

# Registration Decision

<b>Application name</b>	The Malgana Shark Bay People's Application
<b>Name of applicant</b>	Mr John Thomas Oxenham; Ms Sarah Louise Bellottie; Mr Terrence Gordon McKie; Ms Bianca Elise McNeair; Ms Denise Charmaine Mitchell; Mr Leslie Anthony O'Neill and Mr Albert Darby Winder.
<b>Federal Court of Australia No.</b>	WAD6236/1998
<b>NNTT No.</b>	WC1998/017
<b>Date of Decision</b>	23 November 2018

## Claim accepted for registration

I have decided the claim in The Malgana Shark Bay People's Application satisfies all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration.

Katy Woods

*Delegate of the Native Title Registrar*<sup>2</sup>

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<sup>1</sup> All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless stated otherwise.

<sup>2</sup> 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.

# Reasons for Decision

## CASES CITED

*Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 (*Yarmirr*)  
*Corunna v Native Title Registrar* [2013] FCA 372 (*Corunna*)  
*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)  
*Gudjala People # 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)  
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)  
*Martin v Native Title Registrar* [2001] FCA 16 (*Martin*)  
*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)  
*Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*)  
*Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26 (*Sampi*)  
*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)  
*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*)  
*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)  
*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)  
*Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward HC*)

## BACKGROUND

- [1] The claim in this application is made on behalf of the Malgana native title claim group. It covers land and waters in the shires of Shark Bay, Carnarvon and Upper Gascoyne in Western Australia. The claim in this application was first made on 30 March 1998 and has been amended on several occasions since that time, most recently in 2017 according to the Register of Native Title Claims (Register).
- [2] The Registrar of the Federal Court (Court) gave a copy of this amended application and accompanying affidavits to the Native Title Registrar (Registrar) of the National Native Title Tribunal (Tribunal) on 1 October 2018 pursuant to s 64(4) of the Act.
- [3] The claim in this application was not amended as a result of orders made by the Court under s 87A so the exception to applying the registration test under s 190A(1A) does not arise. Amendments have been made to Schedules A, F–H, I, L, R and S since this claim was last tested. The members of the applicant have also been updated by way of orders made by the Court on 26 September 2018 pursuant to s 66B. The amendments to the claim are therefore greater than those contemplated by s 190A(6A), which provides limited circumstances in which the Registrar is required to accept a later claim where it amends an earlier registered

claim, without reapplying the registration test. As neither s 190A(1A) nor s 190A(6A) apply, I must consider the claim in this amended application under s 190A of the Act.

- [4] As the claim was first made in 1998, I am required to consider this amended application against the requirements of s 62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) on 1 September 2007. That legislation made some minor technical amendments to s 62 which only apply to claims made from 1 September 2007 onwards, and the claim before me is not such a claim.
- [5] If the claim satisfies all the registration test conditions in ss 190B–190C, the Registrar must accept the claim for registration.<sup>3</sup> If it does not satisfy all the conditions, it must not be accepted for registration.<sup>4</sup> I have decided the claim satisfies all the registration test conditions and my reasons on each condition follow below.

### ***Procedural fairness***

- [6] On 2 October 2018 a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the State of Western Australia (state government) advising I would be relying on the information in the amended application for my decision, and should the state government wish to make any submissions, it should do so by 16 October 2018.
- [7] On 15 October 2018 the applicant provided additional information directly to the Registrar for consideration by the delegate in applying the registration test (additional information). On 16 October 2018 the senior officer wrote to the relevant state minister advising I would consider the additional information in my decision.
- [8] On 18 October 2018 the senior officer received confirmation the state government did not wish to receive the additional information or make any submissions on the application.
- [9] On 7 November 2018 the senior officer received unsolicited material from [name removed] for consideration by the Registrar's delegate in applying the registration test (unsolicited material). On review of the unsolicited material, I considered it would not affect the outcome of the registration test. The unsolicited material was therefore not provided to the applicant for comment.
- [10] This concluded the procedural fairness process.

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<sup>3</sup> Section 190A(6).

<sup>4</sup> Section 190A(6B).

### ***Information considered***

[11] I have considered the information in the application and the additional information provided by the applicant directly to the Registrar.<sup>5</sup> The additional information consists of:

1. Covering letter from the applicant's legal representative, Yamatji Marlpa Aboriginal Corporation, 15 October 2018 (covering letter);
2. Affidavit of [Claimant 1], 26 July 1999 ([Claimant 1] affidavit);
3. Affidavit of [Claimant 2], 2 June 1999 ([Claimant 2] affidavit);
4. Affidavit of [Anthropologist 1], 12 July 1999 ([Anthropologist 1] affidavit);
5. Affidavit of [Claimant 3] (deceased), 24 June 1999 ([Claimant 3] affidavit);
6. Statement of [Anthropologist 2] attaching 'Summary Report on Malgana Connections to Country from Sovereignty to Present', 12 October 2018 (anthropological report);
7. Statement of [Claimant 4], 5 September 2018 ([Claimant 4] statement 1);
8. Statement of [Claimant 5], 5 September 2018 ([Claimant 5] statement);
9. Affidavit of [Anthropologist 2], 4 September 2018 ([Anthropologist 2] affidavit);
10. Certification of the claim by Yamatji Marlpa Aboriginal Corporation, 19 September 2018;
11. Statement of [Claimant 6], 21 July 2018 ([Claimant 6] statement);
12. Statement of [Claimant 4], 21 July 2018 ([Claimant 4] statement 2); and
13. Statement of [Claimant 7], 26 July 2018 ([Claimant 7] statement).

[12] I have also considered a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services dated 3 October 2018 (geospatial report) and information available through the Tribunal's geospatial database and Register of Native Title Claims.<sup>6</sup>

[13] As noted above, unsolicited material was received on 7 November 2018, which I have reviewed and considered. While the unsolicited material has not affected the outcome of the registration test, I have addressed its contents at the relevant conditions below, s 190C(4)(a) and s 190B(5)(a) respectively.

[14] There is no information before me obtained as a result of any searches conducted by the Registrar of state or Commonwealth interest registers,<sup>7</sup> and as noted above, the state government has not made any submissions.<sup>8</sup>

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<sup>5</sup> Section 190A(3)(a).

<sup>6</sup> Ibid.

<sup>7</sup> Section 190A(3)(b).

<sup>8</sup> Section 190A(3)(c).

## Section 190C: conditions about procedures and other matters

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

[15] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.<sup>9</sup>

[16] I am satisfied the application contains the details required by s 61:

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

[17] I am satisfied the application contains the information required by s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B / Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

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

[18] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application’. <sup>10</sup> To be a ‘previous application’:

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

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<sup>9</sup> *Doepel* [16], [35]–[39].

