National
Native Title
Tribunal

Registration test decision

Application name	Boorroola Moorrool Moorrool
Name of applicant	Ms Rosita Shaw, Mr Charles (Rocky) Prouse, Mr Gary Ozies, Dr Anne Poelina, Ms Linda Nardea, Ms Katherine Ningella, Mr Jonathan Rickerby
NNTT file no.	WC2016/005
Federal Court of Australia file no.	WAD598/2016
Date application made	23 December 2016

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: 9 May 2017

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Heidi Evans

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 20 November 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

[2] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Boorroola Moorrool Moorrool native title determination application to the Native Title Registrar (the Registrar) on 29 December 2016 pursuant to s 63 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.

[3] Given that the claimant application was made on 23 December 2016 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[4] Therefore, in accordance with subsection 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. This is commonly referred to as the registration test.

[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.

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

[5] 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— *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 *(Doepel)* at [16] and [122].

Description of the area covered by the application

[6] Schedule B refers to Attachment B which describes the area covered by the application by means of a metes and bounds external boundary referencing native title determinations and applications, land parcels and geographic coordinates (Referencing Geocentric Datum of Australia 1994 (GDA94) shown to six (6) Decimal places in decimal degrees). Schedule B also lists general exclusions to describe those areas that are not covered by the application.

[7] Schedule C refers to Attachment C which is a colour map prepared by the Tribunal's Geospatial Services, titled 'Boorroola Moorrool Moorrool' dated 2 December 2016. The includes the application area depicted by a bold blue outline; cadastral background colour according to tenure; surrounding Native Title Determinations shown and labelled, surrounding Native Title Determination Applications shown and labelled, topographic background; scalebar, coordinate grid, legend and locality map; and notes relating to the source, currency and datum of data used to prepare the map.

[8] The information in relation to the external boundaries of the area covered by the application allows me to identify the location and extent of those boundaries. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described.

[9] The geospatial report makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the external boundary is identifiable and, along with the general exclusions that set the internal boundary, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[10] 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.

[11] 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).

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

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

[13] Carr J in State of *Western Australia v Native Title Registrar* [1999] FCA 1591 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].

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

> The native title claim group consists of people known as the Nyikina people, being those Aboriginal people whose traditional lands are situated generally in the north west of the Kimberley region in the State of Western Australia.
>
> The individuals who comprise the Nyikina People's Boorroola Moorrool Moorrool native title claim are the descendants of the following Apical Ancestors, including those people adopted in accordance with Nyikina traditional law and custom, see below:
>
> 1. Nani
> 2. Bundangurra and Mabel Ah Chee
> 3. Jambo, Polly Wurrayin and Charlie Djawali
> 4. Dim
> 5. Gadjigar
> 6. Ngurkwan, Yayika and Minyang
> 7. Lucy Muninga, Edward Yedawarra and Wadadarl mother of Fulgentius Fraser
> 8. Gurupirin
> 9. Kitty Kujaja
> 10. Maggie Nimbanirl
> 11. Kudij and Marrkal
> 12. Kalmoorrd and Jumbang

13. Magalanyka and Balkiny
14. Bidarn
15. Jarji
16. Balbarra

> A child is adopted in accordance with Nyikina tradition if they are or have been "grown up" by a person who is or was a descendant of one of the Apical Ancestors named above. According to this law and tradition to become a Nyikina person the child must be 2 years of age or under when they first commenced to be "grown up" by a Nyikina person.

[15] In my view, the description of the 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. Based on the information provided at Schedule A, I understand that a person will be a member of the native title claim group based on descent through the 16 ancestral lines listed or adoption in accordance with Nyikina tradition as defined.

[16] I am therefore satisfied that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group. It may be that some factual inquiry is required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

[17] 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.

[18] 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].

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

> Native title where traditional rights are wholly recognisable:
>
> 1. Paragraph 2 applies to every part of the Claim Area:

(a) where there has been no extinguishment to any extent of native title rights and interests or where any such extinguishment is required to be disregarded pursuant to sections 47, 47A or 47B of the Native Title Act 1993 (Cth); and
(b) which is not subject to the public right to navigate or the public right to fish.

2. Where this paragraph applies, the native title rights and interests possessed under traditional laws and customs confer possession, occupation, use and enjoyment of the land and waters as against all others.

Native title where traditional rights are partially recognisable:

3. Paragraph 4 applies to every part of the Claim Area to which paragraph 2 does not apply.

4. Where this paragraph applies, the customary rights and interests possessed under traditional laws and customs that are able to be and should be recognised by the common law of Australia being the (non-exclusive) rights to:

(a) have access to, remain on and use the land and waters;
(b) access and take the resources of the land and waters; and
(c) protect places, areas and things of traditional significance on the land and waters.

5. Each of the native title rights and interests referred to in each of paragraphs 2 and 4 exist in relation to the whole of each part of the Claim Area to which those paragraphs respectively apply and is held by the members of the native title claim group subject to and in accordance with traditional laws and customs

[20] When read together with the exclusion statements in the description of the area covered by the application (at Schedule B), I am of the view that the native title rights and interests claimed can be 'properly understood'. I understand that the application claims possession, occupation, use and enjoyment to the exclusion of all others only in those areas where it can be recognised, and claims only the 3 listed non-exclusive rights where the exclusive right cannot be recognised. 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.

[21] 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

[22] The task of the Registrar's delegate at s 190B(5) was expressed by Mansfield J in *Doepel* in the following way:

> 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].

[23] This approach was approved by the Full Court in *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*). It was noted by the Full Court that the delegate was able to rely on the statements within the affidavits required by s 62(1)(a) sworn by the applicant persons that the statements in the application were true, in accepting the asserted facts – at [91]–[92].

[24] While s 62(2)(e) makes it clear that it is only a 'general description' of the factual basis that is required to be contained in the application, it is my understanding that for the purposes of s 190B(5), that description must be in sufficient detail to enable a 'genuine assessment of the application', and be 'more than assertions at a high level of generality' – *Gudjala 2008* at [92].

[25] It is the particular matters prescribed by subsections (a), (b) and (c) of s 190B(5) that the factual basis must address – *Doepel* at [130]. That is, the factual basis must provide information that relates to the particular native title claimed, by the native title claim group, over the land and waters of the application area – see *Gudjala 2007* at [39].

