National Native Title Tribunal

# Registration Decision

| | |
|---|---|
| **Application name** | Marlinyu Ghoorlie |
| **Name of applicant** | Brian Champion Snr, Henry Richard Dimer (Kunjilli), Maxine Patricia Dimer (Nyunyi), Raylene Peel, James Champion, Darren Indich, Simon Champion |
| **Federal Court of Australia No.** | WAD647/2017 |
| **NNTT No.** | WC2017/007 |
| **Date of Decision** | 3 August 2018 |

**Claim not accepted for registration**

I have decided that the claim in the Marlinyu Ghoorlie application does not satisfy all of the conditions in ss 190B and 190C of the *Native Title Ac*t 1993 (Cth).[1] Therefore the claim must not be accepted for registration.

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

_____

Heidi Evans

*Delegate of the Native Title Registrar*[2]

.

[1] All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless stated otherwise.

[2] 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 27 July 2018 and made pursuant to s 99 of the Act.

# Reasons for Decision

**CASES CITED**

*Corunna v Native Title Registrar* [2013] FCA 372 (*Corunna*)

*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)

*Gudjala People # 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)

*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)

*Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 *(Lawson)*

*Martin v Native Title Registrar* [2001] FCA 16 *(Martin)*

*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 *(Yorta Yorta)*

*Noble v Mundraby* [2005] FCAFC 212 (*Noble*)

*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

*State of Western Australia v Strickland* [2000] FCA 652 *(Strickland FC)*

*Strickland v Native Title Registrar* [1999] FCA 1530 *(Strickland)*

*Ward v Northern Territory* [2002] FCA 171 *(Ward)*

*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

*Wiri People v Native Title Registrar* [2008] FCA 574 *(Wiri People)*

**BACKGROUND**

[1] The application was filed on behalf of the Marlinyu Ghoorlie native title claim group. It covers 98,000 square kilometres of land and waters in the vicinity of Southern Cross and Kalgoorlie-Boulder in the western part of the Goldfields region of Western Australia. The Great Eastern Highway runs through the southern part of the application area.

[2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 10 May 2018 pursuant to s 64(4) of the Act.

[3] The application was first made on 22 December 2017. A preliminary assessment of the application by a delegate of the Registrar revealed fatal flaws with the application that could only be rectified by amending the application. The applicant filed the amended application on 9 May 2018. This is the application before me.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. This is because those provisions only apply where the previous application has been considered for registration by a delegate of the Registrar. I note that the application was amended prior to a delegate applying the registration test conditions to the claim contained in the application pursuant to s 190A.

[5] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.[3] If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.[4]

[6] I have decided that the claim does not satisfy all of the registration test conditions and my reasons on each condition follow below.

**Information considered**

[7] 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'.

[8] I have had regard to information in the application. I have also considered documents provided by the applicant directly to the Registrar on 1 June 2018: [5]

1. Document, 'Further Information and Submissions in Support of Registration', dated 1 June 2018;
2. Affidavit sworn by [name removed], dated 1 June 2018;
3. Affidavit sworn by [name removed], dated 29 May 2018;
4. Unsigned statement of [name removed];
5. Document titled, 'Kalamaia Kalaako Kapurn Nation Stories', by [name removed] and [name removed];
6. Website, 'Vocabularies of Natives from Norseman, Southern Cross and Eastern Goldfields Districts – National Library of Australia, at http://bates.org.au/text/47-001T.html#man;
7. Genealogical manuscript, titled 'Southern Cross (Karratjibbin)', by Daisy Bates;
8. Copy of death certificate for [name removed] from the Registry of Birth, Deaths and Marriages Perth;
9. Native Welfare record issued by the Southern Cross Police Station, dated 5 August 1909;
10. Native Welfare record issued by the Colonial Secretary's Department – Aborigines and Fisheries, dated 5 August 1909;
11. Document, 'Descendants of Nellie', undated; and
12. Document, 'Descendants of Kaddee and Warada', undated.

[9] In addition, I have had regard to the information provided by the applicant in response to the submissions from the State, and from the [name removed] family, discussed below. These responses were provided directly to the Registrar by the applicant on 11 July 2018.

[10] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.[6]

[11] The State of Western Australia (the State) has provided submissions regarding the additional material and the application of the registration test[7] on 20 June 2018.

---

[3] See s 190A(6).
[4] See s 190A(6B).
[5] See s 190A(3)(a).
[6] See s 190A(3)(b).

[12] I have considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the area covered by the application, dated 14 May 2018 (the geospatial report).

[13] As above, I may have regard to such other information as I consider appropriate. On 5 June 2018, I received an adverse submission from [name removed], on behalf of herself and certain members of her family. As the [name removed] are members of the native title claim group by way of descent from Nellie, one of the apical ancestors for the application, I considered that the views expressed in the submission regarding the content and substance of the claim and its ability to satisfy the conditions of the registration test, had direct relevance to my task, and that it was, therefore, appropriate that I have regard to the submission.

