



## Registration Decision

<b>Application name</b>	Mayala #2
<b>Name of applicant</b>	Frank Davey, Jodi Humphries, Vincent McKenzie, Max Ejai, Janella Isaac
<b>Federal Court of Australia No.</b>	WAD466/2018
<b>NNTT No.</b>	WC2018/020
<b>Date of Decision</b>	29 October 2018

### Claim accepted for registration

I have decided that the claim in the Mayala #2 application does satisfy all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration.

For the purposes of s 190D(3), my opinion is that the claim does satisfy all of the conditions in s 190B and in s 190C.

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Heidi Evans

*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 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*)

*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*)

## BACKGROUND

- [1] The application was filed on behalf of the Mayala native title claim group. It covers a portion of two small islands (UCL514 and UCL791) and the whole of one small island (UCL 612) of unallocated crown land, together a total of 0.03 square km, which form part of the Buccaneer Archipelago in the mouth of the King Sound in northern 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 12 October 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.<sup>3</sup> If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.<sup>4</sup>
- [4] I have decided that the claim does 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. I have also had regard to the additional material provided by the applicant directly to the Registrar on 16 October 2018:
  - Affidavit of [name removed] dated 24 March 1999;
  - Affidavit of [name removed] dated 24 March 1999;
  - Affidavit of [name removed] dated 24 June 2005;
  - Copy of the decision of *Wiggan v Western Australia* [2018] FCA 1485 (the reasons and determination of native title in the first Mayala proceeding);
  - Submissions of 16 October 2018 (applicant’s submissions).

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<sup>3</sup> See s 190A(6).

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

- [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 23 October 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.<sup>5</sup> Further, no submissions were provided by the Western Australian Government (the State) regarding the registration testing of the application.
- [9] I may also have regard to such other information as I consider appropriate. In the applicant's submissions, the applicant states that the Mayala claim (WAD6255/1998; WC1998/039) was determined pursuant to orders of the Federal Court on 4 October 2018. The applicant explains that the Mayala claim included the areas covered by the present Mayala #2 application, however the area subject of the current application was dismissed from the claim at the request of the applicant and with the consent of the parties. This was in order to allow the Mayala native title claim group to obtain the benefit of s 47 of the Act over those areas.
- [10] The Mayala claim was first entered onto the Register of Native Title Claims in July 1998. Following its consideration pursuant to s 190A(6) once the registration test provisions came into effect, it remained on the Register. The Court made orders granting leave to amend the application in May this year. Another delegate of the Registrar considered that amended application pursuant to s 190A(6) and accepted it for registration on 2 August 2018.
- [11] I have accessed the material to which the delegate had regard in applying the registration test to the Mayala claim in August, and note that the factual basis material the delegate was directed to in that matter is almost identical to the factual basis material before me, submitted by the applicant, except that I have before me one additional document. That additional document is a copy of the orders and reasons for decision of the Federal Court in the Mayala determination on 4 October 2018. There are also minor differences between the applicant's submissions provided in relation to the registration testing of the Mayala application and the submissions provided in this matter. These differences are limited to information that is contextual or 'background' information.
- [12] As the Mayala claim included the area covered by the Mayala #2 claim (the subject of my consideration here), the registration test was applied to that area in August this year (approximately three months ago), and the delegate was directed to the same factual basis material in support of the claim made in the prior application, I consider it appropriate that I have regard to the reasons of the delegate dated 2 August 2018 for accepting the Mayala application for registration pursuant to s 190A(6) (the delegate's reasons).
- [13] A copy of the delegate's reasons of 2 August 2018 are annexed to this decision. Having considered the material afresh, in the interests of brevity and administrative efficiency, I have considered it appropriate that I adopt the delegate's reasons in the Mayala claim for certain conditions of the registration test. In my reasons below, I have identified those paragraphs of the delegate's reasons that have been adopted.

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<sup>5</sup> See s 190A(3)(b).

### **Procedural fairness**

- [14] On 16 October 2018, an officer of the Tribunal 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. As above, also on 16 October 2018, the applicant provided directly to the Registrar additional material for the purposes of the registration test.
- [15] On 18 October 2018, the Tribunal officer wrote to the State, providing it with a copy of the non-confidential additional material.
- [16] No submissions were received from the State, either regarding the application, or the additional material. On 23 October 2018, the State emailed the Tribunal officer, confirming that it would not be making any submissions.
- [17] This concluded the procedural fairness processes.

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

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

- [18] 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?***

- [19] 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.<sup>6</sup>

#### ***Does the information about the external boundary meet this condition?***

- [20] Schedule B refers to Attachment B, which provides a written description of the application area, referencing the high water mark, Exploration Licence E04/743, the boundary of Native Title Determination Application Mayala (WAD6255/1998) and coordinate points. It has been prepared by the Tribunal’s Geospatial Services and is dated 16 August 2018.
- [21] A map showing the external boundary of each of the three parcels comprising the application area is contained in Attachment C. It has been prepared by the Tribunal’s Geospatial Services on 17 August 2018, and includes:
- the application area depicted with bold dark blue outline;
  - historical exploration lease, overlapping native title determination application, and tenure;

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<sup>6</sup> *Doepel* at [122].

- scalebar;
- notes relating to the source, currency and datum of data used to prepare the map.

[22] 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?***

[23] Schedule B includes a list of general exclusions, that is, areas within the external boundary that are not included in the application area. This method of describing excluded areas is sufficient to satisfy the requirement at s 190B(2), and I consider that historical tenure searches could confirm the excluded areas with certainty.<sup>7</sup>

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

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

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

[25] 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.

[26] 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.<sup>8</sup>

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

[27] 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.

[28] The description of the claim group provided in Schedule A is identical to the description of the claim group that appears in the Mayala application Form 1, considered by another delegate of the Registrar on 2 August 2018. As stated in the applicant’s submissions, the present application, Mayala #2, is made by the same native title claim group as the Mayala application.

[29] In the decision of 2 August 2018, the delegate decided that the application satisfied the condition of s 190B(3). Having considered the description before me, and the delegate’s reasons at that condition, I consider it appropriate to adopt paragraphs [51] to [58] of those reasons.

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<sup>7</sup> *Strickland* at [50] to [55].

<sup>8</sup> *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

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

[30] 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?***

[31] 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.<sup>9</sup>

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

[32] 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.

[33] The description of the native title rights and interests claimed in relation to the application area, in Schedule E, is identical to the description that appeared in Schedule E of the Form 1 for the Mayala application registration tested in August 2018. Again, the applicant’s submissions note this. It follows that I consider it appropriate to adopt the delegate’s reasons of 2 August 2018 that the Mayala application met the requirement at s 190B(4), at paragraphs [59] to [64], in reaching the view that this condition is satisfied for the present application.

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

[34] I am 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 a sufficient factual basis for the three assertions of subsections 190B(5)(a), (b) and (c).

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

[35] 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 laws 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.

[36] 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

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<sup>9</sup> *Doepel* at [99] and [123].

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>10</sup>

- [37] 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'.<sup>11</sup>
- [38] 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.<sup>12</sup>
- [39] 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.<sup>13</sup>

***Reasons for s 190B(5)(a)***

- [40] As explained above, the factual basis material submitted by the applicant for the purposes of registration testing the present application, is the same as the factual basis material submitted for the Mayala application, notwithstanding one additional document provided in this matter. As in this matter, submissions were provided by the applicant in relation to the testing of the Mayala claim, and having compared the statements and information contained in each of the submissions, other than minor differences relating to the background to each claim, the information providing a factual basis for the claims is identical in terms.
- [41] As also explained above, at the time the registration test was applied in August 2018, the Mayala claim included the area subject of the present application. I have considered the material before me, and the delegate's reasons for concluding that the factual basis was sufficient to support the requirement of s 190B(5)(a) regarding an association of the group and its predecessors with the whole of the application area. In my view, as the decision of 2 August 2018 at this condition involved consideration of the same material and same area before me in this matter, I consider it appropriate to adopt the delegate's reasons of 2 August 2018, at paragraphs [66] to [83], in reaching the view that the present application satisfies this condition.

***Reasons for s 190B(5)(b)***

- [42] Again, I note that a delegate of the Registrar found that the Mayala application satisfied the requirements of this condition, specifically that the factual basis was sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the claim group giving rise to the claim to native title. For the following reasons, I consider it

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<sup>10</sup> *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

<sup>11</sup> *Gudjala 2008* at [92].

<sup>12</sup> *Gudjala 2007* at [39].

<sup>13</sup> *Gudjala 2008* at [91] to [92].

appropriate to adopt the delegate's reasons of 2 August 2018 at this condition (at paragraphs [84] to [100]), in reaching the view that the present application satisfies s 190B(5)(b):

- the delegate reached this view on the basis of the same factual basis material that is before me;
- the claim area considered by the delegate, in relation to which he found the factual basis sufficient to support a relevant society at sovereignty, acknowledging and observing traditional laws and customs from which the group's current laws and customs are derived, included the area of the present application;
- the native title rights and interests claimed are the same rights and interests that were claimed in the application before the delegate.

[43] In addition to this, the further piece of factual basis material before me is the decision of the Federal Court in *Wiggan on behalf of the Mayala People v State of Western Australia* [2018] FCA 1485. The Court found that the Mayala People held native title rights and interests in relation to the Mayala claim area, which the parties agreed would exclude the present application area. Despite the fact that the current application area wasn't included in the determination, I consider the Court's findings on matters relating to the society of people occupying the area at sovereignty, or European settlement, relevant. This is because it is the same native title claim group who are making the present application, and the determination area wholly surrounds the small parcels comprising the Mayala #2 application area.

