National Native Title Tribunal

Registration Decision

Application name	Ngurrara D1
Name of applicant	Malachy Hobbs, Hector Hobbs, Cynthia Winawarl, Mervyn Numbagardie, Richard Pindan, Tony Yanawana, Harry Yungabun, Percy Bulagardie, James Yanawana, Victor Woia, Helen Thomas
Federal Court of Australia No.	WAD327/2018
NNTT No.	WC2018/013
Date of Decision	12 October 2018

Claim not accepted for registration

I have decided that the claim in the Ngurrara D1 application does not satisfy all of the conditions in ss 190B and 190C of the *Native Title Ac*t 1993 (Cth).[1] Therefore the claim must not be accepted for registration.

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

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Heidi Evans

Delegate of the Native Title Registrar[2]

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

[2] Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.

Reasons for Decision

CASES CITED

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*)

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

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

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

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

BACKGROUND

[1] The application was filed on behalf of the Ngurrara D1 native title claim group. It includes five parcels of unallocated crown land covering a total of 1574 square kilometres of land around the southern boundary of the Kimberley region of Western Australia.

[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 19 July 2018 pursuant to s 63 of the Act.

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

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

Information considered

[5] 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'.

[6] I have had regard to information in the application.

[7] I have also 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 25 July 2018 (the geospatial report).

[8] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.[5] Further, no submissions were

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

provided by the Western Australian Government (the State) regarding the registration testing of the application.

Procedural fairness

[9] On 26 July 2018, the Tribunal's Practice Leader for the matter wrote to the State advising of the receipt of the application and inviting the State to make submissions regarding the application of the registration test to the claim. The State did not provide any submissions.

[10] This concluded the procedural fairness processes.

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

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

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

What is required to meet this condition?

[12] 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.[6]

Does the information about the external boundary meet this condition?

[13] Schedule B refers to Attachment B which is a written description of the external boundary of the five parcels comprising the application area. It is a metes and bounds description prepared by the Tribunals' Geospatial Services on 31 May 2018, referring to the boundaries of pastoral leases, reserves, petroleum exploration permits, coordinate points and a number of native title determination applications.

[14] A map showing the external boundary of each of the five parcels of the application area is contained in Attachment C. It has been prepared by the Tribunal's Geospatial Services on 6 June 2018, and includes:

- the application area depicted with bold dark blue outline and hatched fill;
- tenure, including lease or reserve numbers and/or names;
- scalebar, coordinate grid and legend;
- notes relating to the source, currency and datum of data used to prepare the map.

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[5] See s 190A(3)(b).
[6] *Doepel* at [122].

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

Does the information about excluded areas meet this condition?

[16] Schedule B includes a list of native title determinations specifically excluded from the application area. It also describes other areas within the external boundary that are excluded from the application area, by way of general exclusion clauses. This method of describing excluded areas is sufficient to satisfy the requirement at s 190B(2).[7]

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

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

What is required to meet this condition?

[18] 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.

[19] 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.[8]

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

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

[21] The description sets out two criteria by which members of the native title claim group can be identified. It is my understanding that either of these criteria can be met in order for an individual to qualify as a member of the group, noting the word 'or' that separates them. The first criteria provides that the native title claim group are 'those Aboriginal people who are' the biological descendants of a list of named apical ancestors. The second provides that they are 'those Aboriginal people who are' 'acknowledged by the native title claimants in (a) as having rights and interests in the claim area through a direct relationship by birth/finding and growing up in places ("Ngurrara") within the application area.'

[22] In my view, this description provides an objective starting point by which members of the group can be identified. While it would take some genealogical research to determine who the members of the group are under the first criteria, I consider that by undertaking that research, those biological descendants of the named ancestors could be known. The need for this inquiry does not result in the description being unclear for the purposes of this condition.[9] While the second criteria is less objective, noting that the persons under the first criteria can

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[7] *Strickland* at [50] to [55].
[8] *Doepel* at [51] and [37]; *Gudjala 2007* at [33].
[9] *WA v NTR* at [67].

be identified with certainty, I am satisfied that through a process of questioning those first criteria persons, the persons satisfying the second criteria could be known.

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

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

What is required to meet this condition?

[24] 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.[10]

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

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

[26] The first paragraph of Schedule E claims an exclusive right of 'possession, occupation, use and enjoyment of the application area as against all others', in those parts of the application area where there has been no prior extinguishment of native title, and which is not subject to the public rights to navigate and to fish. The second paragraph of Schedule E, in all other parts of the application area, claims a right to do 'all such things as may be done under the right referred to above, save for controlling the access to or the use of land or waters by others. This right is then further described as comprising a right to:

(a) have access to, remain on and use the land and waters;

(b) access and take for any purpose the resources of the land and waters; and

(c) protect places, areas and things of traditional significance on the land and waters.

[27] The remaining paragraphs of the schedule provide further clarification and/or qualifications surrounding the exercise of the rights claimed.

