National Native Title Tribunal

Registration Decision

Application name	Kado Muir & Ors on behalf of the Payarri People and State of Western Australia (Payarri)
Name of applicant	Kado Muir, Samantha Banks, Talbot Muir, and Eric Thomas (Junior)
Federal Court of Australia No.	WAD56/2022
NNTT No.	WC2022/002
Date of Decision	23 September 2022
Date of Reasons	

Claim accepted for registration

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

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Daniel Deibler

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

[1] A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Reasons for Decision

CASES CITED

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (*Anderson*)
Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)
Attorney-General of the Northern Territory v Ward [2003] FCAFC 283 (*Ward FC*)
Bell v Native Title Registrar [2021] FCA 229 (*Bell*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
De Rose v South Australia [2002] FCA 1342 (*De Rose*)
De Rose v State of South Australia [2003] FCAFC 286 (*De Rose FC*)
De Rose v State of South Australia (No 2) [2005] FCAFC 110 (*De Rose FC No 2*)
Drury v State of Western Australia [2000] FCA 132 (*Drury*)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (*Warrie*)
Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)
Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala FC*)
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*)
Hazelbane v Doepel [2008] FCA 290 (*Hazelbane*)
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) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)
Northern Land Council v Quall [2020] HCA 33 (*Quall*)
Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (*Alyawarr*)
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)
Sampi v Western Australia [2005] FCA 777 (*Sampi*)
State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)
Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)
Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia [2016] FCA 910 (*Tjungarrayi 2016*)
Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938 (*Tjungarrayi 2017*)
Wakaman People #2 v Native Title Registrar [2006] FCA 1198 (*Wakaman*)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)
Western Australia v Ward [2002] HCA 28 (*Ward HC*)

BACKGROUND

[1] This is an amended application filed on behalf of the Payarri native title claim group (claim group). It covers land and waters in the north-eastern Goldfields in the Shire of Laverton about 15 km north of Mulga Queen. The application area lies within the western margin of the Great Victoria Desert and borders in the east the registered native title claim Waturta (WAD297/2018, WC2018/012). It is located east of the Kultju native title determination (WAD225/2018, WCD2019/012)[2] and south of the Wiluna native title determination (WAD6164/1998, WAD248/2007, WAD181/2012, WAD108/2016, WCD2013/004)[3].

[2] The claim group filed the original application on 23 March 2002 with the Federal Court (the Court). It was provided to the Native Title Registrar (the Registrar) on 25 March 2022. On 10 May 2022 a delegate of the Registrar conducted a preliminary assessment of the application and identified potential deficiencies.

[3] By order of 27 June 2022 the applicant was given leave to amend the application. An amended application was filed with the Court on 29 June 2022.

[4] The Registrar of the Court gave a copy of the amended application and accompanying affidavit to the Registrar on 13 July 2022 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.[4]

Registration conditions

[5] Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.

[6] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The claim made in the original application was never accepted for registration and therefore the amended application does not meet the requirement of s 190A(6A)(b).

[7] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision. The information that is to be included on the Register of Native Title Claims is outlined in Attachment A.

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[2] *Sceghi on behalf of the Kultju Native Title Claim Group v State of Western Australia* [2019] FCA 1756.
[3] *WF (Deceased) on behalf of the Wiluna People v State of Western Australia* [2013] FCA 755.
[4] Section 190A(1).

Procedural fairness

[8] As a delegate of the Registrar, I am bound by the principles of administrative law, including the rules of procedural fairness, when making a registration decision.[5] Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication.[6] When applying the registration test and making my registration decision I have followed the case law regarding procedural fairness requirements[7] and note that the following steps were undertaken to ensure procedural fairness has been accorded:

- On 22 July 2022 the Tribunal's senior officer for this matter sent a letter to the State of Western Australia (the State) informing the State that any submission in relation to the registration of this claim should be provided by 5 August 2022. No submissions from the State were received.
- The senior officer, also on 22 July 2022, wrote to inform the applicant that any information additional to the application should be provided by 5 August 2022. By email of 1 August 2022 the applicant informed the senior officer that no further material will be provided, other than the material provided to the Tribunal in relation to the original application, namely:
    - Letters to the Tribunal dated 8 April 2022, 7 June 2022, and 17 June 2022;
    - Updated Payarri Registration Test Report, dated June 2022 (Report);
    - Annexure to the Anthropological Report of Dr Heather Lynes and Trinity Handley; and
    - S 62 affidavits of the members of the applicant and affidavits from a Corporate Services Officer and an anthropologist of Native Title Services Goldfields.
- On 15 August 2022, the additional information was provided to the State for comment. The State was advised that any comment in relation to the registration test should be provided by 26 August 2022. No submissions from the State were received.

[9] This concluded the procedural fairness process.

Information considered

[10] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

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[5] *WA v NTR* [37].
[6] *Hazelbane* [25].
[7] See, for instance, *WA v NTR* [21] – [38]; *Hazelbane* [23] – [31]; *Bell* [73] – [84].

[11] I have had regard to information in the application. I have also considered the documents provided by the applicant and referred to in the email of 1 August 2022 (see [8]).[8]

[12] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.[9]

[13] The State has not provided any submissions in relation to the application of the registration test.[10]

[14] I may also have regard to such other information as I consider appropriate.[11] I have therefore considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the area covered by the application, dated 18 July 2022 (the geospatial report).

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

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

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

[16] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.[12]

Section 61

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A, Affidavits of the members of the applicant	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

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

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

[19] Section 62(1)(a) requires a claimant application to be accompanied by an affidavit sworn by the applicant stating the matters mentioned in subsection (1A).

[8] Section 190A(3)(a).
[9] Section 190A(3)(b).
[10] Section 190A(3)(c).
[11] Section 190A(3).
[12] *Doepel* [16], [35]–[39].

[20] I note that annexed to the amended application as Attachment M was an affidavit of Talbot Muir dated 16 December 2021. I observe, however, that this affidavit does not include the statements required by ss 62(1)(a), and 62(1A).

[21] I further note that the applicant, in the email dated 1 August 2022, referred to affidavits of Samantha Banks, Eric Thomas Jnr, Talbot Muir and Kado Muir, filed with the Court before filing the amended application.

[22] The affidavits of Samantha Banks and Eric Thomas Junior, dated 22 March 2022, and of Talbot Muir and Kado Muir, dated 11 March 2022, state the matters mentioned in s 62(1A). However, these affidavits were not annexed to the amended application, but only referred to in the email of the applicant dated 1 August 2022 and submitted as additional material. Therefore the question arises, whether they can be considered as accompanying the application.

