



Registration Decision

Application name	Clive Lyndon & Ors and State of Western Australia (Budina 2)
Name of applicant	Clive Lyndon, Marie Lyndon, Scott Lyndon and Ursula Lyndon
Federal Court of Australia No.	WAD439/2019
NNTT No.	WC2019/010
Date of Decision	15 November 2019

Claim accepted for registration

I have decided that the claim in the Budina 2 application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must be accepted for registration and entered onto the Register of Native Title Claims.

Katy Woods

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

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

Reasons for Decision

Cases cited

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)
Gudjala People #2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)
Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5) [2003] FCA 218 (*Harrington-Smith (No 5)*)
Lyndon on behalf of the Budina People v State of Western Australia [2017] FCA 1214 (*Budina People*)
Martin v Native Title Registrar [2001] FCA 16 (*Martin*)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*)
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)
Sampi v State of Western Australia [2005] FCA 777 (*Sampi*)
Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)
Wakaman People #2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)
Ward v Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*)
Western Australia and Northern Territory v Lane (1995) 59 FCR 332; [1995] FCA 1484 (*Lane*)
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 Budina 2 native title claim group (claim group). It covers land and waters in the shires of Ashburton and Carnarvon in Western Australia, approximately 85 kms inland of Coral Bay (application area). The application area sits adjacent to the area covered by the *Budina People* determination, where the native title of the same claim group was recognised by way of a consent determination in 2017.²
- [2] This application was filed in the Federal Court of Australia (Court) on 3 September 2019 and on 20 September 2019 the Court gave a copy to the Registrar of the National Native Title Tribunal (Tribunal), pursuant to s 63. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.³ Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

Procedural fairness

- [3] On 27 September 2019, a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the Western Australian government (state) advising that I would be considering the information in the application in my decision, and should the state wish to supply any information or make any submissions, it should do so by 4 October 2019.

² *Budina People* [1], Attachment A, Schedule 5.

³ Section 190A(1).

- [4] Also on 27 September 2019, the senior officer wrote to the applicant’s representative to advise that any additional information the applicant wished me to have regard to should be provided by 4 October 2019.
- [5] On 2 October 2019, the applicant provided a document titled ‘Additional material to support the registration of the Budina 2 application WAD439/2019’ (additional material).
- [6] On 3 October 2019, the senior officer wrote to the relevant minister of the state, providing a copy of the additional material and advising that any comments that the state wished to make on the additional material should be received by 11 October 2019.
- [7] No comments were received from the state, and so this concluded the procedural fairness process.

Information considered

- [8] I have considered the information in the application and the additional information provided by the applicant, as outlined above.⁴
- [9] I have considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the National Native Title Tribunal’s (Tribunal) Geospatial Services dated 2 October 2019 (geospatial report), in relation to the sufficiency of the map and description. I have also considered information in the Tribunal’s geospatial database to identify locations mentioned in the application.⁵
- [10] There is no information before me that has been obtained as a result of any searches of state or Commonwealth interest registers,⁶ and as noted above, the state has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.⁷

Section 190C: conditions about procedures and other matters

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

- [11] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.⁸ I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

Section 61

- [12] The application contains the details specified in s 61:

Section	Details	Form 1	Result
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⁴ Section 190A(3)(a).

⁵ Section 190A(3)(c).

⁶ Section 190A(3)(b).

⁷ Section 190A(3)(c).

⁸ *Doepel* [16], [35]–[39].

s 61(1)	Native title claim group has authorised the applicant	Part A(2), Schedule A, s 62 affidavits filed with application	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 62

[13] The application contains all the information specified in s 62:

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

Conclusion

[14] As the application contains all of the prescribed details and other information required by ss 61–2, I am satisfied s 190C(2) is met.

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

[15] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application’.⁹ To be a ‘previous application’:

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

[16] The geospatial report states and my own searches confirm there are no applications which overlap the current application, as required by s 190C(3)(a). Therefore, there are no applications which meet the definition of a ‘previous application’ under s 190C(3). This means that the issue of common claimants does not arise.

⁹ Emphasis in original.

Conclusion

[17] I am satisfied that no person included in the claim group was a member of a native title claim group for any previous application, so s 190C(3) is met.

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

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

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; 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.

