

Registration Decision

Application name	Jack Anthony Edney & Ors and State of Western Australia (Gnulli 2)
Name of applicant	Jack Anthony Edney, Trevarus Jane Kelly, Jeffrey Karl Ryder Jnr, Louise (Dolly) Dalgety, Cheryl Dalgety
Federal Court of Australia No.	WAD366/2018
NNTT No.	WC2018/015
Date application made	17 August 2018
Date of Decision	14 December 2018

Claim accepted for registration

I have decided that the claim in the Gnulli 2 application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Lisa Jowett

*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.

CORRIGENDUM

Correction to the Registration Decision made on 14 December 2018 at the following pages:

Page 2: where the date the application was made was incorrect. Paragraph [4], line 1, is corrected to read “17 August 2018”.

Page 3: where paragraph [5] is a repetition of statements in paragraph [3]. Paragraph [5] is deleted.

Page 7: where a word is missing. Paragraph [31], line 5, is corrected to read “be recognised”.

Page 8: where a word is missing. Paragraph [42], line 4, is corrected to read “...share laws and customs...”.

Page 9: where a word is missing. Paragraph [45], line 1, is corrected to read “...and belongs to certain...”.

Page 10: where words are included that create the opposite meaning. Paragraph [47], first sentence, is corrected to read “The factual basis demonstrates the particular presence and activities of Gnulli (Yinggarda) predecessors in relation to the claim area.”

Correction to the Registration Decision made on 14 December 2018 in relation to the following typographical errors:

- Paragraph [14], line 3, is corrected to read “‘...land or waters’”.
- Paragraph [45], fifth dot point, is corrected to spell, “Maude”.
- Paragraph [46], line 1, is corrected to read “Places’ and “claim”.
- Paragraph [67], first dot point 1, is corrected to read “important”.
- Paragraph [95], line 8, is corrected to remove “their”.
- Paragraph [103], row 8, of the table is corrected to read “met”.
- Paragraph [114], last dot point, is corrected to read “previous”.

Lisa Jowett

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.

20 May 2019

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Reasons for Decision

CASES CITED

Banjima People v State of Western Australia (No 2) [2015] FCAFC 171 (*Banjima*)

Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)

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*)

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

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*)

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

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

BACKGROUND

- [1] The Gnulli 2 application is filed on behalf of the Yinggarda, Baiyungu and Thalanyji people who have connections to the area covered by the application. The claim lies east of the town of Carnarvon. It covers approximately 2500 sq kms of land and waters and is intersected by a number of pastoral stations. The entire western boundary of the Gnulli 2 claim area adjoins the Gnulli 1 claim area. The length of its eastern boundary adjoins the Wajarri Yamatji determination area,⁵ and its southern boundary abuts the northern boundary of the Wajarri Yamatji (Byro Plains) claim 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 20 August 2018 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.

Registration conditions

- [3] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.
- [4] Given that the claimant application was made on 15 September 2017 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

⁵ *I.S. (Deceased) on behalf of the Wajarri Yamatji People (Part A) v State of Western Australia* [2017] FCA 1215.

- [5] If the claim in the application satisfies all the registration conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.⁶ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁷
- [6] The date for my registration decision was originally set for 16 November 2018. On 21 September 2018 the applicant requested an extension of time to provide additional material to support the requirements for registration. I granted an extension of time to 19 November 2018 which consequently extended the timeframe for my decision.
- [7] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

Information considered

- [8] 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’.
- [9] As required by s 190A(3)(a), I have had regard to the application and accompanying documents. I have also considered documents provided by the applicant directly to the Registrar.⁸ On 19 September 2018, the applicant provided the certification of the application (as it was not attached to the filed application). On 16 November 2018, the applicant provided additional material consisting of a summary report prepared by research staff of Yamatji Marlpa Aboriginal Corporation (YMAC) to support the conditions for registration.
- [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.⁹
- [11] The State of Western Australia (the state government) has not provided submissions in relation to the application of the registration test.¹⁰
- [12] I may also have regard to such other information as I consider appropriate.¹¹ 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 22 August 2018 (the geospatial report).

Procedural fairness

- [13] As noted above, I have considered additional material provided by the applicant. On 19 November 2018, I wrote to the state government providing a copy of this material, advising that I would be relying on it for my consideration of the application for registration. On 3 December 2018 the Tribunal’s practice leader for the matter received confirmation that the state government had no comments or submissions to make in relation to the additional material. This concluded the procedural fairness processes.

⁶ See 190A(6).

⁷ See 190A(6B).

⁸ See s 190A(3)(a).

⁹ See s 190A(3)(b).

¹⁰ See s 190A(3)(c).

¹¹ See s 190A(3).

Merits of the claim (s 190B) – Conditions met

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

- [14] 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:
- (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.¹²

Description of the area covered by the application

- [15] Schedule B refers to Attachment B for a description of the external boundary. Attachment B describes the application area with reference to claimant applications, a native title determination, road and river parcels, and Coordinate Points (referenced to the Geocentric Datum of Australia 1994 (GDA94) and shown to six (6) decimal places).
- [16] Schedule C refers to Attachment C which is a colour copy of a map prepared by Geospatial Services, National Native Title Services, titled ‘Gnulli 2’ dated 6 June 2018. The map shows the application area depicted in bold blue outline and includes tenure, depicted as displayed in the legend, identified by lease number and name, and by reserve number as appropriate; scalebar, coordinate grid, and legend and notes relating to the source, currency and datum of data used to prepare the map.
- [17] Schedule B provides a list of general exclusions to describe those areas not covered by the application and Attachment B specifically excludes the Malgana Shark Bay People’s and Gnulli claimant applications and the Wajarri Yamatji determination.