[23] Mansfield J considered it acceptable in *Doepel* to have regard to affidavits of claimants even though they were not exhibited or annexed to the application.[13] Moreover, in *Drury*, French J found that s 62 'does not, either expressly or by implication, convey a requirement that fresh affidavits have to be filed on the occasion of every amendment.'[14]

[24] I note that all four affidavits were filed with the Court, on 23 March 2022 and 28 April 2022, before the amended application was lodged. Based on the above mentioned judgements, it is my view that I can consider the affidavits as accompanying the amended application. I am therefore satisfied that the requirements of s 62(1)(a) are met.

[13] *Doepel* [88].
[14] *Drury* [11].

Other requirements of s 62

Section	Details	Form 1	Result
s 62(1)(d)	Section 47C agreement	Schedule L	Not applicable
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, G, M, Attachment M	Met
s 62(2)(f)	Activities	Schedule G, Attachment M	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	Attachment I	Met
s 62(2)(i)	Conditions on applicant's authority	Schedule IA	Met

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

[25] As outlined in my reasons below, I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application (s 190C(3)).

[26] I note that I am permitted to have regard to information, which does not form part of the application, when assessing the requirements of s 190C(3).[15]

[27] The geospatial report advises that no other native title claim applications or determinations fall within the external boundaries of the Payarri claim. Using the Tribunal's geospatial database and registers, I have verified this information and have also verified that this information is still correct at the time of making this decision. I am therefore satisfied that there is no previous application that covered the whole or part of the area covered by the current application.

[28] In my view, as there is no previous application to which ss 190C(3)(a) to (c) apply, I do not need to consider the requirements of s 190C(3) further.

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

[29] I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each Representative Aboriginal/Torres Strait Islander Body (RATSIB) that could certify the application.

[30] Schedule R provides that the application has been certified under s 203BE of the Act by Native Title Services Goldfields Ltd (NTSG) and refers to Attachment R. That Attachment contains a certificate of the representative body. I therefore consider s 190C(4)(a) to be applicable to the application and will continue assessing the conditions of this subparagraph.

[15] *Doepel* [16].

[31] Section 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body'.[16] It is my understanding that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE. Once satisfied that these conditions have been met, I am not required to 'address the condition imposed by s 190C(4)(b)'.[17]

Appropriate representative body

[32] The geospatial report states that the claim area falls 100% within the area of NTSG. The certificate in Attachment R stems from NTSG, which, according to the certificate, is funded pursuant to s 203FE and fulfils the function of a RATSIB, including the certification function.[18]

[33] The certificate is signed by the CEO of NTSG. It is my view, based on *Quall*, that a CEO can perform the functions of a representative body based on an instrument of delegation or as an agent. [19]

[34] I am therefore satisfied that NTSG was the relevant s 203FE funded body for the application area and that it was within its power to issue the certification.

Requirements of s 203BE

[35] To meet the requirements of this condition, the certification must comply with s 203BE(4), which reads:

> A certification of an application for a determination of native title by a representative body must:
>
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a), (aa) and (b) have been met; and
>
> (b) briefly set out the body's reasons for being of that opinion; and
>
> (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

[36] The certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it, that any conditions under s 251BA on the authority that relate to the making of the application have been satisfied and that reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[37] In this regard I note that even though the introductory sentence in the certificate only mentions that the requirements of s 203BE(2)(a) and (b) have been met,[20] the later list of the

[16] *Doepel* [72], [78], and [80] – [82]; see also *Wakaman* [32].
[17] *Doepel* [80].
[18] Section 203FEA(1).
[19] *Quall* [48], [63], and [93].
[20] Attachment R [2].

requirements mentions all three conditions as described in s 203BE(2)(a), (aa) and (b).[21] I am therefore satisfied that this was a typographical error and that NTSG was in fact of the opinion that all three requirements of s 203BE(2)(a), (aa) and (b) were met.

[38] The certificate further complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion, specifically by the following information:[22]

- The group description is based on two anthropological reports and the findings in these reports regarding which persons have a connection to and hold native title rights and interests in the application area;
- The meeting notice for the authorisation meeting entailed the relevant and necessary information, such as the time and date of the meeting, the purpose of the meeting and a description of the area at issue;
- The meeting notice was advertised in the Kalgoorlie Miner and the Koori Mail, published on the website of NTSG and mailed to persons, who had attended an information meeting in March 2021;
- In the authorisation meeting, the claim group used their traditional decision-making process and authorised the applicant; and
- The applicant met all conditions on their authority.

[39] I further note that s 203BE(4)(c) is not applicable to the present application, as no overlapping application exists (see above [27], [28]).

Conclusion

[40] Having regard to the above, I am satisfied that the certificate of the relevant representative body meets the requirements of s 203BE(4). I therefore consider the criteria under s 190C(4)(a) to be met.

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

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

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

[42] The applicant provided the following information about the boundaries of the application area:

- Schedule B refers to Attachment B and lists general exclusions;

[21] Ibid.
[22] Ibid [3].

- Attachment B describes the application area as a metes and bounds description referencing the area under the responsibility of NTSG, pastoral lease boundaries, two native title determination application (Waturta, WAD297/2018, WC2018/012; Tjalkadjara, WAD597/2018, WC2018/025) boundaries and geographic coordinates to six decimal places; and

- Schedule C refers to Attachment C. Attachment C contains a colour map prepared by Geospatial Services, titled 'Native Title Determination Application Northern Goldfields' dated 14 January 2021 and includes:

    - The application area depicted by a bold blue outline with diagonal line fill, labelled and identified in the legend as 'Application Area';

    - The commencement point depicted by a bold magenta star symbol and labelled;

    - Land tenure as shown in the legend and larger tenure areas labelled;

    - RATSIB areas depicted by a bold brown dashed line and labelled in the map by RATSIB area;

    - Scalebar, coordinate grid and locality map; and

    - Notes relating to the source, currency and datum of data used to prepare the map.

[43] The geospatial report concludes that the description and map are consistent and identify the application area with reasonable certainty. I agree with this assessment and am therefore satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

[44] I am satisfied that the claim meets the requirements of s 190B(3).

[45] Section 190B(3) stipulates that 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.

[46] It is my understanding that, when assessing the requirements of this provision:

- I am required to address only the content of the application;[23]

- S 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification';[24]

[23] *Doepel* [16], [51].

