National Native Title Tribunal

Registration test decision

Application name	Stanley Warrie & Ors on behalf of the Yindjibarndi People -v- State of Western Australia (Yindjibarndi #1)
Name of applicant	Stanley Warrie, Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin, Masie Ingie
NNTT file no.	WC2003/003
Federal Court of Australia file no.	WAD6005/2003
Date application made	9 July 2003
Date application last amended	Application filed 2 May 2017 pursuant to leave granted to amend 1 May 2017
Date of reasons	5 September 2017

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

For the reasons attached, I am satisfied that each of the conditions contained in ss 190B and 190C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 23 August 2017

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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* (Cth) under an instrument of delegation dated 8 June 2017 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Yindjibarndi #1 native title determination application (WAD6005/2003) to the Native Title Registrar (the Registrar) on 3 May 2017 pursuant to s 64(4) of the Act[1]. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 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 and 190C.

[3] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application include a change to Schedule A (the description of the native title claim group) that is not of a type contemplated in s 190A(6A) and do not therefore meet the requirements of that condition.

[4] Therefore, I have considered the claim made in the amended application in accordance with s 190A. I have reached the view that the claim satisfies all of the conditions in ss 190B and 190C and, pursuant to s 190A(6), the claim in the amended application must be accepted for registration. This document sets out my reasons, as the delegate of the Registrar, for my decision to accept the claim for registration pursuant to s 190A of the Act.

Application overview and background

[5] The Yindjibarndi #1 native title determination application was first made when it was filed in the Court on 9 July 2003. The area covered by the application falls north of the town of Tom Price in the Pilbara region of north Western Australia. The northern boundary of the claimed area abuts the southern boundary of the Ngarluma Yindjibarndi determination in *Moses v Western Australia* (2007) 160 FCR 148 (*Moses*). The claimed area includes areas covered by the pastoral stations of Coolawanyah, Mount Florence, Hooley and Mulga Downs and part of the Mungaroona Range Nature Reserve.

[6] The amended application before me follows an earlier amended application filed on 27 September 2016 and referred to the Registrar on 5 October 2016.

[7] The Court had granted leave for the Yindjibarndi #1 application to be amended on 13 September 2016, to give effect to its orders to amend the title of the application, change the description of the native title claim group at Attachment A to the application and reduce the area covered

[1] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) 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.

by the application. Its consideration for registration was not complete by the time this further amended application was referred to the Registrar.

[8] On 20 July 2017, prior to my registration decision, the Court made a decision in relation to the claimed area: *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803 (*Warrie*). Justice Rares found (amongst other matters) that the Yindjibarndi people have since before sovereignty continuously acknowledged and observed their traditional laws and customs that requires the seeking and obtaining of permission to enter or conduct activity on Yindjibarndi country. The parties were ordered to consult and seek to agree and prepare a draft determination of native title for the Court to make under s 225 that will give effect to the reasons for judgement delivered in *Warrie*.

Information considered when making the decision

[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'.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[10] As required by s 190A(3)(a), I have had regard to information in the amended and original applications. I have also considered documents provided to the Registrar as additional material on 18 November 2016:

1. Submissions dated 18 November 2016;
2. Chapter 3 from a 2008 anthropological report by [Name removed] and [Name removed];
3. Outline of Submissions filed by the applicant on 28 June 2016;
4. Affidavit of [Name removed] filed 14 June 2012; and
5. Witness statements of [Name removed], [Name removed], [Name removed], [Name removed], [Name removed], [Name removed] and [Name removed].

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

[11] I note that there is no information before me of the kind identified in s 190A(3)(b).

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[12] The State of Western Australia (the state government) has not provided any submissions in relation to the application of the registration test.

Section 190A(3): other information to which Registrar considers it appropriate to have regard

[13] I have considered it appropriate to have regard to the Court's decision in *Warrie*. In my view, I should have regard to the findings in *Warrie* because they are particularly relevant to my consideration of whether the factual basis in the Yindjibarndi #1 application sufficiently supports the assertion that the native title rights and interests claimed exist. This is for the following reasons:

- the findings in *Warrie* in are relation to this application;
- the Court considered the same material as the applicant has put forward for the purposes of my registration consideration;
- some of the findings are directly relevant to the factual basis consideration;
- I had independently reached the view that the material before me was sufficient to meet the factual basis requirements of s 190B(5) prior to the Court handing down its decision; and

- in the interests of brevity for these reasons, I am of the view that I can rely on the findings as support for the assertions set out in s 190B(5) (and in my consideration of the claimed rights under s 190B(6)).

[14] *Warrie* considers the existence, continuity and observance of traditional laws acknowledged and traditional customs observed by the Yindjibarndi people. I do not 'merely adopt'[2] the reasons for judgement, however they are relevant to my consideration because they substantiate and express the Yindjibarndi connection to country and the existence and content of the group's traditional laws and customs.

[15] I have also considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 10 May 2017 (the geospatial report).

Procedural fairness steps

[16] As noted above, I have considered additional material provided by the applicant on 18 November 2016. The state government was advised on 19 July 2017 that I would be relying on this information in my consideration of the application for registration and provided the opportunity to make any submissions in relation to the material. No submission was made by the state government in relation to either the amended application, nor the additional material. This concluded the procedural fairness processes.

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

[17] 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—*Attorney General of Northern Territory v Doepel (2003) 133 FCR 112 (Doepel)* at [16] and [122].

Description of the area covered by the application

[18] Schedule B refers to Attachment B which contains an external boundary description prepared by the Tribunal's Geospatial Services. The description is dated 15 September 2016 and describes the application area by metes and bounds, referencing native title determinations and applications, cadastral parcels, topographic features and geographic coordinates to six decimal places. The external boundary description specifically excludes all land and waters the subject of the following native title determinations and applications:

[2] *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126 at [18]-[19].

- WAD6017/1996 Ngarluma/Yindjibarndi (WCD2005/001) as determined in the Federal Court 02 May 2005
- WAD6096/1998 Banjima People (WCD2014/001) as determined in the Federal Court 11 March 2014
- WAD6208/1998 Eastern Guruma (WCD2007/001) as determined 01 March 2007
- WAD6090/1998 Kuruma Marthudunera (combined) (WC1999/012) as registered 12 July 2013
- WAD6169/1998 Kariyarra People (WC1999/003) as registered 20 October 2014

[19] Attachment B lists general exclusions and also states "where there is any discrepancy between the map provided at Attachment C and the written description contained in this Attachment B the latter shall prevail."

[20] Schedule C refers to Attachment C which contains a colour map also prepared by the Tribunal's Geospatial Services, titled 'WAD6005/2003 Yindjibarndi #1' dated 9/09/2016 and includes: the application area depicted by a dark blue outline, topographic image in background, scalebar, legend, coordinate grid and locality diagram, notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[21] Schedule S notes that the area of land and waters covered by the application has been amended in accordance with Order 2(c) and Order 3 of the Orders made by Justice Rares on 13 September 2016. The eastern boundary has been withdrawn back to Cockeraga River. The reduction to the area covered by the application occurred in the amending application filed on 27 September 2016.

[22] The information in relation to the external boundaries of the area covered by the application allows me to identify the location of those boundaries on the surface of the earth. The specific exclusions (noted above) provide added certainty to the identification of those boundaries. The general exclusion statements used to describe other areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described.