[44] In the applicant's submissions, the applicant refers me to paragraphs [24] to [27] of the Court's reasons in the determination.<sup>14</sup> For the convenience of the reader, I have extracted those parts of the decision below:

The members of the Mayala Applicant claim group belong to a unique archipelagian society with its own territory, languages, traditional laws and customs and a distinct maritime culture. This society is distinct from, but contains elements of, the two cultural blocs between whom they are situated (being Bardi and Jawi culture to the west and the Wanjina-Wunggurr culture of the Dambimangari to the east).

At sovereignty, this group was associated with a number of languages, principally Umiday, Unguranggu, Uwini and Jawi, each of which was attached to, or associated with, areas of country within the Determination Area. Whilst these languages are generally no longer spoken, the members of the Mayala claim group continue to identify with those languages as markers of identity and of locations within the Determination Area.

The Mayala Applicant's laws and customs have their origins within a period of time long past which is generally referred to as milarnjun or lilai. It was at this time that the physical world, its creatures and human society were created or modified by the activities of spiritual beings that roamed the earth. It was also during this period that the system of rules, prescribed behaviour, ritual and song, which govern the members of the Mayala Applicant claim group today and connect them to their country, were ordained.

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<sup>14</sup> At [7].



Under these laws and customs, the Determination Area is, and has been since prior to sovereignty, the traditional country of the members of the Mayala Applicant claim group and their ancestors. An integral aspect of the Mayala Applicant claim group's traditional laws and customs is their affiliation to a buru or dambi, a particular tract of country typically comprising an island or group of islands, associated islets, reefs, straits and passageways within the Determination Area. Rights to a buru or dambi are principally gained by descent from known ancestors. Contemporary members of the claim group are therefore those persons who can trace their lineage to an ancestor who had a traditional connection to a buru or dambi within the Determination Area.

[45] The submissions provide that 'given the very small distances involved [between the Mayala #2 claim area and the determination area], lack of any distinguishing geographic features, and lack of any indication of any other group asserting rights to these areas, the Mayala #2 Applicant submits that the only plausible inference to be drawn from these facts is that the Mayala #2 claim area is the subject of the same traditional laws and customs previously accepted by both the Native Title Registrar and the Federal Court in relation to the Mayala claim.'<sup>15</sup> Having considered the material before me, I accept the applicant's assertion and am satisfied that the condition at s 190B(5)(b) is met.

#### ***Reasons for s 190B(5)(c)***

[46] 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. Again, as above, on 2 August 2018, a delegate of the Registrar, on the basis of the same material that is before me for the purposes of registration testing the present application, found that the condition was met. The delegate reached this view in relation to the Mayala claim area at the time, which included the present application area.

[47] Having considered the material before me addressing this condition, I agree with the delegate's reasons at s 190B(5)(c), and consider it appropriate to adopt those reasons (at paragraph [101] to [107]) in reaching the same view here regarding the Mayala #2 application that the condition is met.

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

[48] I consider that all of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

[49] In the delegate's decision of 2 August 2018, regarding the Mayala claim (which included the area of the present application), he considered all of the rights and interests claimed by the Mayala native title claim group established on a prima facie basis, and he set out his reasons for that view at paragraphs [109] to [127].

[50] As above, the factual basis material relied upon by the applicant in the present application, is the same as the factual basis material relied upon by the applicant in the Mayala application (subject of the delegate's consideration in August 2018). Also as above, the area subject of the present application was, in August 2018, part of the Mayala application area.

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<sup>15</sup> At [11].

[51] As explained in my reasons at s 190B(4), the native title rights and interests claimed by the Mayala native title claim group in the present application, set out in Schedule E, are identical to the rights and interests that were claimed by that same claim group in relation to the Mayala application.

[52] For clarity and the convenience of the reader, those rights are:

- a right of possession, occupation, use and enjoyment of land and waters as against all others (exclusive native title rights);
- a non-exclusive right to have access to, remain on and use the land and waters;
- a non-exclusive right to access and take the resources of the land and waters; and
- a non-exclusive right to protect places, areas and things of traditional significance on the land and waters.

[53] For the reasons set out above, and having considered the material before me, I adopt paragraphs [109] to [127] of the delegate's reasons in reaching the view that I consider all of the rights and interests claimed, established on a prima facie basis.

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

[54] I am 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?***

[55] 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).

[56] 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;<sup>16</sup>
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;<sup>17</sup>
- the material may need to address an actual presence on the area.<sup>18</sup>

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

[57] As explained above at s 190B(5)(b), I am satisfied the factual basis is sufficient to support an assertion of traditional laws and customs. What is required at s 190B(7) is that the applicant satisfy me that a member of the claim group had or has a traditional physical connection with 'any part of the application area.'

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<sup>16</sup> *Doepel* at [17].

<sup>17</sup> *Gudjala 2007* at [89].

<sup>18</sup> *Yorta Yorta* at [184].

[58] The application area comprises parts of two small islands, UCL514 and UCL791, and the entire area of another island, UCL612. The islands are part of the Buccaneer Archipelago, and in the vicinity of Strickland Bay, Cone Bay and the Yampi Peninsula. The applicant's submissions explain that those parts of UCL514 and UCL791 that are not subject to the present claim, are subject to a determination of exclusive native title in favour of the Mayala native title claim group.<sup>19</sup> The submissions further explain that UCL514 and UCL612 are 150 metres apart and 500 to 600 metres across a short channel to other islands where the Federal Court has also determined the Mayala native title claim group possess exclusive native title rights and interests.<sup>20</sup>

[59] Regarding a traditional physical connection with some part of the application area, Schedule M, which typically contains information addressing this requirement, states: 'The applicant elects not to provide any information in this Schedule.'

[60] In the applicant's submissions, an additional paragraph, that did not appear in the submissions provided in relation to the Mayala application in May 2018, states that:

The associations with Mayala country set out below are specific examples of the Mayala claimants' associations with all of the islands and ocean of Mayala country, which are broadly surrounded by the places referred to below. The Mayala claimants' associations with their country includes all of the areas in between those places, as externally demarcated by the Mayala determination. Those associations include the area of the Mayala #2 claim.<sup>21</sup>

[61] Various examples of claimants' physical presence on the islands within the broader Mayala country (that is, the area within the external boundary of the determination area) is given in the material, including claimants visiting islands to gather trochus shell, to perform duties under traditional laws and customs relating to the protection of places of significance, to collect a particular type of mangrove wood for the construction of rafts, and to fish and hunt turtle. Specific locations, including islands, reefs, channels and parts of the Yampi Peninsula are named as places where these activities occur, however as above, it is asserted that the activities described occur in relation to all of the islands and waters within Mayala country.

[62] Having considered those locations, and the level of detail regarding claimants' current use of and travel to those areas, in accordance with their traditional laws and customs, I am satisfied that at least one member of the claim group currently has or previously had, a traditional physical connection with some part of the application area. In addition to the information described above, an example of the material I have relied upon in forming this view is in Appendix A of the applicant's submissions, where it is stated that senior claimant [name removed], the son's son of apical ancestor [names removed], has visited the place where [name removed] is buried, on a [location removed]. [Location removed] is in the immediate vicinity of the three islands subject of this application, just to the south. Another claimant talks about the way in which claimants travel to a place on the northern coast of the Yampi Peninsula where mangrove wood for rafts was collected.<sup>22</sup> Again, it is my understanding that this location, and travel to it from other parts of Mayala country, would have involved passing

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<sup>19</sup> At [8].

<sup>20</sup> At [10].

<sup>21</sup> At [54].

<sup>22</sup> Applicant's submissions at [58].

by and/or stopping in at the islands subject of the present application. In my view, this information is sufficient to satisfy me the condition at s 190B(7) is met.

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

[63] 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):

<b>Requirement</b>	<b>Information addressing requirement</b>	<b>Result</b>
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 act areas	Schedule B, paragraph [1]	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**

[64] 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):

<b>Requirement</b>	<b>Information addressing requirement</b>	<b>Result</b>
(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 [1](b)	Met

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

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

[65] 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?**

[66] 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 an 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.<sup>23</sup>

**Subsection 61**

[67] 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**

[68] 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 met**

[69] 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.

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

[70] 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**<sup>24</sup>) 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;

<sup>23</sup> Doepel at [16] and also at [35] to [39].

<sup>24</sup> Emphasis in original.

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.

[71] 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.<sup>25</sup>

[72] The geospatial report provides that there is one claim overlapping 100 percent of the application area, namely the Mayala claim. The geospatial report also provides that the claim was entered onto the Register of Native Title Claims in 1998. As explained above, the Mayala claim (an amended application) was considered by a delegate of the Registrar in August 2018, and at that time, the claim included the area of the current application. As a result of the claim being considered, it remained on the Register of Native Title Claims.

[73] As also explained above, however, the Mayala claim was determined by the Federal Court on 4 October 2018. I have confirmed that there is an entry on the National Native Title Register for the Mayala claim. The entry provides that while the determination is in effect, it is not yet finalised. My understanding of the Court orders of 4 October 2018 is that the common law holders are yet to nominate a prescribed body corporate to hold the determined native title rights and interests. As the determination is not finalised, for administrative purposes, the claim remains on the Register of Native Title Claims. It is for this reason only that the claim remains on the Register.

[74] It is clear from the orders of 4 October 2018 that the area subject of the current application was excluded from the claim upon the determination being made by the Court. It follows that there is no overlapping application for the purposes of s 190C(3).

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

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

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

[76] 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.<sup>26</sup> 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.<sup>27</sup>

[77] 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 10 September 2018. It is therefore the requirements of s 190C(4)(a) which apply in this instance.

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<sup>25</sup> See *Strickland FC* at [9].

<sup>26</sup> See subsection 190C(4)(a).

<sup>27</sup> See subsection 190C(4)(b).