[26] The factual basis material included in the application is found at Schedules F, G and M, in Attachment F and in three affidavits sworn by members of the claim group:[name removed], sworn 16 November 2016;[name removed], sworn 11 November 2016; and[name removed], sworn 15 November 2016.

[27] Further, on 18 April 2017, the applicant's legal representative provided directly to the Registrar for consideration in applying the registration test, additional material in the form of a letter of the same date (the additional material).

[28] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Reasons for s 190B(5)(a)

[29] The assertion at s 190B(5)(a) is that 'the native title claim group have, and the predecessors of those persons had, an association with the area'. Where the factual basis addressing this association consists only of broad statements that lack geographical particularity to the land and waters of the claim area, or where the information fails to speak to an association with the entire area claimed, it is unlikely to satisfy the condition at s 190B(5)(a) – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26].

[30] In *Gudjala 2007*, in an aspect of the decision not criticised by the Full Court on appeal, Dowsett J's comments indicate that the information required at this condition may need to address:

- the way in which the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times;
- an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

The applicant's factual basis material – s 190B(5)(a)

[31] I have set out below the asserted facts within the material that I consider speak to the assertion at s 190B(5)(a):

- the earliest recorded interaction with Indigenous people in and around the claim area was in the 17th century when William Dampier landed at Cygnet Bay in the Northwest corner of King Sound – Attachment F at p 23;
- the journals of explorer Alexander Forrest from his travels in 1879 through the land and waters of King Sound and up the Fitzroy River record interactions with local Aboriginal people – Attachment F at p 23;
- it is likely that some of the people who Forrest and other explorers came in contact with in the claim area were ancestors of members of the contemporary native title claimant group – Attachment F at p 23;
- sovereignty in Western Australia occurred in 1829, however the claim area was not settled by Europeans until the 1880s – Attachment F at p 24;
- the native title claim group is a continuation of the Nyikina people who were in possession and occupation of the territory of the claim area at the time of first European settlement – evidence is drawn from current Aboriginal oral tradition among claimants, genealogies and family histories of the claimants, as well as documentary evidence in historical and anthropological sources – Attachment F at p 31;
- from the earliest anthropological record of the Southern Kimberley, Nyikina has been identified as a language and group of people connected with the lower Fitzroy River – additional material at p 3;
- AP Elkin refers in a paper in 1933 to the Nyikina people of the area – Attachment F at p 25;
- the first anthropological study of the region was by Phillis Kaberry in 1934 and 1936 – her work discusses the connection of a person to the belief in spiritual conception in the Kimberley which gives rise to rights in land – Attachment F at p 25;
- Helmut Petri worked with the Nyikina in 1938 and 1939, and regarding the traditional country of the group, he wrote that 'both sides of the lower reaches of the Fitzroy River, as well as the tidal waters of where it flows into King Sound, form the heart of the old Nyigina tribal territory' – Attachment F at p 26;
- genealogies taken by Tindale from the Derby township area and surrounding pastoral stations including Yeeda and Meda record the names of the predecessors of many of the claimants – Attachment F at p 27;

- claimants relay the story of the travels of Wunyumbu, the ancestral law maker, who mapped the area to the west coast of the King Sound when he went to Ladgera Bay – additional material at p 1;
- the sites of Wunyambu extend to the mouth of the Fitzroy River and across King Sound, and he is known as the creator of the Fitzroy River *martuwarra*, the flooding of the Fitzroy River into King Sound – additional material at p 2;
- claimants describe various sites located within the application area associated with particular creation stories or myths, and describe the way their ancestors accessed and used these sites – Attachment F at pp 28-30;
- one claimant's grandmother (also a living claimant), the daughter of apical ancestor Fulgentius Fraser, has shared with her grandson how both her parents were Nyikina and from the Fraser River area – additional material at p 2;
- the claimant's grandmother also shared how as a child she would walk to Mary Island (in the application area) with her mother and camp there, and about fishing trips she went on with her mother to the area around Sawfish Point (in the application area) – additional material at p 2;
- places with which the apical ancestors and their immediate descendants are recorded as being associated with include Yeeda (at the southern edge of the application area), Mt Anderson (in the vicinity of, south of the application area), Manguel Creek (in the vicinity of, south of the application area), Fraser River (within the application area), Derby (within the application area), Liveringa (south east of the application area) and Udialla (further south on the Fitzroy River) – additional material at pp 3-4.

[32] The affidavits sworn by claimants that accompany the application also contain information regarding an association of the members of the group and their predecessors with the application area. Claimants' statements include references to various locations within and in the vicinity of the application area with which they and their predecessors are and have been associated. For example, one claimant states that she was born in Derby hospital and that her mother was born in the bush at Langey Crossing 'possibly within or very close to [the] claim area'. She also explains that her grandparents used to live at Yeeda Station in the south of the application area – affidavit of [name removed] at [1] to [2].

[33] She further states:

> … When I was little my mother gave me to Wandjina parents they lived in old Mowanjum, which is in the claim area. I grew up here.
>
> […]
>
> I grew up on the claim area, I know this area really well, I have lived here all of my life. I grew up at old Mowanjum, they moved us to the new Mowanjum in about 1980. The Government told the people to move, our community was next to the aerodrome – affidavit of [name removed] at [3], [10].

[34] This is an example of the type of material in the affidavits that I consider addresses the assertion at s 190B(5)(a).

My consideration – s 190B(5)(a)

[35] From the material, I understand that European settlement of the region within which the application area is situated took place in the 1880s, and that this was around the time a number of the apical ancestors were born – see the additional material at pp 3-4. It is also my understanding, noting the information within the additional material about the places where these persons were born and/or were otherwise associated with, that the apical ancestors were the Nyikina people who were in possession and occupation of the application area at the time of settlement. As stated in Attachment F, the native title claim group is a continuation of these Nyikina people – at p 31.

[36] It follows, therefore, that I consider the factual basis sufficient to support an association of the apical ancestors of the group with the application area, at settlement.