<sup>10</sup> Emphasis in original.

[19] The geospatial report states and my own searches confirm no overlapping applications were on the Register when the claim in the current application was made on 30 March 1998.<sup>11</sup> This means I do not need to consider whether there are claimants in common between the current application and any previous application, and so s 190C(3) is met.

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

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

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;<sup>12</sup> 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.<sup>13</sup>

[21] Schedule R states: '[t]his application has been certified by Yamatji Marlpa Aboriginal Corporation and an updated Certificate will be supplied to the National Native Title Tribunal'. The additional information provided by the applicant on 15 October 2018 includes a document titled: 'The Malgana Shark Bay People's Application Native Title Claim (WAD6236/1998) CERTIFICATION'.

[22] I note Keifel J's comment that where applications purport to be certified under s 190C(4)(a), the Registrar is not required or permitted to be satisfied about the correctness of the certification.<sup>14</sup> As this application purports to be certified, if I am satisfied the condition at s 190C(4)(a) is met, I am not permitted to address the condition imposed by s 190C(4)(b), that is, whether the applicant is authorised to make the application in accordance with that provision.<sup>15</sup> For this reason, I am unable to consider the concerns raised in the unsolicited material about the community meeting of 23 July 2018 at which the amendments to the application were authorised.

[23] To meet s 190C(4)(a), I must be satisfied the certificate:

- (a) identifies the relevant representative body;
- (b) identifies the representative body's power under Part 11 [of the Act] to issue the certification; and
- (c) meets the requirements of s 203BE(4).<sup>16</sup>

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<sup>11</sup> *Strickland FC* [12]–[22], [35], [41]–[52].

<sup>12</sup> Section 190C(4)(a).

<sup>13</sup> Section 190C(4)(b).

<sup>14</sup> *Wakaman* [33]–[34].

<sup>15</sup> *Doepel* [80]–[81].

<sup>16</sup> *Doepel* [80]–[81].

***Which representative body is identified?***

[24] The certificate is provided by Yamatji Marlpa Aboriginal Corporation (YMAC). It is dated 19 September 2018 and signed by the Chief Executive Officer. The geospatial report confirms YMAC is the only representative body for the whole of the area covered by the application. I have verified this information against the Tribunal's national map of Representative Aboriginal and Torres Strait Island Body areas. That map shows YMAC to be the recognised representative body for the area covering the application area, pursuant to s 203AD. I am satisfied the certificate identifies the relevant representative body.

***What power under Part 11 does the representative body have to issue the certification?***

[25] As the recognised representative body, YMAC can perform all of the functions listed in s 203B of Part 11 of the Act, including the certification functions in s 203BE.<sup>17</sup> I am satisfied YMAC has power to issue the certification under Part 11.

***How does the certification meet the requirements of s 203BE(4)?***

[26] Section 203BE(4) states '[a] certification of an application for a determination of native title by a representative body must:

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

***Section 203BE(4)(a)***

[27] Section 203BE(4)(a) requires a representative body to state in its certification that an application meets the requirements of ss 203BE(2)(a)–(b).

[28] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all 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.

[29] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that 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.

[30] The certificate states:

**Statement of opinion as required by ss 203BE(4)(a) of the *Native Title Act 1993* (Cth)**

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<sup>17</sup> Section 203B(1)(b).

In the matter of The Malgana Shark Bay People's Application Native Title Determination Claimant Application (WAD6236/1998) as amended on (date) [sic] (**the Application**), to which this certification is attached and in relation to:

- the area of land depicted in the map attached to the Application; and
- the written description in the Application,

the Yamatji Marlpa Aboriginal Corporation (**YMAC**) certifies that it is of the opinion that:

1. all of the persons in the Malgana Shark Bay People's Application native title claim group (**the claim group**) have authorised the replacement applicant, being John Thomas Oxenham, Sarah Louise Bellottie, Terrence Gordon McKie, Bianca Elise McNeair, Denise Charmaine Mitchell, Leslie Anthony O'Neill and Albert Darby Winder, 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 persons in the claim group.

and therefore that the requirements of ss 203BE(2)(a) and (b) of the *Native Title Act 1993* (Cth) have been met.

[31] Despite the omission of the date on which the application was amended in the opening paragraph, I am satisfied the certificate includes the requisite statement that the application meets the requirements of ss 203BE(2)(a)–(b), sufficient for the purposes of s 203BE(4)(a).

#### *Section 203BE(4)(b)*

[32] Section 203BE(4)(b) requires the representative body to set out its reasons for being of the opinion that ss 203BE(2)(a)–(b) are met.

[33] The certificate provides the following regarding the authorisation of the applicant:

#### **Reasons for opinion pursuant to ss 203BE(4)(b) of the Native Title Act 1993 (Cth)**

1. In about 2012 YMAC engaged consultant anthropologist [Anthropologist 3] to undertake anthropological research for the Application and to author an independent expert anthropological report. [Anthropologist 3] 's work included substantial research on connection to Malgana country and criterion for membership of the claim group.
2. [Anthropologist 3]'s research findings and supplementary research conducted by YMAC informed the list of apical ancestors contained in the claim group description in the Application.
3. On the basis of [Anthropologist 3]'s research findings, supplementary anthropological research conducted by YMAC and YMAC's experience with convening meetings of the claim group, YMAC formed the view that the claim group can be identified by reference to the apical ancestors described in the claim group description in the Application. The claim group description in the Application includes all of the claim group as identified in the anthropological research.
4. The research was provided to the State of Western Australia and the matter has been the subject of a consent determination negotiation. As a result of these negotiations, the claim has been listed for a consent determination on 4 December 2018.
5. YMAC organized a community meeting on 31 October 2015 (October 15 meeting) and 21 July 2018 (July 18 meeting) to approve amendments to the Application as it stood at those dates, including the claim group description. The meetings approved the claim group description that now appears in the Application. YMAC staff organised and were present at the October 15 and the July 18 meetings of the claim group.
6. At the July 18 meeting, the claim group resolved that John Thomas Oxenham, Sarah Louise Bellottie, Terrence Gordon McKie, Bianca Elise McNeair, Denise Charmaine Mitchell, Leslie Anthony O'Neill and Albert Darby Winder should replace the current applicant to the Application.



YMAC's anthropological research confirms that the proposed members of the replacement Applicant are members of the claim group as described in the Application.

