



Registration Decision

Application name	Gnulli 3
Name of applicant	Sharon Crowe, Rachael Cooyou, Gwen Peck, Denice Cotterill
Federal Court of Australia No.	WAD261/2019
NNTT No.	WC2019/005
Date of Decision	6 June 2019

Claim not accepted for registration

I have decided that the claim in the Gnulli 3 application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must not be accepted for registration.

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

Lisa Jowett

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

¹ A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

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 FC*)

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

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

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*)

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

BACKGROUND

- [1] This is an application filed on behalf of the Gnulli 3 native title claim group, comprised of the Yinggarda, Baiyungu and Thalanyji people. It covers land and waters of unallocated crown land, a number of reserves, an Aboriginal lease and two (2) pastoral leases within the external boundary of the Gnulli 1 claim area. The claim areas are spread across the extent of the Gnulli 1 claim area, from Exmouth Gulf in the north to Shark Bay in the south and east of the Kennedy Range National Park. Together the areas comprise approximately 12,123 sq kms.
- [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 9 May 2019 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.²

Registration conditions

- [3] Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [4] Given that the application was made on 1 May 2019 and has not been amended, I am satisfied that neither s 190A(1A) nor s 190A(6A) apply.
- [5] I have decided that the claim in the application must not be accepted for registration and this document sets out my reasons for that decision.

² Section 190A(1).

Information considered

- [6] 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’.
- [7] I have had regard to information in the application and accompanying documents. There is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.³ The State of Western Australia (the state government) has not provided any submissions in relation to the application of the registration test.⁴
- [8] I have considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 14 May 2019 (the geospatial report).

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

Identification of area subject to native title – s 190B(2) condition not met

- [9] 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.⁵
- [10] To identify the area subject to native title the procedural condition of s 62(1)(b) requires that the application contain the details specified in:
- s 62(2)(a): information about the internal and external boundaries of the area; and
 - s 62(2)(b): a map of the external boundaries of the area.
- [11] The details about the internal and external boundaries of the claim area have been provided at Schedule B and Attachment B. A map purporting to show the external boundaries is provided at Attachment C.
- [12] Schedule B refers to Attachment B for a description of the external boundary. Attachment B describes the application area as covering a list of areas identified as all unallocated crown land as at 3 April 2019, five (5) reserves, two (2) pastoral leases, and one (1) aboriginal lease within a boundary that is described with reference to Native Title Determination external boundaries, Low Water Mark (LWM) and High Water Mark (HWM) boundaries, the 3 Nautical

³ Section 190A(3)(b).

⁴ Section 190A(3)(c).

⁵ *Doepel* at [122].

Mile Coastal Waters Limit Australian Maritime Boundary, the coastline, roads, the Wooramel River, and Coordinate Points (referenced to the Geocentric Datum of Australia 1994 (GDA94) and shown to six (6) decimal places).

- [13] Schedule C refers to Attachment C which is an A3 colour copy of a map prepared by Colin McKellar, Yamatji Marlpa Aboriginal Corporation, titled 'Gnulli 3 Claim' dated 30 April 2019. The map includes: the application area depicted by bold blue outline and identified in the legend as 'Gnulli 3'; Gnulli (WAD22/2019) area depicted by a bold dark blue outline and identified in the legend as 'Gnulli'; general greyscale topographic map background; scalebar, northpoint, coordinate grid, locality map; and notes relating to the source, currency and datum of data used to prepare the map.
- [14] Schedule B provides a list of general exclusions to describe those areas not covered by the application and Attachment B specifically excludes the Combined Thiin-Mah Warriyangka, Tharrkari, Jiwarli, the Malgana Shark Bay People and Gnulli 2 claimant applications and the Thalanyji and Wajarri Yamatji determinations.

