



Registration Decision

Application name	Evelyn Gilla & Ors on behalf of the Yugunga-Nya People and State of Western Australia & Ors (Yugunga-Nya People)
Name of applicant	Evelyn Gilla, William “Bill” Shay, Leonie Gentle, Russel Little, Audrey Shar, Troy Little, Robyn Kelly, Elaine King, Nathaniel Blane, Leonard Barnard, Verna Vos
Federal Court of Australia No.	WAD29/2019
NNTT No.	WC1999/046
Date of Decision	7 August 2020

Claim not accepted for registration

I have decided the claim in the Yugunga-Nya People 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 ss 190B(5)–(7). It also does not satisfy s 190C(4).

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**)
Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (**Burragubba**)
De Rose v South Australia [2002] FCA 1342 (**De Rose**)
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 Western Australia (No 9) [2007] FCA 31 (**Harrington-Smith No 9**)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia [2016] FCA 910 (**Tjungarrayi 2016**)
Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938 (**Tjungarrayi 2017**)
Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (**Kanak**)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538; [2002] HCA 58 (**Yorta Yorta**)
Noble v Mundraby [2005] FCAFC 212 (**Noble**)
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (**Doepel**)
Quall v Native Title Registrar [2003] FCA 145 (**Quall v NTR**)
Risk v National Native Title Tribunal [2000] FCA 1589 (**Risk**)
Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26 (**Sampi FC**)
Strickland v Native Title Registrar [1999] FCA 1530 (**Strickland**)
State of Western Australia v Strickland [2000] FCA 652 (**Strickland FC**)
Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (**Wakaman**)
Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 (**Weribone**)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (**WA v NTR**)
Wiri People v Native Title Registrar [2008] FCA 574 (**Wiri People**)

Background

- [1] This application is made on behalf of the Yugunga-Nya native title claim group (**claim group**). It covers an area of approximately 30,280 square kilometres of the Goldfields and Murchison regions of Western Australia (**application area**).
- [2] This application was filed on 9 December 1999 and was entered on the Register of Native Title Claims (**Register**) on 12 June 2000, after being accepted for registration pursuant to s 190A(6).
- [3] The application was amended on 15 December 2014 and was accepted for registration on 21 January 2015 pursuant to s 190A(6A).

- [4] A further amended application was filed on 10 March 2020 and the Registrar of the Federal Court (**Court**) gave a copy to the Native Title Registrar (**Registrar**) that same day, pursuant to s 64(4). This referral triggered the Registrar's duty to consider the claim in the further amended application, which I will refer to as **the application** in my reasons below.² The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. The amendments to the application are greater than the changes prescribed by s 190A(6A), so that provision does not apply. Therefore, in accordance with s 190A(6), the claim must be accepted for registration if it satisfies all the conditions in ss 190B–190C (**the registration test**).
- [5] A number of s 29 notices have been issued over the application area. Section 190A(2)(f) requires that I use my best endeavours to finish testing the application before the end of four months of the notification date of the relevant s 29 notice. As a s 29 notice was issued over the application area on 8 April 2020, in accordance with s 190A(2)(f), I must use my best endeavours to finish testing the application for registration before the end of four months of that date, that is, before 8 August 2020.
- [6] For the reasons below, I consider the claim in the application does not meet all the conditions of the registration test. Attachment A contains a summary of my decision.

Procedural fairness

- [7] On 13 March 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative for 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 20 March 2020, as the issuing of a s 29 notice meant that I must use my best endeavours to finish considering the application by 3 April 2020.
- [8] On 16 March 2020, the senior officer wrote to the applicant's representative to advise that any additional information or submissions the applicant wished me to consider should be provided by 20 March 2020. The correspondence advised that in my preliminary view, the application was unlikely to pass the registration test as it was not accompanied by affidavits in the prescribed form, as required by s 190C(2), and there was limited factual basis material for the purposes of ss 190B(5)–(7).
- [9] On 19 March 2020, the applicant's representative wrote to the senior officer and provided the following documents for my consideration (**additional material**):
- (a) Yugunga-Nya Anthropology Report by Kim McCaul, dated 17 December 2019 (**McCaul Report**);
 - (b) Appendices A-C of the McCaul Report;
 - (c) Signed affidavit of Nathaniel (Nathan) Bann dated 28 November 2019;
 - (d) Signed affidavit of Robyn Kelly dated 28 November 2019;

² Section 190A(1).

- (e) Signed affidavit of Elaine King dated 28 November 2019 (in two documents, and missing two pages);
- (f) Signed affidavit of Leonard (Jeff) Barnard dated 28 November 2019;
- (g) Signed affidavit of Verna Vos dated 28 November 2019;
- (h) Signed affidavit of Selwyn Hegney dated 29 November 2019 (**authorisation affidavit**);
- (i) Unsigned draft affidavit of Audrey Shar;
- (j) Unsigned draft affidavit of William (Bill) Shay;
- (k) Unsigned draft affidavit of Evelyn Gilla;
- (l) Unsigned draft affidavit of Leonie Gentle;
- (m) Unsigned draft affidavit of Troy Little; and
- (n) Unsigned draft affidavit of Russell Little.

[10] The covering letter to the applicant's additional material advised that the affidavits listed above at (i) to (n) were prepared for the purposes of the registration test, however the relevant applicant members had not had an opportunity to sign their affidavits due to their residence in remote locations and the restrictions imposed as a result of the Covid-19 pandemic. The applicant's representative requested an extension of time until 10 April 2020, in order for the relevant applicant members to sign their affidavits, and submitted that alternatively, I could accept the unsigned affidavits for the purpose of the registration test.