**Procedural fairness**

[14] As noted above, I have considered the additional material provided by the applicant on 1 June 2018. On 5 June 2018, the Tribunal's Practice Leader for the matter wrote to the State advising that I would be relying on this information in my application of the registration test and that should they wish to make any submissions, they should do so by 20 June 2018. On 20 June 2018, the State provided submissions in relation to the application and the additional material.

[15] On 5 June 2018, adverse submissions regarding the application of the registration test to the claim were received from a third party, namely members of the [name removed] family.

[16] On 27 June 2018, the [name removed] family submissions and the submissions provided by the State were forwarded to the applicant for comment. On 11 July 2018, the applicant provided a response to these submissions. As it was my view that the application would not pass all of the conditions of registration, and therefore that the State's interests were not adversely affected, I did not provide the State with the applicant's responses.

[17] This concluded the procedural fairness processes.

# Merits of the claim (s 190B) – Conditions not met

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

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

***What is required to meet this condition?***

[19] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the 'particular land and waters' where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides certainty about:

[7] See s 190A(3)(c).

(a) the external boundary of the area where native title rights and interests are claimed; and
(b) any areas within the external boundary over which no claim is made.[8]

***Does the information about the external boundary meet this condition?***

[20] Schedule B refers to Attachment B which is a written description of the external boundary of the application area. It is a metes and bounds description prepared by the Tribunals' Geospatial Services on 7 November 2017, referring to the boundaries of native title determination applications, lots on plan, road and other reserves and town sites, lake shorelines and coordinate points.

[21] A map showing the external boundary of the application area is contained in Attachment C. It has been prepared by the Tribunal's Geospatial Services on 7 November 2017, and includes:

- the application area depicted with bold dark blue outline;
- tenure;
- towns, labelled;
- scalebar and coordinate grid;
- notes relating to the source, currency and datum of data used to prepare the map.

[22] The geospatial report concludes that the description and map are consistent and identify the application area with reasonable certainty. Having considered the information before me about the area, I agree with the assessment.

***Does the information about excluded areas meet this condition?***

[23] Schedule B also describes those areas within the external boundary that are excluded from the application area, by way of a list of general exclusion clauses. This method of describing excluded areas is sufficient to satisfy the requirement at s 190B(2).[9]

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

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

***What is required to meet this condition?***

[25] For the application to meet the requirements of s 190B(3), 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.

[26] The only question for this condition is 'whether the application enables the reliable identification of persons in the native title claim group': whether the claim has been made on behalf of the correct native title claim group is not relevant.[10]

[8] *Doepel* at [122].

[9] *Strickland* at [50] to [55].

[10] *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

***Does the description of the persons in the native title claim group meet this condition?***

[27] The description of the persons comprising the native title claim group in Schedule A is sufficiently clear so that it can be ascertained whether any particular person is in that group.

[28] My understanding of the description in Schedule A is that there is only one criteria that an individual must satisfy in order to qualify as a member of the group. That is, a person must be a descendant of one of three apical ancestors: Nellie Champion, Kadee and Warada.

[29] A description that identifies group members by reference to named apical ancestors is well-established by the Court as an acceptable method for describing a claim group. While ascertaining who the group members are would take some research, or factual 'inquiry' (for example by consideration of genealogies and family trees), I do not consider that this prevents the description from being sufficiently clear.[11]

[30] The description does not specify whether the group includes persons descended by means of adoption, or whether only biological descendants are included. The notice advertising the authorisation meeting for the application, annexed to the affidavit of applicant person [name removed], invites both the biological descendants of the named apical ancestors, and descendants by means of adoption. I understand, therefore, that both biological and adopted descendants are captured by the description. Regardless, in my view, the lack of clarification on this matter in the description in Schedule E is not problematic at s 190B(3)(b). Again, I consider that research into the laws and customs of the group could determine whether descent by adoption is an acceptable qualification for group membership (which it appears to be), and from this, that the relevant members of the group could be ascertained.

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

[31] I am satisfied the description in Schedule E is sufficient for me to clearly understand and identify the itemised rights as 'native title rights and interests.'

***What is required to meet this condition?***

[32] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the application's description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.[12]

***Does the description of the native title rights and interests meet this condition?***

[33] The description of the native title rights and interests claimed by the native title claim group is clear and the rights claimed are understandable as native title rights and interests.

[34] The first paragraph of Schedule E sets out certain limitations on the rights and interests claimed that follow, namely that those rights and interests are exercisable in accordance with

[11] *WA v NTR* at [67].
[12] *Doepel* at [99] and [123].

the common law, the laws of the State and the Commonwealth, and the traditional laws and customs of the native title claim group.

[35] The second paragraph of Schedule E is entitled 'Area A: Exclusive Possession Rights'. It includes a right to possess, occupy, use and enjoy as against the world, and a further 54 rights. The third paragraph is entitled 'Area B - Areas where Exclusive Possession is not being claimed'. It explains that the rights claimed in relation to these areas are the same as the rights listed in paragraph A, except for the right to possess, occupy, use and enjoy the area as against the whole world (listed as number [1] in paragraph A), and the rights listed at [12], [14], [30], [31] and [51].