[37] In my view, the material also addresses an association of the predecessors of the group with the area over the period since settlement. The additional material includes statements from one claimant regarding his grandmother, the daughter of apical ancestor Fulgentius Fraser, who would take the claimant to various places within the application area and explain how her mother had taken her there as a child. Such places include Sawfish Point and Mary Island, both of which are located within the application area.

[38] Another claimant in her affidavit states:

> All them old people, my mums mum used to tell me they used to walk all around, they used to walk around Mt Jowlaenga to Yilakan, to Yeeda and Derby when it was seasonal, for example they would look for bush tucker, they used to go after the bush banana, bush orange (Nganybal) it is a little shrub and used it [sic] grind the flower to make flour – affidavit of [name removed] at [10].

[39] Regarding an association of the members of the group today with the application area, claimants describe the way they continue to visit the places their elders took them to as children, camping, fishing and hunting in the same way they were taught – see additional material at p 2. The material also includes excerpts of statements from Nyikina elders, describing significant sites in the application area, such as soaks and boab trees. These elders explain the spiritual implications of these places, such that I consider the material to address both a spiritual and physical association of the group with the area – see Attachment F at pp 28-29.

[40] Noting these examples from claimants of places within the application area with which they and their predecessors are and were associated, I am satisfied that the factual basis is sufficient to support an assertion of an association over the period since settlement to the present day.

[41] At s 190B(5)(a), the material must speak to an association of the group and its predecessors with the entirety of the area. Throughout the material, numerous places are referred to. Using the Tribunal’s Native Title Vision Plus database, I have considered these places in relation to the boundary of the application area, and observed that they are spread across the geographical extent of the area. In this way, I am satisfied that the factual basis is sufficient to support an association with the entirety of the area.

[42] Consequently, in light of the above, I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

[43] The requirement at s 190B(5)(a) is met.

Reasons for s 190B(5)(b)

[44] The requirement at s 190B(5)(b) is that I am satisfied that the factual basis is sufficient to support an assertion 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'. Noting the focus of the assertion on the claimed native title, it is my view that the task at s 190B(5)(b) should be undertaken with regard to the definition of 'native title rights and interests' at s 223(1).

[45] Pursuant to subsection (a) of that definition, native title rights and interests are those communal, group or individual rights and interests in relation to land and waters where 'the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. In light of the similarities between this definition and the terms of s 190B(5)(b), I consider it appropriate that I have regard to the leading authority in relation to s 223(1), namely the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

[46] The High Court held that not only were 'traditional laws and customs' those that had been passed down from generation to generation of a society, by word of mouth and/or common practice, but there were two further crucial elements that attached to the definition of that term – *Yorta Yorta* at [46]. Firstly, the High Court held that the origins of the content of the law or custom concerned must be found in the normative rules of the relevant Aboriginal pre-sovereignty society, and secondly, the normative system under which those rights and interests were possessed must have continued substantially uninterrupted since sovereignty – at [46]–[47], [79] and [86]–[87].

[47] In *Gudjala 2007*, in an aspect of the decision not criticised on appeal, Dowsett J approved this approach to the task at s 190B(5)(b). His Honour summarised the principles from *Yorta Yorta* and then sought to apply them to the factual basis material before him. Dowsett J again revisited the requirements of the condition in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). His Honour's comments from each of those decisions suggest the following types of information may be required to satisfy s 190B(5)(b):

- information addressing how the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – *Gudjala 2007* at [63];
- information that speaks to the existence at European settlement of a society of people living according to a system of identifiable laws and customs, and that identifies the persons

comprising that society who acknowledged and observed the laws and customs – *Gudjala 2007* at [65] and [81]; *Gudjala 2009* at [37] and [52];
- an explanation of how current laws and customs can be said to be traditional (that is, laws and customs derived from those of a pre-sovereignty society), and more than an assertion that those laws and customs are traditional – *Gudjala 2009* at [52] and [55];
- an explanation of the link between the claim group described in the application and the area covered by the application, which may involve identifying some link between the apical ancestors named in the application and any society existing at sovereignty, even if the link arose at a later stage – *Gudjala 2007* at [66] and [81];
- information addressing the claim group's acknowledgement and observance of the asserted traditional laws and customs pertaining to the claim area – *Gudjala 2009* at [74].

The applicant's factual basis material – s 190B(5)(b)

[48] I have summarised below the information in the application and additional material that I consider speaks to the assertion at s 190B(5)(b):

- the native title claim group is a continuation of the Nyikina people who were in possession and occupation of the territory of the claim area at the time of first European settlement – Attachment F at p 31;
- the birth dates of the apical ancestors range from around the 1860s to 1900 – additional material at pp 3-4;
- from the earliest anthropological record of the Southern Kimberley, the Nyikina have been identified as a language group associated with the country around the Fitzroy River and the Fitzroy catchment of the lower Fitzroy River including the tidal area of the King Sound – additional material at p 3; Attachment F at p 26;
- Nyikina are recognised by the other Kimberley Aboriginal groups as being a distinct cultural group on the basis of the oral mythology of Wunyambu – additional material at p 2;
- Wunyambu was the ancestral creator and law giver of the Nyikina, and the sites associated with Wunyambu extend to the mouth of the Fitzroy River and across King Sound – additional material at p 2;
- the Fitzroy flooding into the King Sound is associated with the origin myth of the Nyikina, it is an aspect of a significant seasonal event and is the origin of the Nyikina's most significant ancestors – additional material at p 2;
- sovereignty in Western Australia was in 1829, however the region including the application area was not settled until the 1880s – Attachment F at p 24;
- exploration trips took place through 1872 to 1897, as stock routes through the western Kimberley sought to be established – Attachment F at p 23;
- Derby was declared a port in 1880, and established as a town in 1883 – by this time sheep stations existed over the lowlands of the west Kimberley – Attachment F at p 23;
- early explorers to the area recorded their observations of the activities and practices of the Indigenous inhabitants, including that they hunted local wildlife such as ducks, that they were hostile to foreigners in their territory, and that they constructed wells in their country to access fresh water supplies – see Attachment F at p 23;

