



Registration Decision

Application name Walter Palm Island & Ors on behalf of the Manbarra People v
State of Queensland (Manbarra People)
Name of applicant Walter Palm Island, Richard Cassady, Alma Major
Federal Court of Australia No. QUD331/2022
NNTT No. QC2022/003
Date of Decision 14 March 2023

Claim accepted for registration

I have decided that the claim in the Manbarra People 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.

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*)
Bell v Native Title Registrar [2021] FCA 229 (*Bell*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
Evans v Native Title Registrar [2004] FCA 1070 (*Evans*)
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] FCAFC 157 (*Gudjala FC*)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)
Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (*Harrington-Smith*)
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] HCA 58 (*Yorta Yorta*)
Moran v Minister for Land & Water Conservation for New South Wales [1999] FCA 1637 (*Moran*)
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] FCA 1384 (*Doepel*)
Risk v National Native Title Tribunal [2000] FCA 1589 (*Risk*)
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*)
Wakaman People #2 v Native Title Registrar [2006] FCA 1198 (*Wakaman*)
Western Australia v Native Title Registrar [1999] FCA 1591 (*WA v NTR*)
Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)
Western Australia v Ward [2002] HCA 28 (*Ward HC*)

BACKGROUND

- [1] This is an amended application filed on behalf of the Manbarra People native title claim group (the claim group). It covers land and waters of about 5,498 sq km around Palm Island, about 30 km north of Townsville.
- [2] The original application was filed on 21 September 2022.
- [3] On 17 January 2023 an amended application was filed with the Federal Court (the Court) and the Registrar of the Court gave a copy of the amended application and accompanying

affidavits to the Native Title Registrar (the Registrar) on the same date 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.²

Registration conditions

- [4] 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.
- [5] 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. Moreover, the original application was never accepted for registration by the Registrar and the application does therefore not meet the requirements of s 190(6A).
- [6] 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 is outlined in Attachment A.

Procedural fairness

- [7] 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.³ 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.⁴ When applying the registration test and making my registration decision I have followed the case law regarding procedural fairness requirements⁵ and note that the following steps were undertaken to ensure procedural fairness has been accorded:
- On 19 January 2023 the Tribunal's senior officer for this matter sent a letter to the State of Queensland (the State) informing the State that any submission in relation to the registration of this claim should be provided by 2 February 2023. No submissions were received from the State.
 - The senior officer, also on 19 January 2023, wrote to inform the applicant that any information additional to the application should be provided by 2 February 2023. No additional information was received from the applicant.

² Section 190A(1).

³ *WA v NTR* [37].

⁴ *Hazelbane* [25].

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

[8] This concluded the procedural fairness process.

Information considered

[9] 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’.

[10] I have had regard to information in the application.⁶

[11] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁷

[12] The State has not provided any submissions in relation to the application of the registration test.⁸

[13] I have 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 19 January 2023 (the geospatial report). Moreover, I have conducted my own searches using the Tribunal’s registers and geospatial database.

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

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

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

[15] 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.⁹

Section 61

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Attachments A, R2 to R4, and T	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Attachment A	Met

Section 62

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

⁶ Section 190A(3)(a).

⁷ Section 190A(3)(b).

⁸ Section 190A(3)(c).

⁹ *Doepel* [16], [35]–[39].

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Attachment T	Met
s 62(1)(d)	Section 47C agreement		Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Attachment D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis:	Attachments F, G and T	Met
s 62(2)(f)	Activities	Attachments F, G and T	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met
s 62(2)(i)	Conditions on applicant's authority	Schedule IA	Met

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

- [18] 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.
- [19] The Explanatory Memorandum that accompanied the *Native Title Amendment Bill 1997* provides that the 'Registrar must be satisfied that no member of the claim group for the application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test'.¹⁰ The Explanatory Memorandum further discusses the general discouragement of overlapping claims by members of the same claim group and encouragement of consolidation of such multiple claims into one application.¹¹
- [20] It is therefore my understanding that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied.
- [21] 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).¹²
- [22] The geospatial report advises that no other native title claim applications or determinations fall within the external boundaries of the Manbarra People claim. Using the Tribunal's geospatial database and registers, I have verified this information. I am therefore satisfied that

¹⁰ Explanatory Memorandum 29.25.

¹¹ Ibid 35.38.

¹² *Doepel* [16].

there is no previous application that covered the whole or part of the area covered by the current application.

- [23] 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

- [24] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(b) are met.

What is required to meet this condition?

- [25] I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition of s 190C(4) to be satisfied.
- [26] According to Schedule R (1) the application has been certified. Attachment R1 contains a certificate by the North Queensland Land Council (NQLC). I will therefore consider the requirements of s 190C(4)(a).

Have the requirements of s 190C(4)(a) been met?

- [27] 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’.¹³ 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)’.¹⁴

Appropriate representative body

- [28] The geospatial report states that the claim area falls 100% within the area of NQLC. The certificate in Attachment R stems from NQLC, which is a recognised representative body.
- [29] The certificate is signed by the Chairperson of NQLC. It is my view, based on *Quall*, that a Chair can perform the functions of a representative body based on an instrument of delegation or as an agent.¹⁵
- [30] I am therefore satisfied that NQLC was the relevant representative body for the application area and that it was within its power to issue the certificate.