[23] The geospatial report in relation to the first amended application confirms that the area covered by the application has been amended. The geospatial report in relation to this further amended application confirms that the area covered by the application has not been further amended. Both reports make the assessment that the description and the map are consistent such that the area now covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the external boundary is identifiable and, along with the general and specific exclusions that set the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[24] 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.

[25] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. It is therefore necessary to consider

whether the application satisfies the requirements of s 190B(3)(b). 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 is
- 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'—at [37].

[26] 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].

[27] The native title claim group is described at Schedule A as follows:

> Descendents of the following Yindjibarndi ancestors:
> George (Binyabangu)
> Wendy
> Thaydus
> Jibanggo
> Bindaringu
> Bibi
> Nhabarlam
> Jindoman
> Marduwangurra
> Sam (Miyurru)
> Gunyinbangu
> Thandirrbangu
> Waginbangu
> Maggie (Bagabanhu)
> Manyjarra
> Jinawarthu
> Nyurda
> Gubanha
> Yilinburhdu
> Yikarrbangu
> Gurgagawarn
> Jinayurndi
> Wirlabangu (mother of Jacob- Yugarri)
> Binyju
> Jinaguduthu
> Wirlabangu (mother of Ned- Nyithanbangu)
> Toby (Miyanbangu/Dinkoman)

[28] In my view, the description of the native title claim group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by descent from a Yindjibarndi ancestor(s). The description names the apical ancestors through which members of the native title claim group will claim descent.

[29] It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors or compliance with the other principles for membership, but that would not mean that the group has not been sufficiently described.

[30] 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.

[31] 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].

[32] 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, as required by s 62(2)(d), of native title rights and interests claimed in relation to the area covered by the application:

> The claim area has three divisions- "Area A"; "Area B"; and, "Area C";
>
> **"Area A"** comprises:
> (i) areas of unallocated Crown land that have not been previously subject to any grant by the Crown,
> (ii) areas to which section 47 of the Native Title Act 1993 applies,
> (iii) areas to which section 47A of the Native Title Act 1993 applies,
> (iv) areas to which section 47B of the Native Title Act 1993 applies, and
> (v) other areas to which the non-extinguishment principle, set out in section 238 of the Native Title Act, applies and in relation to which to [sic] there has not been any prior extinguishment of native title."
>
> The native title rights and interests in relation to Area A comprise:
> (1) The right to possess, occupy, use and enjoy the area as against the world;
> (2) A right to occupy the area;
> (3) A right to use the area;
> (4) A right to enjoy the area;
> (5) A right to be present on or within the area;
> (6) A right to be present on or within the area in connection with the society's economic life;
> (7) A right to be present on or within the area in connection with the society's religious life;
> (8) A right to be present on or within the area in connection with the society's cultural life;
> (9) A right to hunt in the area;
> (10) A right to fish in the area;
> (11) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
> (12) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
> (13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;
> (14) A right to make decisions about the enjoyment of the area by persons who are not

members of the Aboriginal society to which the native title claim group belong;
(15) A right of access to the area;
(16) A right to live within the area;
(17) A right to reside in the area;
(18) A right to erect shelters upon or within the area;
(19) A right to camp upon or within the area;
(20) A right to move about the area;
(21) A right to engage in cultural activities within the area;
(22) A right to conduct ceremonies within the area;
(23) A right to participate in ceremonies within the area;
(24) A right to hold meetings within the area;
(25) A right to participate in meetings within the area;
(26) A right to teach as to the physical attributes of the area;
(27) A right to teach as to the significant attributes of the area;
(28) A right to teach upon the area as to the significant attributes of the area;
(29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;
(30) A right to control access of others to the area.
(31) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;
(32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
(33) A right take resources, other than minerals and petroleum, used for sustenance within the area;
(34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
(35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
(36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;
(37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;
(38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;
(39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;
(40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;
(41) A right to use and/or enjoy resources, other than minerals and petroleum. for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;
(42) A right to take fauna;
(43) A right to take flora (including timber);
(44) A right to take soil;
(45) A right to take sand;
(46) A right to take stone and/or flint;
(47) A right to take clay;
(48) A right to take gravel;
(49) A right to take ochre;
(50) A right to take water;
(51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out at sub-paragraphs (32) - (41) above) and/or in the said form (set out at sub-paragraphs (42) - (50) above), other than

minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;
(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum including the manufacture of objects, materials or goods for sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial, and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;
(53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;
(54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;
(55) A right, in relation to any activity occurring on the area, to
i. maintain,
ii.conserve; and/or
iii.protect
significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;
(56) A right, in relation to any activity occurring on the area, to -
i. maintain
ii.conserve; and/or
iii.protect
significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;
(57) A right, in relation to a use of the area or an activity within the area, to:
(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs
(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs
in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled;
(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;
(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area; and
(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

"Area B" comprises:

(i) land and waters which are subject to a non-exclusive pastoral lease;

(ii) areas of Crown Land that have been set aside as Crown reserves, but are not vested in a person or body to be held in trust, or otherwise, for a specified purpose pursuant to section 33 of the Land Act 1933 (WA) other than those described in Area C;
(iii) land and waters which are subject to a mining lease as defined in s. 245 of the Native Title Act 1993 (Cth);
(iv) any area which at the time of the application, is
(a) not covered by a freehold estate or a lease, but
(b) covered by a reservation, proclamation, dedication, condition, permission, or authority, made or conferred by the Crown in any capacity, or by the making, amendment repeal of legislation of the Commonwealth or a Territory, under which the whole or a part of the land or waters in the area is to be used for a public purpose or for a particular purpose; or
(c) subject to a resumption process (as defined in s47B(5)(b) of the Native Title Act); and,
(v) any area which, at the time of the application, is:
(a) not covered by a freehold estate or a lease, but
(b) not covered by a reservation, proclamation, dedication, condition, permission, or authority, made or conferred by the Crown in any capacity, or by the making, amendment repeal of legislation of the Commonwealth or a Territory, under which the whole or a part of the land or waters in the area is to be used for a public purpose or for a particular purpose; or
(c) not subject to a resumption process (as defined in s47B(5)(b) of the Native Title Act); and
(d) no member of the native title claim group occupies the area when this application is made."

The native title rights and interests which are claimed in Area B are all the rights claimed in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out at Schedule E paragraphs (12), (14), (30), (31) and (51).

"Area C" comprises:

land and waters which are a "nature reserve" or "wildlife sanctuary" (as those terms are defined in the Wildlife Conservation Act 1950 (WA)) created before 31 October 1975).

The native title rights and interests which are claimed in Area C are all the rights claimed in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out at paragraphs (12), (14), (30), (31) and (51) and the right to hunt, gather or take fauna, in so far as such right is contained within paragraphs (3), (4), (9), (10), (21), (32)-(42), (52) and (53).

[33] I am of the view that the native title rights and interests claimed can be 'properly understood'. I understand that the application claims rights differently in relation to each of the three category areas A, B and C. The rights claimed in respect of each category area, are determined by the extent of extinguishing tenure of the area. Broadly speaking, I understand that both exclusive and non-exclusive rights are claimed in those areas that fall under the category of Area A; only the non-exclusive rights claimed under Area A are claimed under the category of Area B and only *certain* of the non-exclusive rights claimed under Area A are claimed under the category of Area C.

[34] I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[35] 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

[36] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5), as set out in my reasons below. I have considered each of the three assertions set out in the three paragraphs of s 190B(5) in turn before reaching this decision.

[37] 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].

[38] The decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*[3], including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5) and his approach in *Gudjala 2009* was in accord with this.