- [78] I understand that my consideration of the application pursuant to s 190C(4)(a) is limited to two matters.<sup>28</sup> 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).
- [79] 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.
- [80] 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) which includes the certification function. It follows that I am satisfied the KLC is an appropriate body able to certify the application.
- [81] 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.
- [82] 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 in Broome on 15 and 16 August 2018;
  - only members of the native title claim group participated in decision-making at the meeting;
  - the Mayala native title claim group has consistently asserted that they do not have any traditional decision-making process relevant to decisions of the kind dealt with at the meeting;
  - at the meeting, those in attendance agreed to a decision-making process involving decisions by consensus, or by majority vote of the five families who make up the claim group;
  - pursuant to this process, the group resolved to authorise the applicant to make the application and deal with matters arising in relation to it.

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<sup>28</sup> See *Doepel* at [78].

- the KLC, over a number of years, has undertaken extensive anthropological and genealogical research and conducted community consultations with families who assert traditional connection to the application area, to identify the members of the claim group.

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

[84] 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 minimise the number of applications covering the land and waters.

[85] I understand the silence in the certificate regarding this requirement to reflect the fact that, in the circumstances, the requirement is not applicable. That is, there are no overlapping applications and therefore, the KLC do not consider there is any obligation or purpose in addressing the requirement. I accept this approach and consider the certificate complies with s 203BE(4).

*End of reasons*



**Annexure A – Delegate’s Reasons for Decision Mayala WC1998/039, dated 2 August 2018**

# Registration test decision

Application name	Mayala
Name of applicant	Valarie Wiggan, Max Ejai, Janella Isaac, Vincent McKenzie
NNTT file no.	WC1998/039
Federal Court of Australia file no.	WAD6255/1998
Date application made	1 July 1998
Date application last amended	Application filed 2 May 2018
Date of decision	2 August 2018
Date of reasons	9 August 2018

I have considered this claim for registration and, for the reasons attached, I am satisfied it meets each of the conditions contained in ss 190B and 190C of the *Native Title Act 1993* (Cth). I must therefore accept the claim for registration.

Date of decision: 2 August 2018

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

# Reasons for decision

## ***Introduction***

[1] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (the Registrar) on 2 May April 2018 pursuant to s 64(4) of the *Native Title Act 1993* (Cth).<sup>29</sup> This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.

[2] The Registrar must accept a claim for registration if it satisfies all of the conditions in s 190B, which deal mainly with the merits of the claim, and s 190C, which deal with procedural and other matters: see s 190A(6). Section 190A(1A) provides that Registrar need not consider certain amended applications, whereas s 190A(6A) provides that the Registrar must accept a claim made in an amended application where certain conditions are satisfied. Section 190A(6B) confirms that the Registrar must not accept a claim for registration if it does not satisfy all the conditions in ss 190B and 190C or meet the requirements outlined in s 190A(6A).

[3] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the claim made in the amended application. The granting of leave by the Court to amend the application was not made under s 87A, so the circumstance described in s 190A(1A) does not arise. The amendments made to the application include changes to Schedule A (the description of the native title claim group) and Schedule E (by adding new rights and interests to those claimed in the application). As these amendments are not of the kind contemplated by s 190A(6A), the subsection does not apply.

[4] For these reasons, I have considered the claim in the amended application in accordance with s 190A. I conclude that the claim satisfies all the conditions in ss 190B and 190C. The claim must therefore be accepted for registration. My reasons on each condition follow below.

## **Application overview and background**

[5] The Mayala native title determination application was first made when it was filed in the Court on 1 July 1998. The area covered by the application includes land and waters north of Derby between the Dampier Peninsula and the Yampi mainland, extending northwards beyond the sixteenth parallel and including islands in the Buccaneer Archipelago. The application was first entered on the Register of Native Title Claims on 1 July 1998.

[6] On 16 April 2018, an interlocutory application was filed with the Court seeking the replacement of the applicant under s 66B, a change to the title of the applicant for the proceeding and for leave to amend the application. On 1 May 2018, the Court made orders by consent that the then applicant be replaced by the current applicant and that the title of the applicant be changed to its present name. The Court also made orders granting leave to amend the application.

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<sup>29</sup> All legislative references in this decision are to the *Native Title Act 1993* (Cth) (the Act), unless I state otherwise.

## Information considered when making the decision

[7] 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.'

[8] I have had regard to information in the application. I have also considered under 190A(3)(a) the following documents provided by the applicant directly to the Registrar on 16 May 2018:

- a. Affidavit of [claimant 1 name deleted] sworn 24 June 2005
- b. Affidavit of [claimant 2 name deleted] affirmed 24 March 1999
- c. Affidavit of [claimant 3 name deleted] affirmed 24 March 1999
- d. 'Additional submission in support of registration – Mayala' dated 16 May 2018

[9] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers: s 190A(3)(b) The State of Western Australia did not provide any submissions in relation to the application: s 190A(3)(c).

[10] I have had regard to information in an overlap analysis and geospatial assessment prepared by the Geospatial Services team within the National Native Title Tribunal (NNTT) dated 8 May 2018 (the Geospatial Report). I have also had regard to searches of the Register of Native Title Claims and the National Native Title Register I undertook using the NNTT's mapping database on 2 August 2018.

## Procedural fairness steps

[11] A copy of the application was provided to the State on 4 May 2018. The letter enclosing the application advised that, if the State wished to make a submission in relation to the registration of the claim, it should be provided by 18 May 2018. No submissions were received from the State.

[12] On 25 May 2018, the Registrar wrote to the State to advise that additional material had been received from the applicant. The letter noted that I had formed the view that one of the items received, namely the applicant's additional submissions, is confidential in nature and requested the State to give an undertaking should it wish to receive copies of the document.

[13] On 31 May 2018, the State wrote to the Registrar to advise that it did not wish to receive the confidential information and would not be making any submission in relation to the application of the registration test to the claim made in the amended application.

## *Procedural and other conditions: s 190C*

### **Subsection 190C(2)**

#### **Information etc. required by ss 61 and 62**

The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

[14] The application satisfies the condition of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

[15] I note that I am considering this claim 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. This legislation made some minor technical amendments to s 62 which only apply to claims made from the date of commencement of that legislation on 1 September 2007 onwards. The claim before me is not such a claim.

[16] In reaching my decision for this condition, I understand the condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. The condition does not require me to undertake any merit or qualitative assessment of the material before me (*Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16], [35]-[39]).

[17] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details or other information or to be accompanied by an affidavit or other documents.

#### **Native title claim group: s 61(1)**

[18] Section 61(1) provides that a native title determination application may be made by 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.'

[19] The Registrar must consider whether the application sets out the native title claim group in the terms required by s 61. In *Doepel*, the Court held at [36] that the Registrar should not accept a claim for registration if it appears from the claim group description that 'not all the persons in the native title group were included, or that it was in fact a sub-group of the native title claim group' as the application would not meet the relevant requirement of s 190C(2).

[20] Having regard to the claim group description in Schedule A of the application and the accompanying affidavits, I consider there is nothing on the face of the application to indicate that it is not brought on behalf of all members of the native title claim group. I am satisfied the application contains all details and other information required by s 61(1).

#### **Name and address for service: s 61(3)**

[21] Part B of the application states the names and address for service of the persons who comprise the applicant. The application therefore contains all details and other information required by s 61(3).

**Native title claim group named/described: s 61(4)**

[22] Schedule A sets out a description of the persons who comprise the native title claim group. The application therefore contains all details and other information required by s 61(4).

**Affidavits in prescribed form: s 62(1)(a)**

[23] The application is accompanied by affidavits made by each of the four persons who comprise the applicant. Each person has signed a separate affidavit affirming each of the statements required by the subsection. The application therefore meets the requirements in s 62(1)(a).

**Details required by s 62(1)(b)**

[24] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

*Information about the boundaries of the area: s 62(2)(a)*

[25] Attachment B provides a metes and bounds description of the external boundaries of the application area, referencing other native title determination applications and geographic coordinates. Schedule B outlines a list of general exclusions in respect of areas within those external boundaries that are not covered by the application.

*Map of external boundaries of the area: s 62(2)(b)*

[26] Attachment C is a map depicting the external boundaries of the application area.

*Searches: s 62(2)(c)*

[27] Schedule D states that the applicant is not aware of any searches that have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

*Description of native title rights and interests: s 62(2)(d)*

[28] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application.

*Description of factual basis: s 62(2)(e)*

[29] Schedule F provides a general description of the factual basis for the claim made in the application.

*Activities: s 62(2)(f)*

[30] Schedule G lists several activities the native title claim group currently carry out in relation to the area covered the application.

*Other applications: s 62(2)(g)*

[31] Schedule H states that the applicant is not aware of any other applications that have been made in relation to the whole or any part of the area covered by the application.

*Section 29 notices: s 62(2)(h)*

[32] Schedule I states that the applicant is aware of two notices issued under s 29 of the Act that relate to the whole or part of the application area, one dated 18 November 2016 and the other 8 March 2017.

### *Conclusion*

[33] The application contains the details specified in ss 62(2)(a)-(h) and therefore contains all details and other information required by s 62(1)(b).

## **Subsection 190C(3)**

### **No common claimants in previous overlapping applications**

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[34] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if a previous application meets the conditions found in paragraphs (a), (b) and (c) (see *Western Australia v Strickland* (2000) 99 FCR 33 at [9]). The purpose of s 190C(3) is to ensure there are no common native title claim group members between the application currently being considered for registration and any overlapping 'previous application' registered when the current application was made in the Court.

[35] The Geospatial Report indicates that no native title determination applications were entered on the Register of Native Title Claims in respect of any part of the application area when the amended application was filed. The searches I have undertaken of the Register of Native Title Claims using the NNTT's mapping database confirm my view that there are no previous applications over the area. There is therefore no requirement for me to consider whether there are claimants in common with any other application. Accordingly, the application satisfies the condition in s 190C(3).

## **Subsection 190C(4)**

### **Authorisation/certification**

Under s 190C(4) the Registrar/delegate must be satisfied that either:

- (a) the application has been certified under Part 11 of the Act by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word **authorise** is defined in section 251B.