7. On the basis of anthropological research conducted by YMAC and YMAC's experience with previous meetings of the claim group, YMAC is satisfied that there is no process of decision-making under the traditional laws and customs of the claim group that must be complied with to authorise the applicant to make a native title determination application and to deal with matters arising in relation to it, or things of that kind. The decision-making process employed at the below mentioned meetings was an agreed and adopted process which has been employed at previous meetings of the claim group.
8. YMAC gave notice of the October 15 meeting and the July 18 meeting by posting meeting notices to all members of the claim group listed on the YMAC database for the Application at the time, and by advertising the meeting in two Geraldton regional newspapers; in the Geraldton Guardian and the Midwest Times. (Add) [sic]
9. At the meetings, there was an attendance list taken to ensure that the people in attendance were all members of the claim group at the time. YMAC staff explained the register to attendees when they entered the meeting, and asked them to sign the register if they were already identified on the register as a member of the claim group.
10. The people who were present at the meeting were a representative group of the claim group.
11. A resolution to authorise the replacement applicant to make the application and deal with matters arising in relation to it was passed in accordance with the agreed and adopted decision-making process at the July 18 meeting.
12. For the reasons set out above, I am satisfied that reasonable efforts have been made to identify and consult with all of the persons in the claim group and that the above named applicant for this Application has been authorised by all of the persons in the claim group through an agreed and adopted decision-making process to make the application and to deal with matters arising in relation to it under the *Native Title Act 1993* (Cth).

[34] Despite the apparent omission of text in paragraph 8, I am satisfied YMAC has briefly set out its opinion as to how ss 203BE(2)(a)–(b) are met, and thus the certificate meets the requirements of s 203BE(4)(b).

#### *Section 203BE(4)(c)*

[35] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3). Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

- (a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
- (b) minimise the number of applications over the land or waters.

[36] As discussed above at s 190C(3), there are no applications which overlap this application. This means s 203BE(3) does not need to be met and subsequently s 203BE(4)(c) is not applicable.

[37] I am satisfied the certificate meets the requirements of s 203BE.

[38] As the certificate identifies the relevant representative body, that body (YMAC) has the power to issue the certification under Part 11, and the requirements of s 203BE are met, I am satisfied s 190C(4)(a) is met.

## Section 190B: conditions about merits of the claim

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

[39] To meet s 190B(2), the Registrar must be satisfied 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 questions for this condition are whether the information and map provide 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.<sup>18</sup>

#### ***How does the information about the external boundary meet this condition?***

[40] Schedule B refers to Attachment B. Attachment B describes the application area by metes and bounds, referring to:

- 1. the twelve (12) nautical mile territorial sea limit;
- 2. the high water mark;
- 3. land parcel boundaries;
- 4. the right bank of the Wooramel River; and
- 5. coordinated points identified by longitude and latitude to six (6) decimal points.

[41] Schedule C refers to Attachment C. Attachment C contains an A3 colour map prepared by the Tribunal's Geospatial Services titled 'The Malgana Shark Bay People's Application', dated 31 July 2018. It includes:

- 1. the application area depicted in bold light-blue outline;
- 2. the twelve (12) nautical mile territorial sea limit labelled where it forms part of the application area boundary;
- 3. general topographic background;
- 4. scalebar, coordinate grid (GDA94); and
- 5. notes relating to the source, currency and datum of data used to prepare the map.

[42] Having considered the geospatial report and Attachments B and C, I agree with the assessment in the geospatial report and am satisfied the external boundary of the application area can be identified on the earth's surface with reasonable certainty.

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<sup>18</sup> *Doepel* [122].

***How does the information about excluded areas meet this condition?***

[43] Schedule B lists general exclusions in paragraphs 1–3 and B1.1–B1.7, including areas where previous exclusive possession acts have been done. Attachment B specifically excludes any area subject to the following native title determinations and determination applications:

1. WAD6161/1998 Gnulli (WC1997/028) as accepted for registration 13 May 2014;
2. WAD6136/1998 Nanda People (WC2000/013) as accepted for registration 10 December 2001; and
3. WAD6033/1998, WAD382/2017 Wajarri Yamatji Part B (WCD2018/002) as determined by the Court on 23 April 2018.

[44] I note French J’s comment ‘it is unrealistic to expect a concluded definition of the areas subject to these provisions [in s 190B(2)] to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application’.<sup>19</sup> Following this reasoning, I am satisfied the description of the exclusions in Schedule B and Attachment B will be sufficient to ascertain the excluded areas at the appropriate time.

[45] I am satisfied the information 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, which means s 190B(2) is met.

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

[46] To meet s 190B(3), the Registrar must be satisfied:

- (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.

[47] I note I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’.<sup>20</sup>

[48] Schedule A states:

The Malgana People are those Aboriginal persons who are descended from one or more of the following ancestors:

- i. Julia Sappie O’Dene (also known as Julia Thompson);
- ii. Hookey (also known as Angelick);
- iii. Withia; or

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<sup>19</sup> *Strickland* [55].

<sup>20</sup> *Wakaman* [34].

iv. Nellie Peters

where descent can be by birth or adoption under traditional laws acknowledged and traditional customs observed by the Malgana People.

- [49] I consider the description of the native title claim group provides a clear objective starting point, being descent from named persons. Determining all the members of the group from the four ancestors will require genealogical research, however I note Carr J's view that the need to undertake a factual enquiry to determine the members of the group does not mean the group has not been described sufficiently.<sup>21</sup> I am therefore satisfied the persons in the group are described sufficiently clearly, which means s 190B(3) is met.

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

- [50] To meet s 190B(4), the Registrar must be satisfied the description contained in the application as required by s 62(2)(d) is sufficient to allow the claimed native title rights and interests to be identified.

- [51] I have not considered whether the rights and interests claimed are 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights and interests are established as 'native title rights and interests' on a prima facie basis.

- [52] Schedule E states:

The native title rights and interests claimed are the rights to the possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:

- (a) rights and interests to possess, occupy, use and enjoy the area;
- (b) the right to make decisions about the use and enjoyment of the area;
- (c) the right of access to the area;
- (d) the right to control the access of others to the area;
- (e) the right to use and enjoy resources of the area;
- (f) the right to control the use and enjoyment of others of resources of the area;
- (g) the right to trade in resources of the area;
- (h) the right to receive a portion of any resources taken by others from the area;
- (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- (j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

- [53] According to Mansfield J, it is open to the Registrar to read Schedule E 'as a whole' so that there is 'no inherent or explicit contradiction'.<sup>22</sup> I also note the majority's comment in *Ward*

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<sup>21</sup> *WA v NTR* [67].

<sup>22</sup> *Doepel* [92], [123].

