

## Registration Decision

<b>Application name</b>	Valma Saunders & Ors on behalf of the Ngadju Mia Wamu Native Title Claim Group and State of Western Australia ( <b>Ngadju Mia Wamu</b> )
<b>Name of applicant</b>	Barry Smith, Darrell Graham, Grantley Flynn, Harold Goddard, Jarrad McKenzie, Jasmine McPhee, Michael Smith, Pearl Scott, Peter Dimer, Ruth Bonney, Valma Saunders
<b>Federal Court of Australia No.</b>	WAD180/2021
<b>NNTT No.</b>	WC2021/006
<b>Date of Decision</b>	29 October 2021

### Claim accepted for registration

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

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Katy Woods<sup>2</sup>

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

<sup>2</sup> Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 19 May 2021 and made pursuant to s 99 of the Native Title Act.

## Reasons for Decision

### Cases Cited

*Bell v Native Title Registrar* [2021] FCA 229 (**Bell**)

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

*Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177 (**Warrie**)

*Graham on behalf of the Ngadju People v State of Western Australia* [2014] FCA 1247 (**Ngadju Part A**)

*Graham on behalf of the Ngadju People (Ngadju Part B) v State of Western Australia* [2017] FCA 795 (**Ngadju Part B**)

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

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

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

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

*Harrington-Smith on behalf of the Wongatha People v Western Australia (No 5)* [2003] FCA 218 (**Harrington-Smith No 5**)

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

*Kanak v National Native Title Tribunal* [1995] FCA 1624 (**Kanak**)

*Martin v Native Title Registrar* [2001] FCA 16 (**Martin**)

*McLennan v State of Queensland* [2019] FCA 1969 (**McLennan**)

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

*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**)

*Western Australia and Northern Territory v Lane* [1995] FCA 1484 (**Lane**)

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

### Background

- [1] The claim in this application is made on behalf of the Ngadju Mia Wamu native title claim group (**claim group**). It covers approximately 6.5 square kilometres over and around the town of Norseman in the Shire of Dundas in Western Australia (**application area**). The same claim group have had their native title determined by the Federal Court in *Ngadju Part A* and *Ngadju Part B*, which together encompass approximately 88,625 square kilometres extending from the Eucla Basin in the south east, to Hatter Hill in the south west, Kambalda in the north west and Rawlinna station on the Trans-Australian railway in the north east. The town of Norseman lies within the determination area of *Ngadju Part A*, but was excluded from it.<sup>3</sup>
- [2] The application was filed on 9 August 2021 and the Federal Court of Australia (**Federal Court**) gave a copy to the Native Title Registrar (**Registrar**) on 12 August 2021, pursuant to s 63. This referral triggered the Registrar's duty to consider the claim made in the application under s 190A. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C (**registration test**).

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<sup>3</sup> *Ngadju Part A*, Schedule 2.

- [3] For the reasons set out below, I consider the claim in the application satisfies all the conditions of the registration test and therefore it must be accepted for registration pursuant to s 190A(6). Attachment A contains the information that will be included on the Register of Native Title Claims (**Register**).

## Procedural fairness

- [4] On 20 August 2021, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the State of Western Australia (**State**) and advised that any comments or submissions the State wished to make on the application should be received by 3 September 2021. Also on 20 August 2021, the senior officer wrote to the applicant's representative and advised that any further information the applicant wished me to consider should be received by 3 September 2021.
- [5] On 3 September 2021, the applicant's representative provided the following **additional material**:
- (a) Letter titled 'WAD180/2021 Valma Saunders & Ors on behalf of the Ngadju Mia Wamu Native Title Claim Group and State of Western Australia', Charlotte Thorne, 3 September 2021 (**submissions**);
  - (b) 'Applicants' Anthropologist's Report', Dr Kinsley Palmer, December 2003 (**anthropology report**); and
  - (c) Affidavit of [name removed], 3 September 2021 (**Claimant 1's affidavit**).
- [6] On 10 September 2021, the senior officer provided the additional material to the State's representative and advised that any comments or further information should be received by 24 September 2021. No submissions were received from the State and so this concluded the procedural fairness process.

## Information considered

- [7] In accordance with s 190A(3)(a), I have considered the information in the application, the accompanying documents and the additional material. There is no information before me from searches of State, Territory or Commonwealth interest registers obtained by the Registrar under s 190A(3)(b). There is no information before me from the State which I must consider in accordance with s 190A(3)(c). Section 190A(3) also provides that the Registrar may have regard to such other information considered appropriate. Pursuant to that provision, I have considered information in the geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 23 August 2021 (**geospatial report**) and information in the Tribunal's geospatial database.

## Section 190C: conditions about procedural and other matters

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

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

[8] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.<sup>4</sup> I understand the matters covered by s 61(5) are matters for the Federal Court.

#### Consideration

[9] I consider the application contains the details specified in s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A(2), Schedule A, Attachment A, s 62 affidavits filed with application (s 62 affidavits)	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A, Attachment A	Met

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

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

#### Section 62(1)(d)

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

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<sup>4</sup> *Doepel* [16], [35]–[39].

agreement accompanies the application, I understand that no such agreement has been agreed to.

## Conclusion

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

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

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

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

- (a) the application must overlap the current application in whole or part;
- (b) there must be an entry for the claim in the previous application on the Register when the current application was made; and
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

## Consideration

[14] The geospatial report states and my own searches confirm there are no applications which overlap the current application, as required by s 190C(3)(a). This means there are no applications which meet the definition of a ‘previous application’ under s 190C(3). Therefore the issue of common claimants does not arise.