[36] Having considered the rights listed in paragraph A, however, the rights at [12], [14], [30], [31] and [51] have been removed from the list. That is, there are no rights in paragraph A listed with these numbers. It is my understanding, therefore, that the non-exclusive rights claimed in relation to Area B areas are all of those listed at paragraph A except for the right at [1], which is the right to possess, occupy, use and enjoy the area as against the whole world.

[37] In my view, the description is clear and comprehensible. I have read the contents of Schedule E together, including the stated qualifications on the rights claimed, and am satisfied there are no contradictions within the description. I consider that all of the rights and interests listed can be understood as native title rights and interests, however I have not undertaken an assessment of each individual right against the definition in s 223(1). I consider this a more appropriate task at the corresponding merit condition of s 190B(6) as to whether each right is established on a prima facie basis.

[38] The State submit that it is open to me to conclude that this condition is not satisfied, on the basis that 'some of the… claimed rights are unclear as to their content' and some of the rights listed 'are not native title rights and interests'. For the reasons set out above, however, I am satisfied the description, read together as a whole, is clear, and that the rights and interests claimed have meaning as native title rights and interests. Again, I have not undertaken an assessment of each individual right or interest claimed at this condition, as I consider that a more appropriate task for the condition at s 190B(6).

## Factual basis for claimed native title – s 190B(5) condition not met

[39] I am not satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is not a sufficient factual basis for the three assertions of subsections 190B(5)(a), (b) and (c).

### *What is needed to meet this condition?*

[40] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. 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;
(b) that there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests; and

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

[41] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[13]

[42] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.[14]

[43] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.[15]

[44] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) that accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true.[16]

[45] The factual basis material appears in Schedules F, G, Attachment M to Schedule M, and in the additional material supplied by the applicant directly to the Registrar on 1 June 2018, and on 11 July 2018.

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

[46] To meet the requirement at s 190B(5)(a), the factual basis must support the assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area.' Generally, to satisfy this requirement:

- it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;[17]
- it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;[18] and
- the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.[19]

***Is there a sufficient factual basis for the requirement at s 190B(5)(a)?***

[13] *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].
[14] *Gudjala 2008* at [92].
[15] *Gudjala 2007* at [39].
[16] *Gudjala 2008* at [91] to [92].
[17] *Gudjala 2007* at [52].
[18] *Gudjala 2007* at [51] and [52].
[19] See *Martin* at [23]–[26], affirmed in *Corunna* at [35]–[39] and [42]–[44].

[47] The factual basis is not sufficient to support an assertion of an association of the claim group, and its predecessors with the land and waters of the application area. In particular, the factual basis is not sufficient to support an association of the predecessors of the group with the whole of the area at settlement.

[48] As above, the material must speak to an association of the group and its predecessors with the whole of the area subject of the application, including at the time of European settlement in the area. The material provides that European settlement of the region including the application area occurred in the 1880s, and was soon followed by a 'massive influx' of European and other non-Aboriginal people to the area with the discovery of gold in the early 1890s.[20] The material explains that this colonisation process caused significant disruption to the lives of the local Aboriginal people of the area.

[49] Regarding an association of the predecessors of the group with the area at the time of settlement, the material refers to the apical ancestors, each of whom were identified by Bates in a genealogical manuscript of 1907 titled 'Southern Cross (Karratjibbin)'.[21] The material states that this manuscript supports the apical ancestors of the claim group as being 'persons with traditional ties to the land within the claim area.'[22] Other documents, including a death certificate and a Native Welfare document issued by the Southern Cross Police Station support an association of apical ancestor Nellie with Southern Cross, which is within the application area.

[50] Throughout the material, it is asserted that the claim group are the descendants of the Kalamaia Kalaako Kapurn people.[23] The statement of [name removed] at Attachment M of the application explains that each of these three names represents one group who inhabited the application area prior to and at the time of settlement. He further explains that the three groups spoke the Gubrun language.[24]

[51] The additional material provided by the applicant directly to the Registrar includes a link to a website containing a vocabulary recorded by Bates in 1907, titled 'Bandila'.[25] The submissions from the applicant explain that the vocabulary is taken from Bates' 'notes from speaking to Bandila in Norseman of the Tchaa Kalaaga (Kalaako) people.'[26] From this, I understand the applicant to assert that this list of words is the language of the Kalaako people who are one of the groups who comprised the claim group's predecessors at the time of settlement. The submissions also point to the words for 'man' and 'blackfellow' which are both recorded in the list as 'Kabboon', explaining that 'Kabboon' is actually the word 'Kapurn', another of the pre-settlement groups inhabiting the application area from which the claim group are descended.[27]

[52] The website describes the list of words as 'Vocabularies of Natives from Norseman, Southern Cross and Eastern Goldfield Districts', and states that the natives for this area were known as

[20] Further information and submissions in support of registration, p. 3.
[21] At p. 4.
[22] At p. 4.
[23] See Attachment M at [3].
[24] At [3].
[25] At http://bates.org.au/text/47-001T.html#man.
[26] Further information and submissions in support of registration, p. 3.
[27] At p. 3.

the Tchaa kalaaga people. It also provides that 'Bandila was the last of his group and had been taken to Norseman', and also that '[t]he opening up of these goldfields areas dispensed their native groups.'