[36] Where an application purports to be certified, the Registrar must be satisfied about the fact of certification by an appropriate representative body. The Registrar must also be satisfied that the certificate contains the information required by ss 203BE(4)(a) to (c) (see *Doepel* at [72]-[82]).

[37] Schedule R states that the application has been certified by the Kimberley Land Council (KLC). A copy of a certificate signed by the Deputy Chief Executive Officer of the KLC on 1 November 2017 is included as Attachment R. The certificate refers to the *Native Title (Recognition as Representative Body –*

*Kimberley Land Council) Instrument 2016*, which confirms the KLC as the recognised representative body for the Kimberley region. I am therefore satisfied the KLC is an appropriate body to certify the application. The Geospatial Report confirms that the KLC is the only representative body for the application area.

[38] Section 203BE(4)(a) requires the certificate to include a statement to the effect that the representative body is of the opinion that the requirements of ss 203BE(3)(a) and (b) have been met. The first paragraph of the certificate includes such a statement.

[39] Section 203BE(4)(b) requires the certificate to briefly set out the representative body's reasons for being of the opinion that the requirements of ss 203BE(3)(a) and (b) have been met. This information is set out in paragraphs 2 to 7 of the certificate. These paragraphs outline the steps taken to notify members of the native title claim group and other interested Aboriginal people, the assistance the KLC provided to those members of the claim group who requested it to attend the meeting, and the conduct of the authorisation meeting through which the applicant was authorised to make the amended application. The certificate also refers to the extensive anthropological and genealogical research the KLC has undertaken to identify all the persons who hold or may hold native title in the claim area.

[40] Having regard to these statements, I am satisfied the information contained in the certificate is sufficient for the purposes of ss 203BE(4)(a) and (b).

[41] Section 203BE(4)(c) requires the certificate to, where applicable, set out what the representative body has done to meet the requirements of s 203BE(3). That subsection provides that, if there are any overlapping applications of which the representative body is aware, it must make all reasonable efforts to achieve agreement between the claim groups and minimise the number of overlapping applications. Although the certificate does not address this issue, the Geospatial Report confirms there are no overlapping applications and there is no information before me to suggest that any proposed applications wholly or partly cover the area. Therefore, the circumstances described in s 203BE(3) are not applicable and there is no need for the certificate to set out what the representative body has done to meet the requirements of s 203BE(3).

[42] Accordingly, I am satisfied the application satisfies the condition in s 190C(4)(a).



# Merit conditions: s 190B

## Subsection 190B(2)

### Identification of area subject to native title

The Registrar must be satisfied that the information and map contained in the application as required by ss 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[43] In assessing the application against the condition in s 190B(2), I 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 (*Doepel* at [122]). In particular, I must be satisfied the information provides reasonable certainty as to the external boundary of the area where the rights and interests are claimed and any areas within the external boundary over which no claim is made.

*Does the information about the external boundary meet the requirements of this condition?*

[44] Attachment B of the application contains a written description of the external boundary of the application area. It describes the external boundary by metes and bounds referencing the boundaries of specified native title determination applications and coordinate points identified by latitude and longitude to six decimal places.

[45] Attachment C of the application comprises a colour scan of an untitled A3 map prepared by the KLC dated 26 October 2017. The map depicts the application area in bold black outline and includes colouration of Unallocated Crown Land; topographical detail displaying relief, settlement, landscape features, offshore islands and coastal features, appropriately labelled; a locality map, scalebar, northpoint, and coordinate grid; and notes relating to the datum of data used to prepare the map.

[46] Geospatial Services have reviewed the map and written description and say the documents are consistent and identify the application area with reasonable certainty (see the Geospatial Report). The Geospatial Report also notes that the area covered by the application has not been amended and does not include any areas that have not previously been claimed in the application. I have independently considered the map and written description and I am satisfied they are consistent and identify the area with reasonable certainty.

*Does the information about excluded meet the requirements of this condition?*

[47] Schedule B contains a written description of areas within the external boundaries of the application area that are not covered by the claim, subject to circumstances in which ss 47, 47A or 47B apply.

[48] Specifically, Schedule B states that the application area does not include areas covered by:

- a. a Category A past act or intermediate period act;
- b. a Category B past act or intermediate period act that is wholly inconsistent with the continued existence, enjoyment or existence of any native title rights and interests; or

- c. a ‘previous exclusive possession act’ as defined in s 23B of the Act or a ‘relevant act’ as defined in s 121 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA).

[49] The written description also excludes any area where native title rights and interests are otherwise wholly extinguished.

[50] While Schedule B does not specifically identify the parcels excluded from the application, the identification of exclusions based on a class or formula provides an objective mechanism by which the areas not covered by the application can be ascertained. On this basis, I find that the written description provides reasonable certainty about the excluded areas (see *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [51]-[52]), citing *Daniel v Western Australia* [1999] FCA 686 at [31]-[38]).

### **Subsection 190B(3)**

#### **Identification of the native title claim group**

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.

[51] In considering the application against the condition in s 190B(3), my task is not to determine whether the applicant has made the claim on behalf of the correct native title claim group or whether the claim group is correctly described. Rather, it is to assess whether the application enables the reliable identification of persons in the native title claim group (see *Doepel* at [37] and [51]; *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [33]).

[52] Schedule A of the application describes the claim group in the following terms:

The members of the native title claim group are the descendants (including such people descended by adoption as are recognised and accepted in accordance with traditional law and custom) of the following persons:

1. Kudumili
2. Galawa
3. Ngalgarrgard
4. Jabadayim, including his adopted son, Jacob Sesar
5. Ulgirr/Oolgir

[53] I interpret the statement that the claim group comprises ‘the descendants ... of the following persons’ to mean that a person is a member of the native title claim group if that person is descended from one or more of the named apical ancestors. The Court has accepted that descent from named apical ancestors can constitute a ‘substantial factual element’ for ascertaining membership of a claim group (see *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 at [27]). That some factual inquiry may be necessary to determine whether a particular person is a member of the claim group does not mean it has not been described sufficiently (*Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67]).

[54] The claim group description refers to people ‘descended by adoption as are recognised and accepted in accordance with traditional law and custom.’ Membership on this basis therefore appears to be conditioned by two requirements: first, that a person is adopted ‘in accordance with traditional law and custom’; and second, that a person’s adoption on this basis is ‘recognised and accepted.’ In *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*), the High Court considered that the existence of a society depends upon a principle of mutual recognition (see for example [49]-[54]). The Full Court of the Federal Court elaborated on this point in *Sampi v Western Australia* [2010] FCAFC 26 at [45], noting that ‘a relevant factor’ to be considered in determining whether a group constitutes a society in the *Yorta Yorta* sense is ‘the internal view of the members of the group.’

[55] Schedule F provides information as to the basis on which a person’s rights and interests in country may be recognised in accordance with traditional law and custom. It states that the native title claim group are ‘the descendants of the people who are recognised in early records and oral history as having been associated with’ the application area. Rights and interests are held in areas of country or estates known as *buru* or *dambi* and are gained through descent from a male or female parent, ‘including through adoption if recognised and accepted in accordance with traditional law and custom.’ Schedule F further states that members of the claim group ‘are free to use the claim area without the need to seek explicit permission, so long as they respect the owners of the relevant estate and pay appropriate regard to the spiritual features of the country,’ whereas permission is required in respect of strangers.

[56] I also refer to Schedule G of the application, which states that the claim group ‘have continuously carried out on the land and waters all such activities as are contemplated by their rights and interests ... informed by their rights and obligations under traditional law and custom.’ These include:

- a. accessing and using the land and waters;
- b. controlling the access and use of the claim area by others;
- c. accessing and taking the resources of the land and waters; and
- d. protecting places, areas and things of traditional significance on the land and waters.

[57] I infer from these statements that the following rules or principles inform a person’s recognition and acceptance as being adopted ‘in accordance with traditional laws and customs’:

- a. adoption by a male or female parent who holds rights and interests in country;
- b. having an association with an area of country or estate (*buru* or *dambi*);
- c. recognition of and respect for the rights of other members of the claim group;
- d. paying appropriate regard to the spiritual features of the country; and
- e. acknowledging responsibilities to country under traditional law and custom.

[58] In my view, these criteria constitute appropriate rules or principles by which a person's membership in the claim group may reliably be ascertained through a process of factual inquiry, having regard to the content of the traditional laws and customs acknowledged and observed by the claim group. In reaching this view, I have also had regard to the fact that the Act is remedial in nature and should be construed beneficially 'so as to give the most complete remedy which is consistent with the actual language employed' (see *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124).

## **Subsection 190B(4)**

### **Native title rights and interests identifiable**

The Registrar must be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

[59] In assessing whether the application meets the requirements of s 190B(4), I must consider whether the claimed rights and interests are understandable and have meaning, paying attention to how the term 'native title rights and interests' is defined in s 223 of the Act (*Doepel* at [99] and [123]).

[60] Schedule E of the application describes the rights and interests claimed in the application. That description is divided into the areas where a right to possession, occupation, use and enjoyment of land and waters as against all others can be recognised by the common law and Australia and those areas where it cannot.

[61] The first class of rights are claimed in relation to parts of the application area where there has been no extinguishment of native title to any extent or where any such extinguishment is required to be disregarded and which is not subject to public rights to navigate or fish. In respect to these areas, Schedule E asserts that the right possessed under traditional law and custom 'is properly interpreted as, and the native title right recognised by the common law of Australia is, the right of possession, occupation, use and enjoyment of land and waters as against all others.' This formulation is readily identified as a claim to exclusive possession (see *Western Australia v Ward* (2002) 213 CLR 1 (*Ward HC*) at [51] and [89]; *Strickland* at [60]).