HC that where ‘native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms’.<sup>23</sup> I have also considered the comments of French J in *Sampi* in relation to claims of exclusive rights:

the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.<sup>24</sup>

- [54] Noting the similarities between French J’s comments and the wording of paragraphs (a)–(d), I consider it appropriate to read the opening sentence and the rights in paragraphs (a)–(d) as one coherent whole, subsuming the rights in each of those paragraphs into the global right to exclusive possession.
- [55] I consider the right in paragraph (f), to control the use and enjoyment of others of resources of the area, is also subsumed within the right to exclusive possession. This is because I consider controlling the use and enjoyment of others of resources of the same substance as a right to ‘make decisions about [the area’s] use and enjoyment by others’, which forms part of the right to exclusive possession according to French J in *Sampi* quoted above.
- [56] Despite the use of the phrase ‘and in particular comprise’ preceding the entire list of claimed rights, I consider the rights in paragraphs (e) and (g)–(j) are individual rights in and of themselves, rather than amounting to an exclusive right. I therefore consider them to be non-exclusive rights.
- [57] I am therefore satisfied the description in Schedule E is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

- [58] 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) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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<sup>23</sup> *Ward HC* [51].

<sup>24</sup> *Sampi* [1072] (emphasis added).

[59] I understand my task is to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is ‘evidence that proves directly or by inference the facts necessary to establish the claim’.<sup>25</sup>

[60] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) which accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true.<sup>26</sup>

***What is required to meet s 190B(5)(a)?***

[61] To meet s 190B(5)(a) the factual basis must be sufficient to show:

1. the claim group presently has an association with the area, and the claim group’s predecessors have had an association with the area since sovereignty or European settlement;<sup>27</sup>
2. there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;<sup>28</sup> and
3. there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’.<sup>29</sup>

***How does the application support an association between the predecessors of the claim group and the area at sovereignty or European settlement and since that time?***

[62] Schedule F asserts:

The native title rights and interests claimed in this Application exist on the basis that the Malgana people have, and the predecessors of the Malgana people had, an association with the area; ...

[63] The anthropological report from [Anthropologist 2] (anthropological report), supports this assertion in its summary of the historical and ethnographic records of the region surrounding the application area, including the records of the Colonial Secretary of Western Australia Hon. F Barlee who reported that the ‘Majanna’ people’s territory ‘lies around Shark’s Bay’ and that the area was first occupied by ‘the whites’ in 1874.<sup>30</sup> This broadly accords with the information about the establishment of pastoral stations in the region, which is asserted to have occurred between the 1860s and 1880s, at least thirty years after sovereignty occurred in Western Australia in 1829.<sup>31</sup>

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<sup>25</sup> Doepel [16]–[17]; *Gudjala 2008* [83], [92].

<sup>26</sup> *Gudjala 2008* [91]–[92].

<sup>27</sup> *Gudjala 2007* [52].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>30</sup> Anthropological report [12].

<sup>31</sup> *Ibid* [7].

[64] The anthropological report also summarises historical information about the four apical ancestors of the claim group and their association with the application area. It notes the Shark Bay Police Occurrence Books record the apical ancestors, and in some cases their parents, in and around the application area from as early as 1889.<sup>32</sup>

[65] With regards to the intervening generations, the anthropological report refers to the ethnographic data collected by Daisy Bates between 1904 and 1912. The anthropological report asserts Bates located the Malgana in the ‘Shark Bay, Hamelin Pool area’, which broadly describes the application area.<sup>33</sup> The anthropological report also refers to D.S. Davidson’s 1938 map which locates the Malgana in the Shark Bay and Hamelin Pool area,<sup>34</sup> and asserts:

Working and residing on pastoral stations, participating in the pearling and fishing industry (from the early days to the present), living in townships and traversing and visiting country regularly is evidenced in the archival record and in oral accounts of claimants.<sup>35</sup>

[66] The affidavit of the late [Claimant 3] deposes he was born on Dirk Hartog Island, which is part of the application area, in 1925.<sup>36</sup> The deponent lived in Shark Bay as a child with his mother, grandmother and aunts.<sup>37</sup> From the deponent’s date of birth I infer his mother would likely have been born around the 1890s-1900s and his grandmother around the 1860s-1870s, which is around the time of settlement in the application area. The affidavit deposes that in the ‘old times’ people would catch snapper in Wilymia Harbour, which is part of the application area.<sup>38</sup> It also deposes that there are many sacred places in Malgana country, including sites at Shark Bay, Monkey Mia and Herald Bight, which the deponent’s uncles showed him.<sup>39</sup>

[67] The affidavit of [Claimant 2] deposes he was born in Denham, which is part of the application area, in 1927.<sup>40</sup> The affidavit deposes that Julia, one of the claim group’s apical ancestors, was the deponent’s great-great grandmother. Based on the deponent’s date of birth, I infer that Julia would have been born around the 1860s. This accords with the estimated birth date provided for Julia in the anthropological report, ‘circa 1862’.<sup>41</sup> The deponent recalls going from Denham into the surrounding bush ‘on trips with my mother and grandmother’ where they would snare emus and kangaroos and gather various foods including sandalwood nuts.<sup>42</sup>

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<sup>32</sup> Anthropological report [53], see also [41], [44], [49].

<sup>33</sup> Ibid [14].

<sup>34</sup> Ibid [16].

<sup>35</sup> Ibid [54].

<sup>36</sup> [Claimant 3] affidavit [2].

<sup>37</sup> Ibid [13].

<sup>38</sup> Ibid [12].

<sup>39</sup> Ibid [16].

<sup>40</sup> [Claimant 2] affidavit [1].

<sup>41</sup> Anthropological report [39].

<sup>42</sup> [Claimant 2] affidavit [10]–[11].

The deponent also recalls going out fishing ‘in the boats’ with senior Malgana people who also taught him the Malgana language.<sup>43</sup>

- [68] I consider there is sufficient factual basis to support the assertion that the predecessors of the claim group have had an association with the application area since sovereignty. I have formed this view based on the information in the anthropological report and the affidavits of senior claim group members, about successive generations of their predecessors living in the application area around the time of settlement and since that time. I consider it reasonable to infer the association of the claim group’s predecessors was much the same at sovereignty as it was at the time of European settlement in the application area.