[11] I considered the applicant's request and decided the extension of time was reasonable in the circumstances. Therefore, on 23 March 2020, the senior officer wrote to the applicant's representative and advised I had granted the extension and any additional material should be received by 9 April 2020, noting 10 April 2020 was a public holiday. That correspondence advised that because s 190C(2) stipulates applications be accompanied by the affidavits prescribed in s 62 (**s 62 affidavits**), in my preliminary view it was not open to the Registrar to consider affidavits which had not been filed in the Court for the purposes of s 190C(2). The correspondence further advised that I would now use my best endeavours to complete the registration testing of the application by 29 May 2020, that date being four months after the notification date of a s 29 notice issued over the application area.

[12] Also on 23 March 2020, sealed copies of the signed s 62 affidavits listed at (c)–(g) above, and a sealed copy of the authorisation affidavit, were received from the Court. The sealed affidavit of Elaine King was provided as one document and contained the pages which were missing from the additional material.

[13] On 24 March 2020, the senior officer wrote to the representative of the State to advise I had granted the extension of time requested by the applicant and I would now use my best endeavours to complete the testing of the application by 29 May 2020.

[14] On 9 April 2020, the applicant's representative wrote to the senior officer and advised that the relevant members of the applicant had not yet signed their affidavits, due to the travel restrictions imposed by the Covid-19 pandemic. The applicant's representative advised that the unsigned affidavits had been filed in the Court, pursuant to the Court's Information Note

'Special Measures in Response to COVID-19' (**Information Note**). As the Court was accepting unsigned affidavits during the pandemic, the applicant's representative requested that I accept the sealed versions of the unsigned s 62 affidavits for the purposes of the registration test, or alternatively delay the registration testing of the application for 6 months or until such time as the travel restrictions were lifted.

- [15] On 5 May 2020, the applicant's representative wrote to the senior officer to advise that he was currently in discussions with the Court about filing the unsigned affidavits. As the unsigned affidavits had not been filed, I decided that the circumstances warranted a further extension of time for the applicant to address the issue of the unsigned affidavits. Therefore, on 6 May 2020, the senior officer wrote to the parties to advise that I would now use my best endeavours to complete the registration testing of the claim by 3 July 2020, that date being four months after the notification date of a s 29 notice issued over the application area.
- [16] On 12 May 2020, a signed and sealed copy of the s 62 affidavit of Troy Little was received from the Court.
- [17] On 14 May 2020, sealed copies of the remaining five unsigned s 62 affidavits were received from the Court.
- [18] Also on 14 May 2020, the senior officer received an unsolicited submission opposing the amendments to the composition of the claim group from Ms [name removed], signed by herself and nine others described as the 'Traditional Owners of Our Yugunga-Nya Peoples' (**unsolicited information**).
- [19] On 19 May 2020, the senior officer wrote to the representative of the State to advise that the applicant had provided the additional material for my consideration, and should the State wish to comment or provide submissions, it should do so by 2 June 2020. That correspondence enclosed a copy of the Information Note, as I considered it was relevant to the applicant's submission that the sealed versions of the unsigned s 62 affidavits should be accepted for the purposes of the registration test. The correspondence also enclosed a confidentiality agreement with respect to the provision of the McCaul Report and its appendices.
- [20] On 26 May 2020, the representative of the State advised that the State did not intend to make submissions on the application's ability to pass the registration test. The confidentiality agreement was not signed by the State and so it was not provided with a copy of the McCaul Report or its appendices.
- [21] On 25 June 2020, the senior officer wrote to Ms [name removed] and advised that, should she wish me to take into account the information in her submission when making the registration test decision, procedural fairness would require me to provide a copy to the applicant and/or the State for comment. Also on 25 June 2020, Ms [name removed] advised the senior officer that she consented to her submission being provided to the applicant and/or the State.
- [22] I considered the application, the additional information, the sealed copies of the s 62 affidavits and the unsolicited information. I formed the preliminary view that there were deficiencies which would mean that the application would be unlikely to meet the condition at s 190C(4). Therefore, on 29 June 2020, the senior officer wrote to the applicant's representative to

provide my preliminary assessment and advised that any additional information the applicant wished me to consider should be provided by 10 July 2020. That correspondence also enclosed a copy of the unsolicited information for the applicant's comment and advised that I would now use my best endeavours to complete the registration testing of the application by 7 August 2020.

- [23] Also on 29 June 2020, the senior officer wrote to the representative of the State to advise that I had given the applicant until 10 July 2020 to respond to my preliminary assessment of the application, and that I would now use my best endeavours to complete the registration testing of the application by 7 August 2020.
- [24] Also on 29 June 2020, the applicant's representative contacted the senior officer and drew attention to a typographical error in my preliminary assessment. An amended version of my preliminary assessment, which corrected that typographical error, was provided to the applicant on 29 June 2020.
- [25] No further information or submissions were received from the applicant and so this concluded the procedural fairness process.

Information considered

- [26] In accordance with s 190A(3)(a), I have considered the information in the application and the additional material, as outlined above. I have considered the information in the sealed s 62 affidavits, both signed and unsigned, as provided by the Court.
- [27] There is no information before me from searches of State or Commonwealth interest registers obtained by the Registrar under s 190A(3)(b).
- [28] As noted above, the State has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim. I have otherwise considered the following information in accordance with s 190A(3)(c):
- (a) the unsolicited information;
 - (b) information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 12 March 2020 (**geospatial report**);
 - (c) information in the Tribunal's geospatial database; and
 - (d) information in the Register.

Section 190C: conditions about procedures and other matters

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

- [29] 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.³ I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

[30] With regard to s 62, I have considered this claim against the requirements of that provision as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) on 1 September 2007. That legislation made some minor technical amendments to s 62 which only apply to claims made from 1 September 2007 onwards, and the claim before me was made before that date.

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group has authorised the applicant	Part A(2), Schedule A, s 62 affidavits	Met, see reasons below
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 61(1)

[32] The table in s 61(1) identifies that a claimant native title determination application may only be made by:

a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

[33] As noted above, I understand that my assessment at this condition does not require me to undertake a merit assessment, but only to consider the adequacy of the description for ascertaining whether any particular person is a member of the identified claim group.⁴ Schedule A provides a description of the claim group, and Part A and the s 62 affidavits state that the applicant was authorised by the members of the claim group to make the application. In my view, it does not appear that the application, on its face, has not been made by or on behalf of all members of the claim group. I am therefore satisfied that s 61(1) is met.