Consideration

- [18] The information in relation to the external boundaries of the area covered by the application allows me to identify the location of those boundaries on the surface of the earth. The specific exclusions provide added certainty as to the identification of those boundaries. The general exclusions used to describe other areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories listed.
- [19] The geospatial report in relation to the application makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment.
- [20] I am therefore satisfied that the external boundary is identifiable and, along with the general and specific exclusions that set the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

¹² Doepel at [122]

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

[21] 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.

[22] 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.¹³

[23] Schedule A of the application describes the native title claim group as follows:

The Native Title claim group are those Aboriginal persons who:

- (a) are descended from one or more of the following ancestors:
 - (i) Kajuguru/Mammy (mother of Milly, Kitty, Kaja & Maryanne) and Biriji (brother to Kajuguru/Mammy & father of Jean & Michael);
 - (ii) Janya, Jubilee, Tim Dodd, Maggie Dodd, or Mary Harvey (siblings);
 - (iii) Weelbayarra/Frank Hughes (father of Tommy, May & Billy Hughes);
 - (iv) Sarah (mother of Gunggum/Sam Dazzler & siblings);
 - (v) Caroline & Sambo (parents of Dolly Bidgemia);
 - (vi) Tom Dodd (from the Wooramel side, husband of Jinapuga/Mary Anne);
 - (vii) Kalamani/Mary (mother of Paddy Dowker);
 - (viii) Culamire/Fred (father of Ngaa Ngaa/Lucy Bulley);
 - (ix) Jilba/Harry (father of Binthamurra/Stella Snowball/Noble);
 - (x) Annie & Joe Kimberley (parents of Bob Kimberley);
 - (xi) John Friday (husband of Edie Noble);
 - (xii) Mary Anne or Jinny Windie (sisters, mothers of Windie families);
 - (xiii) Gooyoongardi/Tom Dodd;
 - (xiv) Copper (mother of Norcia, Maude & Tommy Mortimer),
- or have been culturally ‘grown up’ from a young age by one or more of these persons or such biological descendants in accordance with the traditional laws acknowledged and the traditional customs observed by the Yinggarda, Baiyungu or Thalanyji people; and
- (b) have connection to the Yinggarda, Baiyungu or Thalanyji lands and waters within the claim Area through the traditional laws and customs applicable there; and
- (c) are accepted as Yinggarda, Baiyungu or Thalanyji in accordance with the traditional laws acknowledged and the traditional customs observed by other Yinggarda, Baiyungu or Thalanyji people.

[24] In my view, the description of the native title claim group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by descent from Gnulli ancestor(s) listed, which also includes being ‘grown up’ by descendants of those ancestors. Membership is additionally regulated by the traditional laws and customs ‘observed by the Yinggarda, Baiyungu or Thalanyji people’ dictating a connection to the land and waters of the claim area and acceptance as Yinggarda, Baiyungu or Thalanyji by other Yinggarda, Baiyungu or Thalanyji people.

[25] It may be that some factual inquiry is required to establish a person’s descent from any of the named ancestors, their connection and acceptance under traditional law and custom, but that would not mean that the group has not been sufficiently described.¹⁴

¹³ *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

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

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

[27] 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.¹⁵

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

Rights in Area A

In relation to Area A, the Applicant claims the following native title rights and interests pertaining to exclusive possession:

1. The right to possession, occupation, use and enjoyment of that area as against the whole world.

Rights in Area A and Area B

The Applicant claims the following native title rights and interests in relation to:

- Area A if the claim to exclusive possession cannot be recognised; and
 - Area B
2. The right to hunt, fish, gather, take and use resources (other than minerals, petroleum and gas) in the area for any purpose;
 3. The right to enter and to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
 4. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
 5. The right to invite and permit others to have access to and participate in or carry out activities in the area; and
 6. The right to travel over, visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;
 7. The right to light fire within the area;
 8. The right to engage in cultural activities in the area including conducting and participating in ceremony and ritual, conducting burials and burial rites and the transmission of cultural knowledge

[29] The description includes a qualification to which the claimed rights and interests are subject.

[30] The application provides definitions of Area A and Area B:

- Area A means the land and waters covered by the application where a claim to exclusive possession is capable of being recognised – areas of unallocated crown land, not previously subject to grant, areas to which ss 47, 47A and 47B apply and areas where the non-extinguishment principle applies (s 238).
- Area B means the land and waters covered by the application that are not included in Area A – that is, those areas where only non-exclusive rights are capable of recognition.

[31] When read together with the exclusion statements in the written description of the area covered by the application, the native title rights and interests claimed can be 'properly understood'. I understand the application to claim possession, occupation, use and enjoyment

¹⁴ *WA v NTR* at [67].

¹⁵ *Doepel* at [99] and [123].

to the exclusion of all others where it can be recognised (Area A). The rights listed at 2-8 are claimed in relation to the areas where exclusive possession cannot be recognised. Non-exclusive rights are claimed in relation to Area B and, in the event that exclusive possession cannot be recognised, they are also claimed in Area A.

[32] Whether any of these rights fall outside the scope of s 223 is, in my view, a matter for consideration under s 190B(6), whether they can be prima facie established. The description of the claimed rights and interests are, in my view, readily identifiable in the sense of being intelligible and understandable.

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

Factual basis for claimed native title – s 190B(5) condition met

[34] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel*¹⁶, Mansfield J stated that:

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

[35] The decisions of Dowsett J in *Gudjala 2007* and *Gudjala 2009* also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*,¹⁸ including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5) and his approach in *Gudjala 2009* was in accord with this.