Consideration

- [15] On the basis that the area covered by the agreement is described as including 'all unallocated crown land as at 3 April 2019', it would be expected that the external boundaries of the lots or parcels that fall within this category would be clearly depicted on the map at Attachment C. The geospatial assessment identifies that an unallocated crown land parcel located north of the town of Carnarvon is not depicted on the map: Lot 714 on Deposited Plan 405551 and centred at approximate Longitude 113.782919° East, Latitude 23.454691° South. The Tribunal's geospatial services has provided me with a depiction of Lot 714 overlaid on the map at Attachment C. The area of Lot 714 extends approximately 30km along the coastline parallel to the Ningaloo Reef area, and extends northward from Amherst Point to approximately 10km south of Point Anderson. The lot covers an area of approximately 13.6 sq km.
- [16] Further, the map does not show or identify the different land tenure used to describe the areas covered by the application and the topographic layer is blurred. Some of the boundaries of the claimed areas are obscured by the Gnulli claim boundary and there is not sufficient detail to allow the external boundaries of most of the claimed lots and parcels to be clearly located on the map. The description also contains a typographic error in relation to reserve AB 1428655, which should be AB 1428655.
- [17] The uncertainty in relation to Lot 714 specifically leads to the assessment by geospatial services that the map and description are not consistent with each other. I have reached the same conclusion. The application does not include a statement that the description prevails over the map should there be any discrepancy between the two. I am of the view that the list at Attachment B of areas described by their tenure might allow me to identify the location of those areas on the surface of the earth. However, without the depiction of Lot 714 on the map I am not certain whether it is in fact an area covered by the application or not. The map does not show, as it is required to do by s 62(2)(b), the boundaries of the area mentioned in s 62(2)(a)(i), being the boundaries of the area covered by the application.

[18] I note that the specific exclusions provide certainty as to the identification of the wider external boundary within which the claimed areas fall. The general exclusions used to describe other areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories listed.

[19] Overall, however, I am not satisfied that the areas which together comprise the area covered by the application are identifiable and that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[20] I am not satisfied the claim meets the requirements of s 190B(2).

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

[21] For the application to meet the requirements of s 190B(3), the Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[22] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’: whether the claim has been made on behalf of the correct native title claim group is not relevant.⁶

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

The Native Title claim group are those Aboriginal persons who:

(a) are descended from one or more of the following ancestors:

(i) Kaŋuguru/Mammy (mother of Milly, Kitty, Kaja & Maryanne) and Biriji (brother to Kaŋuguru/Mammy & father of Jean & Michael);

(ii) Janya, Jubilee, Tim Dodd, Maggie Dodd, or Mary Harvey (siblings);

(iii) Weelbayarra/Frank Hughes (father of Tommy, May & Billy Hughes);

(iv) Sarah (mother of Gunggum/Sam Dazzler & siblings);

(v) Caroline & Sambo (parents of Dolly Bidgemia);

(vi) Tom Dodd (from the Wooramel side, husband of Jinapuga/Mary Anne);

(vii) Kalaman/Mary (mother of Paddy Dowker);

(viii) Culamire/Fred (father of Ngaa Ngaa/Lucy Bulley);

(ix) Jilba/Harry (father of Binthamurra/Stella Snowball/Noble);

(x) Annie & Joe Kimberley (parents of Bob Kimberley);

(xi) John Friday (husband of Edie Noble);

(xii) Mary Anne or Jinny Windie (sisters, mothers of Windie families);

(xiii) Gooyoongardi/Tom Dodd;

(xiv) Copper (mother of Norcia, Maude & Tommy Mortimer),

or have been culturally ‘grown up’ from a young age by one or more of these persons or such biological descendants in accordance with the traditional laws acknowledged and the traditional customs observed by the Yinggarda, Baiyungu or Thalanyji people; and

⁶ *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

- (b) have connection to the Yinggarda, Baiyungu or Thalanyji lands and waters within the claim Area through the traditional laws and customs applicable there; and
- (c) are accepted as Yinggarda, Baiyungu or Thalanyji in accordance with the traditional laws acknowledged and the traditional customs observed by other Yinggarda, Baiyungu or Thalanyji people.

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

[25] It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors, their connection and acceptance under traditional law and custom, but that would not mean that the group has not been sufficiently described.⁷

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

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

[27] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the application's description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.⁸

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

Rights in Area A

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

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

Rights in Area A and Area B

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

- Area A if the claim to exclusive possession cannot be recognised; and
 - Area B
2. The right to hunt, fish, gather, take and use resources (other than minerals, petroleum and gas) in the area for any purpose;
 3. The right to enter and to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
 4. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

⁷ *WA v NTR* at [67].

⁸ *Doepel* at [99] and [123].

5. The right to invite and permit others to have access to and participate in or carry out activities in the area; and
6. The right to travel over, visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;
7. The right to light fire within the area;
8. The right to engage in cultural activities in the area including conducting and participating in ceremony and ritual, conducting burials and burial rites and the transmission of cultural knowledge

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

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

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

[31] When read together with the exclusion statements in the written description of the area covered by the application, the native title rights and interests claimed can be ‘properly understood’.⁹ I understand the application to claim possession, occupation, use and enjoyment to the exclusion of all others where it can be recognised (Area A). The rights listed at 2-8 are claimed in relation to the areas where exclusive possession cannot be recognised. Non-exclusive rights are claimed in relation to Area B and, in the event that exclusive possession cannot be recognised, they are also claimed in Area A.