Requirements of s 203BE

- [31] 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:

¹³ *Doepel* [72], [78], and [80] – [82]; see also *Wakaman* [32].

¹⁴ *Doepel* [80].

¹⁵ *Quall* [48], [63], [93].

- (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).

[32] Subsection (2) states:

A representative body must not certify ... an application for a determination of native title unless it is of the opinion that:

- (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- (aa) any conditions under section 251BA on the authority that relate to the making of the application have been satisfied; and
- (b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Section 203BE(4)(a)

- [33] I note that the certificate includes the statements required by s 203BE(2)(a) and (b). However it does not include a statement to the effect that NQLC is of the opinion that the requirements of subsection (2)(aa) have been met.
- [34] Schedule IA and the section 62 affidavits in Attachment T indicate that there are conditions on the authority of the applicant to make the application and to deal with matters arising in relation to it.
- [35] Therefore, I consider that the certificate by NQLC does not include all the statements required by s 203BE(4)(a).

Section 203BE(4)(b)

- [36] Section 203BE(4)(b) requires the certificate to briefly set out the representative body's reasons for being of the opinion that the requirements in subsection (2) have been met. The certificate does not include any information on the conditions on the authority of the applicant or how these conditions have been satisfied. Given that the reasons are incomplete, the certificate does not briefly set out the reasons as required by s 203BE(4)(b).

Section 203BE(4)(c)

- [37] 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).
- [38] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

- (a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
- (b) minimise the number of applications covering the land or waters.

[39] As mentioned above (see [22]) no other native title claim applications fall within the external boundaries of the current application. I therefore consider that s 203BE(4)(c) is not applicable.

Conclusion

[40] As the certificate of NQLC does neither fulfil the requirements of s 203BE(4)(a) nor s 203BE(4)(b), the certificate does not comply with s 190C(4)(a). I am therefore required to consider whether s 190C(4)(b) is satisfied, i.e. that the applicant is authorised by the rest of the native title claim group.

Have the requirements of s 190C(4)(b) been met?

[41] Section 190C(4)(b) provides that the Registrar must be satisfied that the following requirements, which are mentioned in subsection (4AA), are met:

- the applicant is a member of the native title claim group;
- the applicant is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group; and
- if there are any conditions under s 251BA on the authority that relate to the making of the application, then those conditions must be satisfied.

[42] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b).

[43] I will therefore consider s 190C(5) before turning to the requirements in s 190C(4)(b).

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

[44] Section 190C(5) requires that the application:

- (a) includes a statement to the effect that the requirements mentioned in subsection (4AA) have been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that they have been met.

[45] I am satisfied that Schedule R, Attachments R and T include statements to the effect that the requirements in s 190C(4AA) have been met and contain an outline of the grounds on which the applicant considers the Registrar should be satisfied in this regard.

[46] I will assess whether the material provided addresses those requirements below.

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

[47] It is my understanding that s 190C(4)(b):

- Requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which ‘clearly ... involves some inquiry through the material available ... to see if the necessary authorisation has been given’;¹⁶
- Requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group;¹⁷
- Is not ‘to be met by formulaic statements in or in support of applications’;¹⁸
- Does not permit a claim group to choose between the two decision-making processes described in s 251B, and therefore if there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group.¹⁹

What information has been provided in support of this condition?

[48] The following information is included in the application:

- A consultant anthropologist started researching the claim in 2018;²⁰
- On 27 June 2022 a senior legal administration officer from NQLC emailed notices for community and authorisation meetings to those Manbarra People with an email address on NQLC’s traditional owners contacts database;²¹
- On 28 June 2022 NQLC mailed notices for community and authorisation meetings to all Manbarra People on NQLC’s traditional owners contacts database;²²
- A notice for the community and authorisation meetings was published on 1 July 2022 in the Daily Mercury and on 2 July 2022 in the Townsville Bulletin;²³
- The notices included the purpose of the meetings, a description of the claim group, a map of the proposed application area, and the date, time and location of the meetings. The Manbarra People, as described in the claim group description, were invited. In the public notice it was stated that the meetings would be very important for people who assert native title over the application area;²⁴

¹⁶ *Doepel* [78].

¹⁷ *Wiri People* [21], [29], [35]; *Risk* [60].

¹⁸ *Strickland* [57].

¹⁹ *Harrington-Smith* [1230]; *Evans* [7].

²⁰ Attachment R1 p. 1.

²¹ Attachment R6 [3].

²² Attachment R1 p. 1; Attachment R6 [4]; Attachment T Affidavit CAT [11].

²³ Attachment R5; Attachment T Affidavit CAT [12].

²⁴ Attachment R5; Attachment R6 Annexures SWH01, SWH02.

