National Native Title Tribunal

Registration test decision

Application name	Yilka #2
Name of applicant	Harvey Murray
NNTT file no.	WC2013/004
Federal Court of Australia file no.	WAD303/2013
Date application made	6 August 2013

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 18 October 2013

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 30 July 2013 and made pursuant to s. 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision not to accept the claim for registration pursuant to s. 190A of the Act.

[2] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Yilka #2 claimant application to the Registrar on 7 August 2013 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

[4] The area covered by this application is approximately 3.55 square kilometers comprising of 3 separate parcels in the Central Desert region of Western Australia. It is wholly overlapped by the registered Yilka native title determination application (WC2008/005—WAD297/2008) and the unregistered Sullivan Edwards native title determination (WC2011/011—WAD498/2011).

Registration test

[5] Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C before turning to questions regarding the merit of that material for the purposes of s. 190B.

[6] Pursuant to ss. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

[7] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I must have regard to, but I may have regard to other information, as I consider appropriate.

[8] I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

[9] In reaching my decision I have considered the following information and documents:

- Yilka #2 native title determination application and accompanying documents and affidavits, as filed in the Court on 6 August 2013;
- the Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis' (the geospatial report) of 12 August 2013, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register of Native Title Claims, Schedule of Applications, Determinations of Native Title, Indigenous Land Use Agreements and s. 29 (future act) notices and equivalent; and
- extract of the Register of Native Title Claims: WC2008/005—Yilka—WAD297/2008.

[10] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act; nor any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

[11] In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[12] It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2). I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

[13] Below I consider each of the particular parts of ss. 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s. 61(1)

[14] The nature of the task at s. 190C(2) is limited to a consideration of whether the application sets out the native title claim group in the terms required by s. 61(1) and as such, the task does not require me to look beyond the contents of the application itself. In assessing the Yilka #2 application, and whether it contains the details and information required by s. 61(1), I am not entitled to undertake a merit assessment to determine if I am satisfied whether the native title claim group described in the application before me is the correct native title claim group. That said, in seeking to verify that an application contains all the details and information required by

ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group' as that term is defined in s. 61(1)—*Doepel* at [35] to [37], [39] and [47].

[15] Schedule A of the application contains a description of the native title claim group as comprising the descendents of eleven decent lines. This is preceded by a description of the content of the traditional laws and customs pertaining to the recognition and identification of members of the group.

[16] There is nothing on the face of the application that leads me to conclude that the description of the native title claim group may exclude any persons from the group. The description does not otherwise indicate that this may be a subgroup of the native title claim group.

[17] The application contains all details and other information required by s. 61(1)

Name and address for service: s. 61(3)

[18] Part B of the application states on page 15 the name and address for service of the person who is the applicant.

[19] The application contains all details and other information required by s. 61(3).

Native title claim group named/described: s. 61(4)

[20] Schedule A provides a description of the persons in the group that includes a list of the apical ancestors from which the native title claim group is said to descend.

[21] The application contains all details and other information required by s. 61(4).

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

[22] The application is accompanied by an affidavit from the one person who comprises the applicant. The affidavit is signed and witnessed and makes all the statements required of this section.

[23] The application is accompanied by the affidavit required by s. 62(1)(a).

Details required by s. 62(1)(b)

[24] Subsection 62(2)(b) requires that the application contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

Information about the boundaries of the area: s. *62(2)(a)*

[25] Schedule B of the application contains a description of the external boundaries of the area covered by the application and provides general exclusion statements in relation to those areas not covered by the application.

Map of external boundaries of the area: s. *62(2)(b)*

[26] Schedule C refers to Attachment C being a map showing the external boundaries of the area covered by the application.

Searches: s. *62(2)(c)*

[27] Schedule D refers to Attachment D which is a report prepared by the Tribunal's Geospatial Services identifying tenure and non native title interests in relation to the area covered by the application.

Description of native title rights and interests: s. *62(2)(d)*

[28] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application. This description (included as an excerpt within my reasoning at s. 190B(4)) consists of more than a statement to the effect that the native title rights and interests claimed are all native title rights and interests that may exist, or that may not have been extinguished, at law.

Description of factual basis: s. *62(2)(e)*

[29] Schedule F provides a general description of the factual basis for the claim made in the application.