[62] In respect of any other parts of the claim area, Schedule E asserts that the right possessed under traditional law and custom 'is properly interpreted as the right, occupation, use and enjoyment of the land and waters as against all others,' however the native title rights and interests that may be recognised are rights to 'do all such things as may be done' under such a right 'save for controlling access to or the use of land or waters by others.' According to paragraph 4 of Schedule E, these comprise non-exclusive rights to (a) have access to, remain on and use the land and waters; (b) access and take the resources of the land and waters; and (c) protect places, areas and things of traditional significance on the land and waters. I interpret the rights enumerated in subparagraphs (a), (b) and (c) of paragraph 4 to be an exhaustive list of the non-exclusive rights claimed in the application.

[63] Schedule E states that members of the claim group 'acknowledge that their native title rights and interests are subject to and exercisable in accordance with valid and current laws of the Commonwealth and the State of Western Australia including the common law.' It also specifies that 'resources' do not include 'such minerals, petroleum, geothermal energy or geothermal energy resources, if any, as are,

under the laws of the Commonwealth and the State of Western Australia including the common law as at the date of this application, wholly owned by the Crown.’

[64] In my view, the claimed rights and interests described in Schedule E are clear and comprehensible and I am satisfied they can properly be understood as ‘native title rights and interests’ as defined in s 233 of the Act. Although the claimed non-exclusive rights are framed as the rights and interests that may be recognised where a claim to exclusive possession cannot be sustained, the description in Schedule E makes clear that these rights and interests are confined to those enumerated in paragraph 4 of the description. Accordingly, the application satisfies the condition of s 190B(4).

## **Subsection 190B(5)**

### **Factual basis for claimed native title**

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. 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, and
- (b) 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 interest, and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[65] In considering whether the factual basis of the claim is sufficient to support these assertions, 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’ (*Doepel* at [16]–[17]; *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317 (*Gudjala 2008*) at [83] and [92]). I consider each of the three assertions set out in the paragraphs of s 190B(5) and set out my reasons on each of them below.

### **Reasons for s 190B(5)(a)**

[66] To satisfy the requirements of s 190B(5)(a), the factual basis must support the assertion that the native title claim group has, and its predecessors had, an association with the application area. While it is not necessary that all members of the claim group have an association with the area at all times, the factual basis must support the assertion that the claim group as a whole presently has an association with the area (see *Gudjala 2007* at [51]–[52]).

[67] The factual basis must address the association between the predecessors of the whole group and the claim areas over the period since sovereignty (see *Gudjala 2007* at [52]). It must also support the claim group’s association with ‘the claim area as a whole’ (see *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 at [67]). In *Martin v Native Title Registrar* [2001] FCA 16 at [26], French J said the Registrar is not obliged to accept ‘very broad statements ... which have no geographical particularity.’

[68] The applicant’s additional submissions assert that, although British sovereignty was asserted in Western Australia in 1829, effective sovereignty can be dated to the first half the 1860s, which saw the first significant and sustained contact with Europeans in the application area (paragraph 4).

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

[69] The applicant's additional submissions state that the claim area covers 3,813 square kilometres in the King Sound and Buccaneer Archipelago. The area comprises oceans, reefs, sandbars, mudflats and approximately 800 islands of various sizes. To the east of the claim area are the Worora and Ngarinyin regional cultures and to the west are the Bardi and Jawi regional cultures. Mayala country is distinguished from Bardi and Jawi country by a tidal demarcation that runs along the eastern side of the Sunday Strait as far south as [place name deleted] or Helpman Island. The applicant asserts that claimants regard the land and waters to the west of this tide or *lu* as Bardi and Jawi territory whereas the land and waters on the eastern side is Mayala (Applicant's Additional Submissions, paragraphs 7, 10-11 and 42).

[70] The additional submissions state that the claim area is associated with a number of languages [text deleted]. These languages are said to be associated with particular regions within the claim area. The applicant asserts that, while people associated with these areas identified with these languages, it is likely the members of these groups 'spoke a number of languages for purposes of trade and travel across the islands.' The applicant states that current claimants attribute these languages to the islands and bays of the Buccaneer Archipelago; for example, [text deleted] (Applicant's Additional Submissions, paragraphs 14 and 16).

[71] The additional submissions provide the following information in relation to the apical ancestors' association with the claim area:

- a. Kudumili: [text deleted]
- b. Galawa: [text deleted]
- c. Ngalgarrgard: [text deleted]
- d. Jabadayim: [text deleted]
- e. Jacob Sesar: [text deleted]
- f. Ulgirr/Oolgirr: [text deleted]

[72] The applicant states that 'each of the apical ancestors is at or near the highest generation of people that are recalled by the members of the native title claim group living today,' who were 'handed down knowledge about them from their parents and other older relatives.' They also indicate that Strickland Bay, in the east of the claim area, includes a place called Graveyard and that Elkin noted in 1927-8 that 'Myala' is associated with 'Graveyard' country (Applicant's Additional Submissions, paragraphs 47 and 52).

[73] The applicant asserts that the use of the claim area by the claimants' predecessors was influenced by oceanic conditions and currents, including the tide or *lu* that separates Bardi and Jawi territory from Mayala Country and the presence of *numurr* or 'saltwater highways', areas of calmer waters that can be safely traversed and aided travel between islands. The additional submissions state that some of the islands and marine environments within the claim area were not suitable for extended occupation due to

a lack of fresh water, however other islands with fresh water 'were occupied and used for longer periods of time, while outlying islands and reefs were used seasonally and opportunistically' (paragraph 25).

[74] The applicant states that mobility 'was a key characteristic of the manner in which country was used and occupied pursuant to law and custom,' with the claimants' predecessors travelling from island to island, and between the islands and the mainland, using *galwa* or rafts constructed from mangrove wood. The applicant's additional submissions refer to the evidence of [claimant 4 name deleted], who states that Mayala people would travel from the [place names deleted] Islands to collect suitable materials from a location [text and place name deleted] in the southeast of the claim area and another place on the northern coast of the Yampi Peninsula. The applicant asserts that claimants continue to build mangrove rafts in the manner of their predecessors and continue to make use of saltwater highways, although there is greater reliance on motor boats for purposes of travel (Applicant's Additional Submission, paragraphs 25, 46 and 49).

[75] The factual basis material also contains evidence regarding the predecessors' use of other resources within the application area. For example, in his 2005 affidavit, [claimant 1 name deleted] describes his father gathering [text deleted] (paragraph 25). In her 1999 affidavit, [claimant 2 name deleted] recalls travelling with her parents from Sunday Island west of the claim area to Mermaid Island, High Island and Long Island. She says her father would catch turtle and dugong from a raft and that her mother and other women would go out fishing with the children on the reef. [Claimant 2 name deleted] says she would go with her family to *Yalun* or Cone Bay to gather stones to make spearheads and collect sugarbag from the mainland (paragraphs 3-4, 6 and 10).

[76] The additional submissions also refer to particular islands and reefs that have particular cultural significance or are associated with cultural narratives. For example, the applicant states that [place name deleted] in the northeast of the claim is a place of deep spiritual significance to the claimants and refers to claimant statements regarding protocols restricting women's access to parts of the island under customary law. [Claimant 1 name deleted] states that he was told by his father and 'older bosses' that he has traditional responsibilities for [place name deleted] (paragraph 11). Another example is [place name deleted] in the northwest of the claim area, which is associated with a mythological figure whose story is reflected in the topography of the reef.

[77] The additional submissions also refer to a narrative related by [claimant 4 name deleted] regarding a Dreamtime ancestor [name deleted], whose story covers the [place names deleted] islands. The applicant says there 'is a belief in the ongoing presence of these mythic beings which remain powerfully imbued in areas of country today' (Applicant's Additional Submissions, paragraphs 30 and 43-44).

*Present association of the native title claim group with the application area*

[78] The claimant evidence suggests the claim group's present association with the application area is informed by their predecessors' association with the area. For example, in his 2005 affidavit, [claimant 1 name deleted] states that his *galu* or father's father is from the [place name deleted] area and his *nyami* or mother's father is from [place name deleted]. [Claimant 1 name deleted] describes his 'main country' as being 'around [place names deleted] and the area all through there.' He says that his grandfathers and his mother and father 'used to camp and live around these places' (paragraphs 2-3). Similarly, [claimant 3

name deleted] states in her 1999 affidavit that '[place name deleted] is the country of my father's father and my father' and that her father told her that it is 'my *bur* or my country from the Dreamtime' (paragraph 3). [Claimant 2 name deleted], in her 1999 affidavit, states that her father was born on [place name and text deleted] and that he told her 'my country was [place name deleted] too' (paragraph 2).

[79] The material also indicates that members of the claim group have maintained their association with the application area by travelling through and utilising the resources of the claim area. In his 2005 affidavit, [claimant 1 name deleted] states that, when he was younger, he and his family used to get *gulngarriny* or yams and *madilang* tubers from Long Island, Mermaid Island, Pascoe Island and other islands in Mayala country. [Claimant 1 name deleted] says that, later in life, he would camp at these places with his family and 'did a lot of travelling in *Mayala* country, showing kids the country, and collecting *aarlngir* or trochus' (paragraphs 20 and 26). [Claimant 3 name deleted], whose country includes [place name and text deleted], states in her 1999 affidavit that she has been fishing on her country and shelling on the reef since she was a child and her family 'still goes out to [place name deleted] sometimes' (paragraphs 3 and 7). Although parts of [place name deleted] are restricted, law and custom does permit claimants to make use of the surrounding beaches and reefs, 'which is done regularly in order to obtain things such as trochus, claims, oysters, fish and turtle' (Applicant's Additional Submissions, paragraph 43).

