of different places ‘where I considered that Waturta native title claimants might be residing or visiting’.¹²⁰ I note that the list of locations to where the meeting notice was faxed includes local government (shire) offices, post offices and community stores.

[142] The additional materials provided by the applicant also include an affidavit from [name removed], affirmed 16 July 2018 (the [name removed] affidavit). The [name removed] affidavit affirms that the deponent sent a copy of the meeting notice, along with a covering letter and a map to ‘all those on the Waturta claimant list I had a mail address for (31 people)’.¹²¹ The meeting notice, pro forma covering letter and map are annexed to the [name removed] affidavit.

¹¹⁷ Ibid [22]–[29].

¹¹⁸ Ibid [11].

¹¹⁹ Ibid [13].

¹²⁰ Authorisation affidavit [14].

¹²¹ [name removed] affidavit [9].

[143] I note the map circulated to the proposed claimants is the one produced by the Tribunal's Geospatial Services discussed above at s 190B(3) (the Waturta claim map).

[144] I note that the meeting notice states the date, time and venue of the authorisation meeting, and includes the Waturta claim map. It also states the purpose of the meeting as being to authorise a new native title claim over the area shown on the Waturta claim map, and to 'authorise the person or persons to be the applicant for the new native title claim in accordance with section 61 of the *Native Title Act 1993* (Cth)'.

[145] In addition, the meeting notice states:

You are invited to attend this meeting if:

(a) You are a descendant of one of the following ancestors:

i. *Tjiku Tjiku*; or

ii. *Maraputa* (Jenny Jones); or

(b) You have religious, sacred or ritual authority for land within the proposed claim area; or

(c) You or your ancestor were born on the proposed claim area and you have a connection with the claim area according to the *[sic]* traditional laws and customs of the proposed claim area; or

(d) You or your ancestor have had a long association with the claim area and you have a connection with the claim area according to the traditional laws and customs of the proposed claim area.¹²²

[146] The meeting notice concludes with the contact numbers for [name removed] and [name removed], and notes that travel assistance to attend the meeting is not available.

[147] I note that further information is provided in the covering letter, specifically that the proposed claim area includes the Lake Wells Pastoral Station and its surrounds. The covering letter concludes by saying '[p]lease let other members of your family know about the meeting and encourage them to attend if they also have a connection to the claim area in accordance with traditional laws and customs'.

[148] The [name removed] affidavit affirms that the deponent arranged for the meeting notice to be advertised on the *National Indigenous Times* website and a screenshot of the notice as of 8 March 2018 is annexed to the affidavit. While the screenshot is not of a high resolution, I am satisfied that the meeting notice published on the *National Indigenous Times* website is the same as that which was posted to the proposed claimants and described above. It is not clear to me from either the [name removed] affidavit or the annexure how long the meeting notice was displayed on the *National Indigenous Times* website. Given that the screenshot is dated 8

¹²² Emphasis in original.

March 2018 and the authorisation meeting was held on 28 March 2018, I assume that the meeting notice was visible for less than one month.

[149] The [name removed] affidavit further affirms that the deponent arranged for the meeting notice to be advertised in the Saturday edition of the *Kalgoorlie Miner* newspaper on 10 March 2018, and a copy of the final proof of the notice is annexed to the affidavit. I note that the advertised notice contains the same information as that which was posted to the proposed claimants and described above. I note that the publication date is described as '2018-03-10'.

