

Registration Decision



Application name	Malgana 2
Name of applicant	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
Federal Court of Australia No.	WAD339/2018
NNTT No.	WC2018/014
Date of Decision	16 October 2018

Claim not accepted for registration

I have decided the claim in the Malgana 2 application does not satisfy all the conditions in ss 190B–190C of the *Native Title Act 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 ss 190C(3)–(4). It also does not satisfy ss 190B(5)–(7).

Katy Woods

*Delegate of the Native Title Registrar*²

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

² Delegate of the Native Title Registrar pursuant to 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

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

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

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

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

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

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

Northern Territory of Australia v Doepel [2003] FCA 1384 (*Doepel*)

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

Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)

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

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

Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28 (*Ward HC*)

BACKGROUND

- [1] This application was made on behalf of the Malgana 2 native title claim group. It covers land and waters in the Shire of Shark Bay in Western Australia. The Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 31 July 2018 pursuant to s 63 of the Act.
- [2] If the claim in the application satisfies all the registration test conditions in ss 190B–190C, the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, it must not be accepted for registration.⁴ I have decided the application does not satisfy all the registration test conditions and my reasons on each condition follow below.

³ Section 190A(6).

⁴ Section 190A(6B).

Information considered

[3] I have considered the information in the application⁵ and note the applicant has not provided any further material. There is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers⁶ and the State of Western Australia (the state government) has not provided submissions in relation to the application of the registration test.⁷ I consider it appropriate to have regard to information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 6 August 2018 (the geospatial report) and information available through the Tribunal's geospatial database and Register of Native Title Claims.⁸

Procedural fairness

[4] On 13 August 2018 the Tribunal's senior officer for the matter wrote to the state government advising that I would be relying on the information in the application for my decision, and should it wish to make any submissions, it should do so by 27 August 2018. No submissions were received from the state government. This concluded the procedural fairness process.

Section 190C: conditions about procedures and other matters

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

[5] To meet s 190C(2), the Registrar must be satisfied that the application contains all 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.⁹

Section 61

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

Section	Details	Information	Result
s 61(1)	Native title claim group	Part 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

Section 62

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

⁵ Section 190A(3)(a).

⁶ Section 190A(3)(b).

⁷ Section 190A(3)(c).

⁸ Ibid.

⁹ *Doepel* [16], [35]–[39].

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)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

No previous overlapping claim group – s 190C(3): condition not met

[8] 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’.¹⁰

[9] To be a ‘previous application’:

- (a) the application must overlap the current application in whole or part;
- (b) 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
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[10] The geospatial report states and my own searches confirm the WC2000/013 Nanda People application overlaps the current application. According to the Register, the claim in the WC2000/013 Nanda People application was entered on the Register on 1 March 2001 as a result of being considered for registration under s 190A, and has not been removed. I therefore consider it to be a ‘previous application’ as it meets the three conditions in s 190C(3). This means I must consider whether there are common claimants between the two applications.

[11] Schedule O, which asks applicants whether any member of the native title claim group is also a member of any other claim group, has not been provided. I have examined the Register extract for the WC2000/013 Nanda People claim and note that particular members of the applicant in both claims have identical surnames. Given this commonality, and considering the geographical overlap of the two claim areas, I am not satisfied that no member of the current

¹⁰ Emphasis in original.

application claim group is not also a member of the WC2000/013 Nanda People application claim group. This means s 190C(3) is not met.

Identity of claimed native title holders – s 190C(4): condition not met

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

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;¹¹ 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.¹²

[13] Schedule R, which asks applicants to provide information about the certification of the claim and/or authorisation of the applicant by the members of the native title claim group, has not been provided. No certificate from a representative Aboriginal/Torres Strait Islander body has been provided, so I understand the application has not been certified and I must therefore assess the application against the requirements of s 190C(4)(b).

