

Registration Decision

Application name	Gavin Egan & Ors on behalf of the Wajarri Yamatji #7 Native Title Claim Group and State of Western Australia (Wajarri Yamatji #7)
Name of applicant	Gavin Egan, Tim Simpson, Geoffrey Mongoo
Federal Court of Australia No.	WAD611/2018
NNTT No.	WC2018/026
Date of Decision	1 March 2019

Claim not accepted for registration

I have decided the claim in the Wajarri Yamatji #7 application does not satisfy all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must not be accepted for registration.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy ss 190B(5)–(7),(9). It also does not satisfy ss 190C(3)–(4).

Katy Woods²

¹ All legislative sections are from 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

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
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*)
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 Doepel [2003] FCA 1384 (*Doepel*)
Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)
Ward v Northern Territory [2002] FCA 171 (*Ward*)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

BACKGROUND

- [1] This application was made on behalf of the Wajarri Yamatji #7 native title claim group (claim group). It covers land and waters of approximately 0.67 square kilometres in the shire of Northampton in Western Australia. The Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) of the National Native Title Tribunal (Tribunal) on 20 December 2018 pursuant to s 63 of the Act.
- [2] 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, it must not be accepted for registration.⁴ I have decided the application does not satisfy all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [3] I have considered the information in the application and note the applicant has not provided any further material.⁵ There is no information before me obtained as a result of any searches conducted by the Registrar of state or Commonwealth interest registers⁶ and the state of Western Australia (state government) has not supplied any information in relation to the application of the registration test.⁷ I consider it appropriate to have regard to information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 14 January 2019 (geospatial report) and information available through the Tribunal's geospatial database and Register of Native Title Claims.⁸

Procedural fairness

- [4] On 7 January 2019 an officer of the Tribunal wrote to the relevant minister of the state government advising that I would be relying on the information in the application for my

³ Section 190A(6).

⁴ Section 190A(6B).

⁵ Section 190A(3)(a).

⁶ Section 190A(3)(b).

⁷ Section 190A(3)(c).

⁸ *Ibid.*

decision, and should the state government wish to make any submissions, it should do so by 1 February 2019. No submissions were received from the state government. This concluded the procedural fairness process.

Section 190C: conditions about procedures and other matters

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

[5] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.⁹

Section 61

[6] I am satisfied the application contains the details required by s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group has authorised the applicant	Part A and affidavits filed with application	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

[7] I am satisfied the application contains the information required by s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

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

[8] 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’.¹⁰ To be a ‘previous application’:

⁹ *Doepel* [16], [35]–[39].

¹⁰ Emphasis in original.

- (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.

[9] The geospatial report states, and my own searches confirm, the WC2004/010 Wajarri Yamatji #1 application entirely overlaps the current application. According to the Register, the claim in WC2004/010 Wajarri Yamatji #1 was accepted for registration under s 190A and entered onto the Register on 5 December 2005 and has not been removed. I therefore consider it to be a 'previous application' as it meets the three conditions in s 190C(3). This means I must consider whether there are common claimants between the two applications.

[10] Schedule O, which asks applicants whether any member of the native title claim group is also a member of any other claim group, has not been provided. I have examined the Register extract for WC2004/010 Wajarri Yamatji #1 and note that particular members of the applicant in both claims have identical surnames. In addition, many of the apical ancestors in the current application are also named as ancestors in WC2004/010 Wajarri Yamatji #1. It appears that members of the Jones, Egan, Simpson, Mongoo, Boddington, Dann, Walgar and Ryan families are likely to be members of both this claim and Wajarri Yamatji #1. Given these commonalities, I am not satisfied that no member of the claim group for the current application is not also a member of the WC2004/010 Wajarri Yamatji #1 claim group. This means s 190C(3) is not met.

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

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

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

[12] Schedule R, which asks applicants to provide information about the certification of the claim and/or authorisation of the applicant by the members of the native title claim group, has not been provided. No certificate from a representative Aboriginal/Torres Strait Islander body has been provided, so I understand the application has not been certified and I must therefore assess the application against the requirements of s 190C(4)(b).