- another observation recorded by Forrest in 1879 was that his Indigenous companions were only comfortable guiding the explorers within their own country, and consequently, that they left the party upon reaching the boundary of their country – Attachment F at p 23;
- rights and interests in land are inherited primarily by descent and also in some circumstances by spiritual relationship to land – Attachment F at p 30;
- the ethnographic record demonstrates that prior to sovereignty, areas of land were owned by country groups including persons who had obtained ownership rights through a parent with rights in the area, or through a totemic relationship to the area – Attachment F at p 30;
- Kaberry in 1934 and 1936 undertook anthropological work in the region, including with the Nyikina – she found that descent groups (patrilineal descent) exercised 'well-defined rights over a strip of territory, which are guarded and enforced by the headman' – Attachment F at p 25;
- she also discussed a person's connection to the belief in spiritual conception of an area, giving rise to rights in land – Attachment F at p 25;
- Helmut Petri recorded a detailed account of the laws and customs of the Nyikina in work he undertook in the area in 1938 to 1939 – Attachment F at p 25;
- in 1953 and 1954, Tindale collected genealogies from Derby township area and from surrounding pastoral stations – the predecessors of many of the claimants are recorded on these genealogies – Attachment F at p 27;
- claimants today possess a detailed knowledge of sites associated with the story of Wunyambu, and of various other significant and spiritual sites – Attachment F at pp 28-29, 31 -32;
- claimants today continue to practice ceremonies associated with their mythologies and beliefs – Attachment F at p 33;
- claimants continue to spend time on the application area camping, hunting and fishing in the way demonstrated to them by their predecessors – additional material at p 2.

[49] In addition to this, there are statements included within the material that I consider address the assertion at s 190B(5)(b). For example, one claimant describes a site at the border of the application area, information that was passed down to him through the preceding generations:

> Millard Soak is our boundary, it's a well, the people used to walk across to the Fitzroy, people that used to be in Derby, it used to be a soak, you got to dig down to the soak, but this time of year the water rises, so it is easy. It is because when the creator made this land and people, when there were no white fellas, they lived near the soak, because it's got plenty of water, this man used to go and find water holes. Some places to find wells they used to dig deep, this knowledge was passed down from generation to generation. Millard Soak is connected to Nyikina people, Meda to Koodadangan, that River Lennard River. The Warrwa people are the other side of the River – excerpt at Attachment F p 28.

[50] The additional material also contains statements from a claim group member that I consider speaks to laws and customs of the Nyikina people:

> My grandmother took me to Mary Island, we walked there, you can walk to Mary Island when the tides are right, you have to have the right conditions, like a neep tide. My grandmother and I would walk to Mary Island and she told me that she used to walk to the island and camp there when she

> was young with her mother. My Grandmother told me that this was her country, she would point out the Fraser River and tell me that this was the same name as her Father. On the way to Mary Island we would hook crabs. We used to, and still do access the Sound from both sides, from the Fraser River and from the Derby side – additional material at p 2.

[51] Another claimant, in her affidavit, states:

> Nyikina people told me about an old walking track in claim area Mangajarra, we weren't allowed to walk in certain areas near the highway and there is a boab tree with witchcraft (it can kill), this is a sacred ground. My parents told us not to walk there, today I will not even bring my kids there to this ground – affidavit of [name removed] at [29].

My consideration – s 190B(5)(b)

[52] The starting point at s 190B(5)(b) is the identification, at settlement in the area, of a society of people living according to normative laws and customs – see *Gudjala 2007* at [65] and [66]. From the material, I understand that the society asserted is the Nyikina people, a language group culturally distinctive on the basis of the group's belief in the mythology of creative spirit Wunyambu.

[53] I further understand, noting the birth dates of the apical ancestors given in the additional material, that the apical ancestors were persons who comprised the Nyikina people at the time of settlement, or who were born into that society in the decade or so that followed. In this way, I am satisfied that the factual basis is sufficient to support a link between the apical ancestors named in Schedule A of the application and the society at settlement, in that these persons were either members of, or at least their parents were members of, the society.

[54] Regarding the laws and customs of a normative content acknowledged and observed by the Nyikina people at settlement, the material includes various historical and anthropological sources with relevant information. I understand the writings of early explorers to the area interacting with the local Indigenous people to indicate that the Nyikina people accessed and used the resources of the area, and that they had an intimate knowledge of the natural processes and characteristics of the landscape of their traditional country (acting as guides for European explorers navigating the tides of King Sound). I also understand this material to assert that the Nyikina people at settlement sought to defend their territory from foreigners, and that they had a clear understanding of the boundaries of their country and the protocols around access to neighbouring groups' areas.

[55] In light of this material, I am satisfied that the factual basis is sufficient to support an assertion of a relevant society at sovereignty, namely the Nyikina people, living according to identifiable laws and customs.

[56] 'Traditional' laws and customs, in addition to being those that have been passed down from generation to generation, must be rooted in the laws and customs of the relevant society at settlement – see *Yorta* at [46]. In their affidavits, claimants give detailed explanations of the

operations of laws and customs acknowledged and observed by the group today. For example, regarding marriage laws, one claimant states:

> When you marry you have to marry the right skin, we got 4 skin groups, Banaga, Burrunga, Badjarri and Garemba. Like a Badjarri and Garemba have to marry and their children become from mother's side Burrunga and from father's side Banaga – affidavit of [name removed]at [17].

[57] The material asserts that Petri gives an account of the Nyikina and their laws and customs in the generation that is immediately post-settlement, and that it is likely that some of his informants were alive prior to white contact – see additional material at p 3. In relying on the statements within the applicant persons' affidavits sworn pursuant to s 62(1)(a) that accompany the application, that the information contained in the application is true, I accept this assertion – see *Gudjala 2008* at [90] to [92].

[58] From the excerpts of Petri's writings included in the material, he provides some detail of marriage laws and customs acknowledged and observed by the Nyikina people in this post-settlement period. In particular, he relates a story involving a young boy who was promised in marriage by Nyikina elders to a Yaoro girl from the Broome district, however on the basis of the 'skin' or kinship identities of each of the boy and the girl, the marriage was incorrect according to tribal law – Attachment F at [26].