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

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

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

[34] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel*,¹⁰ Mansfield J stated that:

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the ‘factual basis on which it is asserted’ that the claimed native title rights and interests exist ‘is sufficient to support the assertion’. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other

⁹ *Doepel* at [123].

¹⁰ Approved by the Full Court in *Gudjala FC* at [82] to [85].

words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.¹¹

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

- The applicant is not required ‘to provide anything more than a general description of the factual basis’.
- The nature of the material provided need not be of the type that would prove the asserted facts.
- The Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted.¹²

[36] A ‘general description’, as required by s 62(2)(e), must be in sufficient detail to enable a genuine assessment of the application under s 190A and related sections, and be ‘something more than assertions at a high level of generality’.¹³ Further, Dowsett J later held in *Gudjala 2009* that the asserted factual basis should provide more than mere restatements of the claim:

... it would not be sufficient for an applicant to assert that the claim group’s relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.¹⁴

[37] The above authorities establish clear principles that guide the Registrar when assessing the sufficiency of a claimant’s factual basis against the particularised assertions at s 190B.

Information considered

[38] Schedule F of the application provides a summary of the system of traditional laws and customs acknowledged and observed by Yinggarda, Baiyungu or Thalanyji people in relation to the land and waters of the claim area. It is asserted that it is the Yinggarda, Baiyungu or Thalanyji people who have occupied and used the claim area since prior to the assertion of British sovereignty. It is their traditional country and they share laws and customs and belong to a wider regional society that encompasses others who share laws and customs.¹⁵

[39] The factual basis provides general assertions in relation to the traditional laws and customs of the Yinggarda, Baiyungu or Thalanyji people:

¹¹ *Doepel* at [17].

¹² *Gudjala FC* at [92] and *Doepel* at [47].

¹³ *Gudjala FC* at [90]–[92].

¹⁴ At [29].

¹⁵ At [8].

- since prior to sovereignty, the Yinggarda, Baiyungu or Thalanyji people have acknowledged and observed a system of traditional laws and customs which they continue to acknowledge and observe;
- ancestral beings created the current physical features of the land and laid down the laws and customs that bind Yinggarda, Baiyungu or Thalanyji people; and
- these laws and customs set the rules and responsibilities Yinggarda, Baiyungu or Thalanyji people have in relation to how they behave and are connected to their country and govern the exercise of rights and interests.¹⁶

Consideration

[40] While I am satisfied the applicant has provided a general description of the factual basis for the claim made in the application sufficient for s 62(2)(e), I am not satisfied it is sufficient to support the assertions for the equivalent merit condition at s 190B(5). The material provides limited particularity, addressing each of the assertions for this condition only at a very general level.

[41] Specifically, the factual basis does not address the association of members of the claim group with the application area nor that of their apical ancestors named at Schedule A. It does not show cumulatively an association between the whole group and the whole area of the claim.¹⁷ I cannot therefore be satisfied that the association of the native title claim group has its origins in the preceding generations' association with the area.

[42] The factual basis refers to the existence of traditional laws and customs that relate to ways in which rights and interests in the claim area are vested in members of the claim group. Schedule G also lists the activities that members of the claim group carry out in relation to the land and waters of the claim area. However, the factual basis does not address the relationship between these laws and customs and those of any pre-sovereignty society, other than to assert that it is the Yinggarda, Baiyungu or Thalanyji traditional laws and customs that have governed Yinggarda, Baiyungu or Thalanyji people since sovereignty and continue to do so to the present day. The factual basis fails to establish any link between a pre sovereignty society, the claim group and the apical ancestors, other than to assert that the laws and customs have been handed down to successive generations through teaching. Overall, the factual basis relies on a high level of generality which is not sufficient to support the assertion that native title rights and interests continue to exist under the traditional laws and customs of the native title claim group in relation to the areas claimed.

[43] For these reasons, I am not satisfied there is a sufficient factual basis to support the assertion that the claimed native title rights and interests exist or the particular assertions in s 190B(5).

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

[44] Under s 190B(6) I must be satisfied that some of the native title rights and interests claimed by the native title group can be established, prima facie.

¹⁶ At 1-8.

¹⁷ *Gudjala 2007* at [51] and [52].