[19] Schedule R refers to Attachment R, which is a document titled 'Budina 2 Native Title Claim Certification'. It follows that s 190C(4)(a) is applicable and thus I must be satisfied that:

- (a) the certificate identifies the relevant representative body;
- (b) the representative body has the power under Part 11 to issue the certification; and
- (c) the certificate meets the requirements of s 203BE(4).¹⁰

Is the relevant representative body identified?

[20] Yamatji Marlpa Aboriginal Corporation (YMAC) have provided the certificate, dated 22 August 2019. The certificate states that the certification is made pursuant to a decision of the YMAC Board of Directors and is signed by two Directors on the YMAC Board. The geospatial report states YMAC is the only representative body for the whole of the area covered by the application. I have verified this information against current data in the national map of Representative Aboriginal / Torres Strait Islander Body areas. That map shows YMAC to be the recognised representative body for the area covering the application area. I am therefore satisfied the certificate identifies the relevant representative body.

Does the representative body have the power to issue the certification?

[21] As a recognised representative body, YMAC can perform all of the functions listed in Part 11, including, relevantly, the certification functions referred to in s 203BE. I am satisfied YMAC has the power under Part 11 to issue the certification.

Does the certificate meet the requirements of s 203BE(4)?

[22] I have considered the certificate against each of the requirements of s 203BE(4) below.

Section 203BE(4)(a) – statements

[23] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

¹⁰ *Doepel* [80]–[81].

- [24] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it.
- [25] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.
- [26] As paragraph 1 of the certificate contains these required statements, I am satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

- [27] Section 203BE(4)(b) requires a representative body to briefly set out its reasons for being of the opinion that s 203BE(2)(a)–(b) have been met.
- [28] Under the heading ‘Reasons for Opinion Pursuant to ss 203BE(2)(a) and (b) of the NTA’, the certificate provides the following information:
- (a) YMAC has provided anthropological and legal services to the Budina People over many years;
 - (b) YMAC has performed extensive research to identify Budina claim group members;
 - (c) YMAC staff have attended many meetings with the Budina claim group and have observed the regular use of an agreed and adopted process of decision making;
 - (d) YMAC has performed research in relation to the Budina 2 claim which has indicated that the Budina People are the only people who hold native title over the Budina 2 area, and this research led to the reduction of the Gnulli claim area, which previously overlapped the Budina 2 area;
 - (e) YMAC organised a meeting on 27 March 2019 (the meeting) for the purpose of authorising the Budina 2 claim and invited all Budina People to attend;
 - (f) At the meeting, the Budina People confirmed there was no decision-making process under their traditional laws and customs which must be followed, and agreed and adopted a decision making process to authorise the applicant by way of a motion put and passed by more than 50% of Budina People present and voting;
 - (g) At the meeting, YMAC staff observed the Budina People authorise the Budina 2 application in accordance with the agreed and adopted decision making process.
- [29] As the certificate sets out the reasons for YMAC’s opinion that ss 203BE(2)(a)–(b) are met, I am satisfied s 203BE(4)(b) is met.

Section 203BE(4)(c) – overlapping applications

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

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

However, a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[32] As summarised above, the certificate outlines YMAC’s research about the area covered by the Budina 2 claim, and states that this research led to the reduction of the Gnulli claim insofar as it overlapped the same area. I am satisfied this information is a statement sufficient for the purposes of s 203BE(4)(c).

Conclusion

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

Section 190B: merit conditions

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

[34] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application 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.

[35] I understand the questions for this condition are whether the information and map provide certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed; and
- (b) any areas within the external boundary over which no claim is made.¹¹

Does the information about the external boundary meet this condition?

[36] Schedule B refers to Attachment B, which describes the area covered by the application with reference to surrounding native title determination boundaries and geographic coordinates to six decimal places, using the Geocentric Datum of Australia 1994.

[37] Schedule C refers to Attachment C, which contains a map prepared by Geospatial Services titled ‘Budina 2’ and dated 9 July 2019. The map includes:

- (a) The application area depicted in bold dark-blue outline with commencement point identified and labelled in magenta in the map;
- (b) Tenure, depicted as displayed in the legend, labelled with pastoral lease number and name and reserve number as appropriate;
- (c) The North West Coastal Highway labelled;
- (d) General colour topographic image background;
- (e) Scalebar, locality inset, coordinate grid; and
- (f) Notes relating to the source, currency and datum of data used to prepare the map.

¹¹ *Doepel* [122].

[38] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

Does the information about excluded areas meet this condition?

[39] Schedule B lists general exclusions from the application area including areas in which previous exclusive possession acts have been done.