Activities: s. *62(2)(f)*

[30] Schedule G provides the statement that 'native title claim group members carry on such activities as to fully exercise the rights and interests referred to in Schedule F'—at [23]. I note that the application makes a claim to exclusive possession, however the details of activities undertaken by members of the claim group in exercise of this right are not provided at Schedule F or elsewhere in the application.

[31] The application does not therefore contain the details as required.

Other applications: s. *62(2)(g)*

[32] Schedule H provides the statement that the area covered by the application is wholly overlapped by the two native title determination applications of Yilka (WAD297/2008) and Sullivan Edwards (WAD498/2011).

Section 24MD(6B)(c) notices: s. *62(2)(ga)*

[33] Schedule HA states that the applicant is not aware of any such notices.

Section 29 notices: s. *62(2)(h)*

[34] Schedule I refers to Attachment I which lists three notices given under s. 29 with notification dates between 2005 and 2008.

Conclusion

[35] The application does not contain the details specified in ss. 62(2)(f), and therefore does not contain all details and other information required by s. 62(1)(b).

Conclusion for s. 190C(2)

[36] I am not satisfied that the application contains all details and other information, and is accompanied by any document required by ss. 61 and 62. The application does not contain the details as specified in s. 62(2)(f)—details of activities the native title claim group currently carries on in relation to the land and waters and therefore fails to meet the requirements of s. 62(1)(b).

Subsection 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

[37] The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if a previous application meets the conditions found in ss. 190C(3)(a), (b) and (c)—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that was a registered application when the current application was made in the Court. The Yilka #2 application, which is the current application for the purposes of s. 190C(3), was made when it was filed in the Court on 6 August 2013.

[38] The Tribunal's Geospatial Services provided a geospatial overlap analysis on 12 August 2013 of the application area (the geospatial report). That analysis and my searches of the area against the Tribunal's mapping database and the Register confirms that the following claimant applications underlie the current application:

- WC2008/005—Yilka—WAD297/2008
- WC2011/011—Sullivan Edwards—WAD498/2011

[39] As the Sullivan Edwards claimant application has not been accepted for registration, it does not meet the criterion at subparagraph (b), and therefore does not therefore require further consideration. The Yilka claimant application's entry onto the Register of Native Title Claims (the Register) was made on 6 August 2009 and therefore meets the criterion at subparagraph (b). Further, the Yilka claimant application has remained on the Register as a result of its

consideration for registration by a delegate of the Registrar and thus satisfies the criterion in subparagraph (c).

[40] For these reasons the Yilka application is a previous application which overlaps the area covered by the current application in the sense discussed in s. 190C(3)(a) to (c). I therefore need to be satisfied that there are no common claim group members between the previous Yilka application and the current Yilka #2 claimant application. In order to ascertain whether or not the two native title claim groups include some or all of the same people, I have compared what each of the applications say about the identity of the claim group as well as the applicant. I note that Schedule O of the current application makes the statement that:

> All of the members of the native title claim group, including the applicant, are members of one of the overlapping claims: WAD297 of 2008.

[41] A comparison of the descriptions of the native title claim groups for each of the applications reveals ancestors common to both. Harvey Murray is the applicant in both applications. Given the current application's own admission and confirmation of this through my comparison of the claim group descriptions for each application, it is clear that there are members common to both the native title claim groups for the current and previous applications.

[42] I am therefore not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any relevant previous applications.

[43] The application does not satisfy the condition of s. 190C(3).

Subsection 190C(4)
Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[44] I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

[45] For the reasons set out below, 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 that could certify the application.

The task at s. 190C(4)(a)

[46] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires is that I be 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78], which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s. 203BE—*Doepel* at [80] and [81].

[47] Pursuant to s. 203BE(4), a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs 203BE(2)(a) and (b) have been met;
- briefly set out the body's reasons for being of that opinion; and
- where applicable, briefly set out what the representative body has done to meet the requirements of subsection 203BE(3) in relation to any overlapping applications.

[48] Pursuant to s. 203BE(2), a 'representative body must not certify ... an application for a determination of native title unless it is of the opinion that':

- 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
- 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.