[45] In my view the application cannot satisfy this requirement because of the conclusion I have formed in relation to the condition at s 190B(5). The factual basis is not sufficient to support the assertion that traditional laws and customs exist that give rise to the claimed native title rights and interests in relation to the area covered by the application. Consequently, there is no basis from which to examine whether any of the rights and interests on the face of it, can be established.

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

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

[47] Under s 190B(7) evidentiary material is required capable of satisfying the Registrar that at least one member of the claim group 'has or previously had a traditional physical connection' with any part of the application area. While the focus is not the same as that of the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area'.¹⁸

[48] It was my conclusion at s 190B(5) that the factual basis is not sufficient to support the assertion that traditional laws and customs exist in relation to the area covered by the application. The application likewise fails this condition due to the requirement for material showing a 'traditional' physical connection to the application area. That is, 'such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'.¹⁹

[49] The application does not satisfy the condition of s 190B(7).

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

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

Requirement	Information addressing requirement	Result
Section 61A(1) No native title determination application if approved determination of native title	Geospatial report	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraph 2	Met
Section 61A(3) Claimant application not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule B, paragraph 3	Met

¹⁸ *Doepel* at [18].

¹⁹ *Gudjala 2007* at [84].

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

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

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 4	Met

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

Information etc. required by ss 61–2 – s 190C(2): condition not met

[52] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.²⁰

Subsection 61

[53] 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

[54] The application does not contain all the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Accompanies application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Not 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

²⁰ *Doepel* [16], [35]–[39].

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

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

[55] The application provides a map at Attachment C purporting to show the external boundaries of the area covered by the Gnulli 3 claim. The area is shown relative to the external boundary of the Gnulli 1 application. Within this boundary, specific parcel boundaries illustrate those categories of tenure listed in Schedule B that describe the area covered by the Gnulli 3 claim. The absence of Lot 714 on Deposited Plan 405551 on the map (as explained above for the condition at s 190B(2)), in my view, means that the map is not complete as it does not identify the full extent of the external boundaries of the area covered by the application.

Conclusion

[56] I am satisfied that the application is accompanied by the prescribed documents, however, I am not satisfied that the application contains the prescribed information.

[57] The application does not satisfy the condition of s 190C(2).

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

[58] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim in relation to the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c).²¹ Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' on the Register when the current application was made in the Court.

[59] The application identifies the Gnulli Claim at Schedule H for 'other applications' and Schedule O provides the statement that the claim is brought on behalf of the same people as the members of the Gnulli Claim WAD22/19. Based on this information I understand the application to acknowledge that the Gnulli 3 application overlaps the Gnulli application and both claims are brought by the same people.

[60] The Tribunal's geospatial report confirms that the whole area covered by the Gnulli 3 claim (the current application) is overlapped by Gnulli application.

[61] The Gnulli application was first made and entered on the Register of Native Title Claims on 14 April 1997. It has remained on the Register as result of consideration under s 190A and has not since been removed. It is therefore a 'previous' application as it meets the conditions set out in the subparagraphs (a) to (c) of s 190C(3). As such the Registrar is required to be satisfied that no person included in the Gnulli native title claim group is a member of the Gnulli 3 native title claim group.

²¹ *Strickland FC* at [9].

[62] As the description of the native title claim group is precisely the same in both Gnulli applications, it is clear that there are claimants in common between both groups.

[63] The application does not satisfy the condition of s 190C(3).

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

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

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

[65] Schedule R provides the statement that the application has not been certified. Part A of the application provides the statement that the applicant is entitled to make the application as the persons named as the applicant are authorised by the native title claim group to make the native title determination application and deal with all matters arising under the Act in relation to the application. As the application is not accompanied by a certificate in accordance with s 203BE(5), I must therefore consider whether the application provides sufficient information to satisfy me that the applicant is, firstly, a member of the native title claim group and secondly, has been authorised by all the persons in the native title claim group to make and deal with the application. That is, I must consider whether the application meets the authorisation requirements of ss 190C(4)(b) and 190C(5).

Have the requirements of s 190C(4)(b) and s 190C(5) been met?

[66] For s 190C(4)(b) the first consideration is whether the applicant is a member of the native title claim group. The four (4) persons comprising the applicant have each deposed in their affidavit, accompanying the application for the purposes of s 62(1)(a), 'I am a member of the applicant and a member of the Gnulli 3 native title claim group'. I am satisfied the first limb of the requirement at s 190C(4)(b) is met.