[40] With regard to these types of general exclusion clauses, French J commented that ‘it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application’.¹² Following this reasoning, I am satisfied the description of the areas covered by the general exclusion clauses will be sufficient to ascertain any such areas at the appropriate time.

[41] Attachment B specifically excludes any area subject to:

- (a) Native Title Determination WAD131/2004 Budina People (WCD2017/006) as determined by the Court on 16 October 2017;
- (b) Native Title Determination WAD6113/1998 Thalanyji (WCD2008/003) as determined by the Court on 18 September 2008; and
- (c) Native Title Determination WAD6212/1998 Thudgari People (WCD2009/002) as determined by the Court on 18 November 2009.

[42] In my view, the specific exclusions are clear from the description in Attachment B.

Conclusion

[43] As both the external boundary and the excluded areas of the application area can be identified from the map and description with reasonable certainty, I am satisfied that s 190B(2) is met.

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

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

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

[45] I understand I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’ at this condition.¹³

[46] Schedule A states:

This application is brought on behalf of the Budina People who are those persons who:

¹² *Strickland* [55].

¹³ *Wakaman* [34].

- (a) are descended from one or more of the following: [list of five people, with reference to some of their immediate descendants] where descent can be either by birth or adoption in accordance with traditional laws acknowledged and the traditional customs observed by the Budina People;
- (b) have a connection with the land and waters of the claim area in accordance with the traditional laws acknowledged and the traditional customs observed by the Budina People; and
- (c) are accepted as Budina in accordance with the traditional laws acknowledged and traditional customs observed by other Budina People.

[47] It follows from the above description that s 190B(3)(b) is applicable. I must therefore consider whether the description is sufficiently clear, so as to ascertain whether any particular person is in the claim group.

Is the description sufficient to ascertain the members of the claim group?

[48] I understand that where a claim group description contains a number of paragraphs, the paragraphs should be read ‘as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open’.¹⁴

[49] I understand that to qualify for membership of the claim group an individual must meet all three criteria in Schedule A: they must be descended from one of the named apical ancestors by either birth or adoption, have a connection with the land and waters of the application area and be accepted as Budina by other Budina People. I note that each criterion references the traditional laws acknowledged and traditional customs observed by the Budina People. I therefore understand that the traditional laws and customs operate as the ‘set of rules or principles’ which must be applied when determining whether or not a person is accepted as a member of the group.¹⁵

[50] I note that the same claim group description was accepted by the Court in the determination of *Budina People*, however I do not consider this relieves me of the task at s 190B(3) and so I have considered each criterion of the claim group description in turn below.

Biological descent from named ancestors

[51] The Court has previously held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).¹⁶ I consider that requiring a person to show descent from an identified ancestor provides a clear starting point to commence an inquiry about whether a person is a member of the claim group and that it will be possible to identify the people who meet this criterion for membership through factual enquiries.

Connection to the application area

[52] Schedule F asserts that the claim group, by their laws and customs, have a ‘continuing connection’ to the land of the application area.¹⁷ In my view, determining the people who meet this criterion could be achieved by first identifying the individuals who meet the criterion in paragraph (a), as being descended from one of the named ancestors. By enquiring as to

¹⁴ *Gudjala 2007* [34].

¹⁵ *Ward v Registrar* [25]; see also *Aplin* [256].

¹⁶ *WA v NTR* [67].

¹⁷ Schedule F [5].

those persons' connection to the application area in accordance with their traditional laws and customs, it would be possible to identify the persons who meet this criterion.

Acceptance

[53] The Court has previously held that membership of a native title claim group must be based on group acceptance, that being inherent in the nature of a society.¹⁸ In *Sampi FC*, the Full Court agreed with the submission that '[a] relevant factor ... in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.¹⁹

[54] Noting this criterion's placement at the end of Schedule A, I understand that acceptance by other Budina People acts as a qualifier on the other two criteria, in other words, individuals must first demonstrate their descent from one of the named ancestors and their connection to the application area. If the first two criteria are met, then the laws and customs will operate to inform the internal view of the claim group and determine whether the person is accepted as a member.

Conclusion

[55] I am satisfied the application describes the persons in the native title claim group sufficiently clearly such that it can be ascertained whether any particular person is a member of the group as required by s 190B(3)(b). This means s 190B(3) is met.

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

[56] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223, as I consider that is part of the task at s 190B(6) where I must decide whether the claimed rights are established as native title rights on a prima facie basis.