## Conclusion

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

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

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

[16] Amendments to s 190C(4) came into effect on 25 March 2021.<sup>5</sup> Item 24 of the Replacement Revised Explanatory Memorandum to the *Native Title Legislation Amendment Bill 2020* (Cth) provides:

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

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<sup>5</sup> *Native Title Legislation Amendment Act 2021* (Cth).

the new provisions would apply (provided the relevant claimant or compensation application, or native title agreement occurs after commencement).<sup>6</sup>

- [17] The certificate from Native Title Services Goldfields Ltd (**NTSG**) in Attachment R states that the applicant was authorised at a meeting held on 20 October 2020.<sup>7</sup> Considering this information and the guidance in the Replacement Revised Explanatory Memorandum, I understand I must apply the requirements of s 190C(4) as that provision stood prior to the 25 March 2021 amendments.

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

- [18] To meet the requirements of s 190C(4), as it stood prior to the amendments of 25 March 2021, the Registrar must be satisfied that either:
- (a) the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under Part 11; or
  - (b) the applicant is a member of the claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the claim group.
- [19] As a certificate accompanies the application in Attachment R, I must consider the application against the requirements of s 190C(4)(a) and in particular that:
- (a) the certificate identifies the relevant representative body;
  - (b) the representative body has the power under Part 11 to issue the certification; and
  - (c) the certificate meets the requirements of s 203BE(4).<sup>8</sup>

### Consideration

#### ***Is the relevant representative body identified?***

- [20] The geospatial report states, and my own searches confirm, that NTSG is the representative body for the whole of the application area. I am therefore satisfied the certificate identifies the relevant representative body.

#### ***Does the representative body have the power to issue the certification?***

- [21] The certificate states that NTSG performs the functions of a representative body pursuant to s 203FE(1). NTSG can therefore perform all the functions listed in Part 11 of the Native Title Act, including the certification functions in s 203BE. I am satisfied NTSG has the power under Part 11 to issue the certification. The certificate has been signed by the Chief Executive Officer of NTSG. I understand there is no impediment to the delegation of the certification function to particular individuals acting either as a delegate or agent of the representative body.<sup>9</sup>

#### ***Does the certificate meet the requirements of s 203BE(4)?***

- [22] I have considered each of the requirements of s 203BE(4) in turn below.

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

<sup>7</sup> Attachment R [3].

<sup>8</sup> *Doepel* [80]–[81].

<sup>9</sup> *Quall HCA* [48], [63].

### *Section 203BE(4)(a) – statements*

[23] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met. Amendments to s 203BE(2) came into force on 25 March 2021, however those amendments only apply to applicants authorised after that date.<sup>10</sup> As discussed above, I understand authorisation of the applicant took place before that date and so I must consider the requirements of s 203BE(2) as it stood prior to the amendments.

[24] Section 203BE(2)(a)–(b), prior to 25 March 2021, prohibited a representative body from certifying an application unless it is of the opinion that:

- (a) all persons in the claim group have authorised the applicant to make the application; and
- (b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[25] As the certificate contains these required statements in paragraph 2, I am satisfied s 203BE(4)(a) is met.

### *Section 203BE(4)(b) – reasons*

[26] Section 203BE(4)(b) requires a representative body to briefly set out its reasons for being of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met. Paragraph 3 of the certificate provides the following reasons for NTSG’s opinion:

- (a) the same claim group had their native title recognised in the determinations of *Ngadju Part A* and *Ngadju Part B*, the areas of which wholly surround this application area;
- (b) NTSG’s senior anthropologist reviewed the anthropological materials from *Ngadju Part A* and *Ngadju Part B* and confirmed that a claim of the application area by the same claim group would be supported by the anthropological findings;
- (c) notice of an authorisation meeting held on 20 October 2020 was given:
  - 1. in the *Kalgoorlie Miner* newspaper on 22 September and 13 October 2020;
  - 2. on NTSG’s website from 25 September until 4 November 2020; and
  - 3. by email to all members of Ngadju Native Title Aboriginal Corporation on 17 September, 12 and 13 October 2020;
- (d) at the authorisation meeting, the attendees authorised the applicant to make the application using an agreed to and adopted decision making process.

[27] As the certificate sets out the reasons for NTSG’s opinion that ss 203BE(2)(a)–(b) are met, I am satisfied s 203BE(4)(b) is met.

### *Section 203BE(4)(c) – overlapping applications*

[28] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3). Section 203BE(3) states that if the application

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<sup>10</sup> *Native Title Amendment Act 2021* (Cth), s 24(2).

area is wholly or partly covered by other applications, including proposed applications, of which the representative body is aware, the representative body must make all reasonable efforts to achieve agreement between the persons in respect of whom the applications are made and minimise the number of applications covering the land or waters.

- [29] The certificate does not contain a statement addressing s 203BE(4)(c). However given that there are no overlapping applications, I consider that s 203BE(4)(c) is not applicable.

## Conclusion

- [30] As the certificate identifies the relevant representative body, the representative body has the power under Part 11 to issue the certification, and the certificate meets the applicable requirements of s 203BE(4), the requirements of s 190C(4)(a) are satisfied. This means s 190C(4) is met.

## Section 190B: conditions about merits of the claim

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

#### What is required to meet s 190B(2)?

- [31] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.
- [32] I understand the questions for this condition are whether:
- (a) the information and map provide certainty about the external boundary of the application area; and
  - (b) the information enables identification of any areas within the external boundary over which no claim is made.<sup>11</sup>

## Consideration

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

- [33] Attachment B states that the external boundary of the application area is the boundary of the Norseman Townsite. The Notes provide that the reference datum for the coordinate points is the Geocentric Datum of Australia 2020 (**GDA20**) and that the Townsite data is sourced from Landgate, Western Australia's land information authority.
- [34] Attachment C contains a map titled 'Ngadju Mia Wamu'. On the map, the external boundary of the application area is depicted in bold blue outline and labelled 'Norseman Townsite'. The map includes a coordinate grid and the notes provide that these are referenced to GDA20, with the Townsite data sourced from Landgate.

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<sup>11</sup> Section 62(2)(a)–(b); *Doepel* [122].



[35] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the information in Attachment B and the map in Attachment C and I consider they do provide certainty about the external boundary of the application area.