[34] 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	Met, see reasons below
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, Attachment D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met

³ *Doepel* [16], [35]–[39].

⁴ *Ibid* [37].

s 62(2)(e)	Description of factual basis	Schedule F, Attachment F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

Section 62(1)(a)

[35] The s 62 affidavits all contain statements which I consider are sufficient for the purposes of s 62(1)(a). As discussed above, five of the 11 members of the applicant have not signed their respective s 62 affidavits. The applicant submits that I should accept the unsigned affidavits for the purposes of the registration test, citing the Court’s Information Note about the filing of unsigned affidavits during the Covid-19 pandemic. In this case, the Court has accepted the five unsigned affidavits and the State has not commented on whether the unsigned affidavits should be accepted for the purposes of the registration test. In these exceptional circumstances, I am prepared to accept the unsigned affidavits for the purposes of s 190C(2).

Conclusion

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

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

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

[38] 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.

Conclusion

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

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

[40] 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.

[41] Schedule R states that the application has not been certified and so I must consider whether the applicant has been authorised to make the application in accordance with s 190C(4)(b).⁵

What is required to meet s 190C(4)(b)?

[42] Section 190C(4)(b) requires that the applicant be:

- (a) a member of the claim group; and
- (b) authorised to make the application, by all the other members of the claim group.

[43] Following s 190C(4)(b) there is a note in the Native Title Act referring to the definition of ‘authorising the making of applications’ in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision making is utilised:

- (a) a process which, under the traditional laws and customs of the claim group, must be complied with, or
- (b) where there is no traditional process, a process agreed to and adopted by the claim group.

[44] The definition of ‘native title claim group’ in s 253 refers to s 61(1), which provides that a person may make a native title determination application if they are:

a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

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

- (a) includes a statement to the effect that the requirement in s 190C(4)(b) has been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

[46] I therefore understand that in order to be satisfied that s 190C(4)(b) is met:

- (a) one of the decision making processes outlined in s 251B must be identified and complied with;
- (b) authorisation must be given by the claim group as described in s 61(1); and
- (c) the requirements of s 190C(5) must be met.

⁵ Schedule R [35].

Information provided

[47] The information I have before me which addresses this condition is found in:

- (a) The application;
- (b) The s 62 affidavits;
- (c) The authorisation affidavit;
- (d) The McCaul Report and
- (e) The unsolicited information.

Does the application satisfy s 190C(5)?

[48] Each of the s 62 affidavits contains a statement that the deponent is a member of the claim group.⁶ Attachment R states that the applicant was authorised by the claim group at two meetings, one held on 19 November 2019 in Meekatharra (**Meekatharra meeting**) and the other held on 21 November 2019 in Perth (**Perth meeting**), which I will refer to collectively as **the authorisation meetings** where appropriate in my reasons below.⁷

[49] In *Strickland*, French J commented that the insertion of the word ‘briefly’ in s 190C(5)(b) ‘suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained’.⁸ In light of this comment, I am satisfied that the statements in Attachment R and the s 62 affidavits are sufficient to meet the requirements of s 190C(5).

Does the application satisfy s 190C(4)(b)?

Is the applicant a member of the claim group?

[50] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group. The s 62 affidavits from the applicant members each contain such a statement.⁹ In the absence of any information to the contrary, I am satisfied that the members of the applicant are all members of the claim group.

Is the applicant authorised to make the application by all the other persons in the claim group?

[51] Section 190C(4)(b) also requires that the applicant is authorised to make the application, by all the other members of the claim group. This requires me to identify the decision making process used by the claim group and how it was applied to authorise the applicant to make the application.¹⁰ I am also required to consider the composition of the claim group and be satisfied ‘that the claimants truly constitute a group’.¹¹

⁶ Section 62 affidavits [1].

⁷ Attachment R [1], [7]–[30].

⁸ *Strickland* [57].

⁹ Section 62 affidavits [1].

¹⁰ *Noble* [16].

¹¹ *Risk* [60]–[62]; *Wiri People* [28]–[36].

Which decision making process under s 251B has been identified?

[52] Where a claim group does not have a traditional decision making process, s 251B(b) provides that a claim group may use an agreed to and adopted decision making process to authorise an applicant to make a native title determination application. I consider that the material identifies a process permitted by s 251B(b), as Attachment R and the authorisation affidavit state that the claim group resolved that they did not have a traditional decision making process, and agreed to and adopted a decision making process using a secret ballot, with resolutions carried by a simple majority from the total sum of votes cast at the Meekatharra meeting and the Perth meeting.¹²

How was the decision making process applied?

[53] In order to be satisfied that the necessary authorisation has been given by the claim group in accordance with the identified decision making process, I must inquire through the material available to the Registrar, including any anthropological material.¹³ Where an agreed to and adopted decision making process is used, I must be satisfied that the members of the claim group were given every reasonable opportunity to participate in the decision to authorise the applicant to make the application.¹⁴ In my view this task requires consideration of the notice and conduct of the authorisation meetings.

Notice of authorisation meetings

[54] The authorisation affidavit provides that the meeting notice for the Meekatharra meeting and the Perth meeting was published in:

- (a) National Indigenous Times, 23 October 2019;
- (b) The West Australian, 24 October 2019;
- (c) The Geraldton Guardian, 29 October 2019;
- (d) The Midwest Times; 30 October 2019;
- (e) Koori Mail, 6 November 2019; and
- (f) The Yugunga-Nya People's Trust website, 25 October 2019.¹⁵

[55] The authorisation affidavit states that copies of the meeting notice were sent to the offices of the Shires of Meekatharra and Cue on 22 October 2019, with a request that they be placed on the Shires' public notice boards.¹⁶

[56] The authorisation affidavit also states that personal notice by mail was given to approximately 250 'potential claimants', whose postal details were held by the trustee for the Yugunga-Nya Peoples Trust.¹⁷ Only nine of those notices were returned as 'not at this address'.¹⁸

¹² Attachment R [12]–[13]; [23]–[24]; authorisation affidavit [21]–[22].