- The focus 'is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group.'[25]

- Where a claim group description contains a number of paragraphs, the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open';[26]

- To determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, '[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described'.[27]

[47] The description of the native title claim group at Schedule A is as follows:

> The Payarri claim is brought on behalf of the Payarri people. The Payarri people are:
>
> 1. Those Aboriginal persons from time to time:
>
> a) who in accordance with Western Desert traditional laws and customs, have a connection to all or part of the application area through:
>
> i) their own birth or conception;
> ii) holding religious, sacred or ritual authority;
> iii) acquisition of knowledge through a traditional long association via occupation or custodianship; or
> iv) through descent from a person who has had such a connection in part or all of the area; and
>
> b) in respect of whom that claim is recognised according to Western Desert traditional laws and customs.
>
> 2. As at the date of the application, the persons referred to in paragraph 1 include, but are not limited to, the following persons:
>
> a) the descendants of the siblings Mindi Chapman, Lumi Chapman, Tommy Chapman, Roy Chapman, Coral Chapman, Mary Chapman and Elsie Chapman
> b) the descendants of the siblings Kujikari/Mary Walker/MacArthur, Claudie Walker, Paddy Walker and Pukungka/Dolly Walker/Muir;
> c) the descendants of the siblings Rangka Rangka, Nellie Yalanga and Kitty Yiningka;
> d) the descendants of Tatitjarra Banks, Paddy Longfella Banks and Sandy Banks;
> e) the descendants of Topsy Anderson; and
> f) the descendants of Nukuwarra Paddy Bond and Nyultan Polly Mitchell.

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[24] *Gudjala 2007* [33].
[25] *Doepel* [37].
[26] *Gudjala 2007* [34].
[27] *WA v NTR* [67].

[48] I note that the description in Schedule A does not entail a list of the names of all of the persons in the native title claim group. I therefore consider s 190B(3)(b) to be applicable.

[49] My understanding of the description is that to qualify for membership of the claim group, an individual must meet one of the criteria in paragraph 1.a) of the description. In addition, membership is further qualified by the additional criterion (1.b)) of the claim of the individual being recognised under Western Desert traditional laws and customs.

[50] I observe that similar descriptions of claim groups have been accepted by the Courts.[28] Nonetheless, I will discuss each criterion below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Birth/conception

[51] The first criterion requires that a person was born or conceived within the application area.

[52] In my view, requiring a member to demonstrate that they were born or conceived in the application area provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group. Moreover, membership by birth has been accepted by the Courts, for example, in *De Rose*.[29]

[53] I consider that with some factual inquiry it will be possible to identify the persons who fit this criterion of the native title claim group description.

Religious, sacred or ritual authority

[54] According to the second criterion, membership in the claim group is dependent on a person's religious, sacred or ritual authority for the claim area.

[55] It is my understanding, based on the information contained in the application and its attachment, that having religious, sacred or ritual authority is closely connected to profane and sacred knowledge of the claim area and the responsibility a person takes for it.[30] Knowledge of the claim area consists in particular of knowledge of important places in the area and the songs and stories for these places. By imparting stories about these places the authority for the songlines is also passed on and with it the authority for the area.[31]

[56] Forms of religious, sacred or ritual authority have been accepted by the Courts in other matters as a method of identifying who may comprise the claim group.[32]

[57] In light of these decisions and having regard to the information outlined above, I am of the view that with some factual inquiry it would be possible to determine the persons who have religious, sacred or ritual authority for the application area.

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[28] See for instance *De Rose* [926], [928]; *Tjungarrayi 2016* [13] and *Tjungarrayi 2017* at Schedule 3.
[29] *De Rose* [926].
[30] Schedule F.
[31] Attachment M [22], [25], [26], [34], [35].
[32] See for instance *De Rose* [926], [928]; *Tjungarrayi 2016* [13] and *Tjungarrayi 2017* at Schedule 3.

Traditional long association

[58] According to the third criterion membership to the claim group can be achieved by acquisition of knowledge through a traditional long association via occupation or custodianship.

[59] In my view, requiring a member to demonstrate that they have knowledge of the claim area through a traditional long association is a clear external reference point to commence any inquiry about whether a person is a member of the native title claim group.

[60] I consider that with some factual inquiry it will be possible to ascertain whether a person has knowledge of the claim area and whether this knowledge was gained through a traditional long association. I note that describing a claim group in reference to long traditional association has been accepted by the Courts.[33] Therefore I am satisfied that it is possible to identify the persons who fit this part of the native title claim group description.

Descent

[61] I understand that the last criterion for membership is to be a descendant of a person who had such a connection, some of whom have been named in paragraph 2 of the description.

[62] I consider that requiring a person to show descent from a specific ancestor provides an objective criterion about whether a person is a member of the claim group and has been accepted by the Courts previously.[34] I consider that factual enquiries would lead to the identification of the people who meet this criterion.

Recognition

[63] As noted above, I understand that the description of the claim group is to be read as a discrete whole and that the recognition criteria in 1.b) is a qualifier to all the membership options listed before.

[64] I note that a description of membership containing qualifiers of recognition is not one with an external and objective point of reference from which to commence an inquiry.

[65] I further note that paragraph 1.b) does not specify who has to recognise the claim of the person in question but only specifies that the claim has to be recognised according to Western Desert traditional laws and customs. According to Schedule F of the application the Payarri people observe the traditional laws and customs, which have been acknowledged by the Western Desert society / the Western Desert Cultural Bloc (WDCB) since time immemorial.[35]

[66] Based on this information provided in the application, it is my understanding that paragraph 1.b) of the claim group description does not only refer to recognition by members of the claim group itself but goes beyond the realm of the claim group and requires recognition by members of the WDCB.

[33] *De Rose* [897], [928]; *Tjungarrayi 2016* [13] and *Tjungarrayi 2017* at Schedule 3.
[34] *WA v NTR* [67].
[35] Schedule F a), c) and d).

[67] I note that the Court has considered that membership to a claim group must be based on group acceptance and that this requirement is inherent in the nature of a society.[36] The relevant society is the WDCB and I understand from the material provided, that this society has to accept, based on its traditional laws and customs, the person's claim to a connection to the application area. It follows that, in my view, recognition is inherently linked to the recognition of one's association, through one of the conditions outlined in 1.a), with the application area.