- On 27 July 2022 a community meeting took place in Townsville and the research findings of the consultant anthropologist as well as the claim group description were presented and discussed;²⁵
- On 28 July 2022 an authorisation meeting took place in Townsville, where NQLC explained a number of proposed authorisation decisions and the reasons for them. Attendees were provided with maps and information and a discussion took place within the claim group;²⁶
- At the authorisation meeting a traditional decision-making process was used, where the Manbarra People acknowledged the importance of and respect for Elders, the senior knowledge holders/Elders are deferred to and discussions are held with the Manbarra People present. Once the discussions have been held decisions are made by the Elders and by consensus, with one particular Elder having the final say on the authorisation of the application;²⁷
- The traditional decision-making process has to be complied with to authorise native title applications or to authorise or replace the applicant;²⁸
- 27 Manbarra People attended the authorisation meeting in person and three persons via Teams. Their attendance was registered and their details checked against the contact register held by NQLC;²⁹
- At the authorisation meeting the Manbarra People passed the following relevant resolutions:³⁰
 - In Resolution 1 the Manbarra People confirmed that there was a mandatory traditional decision-making process;
 - Resolution 6 confirmed the claim group description;
 - Resolution 7 confirmed the application area;
 - Resolution 8 authorised the applicant to make the application and deal with all matters arising in relation to the claim;
 - In Resolution 8(a) the persons comprising the applicant were determined;
 - Resolutions 8(b), 11 and 15 placed certain conditions on the authority of the applicant.

²⁵ Attachment R1 p. 1, Attachment R2, R3, R4 [9], Attachment T Affidavit CAT [8] – [9]; I note that Part A (2) dates the community meeting incorrectly on 28 July 2022.

²⁶ Attachment R1 p. 1, Attachment R2, R3, R4 [9]; Attachment T Affidavit CAT [10]; I note that Part A (2) dates the authorisation meeting incorrectly on 29 July 2022.

²⁷ Attachment R2, R3, R4 [7], Attachment T Affidavits WPI2, RC, AM [5].

²⁸ Attachment T Affidavits WPI2, RC, AM [4].

²⁹ Attachment T Affidavit CAT [17] – [18].

³⁰ Attachment T Annexure CAT02

Consideration

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

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

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

[51] Schedule R (2) and the section 62 affidavits indicate that the persons comprising the applicant are members of the native title claim group.³¹ I have not been provided with any material that contradicts this statement. It follows that I am satisfied that the persons who comprise the applicant are members of the native title claim group.

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

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

What decision-making process has been identified?

[53] Section 251B stipulates two distinct decision-making processes, namely:

- (a) a process that is mandated by traditional laws and customs; and
- (b) a process that has been agreed to and adopted by the native title claim group.

[54] Part A(2), Attachment R1 and the section 62 affidavits indicate that a mandatory traditional decision-making process was used to authorise the applicant.³² Therefore, I will consider the applicant's material in light of the requirements of s 251B(a).

How has the decision-making process been applied?

[55] In regard to a traditional decision-making process that vested authority in the Elders of a claim group, I note that French J stated in *Strickland* that neither the Registrar nor the Court is in a position to reject the contention that all relevant authority is vested in the Elders of the relevant native title claim group.³³ However, his Honour also said that the authorisation requirement is a matter of considerable importance and fundamental to the legitimacy of native title determination applications, which acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications.³⁴

³¹ Attachments R2, R3, R4 [6]; Attachment T Affidavits WPI1, WPI2, RC, AM [1]

³² Attachment R1 p. 1; Attachments R2, R3, R4 [7]; Attachment T Affidavits WPI2, RC, AM [4] – [5].

³³ *Strickland* [57], approved in *Strickland FC* [77].

³⁴ *Ibid.*

- [56] In *Moran*, Wilcox J stated that s 251B permitted a decision by a representative or other collective body that exercises authority on behalf of the group under customary law.³⁵ His Honour stated however, that ‘a person who wishes to rely on a decision by a representative or other collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body’s authority to make decisions binding the members of the group and that the body has authorised the making of the application’.³⁶ His Honour considered the evidence in the matter before him and found that there was ‘no evidence of the existence of a Council of Elders, its membership or its powers’ nor ‘evidence as to the composition of any group of people represented by any such Council’.³⁷
- [57] I note that the notice clearly stated the purpose of the meetings, included the date, time and location of the meetings and invited Manbarra People to attend. In addition, the application area was shown on a map in the notice. The notice was published in two newspapers and sent to Manbarra People known to NQLC.
- [58] I also note that the attendees of the community meeting on 27 July 2022 were presented with anthropological research and had an opportunity to discuss it as well as the claim group description.
- [59] It is my understanding that the Manbarra People attending the authorisation meeting unanimously agreed that a mandatory traditional decision-making process existed, which gave the power of decision to Manbarra Elders present and the final say to one Elder in particular. I am therefore satisfied that the authority of Manbarra Elders for a decision to authorise a native title claim application is recognised by the claim group and that a traditional decision-making process existed that vested authority in the Elders.
- [60] I also note that the traditional decision-making process has to be complied with to authorise native title applications or to authorise an applicant. Therefore the Elders have the authority to authorise the application and the applicant.
- [61] Based on the provided information – in particular the resolutions passed - I am also satisfied that the Elders and therefore the Manbarra People authorised the application and the applicant to make the application.

Have any conditions been satisfied?