[53] From my research, I am aware that Norseman is outside of, and to the south of, the application area. The claim area stretches a considerable distance to the west, almost reaching the Great Northern Highway that runs in a north to south direction. In the west, the application area borders the Badimia People determination, the Widi Mob application (WAD6193/1998) and the Ballardong People application (WAD6181/1998).

[54] The [name removed] family, members of the claim group by way of descent from Nellie who oppose the application, submit that the application area 'grossly overstates the land and waters that Nellie Champion held, jointly with others, under the traditional laws and customs of our family group.' They submit that the application area intrudes into 'lands traditionally associated with persons who spoke the Badimaia language.'[28]

[55] The State also provided submissions addressing this condition. The State submit that '[a]t their highest, the materials clearly only indicate an association between the predecessors of the claim group and Southern Cross and Mount Burgess.'[29]

[56] In responding to the [name removed] submissions and the State's submissions, the applicant provides that the claim boundary is 'based on oral history of Brian Champion Snr's father [name removed] that Payne's Find (north-east of the external boundary for this application) was a border area between the Kalamaia, Kalarku, Kapurn (Gubrun) people and the Badimia.'[30] In responding to submissions from the [name removed] family and the State regarding other conditions of the registration test, the applicant asserts that the three apical ancestors were not the only members of the Kalamaia Kalaaka Kapurn society at settlement, but that 'other claim group families did not survive the intense disruption which followed European settlement of the Goldfields.'[31]

[57] The material relies heavily on the work of Daisy Bates and her research conducted in Norseman, Mount Burgess and Southern Cross. In my view, however, the work of Bates that is included in the application and accompanying materials is not sufficient to support an association of the predecessors of the claim group with the whole of the area. While the application clearly asserts that the predecessors of the group at settlement were the Kalamaia Kalaaka Kapurn people, the only information I have before me which connects one or any of those groups with part of the application area is the statement in the Bates website which names the Aboriginal persons of Norseman, Southern Cross and the Eastern Goldfields Districts as the 'Tchaa kalaaga' people. While I accept that Bates' record of the word 'Kabboon' for Aboriginal man may indicate that these were also Kapurn persons, there is no explanation of how this name applied to a wider group of persons, and/or what the relationship of these persons was to the Tchaa kalaaga/Kalaako people.

[58] I note that there is no map prepared by an anthropologist or other researcher in the area that associates the Kalamaia Kalaako Kapurn people (or any one of those three groups), or Gubrun-

[28] [name removed] Submissions at p. 1.
[29] First Respondent's Submissions in Relation to Registration of Claimant Application WAD647/2017, at [15].
[30] Information and submissions in response to submissions of [name removed] at p. 1.
[31] At p. 1.

speaking people with the area subject of the application. There is also limited information addressing an association of two of the three apical ancestors, Warrada and Kadee, with the area, only that they were recorded in a manuscript of Bates taken at Southern Cross.

[59] I accept the assertion of the applicant that the impacts of settlement due to the opening up of the Goldfields region caused considerable dispersion of the groups who had been in occupation of the area prior to this time. The only other material that addresses an association of the group with the wider area is an assertion by the applicant that the boundaries of the application are based on oral history, passed down from one of the claimants' fathers. In my view, however, this is insufficient to support the required association of the predecessors with the western portion of the application area, namely, the land and waters west of Southern Cross. I note that this area is less than, but close to, one half of the total application area.

[60] As the material is not sufficient to support an assertion of an association of the predecessors of the group with the area at settlement, I have not addressed the material that goes to an association of the group presently with the area.

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

[61] To meet s 190B(5)(b), the factual basis must support the 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 rights and interests'. The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of 'native title rights and interests' within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007*[32] by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court in *Yorta Yorta*.[33]

[62] According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

(a) it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice';[34]
(b) the origins of the content of the law or custom concerned can be found in the normative rules of a society[35] which existed before the assertion of sovereignty by the Crown;[36]
(c) the normative system has had a 'continuous existence and vitality since sovereignty';[37] and
(d) the relevant society's descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.[38]

[63] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group 'have their source in a pre-sovereignty society and have been observed since that time by a continuing society.' His Honour held that a 'starting point

[32] *Gudjala 2007* at [26] and [62] to [66].
[33] *Yorta Yorta.*
[34] *Yorta Yorta* at [46].
[35] The term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta* at [49].
[36] *Yorta Yorta* at [46].
[37] *Yorta Yorta* at [47].
[38] *Yorta Yorta* at [87].

must be identification of an indigenous society at the time of sovereignty', and concluded that a sufficient factual basis must also establish a link between the native title claim group described in the application and the area covered by the application, which involves 'identifying some link between the apical ancestors and any society identified at sovereignty.'[39]

[64] I understand that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).[40]

***Is there a sufficient factual basis for the requirement at s 190B(5)(b)?***

[65] As explained above in my reasons at s 190B(5)(a), I am not satisfied the factual basis is sufficient to support an assertion that the claim group have, and its predecessors had, an association with the whole of the application area.