[57] I understand from Schedule E that only non-exclusive rights are claimed. Five non-exclusive rights are listed, some of which are composite rights such as the right 'to enter and remain on the land, camp, erect temporary shelters and travel over and visit any part of the land and waters of the claim area'.

[58] Reading Schedule E as a whole, I do not consider there is any inherent contradiction between any of the rights claimed.²⁰ The rights and interests can be readily identified from the description.

¹⁸ *Aplin* [260]; *Yorta Yorta* [108].

¹⁹ *Sampi FC* [45].

²⁰ *Doepel* [92], [123].

Conclusion

[59] I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

[60] To meet s 190B(5), 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 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 interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[61] I understand my task is to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.²¹

What information has been provided in support the assertions of s 190B(5)?

[62] Schedule F provides a brief outline of the factual basis upon which the rights and interests are claimed. Schedule G lists the activities that the members of the claim group have 'continuously carried out'. I consider this is the extent of the information in the application which supports the assertions at s 190B(5).

[63] The additional material provided by the applicant more specifically addresses the assertions of s 190B(5) and so my reasoning will focus primarily on the information in this document.

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

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

- (a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement;²²
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';²³ and
- (c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.²⁴

²¹ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

²² *Gudjala 2007* [52].

²³ *Ibid.*

²⁴ *Martin* [26]; *Corunna* [39], [45].

What information has been provided in support of the assertion of s 190B(5)(a)?

[65] Schedule F states that the claim group and their ancestors have occupied and used the application area since the assertion of British sovereignty.²⁵

[66] The additional material provides:

(a) European settlement did not substantially impact the application area until around the 1870s, with the first explorers in the region arriving in 1866 and pastoral stations established in the 1880s.²⁶

(b) The application area is covered by the following pastoral leases:

- i. Towera, established 1883;
- ii. Lyndon, previously named Yanyearddy, established 1880;
- iii. Middalya, established 1887;
- iv. Mia Mia and Winning, taken up in 1886 but not established as a sheep run until the 1900s; and
- v. Emu Creek, previously named Wogoola, established 1891.²⁷

(c) The area associated with the Budina People is consistently referenced in the historical and ethnographic records as being in the general area of the Yannarie and Lyndon Rivers, and including Towera, Lyndon and Wogoola stations, by:

- i. Cameron, the original holder of the Towera pastoral lease in 1899;
- ii. Knight, the original holder of the Winning pastoral lease in 1900;
- iii. Radcliffe-Brown in 1912;
- iv. Bates, for the period 1900–1940;
- v. Tindale in 1952, whose account of the location of the Budina People accords closely with the application area.²⁸

(d) Radcliffe-Brown recorded the territorial organisation of people in the Gascoyne and Ashburton regions in 1910–1911 and identified the ‘Burduna’ as one of the ‘eleven tribes’ in the region;²⁹

(e) The application area contains several named significant sites, including a particular well that is known to the claimants and to people across the region.³⁰

[67] The additional material provides the following information about the association of the generations of the claim group since sovereignty:

(a) Jirbar and Tamiguru were recorded as the parents of apical ancestor Nora Lyndon by Radcliffe-Brown;³¹

²⁵ Schedule F [1].

²⁶ Additional material [1.2].

²⁷ Ibid [1.1]–[1.2].

²⁸ Ibid [1.3].

²⁹ Ibid [1.4.2].

³⁰ Ibid [1.3].

- (b) Nora Lyndon was likely to have been born between 1890–1905, and so her parents and grandparents were likely to have been born in the 1870s and 1880s respectively;³²
- (c) Radcliffe-Brown recorded that these ancestors were associated with the Budina and specifically with significant ‘pools’;³³
- (d) Nora Lyndon is also recorded by Tindale in 1939 as ‘of Lyndon Station’ and her son and his wife were working on Towera station in the 1950s, according to state records;³⁴
- (e) Apical ancestors Millie and Charlie are recorded as being present on Emu Creek and Towera stations in the years between 1940–1957; Millie was an elderly woman by the 1950s whose estimated date of birth was in latter half of the 19th century;³⁵
- (f) Bates and Radcliffe-Brown record a Budina woman named Topsy associated with the Towera station area, and Tindale recorded a genealogy which included Topsy’s children in 1953, by which time Topsy had passed away;
- (g) Topsy’s son Hamish is recorded at Towera station from 1956 and is remembered as a ‘grandfather’ to claim group members alive today;³⁶
- (h) Current claimants have knowledge of the application area and avoid certain places such as where burials have occurred, and observe prohibitions on access to a significant well in the application area, in accordance with their laws and customs;³⁷
- (i) Claimants (and their immediate predecessors) maintain their connection with the application area by undertaking seasonal work on the pastoral stations and through regular visits to camp, hunt, gather, fish and teach young people.³⁸

Is the factual basis sufficient to support the assertion at s 190B(5)(a)?