- [62] The last limb of s 190C(4AA) requires that if there are any conditions under s 251BA on the authority that relate to the making of the application, they have been satisfied.
- [63] The section 62 affidavits indicate that the conditions on the authority have been satisfied.³⁸ I have not been provided with any material that contradicts these statements. It follows that I am satisfied that the conditions have been satisfied.

³⁵ *Moran* [34].

³⁶ *Ibid.*

³⁷ *Ibid* [35].

³⁸ Attachment T Affidavits WPI2, RC, AM [6] – [7].

Decision

[64] I consider that the claim group used a mandatory traditional decision-making to authorise the applicant by all members of the claim group to make the application and to deal with matters arising in relation to it. I am satisfied that all conditions on the authority of the applicant that relate to the making of an application have been satisfied. It follows that I am satisfied that the condition at s 190C(4)(b) is met.

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

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

[65] 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.

[66] Schedule B refers to Attachment B and lists general exclusions.

[67] Attachment B describes the application area as all the land and waters within an external boundary defined by the 200m ocean depth contour, Cordelia Rocks, reef formations, and coordinate points. Attachment B specifically excludes Cordelia Rocks and Pandora Reef and a 100m buffer around those features.

[68] Schedule C refers to Attachment C, which contains a map, titled 'Manbarra People' and dated 9 August 2022. The map includes:

- The application area depicted by bold dark blue outline;
- The 200m depth contour depicted by dashed yellow line, labelled;
- Pandora reef and Cordelia Rocks shown and labelled;
- Selected reefs identified and labelled;
- Topographic background;
- Scalebar, coordinate grid, and
- Notes relating to the source, currency and datum of data used to prepare the map.

[69] 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

[70] For the reasons below, I am satisfied the claim meets the requirements of s 190B(3).

[71] 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.

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

- I am required to address only the content of the application;³⁹
- Section 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification';⁴⁰
- 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';⁴¹
- 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';⁴²
- 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'.⁴³

[73] Attachment A provides that:

The Manbarra native title claim group is comprised of the biological or adoptive descendants (in accordance with traditional laws and customs) of the following apical ancestors:

[list of named ancestors]

[74] I note that neither Schedule A nor Attachment A 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.

[75] I understand that members of the claim group are the biological descendants of the named apical ancestors. I further understand that the claim group description also provides for adoption in accordance with the traditional laws and customs.

[76] 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

³⁹ *Doepel* [16], [51].

⁴⁰ *Gudjala 2007* [33].

⁴¹ *Doepel* [37].

⁴² *Gudjala 2007* [34].

⁴³ *WA v NTR* [67].

previously accepted by the Courts.⁴⁴ I consider that factual enquiries would lead to the identification of the people who meet this criterion.

- [77] 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

- [78] 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.⁴⁵ However, this does not mean that rights broadly described cannot readily be identified within the meaning of s 190B(4).⁴⁶
- [79] 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’.
- [80] When assessing whether the claimed native title rights and interests are readily identified, I am confined to the material contained in the application itself.⁴⁷ 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.
- [81] Schedule E contains a description of the claimed native title rights and interests. Having considered the description, 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

- [82] 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

⁴⁴ Ibid.

⁴⁵ *Doepel* [99], [123].

⁴⁶ *Strickland* [60].

⁴⁷ *Doepel* [16].

- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[83] 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).⁴⁸ Moreover, I must treat the asserted facts as true.⁴⁹

[84] I consider my task to be assessing whether the asserted facts can support the existence of the claimed native title rights and interests.⁵⁰ 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.⁵¹ In my view, the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the three assertions outlined in s 190B(5) are supported by the claimants' factual basis material.⁵²

[85] I note that the relevant information is set out in Attachments A, F, G and T.

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

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

[86] As summarised in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:⁵³

- (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 effective sovereignty;⁵⁴
- (b) there is an association between the whole group and the area, although not all members must have such association at all times;⁵⁵ 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'.⁵⁶

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

[87] The applicant has provided the following relevant information in regard to s 190B(5)(a):

- Archaeological excavations have provided evidence of occupation of the application area for at least 4,000 years,⁵⁷ early seaborne explorers observed the application area

⁴⁸ *Doepel* [16]; *Strickland* [62] approved in *Strickland FC* [88] – [89].

⁴⁹ *Doepel* [17]; *Gudjala FC* [57], [83].

⁵⁰ *Ibid*

⁵¹ *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

⁵² *Gudjala FC* [92].

⁵³ *McLennan* [28].

⁵⁴ *Gudjala 2007* [52].

⁵⁵ *Ibid*.

⁵⁶ *Martin* [26]; *Corunna* [39].