[66] In *Gudjala 2009*, Dowsett J summarised the principles enunciated by the High Court in *Yorta Yorta* regarding the meaning of the word 'traditional' in s 223 of the Act, as it applies to laws and customs by which native title rights and interests are held. His Honour expressed an understanding of these principles, that to demonstrate traditional laws and customs, one must demonstrate 'a system of laws and customs which recognises that the relevant claim group has a connection with the land and waters in question.'[41] Further comments from His Honour suggest that traditional laws and customs must be shown to be those that relate to land and waters.[42]

[67] The assertion at s 190B(5)(b) the factual basis must speak to is the existence of traditional laws and customs giving rise to the claim to native title rights and interests in the land and waters of the application area. As above, traditional laws and customs are those that are rooted in the laws and customs acknowledged and observed by the relevant society at settlement. As the factual basis is not sufficient to support an association of the society at settlement with the whole of the application area, I note that there cannot be traditional laws and customs that relate to all of the land and waters subject of the application that give rise to the claim to native title rights and interests over the area.

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

[68] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those 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 the following matters outlined by Dowsett J in *Gudjala 2007:*

---

[39] See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not disagree with his Honour's assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

[40] See also *Stock* at [64] where His Honour held that 'it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists'.

[41] *Gudjala 2009* at [22].

[42] At [54].

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.[43]

***Is there a sufficient factual basis for the requirement at s 190B(5)(c)?***

[69] The requirement at s 190B(5)(c) relates directly to that at s 190B(5)(b), such that where the factual basis is not sufficient to support the assertion regarding the existence of traditional laws and customs, it cannot be found sufficient to support the assertion at this condition, regarding the group continuing to hold their native title pursuant to those traditional laws and customs.[44]

## Prima facie case – s 190B(6): condition not met

[70] I consider that none of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim does not satisfy the condition of s 190B(6).

***What is required to meet this condition?***

[71] For the application to meet the requirements of s 190B(6), the Registrar 'must consider that, prima facie, at least some of the native title rights and interests clamed can be established.' I note the following comments by Mansfield J in *Doepel* in relation to this condition:

1. it requires some measure of the material available in support of the claim;[45]
2. although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);[46]
3. s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.[47]

[72] Mansfield J found that the use of the words 'prima facie' in s 190B(6) means that '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.'[48]

[73] Noting the definition of 'native title rights and interests' in s 223(1) of the Act, in order for me to consider a right or interest prima facie established, it must be shown to be a right or interest that is:

(a) possessed under the traditional laws and customs of the native title claim group;[49]

(b) a right or interest in relation to the land or waters of the application area;[50]

[43] *Gudjala 2007* at [82].
[44] *Martin* at [29].
[45] *Doepel* at [126].
[46] *Doepel* at [127].
[47] *Doepel* at [132].
[48] *Doepel* at [135].
[49] Section 223(1)(a).
[50] Section 223(1)(b).

(c) not extinguished in relation to the entirety of the application area.[51]

[74] As explained above, I am not satisfied the factual basis is sufficient to support any of the assertions at s 190B(5), including the 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. It follows that I cannot be satisfied the factual basis is sufficient to allow me to consider any of the rights and interests claimed established, prima facie, as native title rights and interests, held pursuant to the traditional laws and customs of the claim group.

## Physical connection – s 190B(7): condition not met

[75] I am not satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

***What is required to meet this condition?***

[76] For the application to meet the requirements of s 190B(7), the Registrar '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'—see subsection (a).

[77] The following principles have emerged from the case law about what is required at s 190B(7):

- the material must satisfy the delegate of particular facts;
- evidentiary material is, therefore, required; and
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;[52]
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;[53]
- the material may need to address an actual presence on the area.[54]

***Is there evidence that a member of the claim group has a traditional physical connection?***

[78] As above, to satisfy this requirement, any physical connection of a claim group member with some part of the application area must be shown by the material to be a connection that is in accordance with the traditional laws and customs of the group. As I am not satisfied the factual basis is sufficient to support the assertion regarding the existence of traditional laws and customs, I cannot consider that any member of the group has the traditional connection required.

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

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

| Requirement | Information addressing requirement | Result |
|---|---|---|

[51] Section 223(1)(c).
[52] *Doepel* at [17].
[53] *Gudjala 2007* at [89].
[54] *Yorta Yorta* at [184].

| | | |
|---|---|---|
| s 61A(1) no native title determination application if approved determination of native title | Geospatial assessment | Met |
| s 61A(2) claimant application not to be made covering previous exclusive possession over areas | Schedule B, paragraph [2] | Met |
| s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas | Schedule E | Met – reasons below |

*Section 61A(3)*

[80] 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.