[14] Following s 190C(4)(b) there is a note in the Act referring to the definition of ‘authorising the making of applications’ in s 251B, which reads as follows:

...for the purposes of this Act, all the persons in a native title claim group **authorise** a person or persons to make a native title determination application ... and to deal with matters arising in relation to it, if:

- (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group ... must be complied with in relation to authorising things of that kind—the persons in the native title claim group ... authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
- (b) where there is no such process—the persons in the native title claim group ... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group ... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.¹³

[15] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and

¹¹ Section 190C(4)(a).

¹² Section 190C(4)(b).

¹³ Emphasis in original.

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[16] I note French J's comment that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.'¹⁴

[17] The affidavits of the members of the applicant all depose the following regarding the process by which the applicant was authorised:

1. I am a member of the applicant and a member of the Malgana #2 native title claim group (**Malgana claim group**).¹⁵ ...
5. I am authorised by all the persons in the Malgana claim group to make the application and to deal with matters arising in relation to it. ...
7. The Malgana claim group has an agreed and adopted decision-making process for decisions to authorise the making of an application and to deal with all matters arising in relation to it. The agreed and adopted decision-making process incorporates traditional decision-making principles as far as possible.
8. Decisions are made by way of resolutions made at community meetings which are organised and notified by the Yamatji Marlpa Aboriginal Corporation. These decisions are made by consensus of the Malgana claim group members present at the meeting, with respect given to the knowledge and seniority of the Malgana elders. If no consensus can be achieved, decisions will be made by way of resolutions made by a majority vote using a show of hands or, where the meeting resolves to do so, by way of a ballot.
9. A meeting of the Malgana claim group was held on 21 July 2018 (July meeting). I was present at the July meeting when the resolution to authorise the applicant to make the application and to deal with all matters arising in relation to it was passed using the agreed and adopted decision making process described above.

[18] I consider these statements sufficient for the purpose of s 190C(5).

[19] I have examined the contents of the application and am satisfied there is no further information about the authorisation of the applicant. Based on the information in the affidavits, I understand a claim group meeting was held in order to authorise the applicant using an agreed and adopted decision-making process, as contemplated in s 251B(b). However there is no information before me about the claim group meeting to enable me to consider that 'all the persons in the native title claim group' have authorised the applicant in accordance with the requirements of s 251B. I also understand that where an applicant is relying on s 190C(4)(b), I must be satisfied of the 'fact of authorisation' by all members of the native title claim group.¹⁶

¹⁴ *Strickland* [57].

¹⁵ Emphasis in original.

¹⁶ *Doepel* [78].

[20] I note O’Loughlin J’s theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward*:

Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? ¹⁷

[21] His Honour found that the substance of the above questions must be addressed.¹⁸ Based on the information in the application, I am not satisfied the above questions have been addressed, that all members of the native title claim group were given every reasonable opportunity to participate in the decision-making process¹⁹ or that they have authorised the applicant to make the application and deal with all matters arising in relation to it. This means s 190C(4) is not met.

Section 190B: conditions about merits of the claim

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

[22] To meet s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two 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.²⁰

[23] Schedule B refers to Attachment B, which is titled ‘External Boundary Description’. Attachment B describes the application area by metes and bounds referring to the boundaries of pastoral lease Tamala (NO49576), coordinate points identified by longitude and latitude to six decimal points, and the native title determination application WAD6236/1998 (The Malgana Shark Bay Peoples Application (WC1998/017)).

[24] Schedule C refers to Attachment C, which is a colour A3 map prepared by the Tribunal’s Geospatial Services titled ‘Malgana 2’ dated 29 June 2018. It includes:

¹⁷ *Ward* [25]–[26].

¹⁸ *Ibid.*

¹⁹ *Lawson* [25].

²⁰ *Doepel* [122].

1. The application area depicted in bold blue outline;
2. Tenure, depicted as displayed in the legend, identified by lease number and name, and by reserve number as appropriate;
3. Scalebar, coordinate grid, and legend; and
4. Notes relating to the source, currency and datum of data used to prepare the map.

[25] The assessment in the geospatial report is that the description and map are consistent and identify the application area with reasonable certainty. Having considered the information in Attachments B and C, I agree with the assessment in the geospatial report and am satisfied that the external boundary of the application area can be identified with reasonable certainty for the purposes of s 190B(2).