Consideration

[49] The Tribunal's geospatial report of 12 August 2013 confirms that Central Desert Native Title Services (CDNTS) is the only representative body for the whole of the area covered by the application. It is therefore the only body that could certify the application under s. 203BE. Attachment R to the application contains a certificate from CDNTS, dated 5 August 2013 and signed by the Principal Lawyer and the Executive Director of CDNTS. The certificate states at [1.1] that the statement and reasons contained therein are made pursuant to s. 203FE(1) which is sufficient for me to be satisfied that it has the power to make the certification.

[50] For the purposes of s. 203BE(4)(a), the certification contains the statements in relation to the requirements of paragraphs 203BE(2)(a) and (b), that is CDNTS certifies:

- that all the persons in the claim group have authorised the applicant to make the application and to deal with the matters arising in relation to it—at [2.2]; and

- all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group—at [2.2].

[51] For the purposes of s. 203BE(4)(b), the certificate briefly sets out the reasons at [3] for CDNTS being of that opinion, namely:

- CDNTS has provided legal and anthropological services within the area since 1996 and is satisfied that anthropologists working with the claim group have taken all reasonable efforts to ascertain and identify all the members of the claim group;
- CDNTS staff have attended meetings of the claimants, observed their decision-making process and taken instructions arising from that process;
- the group's decision-making process observed involves discussion and reaching agreement by consensus, and where a decision is not reached, it is referred to senior members of the group;
- specific to this application, a meeting of the native title claim group was held on 18 March 2013 at which consensus was reached in relation the claim boundary, the claim group description, native title rights and interests claimed and to authorise the applicant, Mr Murray, to make the application and to deal with matters arising in relation to it; and
- CDNTS is confident that the authorisation requirements of the Act have been satisfied because the traditional decision-making process of the native title claim group was properly adhered to.

[52] For the purposes of s. 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s. 203BE(3). This provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications, although failure to so does not invalidate the certification. The certificate states at [4.1] that the application has been lodged with the consent of the applicant of one of the two overlapping claims, WAD297/2008 (the Yilka application).

[53] For the reasons set out above, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified under Part 11 by the representative Aboriginal/Torres Strait Islander body that could certify the application.

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[54] In assessing the current application against s. 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss. 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. In reaching the required level of satisfaction, it is to the terms of the application itself that I am to direct my attention—*Doepel* at [16] and [122].

Description of the area covered by the application

[55] Schedule B describes the application area by a metes and bounds description making reference to cadastral boundaries and geographic coordinate points in decimal degrees to six (6) decimal places referenced to the Geocentric Datum of Australia 1994 (GDA94). The application area consists of 3 separate portions totaling approximately 3.55 square kilometers. Part A is a small section of road that falls on unallocated crown land; Parts B and C are located south east of Part A and are two portions of unallocated crown land respectively separated by a road.

[56] Schedule B also lists a series of general exclusions as a means to identify the areas within the external boundaries that are not covered by the application.

Map of the area covered by the application

[57] Schedule C refers to Attachment C which contains a colour photocopy of an A3 map entitled "Yilka #2", produced by Landgate dated 17 April 2013 and includes:

- the application area depicted as a bold black outline with cross hachure yellow fill;
- cadastral boundaries colour coded and labelled;
- two (2) insets showing Part A, B and C;
- the external boundaries of the underlying native title determination applications, coloured in orange;
- scalebar, northpoint, coordinate grid, legend and locality diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[58] Overall, the information in relation to the external boundaries of the area covered by the application allows me to identify the location of the three portions and their external boundaries on the surface of the earth.

[59] In respect of those areas not covered by the application and described by general exclusion statements, a generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would so fall within the generic description provided—see *Daniels & Ors v State of Western Australia* [1999] FCA 686—at [32]. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described. However, as each of the three portions that comprise the area covered by application is over unallocated crown land, it would appear to me that it is unlikely for there to be areas of exclusion within their external boundaries.

[60] The geospatial report makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the boundaries of each of the three portions is reasonably identifiable and that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[61] The application satisfies the condition of s. 190B(2).

Subsection 190B(3)
Identification of the native title claim group

> 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.

[62] Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains a description, and it is therefore necessary for me to consider whether the application satisfies the requirements of s. 190B(3)(b).

[63] I note the comments of Mansfield J in *Doepel* that the focus of s. 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group—at [51]; and
- not on 'the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—[37].