⁵⁷ Attachment F [9], [12].

being inhabited from 1770 and accounts from European settlers (1860s – 1938) tell of using animals and other materials for subsistence and for exchange;⁵⁸

- Early amateur ethnographic records from 1864 recorded ceremonial gatherings, social and economic interactions between the groups of the region, including people from Palm Island. The amateur ethnographer also recorded ‘The Great Flood story’ in the late 1860s, which is known to and recounted by Manbarra claimants;⁵⁹
- Historical accounts recount the recollections of a Manbarra man, the probable father of an apical ancestor and resident of Great Palm Island, who recalled lighting a signal fire as a signal to invite neighbours and battles with ‘invading’ Aboriginal people from the mainland in the 1860s and 1870s;⁶⁰
- According to records from 1898, 50 men from Palm Island attended a bora on the mainland in 1881. In the records the name of Palm Island in the Manbarra language is used;⁶¹
- In 1916, 23 persons were removed from the Palm Islands to an aboriginal mission settlement on the mainland. As the mission was destroyed by a cyclone two years later Palm Island became a government Aboriginal settlement and people were returned to Manbarra country. Residing at the settlement on Palm Island allowed many Manbarra claimants to maintain access to their traditional lands and practice their traditional laws and customs while on country;⁶²
- The term Manbarra was first recorded in 1932 by an Anglican missionary in his book. In his book he associated the Manbarra People with Palm Island;⁶³
- Manbarra claimants identify with the Manbarra language, which is associated with the application area. Manbarra language names exist for places located throughout the Manbarra country;⁶⁴
- According to linguistic research Manbarra People used to speak two different languages/dialects – Mulgu and Buluguyban – with the first being extinct by 1970;⁶⁵
- The Manbarra application area is acknowledged by neighbouring groups as being the traditional land and waters of the Manbarra People;⁶⁶
- Manbarra claimants continue to live in and around the application area, including on Palm Island;⁶⁷

⁵⁸ Ibid [11], [13].

⁵⁹ Ibid [14].

⁶⁰ Ibid [26].

⁶¹ Ibid [15].

⁶² Ibid [20].

⁶³ Ibid [17].

⁶⁴ Ibid [7].

⁶⁵ Ibid [18] – [19].

⁶⁶ Ibid [8].

⁶⁷ Ibid [20].

- The father of one claimant was born in 1920 on Great Palm Island and the five siblings of his father were also born on Great Palm Island in the early 1900s. His grandfather was recorded by Norman Tindale as being born on Palm Island in 1886 as the child of two apical ancestors. His grandmother is also an apical ancestor;⁶⁸
- The above mentioned grandfather spoke and taught Manbarra language;⁶⁹
- Another claimant was born and grew up on the mainland but currently resides on Palm Island. He is the grandson of an apical ancestor, who was likely born on Great Palm Island before 1876 and lived at a camp on Orpheus Island throughout her life;⁷⁰
- The grandfather of another claimant was born around 1886 on Great Palm Island. The grandfather is an apical ancestor;⁷¹
- Several ‘initiation sites’ are in the application area;⁷²
- Connection to the application area is spiritually underpinned by three creation stories and several myths about the creation of particular sacred sites;⁷³
- Manbarra People, who pass away, become part of the land and waters and their spirits stay on Manbarra country;⁷⁴
- Claimants conduct ‘Welcomes to Country’ and smoking ceremonies;⁷⁵
- Since the 1960s Manbarra People have actively opposed development on Manbarra country which may impact significant Manbarra places, entered into ILUAs and participated in cultural heritage surveys;⁷⁶

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

[88] Based on the above information provided I am satisfied the factual basis is sufficient to support the assertion that the claim group presently has an association with the application area. The claimants continue to live in and around the application area and the factual basis material includes examples of claimants being born in the application area.

[89] The factual basis also provides for an association with the application area of the apical ancestors and predecessors of the claimants. Aboriginal people have been recorded as inhabitants of the application area since 1770 and the Manbarra language and the Manbarra People have been recorded as connected with the area since European settlement. In addition, the factual basis material outlines that apical ancestors and the father of one apical ancestor were born or lived in the application area. The years of birth recorded for some of

⁶⁸ Attachment F [36] – [37], Attachment T Affidavit WPI1 [4].

⁶⁹ Attachment F [39].

⁷⁰ Ibid [51].

⁷¹ Ibid [56].

⁷² Ibid [58].

⁷³ Ibid [60].

⁷⁴ Attachment T Affidavit WPI1 [6], [39].

⁷⁵ Attachment F [41] – [42].

⁷⁶ Attachment F [47] – [48], [81]; Attachment T Affidavit WPI1 [59].

the apical ancestors dates back prior to effective sovereignty. The information also provides that subsequent generations continued to live in the application area up to the present day claimants.

- [90] I also note that the claimants have, besides the above physical connection, a spiritual connection. They believe in three creation stories, which form the foundation of the application area, and also believe that ancestors, who pass away, become part of the land and waters and that their spirits stay on Manbarra country.
- [91] Furthermore, neighbouring groups acknowledge that the application area is the traditional land and waters of the Manbarra People.
- [92] I must be further satisfied that there is sufficient information to support the assertion of an association between the group and the whole area. I note that the application area consists of several islands with Great Palm Island being the largest. Great Palm Island has been named as a place where apical ancestors, predecessors of claimants and claimants were born and lived. Moreover, one apical ancestor is named as living on a camp on Orpheus Island. I also note that the creation stories concern the entire application area and its creation.
- [93] Based on the factual basis provided, I consider that the information is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area'. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

Decision

- [94] In sum, given the information before me, I consider the factual basis provided is 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)?

- [95] 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 the case law regarding s 223(1)(a) to s 190B(5)(b).
- [96] 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.⁷⁷ In the context of the Act, 'traditional' carries, however, two other elements in its meaning, namely:⁷⁸

⁷⁷ *Yorta Yorta* [46].