[26] Schedule B includes a description of areas within the boundaries which are excluded from the application area. This description adopts general clauses to identify the excluded areas, including areas in relation to which a previous exclusive possession act has been done, and areas where native title has been validly extinguished.

[27] I note French J's comment in regard to the requirements of s 190B(2), that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions [in the Act] 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'.²¹ Following this reasoning, I am satisfied that the description of the excluded areas is sufficiently clear, which means s 190B(2) is met.

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

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

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[29] 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'.²²

[30] Schedule A states: '[t]he Malgana People are those Aboriginal persons who are descended (where descent can be by birth or adoption under traditional laws and customs) from one or more of the following ancestors: [list of four people]'.

²¹ *Strickland* [55].

²² *Wakaman* [34].

[31] 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.²³ 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

[32] 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.

[33] 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'.²⁴ I have not considered whether the rights and interests claimed can be considered '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 are established on a prima facie basis.

[34] 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; and
- (k) the right to invite or be accompanied by those people who, though not Malgana people, are:
 - i. spouses, parents or children of Malgana people; or
 - ii. people required by or entering in connection with traditional law and custom for the performance of ceremonies or cultural activities on the application area.

²³ *WA v NTR* [67].

²⁴ *Doepel* [92], [123].

- [35] I consider the right in the opening sentence to be a right of exclusive possession, noting the use of the phrase ‘as against the whole world’. I consider that this right is also itemised in paragraph (a), noting the difference in the terminology used between that paragraph and those following, which list claimed rights I understand to be non-exclusive.
- [36] I note the comments of the High Court in *Ward 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’.²⁵ Following this guidance, I consider it appropriate to interpret the description so as to read the opening sentence and the right in paragraph (a) as two parts of one coherent whole, rather than interpreting paragraph (a) in isolation as a ‘non-exclusive’ right to possession.
- [37] I am satisfied the description in Schedule E is sufficient to understand and identify the itemised rights and interests, which means s 190B(4) is met.

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

- [38] 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.
- [39] 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’.²⁶ I also note French J’s view that ‘[t]he provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or [her] delegate undertake a search for such material.’²⁷
- [40] Schedule F states:

²⁵ *Ward HC* [51].

²⁶ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

²⁷ *Martin* [23].

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; that there exist traditional laws and customs which give rise to the claimed native title; and that the native title claim group has continued to hold native title in accordance with their traditional laws and customs, as supported by the following facts:

1. 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.
2. Malgana people have a strong connection to their land and water through their intrinsic local knowledge of its natural resources and the land and seascape. They believe that spirits including the spirits of their ancestors, the old people, still dwell on and in the land. Under these laws and customs, it is the Malgana people who hold the rights and interests in the claim area and have responsibilities to it.
3. These laws and customs were observed by the Malgana people at the time sovereignty was asserted and their descendants and successors are the Malgana people today. These laws and customs have been acknowledged and observed and had a substantially continuous existence and vitality since prior to sovereignty. They were taught to the Malgana people of today by their elders, and they in turn have passed it on to their children. The Malgana people continue to follow and teach their children these ways and to exercise the rights and interests claimed in the claim area today.
4. Under the Malgana traditional laws and customs, Malgana people must be descended from a Malgana person. 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. In this way, the Malgana people today believe, and their laws and customs provide, that they are descendants of the Malgana people who belonged to Malgana country.
5. Under the traditional laws and customs of the Malgana people, the area claimed in this application is, and has been since prior to sovereignty, the traditional country of the Malgana people.

[41] Schedule G states:

The members of the native title claim group carry out the following activities in relation to the land and waters within the Application area:

1. Hunting, gathering and fishing in the area;
2. Moving about, living, residing, erecting shelters and camping on and within the area;
3. Conducting and engaging in cultural activities, rituals, teaching and meetings on and within the area;
4. Visiting, maintaining and protecting places of importance within the area;
5. Maintaining and protecting significant objects located within the area;
6. Taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water and shells;
7. Using the resources of the area for food, shelter, cultural, religious, ceremonial, ritual, healing and decorative purposes and for the manufacture of items like tools, weapons and clothing; and
8. Trading in the resources of the area and goods manufactured using those traditional resources.