[68] In my view, through enquiries to members of the WDCB, it would be possible to ascertain whether a person's claim about their connection to the application area is recognised according to Western Desert traditional laws and customs.

Conclusion

[69] I am satisfied that the application describes the persons in the claim group sufficiently clearly such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Therefore, only focusing upon the adequacy of the description of the claim group, I consider the requirements of s 190B(3) to be met.

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

[70] To meet the requirements of s 190B(4), the Registrar must be satisfied that the description contained in the application is sufficient to allow the claimed native title rights and interests to be readily identified. It is my understanding that the description must be understandable and have meaning.[37]

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

[72] When assessing whether the claimed native title rights and interests are readily identified I am confined to the material contained in the application itself.[38] Moreover, I will not consider whether the claimed rights and interests are 'native title rights and interests', as defined in s 223, as in my view that question 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.

Exclusive possession

[73] From the description in paragraph 1 of Schedule E, I understand that exclusive possession is claimed in areas within the application area where there has been no prior extinguishment, or where any such extinguishment must be disregarded. I understand that a broad claim to exclusive possession such as this does not offend s 190B(4).[39]

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[36] *Aplin* [260].
[37] *Doepel* [99], [123].
[38] Ibid [16].
[39] *Strickland* [60].

Non-exclusive rights

[74] From the description in paragraph 2 of Schedule E, I understand that the listed non-exclusive rights are claimed in areas where native title rights and interests have been partially extinguished. I consider the non-exclusive rights form an exhaustive list, and in my view there is no inherent or explicit contradiction within the description.[40]

Qualifications

[75] Schedule E also describes the qualifications on the claimed rights, stating that they are subject to the laws of the State of Western Australia and the Commonwealth of Australia, to valid interests conferred under those laws, and to the body of traditional laws and customs of the claim group.

Conclusion

[76] I am satisfied that the description is understandable and has meaning and is sufficient to identify all the claimed rights and interests. I consider s 190B(4) to be met.

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

[77] Section 190B(5) provides that:

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. 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; and
> (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) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[78] I understand that, when assessing the requirements of s 190B(5), I am not confined to the information contained in the application but can also have regard to additional information pursuant to s 190A(3).[41] Moreover, I must treat the asserted facts as true.[42]

[79] I consider my task to be assessing whether the asserted facts can support the existence of the claimed native title rights and interests.[43] To do so the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim.[44] In my view, the factual basis must provide sufficient detail to

[40] *Doepel* [123].
[41] Ibid [16]; *Strickland* [62] approved in *Strickland FC* [88], [89].
[42] *Doepel* [17]; *Gudjala FC* [57], [83].
[43] Ibid.
[44] *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

enable a 'genuine assessment' of whether the three assertions outlined in s 190B(5) are supported by the claimants' factual basis material.[45]

Factual basis for s 190B(5)(a)

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

[80] As summarised in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:[46]

(a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement;[47]

(b) there is an association between the whole group and the area, although not all members must have such association at all times;[48] 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'.[49]

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

[81] The applicant has provided the following information about the association of members of the claim group, and that of their predecessors, with the application area:

- The application area is located in the western margin of the Great Victoria Desert and the Aboriginal community of Mulga Queen is 10 or 20km from the southern boundary of the application area. No roads traverse the area.[50]
- Several walking and dreaming tracks of the Western Desert Aboriginal people, including the Seven Sisters, run through the application area.[51]
- In 1903, gold was discovered at Mulga Queen, to the immediate south of the claim area and the establishment of pastoral stations in the region of the claim area began in the late 1890s. Stations in the immediate vicinity of the claim area were founded in 1899, 1903, 1916, and 1921.[52]
- At around 1903, travelling Inspectors reported Aboriginal People travelling between Mulga Queen and further east and by 1909, the owner of what became Bandya Station, then called Salt Soak Station and situated to the immediate south of the

[45] *Gudjala FC* [92].
[46] *McLennan* [28].
[47] *Gudjala 2007* [52].
[48] Ibid.
[49] *Martin* [26]; *Corunna* [39].
[50] Report [20], [21], [38].
[51] Ibid [20], [41], [121], [122], [124] – [126], [128] - [131].
[52] Ibid [29], [30].

application area, was in communication to the Chief Protector of Aborigines about providing rations to a 'large number of Natives'.[53]

- Of relevance to the association of the apical ancestors identified in Schedule A [2] and their descendants, the factual basis includes the following information:

    - The parents of Mindi, Lumi, Tommy, Roy, Coral, Mary and Elsie Chapman - *Walaianga* and *Tjiku Tjiku* – were recorded at Mulga Queen at 1953 and as being 50-55 years and 35-40 years old respectively. They moved to the area of Mulga Queen when *Tjiku Tjiku* was a young woman and Mindi Chapman was a baby. In Mindi Chapman's childhood the family walked and camped in the application area. Coral Chapman was born around 5km south of the southern border of the application area. She and other members of the Chapman family taught Coral's grandson about the application area and the rockholes and places in it. Some of the children of Elsie Chapman were born at Mulga Queen and visited the application area in their youth. Several Chapman family members were recorded as informants for registering Aboriginal heritage sites within the application area and regional elders stated that the Chapman and Murphy families are 'for' the Mulga Queen area.[54]

    - The mother of *Kujikari*/Mary Walker/MacArthur, Claudie Walker, Paddy Walker, and *Pukungka*/ Dolly Walker/Muir was *Maraputa*/Jenny Jones, who was recorded as a 45-50 year old woman in Mulga Queen in 1953. Based on the birthplace of her children, she resettled to the Goldfields area between 1920 and 1928. After relocating to the vicinity of the application area she was given rights to look after country at least very near to the application area. These rights and interests were then taken on by people of future generations, who grew up around Mulga Queen and were taught about the country by their ancestors and family. Dolly Walker is noted as a primary informant for a site associated with the Honey Ant dreaming in the southern portions of the claim area. She also visited the application area with her two sons, Kado and Talbot, and told them the stories associated with it. Talbot Muir has been visiting sites in the last 15 years, is passing the stories on to his children and is visiting the application area with them.[55]

    - *Rangka Rangka*, Nellie *Yalanga* and Kitty *Yiningka* lived with their parents in the Mulga Queen area. *Rangka Rangka's* tribal husband, *Kubulthanu / Kubultjanu* / Billy Polak, who was also the tribal husband of *Rangka Rangka's* sister, Nellie/*Yalana*, and his group had adopted this ground when he was a youth and held it throughout tribal fights and disturbances. In 1952 he was recorded as about 65 years of age. The children, grandchildren and great grandchildren of *Rangka Rangka* have lived and camped around Mulga Queen, including into the application area. They have looked after the country and