Information considered

[39] I have had regard to the following factual basis material:

- Submissions (in support of registration of proposed amended application), 18 November 2016;
- Chapter 3 from a 2008 anthropological report by [Name removed] and [Name removed];
- Outline of Submissions filed by the applicant on 28 June 2016;
- Witness statements of [Name removed], [Name removed], [Name removed], [Name removed], [Name removed], [Name removed] and [Name removed].

[40] To address the factual basis conditions, the November 2016 submissions rely on and quote extensively from a 2014 anthropological report of Professor Kingsley Palmer (Palmer Report 2014). I have also had regard to the findings in *Warrie*, in which the proceedings considered the more extensive evidence from which the material before me is drawn. Justice Rares made 'findings of fact based on [his]

[3] See *Gudjala FC* [90] to [96].

having seen and heard the witnesses, most of whom gave evidence on country or in Roebourne and Perth—at [6].

Native title claim group

[41] The amending application of 27 September 2016 (in accordance with the Court's orders) removed the names of ancestors used in the description of the native title claim group for the original application. The applicant provided an explanation for the basis of their removal:

- "Nayaban" is likely a 'corruption' of an alternative name for an ancestor included in the claim group description under the name Toby(Miyanbangu/Dinkoman);
- Wirlugurranha" was not Yindjibarndi;
- Gajirri and Dudley were the daughter and granddaughter, respectively, of Bibi who included in the list of ancestors.

[42] That the removal of these names does not affect the composition of the native title claim group is, according to the applicant, supported by the findings in the Palmer Report 2014. That is, the amended description does not describe a "new or reconstituted claim group", but describes the same native title claim group as the one which authorised the applicant in 2012. The change to the claim group description is a purely technical change[4].

Reasons for s 190B(5)(a)

[43] This subsection requires that I be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. Specific to the factual basis for the claim made in this application, it is not necessary for it to support an assertion that all members of the native title claim group have an association with the area all of the time. However, it is necessary to show that the claim group as a whole has an association with the area—*Gudjala 2007* at [51] and [52].

[44] Further, Dowsett J also observed:

> Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

[45] Schedule F provides the general assertion that the area covered by the application has been occupied and used by Aboriginal people prior to and since British sovereignty was asserted in the region. Yindjibarndi country is asserted to have been occupied and used by members of the Yindjibarndi language group since sovereignty. On this basis, Yindjibarndi people, under a body of laws acknowledged and customs observed, are said to have possessed rights and interests in relation to, and had a connection with, the land and waters of claim area—at [1]-[4].

[46] The findings in *Warrie* articulate the association of the native title claim group and its predecessors with the area covered by the application. The Court considered the question of Yindjibarndi occupation of certain areas within the claimed area for the purposes of the applicant's claim to the benefit of ss 47A and 47B. Rares J was satisfied that the Yindjibarndi have a connection with the land and waters of the broader claimed area and this was sufficient to find that one or more persons occupied the specific areas subject

[4] Submissions 19 November 2016 at [27].

to the application of the benefit of ss 47A and 47B. Further, this connection extended beyond the discrete areas in question, His Honour concluding that:

> The activities and visits of which the Yindjibarndi witnesses gave evidence involved, inherently, their observance of their traditional customs by which they had a connection with the land and waters concerned. The deep spiritual, indeed emotional, need that motivated the witnesses' visits and activities in the circumstances in evidence, amounted to their being "established over" the broader areas so as to amount to occupation. The visits and activities were not casual trips, such as a tourist might make to places of interest. Rather, the evidence satisfied me that the visits and activities were essential expressions of the Yindjibarndi witnesses' needs and duties to visit and care for their country. That is how and why they derived the deep spiritual satisfaction, indeed joy, expressed by, for example (but not limited to), Tootsie Daniel or Michael Woodley in the passages of their evidence I have quoted in [262] and [53], dealing with their obligations under the Birdarra law, as well as in [65] above—at [283].

[47] His Honour was of the opinion that:

> …the evidence of regular maintenance of the witnesses' spiritual connection to Yindjibarndi country by the visits to it and the exercise of traditional rights, rites and practices, amounted to occupation of each of areas 1, 2, 3 and 4, as well as the Reserve, by one or more Yindjibarndi within the meaning of ss 47A(1)(c) and 47B(1)(c). That is because each such visit evinced substantively the individual Yindjibarndi visitor's exercise of their traditional (and possessory) rights over not just the particular named place where they camped or attended, but also over both any on country routes that they used to get there and the whole of the surrounding locale where they believed the spirits with whom (or which) they were communicating were: *Banjima 231 FCR* at 495 [104]-[105]. Having regard to the whole of the evidence, I am also satisfied that one or more Yindjibarndi was or were "established" in each of areas 1, 2, 3 and 4 and the Reserve in the sense explained in *Moses 160 FCR at 2000* [216].
>
> … As I understood the evidence of the Yindjibarndi about their relationships with their country and its spirits, they attached genuine symbolic significance to their visits to their country. For them, each visit not only involved the exercise of the traditional rights but also the performance of their duty to care for, and not forget, their country. And they had to perform that duty with a degree of symbolism, particularly because of the historic reality of their physical dispossession from their country by European settlement. Many of the Yindjibarndi witnesses spoke of their need to visit, regularly, their country. That need to visit, camp and carry out activities reflected their spiritual and emotional connection to their country and their duty to care for it under the Birdarra law (see e.g. [52]-[53], [146]-[147], [246] above). The visits and activities were manifestations of the possessory rights (and traditional rights to control access) that Yindjibarndi people had over their country in accordance with the traditional laws they have acknowledged, and the traditional customs they have observed, continuously since sovereignty: *Banjima 231 FCR* at 495 [104]-[105]—at [265]-[266].

Association of the predecessors of the native title claim group with the application area

[48] Schedule F states that the Yindjibarndi native title claim group is comprised of the descendants of those persons who occupied and used the area at sovereignty – including those persons listed at Schedule A of the application and their 'lineal ancestors'—at [5]. Palmer's view is that at the time of sovereignty[5], 'Yindjibarndi People possessed rights and interests in the claim area, under the body of traditional laws and customs which they acknowledged and observed'—at p. 2. Based on the likelihood of the named apical ancestors being born in the late 1800s, the submissions assert an inference that the named

[5] The date of the acquisition of sovereignty for Western Australia being 1829. Palmer refers to 'effective sovereignty' as 'the period of first contact in the northern Pilbara region, which was in the mid-1860s' with the establishment of the pastoral and mining industries. His view is 'the characteristics of customary practices in the northern Pilbara at the time of effective sovereignty may be considered to have been much the same as they would have been at the time of sovereignty'—footnote at p. 2.

ancestors are descended from Yindjibarndi people in occupation of the application area in 1829—at p. 3. All of the Witness statements speak to the association of the deponents' parents and grandparents to the claimed area, and to their knowledge of the old people's stories and connection to the land and waters of Yindjibarndi country.

[49] For example, [Name removed] (b. 1959) speaks of her grandparents who are all Yindjibarndi - her father's mother from Garliwinjinha on the claim area, her great grandmother born around Daniel Well and Ngurrawaana Creek; her great grandfather from the Western part of the claim area—at [2]-[5]. Her grandparents taught her about Yindjibarndi country and that she was a Yindjibarndi person—at [9]. She speaks of the old people working on the pastoral stations in the claim area – Mt Florence, Hooely Station, Coolawanyah Station. [Name removed]'s mother's mother and father were Yinjibarndi, her grandmother taught her the stories of Millstream—at [27]-[28].