- [42] I have examined the application and I consider the information in these schedules is the extent of the factual basis material before me.
- [43] I consider that the material does not provide a sufficient factual basis to support an assertion that the predecessors of the group were associated with the area over the period since sovereignty. There are no references to any locations inside the application area and no information about any association between the predecessors of the group and the application area. In my view, there is also insufficient factual basis to demonstrate the association the claim group currently has with the application area. I consider that the information provided is of a very general nature and has no ‘geographical particularity’, which means s 190B(5)(a) is not met.²⁸
- [44] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society or a society that existed prior to European settlement, acknowledging and observing normative laws and customs.²⁹ I consider there is insufficient factual basis to support an assertion that there existed a pre-sovereignty society in the application area. The broad statements in Schedule F I consider to be ‘mere assertions’.³⁰ I also consider there is insufficient factual basis to demonstrate any relationship between the ancestors of the claim group and a pre-sovereignty society.³¹
- [45] Also relevant to my assessment of the assertion at s 190B(5)(b) is the identification of the laws and customs of the claim group and how they are ‘traditional’, that is, how the current laws and customs of the claim group are rooted in the laws and customs of a pre-sovereignty society.³² I am not satisfied that the information in the application supports an assertion that such laws and customs exist in the application area, in relation to a pre-sovereign society or since that time. This means I cannot be satisfied that any such laws or customs are ‘traditional’ and so s 190B(5)(b) is not met.
- [46] Meeting the requirements of s 190B(5)(c) relies on whether there is a factual basis supporting 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.³³ Because I consider the factual basis is not sufficient to support the assertion of the existence of traditional laws and customs at

²⁸ *Martin* [26]; *Corunna* [39], [45].

²⁹ *Gudjala 2009* [37], [52].

³⁰ *Doepel* [102].

³¹ *Ibid* [40].

³² *Yorta Yorta* [46], [49].

³³ *Gudjala 2009* [29].

s 190B(5)(b), I cannot be satisfied that the factual basis is sufficient to support the assertion of the continuity of traditional laws and customs, which means s 190B(5)(c) is not met.

[47] I am therefore not satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support any of the assertions of s 190B(5).

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

[48] 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. As discussed above at s 190B(5)(b), I am not satisfied there is information in the application to support the assertion that such traditional laws and customs exist. This means that I cannot proceed to determine whether any of the claimed rights or interests are held under traditional laws and customs.

[49] In addition, there must be information within the application that talks about each of the individual rights claimed. I am not satisfied the application contains sufficient information of this type. I therefore consider none of the claimed rights and interests have been established on a prima facie basis, which means s 190B(6) is not met.

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

[50] To meet s 190B(7), the Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- (b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[51] 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.³⁴

[52] Schedule M, which asks the applicant for information about this requirement, has not been provided, which means my consideration is limited to the information in the other schedules, particularly Schedules F and G quoted above. I consider the information in these schedules is too general to satisfy the requirements of s 190B(7). In addition, given my finding at

³⁴ *Doepel* [18], *Gudjala* 2009 [84].

s 190B(5)(b), that there is insufficient information to demonstrate the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds the requisite physical connection with the application area in accordance with such laws and customs, which means s 190B(7) is not met.

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

[53] 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

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

[54] 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

Summary of registration test result

Application name	Malgana 2
NNTT No.	WC2018/014
Federal Court of Australia No.	WAD339/2018
Date of decision	16 October 2018

Section 190B conditions

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190B(2)		Met
s 190B(3)		Met
s 190B(4)		Met
s 190B(5)		Not met
s 190B(6)		Not met
s 190B(7)		Not met
s 190B(8)	s 61A	Met
s 190B(9)		Met

Section 190C conditions

<i>Test condition</i>	<i>Subcondition/requirement</i>	<i>Result</i>
s 190C(2)	ss 61–2	Met
S 190C(3)		Not met
s 190C(4)	s 190C(4)(b)	Not met