***Does the information enable identification of the excluded areas?***

[36] Paragraph 3 of Schedule B claims the benefit of ss 47–47B, which permit the extinguishment of native title to be disregarded in certain circumstances. Paragraph 4 of Schedule B states that the application does not cover areas affected by particular acts, including previous exclusive possession acts and areas where native title has been wholly extinguished. I understand it is unrealistic to expect a concluded definition of areas covered by general exclusion clauses to be given in the application and I am satisfied that the information in Schedule B would enable those areas to be ascertained at the appropriate time.<sup>12</sup>

## Conclusion

[37] As I consider that both the external boundary of the application area and the excluded areas can be identified from the information in the application with reasonable certainty, and that the map in the application shows the external boundary, I am satisfied s 190B(2) is met.

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

### What is required to meet s 190B(3)?

[38] To meet s 190B(3), the Registrar must be satisfied that:

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

[39] Schedule A states:

The Ngadju Mia Wamu claim is brought on behalf of the Ngadju people. The Ngadju People are those Aboriginal persons who are:

- 1) The biological descendants of one or more of the following apical ancestors: [list of ancestors].
- 2) those persons adopted by the biological descendants in accordance with Ngadju tradition and custom. (Adoption, under Ngadju tradition and custom, refers to the situation where a child is ‘grown up’ by a relative or someone without a biological relationship, either because they have been ‘gifted’ to them, or left in their care, as the biological parents are not in a position to care for them. This applies regardless of whether or not the child has been formally adopted under the non-Aboriginal legal system).

[40] For completeness I note that this same description appears in Attachment A. In my view, it follows from the above description that s 190B(3)(b) is applicable. *Wakaman* provides that where a description is used, the task is limited to making an assessment of the sufficiency of

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<sup>12</sup> *Strickland* [55].

the description for the purpose of facilitating the identification of any person as part of the group.<sup>13</sup>

## Consideration

[41] *WA v NTR* provides that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).<sup>14</sup> I consider that factual enquiries and genealogical research would enable members of the claim group to be ascertained using the description in Schedule A.

## Conclusion

[42] I am satisfied the application describes the persons in the claim group sufficiently clearly such that it can be ascertained whether any particular person is a member of the group as required by s 190B(3)(b). This means s 190B(3) is met.

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

### What is required to meet s 190B(4)?

[43] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. My consideration of s 190B(4) is confined to information found in the application.<sup>15</sup> I have not considered at this condition whether the rights and interests claimed can be considered ‘native title rights and interests’ in accordance with s 223, as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis.

## Consideration

[44] From paragraph 1 of Schedule E, I understand that exclusive possession is claimed where there has been no extinguishment of native title, or where any previous extinguishment may be disregarded. From paragraph 2, I understand five non-exclusive rights are claimed where there has been no extinguishment. Schedule E also states that the claimed rights are subject to and exercisable in accordance with the common law, the laws of Western Australia and of the Commonwealth, valid interests conferred under those laws, and the traditional laws and customs of the claim group.

[45] In my view, having considered the information in Schedule E, the nature, extent and limitations on the claimed rights are clear and there is no inherent or explicit contradiction within the description.<sup>16</sup>

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<sup>13</sup> *Wakaman* [34].

<sup>14</sup> *WA v NTR* [67].

<sup>15</sup> *Doepel* [16].

<sup>16</sup> *Ibid* [123].

## Conclusion

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

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

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

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

- (a) the claim group have, and their predecessors had, an association with the area; and
- (b) there exist traditional laws acknowledged by, and traditional customs observed by, the claim group that give rise to the claim to native title rights and interests; and
- (c) the claim group have continued to hold the native title in accordance with those traditional laws and customs.

[48] I understand my task is limited to assessing whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determining whether there is evidence that proves directly or by inference the facts necessary to establish the claim.<sup>17</sup> I am not required by s 190B(5) to determine whether the asserted facts will or may be proved at a hearing.<sup>18</sup>

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

[49] As set out above, Schedule E describes the native title rights and interests which are claimed. The applicant has provided submissions, the anthropology report and Claimant 1's affidavit in support of the existence of those claimed rights. Attachment F contains an affidavit from [name removed] dated 5 May 2021 (**Claimant 2's affidavit**). Schedule M briefly describes the activities undertaken by the claim group on the application area and refers to Claimant 2's affidavit. I have examined the application and additional material and I consider this is the extent of the material provided in support of the assertions at s 190B(5).

[50] I understand the anthropology report was written for the previous Ngadju claims, which have since been determined in *Ngadju Part A* and *Ngadju Part B* and which surrounded but excluded the town of Norseman, as explained above. Following the language of the anthropology report, I will generally refer to the combined area of *Ngadju Part A*, *Ngadju Part B* and the application area as **Ngadju country** in my reasons below.<sup>19</sup>

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

[51] *McLennan* confirmed that to meet s 190B(5)(a), the factual basis must be sufficient to show:<sup>20</sup>

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<sup>17</sup> Ibid [16]–[17]; *Gudjala 2008* [83], [92].

<sup>18</sup> *Bell* [98].

<sup>19</sup> Anthropology report 8, Figure 1.1.

<sup>20</sup> *McLennan* [28].

