

## Registration Decision

<b>Application name</b>	Wajarri Yamatji (Byro Plains)
<b>Name of applicant</b>	Elvie Dann, Coralie Dann, Gwen Rakabula, Arthur Ryan, Michelle McIntosh, Dennis Franklin, Roberta Hicks, Julie Kelly
<b>Application made</b>	25 June 2018
<b>Federal Court of Australia</b>	WAD278/2018
<b>NNTT No.</b>	WC2018/008
<b>Date of Decision</b>	30 August 2018

### Claim not accepted for registration

I have considered the claim in the Wajarri Yamatji (Byro Plains) application for registration as required by ss 190A, 190B and 190C of the *Native Title Act 1993* (Cth).<sup>1</sup> I have decided the claim does not satisfy all of the conditions in s 190B.<sup>2</sup> Nor does it satisfy all of the conditions in s 190C. Therefore, I must not accept the claim for registration: s 190A(6B).

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Alex Ripper

*Delegate of the Native Title Registrar Delegate of the Native Title Registrar pursuant to ss 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*

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<sup>1</sup> All legislative references in this decision are to the *Native Title Act 1993* (Cth) (the Act), unless I state otherwise.

<sup>2</sup> This statement is required by s 190D(3).

# Reasons for Decision

## CASES CITED

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

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

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

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

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

*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Western Australia v Strickland*)

## BACKGROUND

- [1] The application was filed in the Federal Court (the Court) on behalf of the Wajarri Yamatji (Byro Plains) native title claim group. The Registrar of the Court gave a copy of the application and the accompanying affidavits to the Native Title Registrar (Registrar) on 25 June 2018.
- [2] The application relates to an area of land and waters in the Murchison-Gascoyne region of Western Australia abutting the western boundary of the Wajarri Yamatji determination area, bounded in the north by the Wooramel River and in the south by the Wajarri Yamatji Part B determination area. I note that the determinations made by the Court in respect of Wajarri Yamatji and Wajarri Yamatji Part B are conditional upon the nomination of a prescribed body corporate.
- [3] 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: s 190A(6). If it does not satisfy all the conditions, the Registrar must not accept the claim for registration: s 190A(6B). I have decided that the claim does not satisfy all the conditions for registration. My reasons on each condition are set out below.

## INFORMATION CONSIDERED

- [4] 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.'
- [5] I have had regard to information contained in the application. No other documents were provided by the applicant: s 190A(3)(a). There is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers: s 190A(3)(b). The State of Western Australia did not provide any submissions in relation to the application: s 190A(3)(c).
- [6] In addition to the information in the application, I have considered information in an overlap analysis and geospatial assessment prepared by the Geospatial Services team within the National Native Title Tribunal (NNTT) dated 28 June 2018 (the Geospatial Report). I have also

had regard to searches of the Register of Native Title Claims and the National Native Title Register that I undertook using the NNTT's mapping database on 30 August 2018.

- [7] Where applicable, I have had regard to the statement of reasons I prepared for my decision of 18 September 2017 not to register the Wajarri Yamatji #2 application (WC2017/004, WAD382/2017). While I acknowledge the claim currently under consideration is a separate application and must be considered on its own merits, it is made on a similar basis to the Wajarri Yamatji #2 application and in many respects is identical. Therefore, in the interests of brevity, I refer to and rely on my earlier statement of reasons where appropriate.

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

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

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

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

- [9] To meet 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 (*Northern Territory v Doepel* at [122]).
- [10] The two questions that need to be addressed for this condition are whether the information provides reasonable certainty about:
- (a) the external boundaries of the areas where the rights and interests are claimed; and
  - (b) any areas within the external boundaries over which no claim is made.