[68] I understand that in assessing the factual basis for the purposes of s 190B(5)(a), I am not obliged to accept very broad statements which have no geographical particularity.³⁹ I do not consider this application is of that nature. In my view, the information before me describes in a sufficient level of detail the association of the claim group with the application area, both at the time of settlement and since that time. I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

[69] I note the comments in *Strickland*, that ‘[t]he requirements of the registration test are stringent. It is not necessary to elevate them to the impossible’.⁴⁰ I also note the comments in *Lane*, that the Registrar’s statutory obligations should be performed with a degree of flexibility consistent with the beneficial nature of the legislation.⁴¹ I have therefore assessed the

³¹ Ibid [1.5.1].

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid [1.5.2].

³⁶ Ibid.

³⁷ Ibid [1.6.1].

³⁸ Ibid.

³⁹ *Martin* [25].

⁴⁰ *Strickland* [55].

⁴¹ *Lane* [9].

sufficiency of the factual basis by taking into account the particular features of this application, and applying this judicial guidance.

Does the application support an association between the claim group at sovereignty and since that time?

[70] According to the additional information, settlement in the application area did not occur until comparatively recently, with the establishment of pastoral stations occurring only in the late 19th century. The early settlers recorded the Budina People (variously spelled) in and around the application area and the early ethnographers recorded details of the apical ancestors and their families. I note in particular the information about Nora Lyndon and her parents, Jirbar and Tamiguru, who were likely born in the 1870s–1880s. In my view, the other ancestors who were alive around the time of settlement would also have had a similar association with the claim area as their parents and grandparents, who would have been alive in the pre-settlement era including at the time of sovereignty. As only a few generations separate the apical ancestors and the members of the claim group, an inference of the continuity of association can more easily be made. With regard to the intervening generations, I note the information about people working on the pastoral stations that cover the application area during the 20th century. For example, the predecessors of the Lyndon family are recorded as being ‘of Lyndon station’ and living on or nearby to that part of the application area.

Does the application support an association between the claim group and the area currently?

[71] The additional material states that the current claimants maintain their association with the application area through regular camping visits. Using the Tribunal’s geospatial database, I can see that the application area is remote and does not include any established towns or communities. Coral Bay is approximately 85 km to the west. Ningaloo lies 200 km to the north west and Carnarvon approximately 545 km to the south. Travelling east, Tom Price lies approximately 300 km away but is not directly accessible by road. Given the remote location, it follows that current claimants would need to travel to the application area to maintain their association. In my view, the information in the additional material about claimants visiting and camping in the application area, to hunt and fish using traditional methods and teach their descendants, is sufficient to support the assertion that there is an association between the current claim group and the area. I also note the information about a significant well in the application area and the prohibitions on access to it due to the presence of particular spirits, of which the claimants have knowledge. In my view, the claimants’ presence on the application area and their knowledge of its particular physical and spiritual features, supports the assertion of a current association.

Does the application support an association, both past and present, with the whole area claimed?

[72] I note that s 190B(5)(a) does not require the whole claim group to have an association with all of the application area at all times.⁴² Following this judicial guidance and noting the nature of this particular application area, I consider there is information in the application to support an association by the claim group, past and present, with the whole of the area claimed,

⁴² *Corunna* [31].

sufficient for the purposes of s 190B(5)(a). In forming this view I have had regard to information in the Tribunal's geospatial database which shows that the application area is almost entirely covered by the pastoral leases mentioned in the additional material. Given the information about claim group members working and living on these pastoral leases, dating back to the time of settlement, I am satisfied that there is an association with the whole area claimed.

Conclusion – s 190B(5)(a)

[73] I consider that the information before me is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the claim area. I am satisfied there is sufficient factual basis to support an assertion of an association of the claim group to the whole application area. This means s 190B(5)(a) is met.