***How does the application support an association between the claim group and the area presently?***

- [69] With regards to the association of the current claim group with the application area asserted in Schedule F and extracted above, the anthropological report states:

Many Malgana people have lived in Shark Bay for all or most of their lives. The research shows that people have worked on stations in Malgana country and have fished, hunted and gathered through much of Malgana country.<sup>44</sup>

- [70] The affidavit of [Claimant 2] deposes he has lived in Denham ‘all my life’.<sup>45</sup> In addition to the hunting and fishing activities of his childhood described above, the affidavit outlines the deponent’s work history in the application area, including shearing on Dirk Hartog Island and Peron Peninsula as a young man, before starting a fishing business which covered the ‘inner parts’ of Shark Bay.<sup>46</sup> He also deposes participating in a heritage survey at Tamala, a station which lies partially within the south-west corner of the application area.<sup>47</sup>

- [71] The statement of [Claimant 5] describes his work history in and around the application area, including working as a professional fisherman in Shark Bay, and on Carrang and Yalardy stations.<sup>48</sup> The statement of [Claimant 6] describes a part of the application area called ‘Magpie’ where he has been coming ‘to hunt and camp with my family since I was a child and I still regularly come here today’.<sup>49</sup> [Claimant 6] states ‘[m]any Malgana people still go hunting for kangaroos here today including my brothers and the younger generations’.<sup>50</sup> He also describes his and other Malgana people’s association with parts of the application area,

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<sup>43</sup> Ibid [4]–[5].

<sup>44</sup> Anthropological report [54].

<sup>45</sup> [Claimant 2] affidavit [1].

<sup>46</sup> Ibid [15]–[16].

<sup>47</sup> Ibid [18].

<sup>48</sup> [Claimant 5] statement [1].

<sup>49</sup> [Claimant 6] statement [4].

<sup>50</sup> Ibid [6].



including the 'Old Common' and 'Old Rifle Range' area west of Denham, Wilya Mia, Kangaroo Island, North Kangaroo Island and Lefebvre.<sup>51</sup>

- [72] Based on the information in the anthropological report and the claim group members' affidavits and statements, examples of which I have summarised above, I consider the factual basis sufficient to support an assertion that the current claim group has an association with the application area.

***How does the application support an association, both past and present, with the entire area claimed?***

- [73] As summarised above, the claimants' affidavits and statements contain numerous references to locations in and surrounding the application area, both in terms of their predecessors, themselves and younger generations of the claim group. There are references to claim group members living and working on different parts of the land and waters of the application area and the surrounding areas of Carnarvon to the north-east, Carey Downs station just outside the application area to the north-east and Tamala station which extends into the application area in the south-west.
- [74] I note the references to places which I can see lie in the application area, based on information from the Tribunal's Geospatial Services, including the following islands and coastal locations:

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<sup>51</sup> Ibid [10]–[19].

- |                                      |                           |                           |
|--------------------------------------|---------------------------|---------------------------|
| 1. Old Common                        | 9. Lefebvre               | 17. Peron Peninsula       |
| 2. Old Rifle Range                   | 10. Salutation Island     | 18. Cattle Well Hill      |
| 3. Lagoon Point /<br>Nicholson Point | 11. Old Reserve<br>10990  | 19. Bottle Bay /<br>Beach |
| 4. Heirison Prong                    | 12. Monkey Mia Tank       | 20. Herald Bight          |
| 5. Wilya Mia                         | 13. Pelican Island        | 21. Nanga Bay             |
| 6. Eagle Bluff<br>lagoon             | 14. Useless Loop          | 22. Eagle Bluff           |
| 7. Kangaroo Island                   | 15. Gladstone             | 23. Denham                |
| 8. North Kangaroo<br>Island          | 16. Dirk Hartog<br>Island | 24. Shark Bay             |

[75] I also note the references to stations in the application area where claimants and their predecessors lived and worked, including:

1. Carrarang in the south west,
2. Yalardy in the far east,
3. Gilroyd in the north east, and
4. Yaringa in the centre.

[76] In my view, the claimants' affidavits provide support for the assertion in Schedule F that the claim group have, and its predecessors had, an association with the application area as a whole. This is because there are geographically particular references to locations across the application area, as well as to surrounding areas and locations, where claim group members and their predecessors were born, lived, worked and undertook activities such as hunting animals and gathering bush foods on the land, and catching fish in the waters. I therefore consider s 190B(5)(a) is met.

[77] The unsolicited material contains an undated map of the west coast of Western Australia, up to and including the application area, titled 'Anthropologist Norman Tindale map'. That map shows the geographical boundaries of indigenous groups, including the Malgana. It is difficult for me to tell from that map how those boundaries align, or not, with the boundaries of the native title claims currently on the Register, however I am able to identify the Shark Bay region, over which the Malgana claim is made. On that map the Shark Bay region is labelled 'Nanda'. An area further inland, which I consider is likely to be at least partially covered by the Malgana claim, is labelled 'Malgana'. I do not consider this map is a sufficient basis for me to consider s 190B(5)(a) is not met. This is because my task at this condition is only to assess whether there is a sufficient factual basis to support an assertion that the native title claim group has, and the predecessors of those persons had, an association with the area. As

discussed above, I am satisfied there is sufficient factual basis in the application to support that assertion.

***What is required to meet s 190B(5)(b)?***

[78] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

[79] ‘Native title rights and interests’ is defined in s 223(1)(a) as those rights and interests ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders. As both provisions refer to traditional laws and customs acknowledged and observed, I consider it appropriate to interpret s 190B(5)(b) in light of the judicial consideration of ‘traditional’ in s 223(1).

[80] The plurality in *Yorta Yorta* held that a ‘traditional’ law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. The High Court further held that in the context of the Act, ‘traditional’ also carries two other elements, namely:

1. ‘the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs’; and
2. ‘the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist’.<sup>52</sup>

[81] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of:

1. a society which was in existence at sovereignty or European settlement in the application area, and
2. normative rules which were observed by that society and which have continued to be observed through to the present day.

***How does the application support the existence of a society at settlement?***

[82] Schedule F asserts:

The Malgana ancestors named in Schedule A are the ancestors of the Malgana people today. Those ancestors are in turn descended from Malgana people who, along with other Malgana people at the time who may not have any Malgana descendants today, formed part of the Malgana society at the time of sovereignty.

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<sup>52</sup> *Yorta Yorta* [46]–[47] (emphasis added).

[83] The anthropological report asserts:

The research on local and social organisation, spiritual beliefs and ceremonial life suggest that Malgana people are and were a separate entity with a distinct language and territory and Malgana laws and customs... At the same time, they are and were also embedded in a wider coastal societal system that can also be seen as their society because although the Malgana spoke a distinct language and occupied a particular area, they were and are still are part of a wider society or broad societal system which include their neighbours such as the Nanda to the south and Ingarda to the north.<sup>53</sup>

[84] The covering letter to the applicant's additional materials includes the following submission:

... the existence of a wider society as well does not diminish or contradict the distinct Malgana-level society but governs the relationships and reciprocal recognitions between the different groups which each have their own distinct territories and identities.