[36] In respect of the nature of the material that comprises the factual basis for the claim made in the application, the Court has provided that:

- The applicant is not required 'to provide anything more than a general description of the factual basis'.
- The nature of the material provided need not be of the type that would prove the asserted facts.
- The Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted.¹⁹

[37] A 'general description', as required by s 62(2)(e), must be in sufficient detail to enable a genuine assessment of the application under s 190A and related sections, and be something

¹⁶ Approved by the Full Court in *Gudjala FC* at [82] to [85].

¹⁷ *Doepel* at [17].

¹⁸ *Gudjala FC* [90] to [96].

¹⁹ *Gudjala FC* at [92] and *Doepel* at [47].

more than assertions at a high level of generality'.²⁰ Further, Dowsett J later held in *Gudjala 2009* that the asserted factual basis should provide more than mere restatements of the claim:

... it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.²¹

- [38] The above authorities establish clear principles that guide the Registrar when assessing the sufficiency of a claimant's factual basis against the particularized assertions at s 190B, a summary of which precedes my consideration of each of the subsection.

Information considered

- [39] Schedule F of the application provides a summary of the system of traditional laws and customs acknowledged and observed by Yinggarda, Baiyungu or Thalanyji people in relation to the land and waters of the claim area. The additional material provided by the applicant sets out in greater detail the factual basis addressing each of the assertions for this condition of registration. The information is based on research conducted in relation to the Gnulli and Gnulli 2 claims and includes analysis of ethno-historical materials relevant to the region.

s 190B(5)(a)

- [40] This subsection requires that the Registrar be satisfied that the factual basis is sufficient to support the assertion that:
- (a) the native title claim group currently has an association with the area covered by the application, and
 - (b) the predecessors of the native title claim group also had an association with the area.
- [41] While 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 all of the time, it is necessary to show that the claim group as a whole has an association with the area. Further, the facts alleged must 'support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'. In other words, the factual basis should show the history of the association that those members of the claim group have, and that their predecessors had, with the application area. It should be sufficient to demonstrate that a link exists between the current claim group and its predecessors and their association with the application area.²²
- [42] Schedule F states that it is the Yinggarda, Baiyungu or Thalanyji people who have occupied and used the claim area since prior to the assertion of British sovereignty. It is their traditional country and they share laws and customs and belong to a wider regional society that encompasses others who share and customs.²³ The additional material explains that the Gnulli claim group is comprised of a 'broad aggregation of people over a correspondingly extensive

²⁰ *Gudjala FC* at [90]–[92].

²¹ At [29].

²² *Gudjala 2007* at [39], [51]–[52] and [66].

²³ At [8].

area'. Rights to speak for and exercise responsibilities over specific areas are held and exercised at the level of families, each of which is affiliated with the Yinggarda, Baiyungu or Thalanyji language. The Gnulli 2 claim area falls within the Yinggarda language area.²⁴

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

- [43] The factual basis states that the historical record puts early European settlement in the region of the claim area at around 1870 with the establishment of pastoral stations and small holdings along the Wooramel River (which runs along the southern boundary of the claim area).
- [44] The claimants are said to be connected to the land and waters of the claim area, that they belong to their country and have rights to speak for it through 'the spirits of their forebears, who also belonged there, [and] continue to be present in the landscape.'²⁵ The country is imbued with spiritual forces and the connection of 'local landed groups' to particular areas forms the basis of the 'land tenure system' which exists under the shared system of laws and customs. These local groups are affiliated with a language shared with other neighboring local groups and each family shares its language affiliation with other families associated 'with more or less contiguous areas'. Yinggarda country is said to be generally located between the Wooramel River and Gascoyne River (which flows across the north of the claim area). The pastoral stations intersecting the claim area of Carey Downs (in the south), Dairy Creek (in the central west) and parts of Mooloo Downs (in the north) fall in Yinggarda country, the areas of which are each associated with the Yinggarda language.²⁶
- [45] The country of the claim area is Yinggarda country and belongs certain Yinggarda families who have inherited this 'estate' connection from their predecessors:
- The daughter of named ancestors Caroline and Sambo, Dolly Bidgemia, a Yinggarda woman, born in the 1870s-80s near Bidgemia station (west of the claim area), resided and worked on Glenburgh, Dalgety Downs and Dairy Creek stations, her traditional country acknowledged by her descendants is the country of these stations.
 - Dolly's daughter is associated with Glenburgh, Dalgety Downs and Dairy Creek and Mooloo Downs stations.
 - Culamire Fred (born c.1884 or 1890) is associated with Mooloo Downs and Dalgety Downs stations, his daughter with Mooloo Downs where she resided in the 1950s/60s.
 - Annie & Joe Kimberley (parents of Bob Kimberley and born at least c.1880) are associated with Bidgemia, Yinnetharra and Towrana (in the Gnulli 1 claim area) and Mooloo Downs.
 - Copper (b.1892) and Ben Mortimer and their children (Norcia, Maud, b.1915 & Tommy) are associated with Mooloo Downs, their granddaughter (b.1948) lived and worked on Mooloo Downs, Dalgety Downs and Dairy Creek.
- [46] Place of importance to Yinggarda people that are known to the current clam group through their forebears include:

²⁴ At 1.1.

²⁵ At 1.4.1.

²⁶ At 1.3.