- (a) the claim group presently has an association with the application area, and the claim group's predecessors have had an association with the application area since sovereignty or European settlement;<sup>21</sup>
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';<sup>22</sup> and
- (c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.<sup>23</sup>

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

- [52] The anthropology report states prior to European settlement, Ngadju people utilised the resources in tracts of land with which they had a close association, inherited from their predecessors through the principle of cognatic descent.<sup>24</sup> Different apical ancestors, and their descendants, are therefore associated with different parts of Ngadju country.<sup>25</sup> For example, apical ancestors Djaruptjal and Tjupu's association was with Israelite Bay, in the southern part of Ngadju country. They were interviewed in Tindale in 1939 and their birthdates estimated as before 1850.<sup>26</sup> Apical ancestor Wicker (Wika), also interviewed by Tindale, was from the Balladonia region, in the east of Ngadju country.<sup>27</sup> Apical ancestors Minnie and Tuumi were from the Mount Ragged area, in the south west of Ngadju country, where their daughter was born in 1901.<sup>28</sup> Mary Kuuban's approximate year of birth is 1882 and she is recorded as being from Fraser Range, in the north eastern reaches of Ngadju country.<sup>29</sup> The mother of apical ancestor Peter Flynn is estimated as being born around 1888 and was recorded as being from Bunington station, in the northern part of Ngadju country.<sup>30</sup> Claimant 2 and his predecessors are associated with, and responsible for, an area nearby to Norseman.<sup>31</sup> In addition to their association with a particular tract of land, the claim group's predecessors also moved seasonally across the whole of Ngadju country, to access water and avoid extreme temperatures, as well as to trade and to participate in regional ritual activities.<sup>32</sup>
- [53] European settlement in the region of the application area occurred with the development of pastoral stations in the 1860s–1870s.<sup>33</sup> Norseman was developed after gold was discovered there in 1894.<sup>34</sup> The anthropologist states it is reasonable to conclude that at the time of settlement, the predecessors of the claim group held rights within Ngadju country.<sup>35</sup>

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<sup>21</sup> *Gudjala* 2007 [52].

<sup>22</sup> *Ibid.*

<sup>23</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>24</sup> Anthropology report 36, 40.

<sup>25</sup> *Ibid* 42.

<sup>26</sup> *Ibid* 61.

<sup>27</sup> *Ibid* 62.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* 63.

<sup>30</sup> *Ibid* 64.

<sup>31</sup> Claimant 2's affidavit [39].

<sup>32</sup> Anthropology report 40.

<sup>33</sup> *Ibid* 17–8

<sup>34</sup> *Ibid* 19.

<sup>35</sup> *Ibid* 18.

- [54] Predecessors of the current claim group worked on the pastoral stations that were established over Ngadju country, which included Balladonia and Southern Hills stations, and were thus able to retain their links to their country.<sup>36</sup> Ngadju people continued to move across their country following settlement.<sup>37</sup> For example, in 1902, a large gathering of people in Norseman was recorded, which included people who had travelled from Balladonia.<sup>38</sup> Approximately 145 predecessors of the claim group were recorded living in Ngadju country in 1902, including at least 70 at Norseman.<sup>39</sup> A now deceased senior claimant, born in 1904 in Norseman, recalled Ngadju people digging soaks there to obtain water.<sup>40</sup> In 1945, a Christian Mission was established at Norseman and a number of senior claimants were sent there as children, until such time they were able to return to their families.<sup>41</sup> Ngadju predecessors are buried in the sandhills in and around Norseman.<sup>42</sup> Many senior claimants were born on Ngadju country 'in the bush' and recall traditional rituals and corroborees taking place in Norseman into the 1950s.<sup>43</sup> Today, a significant proportion of Ngadju people live in Norseman and participate in heritage clearance work there, which includes the identification of scarred trees.<sup>44</sup>
- [55] Accordingly to the claim group's spiritual beliefs in the Dreaming or tjukurpa, spiritual beings travelled the country during the creation era and left evidence of their acts in the features of the landscape such as rock holes.<sup>45</sup> Claimants continue to look after rock holes in Ngadju country as taught by their 'old people', including rock holes located in and around Norseman.<sup>46</sup> The spirits of Ngadju ancestors are also believed to inhabit the landscape, and protocols must be followed when entering or leaving certain places.<sup>47</sup> One claimant describes a site to the north of the application area where spirits are present, such that camping there should be avoided.<sup>48</sup> The anthropology report contains a map of Ngadju country showing important sites, including a number in and around Norseman associated with particular Dreaming stories and where predecessors camped and hunted.<sup>49</sup>
- [56] Claimant 1 grew up in Norseman with his parents, siblings and extended family.<sup>50</sup> He married his wife in Norseman and lives there today.<sup>51</sup> He recalls being taught the stories about Norseman and being taken around Ngadju country by 'the old men', where they would dance and cook kangaroo.<sup>52</sup> Claimant 1's uncle taught him about important places in and around Norseman and the stories for those places, including Lake Cowan, Beacon Hill and Tin Dam.<sup>53</sup> He and other Ngadju people continue to visit these sites every few weeks.<sup>54</sup> A map

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<sup>36</sup> Ibid 20–1, 24.

<sup>37</sup> Ibid 40.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid 22.

<sup>40</sup> Ibid 21.

<sup>41</sup> Ibid 25.

<sup>42</sup> Ibid 57.

<sup>43</sup> Ibid 52–3, 56.

<sup>44</sup> Ibid 36, 45, 70; Claimant 1's affidavit [43].

<sup>45</sup> Anthropology report 50–1.

<sup>46</sup> Ibid 44–5.

<sup>47</sup> Ibid 44.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 76–80.

<sup>50</sup> Claimant 1's affidavit [11]–[13].

<sup>51</sup> Ibid [12], [16].

<sup>52</sup> Ibid [24]–[25].

<sup>53</sup> Ibid [30]–[33], [56].

<sup>54</sup> Ibid [49].

accompanies Claimant 1's affidavit which identifies the location of the relevant sites in the application area.<sup>55</sup>

- [57] Claimant 2's mother was born in a billabong on Seymour Downs station to the north east of Norseman, where she later lived and gave birth to Claimant 2.<sup>56</sup> Claimant 2's mother was a senior law woman who 'travelled all over and practiced the law'.<sup>57</sup> He also recalls being taught by his grandfather and uncles about the significance of Lake Cowan and Cherry Island in the application area.<sup>58</sup> Claimant 2 identifies other places in the application area that he was taught about by his predecessors, including an old 'law ground' and areas where wood continues to be harvested by Ngadju people to make spears.<sup>59</sup> When visiting Norseman, he takes his children to the burial sites and rock holes, including Porcupine Hill just outside of the town.<sup>60</sup>

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

- [58] I have assessed the sufficiency of the factual basis with reference to the judicial guidance in *Strickland* that the requirements of the registration test are stringent and it is not necessary to elevate them to the impossible.<sup>61</sup> I note that the anthropology report does not directly address this application but speaks to a significantly larger area of Ngadju country which has since been determined in *Ngadju Part A* and *Ngadju Part B*. Noting that the determined areas extend from Norseman in all directions, I consider the findings in the anthropology report also provide some factual basis for this application.