[53] Ibid [31].
[54] Ibid [217] – [231].
[55] Ibid [232] – [246]; Attachment M.

have knowledge about the country, which was taught to them by 'the old people'. One of them is recorded as one of the informants for registering Aboriginal heritage sites in the south of the claim area, north of Mulga Queen.[56]

- The three brothers *Thatitjarra*/ *Tatitjara*, Longfella Paddy, and Sandy Banks came with several family members to Mulga Queen in the early 1950s to live with their relations. Members of the Banks family lived at Mulga Queen until recently and some members were recorded as informants for heritage sites registered in the vicinity of Mulga Queen and north, which includes the site *Payarri*. The Banks family is considered by regional elders and other claimants to have rights and interests in the Mulga Queen area.[57]

- Topsy Anderson and her mother *Junggudurru* (*Yungkututu* [*Yungkutjuru*] /Kitty Hill) came to live at Mulga Queen in the early 1980s, as her mother was connected to the families living in the vicinity of Mulga Queen. Topsy Anderson was taught the stories for the claim area by the old people and she passed them onto all of her children, even before they lived at Mulga Queen. Her daughters were mostly raised at and around Mulga Queen. Her son visited often and moved to Mulga Queen in the early 2000s, where he still lives and looks after the sites in the application area. He is known for always being in the application area. Topsy Anderson's grandchildren are taught the stories related to sites within the claim area by their parents. Other claimants agree that the descendants of Topsy Anderson are rightfully connected to the application area and hold rights and interests under the WDCB.[58]

- *Nukuwarra* Paddy Bond and his wife *Nyultan* Polly settled in the Goldfields sometime in the late 1920s or early 1930s. Some of their children were born at Mulga Queen, where they lived until the 1950s. The Bond family are considered by other claimants to have rights in the claim area, as their old people had been there. One of their sons appears as an informant for several registered heritage sites in the vicinity of Mulga Queen and north, including in the claim area.[59]

- None of the claimants or their ancestors were born in the application area. The connection to the application area stems from the long-term association of the claimants and their ancestors with the application area, evidenced by their and their forebears' profane and sacred knowledge of the area and the responsibility they take for the country.[60]

[56] Report [38], [247] – [257].
[57] Ibid [258] – [265].
[58] Ibid [175], [272] – [276].
[59] Ibid [266] – [271].
[60] Ibid [206].

- The claimants believe in the *Tjukurrpa* or 'Law' as a shared mythology, one that has been passed down from generation to generation, through to the present day. *Tjukurrpa*, in the form of 'story', 'songlines' or 'tracks' also refers to the accumulated knowledge of one's own country and the social, political, and spiritual values inherent in various locations throughout one's country.[61]

- Knowledge of the application area means for the members of the claim group knowing the tracks and rockholes that lead very near to, and into, the application area from the east.[62] It also includes knowing the *Tjukurrpa*, the seasons, the changes and when to go hunting.[63] This knowledge has been given to the claimants by their ancestors and is taught to their children.[64]

- Closely connected to the knowledge of the application area is caring for it, which includes physically maintaining the claim area through regularly visiting it and cleaning out rockholes, but extends to passing on the mythological and spiritual components of country. This has a religious meaning for the claimants and maintains their connection to the area.[65]

- Many but not all male members of the claim group are initiated men / *wati*.[66]

- Several sites of relevance to the claim group are in different parts of the application area:

    - Rockholes associated to *Collurabbie* in the northern part of the application area;[67]

    - *Payarri* in the southern or mid-west part of the application area;[68]

    - *Kungarra* in the mid-north west of the application area;[69]

    - Crickets in the south west part of the application area;[70]

    - *Yultu* in the southern margins of the application area;

    - Porcupine in the south-western part of the application area;[71]

    - Bridge rockhole in the south east of the application area;[72] and

[61] Ibid [122], [124].
[62] Ibid [209].
[63] Ibid [212].
[64] Ibid [210] et seqq.
[65] Ibid [210], [214].
[66] Ibid [175], [176].
[67] Ibid [227].
[68] Ibid [225], [126].
[69] Ibid [126].
[70] Ibid.
[71] Ibid.
[72] Ibid p.1 Figure 1.

- The Seven Sisters track running in a west - east direction, coming from around Weebo and heading to *Tjirrkarli* through the application area.[73]

- The claimants identify themselves as Western Desert people and native title holders for surrounding areas have been found to be members of the WDCB.[74]

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

[82] Based on the above information provided I am satisfied that the claim group presently has an association with the application area. This connection is both physical and spiritual in nature. Talbot Muir, for example, has been visiting sites in the application area in his childhood and in the last 15 years. Presently he is passing on the dreamtime stories to his children and visiting the country with his children.[75] Similarly the son of Topsy Anderson has been living around Mulga Queen since the early 2000s[76] and is known for always being in the application area.[77] Moreover knowledge of the application area, including stories, songlines and tracks, are passed on from generation to generation and many male members of the claim group have been initiated.

[83] I note, however, that most of the ancestors of the claimants, if not all of them, did not live in or around the application area at the time of sovereignty or European settlement. With pastoral stations being established in the vicinity of the application area in the late 1890s and gold being found at Mulga Queen in 1903, in my view, effective sovereignty for the application area took place around the turn of the century. At that time however, according to the information provided, only *Kubulthanu / Kubultjanu* / Billy Polak could have lived in or around the application area, as he was born around 1888 and adopted the area when he was a youth. An exact date of his movement to the application area was not provided.

[84] Nonetheless, I also note that the claimants are part of the WDCB and I understand that, according to their traditional laws and customs, acquisition of land is not solely the product of transmission through biological descendants but might also be through migration or population shifts and incorporation.[78]

[85] Most, if not all, of the forebears of the claimants moved into the application area or its close vicinity after effective sovereignty using tracks connected to dreamtime stories and known to the WDCB, which the forebears were part of and with whom they shared common traditional laws and customs.[79] Once in the area the forebears adopted the area[80] or were given rights to look after country from the people living there.[81]

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[73] Ibid [129], [133].
[74] Ibid [23], [24].
[75] Attachment M [23] – [26].
[76] Report [274].
[77] Ibid [175].
[78] *De Rose* [345], [346] with approval in *De Rose FC* [54], [259], [268].
[79] Report [207], [41], [24].
[80] Ibid [38], [208].
[81] Ibid [234], [235].