[13] 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.¹¹

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

- (a) includes a statement to the effect that the requirement in s 190C(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.

[15] I note French J's comment 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'.¹²

[16] The affidavits of the members of the applicant all depose the following regarding the process by which the applicant was authorised:

5. There is no process of decision-making under the traditional laws and customs of the native title claim group that must be complied with in relation to authorising the applicant pursuant to the *Native Title Act 1993* (Cth).

6. The agreed and adopted decision-making process for authorising the applicant is a resolution passed by a majority vote, where a vote is conducted by a show of hands of those members of the native title claim group present at a claim group meeting.

7. Through the agreed and adopted decision-making process, the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it.

[17] I consider these statements are sufficient for the purpose of s 190C(5).

[18] I have examined the contents of the application and am satisfied there is no further information about the authorisation of the applicant. Based on the information in the affidavits, I understand a claim group meeting may have been held in order to authorise the applicant, using an agreed and adopted decision-making process, as contemplated in s 251B(b). However there is no information before me about any such claim group meeting to enable me to consider that 'all the persons in a native title claim group' have authorised the applicant in accordance with s 251B. I also understand that where an applicant is relying on s 190C(4)(b), I must be satisfied of the 'fact of authorisation' by all members of the native title claim group.¹³

[19] I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward*:

¹¹ Emphasis in original.

¹² *Strickland* [57].

¹³ *Doepel* [78].

Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?¹⁴

[20] His Honour found that the substance of the above questions must be addressed.¹⁵ Based on the information in the application, I am not satisfied the above questions have been addressed, that all members of the native title claim group were given every reasonable opportunity to participate in the decision-making process,¹⁶ or that they have authorised the applicant to make the application and deal with all matters arising in relation to it. This means s 190C(4) is not met.

Section 190B: conditions about merits of the claim

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

[21] To meet s 190B(2), the Registrar must be satisfied 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.¹⁷

[22] Schedule B refers to Attachment B which describes the application area as all the lands and waters within Exploration Licence E70/4525 that falls within WAD32/2018 Wajarri Yamatji #3 (WC2018/001) (further described as Lot 12725 on DP40610, and excludes any area subject to:

1. Native title determination WAD6033/1998 Wajarri Yamatji (WCD2017/007); and
2. Native title determination WAD6033/1998, WAD382/2017 Wajarri Yamatji Part B (WCD2018/002).

[23] Schedule C refers to Attachment C which contains a scanned colour A3 map prepared by the Tribunal’s Geospatial Services titled ‘Wajarri Yamatji 7’ and dated 23 November 2018. It includes:

1. The application area depicted with bold dark-blue outline;
2. Exploration License E70/4525, depicted in red outline and light-red fill;
3. Native title application WAD32/2018 Wajarri Yamatji #3 (WC2018/001), depicted in bold dashed green outline;
4. Tenure as represented in the legend and identified respectively by pastoral lease number and name, Lot on plan details and tenure;
5. General topographic background;

¹⁴ *Ward* [25]–[26].

¹⁵ *Ibid.*

¹⁶ *Lawson* [25].

¹⁷ *Doepel* [122].

6. Scalebar, locality diagram, and coordinate grid (GDA94); and
7. Notes relating to the source, currency and datum of data used to prepare the map.

- [24] The assessment in the geospatial report is that the description and map are consistent and identify the application area with reasonable certainty. Having considered the information in Attachments B and C, I agree with the assessment in the geospatial report and am satisfied that the external boundary of the application area can be identified with reasonable certainty for the purposes of s 190B(2).
- [25] Schedule B includes a description of areas within the boundaries which are excluded from the application area. 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 wholly extinguished.
- [26] 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'.¹⁸ Following this reasoning, I am satisfied the description of the excluded areas is sufficiently clear, and that s 190B(2) is met.