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

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

[75] 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Applying the approach of Dowsett J in *Gudjala 2007*, I have interpreted s 190B(5)(b) in light of the judicial consideration of the meaning of those same words in s 223(1)(a).⁴³

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

...it conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs;*

...the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.⁴⁴

[77] In *Gudjala 2009*, Dowsett J provided further guidance to the Registrar in assessing the asserted factual basis, including that if descent from named ancestors is the basis for membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.⁴⁵

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

⁴³ *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.

⁴⁴ *Yorta Yorta* [46]–[47], emphasis added.

⁴⁵ *Gudjala 2009* [40].

- (a) a society which existed at sovereignty in the claim area, the members of which were united through their observance of normative rules;
- (b) a link between the pre-sovereignty society, the apical ancestors and the claim group; and
- (c) the continued observance of normative rules through the generations down to the current claim group, such that the normative rules can be described as ‘traditional laws and customs’.

What information has been provided in support of the assertion of a society at settlement?

[79] According to the additional material, the Budina People are part of a regional society of people who have common laws and customs and who recognise each other’s connection to their particular area of country.

[80] The additional material states that Radcliffe-Brown was the only researcher to address the topic of territorial organisation in the region. As discussed above, he identified the ‘Burduna’ as one of the eleven tribes in the region and noted the following about the social organisation of the region:

Each tribe is composed of a number of local groups. A local group consists of a number of persons who possess in common a certain defined territory or hunting ground. Membership of a local group is determined by inheritance in the male line; that is to say, a child belongs to the local group of his father.⁴⁶

[81] The additional material also states that the claim group are further identifiable within the regional society by their use of the Budina language.⁴⁷

What information has been provided in support of the assertion of traditional laws and customs?

[82] The additional material explains that Radcliffe-Brown’s ‘local groups’, now described as ‘totemic patrilineals’, are identifiable by their association with particular totems and totemic increase sites, which are manifestations of religious principles underlying the laws and customs, and which have been observed since sovereignty.⁴⁸

[83] Radcliffe Brown described the totemic affiliation between some of the ancestors of the claim group and ‘significant pools’; and the additional material also speaks of the importance of particular water sources to the current claimants, including prohibitions on who can enter such places.⁴⁹

[84] Both Radcliffe-Brown and Bates recorded the beliefs held by the predecessors of the claim group about the sentience of the landscape, including beliefs relating to the Watersnake; and current claimants adhere to the same or similar protocols when visiting locations associated with the Watersnake, which include ‘singing out’ and throwing sand.⁵⁰

⁴⁶ Additional material [1.4.2].

⁴⁷ Ibid [1.1].

⁴⁸ Ibid [1.4.2].

⁴⁹ Ibid [1.5.1], [161].

⁵⁰ Ibid [1.4.1], [1.6.1], [1.6.5].

[85] The families which make up the claim group have their origins in the original totemic patrilineal, as described by Radcliffe-Brown, and the rights to the application area arise from the same laws of patrilineality which were observed at the time of settlement.⁵¹

Is the factual basis sufficient to support the assertion of s 190B(5)(b)?

Does the factual basis address the identity of a pre-sovereignty society for the area?

[86] In my view, the information before me addresses the identity of a pre-sovereignty society for the region, identifiable through its members' mutual recognition of rights to land based on patrilineal and totemic associations. The Budina People, identifiable through their use of the Budina language, are one of 11 groups which comprise the regional society. The Court has previously held that '[i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, without the wider population being part of the claim group'.⁵²

Does the factual basis address the link between the pre-sovereignty society, the apical ancestors and the claim group?

[87] From the additional information, I understand that only a few generations separate the apical ancestors from the current claim group, as settlement in the claim area occurred comparatively recently. Senior informants to the early settlers and ethnographers would have lived with claim group members born before sustained European contact occurred. I understand from the application that the current claim group are the descendants of the apical ancestors, thus demonstrating the requisite link.

Is the factual basis sufficient to support the assertion of the existence of 'traditional laws and customs'?

[88] The additional material contains examples of laws and customs which were observed in the early years of settlement and which continue to be observed by the claim group today. These include laws and customs pertaining to totemic associations, patrilineal inheritance of rights to land, and prohibitions on access to particular places. The belief in the Watersnake and the practices that must be observed when interacting with this spirit-being, were recorded during the early 20th century and are observed by the current members of the claim group. The prohibitions on access to particular areas have been observed by successive generations of the claim group and are taught by current claimants to their children.⁵³ In my view, there is sufficient information about how the laws and customs were acknowledged and observed by the apical ancestors, the intervening generations and the current members of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.⁵⁴

Conclusion – s 190B(5)(b)

[89] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the application area. I am satisfied there is a link between the pre-

⁵¹ Ibid [1.4.2]–[1.4.3].