- a rockhole on Glenburgh where ceremonies used to take place between Yinggarda and their neighbours;
- Callytharra Springs on the Wooramel River which was a dancing and meeting ground for Yinggarda and Wajarri people;
- Bilung Pool (on the the south eastern boundary point);
- a totemic increase site located on Mooloo Downs in the north of the claim area.²⁷

[47] The factual basis does not demonstrate the particular presence and activities of Gnulli (Yinggarda) predecessors in relation to the claim area. The geographic specificity of the presence or occupation of the native title claim group's predecessors in the Gnulli 2 claim area is framed in terms of their association with the pastoral properties. The pastoral properties in the region have clearly provided significant access for Gnulli people to their traditional country for the group's predecessors to have worked and lived on these stations across the region.

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

[48] Schedule G states that the members of the native title claim group have continuously carried out activities including hunting, gathering and fishing; camping in the claim area, engaging in cultural activities, visiting, maintaining and protecting places of importance, taking, using and trading in the resources of the claim area.

[49] The additional material details the association of the native title claim group with the claim area through a discussion of the claimed rights and interests and the activities undertaken on the claim area in exercise of those rights:

- Yinggarda claimants speak about the story for a cave near Congo Creek (on Dairy Creek station in the Gnulli 2 claim area);
- Yinggarda people are said to travel through areas on Carey Downs and Dairy Creek as well as visit rockholes to 'check out' places and sites on their country, to show and teach their younger family members, in particular grandchildren, where their country is;
- members of the Noble family (descendants of Caroline and Sambo) regularly go out to Carey Downs, Dairy Creek and Callytharra Springs stations (station formerly along the Wooramel River, partly within the Gnulli 2 claim) hunting, for kangaroo and goannas;
- claimants hold extensive knowledge of the flora of their country, using these resources for food or medicine;
- families (descendants of Caroline and Sambo) visit Bulleyinja Rockhole (on Dairy Creek station in the claim area) to hunt, to teach the young people about country; to fish around Bilung Pool on the south eastern boundary of the claim area;
- Yinggarda people have resided on Dairy Creek and Mooloo Downs over multiple generations;
- Yinggarda families traverse the claim area when travelling between Carnarvon and the communities (in particular Burringurrah Aboriginal Community near Mt Augustus) in the Upper Gascoyne;
- many important places have been recorded on Yinggarda country – on Dairy Creek and Mooloo Downs.²⁸

²⁷ Additional material at 1.6.8.

²⁸ Additional material at 1.6.

- [50] Yinggarda families travel across and intermittently visit the claim area. Generally speaking, Yinggarda people continue to access their country to go camping and hunting with their families.²⁹ The estate connection under the land tenure system recognises the rights of Yinggarda people to speak for the claim area and claimants transmit this cultural knowledge through stories and teaching the younger generations about their country. It is through their elders that members of the claim group remember the stories for their country and such things as the ceremonies held between Yinggarda people and their neighbours.

Consideration

- [51] In *Gudjala 2007* Justice Dowsett considered the requirements of s 190B(5) generally and, in particular, the necessity for the Registrar to address 'the relationship which all members claim to have in common in connection with the relevant land'.³⁰ This should be considered in conjunction with His Honour's statement that the facts alleged need to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area of the application.³¹ The factual basis needs to be in 'sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions of a high level of generality'.³²
- [52] The factual basis is primarily concerned with supporting the assertion that the Gnulli 2 claim area is part of the Yinggarda 'estate' and that it is Yinggarda people who have the primary affiliation with the area covered by this application. I am satisfied that the information is sufficient to support the assertion that of the three local land groupings referred in the description of the native title claim group, it is Yinggarda people who have rights and responsibilities and spiritual affiliation with the land and waters of the Gnulli 2 claim area. The additional material articulates the traditional laws and customs relating to the 'land tenure system' as the means by which Yinggarda people acquire rights and interests in their country. Yinggarda people understood in the past, and continue to understand, that the right of access to country is held by 'those who have connections to the ancestral spirits of that country, especially its Old People'.³³
- [53] The factual basis in support of a previous physical association with the claim area is largely limited to facts of the births and deaths of a few individuals and their working or residence on the pastoral properties that intersect the claim area. Beyond working on these pastoral properties, the material does not evidence the exercise of rights and responsibilities by the predecessors of the claim group in accordance with traditional laws and customs and specifically in respect of the Gnulli 2 claim area. This alone would not, in my view, sufficiently demonstrate an association of the predecessors of the claim group with the claim area. However, in my view, the application provides support for the proposition that members of these local land groupings had an association which extended beyond the Gnulli 1 eastern boundary to the area covered by this application. Ethno-historical sources support the extent of Yinggarda country and contain accounts of the 'occupation of country' (which I infer is one

²⁹ Additional material at 1.6.3.

³⁰ *Gudjala 2007* at [40].

³¹ *Gudjala 2007* at [39].

³² *Gudjala FC* at [92].

³³ Additional material at 1.4.3.

relating to the claim area) 'by the spirits of human ancestors, and associated beliefs held in the claim area at sovereignty, including those relating to the Watersnake'.