#### ***Does the information and map identify the particular land and waters with reasonable certainty?***

- [11] Attachment B to the application contains a written description of the application area. It sets out a metes and bounds description of the external boundary of the application area, referencing the centreline of the Wooramel River, pastoral lease boundaries, the boundaries of native title determinations and determination applications, and specified coordinate points defined by longitude and latitude to six decimal places.
- [12] Attachment C comprises a colour scan of an A3 map prepared by the NNTT's Geospatial Services team entitled 'Wajarri Yamatji Byro Plains.' The map depicts the application area in a bold dark-blue outline; identifies underlying tenure using colour coding and pastoral lease names and numbers; shows the course of the Wooramel River, appropriately labelled; and includes a scalebar, coordinate grid, locality diagram and legend. The map also contains notes relating to the source, currency and datum of data used to prepare the map.
- [13] On review of the map and the written description, the Geospatial Services team say they are consistent and identify the application area with reasonable certainty (see the Geospatial Report). I have independently considered the map and the written description and I accept the documents are consistent and identify the area with reasonable certainty.

***Does the information provide reasonable certainty about excluded areas?***

[14] The written description in Attachment B specifically provides that the application excludes any areas that are the subject of the following determinations and registered applications:

- (a) Native title Determination Application WAD6161/1998 Gnulli (WC1997/028) as accepted for registration on 14 April 1997;
- (b) Native Title Determination Application WAD6236/1998 The Malgana Shark Bay People's Application (WC1998/017) as accepted for registration on 30 June 2017;
- (c) Native Title Determination WAD6033/1998 Wajarri Yamatji (WCD2017/007) as determined by the Federal Court on 19 October 2017; and
- (d) Native Title Determination WAD6033/1998, WAD382/2017 Wajarri Yamatji Part B (WCD2018/002) as determined by the Federal Court on 23 April 2018.

[15] Schedule B contains additional exclusions that are set out in identical terms to Schedule B of the Wajarri Yamatji #2 application. As I noted at [16] of my statement of reasons concerning the Wajarri Yamatji #2 application, the general exclusions in Schedule B provide an objective mechanism by which to discern the areas not covered by the application. I consider that view is still correct and remain satisfied that the written description provides reasonable certainty about the excluded areas.

**Identification of the native title claim group - s 190B(3) condition met**

[16] For the reasons below, I am satisfied the claim meets the requirements of s 190B(3). The description in Schedule A is sufficiently clear to enable someone to ascertain whether a particular person is a member of the claim group.

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

[17] To meet 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.

[18] The question that needs to be considered is not whether the applicant has made the claim on behalf of the correct claim group or whether the claim group is correctly described but 'whether the application enables the reliable identification of persons in the native title claim group' (*Northern Territory v Doepel* at [37] and [51]; *Gudjala* at [33]).

***Does the application adequately describe the persons in the native title claim group?***

[19] Schedule A of the application describes the claim group in the same terms as the Wajarri Yamatji #2 application. At [21]–[22] of my statement of reasons concerning the Wajarri Yamatji #2 application, I considered the claim group description met the requirements of s 190B(3) because it was framed in such a way that, with some factual inquiry, it would be possible to ascertain whether any particular person is a member of the claim group. I remain of that view and, given the current application describes the claim group in the same way, it is appropriate to adopt my previous reasons. I am therefore satisfied the current application adequately describes the persons in the claim group.

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

[20] For the reasons below, I am satisfied the rights and interests described in Schedule E of the application can be readily identified as 'native title rights and interests.'

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

[21] To meet s 190B(4), the Registrar must be satisfied that the description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified.

[22] The question here is whether the claimed rights and interests are understandable and have meaning, having regard to how the term 'native title rights and interests' is defined in s 223 of the Act (*Northern Territory v Doepel* at [99] and [123]).

### ***Does the description of the claimed rights and interests allow them to be readily identified?***

[23] The rights and interests described in Schedule E of the current application are the same as those described in Schedule E of the Wajarri Yamatji #2 application. At [27]–[30] of my statement of reasons concerning the Wajarri Yamatji #2 application, I concluded that the claimed rights and interests could be understood as 'native title rights' within the meaning of s 223. I have considered the information in the current application and, for the same reasons, I am satisfied the application meets the requirements of s 190B(4).