[85] The submissions in the covering letter also refer me to the case of *Sampi* where I note the Full Court made the 'coarse analogy' between the concurrent operation of two levels of a traditional Aboriginal society (the Bardi and Jawi), with the concurrent operation of state and Commonwealth laws in contemporary Australian society.<sup>54</sup> Based on the applicant's submissions and the information in the anthropological report, I understand it is asserted that the society in the application area similarly operates on two levels, a distinct Malgana society identifiable through language, laws and customs, and a 'wider coastal societal system' which includes neighbouring groups to the south and north.<sup>55</sup>

[86] The affidavit of the late [Claimant 3] deposes details of identifiers of Malgana society, including the Malgana language, of which he had knowledge, and Malgana laws and customs, which I will consider in more detail below.<sup>56</sup> The affidavit describes two places in the application area where neighbouring tribes would meet the Malgana for corroborees and meetings.<sup>57</sup> This accords with the information in the anthropological report about the Malgana being part of a regional societal system. I note the elders to whom the deponent refers would have been alive during the early decades of settlement in the application area.<sup>58</sup> It is therefore reasonable to infer the society in which they lived was the same as that prior to and at the time of settlement.

[87] Similarly, the affidavit of [Claimant 2] deposes how he learned Malgana language during his childhood from 'full blood people'.<sup>59</sup> He deposes how he learned the laws and customs of the Malgana, which I will also consider in further detail below. Again, noting the age of the

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<sup>53</sup> Anthropological report [27].

<sup>54</sup> *Sampi* [69].

<sup>55</sup> Anthropological report [27]–[29].

<sup>56</sup> [Claimant 3] affidavit [3], [11]–[25].

<sup>57</sup> *Ibid* [17]–[18].

<sup>58</sup> *Ibid* [17].

<sup>59</sup> [Claimant 2] affidavit [3]–[4].

deponent, the people from whom he learned would have been alive during the early decades of settlement, and so I consider it reasonable to infer the society in which they lived was the same as that at the time of settlement.

[88] Finally, I note the assertion in the anthropological report: '[t]he ethno-historical material shows that Shark Bay is more often than not recorded as associated with Malgana people',<sup>60</sup> and the summary which follows of the early settler records including that identifying the 'Majanna' people around Shark Bay as early as 1886.<sup>61</sup>

[89] Based on the information in the claimants' affidavits and the historical records summarised in the anthropological report, I consider the factual basis sufficient to support the assertion that there was an identifiable society in the application area at settlement, and that society is appropriately identified as 'Malgana'.

***How does the application support the existence of traditional laws and customs?***

[90] Schedule F asserts:

Since prior to the acquisition of sovereignty, the Malgana people have had, and continue to have, a system of traditional laws and customs which they continue to acknowledge and observe. It was these Malgana traditional laws and customs that governed the Malgana people and the claim area at sovereignty and continue to the present day ...

[91] The anthropological report asserts the laws and customs of the Malgana people today are likely to have been the same normative laws and customs which existed at sovereignty and which were observed and acknowledged by the Malgana people since prior to 1829.<sup>62</sup>

[92] There are examples of laws which are prescriptive of behaviour in the affidavits and statements of claim group members, which have been passed down to the deponents from earlier generations of Malgana people. For example, the affidavit of the late [Claimant 3] deposes: '[t]he laws and customs that I speak about in this affidavit are Malgana laws and customs and I was taught these by my relatives and other Malgana people'.<sup>63</sup> The affidavit provides examples of Malgana laws and customs which he was taught by his elders, such as the punishments for breaking particular laws, including interference with sacred sites and ignoring proper Malgana burials rites.<sup>64</sup> The deponent explains the protocols for entering Malgana country and asking to take resources from it.<sup>65</sup> The deponent also explains the

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<sup>60</sup> Anthropological report [9].

<sup>61</sup> Ibid [13].

<sup>62</sup> Ibid [17].

<sup>63</sup> [Claimant 3] affidavit [25].

<sup>64</sup> Ibid [8], [17], [20]–[21].

<sup>65</sup> Ibid [19].

process through which an outsider can be considered for adoption into the Malgana, noting it requires staying in Malgana country for a long time and abiding by the laws of the elders.<sup>66</sup>

[93] There are also numerous examples of customs relating to the appropriate methods of hunting, fishing and preparing food which have been passed down to the members of the current claim group from their predecessors. For example, the affidavit of [Claimant 2] deposes how he learnt to find water, track game and prepare different animals for eating.<sup>67</sup>

[94] As discussed above, noting the birth dates of the late [Claimant 3] and of [Claimant 2], many of the people from whom they learnt Malgana laws and customs would have been alive at or around the time of settlement, and it is reasonable to infer those ancestors observed the same laws and customs throughout their lifetimes. I also consider it reasonable to infer those ancestors received knowledge of the laws and customs in much the same way they taught them to their descendants, through observance, oral transmission and common practice. These inferences are easier to make where there are only a few generations separating the current claim group from the society at settlement. I therefore consider the laws and customs described in the factual basis material to be ‘traditional’ in accordance with the High Court’s interpretation in *Yorta Yorta*.<sup>68</sup>

[95] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the application area identifiable as ‘Malgana’. I am also satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group, which means s 190B(5)(b) is met.

***What is required to meet s 190B(5)(c)?***

[96] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests.<sup>69</sup> It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least European settlement.<sup>70</sup>

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<sup>66</sup> Ibid.

<sup>67</sup> [Claimant 2] affidavit [9]–[12].

<sup>68</sup> *Yorta Yorta* [46]–[47].

<sup>69</sup> *Gudjala 2009* [29].

<sup>70</sup> *Gudjala 2007* [82].