[28] I have read the contents of Schedule E as a whole and am satisfied there are no contradictions within the description. The description is, in my view, clear and comprehendible. I consider that all of the rights and interests listed can be understood as native title rights and interests, having regard to the definition of that term in s 223(1). The condition is, therefore, met.

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

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

[10] *Doepel* at [99] and [123].

What is needed to meet this condition?

[30] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:

(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
(b) that there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests; and
(c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[31] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[11]

[32] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.[12]

[33] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.[13]

[34] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) that accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true.[14]

[35] The factual basis material appears in Schedules F and G. Both schedules are brief. Schedule G lists four activities currently undertaken by the claim group in the application area. Schedule F states that '[t]he native title rights and interests are those of and flowing from the exclusive right to possession, occupation, use and enjoyment of the land and waters pursuant to the traditional laws and customs of the claim group based upon the following facts', and then sets out six, again very brief, subparagraphs which give a broad and general description of the factual basis for the claim. These statements are non-specific to the claim area and non-specific to the claim group.

[36] At s 190B(5)(a), the factual basis is required to speak to an association of the predecessors of the native title claim group with the application area over the period since sovereignty, or at

[11] *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].
[12] *Gudjala 2008* at [92].
[13] *Gudjala 2007* at [39].
[14] *Gudjala 2008* at [91] to [92].

least European settlement, and an association of the group with the area today.[15] The statements before me, beyond asserting that the 'native title claim group and their ancestors' have, prior to and since sovereignty, occupied the application area, and that the group today have a 'continuing connection' with the area, do not address the requirement. The factual basis must have geographical particularity to the land and waters of the application area.[16] Noting the lack of specific information about the persons comprising the group and their association, be it physical or spiritual, with the particular land and waters of the application area, this requirement is not met.

[37] Section 190B(5)(b) requires the factual basis to address a society in the area at the time of sovereignty, bound by the common observance of normative laws and customs. It is also required to explain how the laws and customs of the claim group today are rooted in those of the society at sovereignty.[17] The factual basis, beyond an assertion that 'traditional laws and customs have been passed down from older generations to younger generations by traditional teaching', does not address either of these matters. Again, it is only broad, formulaic statements which is not a sufficient factual basis for the claim at this condition.

[38] Section 190B(5)(c) requires the factual basis to address the way in which the native title claim group has continued to hold their native title rights and interests in accordance with their traditional laws and customs. As above, there is not a sufficient factual basis to support the existence of traditional laws and customs at s 190B(5)(b), which means the requirement at s 190B(5)(c) regarding continuity of those laws and customs, cannot be met.

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

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

What is required to meet this condition?

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

1. it requires some measure of the material available in support of the claim;[18]
2. although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);[19]

[15] *Gudjala 2007* at [51] and [52].
[16] *Martin* at [26].
[17] See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not disagree with his Honour's assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)
[18] *Doepel* at [126].
[19] *Doepel* at [127].

3. s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.[20]

[41] Mansfield J found that the use of the words 'prima facie' in s 190B(6) means that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.'[21]

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

(a) possessed under the traditional laws and customs of the native title claim group;[22]

(b) a right or interest in relation to the land or waters of the application area;[23]

(c) not extinguished in relation to the entirety of the application area.[24]

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

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

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

What is required to meet this condition?

[45] For the application to meet the requirements of s 190B(7), the Registrar 'must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application'—see subsection (a).

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

- the material must satisfy the delegate of particular facts;
- evidentiary material is, therefore, required; and
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;[25]
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;[26]
- the material may need to address an actual presence on the area.[27]

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[20] *Doepel* at [132].
[21] *Doepel* at [135].
[22] Section 223(1)(a).
[23] Section 223(1)(b).
[24] Section 223(1)(c).
[25] *Doepel* at [17].
[26] *Gudjala 2007* at [89].

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

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

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

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

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

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

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

Requirement	**Information addressing requirement**	**Result**
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph [2](e)	Met

[27] *Yorta Yorta* at [184].

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

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

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

What is required to meet this condition?

[51] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken.[28]

Subsection 61

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

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

Subsection 62

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

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Attached to the Form 1	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B and Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
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)(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 not met

[54] I am not satisfied that no person included in the native title claim group for this application is a member of the native title claim group for any previous overlapping application.

[28] *Doepel* at [16] and also at [35] to [39].

What is required to meet this condition?

[55] 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***[29]) was a member of a native title claim group for any previous application'. To be a 'previous application':

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

[56] It is only where there is an application meeting all three of the criteria above, that is, a 'previous application', that the requirement for me to consider the possibility of common claimants is triggered.[30]

[57] The geospatial report provides that there is one claim overlapping approximately 96 percent of the application area, and that that claim was entered onto the Register of Native Title Claims in 2012. It is the Yi-Martuwarra Ngurrara application (WC2012/002; WAD25/2012). From my search of information contained within the Tribunal's databases, I am aware that the entry was made following consideration of the application by a delegate of the Registrar pursuant to s 190A, and that it has not been removed from the Register since that time. It is therefore, a 'previous application' for the purposes of s 190C(3).