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

- [59] From the material, I understand that European settlement in the region of the application area began with the development of pastoral leases in the 1860s–1870s and that the apical ancestors of the claim group were born in the early decades of settlement. The material provides that both prior to and after settlement, Ngadju people would travel across their country in search of water and also to participate in trade and ceremony. From the information before me, I infer that the apical ancestors who were alive at settlement had a similar association with Ngadju country as their own predecessors who would have been alive at the time of British sovereignty. I understand it is appropriate to construe the Native Title Act beneficially and to make this particular retrospective inference.<sup>62</sup>
- [60] I also understand that subsequent generations of the claim group have maintained their association with their country, in part by working on the pastoral leases which were established over it, and that Ngadju people were observed in Norseman in the early 1900s, digging soaks and participating in ceremonies. Senior claimants recall their own predecessors participating in such ceremonies up to the 1950s.

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<sup>55</sup> Ibid, annexure JS-1.

<sup>56</sup> Claimant 2's affidavit [5], [8].

<sup>57</sup> Ibid [12]–[13].

<sup>58</sup> Ibid [23]–[24].

<sup>59</sup> Ibid [28]–[31].

<sup>60</sup> Ibid [32].

<sup>61</sup> *Strickland* [55].

<sup>62</sup> *Harrington-Smith No 9* [294]–[296]; *Kanak* [73]; *Lane* [9].

[61] In my view, these examples are sufficient to support the assertion that there has been an association between the application area and the predecessors of the claim group, both at the time of sovereignty and since that time.

*Is the factual basis sufficient to support an association between the claim group and the application area currently?*

[62] Both Claimant 1 and Claimant 2 were born in Norseman and were taught about the significant places in and around the township by their predecessors. Claimant 1 continues to live in Norseman with his family and regularly checks on these places. On return visits to Norseman, Claimant 2 takes his children to the burial sites and rock holes. In my view, the claimants' affidavits provide sufficient information to support an association between the current claim group and the application area.

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

[63] I understand the task at s 190B(5)(a) is limited to assessing whether the factual basis is sufficient to support the assertion that the claim group have, and their predecessors had, an association over the application area as a whole.<sup>63</sup> It is not a requirement that every member of the claim group have an association with the entire application area at all times.

[64] The anthropology report describes the association that generations of Ngadju people have had with different parts of Ngadju country. From the Tribunal's geospatial database, I can see that these locations surround the application area in all directions. For example, Israelite Bay lies to the south on the Great Australian Bight, Mount Ragged lies to the south west and Fraser Range to the east. I also note that the pastoral stations where predecessors of the claim group lived and worked are spread across Ngadju country, including Balladonia in the east, Southern Hills in the north east, Buniningonia in the north, and Seymour Downs, which I understand is now called Kinclaven station, in the north west. Claimant 2 deposes that his family are responsible for an area near Norseman. In addition, I note the information about claim group members, past and present, living in the town of Norseman, and undertaking activities such as participating in ceremonies and harvesting wood to make spears. In my view, there is sufficient information to support a physical association with the whole application area.

[65] The material provides that the tjukurpa creation beings travelled across the land and their activities are manifest at particular locations in the physical landscape, according to the spiritual beliefs of the claim group. The maps in the anthropology report and annexed to Claimant 1's affidavit identify locations in and around the application area associated with particular tjukurpa stories, including at Lake Cowan which extends along much of the western boundary. I understand from the material that the current claim group were taught about the location of these places and the relevant tjukurpa stories from their predecessors. In my view, this information supports a spiritual association with the whole application area.

### ***Conclusion - s 190B(5)(a)***

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<sup>63</sup> *Corunna* [31].

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

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

[67] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that gives rise to the claim to native title rights and interests. ‘Native title rights and interests’ is defined in s 223(1)(a) as those rights and interests ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders.

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

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

[T]he normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.<sup>64</sup>

[69] In *Warrie*, the Full Court held that:

Where a rule, or practice or behaviour in relation to the identified land and waters arises from traditional law, and has normative content, then it can be capable of satisfying para (a) of s 223(1).

*[A] claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character*, there is no further gloss or overarching requirement, and no further rigidity. The Native Title Act in terms does not require establishment of some overarching “society” that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.<sup>65</sup>

[70] In *Gudjala 2009*, Dowsett J held that the factual basis must demonstrate some relationship between the claim group, their predecessors and the pre-sovereignty society from which the laws and customs of the claim group are derived.<sup>66</sup> I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of:

- (a) a link between the pre-sovereignty society, the predecessors and the claim group in the application area; and

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<sup>64</sup> *Yorta Yorta* [46]–[47], emphasis added.

<sup>65</sup> *Warrie* [105], [107], emphasis added.

<sup>66</sup> *Gudjala 2009* [40].



- (b) the continued observance of normative rules by the successive generations of the claim group, such that the normative rules can be described as ‘traditional laws and customs’.