⁷⁸ *Ibid.*

...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.⁷⁹

[97] In *Warrie*, the Full Federal Court observed that while ‘a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character’, the Act does not ‘require establishment of some overarching ‘society’ that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title’.⁸⁰

[98] 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;⁸¹
- 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;⁸² 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).⁸³

[99] 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’.

⁷⁹ Ibid [46] - [47].

⁸⁰ *Warrie* [107]; *Alyawarr* [78].

⁸¹ *Gudjala 2009* [37], [52].

⁸² Ibid [40].

⁸³ Ibid [29], [54], [69].

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

[100] I consider the information extracted above at s 190B(5)(a) also relevant for the assertions at s 190B(5)(b). In addition, the material provides the following relevant information about the assertion at s 190B(5)(b):

- The Manbarra People are part of the Southern Rainforest (*Girringun*) Regional Society and historical information and cultural knowledge shows a close cultural, social and linguistic connection between the people of Palm Islands, Townsville District and Ingham District;⁸⁴
- At the time of effective sovereignty the regional society had a land (and sea) tenure system composed of land and sea owning, exogamous clans that recruit their members by descent through patrification;⁸⁵
- According to Manbarra laws and customs a being of the Creation epoch ‘brought the law’ that created Manbarra country by physically creating the environment and embedding the Manbarra language into the land;⁸⁶
- Manbarra claimants have an intimate and continuing knowledge of the traditional laws and customs that connect them to the land and waters in the application area. This knowledge has been passed down through the generations and taught to them by their grandparents and parents in a continuous chain of knowledge from pre-sovereign times;⁸⁷
- Early explorers and pre-1938 settlers observed manufacturing of a large variety of objects and constructions out of a number of diverse materials sourced from the land and sea;⁸⁸
- In 1897 an ethnographer recorded a system of land tenure which vested ownership of land and sea amongst the occupants of Palm Island, exhibiting the pre-sovereignty practice of patrification;⁸⁹
- Over time, patrification was adapted to become a system of cognatic descent;⁹⁰
- Songs, stories, language and knowledge about country, sacred places, resource use, fishing and hunting are taught and transferred from Manbarra People to Manbarra People, from Elders, grandparents or parents to younger generations;⁹¹

⁸⁴ Attachment F [1].

⁸⁵ Ibid [22].

⁸⁶ Ibid [23].

⁸⁷ Ibid [3], [25].

⁸⁸ Ibid [12], [13].

⁸⁹ Ibid [26], [28].

⁹⁰ Attachment F [29] Attachment T Affidavit WPI1 [26] – [27].

⁹¹ Attachment F [39] – [40], [46], [50], [56] – [57], [67], [74]; Attachment T Affidavit WPI1 [10] – [13], [18] – [19], [21], [26], [29] – [30], [45], [57].

- Current claimants continue to visit, camp, hunt, fish, protect and conserve important places, perform dances and ceremonies;⁹²
- Manbarra People believe that the application area is supernaturally suffused with various spirits, creatures and beings and that therefore laws and customs are required to receive spiritual permission for certain places. Certain places have to be avoided completely or at certain times, things cannot be taken from certain places or songs have to be sung or food has to be offered;⁹³
- Ancestral spirits and creation being punish non-sanctioned users of the application area;⁹⁴
- In the past, requesting permission to access country was achieved through the use of a message stick and the lighting of signal fires. Current claimants continue to assert the need for non-Manbarra People to seek permission to access places or when necessary be accompanied or guided. In the past trespassers would be speared but now trespassers can get very sick or will be hurt by ancestors.⁹⁵

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

[101] Based on the information provided it is my understanding that the Manbarra People are part of a wider regional society, namely the Southern Rainforest (Girringun) Regional Society, with whom they share a similar system of laws and customs. In this regard, 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.⁹⁶

[102] I also note that some of the apical ancestors or their parents were alive at the time of effective sovereignty and would have shared those laws and customs of the wider society.

[103] One set of laws of that regional society concerned land tenure, according to which land- and sea owning, exogamous clans held rights in particular areas and recruited their members by descent through patrification

[104] The factual basis further provides that this system of land tenure is still acknowledged and observed by the current claimants, even though in an adapted form. The membership system of the land-owning group today is defined by cognatic descents.

[105] The claimants are the descendants of the apical ancestors, who were members of the wider regional society at effective sovereignty. Some of the predecessors of the claimants lived in the claim area. The land-holding rights of the descendants of the apical ancestors are recognised in the general region.

⁹² Attachment F [51], [53], [59] Attachment T Affidavit WPI1 [22] [46], [49], [51] – [52].

⁹³ Attachment F [73] Attachment T Affidavit WPI1 [43] – [44], [50], [52] – [53].

⁹⁴ Attachment F [75], [77].

⁹⁵ Attachment F [79] Attachment T Affidavit WPI1 [32] – [35].

⁹⁶ *Harrington-Smith No 5* [53].