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

[24] For the reasons below, I am not satisfied there is a sufficient factual basis to support the assertion that the claimed native title rights and interests exist.

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

[25] To meet 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 laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[26] As the statement of the law relating to this condition at [33]–[34] of my statement of reasons concerning the Wajarri Yamatji #2 application is still correct, I have decided not to restate it and simply refer to and rely on it for the purposes of considering the current application.

### ***Is there a sufficient factual basis for the claim?***

[27] The information provided in Schedule F and Schedule G of the application is identical to the information provided in the corresponding schedules in the Wajarri Yamatji #2 application. No other information has been provided.

[28] I have reviewed the information in the current application and, for the reasons set out at [35]–[45] of my statement of reasons concerning the Wajarri Yamatji #2 application, I consider that the factual basis:

- (a) does not address the particular claim made in the application;
- (b) does not support the assertion that the claim group has, or the apical ancestors had, an association with the application area;
- (c) does not identify the relevant pre-sovereignty society, outline any facts relating to the laws and customs of the claim group at sovereignty or describe how such laws and customs have been acknowledged by the claim group;
- (d) does not identify any link between the claim group, the apical ancestors and any pre-sovereignty society, other than to assert that the laws and customs have been handed down through successive generations; and
- (e) does not identify the laws and customs of the claim group or describe how they give rise to the claimed native title rights and interests.

[29] For these reasons, I am not satisfied the factual basis for the current application is sufficient to support the assertions in s 190B(5).

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

[30] For the reasons below, I do not consider that any of the native title rights and interests claimed in the application can be established on a prima facie basis.

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

[31] For an application to meet the condition in s 190B(6), the Registrar ‘must consider that, prima facie, at least some of the native title rights and interests claimed can be established.’

[32] A native title right or interest that can be established ‘prima facie’ is one that is arguable on its face, whether it involves disputed questions of fact or law. Accordingly, this condition requires ‘some measure of the material available in support of the claim’ (*Northern Territory v Doepel* at [126] and [135]).

#### ***Can any of the claimed native title rights and interests be established on a prima facie basis?***

[33] At [49]–[50] of my statement of reasons concerning the Wajarri Yamatji #2 application, I noted that the claimed native title rights and interests could not be prima facie established without a sufficient factual basis for the assertion that the rights and interests are derived from traditional laws and customs acknowledged and observed by the claim group. Having considered the condition in the context of the current application, I remain of that view. It follows that the application does not satisfy the requirements of s 190B(6).

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

[34] For the reasons below, I am not satisfied that any member of the claim group currently has or previously had a traditional physical connection with any part of the application area.

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

[35] To meet the condition in s 190B(7), 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 have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[36] The Registrar must be satisfied of a particular fact or facts that support the person's traditional physical connection to the application area in the *Yorta Yorta* sense (*Northern Territory v Doepel* at [18]; *Gudjala* at [89]).

**Has any member of the claim group currently or previous had a traditional physical connection?**

[37] At [55] of my statement of reasons concerning the Wajarri Yamatji #2 application, I observed that an application cannot meet this condition without a sufficient factual basis for the assertion that the claimed rights and interests are derived from traditional laws and customs. Having considered the condition in the context of the current application, I remain of that view. It follows that the application does not satisfy the requirements of s 190B(7).

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

[38] To meet s 190B(8), the application and accompanying documents 'must not disclose, and the Registrar must not otherwise be aware that, because of s 61A ... the application should not have been made.'

[39] There is nothing before me to indicate the application should not have been made because of s 61A. This section provides that applications must not be made:

- (a) *over areas already covered by an approved determination of native title: s 61A(1)*

The Geospatial Report confirms that no part of the application area as described in Schedule B and Attachment B of the application is covered by an approved native title determination. Attachment B expressly excludes from the application any area subject to the Wajarri Yamatji or Wajarri Yamatji Part B determinations.