¹³ *Doepel* [78]; *Strickland FC* [78].

¹⁴ *Lawson* [25].

¹⁵ Authorisation affidavit [12]–[13].

¹⁶ *Ibid* [14].

¹⁷ *Ibid*.

¹⁸ *Ibid*.

[57] Annexed to the authorisation affidavit is a copy of the meeting notice as it appeared in the Geraldton Guardian.¹⁹ Under the heading ‘Who may attend the Information Sessions and Authorisation Meetings’, the meeting notice states:

The Information Sessions and Authorisation Meetings are open to those Aboriginal people who meet the following description, or believe they should meet it:

Those Aboriginal people who:

- (a) Under the traditional laws and customs of the Western Desert, have a spiritual connection to the claim area and the *Tjukurpa* associated with it on the basis of one or more of the following:
 - i. the claim area is his or her country of birth (also reckoned by the area where his or her mother lived during the pregnancy); or
 - ii. he or she has traditional geographical and religious knowledge of the claim area through a long-term association with the area; or
 - iii. he or she has an affiliation to the claim area through a parent or grandparent with a connection to the claim area as specified in sub-paragraphs (a) or (b) [sic] above;

and

- (b) who are recognised under the traditional laws and customs by the other native title holders as having rights in the claim area.

This currently includes the descendants of **Annie Wilba, Dolly Ward and Jimmy Wheelbarrow.**

(the proposed **Amended Claim Group Description**).²⁰

[58] Under the heading ‘Registering for an Information Session & Authorisation Meeting’, the notice states:

Members of the current claim group and/or the amended claim group are required to register by stating the name of the apical ancestor through whom they assert rights and interests in the Yugunga-Nya claim area, or by stating the other basis on which they claim to fall within the proposed Amended Claim Group Description.²¹

[59] The meeting notice states that the purpose of the information sessions was to provide information about matters to be discussed at the authorisation meetings. The stated purpose of the authorisation meetings includes amending the claim group description to that set out above and to confirm the existing applicant or authorise a new applicant group.²² The meeting notice includes a map of the application area and two contact numbers to register attendance, and notes that ‘[c]laimants and prospective claimants can attend the Information Session and Authorisation Meeting in Meekatharra OR Perth, but not in both locations’.²³

[60] The venues of the authorisation meetings are set out in the notice, along with the dates and times as follows:

- (a) The Meekatharra meeting on 19 November 2019, comprising of:
 - i. An information session from 10am–12pm, with registration from 9am;

¹⁹ Ibid [12]; annexure [SEH4].

²⁰ Authorisation affidavit, annexure [SEH4], original emphasis.

²¹ Ibid.

²² Ibid.

²³ Ibid.

- ii. An authorisation meeting from 1pm–3pm, with registration from 12pm.
- (b) The Perth meeting on 21 November 2019, comprising of:
- i. An information session from 10am–12pm, with registration from 9am;
 - ii. An authorisation meeting from 1pm–3pm, with registration from 12pm.

Conduct of authorisation meetings

Meekatharra meeting

- [61] The authorisation affidavit provides that registration for the Meekatharra meeting commenced at 9am, and at 10am, after confirmation of the independent Chairperson and introductory remarks, two members of the applicant requested that the information session be cancelled due to a death in the community the preceding day.²⁴ The authorisation affidavit explains that, '[a]s most of the attendees had attended the previous Information Sessions, the most [recent] being on 19 September 2019', the agent of the applicant's representative proposed that a resolution be put to the attendees for the information session be cancelled and that the authorisation meeting commence, and that resolution was 'unanimously carried by a show of hands'.²⁵
- [62] According to the authorisation affidavit, 36 people had registered their attendance, all of whom were descendants of apical ancestor Wilba, who was the only apical ancestor named in the previous claim group description.²⁶ A copy of the attendance register for the Meekatharra meeting is annexed to the authorisation affidavit.²⁷
- [63] A copy of the agenda for the Meekatharra meeting is also annexed to the authorisation affidavit, however I understand that this does not reflect the conduct of the meeting as it specifies the authorisation meeting commenced at 1pm, whereas the authorisation affidavit provides that the authorisation meeting commenced shortly after 10am, immediately after the cancellation of the information session.²⁸
- [64] The authorisation affidavit explains that the Meekatharra meeting was conducted in two parts: the first part was for the members of the claim group as it was previously described and the second part was for the members of the amended claim group, as described in the meeting notice.²⁹ The resolutions for the first part of the meeting were printed on a blue ballot paper and the resolutions for the second part were printed on a yellow ballot paper.³⁰ Example copies of both ballot papers are annexed to the authorisation affidavit.³¹ Four resolutions appear on the blue ballot paper used for the first part of the meeting, on which the members of the then current claim group were instructed to mark either 'Yes' or 'No'.³² The resolutions which were put to the then current members of the claim group on the blue ballot paper were:

²⁴ Authorisation affidavit [17]–[19].

²⁵ *Ibid.*, [19].

²⁶ *Ibid.*

²⁷ Authorisation affidavit, annexure [SEH6].

²⁸ Authorisation affidavit [19], annexure [SEH5].

²⁹ *Ibid.* [20].

³⁰ *Ibid.*

³¹ Authorisation affidavit, annexures [SEH7]–[SEH-8].