[80] These associations with the application area also extend to the deep-sea waters and reefs in the outer areas of the claim. According to [claimant 1 name deleted], '[t]he deep sea or [place name deleted] amongst the islands is part of Mayala country' and he has 'the right to go there' and 'no-one has no right to hunt me away.' [Claimant 1 name deleted] says he can 'go fishing, get shellfish, dugong, [and] turtle' and has 'always done this, either off the shore or from a boat' (paragraph 16). Statements in [claimant 3 name deleted]'s affidavit further support this association with the sea parts of the claim: she notes that her country 'also takes in the sea, and it takes in the reef' and recalls people travelling on *galwa* rafts using the currents and tides (paragraphs 3 and 7). Furthermore, the applicant's additional submissions assert that claimants have also made 'ongoing irregular use of Brue Reef in the northwest of the claim area as a source of trochus, fish and turtle,' referring to claimant evidence given before the Court in the *Sampi* proceedings (paragraph 45, citing *Sampi v Western Australia* [2005] FCA 777 at [135]).

[81] The claim groups' association with the application area is also informed by their belief that it is inhabited by spiritual beings called [text deleted], who have a role in protecting country. The applicant's additional submissions refer to statements made by claimants that speak of being able to 'feel' the [text deleted] when visiting the islands within the claim area and the need to speak to them or introduce yourself, which they were taught growing up. [Text deleted] also have a role in the conception of children and that '[c]hildren conceived in this way have a special connection to their place of spiritual conception' (Applicant's Additional Submissions, paragraphs 37-39). The presence and knowledge of [text deleted] is also expressed in rules of conduct observed by members of the claim group in relation to particular places within the claim area. For example, [claimant 2 name deleted] states that no one is allowed to [text deleted]. [Text deleted] can guide you but you can make mistakes so you can get hurt then' (paragraph 15). Claimants also have knowledge of areas of special significance within Mayala country (see for example, [claimant 1 name deleted] Affidavit, paragraph 10; Applicant's Additional Submissions, paragraph 43).



### *Consideration*

[82] The material before me suggests that several of the apical ancestors held rights in and were associated with the application area around the time of sustained European contact in the early 1860s. Other apical ancestors are identified within one or two generations of this period or, in the case of Jacob Sesar, by reference to another apical ancestor. Each of these individuals is identified in oral history or through early ethnographic accounts as Mayala or is identified with particular places in the application area. The factual basis material supports the view that the apical ancestors and their immediate descendants travelled between islands in the claim area, and between the islands and the mainland, using vessels constructed from resources obtained in the application area. The material indicates that predecessors of the claim group have continued to traverse the waters of the application area to exercise customary rights and utilise the resources of the claim area. This is further supported by reference to mythological narratives that exist in relation to places such as [place names deleted] and the general belief in spiritual beings which inhabit parts of the claim area, which have been passed down between generations, and indicate an ongoing physical and spiritual association with the claim area.

[83] In my view, the material also supports the assertion that members of the claim group maintain a present association with the area. The claimant evidence suggests that members of the claim group regard particular parts of the application area as their traditional country, which they trace through their predecessors and in respect of which they have particular rights and responsibilities. The material also suggests they continue to traverse the application area more broadly to utilise the resources of the area and undertake cultural responsibilities. This association with the application area is expressed through regular visitation and participation in activities such as camping and fishing and is reinforced by an understanding of the spiritual significance of the claim area, manifested through rules of conduct relating to particular places. In my view, the patterns of use disclosed in the claimant evidence and the asserted facts concerning the teaching of traditional practices and cultural knowledge about places such as [place names deleted] support an inference that the claim group and their predecessors have maintained a continuous physical and spiritual association with the whole of the application area.

### **Reasons for s 190B(5)(b)**

[84] To satisfy the requirements of s 190B(5)(b), the factual basis must support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group which give rise to the native title rights and interests claimed.

[85] In *Gudjala 2007*, Dowsett J considered that, to meet the requirements of s 190B(5)(b), the factual basis must:

- a. demonstrate that the laws and customs observed by the claim group have their source in a pre-sovereignty society and have been observed by a continuing society – at [63];
- b. identify a society of people living, at the time of sovereignty, according to a system of identifiable laws and customs having normative content – at [65] and [66]; and
- c. identify a link between the apical ancestors used to describe the claim group and the society existing at sovereignty – at [66]

### *The relevant society*

[86] As noted above in relation to s 190B(a), the applicant's additional submissions note that particular parts of the claim area are associated with specific languages and, although people associated with these areas identified with these languages, 'it is likely that members of these groups spoke a number of languages for purposes of trade and travel across the islands.' While members of the claim group continue to attribute these languages to parts of the application area and the apical ancestors are recognised as holding various language identities, the applicant asserts that language group identifiers are not a useful means of defining the boundaries of Mayala society, which 'reflects a multiplicity of language group identities.' Accordingly, the applicant asserts that the community of people who comprise Mayala society share 'a system of laws and customs that extends beyond the demarcations of language' and is 'instead unified by the traditional knowledge, ways of living, and practices particular to the unique marine environment of the claim area' (Applicant's Additional Submissions, paragraphs 14-18).

[87] The additional submissions assert that, although Mayala society shares some cultural beliefs and practices with its regional neighbours due to proximity and for reasons of economic and social sustainability, it is 'distinct in its traditional knowledge and practices particular to their marine environment.' They say there is a 'recognised distinction' between Bardi law to the west and Wanjina-Unggur law to the east [text deleted] (Applicant's Additional Submissions, paragraphs 9).

[88] The relationship between Mayala and the Bardi and Jawi regional culture is illustrated by the statement at paragraph 6 of [claimant 1 name deleted] 2005 affidavit, where he describes participating in shared ceremonies in which Mayala featured as a distinct group. Although [claimant 1 name deleted] states in his affidavit that Mayala 'practice the same Law as Bardi people and other Jawi people,' it is apparent from paragraph 8 of his affidavit that Mayala are regarded as a distinct group possessing separate rights and interests:

Our spiritual beliefs connect us to our country. Senior Bardi men share our important spiritual beliefs. We are all therefore very close to one another even if we speak a little bit different languages ... All the *garngga-yun aama*, or 'mainland Bardi men' know all the very special and important places in *Mayala* country and I know all the special and important places on the other Jawi and Bardi islands and Bardi mainland.

[89] I infer from this material that the relevant pre-sovereignty society comprised a community of people who spoke various languages and shared some of the features of Bardi law and custom but were nevertheless distinguished by, and are united in, their acknowledgement and observance of traditional laws, customs and practices particular to the marine environment of the claim area. It is also consistent with the assertion in the applicant's additional submissions that, while people within Mayala society were free to use the claim area provided they respected the owners of the relevant estate and paid appropriate regard to the spiritual features of the country, permission was required for people of other groups (paragraph 25).

### *Traditional laws and customs*

[90] The applicant's additional submissions explain that a 'fundamental component of the system of law and custom is a set of beliefs about the spiritual basis of the world.' The key feature of these beliefs is the

concept of a creation period, known in Bardi as [text deleted] and in Worora as [text deleted], which is 'known by claimants to be the time when customary law, rituals and the physical environment were formed by ancestral beings' (paragraph 32). The applicant's additional submissions refer to [claimant 1 name deleted]'s explanation of this aspect of the claim group's belief system, which is set out as follows:

Our Law was put here long before my time and long before my galu's [father's father's] time. It was put here, when the world was first made. All those people were there when the world was first created and that's when our religion and spiritual beliefs were first created too.

[91] According to the applicant's additional submissions, compliance with the system of law and custom was and is reinforced by ritual practices, traditional law and mythologies associated with the claim area. While the ancestors of the claim group are understood to have a 'supervisory role' in the observance of traditional laws and customs, the claim group also includes senior ritual practitioners known as *marja* or *madja* who are recognised as being responsible for the maintenance of Law and the ongoing conduct of initiations (paragraphs 34, 36 and 41). [Claimant 1 name deleted], who occupied this role, says the *marja* or *madja* '[has] to make sure that everyone in our community follows our Law and ... make sure that our country isn't ruined in any way.' This includes participation in initiation, which 'binds the tribe together as one' and provides the basis on which ritual authority is transferred and maintained across successive generations. [Claimant 1 name deleted] says his father and the 'older bosses' gave him this responsibility (paragraphs 4, 7 and 54).

[92] The applicant asserts that rights and interests are held in areas of country or estates known as *buru* for Bardi speakers and *dambi* for Worora speakers. These estates are made up of land and sea country and typically comprise an island or group of islands and any associated islets, reefs, straits or passageways. A person 'is entitled to access and freely utilise their estate, and speak for it.' The applicant asserts that rights in an estate are gained through descent from either a male or female parent, although rights can also be inherited where a child is adopted and that adoption is recognised and acceptance in accordance with traditional law and custom (Applicant's Additional Submissions, paragraphs 19 and 21).

[93] The additional submissions state that, before sovereignty, rights inherited through the father were given greater emphasis than those inherited through the mother. The applicant says, while the claim group continues to acknowledge this principle, it is now generally the case that rights acquired through either parent are generally given equal emphasis. Nevertheless, the applicant asserts that this aspect of law and custom 'remains fundamentally traditional in nature' and any change is only to the mode of descent or the emphasis applied to different modes of descent, meaning 'the fundamental principle of recruitment to the group (descent) is preserved' (Applicant's Additional Submissions, paragraph 21).

[94] The statements made in the claimant affidavits illustrate this descent-based system of landholding. In his 2005 affidavit, [claimant 1 name deleted] describes his main country as being around [place names deleted]. He says his grandfathers and his mother and father 'used to camp and live around these places' and he can live on [place name deleted] because 'that is the Law' and 'I am part of the place' (paragraph 3). [Claimant 3 name deleted], in her 1999 affidavit, states that [place name deleted] 'is the country of my father's father and my father ... My father told me that, from our Jawi law, [place name deleted] is my *bur* or country from the Dreamtime' (paragraph 2). In [claimant 2 name deleted]'s 1999 affidavit, she states

that her father's country is [place name deleted] and told her 'that my country was [place name deleted] too' (paragraph 2).