- [54] The factual basis asserts that claimants understand that they belong to their country and have rights to speak for it 'because the spirits of their forebears, who also belonged there, continue to be present in the landscape'. The term 'Old People' refers to these spirits, to those 'beyond memory' and extend 'back to mythic origins'. Claimants have been taken to, have spent time on, and been shown, their 'forebears' birthplaces or other historical sites connected to their family, boundary places, and places associated with mythology or stories'.³⁴
- [55] Recent research with both Yinggarda people and neighbouring Wajarri people has refined and identified the area agreed to be Yinggarda and it is asserted that it is on the basis of the knowledge handed down to them that claimants know and can describe their country.³⁵ This is supported in the factual basis that sets out the evidence pertaining to the rights and interests claimed in the application. Yinggarda people visit the important places on their country – to care for these sites and to hunt, camp, perform ritual and to 'spend time on the country of their ancestors where they hold spiritual connections'.³⁶
- [56] 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 all of the time. However, it is necessary that the factual basis material show cumulatively an association between the whole group and the whole area of the claim.³⁷ In my view, it is clear that the area covered by the application is part of a wider region of land and waters in relation to which Gnulli people had, and continue to have, an association. These are the persons who were identified in the early records, and whose descendants identify, as Yinggarda, Baiyungu or Thalanyji. The factual basis that supports an association of the native title claim group and its predecessors with the area covered by the application is somewhat broad and not always specific to the actual claim area. However, the current association of the native title claim group is evident and clearly based on a connection to the claim area that has its origins in the traditional laws and customs that govern the land tenure system. The assertion that this system continues to be acknowledged and observed such that Yinggarda people are recognised by the wider group to hold primary rights in relation to the claim area is sufficiently made out. I am satisfied that the current association of Yinggarda people has its origins in the preceding generations' association with the area.
- [57] For these reasons I am satisfied that the native title claim group has, and its predecessors had, an association with the area.

s 190B(5)(b)

- [58] This subsection requires that the Registrar be satisfied that the factual material is sufficient to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group. These are the traditional laws and customs that give rise to the native title rights and interests claimed in the application.³⁸ As noted earlier in these reasons,

³⁴ Additional material at 1.4.1.

³⁵ Additional material 1.3.

³⁶ Additional material 1.6.6.

³⁷ *Gudjala (2007)* at [51] and [52].

³⁸ *Gudjala 2007* at [62] and [63].

the test at this condition requires the delegate to 'address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests'.³⁹

[59] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate:⁴⁰

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society;⁴¹
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty;⁴² and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'.⁴³

The society at sovereignty

[60] The factual basis is required to identify the society that is asserted to have existed at the time of British sovereignty, or at least since first European contact. It is not sufficient to make a general statement that one existed. The factual basis must provide material upon which I can be satisfied that there was, at the time of first contact, 'an Indigenous society in the claim area observing identifiable laws and customs'.⁴⁴ That is, the factual basis must establish that the traditional laws and customs that give rise to the claimed native title rights and interests have their origin in a pre-sovereignty, normative system with a substantially continuous existence and vitality since sovereignty.⁴⁵

[61] Attachment F contains general assertions in relation to the traditional laws and customs of the Yinggarda, Baiyungu or Thalanyji people:

- since prior to sovereignty, the Yinggarda, Baiyungu or Thalanyji people have acknowledged and observed a system of traditional laws and customs which they continue to acknowledge and observe;
- ancestral beings created the current physical features of the land and laid down the laws and customs that bind Yinggarda, Baiyungu or Thalanyji people; and
- these laws and customs set the rules and responsibilities Yinggarda, Baiyungu or Thalanyji people have in relation to how they behave and are connected to their country and govern the exercise of rights and interests.⁴⁶

[62] The additional material provides information about the traditional laws and customs of the Yinggarda, Baiyungu and Thalanyji people as they relate to land tenure and language groupings and rights to speak for country. The ethno-historical record is said to show:

³⁹ *Doepel* at [17].

⁴⁰ At [71], [72] and [96]. This was not criticised by the Full Court in *Gudjala FC*.

⁴¹ *Gudjala 2007* at [63].

⁴² *Gudjala 2007* at [65] and see also at [66].

⁴³ *Gudjala 2007* at [66].

⁴⁴ *Gudjala FC* at [96].

⁴⁵ *Gudjala 2009* at [29].

⁴⁶ At 1-7.

- the language-owning groupings whose lands lay wholly or partly within the Gnulli claim area shared the same or a similar system of laws and customs;
- under this system connections to lands and waters were established – local landed groups (totemic patricians) were connected to particular areas (estates);
- sets of contiguous local landed groups affiliated with a particular language comprised the language-owning groups of Yinggarda, Baiyungu and Thalanyji.⁴⁷

[63] A religious system underpins this land tenure system:

The anthropological research shows that the system of laws and customs under which people have connections to their lands and waters in the claim area was, and has continued to be, essentially religious in nature. Country itself was, and is, understood as imbued with spiritual forces which can be acted upon through particular ritualised practices. In this 'sentient landscape', people, spirits, and spiritual forces interact and may affect one another and/or the country itself.⁴⁸

[64] That the land and waters of the Gnulli 2 claim area are held by a number of 'Yinggarda families' is the contemporary expression of this system. It is asserted that these families are the descendants of those local landed group (totemic patrician) members who held the land at sovereignty. Yinggarda families have rights in country today through their forebears, the origins of which are in the patrilineal system in existence at sovereignty. That is, 'landed and language identity' is passed onto offspring.⁴⁹

[65] In my view, the explanation of how the groupings and estate holdings operated at sovereignty to govern rights in relation to country in accordance with traditional law and custom is a sufficient identification of the particular society of which the named ancestors, the Yinggarda, Baiyungu and Thalanyji people, were a part. That Yinggarda people today assert primary affiliation over the Gnulli 2 claim area is support for the proposition that the rights continue to operate in largely the same way. That is, there is sufficient explanation about the body of persons united in, and by, its acknowledgement and observance of a body of laws and customs at sovereignty such that a connection can be made to the normative and contemporary society of the native title claim group.⁵⁰

Traditional laws and customs

[66] The factual basis must speak to the existence of those traditional laws and customs that give rise to the claim to native title rights and interests in the land and waters of the claim area. The factual basis comprehensively sets out the details of the traditional laws and customs under which rights in relation to country are held. The traditional laws and customs that govern the land tenure system described above underpin all the rights and interests claimed in the application and have been inherited from the 'Old People' and the 'Watersnakes':

The maintenance of fresh water and thus the protection of a pool, for example, is governed by the Watersnake that resides there. Yinggarda claimants described the importance of 'singing out' at all pools in their country where there is a Watersnake resident, to show respect for the Watersnake which in turn protects the country (as the Watersnake could otherwise dry the

⁴⁷ Additional material at 1.4.1.