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

- [27] To meet 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.
- [28] I note 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'.¹⁹
- [29] Schedule A states:
- The application is brought on behalf of the descendants of:
- *Kia Murgoo Fred, Innie Annie, Jungudji Rosie English, Badja, Kadjba* (siblings) • *Baljarba Jim Crow • Mogagee Daniel Dann • Jinatharra Bobby Clark • Tommy Glass • Wannanu Waurene Porter • Nellie* (mother of Fred Simpson) • *Bundadee English Edwards and Munoberrie Mary Jane • Yanbaree • Kitty Gilbert • Tigher Dija • Mary from Twin Peaks* (mother of Wandy Boddington and Eva Boddington) • *Emily* (mother of *Cunnie Elizabeth Worth and Fred Worth*) • *Ivy Walgar, Robby Walgar, Simon Walgar* (siblings) • *Tommy Jones and Fanny Jones • Tiger Ryan, Frances/Fanny Ryan, Boomer Ryan, unnamed Ryan* (siblings) • *Molly • Caroline* (mother of *Lena Sullivan*) • *Budjeeyona and Jinny • Jinty Cindy Tyson* (nee *Sullivan*) • *Amy Porter and Jigaroo • Polly Parker • Frank/Bubadee Franklin/Punch • Charlie Dongara • Eniwani Jimmy and Jenny/Jinnie • Grace Jones • Julia* (mother of *Cecil Lane*) • *Jimmy and Judy • Bunnabuddy Daisy, Ngambulu Molly* (siblings); • *Jibija Rosie Jones • Moweramarra Caroline* (mother of *Ruby Nairn*)
- [30] I consider the description of the claim group provides a clear objective starting point, being descent from named persons. Determining all the members of the claim group from the

¹⁸ *Strickland* [55].

¹⁹ *Wakaman* [34].

ancestors will require genealogical research, however I note Carr J's view that the need to undertake a factual enquiry to determine the members of the group does not mean the claim group has not been described sufficiently.²⁰ I consider that determining whether 'the descendants' includes descent by adoption can also be ascertained by undertaking a factual enquiry and research into the native title claim group's laws and customs. I am therefore satisfied the persons in the claim group are described sufficiently clearly, which means s 190B(3) is met.

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

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

[32] According to Mansfield J, it is open to the Registrar to read Schedule E 'as a whole' so there is 'no inherent or explicit contradiction'.²¹ I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights are established on a prima facie basis.

[33] Schedule E states:

Application area means the area of land and waters covered by the application as described in Schedule B.

Area A means land and waters within the application area that are landward of the high water mark and which comprise:

- (i) areas of unallocated Crown land (including islands) that have not been previously subject to any grant by the Crown;
- (ii) areas to which s 47 of the Act applies;
- (iii) areas to which s 47A of the Act applies;
- (iv) areas to which s 47B of the Act applies; and
- (v) other areas to which the non-extinguishment principle, set out in s 238 of the Act, applies and in relation to which to [sic] there has not been any prior extinguishment of native title.

Area B means land and waters within the application area that is not included in Area A.

Subject to laws and customs

The native title rights and interests claimed in the application are subject to and exercisable in accordance with:

1. The common law and the laws of the State of Western Australia and the Commonwealth of Australia;
2. Valid interests conferred pursuant to the laws of the State of Western Australia and the Commonwealth of Australia; and
3. The body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which the native title claim group have a connection to the land and waters the subject of this application.

Rights in Area A

In relation to Area A, the applicant claims the following native title rights and interests:

1. The right to possession, occupation, use and enjoyment of that area as against the whole world.

²⁰ *WA v NTR* [67].

²¹ *Doepel* [92], [123].

Rights in Area A and Area B

The Applicant claims the following native title rights and interests in relation to Area A, if the claim to exclusive possession cannot be recognised, and to Area B:

1. The right to access and to take resources (other than minerals, petroleum and gas) in the area for any purpose;
2. The right to access the area, to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
3. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
4. The right to invite and permit others to have access to and participate in or carry out activities in the area; and
5. The right to visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm.

[34] From this description, I understand the claim group is claiming exclusive possession in areas which meet the description of 'Area A', and is claiming non-exclusive rights in the areas which meet the description of 'Area B'. I understand the same non-exclusive rights are also claimed in any parts of Area A where exclusive possession cannot be recognised.