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

- [71] The anthropology report states that the Ngadju people belong to the society known as the Western Desert Cultural Bloc (**WDCB**).<sup>67</sup> The laws of the WDCB are underpinned by the tjukurpa and spiritual beliefs about the creative era in which the land and the laws of the WDCB were made.<sup>68</sup> The spiritual beliefs of the WDCB are demonstrated in rituals and ceremonies which re-enact the activities of the creative ancestors.<sup>69</sup> Prior to sovereignty, Ngadju people participated in such rituals with other groups in the region, including the Mirning People to the east, and today claimants continue to participate in such rituals with WDCB communities to the north.<sup>70</sup>
- [72] A fundamental principle of land tenure for the Ngadju people is descent, such that a person inherits both their mother’s and their father’s country and cultural identities.<sup>71</sup> The claimants learned from their predecessors the principles of land ownership through descent and the geographical and spiritual features of their land.<sup>72</sup> The claimants are descended from the Ngadju apical ancestors, who are believed to have inherited their country and identity from their own forebears.<sup>73</sup> While individuals and families are considered the owners of particular tracts of land, all Ngadju people have the right to access the whole of Ngadju country and to exploit its resources, ‘without fear of trespass’.<sup>74</sup> This law is believed to have been in operation since before British sovereignty and continues to be observed today.<sup>75</sup> One senior claimant explains that while particular families are associated with particular areas as their ‘homes’, they are also free to travel across the whole of Ngadju country.<sup>76</sup>
- [73] Pursuant to the WDCB laws, non-Ngadju people are expected to seek permission to access Ngadju country and its resources.<sup>77</sup> Ngadju people must similarly seek permission to access the country belonging to other groups.<sup>78</sup> Accessing country without observing the correct protocols can cause harm.<sup>79</sup> For example, Claimant 1 explains that his predecessors taught him that sickness or death could result from improperly accessing burial sites.<sup>80</sup> He has taught the younger generations how to look after those sites so as not to disturb the spirits.<sup>81</sup>

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<sup>67</sup> Anthropology report 16.

<sup>68</sup> Ibid 50–1.

<sup>69</sup> Ibid 51.

<sup>70</sup> Ibid 16, 34.

<sup>71</sup> Ibid 32.

<sup>72</sup> Ibid 33–4.

<sup>73</sup> Ibid 32, 35.

<sup>74</sup> Ibid 40.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 41.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 43.

<sup>80</sup> Claimant 1’s affidavit [35]–[37], [52].

<sup>81</sup> Ibid.

- [74] Claimants recall being instructed by their parents and grandparents in the methods of exploiting the resources of Ngadju country.<sup>82</sup> These resources include plants with healing properties, kangaroo, goannas and emus, various native fruits and seeds, wood for boomerangs and ochre for ceremonies.<sup>83</sup> Claimants were taught the location of rock holes where fresh water can be obtained and to keep the rock holes covered and clean, and these responsibilities are now taught to the younger generations.<sup>84</sup>
- [75] As set out above at s 190B(5)(a), Claimant 1 recalls learning from ‘the old men’ how to cook kangaroo.<sup>85</sup> He explains that he still cooks kangaroo today and shows the younger generations how to do so.<sup>86</sup> Claimant 2 was taught how to dig up witchetty grubs and look for quandongs by his mother, and his uncle taught him how to identify trees and cut spears from them.<sup>87</sup> He has taught these skills to his children and grandchildren.<sup>88</sup>
- [76] Other WDCB laws that the claim group have been taught by their predecessors and continue to observe include a kinship system which involves marriage rules and totems.<sup>89</sup> Claimant 1 explains how totem animals are assigned and that his marriage is considered ‘right way’.<sup>90</sup> He also explains the traditional Ngadju burial method that he was taught by his uncle and which he is now teaching to younger Ngadju people.<sup>91</sup> Claimant 2 explains that there are only certain persons that he is allowed to marry, pursuant to the WDCB kinship laws.<sup>92</sup>
- [77] One senior claimant recalls that his predecessors ‘learnt me the coroboree and all. Law songs, lot of meaning to that Law’.<sup>93</sup> Senior claimants have taught the relevant dances to the younger generations and decorate them with ochre collected from Ngadju country.<sup>94</sup> As mentioned above, younger claimants continue to participate in rituals and go ‘through the Law’ with WDCB communities to the north.<sup>95</sup>

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

*Does the factual basis support a link between the pre-sovereignty society, the predecessors and the claim group?*

- [78] The anthropology report identifies the pre-sovereignty society in the application area as the WDCB. I understand that it is possible for a claim group to be members of a broader society, without all the members of that society being members of the claim group, similar to the society of Australia, whose various members also observe their local and state-based laws.<sup>96</sup> In my view, the current application is analogous – the claim group are members of the WDCB and are the people who have inherited rights in the application area pursuant to those laws. I

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<sup>82</sup> Anthropology report 43, 47.

<sup>83</sup> Ibid 47, 67–9.

<sup>84</sup> Ibid 44–5.

<sup>85</sup> Claimant 1’s affidavit [24]–[25].

<sup>86</sup> Ibid [26].

<sup>87</sup> Claimant 2’s affidavit [14], [17].

<sup>88</sup> Ibid [33].

<sup>89</sup> Anthropology report 48–9, 54–5.

<sup>90</sup> Claimant 1’s affidavit [4], [21]–[22].

<sup>91</sup> Ibid [38].

<sup>92</sup> Claimant 2’s affidavit [40].

<sup>93</sup> Anthropology report 53.

<sup>94</sup> Ibid 70, Claimant 1’s affidavit [27].

<sup>95</sup> Anthropology report 53.

<sup>96</sup> *Harrington-Smith No 5* [53]; *Sampi FC* [69].

therefore consider the material addresses the identity of the pre-sovereignty society, sufficient for the purposes of s 190B(5)(b).

- [79] In my view, the material provides sufficient information about the inclusion of the claim group's predecessors in the society of the WDCB, shown through their participation in ceremony with neighbouring groups and observation of the rules of appropriate access to country. I understand the predecessors of the claim group, including the apical ancestors, had rights to Ngadju country recognised under the laws of the WDCB. The material explains that the claim group have inherited those rights as the descendants of the apical ancestors. I therefore consider the factual basis supports the assertion of a link between the pre-sovereignty society, the predecessors and the current claim group.