[81] The description of the rights and interests claimed in Schedule E is separated into two parts, namely those rights and interests claimed in relation to Area A, titled 'Exclusive Possession Rights', and those rights and interests claimed in relation to Area B, titled 'Areas where Exclusive Possession is not being claimed.' The application does not (neither in Schedule E nor Schedule B) provide a definition of what constitutes each of these areas, or what parts of the application area they cover. It is my understanding that this separation of the application area into Area A and Area B is based only on the applicant's wish to claim exclusive possession in relation to the application area. I accept that the applicant is acknowledging that exclusive possession cannot be claimed in relation to the entirety of the application area. Specifically, it cannot be claimed in relation to those areas where there has been some prior extinguishment. It is for this reason the applicant has distinguished Area B, which is those areas where there has been some prior extinguishment, and 'Exclusive Possession is not being claimed'.

[82] In my view this is sufficient in satisfying the requirement at s 190B(8) regarding those claims prohibited by s 61A(3).

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

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

| **Requirement** | **Information addressing requirement** | **Result** |
|---|---|---|
| (a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown | Schedule Q | Met |
| (b) exclusive possession is not claimed over all or part of waters in an offshore place | Schedule P | Met |
| (c) native title rights and/or interests in | Schedule B, paragraph [3] | Met |

| | | |
|---|---|---|
| the application area have otherwise been extinguished | | |

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

## Information etc. required by sections 61 and 62 – s 190C(2): condition met

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

***What is required to meet this condition?***

[85] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken.[55]

***Subsection 61***

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

| Section | Details | Form 1 | Result |
|---|---|---|---|
| s 61(1) | Native title claim group | Schedule A | Met |
| s 61(3) | Name and address for service | Part B | Met |
| s 61(4) | Native title claim group named/described | Schedule A | Met |

***Subsection 62***

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

*Section 62(1)(a) affidavits*

[88] I note that the application was not accompanied by s 62(1)(a) affidavits sworn by each of the applicant persons. However, I do not consider this fatal to the application satisfying the condition of s 190C(2). In *Drury*, French J held that an amendment to an application did not require the filing of fresh affidavits, particularly in circumstances where the amendment involved a minor change to the map and description of the external boundary of the application.[56] I note that this was the nature of the amendment in this instance.

| Section | Details | Form 1 | Result |
|---|---|---|---|
| s 62(1)(a) | Affidavits in prescribed form | Annexure to the Form 1 | Met |
| s 62(2)(a) | Information about the boundaries of the area | Schedule B and Attachment B | Met |
| s 62(2)(b) | Map of external boundaries of the area | Attachment C | Met |
| s 62(2)(c) | Searches | Schedule D | Met |
| s 62(2)(d) | Description of native title rights and interests | Schedule E | Met |

[55] *Doepel* at [16] and also at [35] to [39].
[56] *Drury* at [11] to [13].

| Section | Details | Form 1 | Result |
|---|---|---|---|
| s 62(2)(e) | Description of factual basis: | Schedules F, G and Attachment M | Met |
| s 62(2)(f) | Activities | Schedule G | Met |
| s 62(2)(g) | Other applications | Schedule H | Met |
| s 62(2)(ga) | Notices under s 24MD(6B)(c) | Schedule HA | Met |
| s 62(2)(h) | Notices under s 29 | Attachment I | Met |

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

[89] I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

***What is required to meet this condition?***

[90] To meet s 190C(3), the Registrar 'must be satisfied that no person included in the native title claim group for the application (the ***current application***[57]) was a member of a native title claim group for any previous application'. To be a 'previous application':

1. the application must overlap the current application in whole or part;
2. there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
3. the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[91] It is only where there is an application meeting all three of the criteria above, that is, a 'previous application', that the requirement for me to consider the possibility of common claimants is triggered.[58]

[92] The geospatial report provides that there is one claim overlapping part of the application area that appeared on the Register of Native Title Claims at the time the current application was made. It is the Maduwongga application (WC2017/001; WAD186/2017). From my search of information contained within the Tribunal's databases, I am aware that the application was entered onto the Register after being considered by a delegate of the Registrar pursuant to s 190A, and that it has not been removed from the Register since that time.

[93] As it is a 'previous application' meeting all three criteria of s 190C(3), I must consider whether there are any common claimants between the native title claim groups for that previous application and the one before me.

[94] The Maduwongga native title claim group are the descendants of Kitty Bluegum. The apical ancestors for the current application are Nellie Champion, Kadee and Warada.

[95] Schedule H identifies the Maduwongga application as a registered claim that overlaps the current application area. Schedule O of the Form 1, addressing common claimants, states '[n]one [k]nown', which I take to mean that the applicant is not aware of any claimants in common with the Maduwongga application.

[57] Emphasis in original.
[58] See *Strickland FC* at [9].

[96] Having considered the claim group descriptions for each of the applications, and the names of the applicant persons, there is nothing to suggest that there are members in common between the claim group for the previous application and the claim group for the current application.

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

[97] I am satisfied the requirements set out in s 190C(4)(b) are met.