- (b) *over areas where a previous exclusive possession act attributable to the Commonwealth or a State or Territory was done: s 61A(2)*

Schedule B expressly excludes any such areas from the claim, subject to the application of the non-extinguishment principle and provisions of the Act requiring extinguishment to be disregarded.

- (c) *which claim exclusive possession, occupation, use and enjoyment in relation to areas where a previous non-exclusive possession act was done and is attributable to the Commonwealth or a State or Territory: s 61A(3)*

Schedule B expressly states that this right is not claimed in respect of such areas, subject to the application of the non-extinguishment principle and provisions of the Act requiring extinguishment to be disregarded (see also the definition of Area A in Schedule E).

### No extinguishment etc. of claimed native title – s 190B(9) condition not met

[40] To meet s 190B(9), the application and accompanying documents must not disclose and the Registrar must not otherwise be aware, that:

- (a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;
- (b) to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent the extinguishment is to be disregarded under ss 47, 47A or 47B.

[41] The application does not extend to any offshore places (see Schedule B and Attachment B of the application) and there is no information before me to indicate that the native title rights and interests claimed have been otherwise extinguished. It follows that the application satisfies s 190B(9)(b) and s 190B(9)(c).

[42] As I noted in relation to the Wajarri Yamatji #2 application at [60]–[61] of my statement of reasons dated 18 September 2017, the rights and interests claimed in respect of Area A do not expressly exclude the right to take minerals, petroleum and gas. Nor is there the relevant statement in Schedule Q of the current application. For the same reasons I gave in relation to the Wajarri Yamatji #2 application, I find the current application does not satisfy the requirements of s 190B(9)(a).

### Procedural and other matters (s 190C) – Conditions not met

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

[43] To meet the condition in s 190C(2), the Registrar must be satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62.

[44] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents, as noted in the table below.

<b>Requirement</b>	<b>Information addressing requirement</b>	<b>Met / Not met</b>
s 61(1) Native title claim group	Schedule A. There is nothing on the face of the application to indicate that ‘not all the persons in the native title claim group were	Met



	included, or that it was in fact a sub-group of the native title claim group' ( <i>Northern Territory v Doepel</i> at [36]).	
s 61(3) Name and address for service	First page of application, Part B	Met
s 61(4) Native title claim group named/described	Schedule A	Met
s 62(1)(a) Affidavits in prescribed form	The application is accompanied by affidavits for each of the eight members of the applicant. Each affidavit has been signed in the presence of a witness and contains the five statements required by this section.	Met
s 62(2)(a) Information about the boundaries of the area	Schedule B, Attachment B, Attachment C	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
s 62(2)(e) Description of factual basis	Schedule F, Schedule A, Schedule G	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	Schedule I, Attachment I	Met

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

[45] For the reasons below, I am satisfied that none of the persons included in the native title claim group for the application was a member of the claim group for any previous application.

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

[46] To meet s 190C(3), the Registrar must be satisfied that no person included in the native title claim group for the application was a member of a 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;

- (b) when the current application was made, there was an entry on the Register of Native Title Claims in relation to the previous application; and
- (c) the entry was made, or not removed, as a result of the consideration of a previous application under s 190A.

[47] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if a previous application meets the conditions found in paragraphs (a), (b) and (c) (see *Western Australia v Strickland* at [9]). The purpose of s 190C(3) is to ensure there are no common native title claim group members between the application currently being considered for registration (the current application) and any overlapping 'previous application' that was registered when the current application was made in the Court.

***Does the current application overlap with a previous application?***

[48] The Geospatial Report indicates that no native title determination applications were entered on the Register of Native Title Claims in respect of any part of the application area when the current application was made. The searches I have undertaken of the Register of Native Title Claims using the NNTT's mapping database confirm that there are no previous applications over the area. There is therefore no need to consider whether there are claimants in common with any other application.