[86] Based on the traditional laws and customs of the WDCB governing land acquisition, I am of the view, that claim group's predecessors have had an association with the area since sovereignty or European settlement.

[87] From the above information, I am also satisfied that the association exists between the whole group and the entire area. The sites and tracks of relevance are spread over the entire application area and in the application there are several examples of claimants having at least a spiritual connection to these sites and some also having a physical connection to them, by visiting and cleaning rockholes. Moreover, some of the claimants have been or are living close to the application area around Mulga Queen.

Decision

[88] In sum, given the information before me, I consider the factual basis provided sufficient to support the assertion described by s 190B(5)(a).

Factual basis for s 190B(5)(b)

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

[89] 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 give 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. I therefore consider it appropriate to apply case law regarding s 223(1)(a) to s 190B(5)(b).

[90] Based on the observations made by the High Court in *Yorta Yorta* I understand 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.[82] In the context of the Act, 'traditional' carries, however, two other elements in its meaning, namely:[83]

> …it 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 [and]
>
> …the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. 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.[84]

[91] In *Warrie*, the Full Federal Court observed that while 'a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character', the Act does not 'require establishment of some overarching 'society' that can only be described in one way and with which members of

[82] *Yorta Yorta* [46].
[83] Ibid.
[84] Ibid [46], [47].

a claim group are forever fixed in relation to any other land and waters over which they assert native title'.[85]

[92] Finally, further guidance for my assessment of the factual basis can be gained from *Gudjala 2009*, in which Dowsett J required:

- that the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;[86]
- that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;[87] and
- that the factual basis contains an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).[88]

[93] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) to require the identification of:

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

[94] In addition to the information summarised above in relation to s 190B(5)(a), the material provides the following information in support of s 190B(5)(b):

- The application area lies within the Western Desert[89] and the Aboriginal inhabitants of the claim area form part of a larger society, known as the WDCB. This was the case at effective sovereignty, and at all times since. The society is underpinned by a traditional body of law and custom, referred to as the *Tjukurrpa*, which gives rise to various rights and interests in land.[90]

[85] *Warrie* [107]; *Alyawarr* [78].
[86] *Gudjala 2009* [37], [52].
[87] Ibid [40].
[88] Ibid [29], [54], [69].
[89] Report [84].
[90] Ibid [102], [104], [106], [108].

- Aboriginal people in the surrounding areas have been recognised as members of the WDCB.[91]

- The members of the WDCB can further be grouped into land-owning units, land-using units, and at other times be grouped according to religious units or grouped according to 'dialectical unit', groups speaking a particular dialect of the more common (unnamed) Western Desert Language. Neither of these four groupings necessarily take precedence over the others and one might be a member of one group without being a member of another group.[92]

- The characteristic sociocultural features of the Aboriginal peoples comprising the WDCB include acknowledgement and observance of a common mythology known as the *Tjukurrpa,* from which a shared body of law and custom originates.[93] The claimants share this belief, which provides them with a set of normative rules for social practice.[94]

- The *Tjukurrpa* informed present day practices, including how to prepare food, name children, interact socially, look after and manage the country, and how to participate in the religious domain. Moreover rites and practices associated with death of a member, the section or 'skin' system and the principles of land ownership have their origins in the *Tjukurrpa.*[95]

- Non observance of the rules and customs and non-fulfilment of responsibilities regarding the country has consequences on a spiritual and non-spiritual level, including physical punishment.[96]

- *Tjukurrpa*, in the form of 'story' or 'songline' or 'track', also refers to the accumulated knowledge of one's own country and the social, political, and spiritual values inherent in various locations throughout one's country.[97]

- The *Tjukurrpa* is a traditional belief, one that has been passed down from generation to generation, through to the present-day.[98] Examples for such a transfer of knowledge, customs and law include:

    - Coral Chapman's grandson was taught about the *Tjukurrpa* stories for the area by his uncle, the ancestor Mindi Chapman;[99] Mindi Chapman also showed the rockholes to other claimants and taught them the stories associated with them;[100]

[91] Ibid [87] – [97], [102], [103], [106].
[92] Ibid [117].
[93] Ibid [119], [120].
[94] Ibid [120], [130].
[95] Ibid [120], [121], [138], [145], [150], [158], [188], [204].
[96] Ibid [139], [141], [172]; Attachment M [34].
[97] Report [124].
[98] Ibid [122], [125], [128], [137].
[99] Ibid [125], [213].
[100] Ibid [211].

- The ancestor Topsy Anderson was taught *Tjukurrpa* stories for the area by old people and passed them on to her daughter, when going on day trips to the application area;[101]
- A son of the ancestor Elsie Chapman explained that, when going out hunting and camping, it was necessary to take an old person with him so the younger generation could be taught about the preparation of food;[102] he was also told by his father to be initiated and become a wati so that the Law is passed on to the next generation;[103]
- The grandchildren of *Rangka Rangka* were taught about the area by 'all the old people';[104]
- Kado Muir is showing the application area to his children, when visiting the area and maintaining sites.[105]

- The claimants do not use a single language group identity but rather use the following language identifiers, all of which are recognised dialects of the Western Desert Language: *Mantjintjarra*, *Ngalia*, *Martu*, and *Wangkayi*.[106]

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

[95] Based on the information provided, it is my understanding that the application area is situated within the Western Desert and that at pre-sovereignty the application area was inhabited by members of the WDCB. The apical ancestors of the claimants, who were also members of the WDCB, adopted the application area, after they had moved there, through incorporation or long association. Both forms of land ownership are accepted by the rules of the WDCB, which the present claimants are also members of.

[96] The WDCB is grouped into smaller units according to language, religion, land-use or land-ownership, but is characterised by a common set of customs and laws, which have their foundation in the *Tjukurrpa*. I note that Lindgren J accepted in *Harrington-Smith No 5* that traditional laws and customs of a claim group might also be the traditional laws and customs of a wider population, without that wider population being a part of the claim group.[107]

[97] These customs and laws regulate different aspects of sociocultural life, such as how to prepare food, name children, interact socially, look after and manage the country, or land ownership. They also have a normative character as none observance of these rules will have consequences, on a spiritual as well as a non-spiritual level.