***What is required to meet this condition?***

[98] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions.[59] If the application has not been certified, the Registrar must be satisfied that 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.[60]

[99] As the application does not purport to be certified under 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 group to make the application and deal with matters arising in relation to it. I must also consider the requirements as set out in s 190C(5). That is, that the application itself 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.

[100] In *Doepel*, Mansfield J discusses the interaction between s 190C(4)(b) and s 190C(5) and how the Registrar is to be satisfied as to these conditions of the registration test:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). The interactions of s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.[61]

[101] Having considered the information contained in the application and in the s 62(1)(a) affidavits, I am satisfied that it contains the statement required by s 190C(5)(a), and that Schedule R contains a further 'brief' statement setting out the grounds upon which the Registrar can consider the requirement at s 190C(4)(b) met. This includes information about an authorisation meeting held 13 October 2017 in Coolgardie at which the applicant was authorised to make the application by the members of the group.

[102] Following s 190C(4)(b) in the Act is a note referring to the definition of 'authorise' in s 251B. Section 251B 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:

[59] See subsection 190C(4)(a).
[60] See subsection 190C(4)(b).
[61] *Doepel* at [78].

(a) in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists;[62] or

(b) in any other case, by an agreed or adopted process in relation to authorising things of that kind.[63]

[103] In light of this note, I consider the material must speak to the decision-making process used by the group to authorise the applicant to make the application. I have before me a copy of the minutes of the authorisation meeting held 13 October 2017, which set out the resolutions passed by the persons in attendance. I note that the resolutions do not include one about an appropriate decision-making process, nor do they confirm whether the group was of the view that there is a traditional process that must be used to authorise an applicant. The applicant addresses this absence of information in the additional material supplied 1 June 2018. In the submissions, the applicant refers to the decision of the Court in *Noble*, that there is no requirement for a formal agreement to the process of decision-making by the group for the purposes of s 251B, and that agreement to a decision-making process can be proved by the conduct of the parties.[64]

[104] In addition to this, the submissions set out a statement by an elder of the group made on 31 May 2018, to the effect that the 'laws and customs of the group had not adapted over earlier decades to cover the making of decisions under European legislation', and that the group resort to mainstream processes for authorising the making of native title claims.[65]

[105] The information about authorisation in the application and additional material asserts that a process involving majority vote by show of hands was adopted by the group for the purposes of authorising the applicant. From the meeting minutes and the affidavit of [name removed] (who was elected to chair the meeting), setting out how the meeting proceeded, it is clear that the persons in attendance agreed to and adopted a process of decision-making involving decisions carried by a majority.[66] The minutes set out the wording of each resolution, the name of a person who moved the resolution, the name of a person who seconded the resolution, and then the votes recorded for and against. All of the resolutions proposed were passed by the persons in attendance, despite there being objections to some of those resolutions. It is clear, therefore, that consensus was not required, and a simple majority carried the resolution.

[106] In my view, the information before me about the decision-making process is sufficient in addressing the definition of authorise in s 251B. There is information which clearly indicates that at the meeting in Coolgardie on 13 October 2018, the persons in attendance agreed to adopt a decision-making process where resolutions were carried by a majority vote. There is nothing to suggest any person disagreed with this process, and the conduct of the attendees, in my view, demonstrate their agreement to the process. From the statement of the senior member of the group, I understand that this agreement was given on the basis that there was

[62] Section 251B(a).
[63] Section 251B(b).
[64] Further information and submissions in support of registration, 1 June 2018, at p.1, referring to *Noble* at [18].
[65] At pp. 1-2.
[66] See affidavit of [name removed] sworn 1 June 2018 at [8].

no traditionally-mandated process that persons attending were of the view should have been used instead. I consider this information sufficient in addressing the matters prescribed by s 251B.

[107] Where it is an agreed to and adopted decision-making process at a meeting of members of the native title claim group that is the basis of the applicant's authority to make the application, there is no requirement that all of the members of the group be involved in the decision-making. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate.[67]

[108] The affidavit of [name removed] sets out information about how the meeting was notified, including that public notices were placed in three newspapers relevant to the application and application area on 19, 20 and 26 September 2017, approximately three weeks prior to the date of the meeting.[68] A copy of the notice, which includes a map of the application area, a description of the claim group, and a clear statement of the purpose of the meeting, is provided in the materials.[69] In addition to the public notification, [name removed] explains that 'extensive efforts were made to directly contact as many known descendants of the claim group ancestors as possible, by word of mouth and social media posts.'[70] Schedule R explains that an agenda was prepared for the meeting and maps relevant to the application obtained from the Tribunal 'for presentation to persons both before and at the meeting.'