[64] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[65] Schedule A of the application contains the following description of the persons in the native title claim group:

> 5. The native title claim group comprises those persons:
>
> (a) who have a connection to the land and waters, through:
>
> (i) their own birth on those lands or waters;
>
> (ii) their long association with those lands or waters;
>
> (iii) the birth and/or the long association with those lands or waters of one or more of their ancestors; or
>
> (iv) their holding of senior ritual authority in relation to those lands or waters,
>
> by which those persons claim to possess rights or interests in relation to the land and waters; and
>
> (b) in respect of whom that claim is recognised under the laws and customs of the society generally referred to as the Western Desert Cultural Bloc (WDCB).
>
> 6. At the date of the application, the persons referred to in [5(a)(i)-(iii)] are:
>
> (a) the descendants of the Marnupa, Waltila and Nanuma, Billy Kurlu, Sandy Grey, Skipper Elliot, Charlie Winter, Danny Harris, Lincoln Smith, Paul Simms and Andrew Watson; and
>
> (b) Victor Fraser and his descendants.

[66] I understand this description to mean that the native title claim group comprises of persons who are connected to the land or waters of the application area by virtue of:

(i) being born in the application area, or

(ii) long assocation with the application area, or

(iii) the birth and/or long association with the application area of a person's ancestors, or

(iv) holding senior ritual authority in relation to the land or waters.

It is by such connection that the persons in the native title claim group possess rights or interests in relation to the land and waters. Further, the claim made by those persons to that connection is recognised under the laws and customs of Western Desert Cultural Bloc society. Paragraph 6 specifies those persons whose connection is through any of the forms identified at (i) to (iii) – that is, they are the descendents of 11 people and one other person and his descendents.

[67] The rules or principles by which a person might be deemed a member of the group are clear to me: members of the native title claim group are the descendents of 12 named persons, they have a circumscribed connection to the land and waters recognised under Western Desert Cultural Bloc society and by which rights and interests in relation to the land and waters are possessed. The fourth form that connection takes, through the holding of senior ritual authority in relation to the land or waters, is presumably not one applicable to all the persons in the native title claim group. In my view, a process of factual inquiry would be a sufficient means by which to ascertain whether such a person is in the group by virtue of their holding such spiritual authority in accordance with the traditional laws and customs of the Western Desert Cultural Bloc.

[68] As I understand it, the authorities of *Doepel* and *Western Australia v Native Title Registrar* suggest that the description at Schedule A needs to contain some objective means of identifying or ascertaining the members of the group. The decision in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) supports interpreting such a description with a view to giving it meaning as the priority. Dowsett J defines the requirement of s. 190B(3) as such:

> However subs 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—at [33].

[69] In my view, there is sufficient objective means, through the principle of descent and the rules that relate to connection to the land and waters, by which to ascertain members of the native title claim group. The description likely entails some form of factual inquiry in respect of the connection criteria (in particular the fourth) but this does not mean that the claim group's descent based description does not describe the group sufficiently clearly.

[70] I am therefore satisfied that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

[71] The application satisfies the condition of s. 190B(3).

Subsection 190B(4)
Native title rights and interests identifiable

> The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

[72] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s. 223(1) and to the decision in Ward. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

[73] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Schedule E of the application contains the description of native title rights and interests claimed in relation to the area covered by the application, as required by s. 62(2)(d):

> 13. The nature and extent of the native title rights and interests is the right of possession, occupation, use and enjoyment to the exclusion of all others.
>
> 14. The native title rights and interests are exercisable in accordance with and subject to the:
> (a) traditional laws and customs of the native title holders; and

(b) laws of the State and Commonwealth, including the common law.

15. Notwithstanding anything in this determination, there are no native title rights and interests in the application area in or in relation to:
(a) such minerals as are wholly owned by the Crown; or
(b) such petroleum as is wholly owned by the Crown.

[74] I am of the view that the native title rights and interests claimed can be 'properly understood', it being the case that the application makes a claim to exclusive possession, subject to the qualifying statements at 14 and 15.

[75] The application satisfies the condition of s. 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

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

[76] The application does not satisfy the condition of s. 190B(5) because the factual basis provided is not sufficient to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

[77] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s. 190B(5). In *Doepel* (and this was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85]), Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

[78] The Full Court in *Gudjala FC* held that a 'general description' (as required by s. 62(2)(e)) 'must be in sufficient detail to enable a genuine assessment of the application by the Registrar

under s. 190A and related sections, and be something more than assertions at a high level of generality'—*Gudjala FC* at [92].