[35] I am satisfied the description in Schedule E is sufficient to understand and identify the itemised rights and interests, which means s 190B(4) is met.

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

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

- (a) that the 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 the claim 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.

[37] I understand my task is to 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'.²² 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 [her] delegate undertake a search for such material'.²³ As such I have not undertaken any searches for material to support the applicant's claim.

[38] Schedule F states:

The factual basis of the claim is as follows:

- (a) The native title claim group and their ancestors or predecessors have, since the assertion of British Sovereignty possessed, occupied, used and enjoyed the area the subject of the native title claim.

²² *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

²³ *Martin* [23].

- (b) The native title claim group's rights to such possession, occupation, use and enjoyment derive from and are currently held in accordance with Aboriginal traditional laws and customs.
- (c) The native title continues to be held in accordance with those traditional laws and customs by the native title claim group.

The native title rights and interests are those of and flowing from the right to possession, occupation, use and enjoyment of the land pursuant to the traditional laws and customs of the claim group based upon the following facts:

- (1) the native title claim group and their ancestors or predecessors have, before and since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area; and
- (2) such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group and their predecessors, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:
 - (a) descent from ancestors connected to the area
 - (b) conception in the area
 - (c) birth and/or burial in the area
 - (d) knowledge of the traditional laws of the area
 - (e) traditional knowledge of geography of the area
 - (f) traditional knowledge of the resources of the area
 - (g) knowledge of traditional ceremonies of the area
- (3) 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;
- (4) the native title claim group continues to acknowledge and observe those traditional laws and customs;
- (5) the native title claim group by those laws and customs have a connection with the land in respect of which the claim is made;
- (6) the rights and interests are capable of being recognised by the common law of Australia.

[39] Schedule G states:

The members of the native title claim group carry out the following activities in relation to the land and waters within the area of the application:

- 1. Hunting, gathering and fishing;
- 2. Moving about, living, residing, erecting shelters and camping;
- 3. Conducting and engaging in cultural activities, ceremonies, rituals, teaching and meetings;
- 4. Visiting, maintaining and protecting places of importance;
- 5. Maintaining and protecting significant objects;
- 6. Taking resources, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water and shells;
- 7. Using resources for food, shelter, cultural, religious, ceremonial, ritual, healing and decorative purposes and for the manufacture of items like tools, weapons and clothing; and
- 8. Trading in resources and goods manufactured using those traditional resources.

[40] I have examined the application and I consider the information in these schedules is the extent of the factual basis material before me.

- [41] I consider that the material does not provide a sufficient factual basis to support an assertion that the predecessors of the group were associated with the area over the period since sovereignty. There are no references to any locations inside the application area and no information about any association between the predecessors and the application area other than one general statement regarding their occupation of that area. In my view, there is also insufficient factual basis to demonstrate the association the claim group currently has with the application area. I consider that the information provided is of a very general nature and has no ‘geographical particularity’, which means s 190B(5)(a) is not met.²⁴
- [42] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society, acknowledging and observing normative laws and customs.²⁵ I consider there is an insufficient factual basis to support an assertion that a pre-sovereignty society existed in the application area. I consider the broad statements in Schedule F to be ‘at a high level of generality’.²⁶ I also consider there is insufficient factual basis to demonstrate any relationship between the ancestors of the claim group and a pre-sovereignty society.²⁷
- [43] 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.²⁸ I am not satisfied the information in the application supports an assertion that laws and customs exist in the application area, either in relation to a pre-sovereignty society or since that time. This means I cannot be satisfied that any such laws or customs could be considered ‘traditional’ and so s 190B(5)(b) is not met.
- [44] Meeting the requirements of s 190B(5)(c) 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.²⁹ Because I consider the factual basis is not sufficient to support the assertion of the existence of traditional laws and customs at s 190B(5)(b), I cannot be satisfied that the factual basis is sufficient to support the assertion of the continuity of traditional laws and customs, which means s 190B(5)(c) is not met.
- [45] I am therefore not satisfied the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support any of the assertions of s 190B(5).