³² *Ibid.*

- (a) Resolution 1: There is no decision-making process, under traditional laws and customs, that must be complied with in relation to authorising the making of native title determination applications;
- (b) Resolution 2: The decision-making process agreed to and adopted is that:
 - (a) There will be two meetings of native title claim group members: one meeting in Meekatharra on 19 November 2019 and the second meeting in Perth on 21 November 2019;
 - (b) Claim group members can attend and vote at only one meeting;
 - (c) Voting on each resolution will occur by secret ballot;
 - (d) Resolutions will be carried by a simple majority of votes (50% plus 1) calculated from the total sum of votes that are cast at the two meetings; and
 - (e) In the event that there is a majority of votes for resolution 5 and 6 [on the yellow ballot paper], the resolution with the highest number of votes will be carried.
- (c) Resolution 3: The 'right people are at today's meeting for decisions to be made about the Yugunga-Nya native title claim'; and
- (d) Resolution 4: The claim group description should be changed to that which appeared in the meeting notice, with the name of apical ancestor Dolly Ward amended to 'Dolly Ward Bootha'.³³

[65] The authorisation affidavit states that the deponent explained the first three resolutions and the attendees proceeded to record their votes on those resolutions on the blue ballot paper.³⁴ The deponent then explained the changes to the claim group description set out in Resolution 4.³⁵ The authorisation affidavit provides that the attendees asked some questions about that resolution which were addressed by the deponent, his agent or the Chairperson, and the attendees then proceeded to record their vote on Resolution 4 on the blue ballot paper.³⁶

[66] The authorisation affidavit provides that after a short break, the Chairperson reopened the meeting at 10.50am and advised that the second part of the meeting would involve the yellow ballot paper.³⁷ The authorisation affidavit states that the second part of the meeting was for all the people who fell within the proposed claim group description and that all the attendees who had registered fell within that description.³⁸

[67] Seven resolutions appear on the yellow ballot paper used for the second part of the meeting, on which members of the newly described claim group were similarly instructed to mark 'Yes' or 'No'.³⁹ The first four resolutions are the same as those on the blue ballot paper. Resolutions 5 and 6 both concern the authorisation of the applicant. As these resolutions are referred to in the agreed to and adopted decision making process contained in Resolution 3, I will set them out in full. Resolution 5 states:

³³ Ibid.

³⁴ Authorisation affidavit [23].

³⁵ Ibid [23]–[24].

³⁶ Ibid [25].

³⁷ Ibid [27].

³⁸ Ibid.

³⁹ Authorisation affidavit, annexure [SEH8].

The current Applicant comprising Evelyn Gilla, Rex Shay, William "Bill" Shay, Leonie Gentle, Russell Little, Audrey Shar, Troy Little is authorised to make the application and to deal with all matters arising under the *Native Title Act 1993* (Cth) in relation to it, subject to any specific directions that may be the subject of further resolutions made at this meeting.⁴⁰

[68] Resolution 6 states:

The current Applicant comprising Evelyn Gilla, Rex Shay, William "Bill" Shay, Leonie Gentle, Russell Little, Audrey Shar, Troy Little is no longer authorised to make the application and to deal with all matters arising under the *Native Title Act 1993* (Cth) in relation to it and, instead, a replacement Applicant comprising Evelyn Gilla, William "Bill" Shay, Leonie Gentle, Russell Little, Audrey Shar, Troy Little, Robyn Kelly, Elaine King; Nathaniel Bann, Leonard Barnard and Verna Vos is authorised by the claim group to make the application and to deal with all matters arising in relation to it.⁴¹

[69] Two further resolutions appear on the yellow ballot paper which concern the establishment of a working group for an agreement and the appointment of a trustee.⁴²

[70] The authorisation affidavit provides that after the attendees voted using the yellow ballot paper, the deponent reminded the Meekatharra meeting that votes would be counted after the attendees at the Perth meeting had also voted on the resolutions, and the meeting closed at 12.05pm.⁴³

Perth meeting

[71] With regard to the conduct of the Perth meeting, the authorisation affidavit states that individuals who were not on the 'members' list' provided by the trustee of the Yugunga-Nya People's Trust were asked to complete a 'Family Information Form', 'to establish whether the individual falls within the proposed claim group description'.⁴⁴ Sixteen Family Information Forms were completed and the forms which related to the Ashwin family were photographed and discussed by telephone with an anthropologist from Yamatji Marlpa Aboriginal Corporation (YMAC), as it had been arranged that they would 'assess the eligibility of attendees'.⁴⁵

[72] The authorisation affidavit provides that the information session commenced at 10am and involved two powerpoint presentations on legal aspects of the claim and anthropological research which had informed the drafting of the proposed claim group description.⁴⁶ Copies of those presentations are annexed to the authorisation affidavit.⁴⁷

[73] The authorisation affidavit provides that the information session finished at 12.05pm and that during lunch, the deponent was advised that YMAC had provided information that 'approximately 8 people who were related to Bill Ashwin were not eligible to attend the Authorisation Meeting', and that these people were then informed by the deponent and his agent that they could not attend the authorisation meeting.⁴⁸ The affidavit of applicant member Verna Vos states that advice from YMAC was provided to her by the applicant's

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Authorisation affidavit [31]–[34].

⁴⁴ Ibid [35].

⁴⁵ Ibid [36].

⁴⁶ Ibid [37]–[38].

⁴⁷ Authorisation affidavit, annexure [SEH1], [SEH11] and [SEH12].

⁴⁸ Authorisation affidavit [39]–[40].

representative by text message, which listed the names of the relevant individuals and in relation to each of them, stated 'not part of Form 1 or research description – Bill Ashwin'.⁴⁹ Ms Vos states that, despite registering her attendance at the authorisation meeting, she stayed outside with the members of the Ashwin family 'so that matters did not get out of hand'.⁵⁰

[74] The authorisation affidavit states that 25 people attended the Perth meeting, which I understand to be a typographical error as the copy of the meeting register is annexed, which shows that 27 people registered their attendance, however as discussed above, Verna Vos registered but did not attend.⁵¹ Although it is not specifically stated, I understand that the same independent Chairperson was appointed at the Perth meeting.⁵² The same process of blue and yellow ballot papers was used, with the members of the claim group as it was previously described voting on the resolutions on the blue ballot paper, followed by all the attendees voting on the resolutions on the yellow ballot paper.⁵³ No agenda for the Perth meeting has been provided, nor details of any discussion at the Perth meeting pertaining to any of the resolutions.