[79] Further, Dowsett J later held in *Gudjala 2009* that the asserted factual basis should provide more than mere restatements of the claim:

> … it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

[80] The information in the application that goes to the factual basis for the assertion that the claimed native title rights and interests exist is limited to a very general description at Schedule F. The material contains broad, generalised and non-specific assertions. That such material may not be sufficient for the purposes of s. 190B(5) was considered in *State of Queensland v Hutchison* [2001] FCA 416:

> Section 62(2)(e) does not entirely correspond with s 190B(5). It requires that a "general description" of the factual basis for the assertions of the existence of native title rights and interests be provided in the application. Section 190B(5) may require more, for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not of some summary of it—at [25].

[81] The information in the Yilka #2 application does not appear to relate with any particularity to the claim before me and could equally apply to any other claim made in the region. In my view, with the above authorities in mind, what is required to be provided in order for there to be a sufficient factual basis are sufficient details that can be understood as applying or having relevance to the particular native title claimed by the particular group over the particular area covered by the application.

[82] In respect of the content of the factual basis material, there is a requirement for factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters—*Gudjala 2009* at [29]. Further the claim's factual basis is required to address whether or not the relevant traditional laws and customs that give rise to the claim to native title rights and interests have their origin in a pre-sovereignty, normative system with a substantially continuous existence and vitality since sovereignty. This is the proposition that arose from the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (*Yorta Yorta*), and was relied on by Dowsett J in his *Gudjala 2007* decision—at [26].

[83] No additional information or material is included in the affidavit of the person comprising the applicant, nor has any material been provided to the Registrar separate to the application to support the assertions:

- that the content of the relevant laws and customs originated in the normative rules of a society that existed prior to European settlement; and
- that the rights and interests possessed under the traditional laws and customs acknowledged and observed by the claim group are derived from a normative system that has had a continuous existence and vitality since European settlement.

In considering the information available to me, I am of the view that I do not have sufficient material before me that provides details about:

- the past and present association of the native title claim group with the claim area—to support the assertion at s. 190B(5)(a);
- an indigenous society observing identifiable laws and customs at the time of European settlement, the rights and interests now possessed by the native title claim group under those traditional laws and customs—to support the assertion at s. 190B(5)(b); and
- the native title claim group having since European settlement continued to acknowledge and observe traditional laws and customs—to support the assertion at s. 190B(5)(c).

[84] I note that the provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that a delegate undertake a search for such material—*Martin v Native Title Registrar* [2001] FCA 16 at [23]. Without the requisite factual basis before me, I am therefore not satisfied that the information in this application is sufficient to support the assertion that the claimed native title rights and interests exist and to support the assertions:

[85] The application does not satisfy the condition of s. 190B(5) because the factual basis provided is not sufficient to support each of the particularised assertions in s. 190B(5).

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[86] In considering the requirements of this condition, I am guided by the comments of Mansfield J in *Doepel*:

> Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim—at [126].

[87] As referred to in my reasons at s. 190B(5) above, the application does not provide sufficient material for me to make any measure of it against the claimed rights and interests found at Schedule E. *Doepel* contains further clarification on this:

> ... s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].

And

> ... s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

[88] Additionally, Dowsett J in *Gudjala 2007* was of the view that an application which fails the merit condition at s. 190B(5) must then fail the condition at s. 190B(6)—at [87].

[89] Therefore in the absence of any supporting material, and as the application fails to meet the condition at s. 190B(5), I do not consider, that, prima facie, the native title rights and interests claimed in the application can be established.

[90] The application does not satisfy the condition of s. 190B(6).

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[91] Under 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. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application'—*Gudjala FC* at [84].

[92] In *Doepel*, Mansfield J also considered the nature of the Registrar's task at s. 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6),

as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18].

[93] The word 'traditional' as it is used here must be understood as it was defined in *Yorta Yorta—Gudjala 2007* at [89]. That is, it is necessary to show that the traditional connection is in accordance with the laws and customs of a group or society which has its origins in the society that existed at sovereignty. Dowsett J observed in *Gudjala 2009* that '[i]t seems likely that such connection be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'—at [84].