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

- [46] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a ‘native title right or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group. As discussed above at s 190B(5)(b), I am not satisfied there is information in the application to support the assertion that such traditional laws and customs exist. This means the claimed rights and interests cannot be shown to be held in

²⁴ *Martin* [26]; *Corunna* [39], [45].

²⁵ *Gudjala 2009* [37], [52].

²⁶ *Doepel* [102].

²⁷ *Ibid* [40].

²⁸ *Yorta Yorta* [46], [49].

²⁹ *Gudjala 2009* [29].

accordance with traditional laws and customs, and thus cannot be established on a prima facie basis as ‘native title rights and interests’.

[47] In addition, there must be information within the application which talks about each of the individual rights claimed. I am not satisfied the application contains sufficient information of this type. I therefore consider none of the claimed rights and interests have been established on a prima facie basis, which means s 190B(6) is not met.

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

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

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- (b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[49] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and requires that the physical connection is in accordance with the traditional laws and customs of the claim group.³⁰

[50] Schedule M, which asks the applicant for information about this requirement, has not been provided, which means that my consideration is limited to the information in the other schedules, particularly Schedules F and G, quoted above. I consider the information in these schedules is too general to satisfy the requirements of s 190B(7). In addition, given my finding at s 190B(5)(b), that there is insufficient information to demonstrate the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds the requisite physical connection with the application area in accordance with such laws and customs, which means s 190B(7) is not met.

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

[51] I am satisfied the application complies with ss 61A(1)–(3) and so s 190B(8) is met:

Section	Requirement	Information	Result
s 61A(1)	No native title determination application if approved determination of native title	Geospatial report, my own searches	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B	Met
s 61A(3)	Claimant application not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule B	Met

³⁰ *Doepel* [18], *Gudjala 2009* [84].

No extinguishment etc. of claimed native title – s 190B(9): condition not met

[52] I am not satisfied s 190B(9) is met:

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule E	Not met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	There is no information in the application that discloses to me that exclusive possession is claimed over water in an offshore place	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 to me that native title rights and interests in the application area have otherwise been extinguished. Paragraph 4 of Schedule B expressly excludes from the application any areas in which native title rights and interests have otherwise been wholly extinguished	Met

Section 190B(9)(a)

[53] To meet s 190B(9)(a), the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware that, to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas. I understand my task at this condition is to consider whether the claimed native title rights and interests consist of or include ownership of any minerals, petroleum or gas wholly owned by the Crown, in either the right of the Commonwealth or the relevant state, which in relation to this application is Western Australia.

[54] Schedule Q, which asks applicants about claims to any resources owned by the Crown, has not been provided. Schedule E, which lists the rights and interests claimed, excludes the right to take minerals, petroleum and gas in areas where the claim to exclusive possession cannot be recognised. However there is no such exclusion stated with respect to the area where the right to possession, occupation, use and enjoyment against the whole world is claimed ('Area A'). Without further information, I am unable to be satisfied that the claim to exclusive possession does not include a claim to ownership of minerals, petroleum and gas. As minerals, petroleum and gas in the claim area are wholly owned by the Crown in the right of Western Australia,³¹ I consider s 190B(9)(a) is not met.

End of reasons

³¹ See *Mining Act 1978 (WA)* s 9; *Petroleum and Geothermal Resources Act 1967 (WA)*, s 9.

Attachment A

Summary of registration test result

Application name	Wajarri Yamatji #7
NNTT No.	WC2018/026
Federal Court of Australia No.	WAD611/2018
Date of decision	1 March 2019

Section 190B conditions

<i>Test condition</i>	<i>Sub-condition/requirement</i>	<i>Result</i>
s 190B(2)		Met
s 190B(3)		Met
s 190B(4)		Met
s 190B(5)	s 190B(5)(a)–(c)	Not met
s 190B(6)		Not met
s 190B(7)		Not met
s 190B(8)	s 61A	Met
s 190B(9)	s 190B(9)(a)	Not met

Section 190C conditions

<i>Test condition</i>	<i>Sub-condition/requirement</i>	<i>Result</i>
s 190C(2)	ss 61–2	Met
S 190C(3)		Not met
s 190C(4)	s 190C(4)(a)–(b)	Not met