- [106] The current claimants further observe and acknowledge other laws and customs. Restrictions concern, for example, different places in the claim area. The laws and customs identify some places as no go areas and some as only being approachable after a certain cultural protocol has been fulfilled. It is my understanding that these restrictions are based on the presence of various spirits, creatures and beings. It is also my understanding that these customs and laws have a normative character as non-observance of these rules will have consequences on a spiritual level as well as physical level. I also note that these restrictions were strictly enforced by predecessors of the claimants and trespassers would be speared.
- [107] It is also my understanding that Manbarra People at effective sovereignty spoke two dialects/versions of Manbarra language and that claimants continue to speak Manbarra language, even though one dialect/version has been extinct since around 1970.
- [108] Lastly I note that the claimants were taught these rules by their parents, grandparents and other Elders through stories and visiting places and that they transmit their cultural knowledge to their children and grandchildren in the same way. The material provides, for example, that a version of a creation story was recorded in the 1860s and that the same story is still known to current claimants. Given that there have only been a few generations between effective sovereignty and the claimants, I infer the apical ancestors would have observed the same or similar restrictions and customs as the current claimants. It follows, in my view, that the laws and customs currently observed and acknowledged are ‘traditional’ in the *Yorta Yorta* sense as they derive from a society that existed at the time of sovereignty.

Decision

- [109] 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)?

- [110] 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.
- [111] Meeting the requirements relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.⁹⁷ 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 effective sovereignty.⁹⁸
- [112] Based on *Gudjala 2009* it is my understanding that, if the claimant’s factual basis relies upon the drawing of inferences, ‘[c]lear evidence of a pre-sovereignty society and its laws and

⁹⁷ *Martin* [29].

⁹⁸ *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'.⁹⁹

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

[113] 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 effective sovereignty in the application area.

[114] As outlined in my reasons regarding s 190B(5)(b), the applicant has identified the relevant pre-sovereignty society and outlined some facts in relation to that society, in particular regarding their land-holding and membership system and the belief in ancestral spirits and creation being. Moreover examples of observance and acknowledgement of this system and of other customs and laws by the present claim group and their predecessors have been provided, such as speaking Manbarra language, singing songs, conducting ceremonies, hunting, fishing, gathering resources, conserving important places, sharing creation stories, camping, performing dances and adhering to cultural protocols for certain places.¹⁰⁰

[115] The knowledge about country has been transmitted from generation to generation and is still taught to children and grandchildren.¹⁰¹ One of the provided examples of transmission of knowledge from generation to generation concerns for example a creation story that has been recorded in the 1860s and is still known to current claimants.¹⁰² Another example concerns a claimant who was taught about laws, customs and country by 'old Manbarra People' including his father and other Elders, is now considered an Elder himself and has been recognised as the primary 'story holder'.¹⁰³ His brother is recognised as primary 'visual arts story holder'.¹⁰⁴

Decision

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

Conclusion

[117] 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).

⁹⁹ *Gudjala 2009* [33].

¹⁰⁰ Attachment F [39] – [41], [50], [51], [59], [67], [73], [74]; Attachment T Affidavit WPI1 [22], [29], [43] – [46], [49] – [53], [57].

¹⁰¹ Attachment F [39] – [40], [46], [50], [56] – [57], [67], [74]; Attachment T Affidavit WPI1 [10] – [13], [18] – [19], [21], [26], [29] – [30], [45], [57].

¹⁰² Attachment F [14].

¹⁰³ Attachment T Affidavit WPI1 [10] – [13], [17] – [18].

¹⁰⁴ *Ibid* [13].

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

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

[118] 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 prima facie basis.¹⁰⁵ 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).¹⁰⁶

[119] I understand that, when assessing the requirements of s 190B(6), I am permitted to consider material beyond the application.¹⁰⁷

[120] 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.¹⁰⁸

[121] 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’.¹⁰⁹ The phrase ‘in relation to’ is however ‘of wide import’.¹¹⁰

[122] Taking into account the definition of ‘native title rights and interests’ in s 223(1),¹¹¹ 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.

[123] Only those rights and interests that I consider to be established prima facie will be entered on the Register.¹¹²

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

[124] At the outset I note that all the rights and interests claimed in Schedule E are claimed in relation to the application area and are therefore, prima facie, rights or interests ‘in relation to land or waters’. I also consider that Schedule E sufficiently addresses any issue of extinguishment, for the purpose of the test at s 190B(6), since the application differentiates

¹⁰⁵ *Doepel* [135].

¹⁰⁶ *Ibid* [127], [132].

¹⁰⁷ *Ibid* [16].

¹⁰⁸ *Yorta Yorta* [86]; *Gudjala 2007* [86].

¹⁰⁹ *Ward HC* [577].

¹¹⁰ *Alyawarr* [93].

¹¹¹ *Gudjala 2007* [85].

¹¹² Section 186(1)(g).

between rights and interests that are wholly recognisable and that are partially recognisable. Schedule E provides that an exclusive right is only claimed for:

every part of the Claim Area where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded

Possession, occupation, use and enjoyment of the land and waters as against all others

[125] 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.¹¹³

[126] 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.¹¹⁴

[127] 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.¹¹⁵

[128] I note that Manbarra People believe that their connection to the application area is spiritually underpinned by three creation stories and several myths about the creation of particular sacred sites and that ancestors, who pass away, become part of the land and waters and their spirits stay on Manbarra country.¹¹⁶ In addition, Manbarra People believe that the application area is supernaturally suffused with various spirits, creatures and beings and that therefore certain places have to be avoided completely or at certain times, or that songs have to be

¹¹³ *Ward HC* [88].