**Identity of claimed native title holders - s 190C(4) condition not met**

[49] For the reasons below, I am not satisfied that either requirement in ss 190C(4)(a) or (b) is met.

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

[50] To meet s 190C(4), the Registrar must be satisfied that:

- (a) each representative Aboriginal/Torres Strait Islander body that can certify the application in performing its functions has certified 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.

[51] The application does not contain any information at either Part A, Item 2 or Schedule R. On this basis, I consider that the representative Aboriginal/Torres Strait Islander body has not certified the application.

[52] It is necessary therefore to consider whether the application meets the requirements of s 190C(4)(b) and s 251B – that is, that the applicant has been authorised by the native title claim group to make the application and to deal with matters arising in relation to it.

[53] Section 190C(5) provides that the Registrar cannot be satisfied that the applicant is authorised to make the application unless the application:

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

***Is the applicant authorised to make the application?***

[54] Each of the affidavits provided by the applicant in accordance with s 62(1) includes the following statements:

- (a) the deponent is a member of the native title claim group;
- (b) the deponent was authorised by the native title claim group to be a member of the applicant for the application;
- (c) there is no process of decision-making under the traditional laws and customs of the native title claim group that must be complied with in relation to authorising the applicant under the Act;
- (d) the agreed and adopted decision-making process for authorising the applicant is a resolution passed by a majority vote, where a vote is conducted by a show of hands of those members of the native title claim group present at the meeting; and
- (e) through the agreed and adopted decision-making process, the applicant is 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.

[55] In light of these statements, I am satisfied the application meets the requirements of s 190C(5). Specifically, I consider the statements at paragraphs 1 and 7 of the affidavits satisfy the requirement to provide a statement to the effect that s 190C(4)(b) has been met. The affidavits also set out, in broad terms, the grounds on which the Registrar should consider that s 190C(4) has been met. I note in this respect that s 190C(5) only requires that the application 'briefly set out' the grounds for the claim that the applicant is authorised by the claim group.

[56] I am also satisfied, based on the statements in the affidavits, that the claim group does not have a mandated traditional decision-making process for authorising decisions of this kind. It is therefore necessary to consider whether the applicant is authorised to make the application in accordance with a process of decision-making agreed to and adopted by the persons in the claim group. In considering that question, I must have regard to, among other things, whether the members of the claim group were given a reasonable opportunity to participate in the decision-making process (*Lawson* at [25]).

[57] There is no information about the meeting, the date on which it occurred or its location. There is also no information about the steps taken to notify members of the claim group, the people who attended the meeting or their authority to do so. Nor is there any information about the resolutions passed or the decisions made or whether any such decisions were unanimous or otherwise. While these matters need not be addressed on any formal basis, as O'Loughlin J observed in *Ward v Northern Territory* at [24]–[25], the application must at least address the substance of those matters. In the absence of any substantive information about the meeting, the way in which it was conducted, or how members of the claim group were notified about the meeting, I am not satisfied the applicant is authorised to make the application.

*End of reasons*

## Attachment A

### Summary of registration test result

<b>Application name</b>	Wajarri Yamatji (Byro Plains)
<b>NNTT No.</b>	WC2018/008
<b>Federal Court of Australia No.</b>	WAD278/2018
<b>Date of decision</b>	30 August 2018

### Section 190B conditions

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

### Section 190C conditions

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190C(2)		Aggregate result: Met
	re s 61(1)	Met
	re s 61(3)	Met
	re s 61(4)	Met
	re s 62(1)(a)	Met
	re s 62(1)(b)	Aggregate result: Met
s 190C(3)		Met
s 190C(4)		Overall result: Not met
	s 190C(4)(a)	NA
	s 190C(4)(b)	Not met