[109] The [name removed] family submit that they have not authorised the applicant to make the application, and that 'Brian Champion has not spoken to us about his, and the other named applicants' intentions to lodge the Claim.'[71] They further explain that they have not been consulted regarding the application, which includes their traditional lands. In response, the applicant provides that there is no requirement for each individual member of the claim group to authorise persons to make the application.[72]

[110] It is not clear from the material before me whether the [name removed] family were personally notified of the meeting, however it is clear from the attendance sheets for the meeting that at least two persons from the [name removed] family were present.[73] In my view, the public notice given of the meeting, approximately three weeks prior to the day, and which set out the purpose of the meeting and invited all of the members of the claim group as described in the application to attend, was sufficient to allow the [name removed] family to become aware of the meeting and make arrangements to attend. I note that it appears some [name removed] family members did attend, among a total of 79 persons.[74] In light of the public and personal notice given of the meeting described in the material, I am satisfied that all of the members of the group were given every reasonable opportunity to participate in the decision-making process.

---

[67] *Lawson* at [25].
[68] At [3] to [5].
[69] At annexure 'BC-1' of [name removed]'s affidavit sworn 1 June 2018.
[70] At [5].
[71] [name removed] Submissions, p. 2.
[72] Information and submissions in response to submissions of [name removed], p.1.
[73] Annexure 'BC-2' of [name removed]'s affidavit sworn 1 June 2018.
[74] Schedule R.

[111] In addition to the submissions referred to above, the [name removed] family also raise questions about the composition of the native title claim group, asserting that 'the Marlinyu Ghoorlie people are a small family group or sub-group of the Gubrun people.'[75] I note that my task at s 190C(4)(b) requires me to consider whether the applicant is authorised by a properly constituted native title claim group, as those persons are described in s 61(1). That is, persons who hold the common or group rights and interests comprising the particular native title claimed.[76]

[112] In response, the applicant states that the [name removed] have failed to identify any persons or families that they consider have been excluded from the claim group description.[77] The applicant refers to material submitted by the [name removed] about another ancestor, [name removed], and says that no information has been produced which supports an assertion that this person had any traditional connection with the application area.[78]

[113] The basis upon which the [name removed] have provided the historical and other material about [name removed] is unclear. The material is not referred to in their submissions, nor do the [name removed] submit that this person should have been included in the description of the native title claim group. Without any further information, I cannot make that inference.

[114] It is not my role to determine the correctness of the native title claim group described, and while it appears that there may be some dispute about this issue, there is nothing before me to indicate that there are persons who hold native title in the application area that are not captured by the description of the group in Schedule A, and who were denied an opportunity to participate in the decision to authorise the applicant.

[115] There is information of some detail before me about the meeting that took place on 13 October 2017. This includes a copy of the notices used to advertise the meeting, a copy of the attendance records, and a copy of the minutes taken at the meeting which show each resolution passed and the votes for and against each resolution. This includes resolutions effecting the nomination and giving of authority to the applicant to make the claim.

[116] I note that the wording of the resolutions is not explicit in providing that the claim group 'authorise the applicant to make the application and to deal with all matters arising in relation to it', however, in my view, the other material before me makes clear that this was the precise intention of the group. This includes statements in the s 62(1)(a) affidavits that the applicant persons 'are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it', and information in the minutes of the meeting that prior to the final authority of the group being given, an explanation of the role of the applicant was provided to those in attendance. Further, Schedule R explains the process by which the applicant persons were nominated and then states, '[a]t the end of that process, the seven persons so nominated were declared by the chairperson to have been elected members of the applicant with authority to deal with all matters arising in relation to the claim.'

[75] [name removed] Submissions, p. 2.
[76] See *Wiri People* at [12] to [36].
[77] Information and submissions in response to submissions of [name removed], p. 1.
[78] At p. 1.

[117] In my view, the information before me addresses the substance of the questions posed by O'Loughlin J in *Ward* which indicate the matters that authorisation material in support of an application must speak to in order to satisfy the requirement at s 190C(4)(b).[79] For the reasons set out above, I consider the information before me sufficient to allow me to be satisfied of the fact of authorisation by all the members of the native title claim group.

*End of reasons*

[79] *Ward* at [24] and [25].

## Attachment A

## Summary of registration test result

| | |
|---|---|
| **Application name** | Marlinyu Ghoorlie |
| **NNTT No.** | WC2017/007 |
| **Federal Court of Australia No.** | WAD647/2017 |
| **Date of decision** | 3 August 2017 |

**Section 190B conditions**

| ***Test condition*** | ***Subcondition/requirement*** | ***Result*** |
|---|---|---|
| s 190B(2) | | Met |
| s 190B(3) | | Overall result:<br>Met |
| s 190B(4) | | Met |
| s 190B(5) | | Aggregate result:<br>Not met |
| | re s 190B(5)(a) | Not met |
| | re s 190B(5)(b) | Not met |
| | re s 190B(5)(c) | Not met |
| s 190B(6) | | Not met |
| s 190B(7)(a) or (b) | | Not met |
| s 190B(8) | | Aggregate result:<br>Met |
| s 190B(9) | | Aggregate result:<br>Met |

**Section 190C conditions**

| ***Test condition*** | ***Subcondition/requirement*** | ***Result*** |
|---|---|---|
| s 190C(2) | | Aggregate result:<br>Met |
| s 190C(3) | | Met |
| s 190C(4) | | Overall result:<br>Met |