[59] It is my understanding, therefore, that the factual basis supports this aspect of laws and customs as one that continues to be acknowledged and observed by the native title claim group today, noting the statement from a claimant indicating her awareness of the rules that must be adhered to regarding one's choice of marriage partner. In the same way, I consider the material sufficient in supporting an assertion of the continued acknowledgement and observance by the native title claim group of kinship systems and totems, the operation of which are set out in detail in the material comprising excerpts from Petri's work.

[60] Noting the two statements made by claimants excerpted from the material in my reasons above at [50] and [51], I consider the factual basis does speak to laws and customs that have been handed down through the generations to the claimants. Further, from other excerpts in the material, I consider the factual basis to assert that relatively few generations separate the members of the claim group today from the persons comprising the Nyikina society at settlement.

[61] For example, in the additional material, one claimant states that his grandmother is the daughter of apical ancestor Fulgentius Fraser. He explains that when he was a child his grandmother took him to many places on the application area, showing him how to access parts of King Sound in accordance with the tides, teaching him how to fish, hook crabs, and hunting goanna and turkey. He further explains that she would share stories of how she was taken to these places as a young girl by her mother, and the things about her country that her parents taught her. The claimant provides that his grandmother is a living member of the group, and from this, I accept the factual basis to assert that only one generation separates elder members of the claim group from the Nyikina apical ancestors.

[62] Elsewhere within the material, excerpts of statements from elders within the claim group are provided. Their statements include phrases such as 'when there were no white fellas' and 'before white people' – see Attachment F at [28] to [29]. From this material, therefore, I consider it reasonable to infer that the laws and customs of the Nyikina people at settlement have been passed down through only one or perhaps two generations, such that there is unlikely to have been any substantial change in those laws and customs. In my view, the example regarding the transmission of marriage laws and customs discussed above supports this inference.

[63] Consequently, in light of the discussion above, I have formed the view that the factual basis is sufficient to support an assertion 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.

[64] The requirement at s 190B(5)(b) is met.

Reasons for s 190B(5)(c)

[65] The assertion at s 190B(5)(c) is that 'the native title claim group have continued to hold the native title in accordance with those traditional laws and customs'. It is my understanding that the phrase 'those traditional laws and customs' is a direct reference to the laws and customs that the factual basis was required to address in answering the assertion at s 190B(5)(b) – see *Martin* at [29]. Consequently, where the factual basis is not sufficient for the purposes of s 190B(5)(b), I am of the view that it cannot be sufficient to meet the requirement at s 190B(5)(c).

[66] In dealing with continuity of native title, I consider that the requirement at s 190B(5)(c) can be equated with the second element of the meaning given to the term 'traditional laws and customs' by the High Court in *Yorta*. The requirement, therefore, is for the factual basis to address the way in which the native title claim group have continued to hold their native title rights and interests by acknowledging and observing laws and customs rooted in those of a pre-sovereignty society, in a 'substantially uninterrupted' way – see *Yorta* at [47] and [87].

[67] In *Gudjala 2007*, Dowsett J's comments suggest the factual basis may need to address the following in order to satisfy the requirement at s 190B(5)(c):

- there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the members of the claim group;
- there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement – at [82].

[68] I have already explained above at s 190B(5)(b), the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at sovereignty acknowledging and observing laws and customs, from which present laws and customs are derived. I have also set out material that speaks to the way in which these laws and customs were handed down through the generations to the members of the native title claim group.

[69] Subsequently, it is the matter of continuity in the acknowledgement and observance of traditional laws and customs by the group and its predecessors, going back to settlement, to which I now turn my attention. As discussed above, the additional material sets out one claimant's explanation of how knowledge of laws and customs and the rights and interests arising under these laws and customs was passed to him by his grandmother, the daughter of apical ancestor Fulgentius Fraser. He explains that his grandmother took him to various places on his country, teaching him about these places, and showing him how to obtain a range of natural resources and food. He further explains that his grandmother told him her mother had taken her to these same places, and taught her these same things.

[70] In this way, noting the claimants' statement that his grandmother is a living member of the claim group, and my acceptance above that the apical ancestors were persons comprising the Nyikina society at settlement, I accept that the material speaks to the acknowledgment and observance of this aspect of laws and customs across the generations back to settlement.

[71] In addition to this, I consider the material that speaks to claimants' detailed knowledge of the kinship system and totems, and its operation among the members of the claim group supports an assertion of continued acknowledgement and observance of laws and customs. In my view, the statements provided by claimants about this system, and their own and their family members' relationships with it and within it, mirrors the detailed information recorded by Petri and others before him around the time of settlement. In this way, I consider the material to support an assertion of the continued acknowledgment and observance of laws and customs without substantial interruption.

[72] I note that the material includes information about the way in which members of the native title claim group continue to exercise their rights and interests in relation to the application area. According to this material, the members of the group continue to go through ceremony, many individuals are able to sing particular songs that are part of the traditional laws and customs for protecting sites, and members of the group undertake cultural heritage recording and site protection activities – Attachment F at p 33. In my view, this information is sufficient in supporting an assertion of a system of laws and customs that has a continuous existence and vitality since settlement – see *Yorta Yorta* at [47].

[73] It follows, therefore, that I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title in accordance with their traditional laws and customs.

Conclusion

[74] 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.

[75] At s 190B(6) I must consider 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].

[76] I note that, in my view, as set out above at s 190B(5), 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. What follows is my consideration of each of the rights and interests claimed in the application as to whether they can be prima facie established to exist under the native title claim group's traditional laws and customs.

Exclusive right to possession, occupation, use and enjoyment

[77] The nature of a native title right to exclusive possession was discussed in *Western Australia v Ward* [2002] HCA 28 (*Ward*), where the High Court held that:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others – at [88].

[78] Since *Ward*, there have been a number of cases that have also considered the substance of such a right. From these cases, the following principles have emerged:

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others – *Sampi v State of Western Australia* [2005] FCA 777 at [1072];
- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom – *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) at [71];
- the material must speak to how, pursuant to their laws and customs, the group is able to 'exclude from their country people not of their community', acting as 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – *Griffiths* at [127].

[79] In my view, there is relatively limited material that speaks to these aspects of a right to exclusive possession. Attachment F provides a quote from explorer William Dampier at Cygnet

Bay (on the west coast of King Sound) regarding hostility he faced from the local Indigenous population. From this, I consider it reasonable to infer that this hostility was the result of an exercise of the right to exclusive possession, that is, that the Indigenous inhabitants of the area were seeking to exclude persons not of their community, on the basis that their permission to access the area had not been sought.