Current association of the native title claim group with the application area

[50] [Name removed] lived at [location removed] (in the claim area) with his grandfather from the time he was 6 years old—at [11]. It is his responsibility to look after Yindjibarndi country, to protect its sites and areas of significance and he does this in accordance with Yindjibarndi law—at [26]. He has been taught by his old people the boundaries of Yindjibarndi country. The boundaries follow geographical markers (watercourses, hills) and Yindjibarndi story lines—at [28]-[32]. He knows the stories and songs that travel through the claim area and give Yindjibarndi country meaning and connect Yindjibarndi people to their country:

> Yindjibarndi people have always enjoyed our traditional rights in the Mount Florance Pastoral Lease area (F4-F5, G4-G8, H5-H9, 17-18, J7-J8), although we first make arrangements so our activities don't clash with pastoral activities. But this has never been a problem because the current owners of the Pastoral Lease, like those who had pastoral interests in that area before, have always respected our rights; so we have always been able to go there to camp, hunt and fish, collect bush tucker and bush medicines, and perform religious ceremonies. We do this every year sometimes just camping, and other times to collect resources on our way out to law ceremonies at Jigalong—at [69].

[51] [Name removed] states that she has 2 areas that are her country – Millstream (through her mother) and Fortescue River near Gregory Gorge through her (social) father—at [27].

[52] The Witness statements all refer to areas of association for members of the native title claim group - Mount Florance and Coolawanyah Pastoral leases is an area we call Yawarnganha. Yawarnganha is a flat plain that lies between Gambulanha (Hamersley Ranges) and Birdarrdamra (Chichester Ranges). [Name removed] has travelled throughout his life all over the claim area: on the way to and from law ceremonies held outside the claim area; with his grandfathers, with senior Yindjibarndi people and his own family—at [78]. He names places in the claim area: [location names removed] where his grandfather took him camping and hunting when he was a boy; and, after he became a man, he took him there to teach him the songs and stories for the different places. He goes to these places every year, with his family or with other men—at [79]. [Name removed] speaks of travelling throughout the claim area – for work on dogging contracts when she was younger, camping, hunting, taking old people back to their birth place, fishing on Hooley Creek on the way to Wittenoom (south of the claim area)—at [18]-[20]. She lives at [location removed] (in claim area), she has been hunting and gathering in the claim area all her life, she knows where and when to find certain foods—at [33]-[39]. [Name removed] speaks of exercising Yindjibarndi rights and interests – fishing at [location removed] near Millstream (north of the claim area but in

Yindjibarndi country); kangaroo hunting, collecting plants for bush tucker and medicine; she is *ngurrara* for [location removed] and speaks to the land when she is 'standing on her country'—at [31]-[37].

Consideration

[53] I consider that the factual basis material, together with the findings in *Warrie*, is sufficient to demonstrate the association that members of the claim group have and its predecessors had with the area covered by the application. The extensive personal detail in the affidavits of the members of the native title claim group provides particular evidence to illustrate the claim group's abiding connection to the land and waters of the application area through birth, descent, long term association and/or ancestral connection to that area. In this way it is clear that this current association has its origins in the preceding generations' association with the area.

[54] For these reasons I am satisfied that the native title claim group has, and its predecessors had, an association with the area.

Reasons for s 190B(5)(b)

[55] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group which give rise to the native title rights and interests it claims.

[56] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate[6]:

- that the laws and customs currently observed by the claim group have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66]

[57] In the context of the registration test, and explicitly the task at s 190B(5)(b), there must be factual material capable of supporting the assertion that there exists 'traditional' laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala 2007* at [62] and [63]. In my view, there is sufficient factual account in the application and accompanying Witness statements to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application. In my view, the findings in *Warrie* support the same proposition:

> I am of opinion that the evidence to which I have referred above reflected not only the Yindjibarndi's past (since before sovereignty) and present acknowledgment of their traditional laws and observance of their traditional customs in the claimed area and throughout Yindjibarndi country (including the Moses land), but also the Yindjibarndi's profound sense of relationship with, and duty to protect, their land and waters.
>
> I am satisfied that, under those laws and customs, the Yindjibarndi in the past did not permit a manjangu (stranger) to enter on or to exploit any of the land and waters without a Yindjibarndi elder

[6] This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

> having first given permission to, and then introduced, the stranger, if the traditional laws and customs permitted him or her to be there at all, to the spirits in the particular place and taken steps to protect the stranger from any harm—[88]-[89]
>
> A necessary factual underpinning of the 2007 determination, that, I am satisfied independently, the evidence in this trial also establishes, is that the Yindjibarndi people possessed, at sovereignty and now, native title rights and interests recognised by the common law within the meaning of s 223(1) of the *Native Title Act* that are at least no less than those recognised by the 2007 determination. And, for the reasons I have given, I am satisfied that those rights and interests include a right to control access equivalent to the right of exclusive possession in respect of the claimed area—[110].

Traditional laws and customs

[58] [Name removed] explains that Yindjibarndi people are bound by a shared system of cultural beliefs and laws called Birdarra Law. He speaks of the creative spirit beings that gave form to 'everything that is Yindjibarndi', that Yindjibarndi country is a 'sacred domain inhabited by the spirits of the old people' and created by the creative spirit beings. He gives extensive detail of the creation of Yindjibarndi Law and the domain allocated to the groups under that Law—at [33]-[35].

[59] [Name removed] explains the system of rules that governs all Yindjibarndi relationships – one which governs how a person must behave in relation to all people and things, what people must and must not do in their relationships with each other and with their country and its resources.

> Under Birdarra Law, if we look after our country the proper way, our country must look after us and provide for us; this is the promise of Minkala (God), which was told to us by the Marrga. However, if we break the Birdarra Law, or allow others to break it, we suffer; our people get sick or die, or the country dries up and we can't get what we need to go on living—at [41]

[60] Birdarra Law governs people's roles and responsibilities at Law and funeral ceremonies, determines who can marry who and is cared for by who and who is deferred to by who. Fundamental to this system are the rules in relation to sharing the resources of Yindjibarndi country – 'it is a social contract under which every Yindjibarndi person is entitled to share in the bounty of Yindjibarndi country and prosper'. It provides for a system of governing relationships with other language groups. A failure to acknowledge or abide by the system has detrimental effects on people – 'they become cursed by the country'—at [45]-[49].

[61] [Name removed] explains the significance of the term *ngurra* (home) and the system of division of country in accordance with the Birdarra Law. There are 13 *ngurra*, each divided into 4 parts, important in ceremonial activities. People's spirits remain connected to their *ngurra* despite physical absence; 'each *ngurra* holds the spirits of all our ancestors who belonged to that *ngurra'* that ensure the law is followed, each has its own sacred sites and particular resources, significant in the performance of cultural activities—at [50]-[53]. He explains the traditional law and custom that underpins access to country and the permission protocols:

> It's the same thing for Ngaarda *manjangu* (Aboriginal strangers) from neighbouring countries; if they want to come into Yindjibarndi country, they have to ask us for permission. They can't just go wandering around our country going wherever they want and doing whatever because if they go to the wrong place they could be harmed or killed by the spirits in our country—at [59].

[62] He describes the rituals and practices followed under Birdarra Law by 'the old people'—at [60].

[63] [Name removed] speaks in her statement of her knowledge of the spirits of Yindjibarndi country, her participation in Law ceremonies; she relates the dreaming story for the Millstream area (north of the claim area but in Yindjibarndi country)—at [26]-[32].