⁵² *Harrington-Smith No 5* [53].

⁵³ Additional material [1.6.4].

⁵⁴ *Yorta Yorta* [46]–[47].

sovereignty society in the claim area, the apical ancestors and the current members of the claim group. I am also satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by the claim group. This means s 190B(5)(b) is met.

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

[90] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests.⁵⁵ It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.⁵⁶

Is the factual basis sufficient to support the assertion of the continuity of traditional laws and customs?

[91] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the application area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. The additional material provides examples of how the laws and customs have been passed down to current members of the claim group by their predecessors, such as the example provided above about the prohibitions on access to particular areas observed by successive generations of the claim group and taught by current claimants to their children.⁵⁷ Other examples include traditional methods of hunting, fishing and preparing food, the skills for which were taught to the current claimants by their predecessors and are passed onto the younger generations during camping trips to the application area.⁵⁸

Conclusion – s 190B(5)(c)

[92] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the application area. This is because the material before me demonstrates that claimants possess knowledge about how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the application area around the time of settlement, so as to permit an inference that the claim group is a ‘modern manifestation’ of the pre-sovereignty society.⁵⁹ I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

Conclusion

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

⁵⁵ *Gudjala 2009* [29].

⁵⁶ *Gudjala 2007* [82].

⁵⁷ Additional material [1.6.4].

⁵⁸ *Ibid* [1.6.2].

⁵⁹ *Gudjala 2009* [31].

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

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

[95] I note the following judicial guidance about s 190B(6):

- (a) it requires some measure of the material available in support of the claim;⁶⁰
- (b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;⁶¹ and
- (c) the words ‘prima facie’ mean ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’.⁶²

[96] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register of Native Title Claims.

Which of the claimed rights and interests are established on a prima facie basis?

- (a) The right to enter and remain on the land, camp, erect temporary shelters and travel over and visit any part of the land and waters of the claim area

[97] As discussed above at ss 190B(5)(a)–(b), the additional material contains examples of members of the claim group being in the application area, both currently and throughout the historical period. There are examples of claim group members camping on the application area and visiting particular parts of it, including areas where particular customary practices must be observed.⁶³

- (b) The right to hunt, fish, gather, take and use the traditional resources of the land

[98] The additional material describes how claimants continue to access the application area to acquire game, and states that the skills of the younger Budina People are evidence of the transmission of custom through accompanying elders on hunting trips.⁶⁴ The additional material also describes claimants collecting plants, fruit, seeds, nuts and firewood in the application area, as well as animals and birds.⁶⁵ Claimants describe the types of fish and

⁶⁰ *Doepel* [126].

⁶¹ *Ibid* [132].

⁶² *Ibid* [135].

⁶³ Additional material [1.3], [1.4.1], [1.6.1].

⁶⁴ *Ibid* [1.6.2].

⁶⁵ *Ibid*.

worms found in river banks in the application area, similar to the details of fishing in the Gascoyne region recorded by Bates in the early 20th century.⁶⁶

(c) The right to take and use water

[99] As discussed above at ss 190B(5)(a)–(b), water sources have particular spiritual significance in the application area and are often associated with the Watersnake spirit-being. The additional material describes how, within the limitations imposed by the traditional laws and customs on access to such places, water is used for drinking, fishing and swimming.⁶⁷

(d) The right to engage in cultural activities on the claim area, including:

(i) visiting places of cultural or spiritual importance and maintain, caring for, and protecting those places by carrying out activities to preserve their physical or spiritual integrity; and

(ii) conducting ceremony and ritual and the transmission of cultural knowledge

[100] There is information in the historical record about the protocols undertaken by the predecessors of the claim group in relation to places of spiritual importance, such as calling out to the relevant spirit-beings, as discussed above. The additional material describes transmission of cultural knowledge, such as the correct distribution and consumption of animals.⁶⁸ The additional material also describes how involvement in the pastoral industry has provided opportunities to carry out preservation activities and cultural transmission on the lands and waters of the application area.⁶⁹

(e) The right to be accompanied on to the claim area by those people who, though not Budina People and who (for the avoidance of doubt) cannot themselves exercise any native title right in the claim area, are:

(i) the non-Budina spouses, parents or children of the Budina People; or

(ii) people entering in connection with, and subject to, traditional law and custom for the performance of ceremonies or cultural activities on the claim area

[101] The additional material states that oral history, and state records, document the residence of non-Budina spouses on Budina country throughout the 20th century.⁷⁰ Spouses' rights are contingent on their status as 'affines', which I understand is an anthropological term for kin by marriage, and these rights do not extend to ownership or the responsibility to speak for country.⁷¹ Claimants today continue to access the application area with their non-Budina spouses, parents and children for camping, hunting and fishing.⁷²

⁶⁶ Ibid.