***How does the application support the continuity of traditional laws and customs?***

- [97] As discussed above, I am satisfied the factual basis is sufficient to support an assertion that there was a society in the application area at settlement acknowledging and observing laws and customs, from which the current laws and customs of the native title claim group are derived. It is also my view that the factual basis is sufficient to support an assertion that those laws have been continually acknowledged and observed by the intervening generations since settlement without substantial interruption.
- [98] I have formed this view based on the information in the claimants' affidavits and statements about how they and their predecessors, over the period since settlement, have maintained a physical presence in the area, predominantly through their work as fishermen or on stations, and how sites in the application area continue to hold spiritual importance to the members of the claim group. As discussed at s 190B(5)(a) above, the claimants' affidavits provide examples of claim group members and their predecessors residing in the surrounding areas, and frequenting the application area to camp, hunt, collect bush foods and catch fish.
- [99] My view is also based on the information in the claimants' affidavits about how laws and customs were taught to them by their predecessors, which they have continued to observe and in turn are now passing on to the younger generations. For example, the statement of [Claimant 4] describes a '[removed for cultural reasons] story' attached to Shell Beach in the application area, which warns of the consequences of failing to care for country. [Claimant 4] states he was taught the story and how to care for country by his grandparents, and has passed this knowledge to his son.<sup>71</sup> [Claimant 4] also describes how he was taught not to disturb particular sites including middens and burial grounds, and he is waiting to teach this story to his son when he is old enough to understand.<sup>72</sup> Further examples are in the statement of [Claimant 5] where he describes how his grandmother taught his children traditional dances and songs, and how the old people taught him the rules about looking after the country which he has subsequently taught to his children.<sup>73</sup> The statement of [Claimant 7] describes how she has passed traditional knowledge onto her children and has taught them to 'listen to the old people' to improve their hunting techniques.<sup>74</sup> I consider the deponents have provided information about the observation and practice of Malgana laws and customs across all of the generations in the application area since settlement and up to the present day.

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<sup>71</sup> [Claimant 4] statement 1 [8], [12].

<sup>72</sup> Ibid [13].

<sup>73</sup> [Claimant 5] statement [7], [11].

<sup>74</sup> [Claimant 7] statement [6].

[100] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs. This is because the information in the application and additional material demonstrates that current claimants possess knowledge about how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the application area since around the time of settlement. I also consider the information about how younger generations have received knowledge of the Malgana laws and customs, through observance, oral transmission and common practice, reflects the description of how elderly claim group members received such knowledge from their predecessors who were alive around the time of settlement. As such I consider there has been continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

[101] As I consider the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the three assertions of ss 190B(5)(a)–(c), I am satisfied s 190B(5) is met.

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

[102] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a ‘native title right or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group.

[103] I note the comments of Mansfield J about s 190B(6):

1. it requires some measure of the material available in support of the claim;<sup>75</sup>
2. it appears to impose a more onerous test to be applied to the individual rights and interests claimed;<sup>76</sup> and
3. the words ‘prima facie’ mean ‘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’.<sup>77</sup>

[104] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie

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<sup>75</sup> *Doepel* [126].

<sup>76</sup> *Ibid* [132].

<sup>77</sup> *Ibid* [135].



established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be prima facie established will be entered on the Register.<sup>78</sup>

***Which of the claimed native title rights and interests can be established on a prima facie basis?***

[105] In the covering letter to the additional information the applicant has directed my attention to particular examples in the materials of some of the rights claimed, which is helpful to my task at s 190B(6). There are nine rights claimed in the application which I have reproduced above at s 190B(4) as they appear in Schedule E. I consider these rights can be broadly grouped into three categories: exclusive possession, resources and protection. My reasoning about interpreting the opening sentence of Schedule E and the rights in paragraphs (a)–(d) and (f) as a whole is also above at s 190B(4). The remaining categories, resources and protection, I consider appropriate based on the wording and subject matter of each of the rights. I have organised my consideration of the rights accordingly:

***Exclusive possession***

*The native title rights and interests claimed are the rights to possession, occupation, use and enjoyment as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:*

- (a) rights and interests to possess, occupy, use and enjoy the area;*
- (b) the right to make decisions about the use and enjoyment of the area;*
- (c) the right of access to the area;*
- (d) the right to control the access of others to the area;*
- ...*
- (f) the right to control the use and enjoyment of others of resources of the area;*

[106] The affidavit of anthropologist [Anthropologist 1] states: ‘Malgana people continue to exercise traditional rights to speak for the claim area’.<sup>79</sup>

[107] The affidavit of the late [Claimant 3] deposes: ‘[w]hen outsiders would come to Malgana country they would light a fire in the distance to announce their arrival, they had to wait until an elder said it was alright for them to come into Malgana country’.<sup>80</sup> The affidavit deposes the continued observance of this law by the Malgana people, stating: ‘Malgana people still try

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<sup>78</sup> Section 186(1)(g).

<sup>79</sup> [Anthropologist 1] affidavit [13], [11].

<sup>80</sup> [Claimant 3] affidavit [19].

to protect our country... Under Malgana law people should ask permission of the Malgana people and the elders permission to use Malgana country'.<sup>81</sup>

[108] I consider the information about the traditional laws and customs relating to the seeking of permission to access the application area demonstrates that the claimed right accords with a right of exclusive possession as described in *Ward HC*, where the High Court held:

It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.<sup>82</sup>

[109] The affidavit of the late [Claimant 3] deposes '[p]eople should ask Malgana people before they build houses or do things to Malgana country...the salt works should not be allowed to build more dams without asking Malgana people, that would be the right way of doing things'.<sup>83</sup>

[110] The statement of [Claimant 4] describes how tourists accessing the application area do so in ways not acceptable to Malgana people:

There are so many tracks on the beach. These are not from Malgana people because that this not [*sic*] how we were taught to care for country. This is from tourists just coming here and going anywhere they want. Tourists need to respect country and the right way to care for country including accessing country.<sup>84</sup>

[111] I note the comments of the majority of the High Court in *Yarmirr*, that a claimed right is not required to be supported by 'some enforceable means of excluding from its enjoyment those who are not its holders'; and that an inquiry into how a right is observed 'seems directed more to identifying practices that are regarded as socially acceptable, rather than looking to whether the practices were supported or enforced through a system for the organised imposition of sanctions by the relevant community'.<sup>85</sup>

[112] The affidavit of the late [Claimant 3] deposes that he is a Malgana elder and that under Malgana law, the elders or 'old fellas' should be asked permission to 'use Malgana country'.<sup>86</sup> He further deposes that 'I don't like people coming and taking fish from the Bay without first asking permission'.<sup>87</sup>

[113] I consider the information in the affidavits and statements of the claimants, examples of which I have reproduced above, describes practices around access to country that are

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<sup>81</sup> Ibid [22]–[23].

<sup>82</sup> *Ward HC* [88].

<sup>83</sup> [Claimant 3] affidavit [22].

<sup>84</sup> [Claimant 4] statement 2 [8].

<sup>85</sup> *Yarmirr* [16].

<sup>86</sup> [Claimant 3] affidavit [1], [23].