[64] [Name removed] speaks of her knowledge of Birdarra Law business and ceremonies – people carrying out Yindjibarndi law business, ceremonies and ritual as part of boys going through the law, traditional songs sung given by the spirits to a man and a woman when they visit country—at [52]-[65].

[65] I am of the view that the factual basis material supports the proposition that there was a society comprised of the predecessors of the native title claim group acknowledging and observing traditional laws and customs in the area of the application at the time British sovereignty was asserted in Australia and at the time of European contact. The application asserts, and this is illustrated in the Witness statements, that this is the society that has continued largely uninterrupted since that time. That is, Yindjibarndi society existed at sovereignty in respect of the area covered by the application, defined by recognition of laws and customs (Birdarra Law), from which the claim group's current traditional laws and customs are derived—*Gudjala 2009* at [66].

[66] The personal detail provided in the Witness statements supports and illustrates the information at Attachment F and the additional material. Justice Rares' judgement intricately sets out the detailed evidence that supports the existence of Yindjibarndi traditional laws and customs, drawn from the material before me.

[67] I am satisfied that the factual basis for the claim supports that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

Reasons for s 190B(5)(c)

[68] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. In order for a delegate to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala 2007* at [63], [65] and [66] (as summarised above).

[69] Continued acknowledgement and observance of their traditional law and custom has been possible because the members of the Yindjibarndi claim group and their predecessors have continued to live, occupy and travel through the area covered by the application. Even when physically absent from the area they continue to practice their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their country. [Name removed] knows of the sites and areas of significance on Yindjibarndi country watercourses, birth places, burial sites, increase and healing sites, caves and rock shelters, rock paintings and engravings, artifacts and ochre quarries – all which require their own permission protocols, introduction rituals and protection—at [62]-[63]. It is his duty to visit different parts of Yindjibarndi country to perform the ceremonies that 'let the country know we are still here' - that his grandfather taught him and that he does every year on the claim area—at [64]. [Name removed]teaches her children Yindjibarndi ways and customs, they have rights to Yindjibarndi country which they get through her—at [30].

[70] That Yindjibarndi people have continued to hold their native title in accordance with traditional law and custom is also borne out in Justice Rares' findings in *Warrie*. Change and adaptations to Yindjibarndi traditional law and custom may have occurred over the period since sovereignty, however, they have done so 'conformably with the continuing efficacy of the native title rights and interests that those laws and customs evince':

> … such changes and adaptations, as the evidence reveals have occurred since sovereignty to the traditional laws and traditional customs, relating to a manjangu seeking permission from Yindjibarndi to access or conduct activity on Yindjibarndi country have not affected the essential normative character of those laws and customs or their observance at the present time. The right to control access that the Yindjibarndi assert is, in substance, the same as they have possessed continuously since before sovereignty under their traditional laws and customs—at [130] and [132].

[71] I am satisfied that the information before me supports the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. Attachment F and the additional material, including the Witness statements contain many statements (some of which are summarised above) that demonstrate the continuity of the native title claim group's traditional laws and customs. Further, all of the Witness statements illustrate that these laws and customs have been passed from generation to generation by traditional modes of oral transmission, teaching and common practice, and continue to be acknowledged and observed today among the current generations of Yindjibarndi people.

Conclusion

[72] The application satisfies the condition of s 190B(5) because the factual basis provided is 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.

[73] Under s 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s 190B(6):

> it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132]; and
>
> it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].

[74] As mentioned above in relation to the requirements of s 190B(5), I have relied on some of the findings of the Court in *Warrie*, where they are relevant to my consideration of the amended application for registration. I note that the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

Consideration

Exclusive Rights

(1) The right to possess, occupy, use and enjoy the area as against the world;
(12) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
(14) A right to make decisions about the enjoyment of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
(30) A right to control access of others to the area.
(31) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;
(51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out at sub-paragraphs (32) - (41) above) and/or in the said form (set out at sub-paragraphs (42) - (50) above), other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;

[75] I consider that the above listed exclusive rights can be prima facie established.

[76] The majority decision of the High Court in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*) considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land'. Further, it considered that the expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

[77] The decisions of the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths*) and *Banjima People v State of Western Australia (No 2)* [2015] FCAFC 171 (*Banjima*) indicate that for this right to be established, it must be accompanied by evidence that the practice of seeking permission to go onto another's country is grounded in a spiritual imperative that gives the practice normative force. This may be expressed by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'.[7] In the more recent case of *Banjima*, the Full Court referred to these statements from *Griffiths* and held that 'controlling access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction ... is readily recognisable as a right of exclusive possession'.[8]

[78] The decision in *Warrie* relies on the authorities in *Griffiths* and *Banjima* and provides an extensive examination of the Yindjibarndi people's claimed right to exclusive possession as against the whole world. It is appropriate that I rely on the Court's finding that such a right has existed under Yindjibarndi traditional law and custom since prior to the assertion of sovereignty:

> I am satisfied that, under those laws and customs, the Yindjibarndi in the past did not permit a manjangu (stranger) to enter on or to exploit any of the land and waters without a Yindjibarndi elder having first given permission to, and then introduced, the stranger, if the traditional laws and customs permitted him

[7] *Griffiths FFC* at [127].
[8] *Banjima FFC* at [38].

or her to be there at all, to the spirits in the particular place and taken steps to protect the stranger from any harm—[88]-[89].

[79] I am also satisfied that the information accompanying the application and the witness statements provided as additional material support the claimed right sufficient for it to be prima facie established.

[80] I note that the right at [31] was not established when the original application was considered for registration. In my view there is sufficient evidence before me to support its existence under the 'portmanteau' of the exclusive right. The right is therefore established prima facie and can be added to the existing entry of rights interests on the Register.

Non exclusive rights

(2) A right to occupy the area;
(3) A right to use the area;
(4) A right to enjoy the area;
(5) A right to be present on or within the area;
(6) A right to be present on or within the area in connection with the society's economic life;
(7) A right to be present on or within the area in connection with the society's religious life;
(8) A right to be present on or within the area in connection with the society's cultural life;
(11) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
(13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;
(15) A right of access to the area;
(16) A right to live within the area;
(17) A right to reside in the area;
(18) A right to erect shelters upon or within the area;
(19) A right to camp upon or within the area;
(20) A right to move about the area;

[81] These rights are evidenced in the material before me, suggesting they exist under the traditional laws and customs of the native title claim group.

[82] The submissions and witness statements describe numerous instances of access and use of the claim area by members of the native title claim group, and their predecessors. Yindjibarndi people have continuously occupied and accessed the areas of and proximate to the claim area through camping, hunting, gathering; collection of resources for a multitude of purposes; caring for country and protecting and maintaining places of importance; conducting ceremony; and the teaching of Yindjibarndi stories and cultural traditions to the younger generations. As referred to above in relation to my consideration of the factual basis, the claimants witness statements are replete with references to their life-long access to Yindjibarndi country.

[83] I consider that these rights can be established, prima facie.

(9) A right to hunt in the area;
(10) A right to fish in the area;
(32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
(33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;
(34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
(35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
(36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;
(37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;
(38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;
(39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;
(40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;
(41) A right to use and/or enjoy resources, other than minerals and petroleum. For cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;
(42) A right to take fauna;
(43) A right to take flora (including timber);
(44) A right to take soil;
(45) A right to take sand;
(46) A right to take stone and/or flint;
(47) A right to take clay;
(48) A right to take gravel;
(49) A right to take ochre;
(50) A right to take water;

[84] These rights are evidenced in the material before me, suggesting they exist under the traditional laws and customs of the native title claim group.