Ballot counting

[75] According to the authorisation affidavit, following the Perth meeting on 21 November 2019, the independent Chairperson acted as the scrutineer for the counting of the ballot papers from both meetings.⁵⁴ The blue ballot papers from both meetings were counted, and as each resolution was successfully carried, the yellow ballot papers were then counted.⁵⁵ Annexed to the authorisation affidavit is a copy of the Scrutineer's Report which records that all the resolutions on both the blue and yellow ballot papers were carried, save for Resolution 5 on the yellow ballot paper.⁵⁶ That resolution, reproduced above, required meeting attendees to vote 'Yes' or 'No' to authorise the then existing members of the applicant. By Resolution 6, which passed 62:0 with no abstentions or invalid votes, the new members of the applicant were authorised to make the application.⁵⁷

Claim group composition

[76] The previous description of the claim group read as follows:

1. Evelyn Gilla, William Shay, Name withheld for cultural reasons and Rex Shay;
2. The biological descendants of 'Wilba' (the Grandmother of Evelyn Gilla).⁵⁸

[77] Wilba is now one of three apical ancestors named in the amended claim group description, which now also permits claim group membership through birth on the application area or long association with it.

⁴⁹ Affidavit of Verna Vos, 28 November 2019 [9].

⁵⁰ Ibid [10].

⁵¹ Authorisation affidavit [42], annexure [SEH9].

⁵² Authorisation affidavit [37].

⁵³ Ibid [42]–[45].

⁵⁴ Ibid [46]–[51].

⁵⁵ Ibid.

⁵⁶ Authorisation affidavit, annexure [SEH13].

⁵⁷ Ibid.

⁵⁸ Authorisation affidavit, annexure [SEH4].

- [78] The unsolicited information appears to assert that it is only the descendants of Wilba who are Yugunga-Nya People and states that ‘disclaimers [*sic*] like Dolly Ward, Wheelbarrows & Ashwin Families’ will ‘have to show proof’.⁵⁹ Under the heading ‘This is the list of Traditional Owners of our Yugunga-Nya Peoples – Tjkurpa Tribe Dadawonga Boundary – all signatures of our peoples’, there is a list of 10 people, signed and dated between 29 April 2020 and 11 May 2020. I have compared this list with the information in the application and it appears that all but two of these people registered their attendance at one of the authorisation meetings.⁶⁰ The signatories to this document include the lead applicant, Evelyn Gilla, whose signature is dated 29 April 2020. The s 62 affidavit of Evelyn Gilla has not been signed, and the applicant has not provided any information to address the unsolicited information.⁶¹
- [79] I understand from the authorisation affidavit that the new claim group description was the result of anthropological research found in the McCaul Report.⁶² The proposed claim group description in the McCaul Report differs from that in the meeting notice and Schedule A in that the final sentence of McCaul’s proposed description reads: ‘This currently includes the descendants of Annie *Wilba*, Dolly Ward and Jimmy Wheelbarrow, *as well as any other individuals or families who meet the above criteria*’.⁶³ In the meeting notice and in Schedule A, the final phrase regarding other individuals or families has been removed. No explanation has been provided by the applicant as to why the claim group description proposed by McCaul was not used for the meeting notice or on what basis or authority those changes were made prior to the publication of the notice.

Consideration

- [80] I understand that the task at s 190C(4) differs from that at s 190C(2). Section 190C(2) only requires me to be satisfied that the application contains the details required by s 61 and s 62. The difference between s 190C(2) and s 190C(4) was summarised in *Wiri People*, where Collier J held:

In relation to s 190C(2), the Registrar must be satisfied as to *the contents of the application* and that it contains the information required by ss 61 and 62... whereas in relation to section 190C(4) the Registrar must be satisfied as to the *identity* of the claimed native title holders including the applicant.⁶⁴

- [81] In *Harrington-Smith No 9*, Lindgren J held:

[T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4).⁶⁵

- [82] My task here also differs from that at s 190B(3), where I am not to consider the correctness of the claim group description or whether there is a ‘cogent explanation’ of the basis upon which

⁵⁹ Covering email to unsolicited information, 14 May 2020.

⁶⁰ See authorisation affidavit, annexures [SEH6], [SEH9].

⁶¹ Affidavit of Evelyn Gilla, dated 12 May 2020 (unsigned).

⁶² Authorisation affidavit [38].

⁶³ McCaul Report [670], emphasis added.

⁶⁴ *Wiri People* [29], original emphasis.

⁶⁵ *Harrington-Smith No 9* [1216].

individuals qualify for membership of the claim group.⁶⁶ In contrast, the Court has held that s 190C(4)(b) requires consideration of the composition of the claim group to ascertain whether the authorisation of the applicant has come from all the persons in the claim group, as defined in s 61(1), as being the persons who hold common or group rights and interests in the application area. In *Risk*, O’Loughlin J held:

A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute a group.⁶⁷

- [83] I understand from the case law that while the claim group description may be sufficient for the purposes of s 190B(3) (as I discuss below), this does not relieve me of my task at s 190C(4)(b) of ascertaining whether the applicant has been authorised by the persons who hold common or group rights and interests in the application area.
- [84] I note it is not my task to embark upon a fact finding exercise, however if there is uncertainty as to the claim group composition, this affects my ability to be satisfied that the application meets the requirements of s 190C(4)(b) (as well as ss 190B(5)–(7), as discussed further below).⁶⁸
- [85] In my view, the notice of the authorisation meeting was wide-reaching and comprehensive, with the public notice printed in a number of publications distributed in the region of the application area, as far as Geraldton and Perth, and in the national publications of the National Indigenous Times and the Koori Mail. The notice was sent to Shire Council offices to place on their public notice boards and was published online on the Yugunga-Nya Peoples Trust website. Personal notice was also distributed to the members of the Yugunga-Nya People whose details were held by the trustee, which in my view supplemented the broad public notice. The notice included all the details of the authorisation meetings. It also stated the purpose of the authorisation meetings, which in my view gave fair notice of the business to be dealt with, and would have enabled members and potential members of the claim group to judge for themselves whether to attend the meetings.⁶⁹
- [86] I note the invitation in the meeting notice was broad, as it stated that it was ‘open to those Aboriginal people who meet the [amended claim group] description, *or believe they should meet it*’, to attend either the Meekatharra or Perth meeting.⁷⁰ I note there is a typographical error in paragraph (iii) of the notice, which refers to paragraphs ‘(a) or (b) above’ when in fact the relevant paragraphs above are numbered ‘(i)’ and ‘(ii)’. In my view, this is a minor error which did not result in the invitation excluding people who hold or claim to hold native title in the application area. I consider it is appropriate to read the meeting notice as a whole and I note that it included a map of the application area and surrounds.
- [87] Turning to the conduct of the Meekatharra meeting, in my view the decision to hold the authorisation meeting nearly three hours earlier than scheduled may have had the effect of excluding people from the decision to authorise the applicant. While the authorisation

⁶⁶ *Doepel* [37]; *Gudjala 2007* [28]–[34].

⁶⁷ *Risk* [60].

⁶⁸ *Doepel* [47].

⁶⁹ *Weribone* [40]–[41], followed in *Burragebba* [30]–[31].

⁷⁰ Authorisation affidavit, annexure [SEH4], emphasis added.

affidavit states that most of the attendees at the Meekatharra meeting had attended previous information sessions, I have no information before me about those sessions, save for one notice for the 19 September 2019 meeting which has been provided.⁷¹ I do not consider that previous participation in an information session by the people who attended the Meekatharra meeting from 10am is a sufficient basis on which to assume that no additional people were planning on attending the authorisation meeting, scheduled for 1pm, particularly noting the wide public notification of the meeting which had occurred.

- [88] With regard to the Perth meeting, I do not consider the applicant has sufficiently explained why particular people were excluded. Such exclusion appears contrary to the meeting notice which stated that the meeting was open to people who believed they may meet the criteria of the amended claim group description, which permits different pathways to membership. It also appears from the authorisation affidavit that the members of the Ashwin family attended the information session component of the Perth meeting, and if there was any concern from other claim group members about their attendance, this has not been specified in the material from the applicant. The authorisation affidavit and the affidavit of Verna Vos indicate that the Ashwin family were excluded from the authorisation meeting on the basis of the advice from YMAC, which appeared to be based on an unspecified relationship between each of them and Bill Ashwin. Noting the multiple pathways under which membership of the claim group can be attained, as well as the Ashwins' apparent attendance at the information session, it is not clear to me what the reasons for this exclusion were, or whether this exclusion was supported by the claim group members in attendance at the Perth meeting.
- [89] Regarding the conduct of the authorisation meetings, it appears that the voting process by secret ballot, the proposed changes to the claim group description and proposed members of the applicants were all determined prior to the meetings. While attendees were able to vote on these predetermined resolutions, there does not appear to have been any opportunity to put alternative resolutions forward or propose alternative applicant members for consideration.
- [90] In summary, from the information before me, I consider that the conduct of the authorisation meetings was such that I am unable to be satisfied that the applicant is authorised by all the members of the claim group. Firstly, there may have been members of the claim group who were unable to attend the Meekatharra meeting, due to it being held some three hours earlier than advertised, and so did not have an opportunity to vote on the resolutions. Secondly, it appears that people who claim to hold native title in the application area were excluded from attending the Perth meeting, contrary to the broad invitation in the meeting notice and for reasons which I do not consider are fully explained. Thirdly, the particular voting process used may have predetermined the outcomes of the authorisation meetings to some extent, as all of the resolutions were drafted in advance. With regard to the applicant members named in Resolution 6, it appears that they were chosen in advance of the printing of the ballot papers and of the authorisation meetings, and I have no information about the basis on which those individuals were chosen.

⁷¹ Authorisation affidavit [19], annexure [SEH3].

- [91] From the unsolicited information, it appears that at least some of the descendants of Wilba do not agree with the amendment to the claim group description, including the lead applicant Evelyn Gilla. The unsolicited information was signed by the descendants of Wilba during April and May 2020, which is the period over which the applicant’s representative advised that the applicant members were unable to sign their s 62 affidavits. While I accept that having a document witnessed for the purposes of filing it in the Court may present some additional difficulties, the fact the lead applicant was able to sign a document during this same period which was then provided to the Tribunal raises questions in my mind as to whether the lead applicant’s unsigned s 62 affidavit reflects her position with regard to the amended claim group description.
- [92] It appears from the unsolicited information that at least some of the descendants of Wilba do not wish the Ashwin family to be part of the claim group and advice to this effect was provided by YMAC. However members of the Ashwin family attended the Perth information session and attempted to attend the Perth authorisation meeting, presumably on the basis that they believed they met the criteria of the advertised claim group description. Limited explanation has been provided by the applicant about their exclusion and this issue raises further uncertainties as to the composition of the claim group which I am not in a position to resolve.
- [93] In *Quall v NTR*, Mansfield J discussed the requirements of s 190C(4)(b) in circumstances where the delegate was not satisfied that an application was made on behalf of a properly described or constituted claim group under s 61(1). His Honour held that:
- Section 251B makes it clear that authorisation must be given by all the persons in the native title claim group in accordance with the process of decision-making under traditional laws and customs, unless there is no such process. ***It followed, from the delegate’s view that the claim group was not properly described or constituted, that the applicant was not authorised on behalf of all the persons in the native title claim group.***⁷²
- [94] In my view, there are too many discrepancies in the material for me to be satisfied that the claim group, as described in Schedule A, is properly constituted. Separate to my concerns about the conduct of the authorisation meetings, the uncertainty of the claim group constitution means that I am not able to be satisfied that the applicant is authorised by all the members of the claim group.