¹¹⁴ *Griffiths* [127].

¹¹⁵ *Sampi* [1072].

¹¹⁶ Attachment F [60]; Attachment T Affidavit WPI1 [6], [39].

sung or food has to be offered.¹¹⁷ Non compliance with these cultural protocols or trespassing would be punished by the ancestral spirits and creation being.¹¹⁸ Moreover, in the past, trespassers would be speared. Nowadays, claimants continue to assert the need for non-Manbarra People to seek permission to access places or when necessary be accompanied or guided, as trespassers might get very sick or be hurt by ancestors.¹¹⁹

[129] Besides the spiritual harm that might befall trespassers, I note that the provided material also informs of battles in the 1860s and 1870s of Manbarra People with Aboriginal people ‘invading’ from the mainland.¹²⁰ These days Manbarra People are recognised by neighbouring groups as the traditional owners of the application area.¹²¹

[130] In light of the above, I consider that, as pointed out in *Griffiths*, the claimants consider it a spiritual necessity to control access to country because of the harm that the country will inflict upon unauthorised entry. Moreover, I note that the material also refers to battles against invading groups to control access in the past. I am therefore satisfied that an exclusive right against the whole world is prima facie established.

Non-exclusive rights to

(a) have access to, remain on and use the land and waters;

(b) have access to, and take the resources of the land and waters for any purpose;

(c) protect places, areas and things of traditional significance on the land and waters.

[131] As outlined above, the information before me provides that the apical ancestors and their parents lived and camped in the application area and so did some of their descendants and some of the current claimants.¹²² I also note that claimants regularly fish, hunt and collect resources in the application area.¹²³ I further understand that the claimants are involved in cultural heritage surveys and other activities to protect important sites.¹²⁴

[132] It is my view that the factual basis material prima facie establishes that these rights are possessed under the traditional laws and customs of the native title claim group.

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

[133] 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

¹¹⁷ Attachment F [73]; Attachment T Affidavit WPI1 [43] – [44], [50], [52] – [53].

¹¹⁸ Attachment F [75], [77].

¹¹⁹ Attachment F [79]; Attachment T Affidavit WPI1 [32] – [35].

¹²⁰ Attachment F [26].

¹²¹ Attachment F [8].

¹²² Attachment F [20], [36] – [37], [51], [56]; Attachment T Affidavit WPI1 [4].

¹²³ Attachment F [51], [53], [59] Attachment T Affidavit WPI1 [22] [46], [49], [51] – [52].

¹²⁴ Attachment F [47] – [48], [81]; Attachment T Affidavit WPI1 [59].

customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.¹²⁵

[134] The factual basis includes information that describes a traditional physical association of members of the claim group with the application area, including claimants living, camping, fishing, hunting and collecting resources in the application area, protecting places of cultural importance, conducting ceremonies, performing dances and teaching the younger generations about places in the application area and cultural protocol connected to these places.¹²⁶

[135] Given the above 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

[136] In my view the application does not offend any of 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 and registers	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraphs 3 (b), (c)	Met
Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule E, paragraphs 1, 2	Met

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

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

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 3 (d)	Met

End of reasons

¹²⁵ *Gudjala* 2009 [84]; *Yorta Yorta* [86].

¹²⁶ Attachment F [20], [39] – [42], [46], [50] – [51], [53], [56] – [57], [59], [67], [74]; Attachment T Affidavit WPI1 [10] – [13], [18] – [19], [21] – [22], [26], [29] – [30], [45] – [46], [49], [51] – [52], [57].

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Manbarra People
NNTT No.	QC2022/003
Federal Court of Australia No.	QUD331/2022

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:

21 September 2022

Date application entered on Register:

14 March 2023

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

1. The Applicant is to act at all times in the interests of the Manbarra People.
2. The Applicant is to act on the advice of legal representatives.
3. The Applicant can make all decisions by majority.
4. If an Applicant's becomes deceased or is unable or unwilling to continue in the capacity as an Applicant then they will be replaced.
5. If the Applicant's authorized alternative replacement becomes deceased or is unable or unwilling to continue in the capacity as an Applicant, the surviving persons making up the Applicant are authorized as the Applicant.
6. The Applicant is not to engage another solicitor without a resolution being passed at an authorisation meeting.

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications but include at the end:

[A copy of Attachment B and Attachment C are attached to this register extract.]

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:

‘Area covered by native title and who holds the rights

5. Each of the native title rights referred to in paragraph [2] and [4] exist in relation to the whole of each part of the claim area to which those paragraphs respectively apply and is held by the members of the native title claim group subject to and in accordance with traditional law and customs, as further described in paragraphs [2] and [3] in schedule F.

Activities currently carried on

6. Activities in the exercise of the native title rights referred to in Schedule E are all such activities as are contemplated by those rights and interests and include the activities identified in Schedule G.’

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.

14 March 2023