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

- [80] I consider there are sufficient examples in the material before me to show that the current claim group is a modern manifestation of the pre-sovereignty society.<sup>97</sup> The material provides that the claim group continue to observe the WDCB laws and customs which were taught to them by their predecessors. These include laws pertaining to the inheritance of rights to land through the principle of descent, and normative rules to allow safe and appropriate access to country. I note the information about the spiritual underpinning of the WDCB laws in the tjukurpa, and the ongoing significance that certain sites have to the claim group, such as rock holes where the tjukurpa stories manifest. The material provides that the claim group were taught how to look after these rock holes in both spiritual and physical terms by their predecessors, and continue to undertake these same practices today with younger members of the claim group.
- [81] The claimants in their affidavits provide specific examples of laws and customs taught to them by their predecessors, such as the appropriate ways to approach burial sites and the kinship system. The claimants continue to follow these rules and have taught them to their descendants. I also note the information about the claimants learning how to cook kangaroo, collect quandong and harvest wood for spears from their predecessors, and that they have now taught these skills to the younger generations of the claim group. In my view, there is sufficient information about how the laws and customs have been acknowledged and observed by successive generations of the claim group, to support the assertion that the laws and customs are 'traditional' in the sense described in *Yorta Yorta*.<sup>98</sup>

### **Conclusion – s 190B(5)(b)**

- [82] I am satisfied the factual basis supports the assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group. This means s 190B(5)(b) is met.

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

- [83] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which

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<sup>97</sup> *Gudjala 2009* [31], [54]–[55], *Sampi FC* [15].

<sup>98</sup> *Yorta Yorta* [46]–[47].

give rise to the claimed native title rights and interests.<sup>99</sup> It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.<sup>100</sup>

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

[84] As discussed above at s 190B(5)(b), I am satisfied that the claim group continue to observe the same normative rules in relation to the inheritance of rights to land, appropriate access to country, social organisation and use of resources as their predecessors observed prior to European settlement. I note the information from the claimants about learning these laws and customs from their predecessors, and teaching them to their descendants. For example, Claimant 2 describes his grandfather teaching him about the prohibited places around the application area, which Ngadju people continue to avoid today.<sup>101</sup> He also explains how he was taught that trade of spears for shells previously occurred between inland and coastal people, and that Ngadju people today continue to make and use spears harvested from wood found in the application area.<sup>102</sup> He also explains that he was taught that in pre-settlement times, fires were lit along boundaries to indicate to the neighbouring group that permission to access their area was sought, and that the ownership of areas, pursuant to traditional laws and customs, is still recognised today.<sup>103</sup> In my view, these examples and others in the material before me demonstrate a continuance in the observance of traditional laws and customs.

#### **Conclusion – s 190B(5)(c)**

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

#### **Conclusion**

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

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

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

[87] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a ‘native title right or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group. I understand the condition of s 190B(6) requires some measure of the material available in support of the claim and imposes a more onerous

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<sup>99</sup> *Gudjala 2009* [29].

<sup>100</sup> *Gudjala 2007* [82].

<sup>101</sup> Claimant 2’s affidavit [23]–[24].

<sup>102</sup> *Ibid* [27], [29]–[31].

<sup>103</sup> *Ibid* [39].

test to be applied to the individual rights and interests claimed.<sup>104</sup> I also understand that the words ‘prima facie’ mean that if a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.<sup>105</sup> It is therefore my task to consider whether there is probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register.<sup>106</sup>

## Consideration

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

*1) 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.*

[88] I understand that the above claimed right is one of exclusive possession. *Griffiths FC* held:

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. The relationship to country is essentially a “spiritual affair”.<sup>107</sup>

[89] As discussed above at s 190B(5), I understand that the WDCB laws and customs observed by the claim group are underpinned by the tjukurpa and the spiritual beings which created the landscape and remain present in it. The anthropology report provides that claimants believe there are spirits within Ngadju country and these must be respected, so as to avoid danger.<sup>108</sup> One claimant describes the protocols for entering and leaving places in Ngadju country to avoid potential harm from the resident spirits.<sup>109</sup> Another claimant explains the protocol that she undertook at a rock hole in the application area to appropriately greet and acknowledge the spirits.<sup>110</sup> Claimant 1 states:

Ngadju people have to do site clearances. They do it because if non-Ngadju people disturb sites they will be in danger. It’s like the curses from the Egyptian pyramids – people do the wrong thing and they will drop dead in a couple of months. It is our responsibility as Ngadju to prevent this happening.<sup>111</sup>

[90] In my view, this information accords with the judicial guidance about the right of exclusive possession outlined in *Griffiths FC*. From the material I understand that, pursuant to the WDCB laws and customs, the claim group must mediate between the spirits present in Ngadju country and other people. I therefore consider that the claim group are the ‘gatekeepers’ for the purpose of preventing harm caused by unauthorised entry to their country.<sup>112</sup> I am satisfied the right of exclusive possession is prima facie established.

*2) Where native title rights and interests have been partially extinguished, the applicant claims the*

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<sup>104</sup> *Doepel* [126].

<sup>105</sup> *Ibid* [135].

<sup>106</sup> Section 186(1)(g).

<sup>107</sup> *Griffiths FC* [127].

<sup>108</sup> *Ibid* 56.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* 56–57.

<sup>111</sup> Claimant 1’s affidavit [59].

<sup>112</sup> *Griffiths FC* [127].

*following non-exclusive native title rights and interests:*

*a) hunt and fish (excluding commercial fishing), gather and use the natural resources of the area, such as food and medicinal plants and trees, timber and ochre and to have access to and use of potable water;*

[91] Claimant 2 states that claim group members continue to hunt around the application area for kangaroos, emus and mallee fowl.<sup>113</sup> He also identifies traditional bush foods around Norseman including quandongs and silky pears.<sup>114</sup> Claimant 1 describes using tea trees around Norseman to make hunting sticks and didgeridoos in a 'specific Ngadju way' which he has taught to the younger generations.<sup>115</sup> Claimant 2 describes accessing the waterholes around the application area with his children.<sup>116</sup> I consider this right is prima facie established.