⁴⁸ Additional material at 1.4.1.

⁴⁹ Additional material at 1.4.3.

⁵⁰ *Yorta Yorta* at [49].

water source), and ensure that the Watersnake recognises the visitors as kin and the rightful people for the country and will protect them from harm.⁵¹

[67] It is on this basis that the claim group's traditional laws and customs are asserted to have been transmitted through the generations and to exist in relation to:

- maintenance and protection of importance places (flowing from the obligation to care for country);
- the use of resources, including protection against spiritual and physical harm;
- the spiritual care for country through ritual and ceremonial practices;
- holding and transferring of cultural knowledge;
- hunting, fishing, gathering resources and using water, and the practical and ceremonial use of fire.⁵²

Consideration

[68] It is not the purpose of the registration test to come to definitive conclusions about what in fact was the society at sovereignty, only whether the factual basis can support the assertion that the society at sovereignty has continued a vital existence (largely uninterrupted) since that time to the present. In my view, the material I have considered is sufficient to support this.

[69] The factual basis supports that inter-generational transmission of law and custom has occurred between the native title claim group and its predecessors, in the sense defined in *Yorta Yorta*. It contains information that provides a link between the named apical ancestors and the area covered by the application, and identifies those predecessors of the native title claim group who, at the time of European settlement, acknowledged and observed the laws and customs of a society by which Yinggarda, Baiyungu and Thalanyji people were united. In my view, the factual basis articulates that members of the claim group possess rights and interests under those traditional laws and customs by virtue of those laws and customs being handed down to them by their predecessors. In other words, the material supports the assertion that there was a society at sovereignty in respect of the area covered by the application, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived.⁵³

[70] I am therefore satisfied that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims in respect of the claim area.

s 190B(5)(c)

[71] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. Dowsett J, in *Gudjala 2007*, held that this requirement 'implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date'. The factual basis material is therefore required to

⁵¹ Additional material at 1.6.6.

⁵² Additional material at 1.6.2–1.6.8.

⁵³ *Gudjala 2009* at [33], [66] and [72].

illustrate or demonstrate how members of the native title claim group 'have continued to hold native title in accordance with traditional laws and customs'.

- [72] The requirement and necessity to seek permission to access country is a central feature of the native title claim group's land tenure system and continues to be practiced in relation to all areas of country in the claim area. Access to country to participate in activities only by invitation shows respect for the people from that country. This extends to ensuring only the 'right people' (whose Old People are from that country and who have knowledge of that country) are involved in making decisions for and speaking for country, particularly on heritage surveys or relating to Future Acts'.⁵⁴
- [73] Members of the families who speak for the rain increase site in the claim area continue to maintain and protect this site; members of the claim group continue to travel through the claim area, to camp and to hunt on the claim area with their families. It remains important for people to communicate with the 'spirits of the country' to ensure that 'those who belong to the country are recognised and kept safe, and those who are introduced to the country are safe in the company of those who belong there'.⁵⁵ Transmission of cultural knowledge continues when claimants tell their younger generations the stories of country and teach them to hunt and to care for the important places.
- [74] The factual basis sufficiently demonstrates that the native title claim group has continued in such matters as its cultural practices and use of the natural resources of the land and that this knowledge has been passed down from their 'Old People' and continues to be passed down to successive generations. It is through such intergenerational transfer that the claim group continues to acknowledge and observe the traditional law and custom of their ancestors in relation to the area of the application.
- [75] There is sufficient information to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Prima facie case – s 190B(6): condition met

- [76] Under s 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s 190B(6):
- it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis';⁵⁶
 - it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'.⁵⁷
- [77] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

⁵⁴ Additional material at 1.6.5.

⁵⁵ Additional material at 1.6.8.

⁵⁶ *Doepel* at [135].

⁵⁷ *Doepel* at [126], [127] and [132].

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s 223(1)); and
- are rights and interests that have not been extinguished over the whole of the application area.

Consideration

[78] In my view, as set out above at s 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests. What follows is my consideration of the rights and interests claimed in the application as to whether they can be prima facie established to exist under the native title claim group's traditional laws and customs.

The right to possession, occupation, use and enjoyment of that area as against the whole world.

[79] This right is evidenced in the material before me, suggesting it exists under the traditional laws and customs of the native title claim group.

[80] The majority decision in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land'. Further, it considered that the expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'.⁵⁸ *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

[81] The decisions of the Full Court in *Griffiths* and *Banjima* indicate that for this right to be established, it must be accompanied by evidence that the practice of seeking permission to go onto another's country is grounded in a spiritual imperative that gives the practice normative force. This may be expressed by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'.⁵⁹ In the more recent case of *Banjima*, the Full Court referred to these statements from *Griffiths* and held that 'controlling access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction ... is readily recognisable as a right of exclusive possession'.⁶⁰

[82] The additional material addresses the exclusive right claimed in the application. The native title claim group's 'belonging to' or 'being from' country is said to arise 'largely from the laws and customs which emanate from the religious system which underpins the land tenure system' (as discussed above):

According to the traditional law and custom, spiritual sanctions can be imposed on individuals who are not authorised to be on the country. Yinggarda claimants understand their country to

⁵⁸ At [89] and [93].

⁵⁹ *Griffiths* at [127].