[85] There is information that members of the claim group hunt and fish and have used the resources of their land and waters in the generations since settlement and in a manner consistent with Yindjibarndi traditional laws and customs. The witness statements refer to these matters extensively in relation to the claimed area as well as in relation to the Yindjibarndi determined area to the north.

[86] I consider that these rights can be established, prima facie.

(21) A right to engage in cultural activities within the area;
(22) A right to conduct ceremonies within the area;
(23) A right to participate in ceremonies within the area;
(24) A right to hold meetings within the area;
(25) A right to participate in meetings within the area;
(26) A right to teach as to the physical attributes of the area;
(27) A right to teach as to the significant attributes of the area;
(28) A right to teach upon the area as to the significant attributes of the area;
(29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;

[87] These rights are evidenced in the material before me, suggesting the rights exist under the traditional laws and customs of the native title claim group.

[88] All of the claimants attest to the exercise of these rights – both during their childhoods with their parents and grandparents and currently in the form of law business, ceremonial business, meetings on country to care for and manage areas within the claim area and cultural practices in relation to important sites. All attest to passing on their knowledge about all of these matters onto the younger generations of the native title claim group.

[89] [Name removed] refers extensively to the conduct of and participation in ceremony in accordance with Yindjibarndi Birdarra Law. For example:

> the ngurrara for the area are required to perform the wutheroo (introduction) ritual. This ritual introduces the people to Barrimirndi and to the other Marrga in the area. The requirement under our Law to perform the wutheroo ritual applies to all Yindjibarndi people and also to manjangu (strangers), although manjangu must be introduced by an Yindjibarndi person. In this ritual we first talk to the country—[62].

and

> It is my duty, and the duty of the other senior Yindjibarndi Lawmen to regularly visit different parts of Yindjibrndi country to perform thalu ceremonies .These ceremonies let the country know we are still here, that we haven't forgotten our country, and that it should not forget us. Those of us who work the different thalu must be the correct Galharra for the particular thalu and must get painted up with local yarna (ochre). Again, we must ask the Marrga in the area for permission to break the leaves off a tree, which we then use to brush the thalu from side to side, while at the same time talking and calling out in Yindjibarndi language. My grandfathers taught me how to do this and I have been doing it ever since. Every year I travel out to the claim area to do this—[64].

[90] I consider that these rights can be established, prima facie.

(55) A right, in relation to any activity occurring on the area, to
i. maintain,
ii.conserve; and/or
iii.protect
significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object

[91] This right is evidenced in the material before me, suggesting the right exists under the traditional laws and customs of the native title claim group. [Name removed] explains:

> There are sacred sites and significant places all over the Yindjibarndi #1 claim area, including all wundu (watercourses), yirrgarn (birthplaces), thungari (burial sites), yamararra (caves and rock-shelters), thalu (increase sites and healing sites), maminagrli (rock paintings and engravings), budbungarli (artefacts), yama-ngarli (ochre quarries) and wurrungarli (special hunting hides). Ylndjlbarndi people have to look after those places. Some of these places are inhabited by Marrga and by the spirits of our old people. Under the Birdarra Law, manjangu (strangers) must be properly introduced because if they aren't and they go into the wrong place they could be seriously harmed or killed. That is why Aboriginal strangers to Yindjibarndi country will always ask us for permission before they go into places where they haven't been introduced by us—at [61].

[92] The other witness statements also include information illustrating that members of the claim group continue to maintain and protect sites and areas of significance under their traditional laws and customs.

[93] I consider that this right can be established, prima facie.

Not established

(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum including the manufacture of objects, materials or goods for

sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial, and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;

[94] There is no evidence in the application or additional material to suggest that this right exists under the traditional laws and customs of the native title claim group. I am therefore of the view that it cannot be established prima facie.

(53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;
(54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;

[95] I am not satisfied that these claimed rights can be established prima facie. The 'right of senior members . . . to receive a portion of major catches [of fish]' and 'the right of clan members to receive a portion of a major catch taken from the waters or land of the clan's estate' are not rights and interests in relation to lands or waters. The 'do not come within the ambit of the statutory definition of "native title rights and interests"'—*Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] FCA 771 (6 July 1998.[9]

[96] I consider that this right cannot be established, prima facie.

(56) A right, in relation to any activity occurring on the area, to -
i. maintain
ii.conserve; and/or
iii.protect
significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;
(57) A right, in relation to a use of the area or an activity within the area, to:
(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs
(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled;

[97] These rights would appear to fall within ambit of 'the right to protect cultural knowledge' and are not rights that have been recognised by the Courts. *Ward HC* the High Court found that the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holder:

- 'goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The "recognition" of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was found there or took place, there, or elsewhere'.[10]

[9] 156 ALR at [118] per Olney J.
[10] At [59] and [60].

- The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s 223(1).

[98] In *Daniel v Western Australia* [2003] FCA 666 (*Daniel*) the Court held in relation to similarly framed rights:

- 'to assert cultural knowledge going beyond what, according to *Ward* can be claimed as part of native title';
- To the extent this claim is an assertion of a right to control others imparting traditional knowledge it is not maintainable: *Ward* HC at 31, at [59] - [60].[11]

[99] I consider that these rights cannot be established, prima facie.

(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;

[100] As the claimed right is expressed, it is open to wide interpretation and is potentially not a right claimed in relation to land and waters.

[101] I consider that this right cannot be established, prima facie.

(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;
(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

[102] The Court held in *Daniel* that this claimed right 'addresses the matter of law falling to be decided in the context of ss 223 and 225 of the NTA. That is, determination of native title must determine who the persons or each group of persons are who hold the common or group rights. This therefore cannot itself be a native title right and interest'.[12]

[103] I consider that these rights cannot be established, prima facie.

Conclusion

[104] The application satisfies 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.

[11] At [300] and [301].
[12] At [302].

[105] 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].

[106] In *Doepel*, Mansfield J also considers 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].

[107] Schedule M of the application refers to Michael Woodley's regular conduct of ceremony within the claimed area, pursuant to and in accordance with Yindjibarndi traditional laws and customs. His witness statement is replete with examples of his physical connection to the sites, locations and the broader area of Yindjibarndi country. As evidenced in all of the witness statements members of the claim group continue to visit many areas within the area covered by the application and to carry out various traditional activities associated with 'looking after country' and in exercise of their claimed native title rights and interests. The findings of Justice Rares in *Warrie* support the continuing physical connection of members of the native title claim group to the claimed area.

[108] Sufficient material is provided to show that, in their acknowledgement and observance of Yindjibarndi traditional laws and customs, members of the native title claim group have a traditional physical connection with the land and waters of the application area. The material is referred to and quoted extensively in the consideration above for both ss 190B(5) and 190B(6). I am satisfied that at least one member of the claim group currently has a traditional physical connection with parts of the application area

[109] The application satisfies 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 s61A (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.

[110] 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 as to whether the application should not have been made.

Section 61A(1)

[111] 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 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the application.

Section 61A(2)

[112] 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. Attachment B of the original application makes the requisite statements at paragraph 1.

Section 61A(3)

[113] 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 description of the claimed rights at Schedule E make it clear that rights conferring exclusive possession are not claimed in relation to areas where exclusive possession acts have been done. The exclusive right is only claimed in relation to Area A which comprises of areas of unallocated Crown land not previously subject to any grant by the Crown, to areas where ss 47, 47A and 47A apply and to areas where the non-extinguishment principle applies.