<sup>87</sup> Ibid [24].

regarded as socially acceptable by Malgana people. I consider there is information in the application about all the rights which are subsumed within the right to exclusive possession.

**Resources**

*(e) the right to use and enjoy resources of the area;*

...

*(g) the right to trade in resources of the area;*

*(h) the right to receive a portion of any resources taken by others from the area;*

[114] I understand ‘resources’ can include organic plant and animal resources, and non-organic resources such as ochre, but not minerals, petroleum or gas wholly owned by the Crown, which the applicant has specifically excluded in Schedule E.<sup>88</sup>

[115] There are numerous examples in the claimants’ statements and affidavits of claim group members and their predecessors using and enjoying the resources of the application area, including plants, animals and fish.<sup>89</sup> For example the statement of [Claimant 5] describes how he learned to catch turtle and dugong in a traditional way from his uncle, using a special spear.<sup>90</sup>

[116] [Claimant 5] describes how spearheads were traded by coastal Malgana people in the ‘old days’ for chert ‘on Yaringa country’ in the middle of the application area where there is a chert quarry.<sup>91</sup> The anthropological report asserts that chert samples from archaeological sites in Shark Bay were found to have come from the Yaringa quarry.

[117] The statement of [Claimant 4] describes how Malgana people share portions of the natural resources of the area.<sup>92</sup>

[118] I consider the application contains information about each of the rights pertaining to the resources of the application area.

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<sup>88</sup> Section 190B(9)(a).

<sup>89</sup> See for examples, [Claimant 4] statement 1 [9]–[10], [16]–[18], [20]; [Claimant 4] statement 2 [5]; [Claimant 7] statement [4]–[12].

<sup>90</sup> [Claimant 5] statement [13].

<sup>91</sup> [Claimant 5] statement [14].

<sup>92</sup> [Claimant 4] statement 1 [24].

## **Protection**

- (i) *the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and*
- (j) *the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.*

[119] The statement of [Claimant 4] explains '[a]s a Malgana person I feel a duty to protect areas in Malgana country. I often go around to check on country... we are taught to look after this area, I learnt this from my grandparents'.<sup>93</sup> The statement of [Claimant 6] describes 'Magpie' in the application area as a 'significant area' and says '[u]nder our Malgana traditional laws and customs, we need to care for this area and protect it'.<sup>94</sup>

[120] Throughout the claimants' affidavits and statements there are examples of cultural knowledge held in relation to hunting and fishing techniques, sacred sites and Dreaming stories. The late [Claimant 3], [Claimant 4] and [Claimant 5] all outline cultural knowledge the claimants hold regarding traditional Malgana burial practices.<sup>95</sup> I am therefore satisfied the application contains sufficient information about the rights pertaining to protection of the application area.

[121] I am satisfied the application contains sufficient information about each of the rights claimed, and, because I am satisfied there is sufficient factual basis material to support the assertion of the existence of traditional laws and customs as required by s 190B(5)(b), I am satisfied there is sufficient information to show that, prima facie, the native title rights and interests claimed can be established. This is because, according to the definition in s 223(1), a native title right or interest is one that is held under traditional laws acknowledged and traditional customs observed. I therefore consider the claimed rights and interests have all been established on a prima facie basis and s 190B(6) is met.

## **Traditional physical connection – s 190B(7): condition met**

[122] To meet s 190B(7), the Registrar must be satisfied 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

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<sup>93</sup> [Claimant 4] statement 2 [8].

<sup>94</sup> [Claimant 6] statement [7].

<sup>95</sup> [Claimant 3] affidavit [21]; [Claimant 4] statement 1 [13]; [Claimant 5] statement [6].

acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[123] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.<sup>96</sup>

[124] Schedule M, which asks applicants to provide information to support the assertion at s 190B(7), was not provided as part of the filed application. I have therefore examined the additional material provided by the applicant to find information relevant to this condition.

[125] Based on the affidavit of [Claimant 2], I am satisfied he has a physical connection to parts of the application area. His affidavit deposes he was born in Denham in 1927 and has lived there all his life.<sup>97</sup> I am also satisfied [Claimant 2]’s connection with the application area is ‘traditional’ in the sense required by s 190B(7). I am satisfied his knowledge of the application area has been passed to him from the predecessors of the claim group while spending time on the lands and waters of the application area. As I consider that the factual basis material is sufficient to support an assertion that traditional laws and customs acknowledged and observed by the predecessors of the claim group have been passed down to the current members of the claim group, it follows that I am satisfied that [Claimant 2]’s connection with the application area is in accordance with those traditional laws and customs.

[126] I am therefore satisfied at least one member of the native title claim group currently has a traditional physical connection with a part of the claim area, and so s 190B(7)(a) is met.

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

[127] I am satisfied the application complies with ss 61A(1)–(3) and so s 190B(8) is met:

Section	Requirement	Information	Result
s 61A(1)	No native title determination application if approved determination of native title	Geospatial report, my own searches	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, paragraph 2	Met
s 61A(3)	Claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule E, paragraph (iii)	Met

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<sup>96</sup> Doepel [18], *Gudjala* 2009 [84].

<sup>97</sup> [Claimant 2] affidavit [1].

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

[128] I am satisfied s 190B(9) is met:

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule E, paragraph (i)	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule E, paragraph (ii)	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	There is no information in the application that discloses to me that native title rights and interests in the application area have otherwise been extinguished	Met

*End of reasons*

## Attachment A

### Information to be included on the Register of Native Title Claims

Application name	The Malgana Shark Bay People's Application
NNTT No.	WC1998/017
Federal Court of Australia No.	WAD6236/1998

#### 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:

National Native Title Tribunal

**Date application filed/lodged:** 30 March 1998

**Date application entered on Register:** 30 March 1998

**Applicant:** As per the Schedule

**Applicant's address for service:** As per the Schedule

**Area covered by application:** As per the Schedule

**Persons claiming to hold native title:** As per the Schedule

#### Registered native title rights and interests:

The native title rights and interests claimed are the right to possession, occupation, use and enjoyment as against the whole world, of the area and the following non-exclusive rights:

- (e) the right to use and enjoy resources of the area;
- (g) the right to trade in resources of the area;
- (h) the right to receive a portion of any resources taken by others from the area;
- (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- (j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

The Native Title Rights and Interests are subject to the following qualifications:

- (i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
- (ii) To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place.
- (iii) The applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NT A, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western

Australia and a law of that State has made provision as mentioned in section 231 in relation to the act;

- (iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 478 of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing.
- (v) The said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.

Katy Woods

23 November 2018

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 23 August 2017 and made pursuant to s 99 of the Act.