[80] The material does address the way in which the predecessors of the claimants had a clear knowledge of the boundaries of their country and that they considered the area within those boundaries to belong to them. In my view, however, this information is not sufficient to support an assertion of exclusive native title rights and interests in that area – see for example Attachment F at pp 23, 28. In addition to this, the material speaks to a belief of elders of the group that spiritual forces reside in the area and that persons accessing the area need protection from these forces – see Attachment F at p 29 and the affidavit of [name removed]at [23]. Another claimant explains that '[y]ou must ask the right people for the place to protect us' – affidavit of [name removed]at [6].

[81] I accept that this information indicates members of the claim group are aware of spiritual forces within the application area and believe those forces capable of imposing harm upon individuals who fail to adhere to correct procedure and practice when engaging with country. This information does not, however, indicate that the members of the claim group have any authoritative role in managing those spiritual forces in order to prevent harm to others. Similarly, I do not consider this information to suggest that members of the claim group exercise any decision-making authority around access to their country. Consequently, I do not consider this information alone to be sufficient in supporting the prima facie existence of an exclusive native title right.

[82] While it is relatively limited, I do consider that there is information before me that addresses the aspects of an exclusive native title right discussed in the case law as set out above. Firstly, regarding a right to speak for country, one claimant in her affidavit states:

> …We can't speak for the other people's country we only speak for our area. The old people told me where the boundaries are.
>
> […]
>
> Only Nyikina people can only [sic] speak for country. You can't be a Nyikina person by being born on Nyikina country - affidavit of [name removed] at [5] and [7].

[83] Regarding a right to exclude persons not of the claim group, Attachment F provides that anthropologist Phyllis Kaberry, working in the Kimberley region in 1934 and 1935 recorded her observations of Indigenous laws and customs surrounding land-ownership. Attachment F states that the principles she described applied to all the groups with whom she worked, including the Nyikina. As set out in Attachment F, Kaberry observed that a patrilineal group 'exercises well-defined rights …over a strip of territory, which are guarded and enforced by the headman' – at p

25. In my view, this information allows me to infer that the laws and customs of the Nyikina gave rise to rights to exclude others who did not possess rights and interests in their traditional country, including the application area. In this way, I accept the material to assert that the Nyikina pursuant to their traditional laws and customs, possess rights to make decisions about access to and use of their country.

[84] Notwithstanding this, one statement included in the material from a Nyikina elder does, in my view, speak to a practice of seeking permission from Nyikina elders to access certain areas, and that this practice is founded on a belief that doing so would ensure protection from spiritual forces in that place. The elder states:

> Milngoongooroo he was boss man for Derby. That old man all these people used to drove cattle, be careful that old man Milngoongooroo, ask them people you here and you the drover, you get into trouble. So people would go to him for protection, so places you can't go it will make you sick but with his permission you could go there – Attachment F at pp 29-30.

[85] I note that the standard at s 190B(6) is prima facie, that is, 'at first sight; on the face of it; as appears at first sight without investigation' – see *Doepel* at [134]. Therefore, noting that I have material before me addressing a right of the members of the group to speak for country, to exclude persons not of their community, and to act as gatekeepers for the purpose of preventing spiritual harm, I consider the right to exclusive possession, prima facie, established.

Non-exclusive right to have access to, remain on and use the land and waters

[86] In my view there is a considerable amount of information regarding the way in which members of the group and their predecessors, including at settlement, have accessed and used the land and waters of the application area. An example of this type of material is where one claimant states:

> Derby was also known as "Nambalangja" (another language not Nyikina). In Nyikina Joord Joord (Nyikina name of soak), people used to live there on the hill, there was a soak. People right there in the sand dune, before white people but remained a camp, now all filled in by houses – Attachment F at p 29.

[87] In addition to this, as explained above, another claimant tells how as a child his grandmother took him to places throughout the application area, teaching him to fish and hunt, and explaining that her mother had taken her camping at these same places when she was young.

[88] In this way, I consider the material speaks to the right as one handed down through the generations pursuant to the laws and customs of the Nyikina, and that it is, therefore, prima facie, established.

Non-exclusive right to access and take the resources of the land and waters

[89] The additional material states that '[i]n the Nyikina dictionary there are three different words for crab, there are words for saltwater prawns, saltwater turtle and many other types of saltwater fish, all of which indicate that the Nyikina people would have been fishing and hunting

in the King Sound'. Noting that the material provides the Nyikina to be the language group associated with the application area since prior to sovereignty, it is my understanding that the material asserts the Nyikina predecessors to have accessed and used these resources of King Sound since the foundation of that language group, pre-sovereignty.

[90] Further information addressing this right is in the affidavits sworn by members of the claim group. For example, one claimant states:

> Mangajarra (Munkayarra on the map) you got a big wetlands there, there are a lot within that area, when we have big rain, you get Barramundi there, young ones. We go fishing there, they also got the biggest mob jilkarr (anthills). The Nyikina when a person becomes a widow, there is a place called Winjarabull in the claim area just past Mangajarra, there is an old well there. At Winjarabull there is a plantation of trees there is a spring there, they call the trees Ngarli Wali, the bark on the tree is made into charcoal. You have to harvest the bark, you have to make a fire, but can't just let it burn have to watch it, if you don't do it carefully it will burn too much and it will kill all the medicine in it.
>
> This medicine is used for widows, they paint their body with this, this is the law and custom, the medicine will heal your spirit when you are hurting, it's like what white people called an antidepressant – affidavit of [name removed]at [11]-[12].

[91] In light of the material of this nature within the application and additional material, I consider the right to access and take the resources of the area prima facie, established.

Non-exclusive right to protect places, areas and things of traditional significance on the land and waters

[92] In my view, there is relatively limited material addressing this right. Notwithstanding this, I have formed the view that the information is sufficient in allowing me to consider that the right is, prima facie, established.