[95] The applicant's additional submissions assert that apical ancestors 'shared in the mutual recognition of one another as possessing rights to the claim area, although not necessarily with identical levels of authority or in relation to identical areas.' According to the applicant, 'this understanding has been transmitted from generation to generation to the claimants today.' In this way, rights in an estate are not only regarded as conferring rights to speak for country and to make use of its resources, but also bring with them a 'corresponding duty to protect their country, particularly its spiritual aspects and environmental health; and to protect strangers from its spiritual dangers' (paragraphs 23, 25 and 27).

[96] Similarly, while claimants are free to use and take resources of their country, in doing so they must observe traditional rules about the appropriate way to deal with certain resources. The applicant's additional submissions refer in this respect to the statement of [claimant 5 name deleted], who gives the example of Mayala families sharing trochus meat among family and selling the shells overseas for profit, which [claimant 5 name deleted] regards as 'acceptable under traditional law and custom' (Applicant's Additional Submissions, paragraph 27). [Claimant 1 name deleted] also refers to 'special ways of cutting up *odor* [dugong]' according to customs that were 'passed on to us by our old people' and says he 'first saw the special way of cutting up *odorr* from my grandparents' (paragraph 23). The applicant states that these rules 'are part of a system of regulation about how claimants exercise their general right to make use of the resources of their country' (Applicant's Additional Submissions, paragraph 26).

[97] According to the applicant's additional submissions, these rules are also associated with and reinforced by the kinship system that was observed by the apical ancestors and continues to be observed by the claim group and which regulates the relationships between members of the claim group including rules around marriage. The applicant refers in particular to the practice of butchering turtles in a particular way and sharing the body parts between kin. This is also evident in [claimant 2 name deleted]'s affidavit, where she refers to her father hunting turtle and bringing them back to 'share it all around in the camp' (paragraph 6). The applicant asserts that these understandings of kinship relationships are still observed today (Applicant's Additional Submissions, paragraphs 26 and 31).

[98] The factual basis material suggests these rules of conduct also includes rules around accessing places within the application area, which are underpinned by belief in the ongoing presence of mythic beings within the claim area (see Applicant's Additional Submissions, paragraphs 32, 36 and 38). For example, the applicant refers to [claimant 6 name deleted]'s statement regarding protocols for interacting with the [text deleted] who inhabit certain islands within the claim area:

Sometimes we speak to them and ask them for good luck when we go for turtle. We might say, "we here for a visit, don't hurt us". They are not dangerous but don't like strangers. They can feel you if you don't belong there and they won't give you a proper sleep. We were taught these things when we were growing up.

### *Consideration*

[99] In my view, the factual basis material is sufficient to support the assertion that there existed, at sovereignty, a distinct society unified in their acknowledgement and observance of traditional laws, customs and practices particular to the marine environment of the application area. The asserted facts

identify the apical ancestors as members of this society and indicate that rights to particular areas of country or estates were acquired through descent from individuals with traditional rights and responsibilities for those areas. These rights existed alongside broader rights in respect of the application area at large, which were exercisable subject to respecting the owners of the relevant estate and having regard to its spiritual features. The factual basis material supports the view that this society participated in the cultural beliefs and practices of neighbouring groups but was nevertheless a distinct community that held rights to country in accordance with traditional laws and customs, underpinned by a set of beliefs about the spiritual basis of the world and regulated by senior ritual practitioners and kinship networks.

[100] The factual basis material also supports the assertion that the claim group and their predecessors have continued to acknowledge and observe those traditional laws and customs. The material discloses a continuing oral tradition whereby rules and norms relating to matters such as descent and kinship, the use and distribution of resources, access protocols and ritual authority have been passed down, and continue to be transmitted, to younger generations through teaching, initiation and practical instruction. As there are, in many cases, only a few generations between the apical ancestors and the current claimants, I infer that the apical ancestors practiced the same or similar modes of teaching and the laws and customs have remained relatively unchanged from those acknowledged and observed by their predecessors at the time of European contact. It follows that I am satisfied the factual basis supports the assertion that the laws and customs observed by the claim group are derived from those of a normative society that existed at sovereignty or at least European contact and are therefore 'traditional' in the *Yorta Yorta* sense.

### **Reasons for s 190B(5)(c)**

[101] To satisfy the requirements of s 190B(5)(c), the factual basis must support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

[102] In *Gudjala 2007*, Dowsett J noted at [82] that the assertion in s 190B(5)(c) may require information to the effect that:

- (a) there was a society which existed at sovereignty that observed traditional laws and customs from which the laws and customs of the claim group were derived; and
- (b) there has been continuity in the observance of traditional laws and customs going back to the assertion of sovereignty or at least European settlement.

[103] The applicant asserts that knowledge of the laws and customs observed by the apical ancestors 'are known and understood primarily as a result of their transmission orally to the current generation.' They say that the claim group 'continues to acknowledge and observe the system of law and custom' acknowledged and observed by their predecessors and 'teach the laws and customs to their children and grandchildren (Applicant's Additional Submissions, paragraphs 51 and 54).

[104] The applicant illustrates this transmission of knowledge to the current generation by reference to [claimant 1 name deleted]'s account, at paragraph 23 of his 2005 affidavit, of being taught the rules or protocols relating to the preparation of dugong:

*Mayala* people have always hunted *odorr* or dugong. We hunt dugong in boats with harpoons or *jarrar*. There are special ways of cutting up *odor* according to my customs. This way of cutting up the *odorr* is passed on to us by our old people. I first saw the special way of cutting up *odorr* from my grandparents.

[105] The factual basis material contains other examples of claimants having been taught rules or protocols about what food can be eaten, how it should be prepared or how to obtain introduce oneself to a particular place. In her 1999 affidavit, [claimant 3 name deleted] explains that her old people taught her about fish that women and children cannot eat and says that those ‘who go to my country and other places inside *Mayala* have to obey these kinds of rules’ (paragraph 11). Similarly, [claimant 2 name deleted] recalls that when her father caught a turtle, he would bring it back to share with others in the camp (paragraph 6). The applicant’s additional submissions also refer to the account of [claimant 6 name deleted], who says that when he was growing up he was taught the rules for interacting with the [text deleted] who inhabit certain islands within the claim area (paragraph 38).

[106] The claimant evidence also demonstrates how laws and customs have continued to be acknowledged and observed through initiation and the transmission of ritual authority. In his 2005 affidavit, [claimant 1 name deleted] states that he went through the Law and ‘learnt those songs from my old people back on Sunday Island’ (paragraph 6). At paragraph 7 of his affidavit, [claimant 1 name deleted] also describes, in general terms, the roles of senior ritual practitioners (*madja*) and initiates (*jawul*), emphasising the importance of this relationship in maintaining the group:

*Jawul* helps to get the tribe more close, it binds the tribe together as one. When there’s Law, everyone’s got a *Jawul*. All the men and women have responsibility and feel they are boss for something. This is how *jawul* binds the tribe together as one.

[107] In my view, the factual basis material is sufficient to support the assertion that the claim group has continuously acknowledged and observed traditional laws and customs through instructing younger generations in the rules and protocols that regulate the exercise of the claimants’ rights to country and by transmitting and maintaining ritual authority through initiation. It follows that I am satisfied the factual basis material is sufficient to support the assertion that the claim group continues to hold native title in the application area in accordance with their traditional laws and customs.

## **Conclusion**

[108] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5).

## **Subsection 190B(6)**

### **Prima facie case**

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[109] A native title right or interest that can be established ‘prima facie’ is one that is arguable on its face, whether it involves disputed questions of fact or law. Accordingly, this condition requires ‘some measure of the material available in support of the claim’ (*Doepel* at [126] and [135]). The claimed native title rights and interests that I consider can be established prima facie are identified in my reasons below.

## Consideration

### *Right of possession, occupation, use and enjoyment of the land and waters as against all others*

[110] In *Ward HC* at [89], the majority of the High Court regarded the expression ‘possession, occupation, use and enjoyment ... to the exclusion of all others’ as a ‘composite expression directed to describing a particular measure of control over access to land.’ The majority went on to observe at [93] that, to the extent the expression is ‘intended to convey the assertion of rights of control over land,’ rights of that kind would not flow from the fact of occupation ‘but from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country.’

[111] Speaking of claims to exclusive rights, the Full Court of the Federal Court held in *Griffiths v Northern Territory* [2007] FCAFC 178 at [127] that it was ‘not a necessary condition’ of such claims that they should be framed as ‘some sort of analogue to a proprietary right.’ Rather, it will suffice if it is expressed in terms of ‘spiritual sanctions’ visited upon unauthorised entry, where claimants are ‘the gatekeepers for the purpose of preventing such harm and avoiding injury to the country.’ The Full Court revisited these comments in *Banjima People v Western Australia* [2015] FCAFC 84 at [38], observing that control over access to country, ‘expressed by the need to obtain permission to enter under pain of spiritual sanction ... is readily recognisable as a right to exclusive possession.’

[112] The applicant’s additional submissions state that, whereas members of the claim group are free to use the claim area without seeking explicit permission provided they ‘respect the owners of the relevant estate’ and ‘pay appropriate regard to the spiritual features of the country,’ permission is required for people from other groups. The applicant states that rights to country are accompanied by a corresponding duty to ‘protect strangers from its spiritual dangers’ and notes that claimants have language terms for strangers and visitors. The applicant states that owners of country also ‘have a duty to look after and protect visitors who have their permission to enter their country and to ensure they do not suffer harm from the spiritual beings’ (Applicant’s Additional Submissions, paragraph 25).

[113] The operation of these rules around control over access to country is illustrated in the following passage at paragraph 13 of [claimant 1 name deleted]’s 2005 affidavit:

If any *marriyun amborriny* or blackfella strangers wanted to come into our country to walk around or to take trees or feed or other things from the country, they must get permission from the *Mayala* mob to do these things. That’s our Law. In old Aborigine way, they used to send a smoke signal to seek permission to enter our country. If they don’t get our permission, it’s against our Law and they can get into big strife. If we don’t tell them where they can walk and where they can’t walk, bad things might happen to them if they walk on our sacred sites. And they must share with us what they take from our country. That’s our Law.