[94] Schedule F does provide some information in relation to the concept of *Tjukurpa*, or Dreaming, an 'important element of the belief system of the people of the Western Desert'—at [20]. The information is general in nature and not specific in demonstrating its operation as it pertains to the native title claim group or the areas covered by the application, or at least those areas surrounding them. There is nothing before me, such as statements or information from particular claim group members detailing their traditional physical connection, although I note Schedule M states that members of the native title claim group have resided in the Cosmo Newberry Community, some 60 kms from the application area, for an uninterrupted period of 24 years. This residence is said to entail travelling through the application area and looking after the application area and the land surrounding it.

[95] However, without material sufficient to support an assertion as to the existence of traditional laws acknowledged and customs observed by the claim group that give rise to the claimed native title rights and interests, I am unable to be satisfied that the requirements of this condition to do with traditional physical connection are met.

[96] The application does not satisfy the condition of s. 190B(7).

Subsection 190B(8)
No failure to comply with s. 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If:

(a) a previous exclusive possession act (see s. 23B) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth; or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done in relation to an area; and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:
(a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and
(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[97] In the reasons below, I look at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me in order to consider whether the application should not have been made.

Section 61A(1)

[98] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report dated 12 August 2013 and a search that I made of the Tribunal's geospatial databases on the day of my decision reveals that there are no approved determinations of native title over the application area.

Section 61A(2)

[99] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B provides the requisite statements that the application does not cover any area where a previous exclusive possession act was done, although this is subject to ss. 61A(4) and 47B applying.

Section 61A(3)

[100] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply. The application makes a claim to exclusive possession. It makes the statement at Schedule B that ss. 61A(4) and 47B 'apply to the whole of the area of this application'. The effect of those provisions is that any extinguishment brought about by 'any prior interest in relation to the area must be disregarded' (s. 47B(2) for all purposes under the NTA. Therefore, subsection 61A(3) does not apply to my consideration in this case because the information in the application provides that the circumstances of subsection 61A(4) apply to it.

Conclusion

[101] In my view the application does not offend the provisions of ss. 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s. 190B(8).

Subsection 190B(9)
No extinguishment etc. of claimed native title

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

[102] I consider each of the subconditions of s. 190B(9) in my reasons below.

Section 190B(9)(a)

[103] The application at Schedule Q states that the applicant does not make any claim for minerals, petroleum or gas wholly owned by the Crown

Section 190B(9)(b)

[104] The application at Schedule P states that no offshore places comprise any part of the area covered by the application.

Section 190B(9)(c)

[105] The application contains the requisite statement in Schedule B at 10(e).

Conclusion

[106] In my view the application does not offend the provisions of ss. 190B(9)(a), (b) and (c) and therefore the application meets the condition of s. 190B(9).

[End of reasons]

Attachment A

Summary of registration test result

Application name	**Yilka #2**
NNTT file no.	**WC2013/004**
Federal Court of Australia file no.	**WAD303/2013**
Date of registration test decision	**18 October 2013**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. **190C(2)**			**Aggregate result:** **not met**
	re s. **61(1)**		**met**
	re s. **61(3)**		**met**
	re s. **61(4)**		**met**
	re s. **62(1)(a)**		**met**
	re s. **62(1)(b)**		**Aggregate result:** **not met**
		s. **62(2)(a)**	**met**
		s. **62(2)(b)**	**met**
		s. **62(2)(c)**	**met**
		s. **62(2)(d)**	**met**
		s. **62(2)(e)**	**met**
		s. **62(2)(f)**	**not met**
		s. **62(2)(g)**	**met**
		s. **62(2)(ga)**	**met**

Test condition	Subcondition/requirement		Result
		s. **62(2)(h)**	**met**
s. **190C(3)**			**not met**
s. **190C(4)**			**Overall result:** **met**
	s. **190C(4)(a)**		**met**
	s. **190C(4)(b)**		**N/A**

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. **190B(2)**		**met**
s. **190B(3)**		**Overall result:** **met**
	s. **190B(3)(a)**	**N/A**
	s. **190B(3)(b)**	**met**
s. **190B(4)**		**met**
s. **190B(5)**		**not met**
s. **190B(6)**		**not met**
s. **190B(7)(a) or (b)**		**not met**
s. **190B(8)**		**met**
s. **190B(9)**		**met**

[End of document]