[93] Schedule G provides that one activity the members of the claim group presently undertake in relation to the application area is 'visiting, protecting and preserving sites and places of significance… on the application area'. Attachment F states that members of the claim group have engaged in cultural heritage recording and site protection on behalf of the group as a whole – at p 33.

[94] Attachment F also contains the following statement by a Nyikina elder:

> Then at Liveringa there is a special place an initiation ground there, that bloke came from Bunaba side, Gumba came to be initiated in Nyikina country, then a bloke called Jandamurra brought Gumba to be initiated, then he said to all the mob go and get Myarda (pelican) and Gurraga (brolga). This ground still exists and we really want it to be protected – Attachment F at p 32.

[95] Having considered this information, I have formed the view that collectively it is sufficient to allow me to consider the right to protect places, areas and things of traditional significance on the application area, prima facie, established.

Conclusion

[96] 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.

[97] In *Gudjala 2007*, Dowsett J commented on the approach of the delegate at s 190B(7) in the case before him in the following way:

> The delegate considered that the reference to 'traditional physical connection' should be understood as denoting, by the use of the word "traditional", that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in Yorta Yorta. As I can see no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7) – at [89].

[98] Consequently, it is my understanding that the material addressing the requirement at s 190B(7) must show how the physical connection asserted is in accordance with the laws and customs of the group which have their origin in the laws and customs of a pre-sovereignty society. It flows from this, that where the factual basis is insufficient to support the assertion at s 190B(5)(b), it may be that the material is unable to show the traditional physical connection required at s 190B(7).

[99] In *Yorta Yorta* (at [184]), the High Court indicated that an actual presence on land may be required at s 190B(7), and I note that this is supported by the explanatory memorandum to the Native Title Amendment Bill 1997, which provides that the connection 'must amount to more than a transitory access or intermittent non-native title access' – at [29.19].

[100] Mansfield J, in *Doepel*, gave further guidance to the task of the Registrar's delegate at 190B(7) when His Honour held that '[s]ection 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' – at [18]. Further, His Honour held that such material was not to be approached as evidence at a hearing, but merely that the

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

[101] Noting that the focus of the condition is to be upon the relationship of at least one member of the native title claim group with some part of the application area, I have turned my mind to the material in support of the connection of a particular claim group member with the application area, being[name removed].

[102] Paragraph one of [name removed] affidavit states that she is a Nyikina person, through her mother's mother. The affidavit gives the following information about[name removed]:

- she was taught that her mother's father's father was a law boss and one of the men who held the dreamtime story Bookarrikarra the law and culture for Nyikina people – at [3];
- her mum and uncle taught her how to use bark obtained from river mangroves in the mouth of King Sound to stun fish so that they could be easily caught – at [14];
- when she was growing up she would go with her family fishing at the mouth of the Fitzroy – at [16];
- her totem is the rock python, given to her due to an event which occurred when her mother was pregnant with her – at [9].

[103] From this information, it is clear that [name removed]has spent time on the application area, such that I can be satisfied that she has had a physical connection with the area. In light of the substance of this information it is also my view that the physical connection [name removed] has with the application area is traditional. I have explained above at s 190B(5)(b), the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a system of traditional laws and customs. I have also explained my view that aspects of that system asserted by the material include the intergenerational transfer of knowledge regarding laws and customs, kinship systems and totems, marriage laws, and rights to use of natural resources within Nyikina traditional country.

[104] In my view, a number of these aspects of the system of Nyikina traditional laws and customs are reflected in the information given about [name removed] and her time spent on the application area. It follows, therefore, that I am satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with the application area.

[105] 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.

[106] 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)

[107] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report dated 4 January 2017 and a search that I made of the Tribunal's geospatial databases on the day of my decision reveals that there are no approved determinations of native title over the application area.

Section 61A(2)

[108] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B provides the relevant statements that the application excludes any area where a previous exclusive possession act was done in relation to the area.

Section 61A(3)

[109] 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. Schedule E provides a statement that exclusive possession is only claimed where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded.

Conclusion

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

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

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

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

Section 190B(9)(a)

[112] Schedule Q contains the statement 'not applicable' which I take to mean that no claim is made to ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Section 190B(9)(b)

[113] Schedule P provides the statement 'not applicable' which I take to mean that exclusive possession is not claimed over any of the offshore area claimed in the application.

Section 190B(9)(c)

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

Conclusion

[115] 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.

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

[117] Section 190C(2) 'directs attention to the contents of the application and supporting affidavits' and 'seeks to ensure that the application contains 'all details' required by s 61'. 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. I am not required to undertake any merit or qualitative assessment of the material for the purposes—*Doepel* at [16] and also at [35] to [39]. In other words, I must be satisfied that the application contains the prescribed details and other information required of it.

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

Native title claim group: s 61(1)

[119] This section 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].

[120] In my view, there is nothing on the face of the current application that suggests that it is not brought on behalf of all members of the native title claim group.

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

Name and address for service: s 61(3)

[122] Part B of the application states on page 16 the name and address for service of the persons who are the applicant.

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

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

[124] Schedule A provides a description of the persons who comprise the native title claim group.

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

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

[126] Each of the 7 persons who comprise the applicant have signed an affidavit swearing or affirming, in full, to all the statements required of this section.

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

Details required by s 62(1)(b)

[128] 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)*

[129] 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)*

[130] 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)*

[131] Schedule D provides the statement that no such searches have been carried out in relation to the area covered by the application.

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

[132] 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)*

[133] Schedule F provides a general description of the factual basis for the claim made in the application, and refers to Attachments F1 – F4 which include statements made by the members of the native title claim group.

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

[134] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application.

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

[135] Schedule H refers to the Warrwa combined native title claim (WAD258/2012) made in relation to part of the area covered by the application.

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

[136] Schedule HA provides the statement that no such notices of which the applicant is aware have been given in relation to the area covered by the application.

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

[137] Schedule I provides a list of s 29 notices or equivalent which have been issued in relation to the area covered by the application since 2004.

Conclusion

[138] 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.

[139] 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 in relation to the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c)—*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.