[101] Ibid [128], [274].
[102] Ibid [141].
[103] Ibid [172].
[104] Ibid [253], [255].
[105] Attachment M [25], [26], [33].
[106] Ibid [183].
[107] *Harrington-Smith No 5* [53].

[98] The *Tjukurrpa* and the corresponding stories, songlines, tracks, customs and laws, which existed pre-sovereignty, have been passed on from generation to generation up to the claimants, which still adhere to the laws and know the stories, songlines and tracks. The material entails ample examples of members of the younger generation being taught by elders about songlines, tracks and customs. This includes going to the application area together and being shown the tracks and important places as well as how to prepare food and take care of the country.[108] For male members being taught about country and being initiated is described as graduating.[109] The ancestors named in the application have learned the stories and songlines from the forebears, who reach back to the time of effective sovereignty.

[99] It is therefore my view that the factual basis is sufficient to demonstrate that the ancestors of the claimants are linked to the members of the WDCB that lived in the application area at the time of pre-sovereignty and to the WDCB as such. This link also exists to the claimants, who observe a set of normative rules, which have been passed on to them through their ancestors from the ancestors' forebears. In my view these rules have not merely been passed on to the claimants by word of mouth but were taught and experienced by them, when going to the bush together. I therefore consider the laws and customs currently observed and acknowledged as 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of effective sovereignty.

Decision

[100] I am satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(b).

Factual basis for s 190B(5)(c)

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

[101] Section 190B(5)(c) is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[102] Meeting the requirements rely on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.[110] 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.[111]

[103] Based on *Gudjala 2009* it is my understanding that, if the claimant's factual basis relied upon the drawing of inferences, '[c]lear evidence of a pre-sovereignty society and its laws and

[108] Report [122], [125], [128], [137], [141], [211] – [215].
[109] Ibid [175], [306].
[110] *Martin* [29].
[111] *Gudjala 2007* [82].

customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'.[112]

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

[104] It is my view that there is a sufficient factual basis for the assertion that the laws and customs have continued to be observed by the claim group, substantially uninterrupted, since at least the time of settlement in the application area.

[105] As outlined in my reasons regarding s 190B(5)(b), the applicant has identified the WDCB as the relevant pre-sovereignty society and outlined some facts in relation to that society, in particular regarding their belief system and the customs and laws based on that belief. Moreover examples of observance and acknowledgement of these customs and laws by previous generations and the present claim group have been provided, such as:

- The singing and knowledge of songlines and dreamtime stories, which are passed on from generation to generation;[113]
- Rules governing the preparation and sharing of food;[114]
- The naming of children;[115]
- The relevance of the skin system for marriage;[116] and
- Initiation of male members of the claim group.[117]

Decision

[106] I am therefore satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(c).

Conclusion

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

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

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

[108] 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. If a claim is arguable on its face, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a

[112] *Gudjala 2009* [33].
[113] Report [122], [125], [128], [137], [211] – [216].
[114] Ibid [139] – [144].
[115] Ibid [146] – [149]; Attachment M [11] - [13].
[116] Report [164] – [166].
[117] Ibid [172], [175].

prima facie basis.[118] The assessment requires, however, some weighing of the factual basis and imposes a more onerous test to be applied to the individual rights and interests claimed than s 190B(5).[119]

[109] I understand that, when assessing the requirements of s 190B(6), I am permitted to consider material beyond the application.[120]

[110] I note that a claimed native title right or interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.[121]

[111] I also understand the 'critical threshold question' for recognition of a native title right or interest under the Act to be 'whether it is a right or interest "in relation to" land or waters'.[122] The phrase 'in relation to' is however 'of wide import'.[123]

[112] Taking into account the definition of 'native title rights and interests' in s 223(1),[124] it is my view that under s 190B(6) I must consider whether, prima facie, the individual rights and interests claimed:

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

[113] Only those rights and interests that I consider to be established prima facie will be entered on the Register.[125]

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

2. Where native title rights and interests have been partially extinguished, the applicant claims the following non-exclusive native title rights and interests:

b) the right to access and use the area;
c) live on, camp, erect shelters and other structures and to travel over and visit;
d) the right to maintain and look after physical aspects of the area, including burning;
e) the right to look after spiritual and sacred aspects of the area, including cleaning and protecting sites of significance and the management of water resources in the area;
f) the right to hunt, gather, and take resources; and
g) the right to pass on traditional knowledge of and stories about the area.

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[118] *Doepel* [135].
[119] Ibid [127], [132].
[120] Ibid [16].
[121] *Yorta Yorta* [86]; *Gudjala 2007* [86].
[122] *Ward HC* [577].
[123] *Alyawarr* [93].
[124] *Gudjala 2007* [85].
[125] Section 186(1)(g).

[114] In regards to these non-exclusive rights claimed by the applicant, I note that, as already outlined under s 190B(5), there are a number of examples in the material of claim group members, past and present, accessing and moving about the application area for various activities, including camping, hunting, gathering resources, cleaning rockholes as well as teaching stories and songs.[126] The material also entails examples for how the traditional laws and customs impact how prey is prepared and shared.[127]

[115] I therefore consider that, prima facie, these rights exist under traditional laws and customs, are native title rights and relate to the application area. I consider them to be prima facie established.

Which of the claimed native title rights and interests are not 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,

a) 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; and
b) the applicant claims the right to control access to and use of these areas.

[116] I understand that the above claimed right is one of exclusive possession, and for such claims, there is significant judicial guidance. In *Ward HC*, the High Court commented that

> … a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.[128]

[117] In *Griffiths* the Full Court held:

> It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is "their country". 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'. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation.[129]

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[126] Attachment M [26], [28], [29], [31], [33]; Report [128], [137], [139], [141], [209] – [216[, [224], [227], [240], [241], [246], [253], [255], [291], [299].
[127] Report [139] – [144].
[128] *Ward HC* [88].
[129] *Griffiths* [127].

[118] Lastly, in *Sampi* the Court held:

> The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.[130]

[119] I note that in my view, based on *Sampi*, the claimed rights to possess, occupy, use and enjoy (1.a)) and the right to control access to and use (1.b)) are both subsumed in a global right of exclusive possession.