⁶⁷ Ibid [1.6.3].

⁶⁸ Ibid [1.6.4].

⁶⁹ Ibid.

⁷⁰ Ibid [1.6.5].

⁷¹ Ibid.

⁷² Ibid.

[102] The additional material describes how claimants believe they have an obligation under their laws and customs to protect outsiders from harm while on their country.⁷³ This harm can be caused by the spirit-beings which are believed to inhabit the landscape, such as the Watersnake, discussed above. Given the risk of harm to both people and the country, it is necessary for strangers to be accompanied by claimants onto the application area so that claimants can introduce people to the spirit-beings in accordance with the traditional laws and customs, and prevent strangers from inappropriately accessing important areas.⁷⁴

Conclusion

[103] I am satisfied the application contains sufficient information about all of the rights claimed, such that they can be said to be established on a prima facie basis. I am also satisfied the claimed rights can be considered 'native title rights and interests'. This is because there is information in the application to show how those rights were observed at the time of settlement and in recent times. Additionally, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

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

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

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

[105] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.⁷⁵

Is there evidence that at least one member of the claim group has or had a traditional physical connection to any part of the claim area?

[106] Based on the information before me, I consider at least one claim group member currently has or had a traditional physical connection to the application area. There is sufficient information in the additional material to demonstrate how the members of the claim group continue to access the application area to camp, hunt, fish and protect significant sites. The additional material describes how, in addition to camping trips, the pastoral industry and cultural heritage surveys have provided opportunities for claimants to maintain their connection with the application area.⁷⁶

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ *Doepel* [18], *Gudjala 2009* [84].

⁷⁶ Additional material [1.6.4]–[1.6.5].

[107] I also consider the claim group members' connection is 'traditional' in the sense required by s 190B(7). I consider the claimants' knowledge of the claim area has been passed to them from the predecessors of the claim group while spending time on the application area. As I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, it follows that I am satisfied the current claim group members' connection with the application area is in accordance with those traditional laws and customs.

Conclusion

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

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

[109] To meet s 190B(8), 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.

[110] The application meets the requirements of s 61A:

Section	Requirement	Information addressing requirement	Result
s 61A(1)	No native title determination application if approved determination of native title	The geospatial report states and my own searches confirm that there are no approved determinations of native title in the area covered by this application.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B paras 2(a), (c) state that any area which is covered by a previous exclusive possession act is excluded from the application.	Met
s 61A(3)	Claimant applications not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule B para 3 states that the applicant does not claim native title rights to the exclusion of all others over areas in relation to which previous non-exclusive acts have been done.	Met

Conclusion

[111] I am satisfied the application does not disclose that the application should not have been made because of s 61A. I am not otherwise aware that the application should not have been made because of s 61A. This means that s 190B(8) is met.

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

[112] Section 190B(9) states that the application must not disclose, and the Registrar must not otherwise be aware that the claimed native title extends to cover the situations described in ss 190B(9)(a)–(c), as summarised in the table below:

Section	Requirement	Information addressing requirement	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states the applicant does not claim any native title interests to resources owned by the Crown.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states the applicant does not claim exclusive native title interests to an offshore place.	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	There is nothing in the application which discloses that the native title rights in the application area have otherwise been extinguished.	Met

Conclusion

[113] I am satisfied the application does not disclose that the claimed native title extends to cover the situations described in s 190B(9)(a)–(c), and I am not otherwise aware that these provisions are not met. This means that s 190B(9) is met.

End of reasons

Attachment A

Summary of registration test result

Application name	Clive Lyndon & Ors and State of Western Australia
NNTT No.	WC2019/010
Federal Court of Australia No.	WAD439/2019
Date of decision	15 November 2019

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

3 September 2019

Date application entered on Register:

15 November 2019

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

As per Schedule

Katy Woods

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

15 November 2019