⁶⁰ *Banjima* at [38].

be imbued with spiritual forces, including the Old People and Watersnakes. These forces may be dangerous or benevolent, and can distinguish between those people who are from that country and those who are strangers. The spiritual forces act accordingly to protect and provide for those whose country it is and who thus have the legitimate right under customary law to be there, or to cause harm to those who should not be there and who thus are not conducting themselves in accordance with customary law.

[83] The rights, responsibilities and practices that come with this 'ownership' entail:

- performing ritualised greetings to country, in order to interact with the country and the spirits within it, by calling out the 'Old People's' names, throwing sand into and calling out in greeting to the Watersnake at freshwater pools;
- ritualised interventions to regulate access to country and waters and resources;
- speaking with authority about country based on the recognition of links to predecessors (through serial filiation);
- avoiding certain places and prohibited activities;
- that permission to use and access country is not required for those who belong to and speak for an area of country.

[84] For those who do not belong to Yinggarda country, people are required to be invited or to seek permission to access certain areas of country:

- attempts to enforce rights to regulate access to country is recorded in early accounts of European exploration and settlement in the claim area;
- spiritual forces protect and provide for those who have legitimate rights under customary law to be present or to conduct activities on the country of the claim area;
- there may be spiritual ramifications for those who are not granted permission to access country.

[85] It is important and necessary that visitors must seek permission from or be invited by those with knowledge of country and who have the authority to grant or guide access. Obtaining permission extends to families and people within the claim group over particular areas – it is important to ask the family whose country it is before going onto it and it is still customary to show respect by invitation. The claim group continues to acknowledge and observe the protocols of the right people speaking for the right country.⁶¹

[86] I consider that the exclusive right, where it can be recognised, can be prima facie established.

Non-exclusive rights

The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

The right to invite and permit others to have access to and participate in or carry out activities in the area;

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

[88] Acknowledgement and observance of the traditional laws and customs that give rise to these rights have been considered above in relation to the factual basis for the claim and the claimed

⁶¹ Additional material at 1.6.5.

right to exclusive possession. It is evident in the material before me that the claim group continues to acknowledge and observe those laws and customs that regulate access to country, specifically in relation to who speaks for and makes decisions for particular areas within the claim area. Discussion in the additional material around the land tenure system that regulates the right people for the land and waters of the claim area shows that of the three language groups that comprise the native title claim group, the Yinggarda people have a primary affiliation with the claim area. The Yinggarda estate is recognised in accordance with the traditional laws and customs of the wider society and confers rights and obligations in relation to these rights.

[89] I consider that these non-exclusive rights can be prima facie established.

The right to enter and to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;

The right to hunt, fish, gather, take and use resources (other than minerals, petroleum and gas) in the area for any purpose;

The right to travel over, visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;

The right to light fire within the area;

The right to engage in cultural activities in the area including conducting and participating in ceremony and ritual, conducting burials and burial rites and the transmission of cultural knowledge

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

[91] Acknowledgement and observance of the traditional laws and customs that give rise to these rights have been considered above in relation to the factual basis for the claim. It is evident in the material before me that the claim group continues to acknowledge and observe the traditional laws and customs that govern the cultural practices and knowledge of the native title claim group. Contemporary activities of families of the native title claim group in exercise of these rights include hunting with their families, camping, fishing in the rockholes, lighting fires to cook and for ceremonial purposes. Plant resources of the claim area are used predominantly for food or medicine, *bugardi*/snakewood is used for firewood. Claimants continue to visit places of importance to check on them and ensure the protection of sites and areas of significance. Ceremony and ritual and the transmission of cultural knowledge to children and grandchildren is an integral part of claimants cultural activities. Activity on and traversing the landscape of the claim area is accompanied by rituals that speak to the 'Old People' and the 'Watersnakes' in accordance with traditional laws and customs that have been passed down through the generations.

[92] I consider these non-exclusive rights can be prima facie established.

Physical connection – s 190B(7): condition met

[93] 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’.

[94] Mansfield J decided that the condition of s 190B(7) imposes a different task upon the Registrar to that found in s 190B(5), saying that:

It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration.⁶²

[95] The application makes the general statement at Schedule M that at least one member of the claim group has a traditional connection to the claim area. The additional material speaks in general terms about the physical connection of the Yinggarda claimants to the Gnulli 2 claim area and the extent to which this connection is in accordance with the land tenure system which has its origins in the laws and customs acknowledged and observed at sovereignty. Yinggarda people have spent periods of time living on the pastoral stations that intersect the claim area and in this way Yinggarda people have maintained access to their traditional lands and enabled them to visit and protect sites and camps and retain their a close relationship and connection to their country.

[96] The material refers the Noble and Dalgety families (descendants of named ancestors Caroline and Sambo) who ‘regularly go out with family members to Carey Downs, Dairy Creek and Callytharra Springs (station formerly along the Wooramel River, partly within the Gnulli 2 claim) stations hunting, in particular for kangaroo and *guiwarl/yunggurji* (goannas).⁶³

[97] I am satisfied that at least one member of the group currently has a traditional physical connection with parts of the application area.

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

[98] The application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination application if approved determination of native title	Geospatial report	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 application not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule B, paragraph 3	Met

⁶² *Doepel* at [17].

⁶³ Additional material at 1.6.2.

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

[99] The application does not offend the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9):

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 the application area have otherwise been extinguished	Application and Schedule B, paragraph 4	Met

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

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

[100] 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 undertaken⁶⁴.

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

Subsection 61

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Part A and Schedule A	Met
s 61(3)	Name and address for service	Part B, pp 17	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Subsection 62

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Accompany application	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	Schedule C and 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

⁶⁴ Doepel at [16] and also at [35] to [39].