*b) live on, camp, erect shelters and other structures and to travel over and visit;*

[92] Claimant 1 lives in Norseman permanently and Claimant 2 states that he has camped all around Norseman.<sup>117</sup> As discussed above at 190B(5)(a), the anthropology report describes the predecessors of the claim group travelling over the application area in search of water and to participate in trade and ceremony.<sup>118</sup> Schedule M states that claim group members continue to travel over the application area.<sup>119</sup> I consider this right is prima facie established.

*c) do the following activities:*

*i. engage in cultural activities;*

*ii. conduct rituals or ceremonies;*

*iii. hold meetings; and*

*iv. teach the physical and spiritual attributes of places and areas of importance on or in the land and waters;*

[93] Claimant 1 explains how he participated in dances when he was younger, taught to him by the 'old men' and that Ngadju people continue to perform these dances today.<sup>120</sup> Meetings of Ngadju people continue to be held in Norseman.<sup>121</sup> Claimants 1 and 2 describe how they teach the younger generations of the claim group about the physical and spiritual attributes of the application area, for example, Claimant 1 has taught the younger Ngadju rangers and his children the location of burial sites and the appropriate conduct to observe when visiting these places.<sup>122</sup> Claimant 2 was taught by his mother and uncles about the attributes of Ngadju country and is now teaching his children and grandchildren those same things, including the places to dig for yams and the stories attached to Lake Cowan in the application area.<sup>123</sup> I consider this right is prima facie established.

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<sup>113</sup> Claimant 2's affidavit [34].

<sup>114</sup> Ibid [36].

<sup>115</sup> Claimant 1's affidavit [45].

<sup>116</sup> Claimant 2's affidavit [32].

<sup>117</sup> Claimant 1's affidavit [12], Claimant 2's affidavit [32].

<sup>118</sup> Anthropology report 40.

<sup>119</sup> Schedule M.

<sup>120</sup> Ibid [24]–[25], [27].

<sup>121</sup> Anthropology report 41.

<sup>122</sup> Claimant 1's affidavit [35]–[37].

<sup>123</sup> Claimant 2's affidavit [33]–[34].

*d) have access to, maintain and protect, places and areas of importance on or in the land and waters, including Dreaming sites, waterholes and ceremony grounds; and*

[94] Claimant 1 explains that he has an obligation to protect places of importance, including burial grounds in Norseman that he checks on regularly.<sup>124</sup> I consider this right is prima facie established.

*e) share or exchange subsistence and other traditional resources obtained on or from the land and waters.*

[95] Claimant 1 describes how he and other Ngadju people get kangaroos and share them with people in Norseman.<sup>125</sup> I consider this right is prima facie established.

## Conclusion

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

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

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

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

- (a) currently has or previously had a traditional physical connection with any part of the application area; or
- (b) previously had and would reasonably have been expected currently to have such a connection, but for certain things done.

[98] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.<sup>126</sup>

## Consideration

[99] Schedule M provides that Ngadju people regularly travel across the application area to undertake various activities and to care for the places of significance taught to them by their predecessors. Schedule M also refers to the affidavit of Claimant 2, for details of his particular physical connection. Claimant 2's affidavit talks about growing up in Norseman and collecting quandongs with his mother and learning how to make spears with his uncle.<sup>127</sup> He also describes visits to the application area with his children and grandchildren, during which they

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<sup>124</sup> Claimant 1's affidavit [35], [49].

<sup>125</sup> Ibid [44].

<sup>126</sup> *Doepel* [18]; *Gudjala 2009* [84].

<sup>127</sup> Claimant 2's affidavit [14], [18].

visit burial sites and water holes.<sup>128</sup> In light of this information, I consider that members of the claim group have a physical connection to the application area.

[100] I also consider the claimants' connection with the application area is 'traditional' in the sense required by s 190B(7). As I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, as discussed above at s 190B(5)(b), it follows that I am satisfied their connection with the application area is in accordance with those traditional laws and customs.

## Conclusion

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

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

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

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

## Consideration

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

Section	Requirement	Information	Result
s 61A(1)	Claimant application not to be made covering areas of approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Paragraphs (4)(c) and (d) of Schedule B state that any area to which a previous exclusive possession act has been done is excluded from the application	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Paragraph 1 of Schedule E provides that exclusive possession is only claimed where it can be recognised	Met

## Conclusion

[104] I am satisfied the requirements of s 190B(8) are met.

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<sup>128</sup> Ibid [32]–[33].



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

What is required to meet s 190B(9)?

[105] Section 190B(9) states that the application must not disclose, and the Registrar must not otherwise be aware that the claimed native title extends to cover the situations described in ss 190B(9)(a)–(c).

### Consideration

[106] In my view, the application does not contravene any of the restrictions found in s 190B(9):

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states the claim group does not claim ownership of any minerals, petroleum or gas wholly owned by the Crown	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states no claim of exclusive possession is made of any offshore place	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Paragraph 4(e) of Schedule B states the application does not cover any areas where native title has been wholly extinguished	Met

### Conclusion

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

*End of reasons*

## Attachment A

### Information to be included on the Register of Native Title Claims

Application name	Ngadju Mia Wamu
NNTT No.	WC2021/006
Federal Court of Australia No.	WAD180/2021
Date of Registration Decision	29 October 2021

#### Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

<b>Application filed/lodged with:</b>	Federal Court of Australia
<b>Date application filed/lodged:</b>	9 August 2021
<b>Date application entered on Register:</b>	29 October 2021
<b>Applicant:</b>	As per Schedule
<b>Applicant's address for service:</b>	As per Schedule
<b>Area covered by application:</b>	As per Schedule
<b>Persons claiming to hold native title:</b>	As per Schedule
<b>Registered native title rights and interests:</b>	As per Schedule

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Katy Woods

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