[140] The Tribunal's geospatial report confirms that one native title determination application falls within the external boundaries of the current application: WC2014/004 Warrwa Combined

People WAD258/2012. This application was made on 4 July 2014 and accepted for registration on 26 November 2014. Schedule H of the BMM application states that the area covered by the application is overlapped in part by the Warrwa Combined application. Schedule O which provides for details in relation to any common membership between such overlapping claims provides the statement 'not applicable which I take to mean that the applicant asserts there to be no claimants in common between the BMM and Warrwa claims.

[141] Therefore, from this information, I understand that the Register contained an entry for the Warrwa Combined application at the time the BMM application was made.

[142] I have checked the pre-combination applications (WAD262/2010 and WAD258/2012) that make up the combined application, and both provide the same description of the native title claim group used in the combined claim.

[143] Having considered the Warrwa and BMM descriptions, I do not see any commonality in the named apical ancestors by which members of each group are identified. Consequently, I am satisfied that no person is included in the native title claim group for both applications.

[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.

Note: The word ***authorise*** is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s 190C(5), if the application has not been certified as mentioned in s 190C 4(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

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

[146] Schedule R refers to Attachment R. Attachment R contains a document which sets out information about the authorisation of the applicant persons to make the application.

[147] As the application is not certified pursuant to s 190C(4)(a), it is necessary to consider if the application meets the condition in s 190C(4)(b); that 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.

[148] Where an application is not certified, I must be satisfied of the fact of authorisation by all members of the native title claim group – *Doepel* at [78]. In this regard, in *Strickland*, French J found that authorisation is 'a matter of considerable importance and fundamental to the legitimacy of native title determination applications' – at [57].

[149] 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 must also briefly set out the grounds on which the Registrar should consider that the requirement has been met. My consideration is confined to information contained in the application.

[150] Having considered the information contained in Attachment R and in the affidavits sworn by the applicant persons pursuant to s 62(1)(a), I am satisfied that the material includes the required statement, and provides 'brief' grounds on which I can consider the requirement at s 190B(4)(b) met. Therefore, I am satisfied the requirements of s 190C(5) are met.

[151] Noting the reference to the definition of 'authorise' in s 251B of the Act that follows s 190C(4)(b), it is my view that the material must address the requirements of that provision. As set out in the material, it was at a meeting of the members of the native title claim group on 10 November 2016 in Derby that the applicant was authorised to make the application and deal with all matters arising in relation to it.

[152] I note that Attachment R states that 'all of the people who comprise the applicant on the Boorroola Moorrool Moorrool (BMM) native title claim are Nyikina people who are members of the native title claim group, such that I am satisfied as to the identity of the applicant persons.

[153] Attachment R also provides that at the meeting, those in attendance first resolved there was no traditional decision-making process that applied to the making of a native title determination application. It states that the group subsequently agreed to and adopted another decision-making process, one involving decision by majority of those present. In this way, I consider the material addresses the matters prescribed by s 251B.

[154] Where an agreed to and adopted decision-making process at a meeting of the claim group is asserted as the basis for the applicant's authority, despite the wording of s 190C(4)(b), I note that there is no requirement that all the persons comprising the native title claim group are involved in the decision-making process. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate – *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation NSW* [2002] FCA 1517 at [25].

[155] Attachment R provides the following information about the meeting, and about how it was notified:

- the members of the claim group have had extensive genealogical research done regarding their ancestry in the last 20 years;
- the members of the group have in-depth knowledge not only of their own ancestry but also an awareness of other Nyikina's descent from the apical ancestors;
- 120 people attended the meeting in Derby on 10 November 2016;
- the meeting was held after the Walalakoo Annual General Meeting so as to reduce costs and inconvenience for persons wanting to attend the BMM authorisation meeting;
- people travelled from Broome, Jarlmadangah, Pandanus Park, Bedun Buru, Port Hedland, Fitzroy Crossing, Looma and One Arm Point to attend the meeting;
- assistance was provided in the form of purchase orders for fuel, a bus service from Pandanus Park and Looma, and bus tickets for certain claimants;
- approximately 250 notices were mailed out to known Nyikina People, which included a map of the proposed claim area;
- emails were sent to notify claimants of the meeting;
- a notice about the meeting was posted on the Walalakoo website, and at the Walalakoo Office;
- the notice was posted in a major newspaper circulating in the area on 13 October 2016;
- at the meeting, a resolution was passed that those in attendance were sufficiently representative of the claim group;
- the claim group resolved to use a particular agreed to and adopted decision-making process to authorise the applicant;
- using this process, the group unanimously resolved to authorise the applicant persons to make the application and deal with all matters arising in relation to it.

[156] Noting that personal and public notice of the meeting was given, assistance to attend provided, and that the meeting appears to have been attended by persons agreed by the group to be sufficiently representative of the members of the Nyikina People, I have formed the view that the members of the group were given every reasonable opportunity to attend the meeting.

[157] Regarding the meeting on 10 November 2016 in Derby, and whether the information before me allows me to be satisfied of the fact of authorisation, I have had regard to the decision of O'Loughlin J in *Ward v Northern Territory* [2002] FCA 171 (*Ward v NT*). In that case, O'Loughlin J posed a number of hypothetical questions of material before him relating to an asserted authorisation meeting, which indicates the nature of the material that is required at s 190B(4)(b):

> …Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24].

[158] His Honour held that while these questions need not be answered on any formal basis, the material should address their substance – at [25].

[159] Having considered the material before me, I am satisfied that it does address the substance of the questions above. It is my understanding that the Walalakoo Aboriginal Corporation convened the meeting, and undertook the notification process required. Attachment R states that attendance sheets were taken, and there is nothing before me to suggest that any of the persons in attendance were not eligible to vote as members of the native title claim group.

[160] Noting the information in Attachment R that the persons in attendance unanimously resolved to authorise the applicant to make the application, and in light of my reasoning above, I am satisfied that the requirements set out in s 190C(4)(b) are met.

[*End of reasons*]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Boorroola Moorrool Moorrool
NNTT file no.	WC2016/005
Federal Court of Australia file no.	WAD598/2016

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

23 December 2016

Date application entered on Register:

9 May 2017

Applicant:

As per the Schedule

Applicant's address for service:

As per the Schedule

Area covered by application:

As per the Schedule

Persons claiming to hold native title:

As per the Schedule

Registered native title rights and interests:

As per the Schedule

[*End of document*]