[150] I consider that the content of the notice sufficiently describes the relevant details of the authorisation meeting. I consider that the publication of the meeting on the *National Indigenous Times* website for a period less than 3 weeks and in the *Kalgoorlie Miner* newspaper for a single day is unlikely to have given adequate notice to members of the native title claim group. Display of the meeting notice in community stores and post offices would have been an additional means of communication to members of the native title claim group, however I note that the authorisation affidavit affirms only that the deponent faxed the notice to the various locations; there is nothing in the material before me to confirm whether or not the meeting notice was in fact displayed at those locations. While none of these activities on their own demonstrate that adequate notice was given to members of the native title claim group, I consider that the combination of the publication of the notice in print and online, the display of the notice on at least some of the notice boards to which it was faxed, and the letters sent to 31 people encouraging word of mouth communication to other potential claimants demonstrate to me that members of the native title claim group were given adequate notice of the authorisation meeting.¹²³ I consider that the content of the notice is clear about the meeting's purpose and demonstrates that members of the native title claim group had an opportunity to participate in the decision to authorise the applicant.

[151] To my mind this is further demonstrated by the discussion that occurred at the authorisation meeting about the inclusion of apical ancestors other than those specifically named in the meeting notice, being Tjiku Tjiku and Maraputa. The [name removed] affidavit affirms that the attendees included descendants of all four apical ancestors who have since been named in the application and:

26. 'I ... observed those present discuss and agree by consensus that the descendants of Rangka Rangka ... and the '[name removed] family' (who are the descendants of Yungkututu ...) also have rights and interests in

¹²³ See for example, the comments from French J in *Bolton* [45], regarding the inadequacies of a meeting notice, which although made in relation to a s 66B application, I believe are relevant here.

the claim area according to their traditional laws and customs, so long as they also have a personal connection to the country.

27. The participants then confirmed that the proposed claim group description should be further particularised in order to clarify that it includes the descendants of Rangka Rangka aka Nellie Polak and the '[name removed] family' (Yungkututu aka Kitty Hill), in addition to Maraputa aka Jenny Jones and Tjiku Tjiku.

[152] It is my view this demonstrates that the wording of the notice was inclusive enough for a person claiming to hold native title in the application area to work out whether or not they should attend the meeting. This is despite the fact their ancestor may not have been specified by name in the claim group description that appeared in the notice, as the content of the notice and the attached map was clear about who should attend. I am therefore satisfied that the requirement of s 251B is met.

Does the material provide sufficient detail of the conduct of the meeting?

[153] I note Mansfield J's comments that the Registrar must be satisfied 'of the fact of authorisation by all members of the native title claim group' and that s 190C(4)(b) clearly involves 'some inquiry through the material available to the Registrar to see if the necessary authorisation has been given'.¹²⁴ I have therefore considered the material available to me in the application and note the following details about the conduct of the authorisation meeting:

- (a) Annexed to the [name removed] affidavit is the attendance sheet for the authorisation meeting, which records that 18 members of the native title claim group attended, including five of the six members of the applicant;
- (b) The [name removed] affidavit affirms that at least one descendant from each of the apical ancestors listed in the description at Schedule A attended;¹²⁵
- (c) The [name removed] affidavit describes in detail the traditional decision-making processes of the claim group and how these processes were applied to the decisions made at the authorisation meeting, including the decision to confirm the claim group description;¹²⁶ and
- (d) The affidavits of the members of the applicant affirm that decision making is a process of consensus, featuring 'listening in particular to the senior people, including the *wati*'. This accords with the information in the [name removed] affidavit about [text removed for cultural reasons], as quoted in my reasons above in regards to s 251B.¹²⁷

¹²⁴ *Doepel* [78].

¹²⁵ [name removed] affidavit [18].

¹²⁶ *Ibid* [9]–[11] and [22]–[33].

¹²⁷ *Ibid* [29]–[30].

[154] Having inquired through the information in the application before me, I consider that there is sufficient detail about the conduct of the meeting in order to confirm the authorisation of the applicant, to enable me to be satisfied of the fact of authorisation.

Decision on s 190C(4)

[155] Given my above reasons for finding that the requirements of s 190C(5) are met, that the authorisation process accords with s 251B, that claim group members were given reasonable opportunity to participate in the decision making process, and that the application contains sufficient detail of the conduct of the meeting, I am satisfied that s 190C(4)(b) is met.

End of reasons