Conclusion

[114] In my view the application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisifies 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.

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

Section 190B(9)(a)

[116] Schedule Q contains the requisite statement that no claim is made to ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Section 190B(9)(b)

[117] Schedule P makes the statement that this requirement is not applicable – on the basis that no claim is made to any offshore place.

Section 190B(9)(c)

[118] There is no information in the application or otherwise to indicate that the native title rights and/or interests claimed in the application area have otherwise been extinguished.

Conclusion

[119] 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)

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.

[120] The application satisfies the condition of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

[121] This condition is procedural only and simply requires the Registrar to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. It does not require any merit or qualitative assessment of the material for the purposes of s 190C(2)—*Doepel* (at [16] and also at [35] to [39].

Native title claim group: s 61(1)

[122] Section 61(1) provides that a native title determination application may be made by 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'. The Registrar must consider 'whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

> If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [36].

[123] There is nothing on the face of the current application to indicate that it is not brought on behalf of all members of the native title claim group.

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

Name and address for service: s 61(3)

[125] Part B of the application states the name and address for service of the persons who are the applicant.

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

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

[127] Schedule A refers to Attachment A which provides a description of the persons who comprise the native title claim group.

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

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

[129] The application is accompanied by an affidavit from each of the 10 persons who comprise the applicant. Each person has signed a separate affidavit swearing or affirming in full to all the requirements of this section.

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

Details required by s 62(1)(b)

[131] Subsection 62(1)(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)*

[132] Attachment B provides a metes and bounds description of the geographical external boundaries of the area covered by the application, referencing geographic coordinate points. Schedule B provides a list of general exclusion statements for those areas not covered by the application.

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

[133] 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)*

[134] Schedule D provides the statement that searches have been undertaken by the State of Western Australia in relation to the land and waters covered by the application

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

[135] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application

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

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

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

[137] Schedule G lists a number of activities the native title claim group currently carries out in relation to the area covered by the application.

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

[138] Schedule H provides the statement that the applicant is not aware of any such applications. The applicant makes reference to a native title determination application made in 2015 that has since been dismissed.

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

[139] Schedule HA provides the statement that the applicant is not aware of any such notifications.

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

[140] Schedule I provides the details of two notices issued under s 29 as at 15 September 2016 (the date relevant to the timing of the filing of the earlier amended application).

Conclusion

[141] The application contains the details specified in ss 62(2)(a) to (h), and therefore contains all details and other information required by 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.

[142] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim, as described 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 is a registered application when the current application was made in the Court.

[143] The Tribunal's geospatial report confirms that no native title determination applications fall within the external boundaries of the current application. As the Yindjibarndi #1 application is not overlapped by any other applications, there is no requirement that I consider the issue of common claim group membership.

[144] The application satisfies 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.

[145] I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met, and as the application does not purport to be certified pursuant to s 190C(4)(a), it is necessary to consider if the application meets the requirements set out in s 190C(4)(b). That is, whether the applicant is a member of the native title claim group and is authorised by all the other persons in the claim group to make the application and deal with matters arising in relation to it.

[146] I must also consider the requirements as set out in s 190C(5). That is, that the application includes a statement to the effect that the requirement of paragraph 4(b) has been met and briefly sets out the grounds on which the Registrar should consider that it has been met.

Background

[147] The composition of the applicant has changed since the time the application was first made in 2003. The applicant has been the subject of proceedings in the Court pursuant to s 66B to replace the applicant and more recently subject to a s 62A order of the Court. Below are the changes that have taken place since the authorisation of the applicant in 2012, on which this amended application relies:

Applicant authorised 24 March 2012	NC (deceased), Thomas Jacob, Stanley Warrie, Allum Cheedy, Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin, Masie Ingie
Applicant replaced	Thomas Jacob, Stanley Warrie, Allum Cheedy, Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin and Masie Ingie * S 66B orders replacing applicant 15 Feb 2013—*NC (deceased) v State of Western Australia (No 2)* [2013] FCA 70
Applicant for earlier amended application	Thomas Jacob, Stanley Warrie, AC (deceased), Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin, Masie Ingie
Applicant on RNTC at the time further amended application filed	Thomas Jacob, Stanley Warrie, Allum Cheedy, Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin, Masie Ingie *1 May 2017 s 62A order removing names of Thomas Jacob and Allum Cheedy (now deceased)
Applicant for further amended application	Stanley Warrie, Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin, Masie Ingie

The law

[148] The importance of the proper authorisation of an application has been considered by the courts on many occasions. For instance, in *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 (*Bolton*), Justice French said:

> As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title…—at [43].

[149] Section 251B defines the term 'authorise' and provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways:

- by a process of decision-making that is mandated by the traditional laws and customs of the native title claim group in relation to authorising things of that kind (in accordance with s 251B(a)); or
- where there is no traditionally mandated process, by a decision-making process agreed to and adopted by the native title claim group (in accordance with s 251B(b)).

Information considered

[150] Part A of the amended application makes the following statement and refers to affidavits at Attachment A to the application:

> The Applicant is authorised by all members of the claim group to make the application and to deal with all matters arising under the Native Title Act 1993 in relation to the application (see: *NC (deceased) v State of Western Australia (No 2)* [2013] FCA 70.

[151] Schedule R of the amended application includes the following statement:

> In *NC (deceased) v State of Western Australia (No 2)* [2013] FCA 70, his Honour held that the applicant was 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.

[152] Schedule R also includes reference to the condition in that decision that in the event that a member of the applicant passes away, that member is no longer authorised to make and deal with the Yindjibarndi #1 application and the remaining members of the applicant remain authorised to make and deal with it.

[153] I have therefore considered the Court's decision in *NC (deceased) v State of Western Australia (No 2)* [2013] FCA 70 (12 February 2013) (*NC (deceased)*). *NC deceased* is the judgement in relation to an interlocutory application in accordance with s 66B to replace the then current applicant. The Court allowed and ordered the replacement of the applicant on 15 February 2013. The Court was satisfied that '[t]he Replacement Applicant has adduced a considerable body of evidence and argument to discharge its onus', despite the proceedings being 'strenuously opposed on both technical and policy or discretionary grounds by two members of the Current Applicant, Ms Aileen Sandy and Ms Sylvia Allen'—at [2].

[154] I have also considered additional information provided by the applicant in the form of [Name removed]'s affidavit, dated 14 June 2012. [Name removed] is the Solicitor and In-House Legal Counsel acting for the Yindjibarndi Aboriginal Corporation. He states he was authorised by TJ (deceased), Stanley Warrie, AC (deceased), Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin, Masie Ingie to make his affidavit in support of their joint interlocutory application to replace the applicant – the subject of the proceedings in *NC (deceased)*—at [1]-[2].

[155] [Name removed]'s affidavit includes the following information:

- a copy of the notice of the authorisation meeting held on 24 March 2012, mailed to approximately 300 Yindjibarndi persons and published in 3 regional newspapers in the 3 weeks leading up to meeting;
- prior to the authorisation meeting, a list was prepared to serve as an Attendance Register of all known living descendants of the Yindjibarndi ancestors (as listed in the notice) based on genealogies and anthropological expertise;
- 180 adult descendants of the Yindjibarndi ancestors attended the meeting and were entitled to vote;
- resolutions were passed that the current applicant was no longer authorised to make the Yindjibarndi application and to deal with matters relating to it;
- 13 persons were authorised by the claim group to make and deal with the application;
- a set of conditions relating to that authorisation of the new applicant.