[67] The next consideration is whether the applicant is *authorised* by all the other persons in the native title claim group to make the application and deal with matters arising in relation to it. A note to s 190C(4) directs the Registrar to s 251B of the Act, for the meaning of the word 'authorise'. A person or persons can be authorised in one of two ways:

(a) a traditional decision-making process which, under the traditional laws and customs of the persons in the claim group, must be complied with in relation to authorising 'things of that kind' (that is, the making of a native title determination application); or

(b) where there is no such process, a process of decision-making agreed to and adopted by the persons in the claim group in relation to authorising the making of the application or doing things of that kind.

[68] For the purposes of s 251B, the 'native title claim group' is defined as 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'.²²

[69] The only information for my consideration is to be found in the s 62(1)(a) affidavits affirmed in April 2019 by the persons comprising the applicant. Each of the affidavits includes the following information relevant to the process undertaken to authorise the persons comprising the applicant:

- there is no process of decision-making under the traditional laws and customs of the native title claim group that must be complied to authorise an applicant to make a native title determination application under the Act;
- the native title claim group agreed to and adopted a decision-making process which incorporates traditional decision-making principles as far as possible; decisions are made by way of resolutions made by a majority vote of members of the native title claim group who are representative of the group and present;
- this was the process the native title claim group used to authorise the applicant to make and deal with the application.

[70] The application provides no information about the authorisation meeting, the date on which it occurred or its location. There is also no information about the steps taken to notify members of the claim group of the meeting, the people who attended or whether those who did attend were sufficiently representative of the native title claim group to make the requisite decisions. I have no information before me about the resolutions passed or the decisions made that may demonstrate that the processes undertaken to authorise were that which is described in the affidavits.

[71] In *Lawson*, the Court addressed authorisation involving an agreed and adopted decision-making process which permits decisions to be made by persons from the claim group who are present at an authorisation meeting convened for that purpose, but who clearly do not amount to all of the persons of the claim group. Stone J decided a person may be authorised following an agreed and adopted process where every reasonable opportunity is extended to group members to attend a meeting, even though all members do not actually attend.²³ As the application provides no information about such matters as how members of the claim group were notified about the meeting and the way in which it was conducted, I cannot be satisfied that members of the claim group were given a reasonable opportunity to participate in the process to authorise the applicant to make and deal with the application.

[72] For the purposes of s 190C(5), the application must contain a statement to the effect that the requirement set out in paragraph (4)(b) has been met and must also briefly set out the grounds on which the Registrar should consider that the requirement has been met. My consideration is confined to information contained in the application. The application itself does not include the statements required by s 190C(5)(a) and (b). However, the statements

²² See ss 61(1) and 253 of the Act.

²³ At [25]-[27].

are made in each of the affidavits affirmed by the persons comprising the applicant and these accompany the application. It is appropriate that I treat information in the accompanying s 62(1)(a) affidavits as being in the application.

[73] While I am satisfied that the application meets the requirements of s 190C(5), I am not satisfied that the application meets the requirements of both limbs of s 190C(4)(b). I am therefore not satisfied that the application demonstrates that the applicant is duly authorised in accordance with s 251B(b) to make this application and to deal with all matters arising in relation to it.

[74] The application does not satisfy the condition of s 190C(4).

End of reasons

Attachment A

Summary of registration test result

Application name	Gnulli 3
NNTT No.	WC2019/005
Federal Court of Australia No.	WAD261/2019
Date of decision	6 June 2019

Section 190B conditions

Test condition	Sub-condition/requirement	Result
Section 190B(2)		Not met
Section 190B(3)		Met
Section 190B(4)		Met
Section 190B(5)		Not met
Section 190B(6)		Not met
Section 190B(7)		Not met
Section 190B(8)		Met
Section 190B(9)		Met

Section 190C conditions

Test condition	Sub-condition/requirement	Result
Section 190C(2)		Not met
	Section 61(1)	Met
	Section 61(3)	Met
	Section 61(4)	Met
	Section 62(1)(a)	Met
	Section 62(1)(b)	Not met
	Section 62(2)(a)	Met
	Section 62(2)(b)	Not met
	Section 62(2)(c)	Met
	Section 62(2)(d)	Met
	Section 62(2)(e)	Met
	Section 62(2)(f)	Met
	Section 62(2)(g)	Met
	Section 62(2)(ga)	Met
	Section 62(2)(h)	Met
Section 190C(3)		Not met
Section 190C(4)		Not met
	Section 190C(4)(a)	N/A
	Section 190C(4)(b)	Not met