[58] It follows that I must consider whether there are any common claimants between the native title claim group for the previous application and for the application before me.

[59] Schedule O of the Form 1 states that '[t]he members of the Yi-Martuwarra Ngurrara (WAD25/2012) application are the same members in this application.' I understand this to mean that the native title claim group for the current application comprises the same persons as the native title claim group for the previous application.

[60] I cannot, therefore, be satisfied that no person in the claim group for this application is not also a member of the claim group for a previous application.

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

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

What is required to meet this condition?

[62] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions.[31] If the application has not been certified, the Registrar must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.[32]

[29] Emphasis in original.
[30] See *Strickland FC* at [9].
[31] See subsection 190C(4)(a).
[32] See subsection 190C(4)(b).

[63] Schedule R refers to Attachment R which is a document titled 'Certification' that has been signed by the Acting Chief Executive Officer of the Kimberley Land Council and is dated 17 May 2018. It is therefore the requirements of s 190C(4)(a) which apply in this instance.

[64] I understand that my consideration of the application pursuant to s 190C(4)(a) is limited to two matters.[33] Firstly, whether the certificate has been provided by an appropriate representative body able to certify a native title determination application, and secondly, whether the certificate complies with s 203BE(4).

[65] The certificate states that, 'the Kimberley Land Council (KLC) pursuant to s 203BE(1)(a) of the NTA certifies [the application]'. No further information is provided in the certificate about the basis upon which, or the authority with which, the KLC has certified the application. Section 203BE(1) merely sets out the certification functions of a representative body.

[66] I have accessed, through the Tribunal website, a national map titled, 'Representative Aboriginal and Torres Strait Islander Body areas'. The map provides information about the legal status of representative and native title service provider organisations across Australia. The map shows the KLC as a recognised representative body, pursuant to s 203AD of the Act. As a recognised representative body, the Act provides that the body is to perform all of the functions of a representative body, set out in s 203B(1) and including the certification function. It follows that I am satisfied the KLC is an appropriate body able to certify the application.

[67] Section 203BE(4)(a) requires the certificate to contain a statement to the effect that the representative body is of the opinion the requirements of paragraphs (2)(a) and (b) (relating to all the persons in the native title claim group authorising the applicant to make the application, and all reasonable efforts being made to ensure the application identifies the persons comprising the group) have been met. I have considered the contents of the certificate and am satisfied that it contains the necessary statement regarding the KLC's opinion.

[68] Section 203BE(4)(b) requires the certificate to 'briefly set out' the representative body's reasons for being of the opinion stated. The certificate contains the following information addressing the matters referred to in ss 203BE(2)(a) and (b):

- an authorisation meeting attended by members of the native title claim group was held at Fitzroy Crossing Recreation Centre on 9 May 2018;
- the meeting was advertised publicly and widely, including through advertisements in two newspapers, notices posted and emailed to all claim group members, and notices displayed in towns and communities where claim group members reside;
- the KLC provided travel and accommodation assistance to any claim group members who requested it to allow them to attend;
- at the meeting, the attendees resolved there was no traditional decision-making process that must be complied with for authorising the applicant, and agreed to a process involving votes by majority;

[33] See *Doepel* at [78].

- using this decision-making process, a resolution was passed that the claim group authorise the applicant to make the application and deal with all matters arising in relation to it;
- the KLC, over a number of years, has undertaken extensive anthropological and genealogical research and conducted consultations with families who assert traditional connection to the application area to identify the members of the claim group.

[69] In my view, this information is sufficient in providing a 'brief' explanation of the KLC's reasons for stating the opinion in the certificate.

[70] Section 203BE(4)(c) requires the certificate to, where applicable, briefly set out what the body has done to address overlapping applications pursuant to s 203BE(3). That is, either to achieve agreement between claim groups for overlapping claims, or to minimize the number of applications covering the land and waters.

[71] As explained above in my reasons at s 190C(3), there is one claim that overlaps approximately 96 percent of the application area, the Yi-Martuwarra Ngurrara application. The requirement of s 203BE(4)(c) is, therefore, applicable in the circumstances. The certificate does not speak to the requirement. I note, however, that s 203BE(3) specifically provides that, 'a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.'

[72] The silence in the certificate regarding the overlapping application indicates to me that the KLC has not taken any action to reduce the number of claims (two) overlapping the application area. However, noting the wording of s 203BE(3), it is my understanding that the KLC's failure to act in this regard cannot lead to the invalidity of any certification of the application. For this reason, I consider the certificate valid pursuant to s 203BE(4).

End of reasons

Attachment A

Summary of registration test result

Application name	Ngurrara D1
NNTT No.	WC2018/013
Federal Court of Australia No.	WAD327/2018
Date of decision	12 October 2018

Section 190B conditions

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

Section 190C conditions

Test condition	***Subcondition/requirement***	***Result***
s 190C(2)		Aggregate result: Met
s 190C(3)		Not met
s 190C(4)		Overall result: Met