[156] The final paragraph in each of the affidavits sworn by the persons comprising the applicant sets out very briefly the decision-making process followed by the native title claim group to authorise.

First limb of s 190C(4)(b) – is the applicant a member of the native title claim group

[157] The application and accompanying affidavits do not contain the specific statement that each of the persons comprising the applicant are members of the native title claim group. However, the decision in *NC (deceased)* clearly states that there was no dispute that those persons comprising the replacement applicant are all members of the native title claim group—at [63].

[158] I am satisfied that this requirement is met.

Second limb of s 190C(4)(b)—is the applicant authorised by all the other persons in the native title claim group

[159] Each of the 2016 affidavits sworn by the persons comprising the applicant contain the statement that they are authorised on the basis of 'a meeting of the native title claim group held in Roebourne in Western Australia on 24 March 2012, pursuant to a decision-making process unanimously agreed to and adopted by the members of the claim group present at the meeting. That process was one by which decisions were made by majority vote – at [4].

[160] [Name removed]'s affidavit says very little about the decision-making process followed by the attendees of the 24 March 2012 authorisation meeting. However, the reasons for judgement in *NC (deceased)* set out the evidence before the Court in relation to the decision-making process agreed to and adopted by the Yindjibarndi native title claim group. Michael Woodley's evidence includes the following:

> Mr Woodley explains that in the old days decisions about matters that affected Yindjibarndi country would be made following consultation with the Yindjibarndi people by the Tharngu and the Nyambali sitting together in what was called the Nyambali-Tharngungarli. However, this original way of making decisions has changed over the last 20 years or so to make way for more democratic processes. Today decisions concerning rights and interests in Yindjibarndi country are usually made by consensus at community meetings after taking advice from the Nyambali-Tharngungarli.
>
> As Mr Woodley notes and as will be seen, it is common ground there is no traditional decision-making process for dealing with an application for a determination of native title.
> ….
> important decisions about Yindjibarndi native title claims, such as who should be the applicant, have been made by the Yindjibarndi people at community meetings like the 2012 meeting. Mr Woodley has attended many Yindjibarndi community meetings over the past five years and has observed that the issues discussed at those meetings are generally decided by consensus. This is because more often than not the Yindjibarndi people follow the advice and guidance of the Tharngu.
> ….
> where there is a division of opinion as to what should happen, the issue is usually decided by a majority vote. The process followed at the 2012 meeting to appoint the Replacement Applicant for the Yindjibarndi No 1 claim accords, he says, with the process that was followed to appoint the Current Applicant. To Mr Woodley's knowledge and belief, all the members who were authorised to become the applicant for the Yindjibarndi No 1 claim are members of the Yindjibarndi No 1 claim group—at [39]-[43].

[161] It was Justice McKerracher's consideration and view that:

- no determination was necessary at the 2012 meeting regarding applicability of a traditional decision-making process;
- it was common ground there was no such process for meetings; and

- it was not necessary for the anterior process of decision-making to be agreed and adopted prior to any resolution regarding the applicant– agreement within the contemplation of s 251B may be proved by the conduct of the parties: see *Noble* (at [18])[13]—at [80]-[82].

[162] Justice McKerracher's comments and conclusions are sufficient for me to be satisfied that the applicant has been authorised to make and deal with the Yindjibarndi #1 application, for the following reasons:

- the Court's focus is on whether the correct procedure in relation to authorisation in accordance with s 251B has been followed—[76];
- the Court accepted the submission of the Replacement Applicant that the meeting proceeded on the basis that the decision would be by simple majority vote of all the members of the native title claim group present at the meeting—at [84].
- there was no relevant dissent as to the process—at [91]
- it was clear to the Court that those who attended the 2012 meeting had an opportunity to fully participate in the decision-making process and the conduct of the Chair 'gave the utmost opportunity for any person to express a contrary view on that topic. No person sought to do so'—at [92]-[93]
- the Court's inference was that the process of decision-making in each instance was accepted and agreed—at [94]
- it was clear to the Court that the claim group as a whole put its 'trust and authority in the Replacement Applicant'—at [104]
- the Court was satisfied that the Replacement Applicant should succeed in its s 66B application—at [107].

[163] The information pertaining to the authorisation of the applicant to make and deal with the application relates to a different composition of applicant than that which brings this amended application. However, the persons comprising the applicant for this amended application are those persons comprising the replacement applicant the subject of the application in *NC (deceased)* less the names of deceased persons. The process of removing their names was ventilated in the Court, the result of which are the orders made on 1 May 2017 to remove their names pursuant to s 62A. The removal of their names is also in accordance with the resolutions made at the 2012 meeting that deal with circumstances where a person comprising the applicant passes away (as set out in [Name removed]'s affidavit).

190C(5)

[164] For the purposes of s 190C(5)(a), the application must contain a statement to the effect that the requirement set out in paragraph (4)(b) has been met, and, for the purposes of s 190C(5)(b), must also briefly set out the grounds on which the Registrar should consider that the requirement has been met. The statement is not specifically made in the amended application, however, in my view it is appropriate that I have regard to the reasons in *NC (deceased)* as it is referred to in Part A of the application.

[165] For the statement that the applicant is a member of the native title claim group, I refer to *NC (deceased)*: the evidence of Michael Woodley at [43]; arguments advanced by replacement applicant at [57] and the Court's acceptance that the applicant is a member of the native title claim group:

> Dealing with each of those four matters, there is no doubt that there is a current application which was filed on 9 July 2003 and the Replacement Applicant's interlocutory application is made within that

[13] *Noble v Mundraby, Murgha, Harris and Garling* [2005] FCAFC 212

> proceeding. There is also no dispute as to the second issue, namely, that each person comprising the Replacement Applicant is a member of the Yindjibarndi native title claim group. That is established on the evidence of Mr Davies and the evidence of Ms Coppin—at [63].

[166] Part A of the application makes the statement that the applicant is authorised to make the application, and to deal with matters arising in relation to it, by all the other persons in the native title claim group.

[167] The grounds on which Registrar can consider that paragraph 4(b) is set out in the final paragraph of each affidavit that accompanies the application, sworn or affirmed by the persons comprising the applicant.

[168] I am satisfied that the amended application satisfies the requirements of s 190C(5).

Conclusion

[169] I am satisfied that Stanley Warrie, Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin, Masie Ingie, the persons comprising the applicant, are all members of the Yindjibarndi native title claim group.

[170] I understand that authorisation of the applicant is derived through a decision-making process agreed to and adopted by members of the native title claim group in attendance at a meeting in Roebourne on 24 March 2012. I understand that three of these persons are since deceased, their names have been removed and that it is the remaining 10 that continue to be authorised to make and deal with the amended application.

[171] I am satisfied that all the material before me demonstrates that the applicant is authorised in accordance with s 251B(b) to make this application and to deal with all matters arising in relation to it:

- the information before me sufficiently describes the decision-making process agreed to and adopted by the Yindjibarndi native title claim group;
- that sufficient notice of the meeting was given to the claim group;
- there is sufficient detail to evidence that the decision-making process (described above) was followed to authorise those persons identified at Part A of the Form 1 to make and deal with the application;
- each of the persons now comprising the applicant have affirmed or sworn to the decision-making process in their affidavit that accompanies the application; and
- the decision in *NC (deceased)* supports the veracity of the resolutions of the native title claim group and the authorisation of the persons comprising the applicant.

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

[End of reasons]