[120] I further note that, as outlined in my considerations regarding s 190B(5), the members of the claim group have a spiritual connection to the application area, which is shown by their knowledge of tracks, songlines and stories. This knowledge of the area is, amongst others, shown by the fact that members of the claim group have acted as informants for registered heritage sites in the application area.[131] Their knowledge of the *Tjukurrpa* for the area brings with it on the one hand a responsibility for the area, i.e. visiting, maintaining and looking after the country, and on the other hand the authority over the songlines, the right to speak for the country and the right to go into the area without requiring permission of someone else.[132] The material also provides examples that some families of the claim group are considered by non-claim group members of the WDCB to speak for the application area.[133]

[121] It is my view, however, that the factual basis is not sufficient to establish prima facie the existence of exclusive native title rights and interests in the application area. I do not consider that the asserted facts establish sufficiently how the native title claim group excludes outsiders from the application area, controls access to the area or that the permission of the claim group is required to access the application area. The material also does not provide that the country would inflict harm upon unauthorised entry.

[122] Even though Talbot Muir stated that the country does not accept everyone but recognises the claimants,[134] there is no information provided about the consequences of non-recognition or what the claimants undertake to control access. Moreover, another claimant stated that

> [w]e share that country, as long as they look after country too. If they didn't look after country we'd tell em 'what's wrong with you?' But really, it's not our people ruining the country, it's the mining company.

[123] Based on the factual basis provided I consider that an exclusive right against the whole world is not prima facie established.

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[130] *Sampi* [1072].
[131] Report [241], [270].
[132] Attachment M [27], [34], [35]; Report [282] – [284], [291], [292], [296], [297].
[133] Report [229], [263].
[134] Attachment M [27], Report [289].

2. Where native title rights and interests have been partially extinguished, the applicant claims the following non-exclusive native title rights and interests:

a) the right to speak for and make decisions about the area;

[124] I note that the Courts have accepted a non-exclusive right to make decisions about the use and enjoyment of the application area in cases where the control is only directed at other Aboriginal people, in particular where the claim group was a subset of a wider society incorporating other groups bound by the same traditional laws and customs.[135] Such a limitation is, however, not included in the right claimed by the claimants.

[125] In my view without such a limitation a non-exclusive right to speak for country cannot exist. Based on *Ward HC*[136] and *Sampi*[137], the right to speak for country is, in common law terms, expressed as the right to possess, occupy, use and enjoy land to the exclusion of all others. Similarly the right to make decisions about an area is part of the global right to exclusive occupation and possession. It is therefore my understanding that an unrestricted non-exclusive right to speak for and make decisions about the area cannot exist, as both rights require the exclusion of all others.

[126] I therefore consider that the claimed non-exclusive right to speak for and make decisions about the area (2.a)) is not prima facie established.

Conclusion

[127] I consider that some of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

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

[128] For the application to meet the requirements of s 190B(7) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done. It is my understanding that the physical connection must be in accordance with the traditional laws and customs of the claim group and that 'traditional' in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.[138]

[129] The applicant states in Schedule M that:

> Payarri people regularly travel across the claim area, undertaking the activities set out in Schedule G above, and visiting and caring for places of significance as taught to them by their ancestors.

[135] *Ward FC* [11]; *De Rose FC No 2* [169], [170]; *Alyawarr* [151].
[136] *Ward HC* [88].
[137] *Sampi* [1072].
[138] *Gudjala 2009* [84]; *Yorta Yorta* [86].

[130] In addition, Attachment M provides details of the physical connection of Talbot Muir, a member of the claim group and of the applicant. According to his affidavit, he visited sites in the application area with his mother and brother in the 1970s and for the last 15 years he has spent a lot of time visiting sites in the application area.[139] He has also shown the country to his daughter and wife and passed on dreamtime stories to his children.[140] He states that he is accepted by the country, and does not need permission to go and/or hunt there.[141] He hunts in the application area as well as cuts wood for spears.[142] He has a responsibility for the area and that is why he visits it and cleans rockholes.[143] Finally he asserts that he can speak for his country, as it was the country of his ancestors and the stories and the authority over the songlines has been given to him.[144]

[131] I consider that Attachment M entails relevant information that describes a physical association of Talbot Muir with the application area. Based on my considerations regarding s 190B(5)(b) I also consider this connection to be 'traditional' in the sense required by s 190B(7).

[132] Given the above, and considering all of the information provided within the application, I am satisfied that at least one member of the native title claim group currently has a traditional physical connection with the land or waters within the application area.

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

[133] In my view the application does not offend the provisions of ss 61A(1)–(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	**Information addressing requirement**	**Result**
Section 61A(1) No native title determination application if approved determination of native title	Geospatial report, Tribunal's geospatial database	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraph 4(a) – (d)	Met
Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule E, paragraph 1	Met

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

[134] In my view the application does not offend the provisions of ss 190B(9)(a)–(c) and therefore the application meets the condition of s 190B(9):

[139] Attachment M [6], [23], [24].
Ibid [25], [28].
[140] Ibid [25], [28].
[141] Ibid [27], [28].
[142] Ibid [28], [31].
[143] Ibid [32] – [34].
[144] Ibid [35].

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 4(e) and (f)	Met

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Kado Muir & Ors on behalf of the Payarri People and State of Western Australia
NNTT No.	WC2022/002
Federal Court of Australia No.	WAD56/2022

Section 186(1): Mandatory information

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

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

23 March 2022

Date application entered on Register:

23 September 2022

Applicant:

As appears on the extract from the Schedule of Native Title Applications

Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

Conditions on Applicant's authority

The claim group's authorisation of the Applicant is not unlimited and has conditions. The Applicant cannot do any of the following without first obtaining a resolution of the claim group specifically authorising the Applicant to:

1. make any decisions that extinguish or surrender native title rights and interests (like entering into certain types of agreements);

2. change the solicitor for the Applicant (and the claim group) in the native title proceedings;

3. approve any consent determination in the native title proceedings;

4. change the membership of the Applicant; or

5. change the boundaries of the claim area or the membership of the claim group.

Except for those things listed above, the Applicant is authorised to deal with all matters arising in relation to the claim.

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications but under 3. move 'and' in same line as (c); under 4. move 'and' in same line as (a)iii) and 'or' in same line as (f)ii)(D).

Persons claiming to hold native title:

As appears on the extract from the Schedule of Native Title Applications

Registered native title rights and interests:

As appears on the extract from the Schedule of Native Title Applications but delete:

'1. Where there has been no extinguishment of native title rights and interests, or where any extinguishment must be disregarded,

a) 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; and

b) the applicant claims the right to control access to and use of these areas.'

and

'2)a) the right to speak for and make decisions about the area;'

_____

Daniel Deibler

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

23 September 2022