[114] Although the applicant does not claim exclusive rights over areas in respect of which there is a public right to navigate or a public right to fish, [claimant 1 name deleted]’s affidavit suggests (at paragraph 13) that there also exists rights under traditional law and custom to control access to sea country:

A Noongar person can’t just come and use the sea in *Mayala* country. We’d tell him: “You can’t go there because you don’t know the tide”. It would be too dangerous, even with an outboard motor, if you don’t know the tides in *Mayala* country, like us *Mayala* mob do. If that Noongar says he doesn’t care what we say,

I'd tell him he shouldn't come into my country. *Waybal* or white people shouldn't come into the sea and use that sea in our country without asking.

[115] The affidavit of [claimant 2 name deleted] (at paragraph 14) also speaks to the spiritual consequences that may befall a stranger if he or she were to access Mayala country without seeking permission from the appropriate people:

People used to camp on [place name deleted] [Mermaid Island] and makes fires, if they were countrymen. But [place name deleted] doesn't like strangers. It is dangerous for strangers to stay there, so they have to ask the people for that place first.

[116] In my view, these statements and the other material before me are sufficient to establish, prima facie, the existence of an exclusive right to possess, occupy, use and enjoy the land and waters of the application area.

*Right to access, remain on and use the land and waters; Right to access and take the resources of the land and waters*

[117] The applicant's additional submissions assert that a person's rights and interests in an estate include rights to access and freely utilise their estate. Other members of the group are free to use the claim area without the need to seek explicit permission, provided they respect the owners of the relevant estate and pay appropriate regard to the spiritual features of the country (paragraphs 19 and 25).

[118] The claimant evidence is replete with examples of claim group members and their predecessors travelling through, visiting or living on the land and waters within the application area. [Claimant 2 name deleted] recalls travelling from Sunday Island with her parents to islands within the claim area and staying there for months at a time (paragraph 4). [Claimant 1 name deleted] states in his affidavit that his grandfathers and parents would camp and live around the islands that form part of his traditional country and that later in life he would go camping with his family in places like [place name deleted] (paragraph 3).

[119] [Claimant 1 name deleted] also says he has the right to travel through the areas of deep sea between the islands in Mayala country and refers to the use of 'tidal roads' to navigate and traverse the claim area (paragraphs 3 and 16-17). This is consistent with the evidence of [claimant 3 name deleted], who recalls people travelling on *galwa* rafts to go between the islands using the currents and tides (paragraph 8). The applicant's additional submissions also refer to oral histories suggesting that [name deleted] had traditional rights to travel around the islands and died while camping in the claim area (see page 8).

[120] The claimant evidence includes numerous illustrations of Mayala people exercising the right to take the resources of the land and waters. [Claimant 1 name deleted] states in his affidavit that, as a child and a young man, he would collect *gulngarriny* or yams and *madilang* tubers from islands within the claim area and would hunt dugong, fish and turtle with his grandparents. They would do this using canoes made by his mother's father using mangrove wood from trees growing near [place name deleted] off the Yampi coastline. In the 1990s, [claimant 1 name deleted] would often travel through the claim area showing his children the country and collecting *aarlngir* or trochus (paragraphs 20, 22-23 and 26). [Claimant 2 name deleted] also recalls digging for water with her parents while visiting the islands in Mayala country (paragraph 4).



[121] The applicant's additional submissions also suggest that Mayala people would trade goods with neighbouring groups as part of a 'network of ritual, exchange and trade' (paragraph 13). This is illustrated by the example discussed above regarding the sharing of trochus meat in accordance with kinship rules and the sale of trochus shells for profit. It is also consistent with Elkin's observations of Mayala and Jawi people trading items such as edge ground axes, double rafts and bamboo (see Applicant's Additional Submissions, paragraphs 27 and 47). These examples support the view that the right to take the resources of the land and waters is a right to take those resources for any purpose.

[122] In my view, these rights have been prima facie established pursuant to the traditional laws and customs of the claim group.

*Right to protect places, areas and things of traditional significance on the land and waters*

[123] The applicant's additional submissions state that claimants have a right and responsibility generally to protect things in their country. This includes the obligation to care for the environment of the claim area. In this respect, they cite the statement of [claimant 5 name deleted] that '[if] you turn over a rock, then you must turn it back again so it's like it was, to protect the animals beneath its shelter' (paragraph 30). This is also evident in activities that could broadly be described as 'caring for country,' such as the lighting of fires to clear old grass and promote new growth, as described in the affidavit of [claimant 1 name deleted] (paragraph 27).

[124] The factual basis material suggests that claimants have additional responsibilities in relation to places of particular cultural or spiritual significance. For example, [claimant 1 name deleted] states that he is 'one of the Mayala mob looking after [place name deleted].' As a senior man, [claimant 1 name deleted] says he was responsible for looking after 'all areas on our country, including very special islands like [place name deleted], and get together to talk about it.' [Claimant 1 name deleted] also states that there are Law grounds in Mayala country in respect of which all Law bosses have responsibility to make sure they are looked after (paragraphs 11 and 9).

[125] This also extends to the right to protect things and objects of traditional significance on the land and waters of the application area. The applicant's additional submissions state that particular physical objects are set aside [text deleted] in certain parts of the claim area to which only initiated men can safely travel [text deleted]. The applicant states that removing these objects 'would invoke grave spiritual dangers' for trespassers and the responsible claimants. The additional submissions also note that some deceased people were traditionally interred in [text deleted] and claimants are responsible for protecting these gravesites and ensuring the remains are not disturbed (paragraphs 28-29).

[126] In my view, there is sufficient material to prima facie establish the claimed right pursuant to the traditional laws and customs of the claim group.

**Conclusion**

[127] The application satisfies the condition of s 190B(6).

## Subsection 190B(7)

### Traditional physical connection

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 be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
  - (i) the Crown in any capacity, or
  - (ii) a statutory authority of the Crown in any capacity, or
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[128] To meet the requirements of this condition, the Registrar must be satisfied of a particular fact or facts that support the person's traditional physical connection to the application area (see *Doepel* at [18]; *Gudjala 2007* at [89]).

[129] As noted in my consideration of whether the application meets the conditions in ss 190B(5) and 190B(6), the factual basis material includes claimant evidence and other material documenting numerous instances in which members of the claim group have travelled through or visited places within the application area to carry out activities or exercise rights and interests in accordance with traditional law and custom. For example, [claimant 3 name deleted] affidavit states that she has been fishing in her country and shelling on the reef since she was a child and her family 'still goes out to [place name deleted] [Long Island] sometimes' (paragraph 8). Similarly, in his 2005 affidavit, [claimant 1 name deleted] states that he would take his children onto Mayala country and collect *aarlngir* or trochus when he lived at One Arm Point in the 1990s (paragraph 20). The applicant's additional submissions also refer to claimants' knowledge and observance of protocols for accessing islands within the claim area, which suggests a continuing pattern of visitation for traditional purposes (see for example paragraph 35).

[130] Having regard to this material, I am satisfied at least one member of the claim group has or had a traditional physical connection with parts of the application area. The application therefore satisfies the condition of s 190B(7).

## Subsection 190B(8)

### No failure to comply with s 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

- (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
- (2) If:
  - (a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
  - (b) either:
    - (i) the act was an act attributable to the Commonwealth; or
    - (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and

(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[131] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

#### *Section 61A(1)*

[132] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The Geospatial Report indicates that no native title determinations fall within the external boundary of the amended application. My own searches of the National Native Title Registrar using the NNTT's mapping database confirm this to be the case.

#### *Section 61A(2)*

[133] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Section 61A(4) applies where certain provisions of the Act require the extinguishing effect of the previous exclusive possession act to be disregarded and the application states that one of those provisions apply to the act. Paragraphs 1 and 2 of Schedule B expressly exclude such areas from the claim, subject to the application of ss 47, 47A or 47B.

#### *Section 61A(3)*

[134] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. Schedule E states that the right of possession, occupation, use and enjoyment of land and waters as against all others is only claimed in relation to those parts of the application area where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded.

### **Conclusion**

[135] In my view the application does not offend ss 61A(1), 61A(2) or 61A(3). The application therefore satisfies the condition in s 190B(8).

## **Subsection 190B(9)**

### **No extinguishment etc. of claimed native title**

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

[136] I consider each of the subconditions of s 190B(9) in my reasons below.

#### *Section 190B(9)(a)*

[137] Paragraph 6 of Schedule E states that the right to access and take the resources of the land and waters 'does not include such minerals, petroleum, geothermal energy or geothermal energy resources, if any, as are, under the laws of the Commonwealth and the State of Western Australia including the common law as at the date of this application, wholly owned by the Crown.' Schedule Q confirms that, to the extent that any minerals, petroleum or gas within the application area are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia, the applicant does not claim them.

#### *Section 190B(9)(b)*

[138] The description in Schedule E makes clear that no right of exclusive possession is claimed in respect of areas subject to a public right to navigate or the public right to fish. This is confirmed in Schedule P, which states the application does not claim exclusive possession to any part of an offshore place.

#### *Section 190B(9)(c)*

[139] The description of the application area in Schedule B expressly excludes areas that are or were subject to certain extinguishing tenure and other areas where native title rights and interests are otherwise wholly extinguished, subject to provisions of the Act requiring extinguishment to be disregarded. Schedule E also makes clear that the right of exclusive possession is only claimed over areas where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded.

### **Conclusion**

[140] In my view the application does not offend ss 190B(9)(a), (b) or (c). The application therefore satisfies the condition of s 190B(9).

[End of reasons]