Section	Details	Form 1	Result
s 62(2)(e)	Description of factual basis:	Attachment F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Me
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

[104] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim, as described in ss 190C(3)(a), (b) and (c). Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court.

[105] The Tribunal's geospatial report confirms that no native title determination applications fall within the external boundaries of the current application. As the Gnulli 2 application does not overlap any other applications, there is no requirement that I consider the issue of common claim group membership.

[106] 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.

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

[107] The application is not accompanied by any information in relation to the requirements of s 190C(4). The applicant provided the certificate direct to the Registrar on 21 September 2018. Schedule R contemplates that a copy of the certification will be provided with the application. However, the Form 1 states that the information for the purposes of Schedules M to T is not prescribed. On this basis, it is my view that that the certificate is not a prescribed document and there is no requirement that the certification must accompany the application. That is, the requirements of this section will be met if the certification is provided separately to the Registrar. As I have been provided with a certification, I take the view that the application purports to be certified by the representative body for the area, the relevant consideration for me is at s 190C(4)(a).

[108] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward.⁶⁵ All that the task requires is that I be 'satisfied about the fact of certification by an appropriate representative body',⁶⁶ which necessarily entails:

1. identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
2. being satisfied that the certification meets the requirements of s 203BE.⁶⁷

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

⁶⁵ *Doepel* at [72].

⁶⁶ *Doepel* at [78].

⁶⁷ *Doepel* at [80] and [81].

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

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

1. all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
2. all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Identification of the representative body

[111] The Tribunal's geospatial report of 22 August 2018 confirms that Yamatji Marlpa Aboriginal Corporation (YMAC) is the only representative body for the whole of the area covered by the application. It is therefore the only body that could certify the application under s 203BE.

[112] The certificate is dated 29 August 2018 and is signed by the Chief Executive Officer of YMAC.

Does the certificate meet the requirements of 203BE

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

1. all the persons in the Gnulli 2 native title claim group have authorised the applicant to make the application and to deal with the matters arising in relation to it; and
2. all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the Gnulli 2 native title claim group.

[114] For the purposes of s 203BE(4)(b), the certification briefly sets out the reasons for YMAC being of that opinion, namely:

- YMAC has conducted research in relation to the Gnulli native title claim (WAD6161/1998) since 2000. In 2014 a consultant anthropologist and YMAC staff were engaged to author a connection report which was completed in 2017. The report included substantial research on connection to country and criterion for membership. Further research has been conducted in relation to country east of the Gnulli claim area which includes the area covered by the Gnulli 2 application.
- The anthropological research has informed the list of apical ancestors used to describe the native title claim group. The description includes all the members of the Gnulli claim group as identified in that research.
- On the basis of the anthropological research and the conduct of previous meetings of the Gnulli claim group YMAC is satisfied there is no traditional decision-making process which must be followed in relation to authorising an applicant.
- YMAC gave notice of the authorisation meeting to all Gnulli claimants on its database and published a notice in a regional newspaper on 24 May 2017.

- The authorisation meeting was held on 31 May 2017 at which attendees were required to register their membership of the Gnulli claim group. The persons present at the meeting were a representative group of the proposed Gnulli 2 claim group.
- A resolution to authorise the applicant to make and deal with the Gnulli 2 claimant application was passed in accordance with an agreed and adopted decision-making process utilised in previous Gnulli meetings at which YMAC has been in attendance.

[115] In my view, the statements made in the certificate, as summarised above, briefly set out the reasons for YMAC being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.

[116] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. As the application is not overlapped by another claimant application, I am satisfied that the issue is not required to be addressed in YMAC's certificate.

Conclusion

[117] For the above reasons, I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s 190C(4)(a).

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Gnulli 2
NNTT No.	WC2018/015
Federal Court of Australia No.	WAD366/2018

Section 186(1): Mandatory information

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

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

17 August 2018

Date application entered on Register:

14 December 2018

Applicant:

As per Schedule of Applications (Schedule)

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

Definitions

Area A means land and waters within the Application area that are landward of the high water mark and which comprises:

- (i) areas of unallocated Crown land (including islands) that have not been previously subject to any grant by the Crown;
- (ii) areas to which s 47 of the Act applies;
- (iii) areas to which s 47A of the Act applies;
- (iv) areas to which s 47B of the Act applies; and
- (v) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.

Area B means land and waters within the Application area that is not included in Area A above.

Subject to laws and customs

The native title rights and interests claimed in this Application are subject to and exercisable in accordance with:

1. The common law and the laws of the State of Western Australia and the Commonwealth of Australia;
2. Valid interests conferred pursuant to the laws of the State of Western Australia and the Commonwealth; and
3. The body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which the native title claim group have a connection to the land and waters the subject of this Application.

Rights in Area A

In relation to Area A, the Applicant claims the following native title rights and interests pertaining to exclusive possession:

1. The right to possession, occupation, use and enjoyment of that area as against the whole world.

Rights in Area A and Area B

The Applicant claims the following native title rights and interests in relation to:

- Area A if the claim to exclusive possession cannot be recognised; and
 - Area B
2. The right to hunt, fish, gather, take and use resources (other than minerals, petroleum and gas) in the area for any purpose;
 3. The right to enter and to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
 4. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
 5. The right to invite and permit others to have access to and participate in or carry out activities in the area; and
 6. The right to travel over, visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;
 7. The right to light fire within the area;
 8. The right to engage in cultural activities in the area including conducting and participating in ceremony and ritual, conducting burials and burial rites and the transmission of cultural knowledge.

Lisa Jowett

14 December 2018

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.