Conclusion

- [95] I am satisfied that s 190C(5) is met. However, I am not satisfied that the applicant is authorised by all the other members of the claim group to make the application. This means s 190C(4)(b) is not met.

⁷² *Quall v NTR* [35], emphasis added.

Section 190B: merit conditions

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

[96] 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.

[97] 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.⁷³

Does the information about the external boundary meet this condition?

[98] Schedule B refers to Attachment B, which contains a written description of the application area (**written description**). The written description uses metes and bounds referring to boundaries of pastoral leases, road reserves, coordinated points identified by longitude and latitude to six decimal places and the boundaries of the following native title determinations:

- (a) WAD72/1998 Nharnuwangga (WCD2000/001);
- (b) WAD6002/2003 Gingirana (WCD2017/011);
- (c) WAD6164/1998, WAD248/2007, WAD181/2012, WAD108/2016 Wiluna (WCD2013/004);
- (d) WAD6123/1998 Badimia People (WCD2015/001); and
- (e) WAD6033/1998 Wajarri Yamatji (WCD2017/007).

[99] Schedule C refers to Attachment C, which contains a map titled 'WAD29/2019 Yugunga-Nya People (WC1999/046) Proposed Amended Claim', dated 6 August 2019 (**map**). The map includes:

- (a) The application area depicted with bold blue outline;
- (b) Tenure, depicted as displayed in the legend, labelled with pastoral lease number and name, reserve number or as unallocated crown land as appropriate;
- (c) Local settlement, the Northern and Goldfields Highways and Road No. 4274;
- (d) Scalebar and coordinate grid; and
- (e) Notes relating to the source, currency and datum of data used to prepare the map.

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

⁷³ Doepel [122].

Does the information about excluded areas meet this condition?

[101] Schedule B lists the areas which are excluded from the application in general terms, such as areas subject to previous exclusive possession acts. Schedule B also states that the application does not cover any area where native title has been extinguished, except where any extinguishment is required to be disregarded pursuant to ss 47–47B.

[102] Following the reasoning of French J, that it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application, I am satisfied the areas affected by the general exclusion clauses can be ascertained at the appropriate time.⁷⁴

[103] Attachment B specifically excludes the following native title determinations:

- (a) WAD72/1998 Nharnuwangga (WCD2000/001);
- (b) WC1999/024, WC2007/003, WC2012/007, WR2016/001 Wiluna (WCD2013/004);
- (c) WAD6033/1998 Wajarri Yamatji (WCD2017/007);
- (d) WAD6033/1998, WAD382/2017 Wajarri Yamatji Part B (WCD2018/002); and
- (e) WAD6002/2003 Gingirana (WCD2017/011).

[104] In my view, the specific exclusions are clear from Attachment B.

Conclusion

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

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

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

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

[107] As discussed above at s 190C(4), I am not required or permitted to be satisfied about the correctness of the description at this condition.⁷⁵ My task at this condition is limited to whether I can ‘be satisfied as to the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’.⁷⁶ My consideration at this condition is also limited to information in the application.⁷⁷

[108] Schedule A states:

The native title claimants comprise those Aboriginal people who:

Under the traditional laws and customs of the Western Desert, have a spiritual connection to the claim area and the Tjukurpa associated with it on the basis of one or more of the following:

⁷⁴ *Strickland* [55].

⁷⁵ *Wakaman* [34].

⁷⁶ *Ibid.*

⁷⁷ *Doepel* [16].

- i. the claim area is his or her country of birth (also reckoned by the area where his or her mother lived during the pregnancy); or
- ii. he or she has traditional geographical and religious knowledge of the claim area through a long-term association with the area: or
- iii. he or she has an affiliation to the claim area through a parent or grandparent with a connection to the claim area as specified in sub-paragraphs (i) or (ii) above;

and

who are recognised under the traditional laws and customs by the other native title holders as having rights in the claim area.

This currently includes the descendants of Annie Wilba, Dolly Ward Bootha and Jimmy Wheelbarrow.

[109] It follows from the above description that s 190B(3)(b) is applicable. Therefore I must be satisfied that the description is sufficient to ascertain whether any particular person is a member of the claim group.

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

[110] 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’.⁷⁸ Following this approach, I understand that to qualify as a member of the claim group, an individual must:

- (a) Have a spiritual connection with the application area through birth, through long association, or through affiliation with a parent or grandparent who has a spiritual connection through birth or long association; and
- (b) Be recognised by the other members of the claim group as having rights in the application area.

Birth

[111] I consider that requiring a person to demonstrate that they were born on the application area, or that their mother lived on the application area during pregnancy, provides a clear objective starting point to commence an inquiry about whether the person is a member of the claim group. Describing a claim group with reference to birth is a method which has been accepted by the Court.⁷⁹ I am therefore of the view that with some factual enquiry it will be possible to identify the persons who meet this criterion of the claim group description.

Long association

[112] Describing a claim group with reference to long traditional association is also a method which has been accepted by the Court.⁸⁰ I consider that factual enquiries will also enable the persons who meet the ‘long association’ option for claim group membership to be ascertained.

⁷⁸ *Gudjala 2007* [34].

⁷⁹ *De Rose* [926].

⁸⁰ *De Rose* [897], Schedule 3 of *Tjungarrayi 2016* and *Tjungarrayi 2017*, for example.

Affiliation

[113] I understand that the final option for membership is to have an affiliation to the application area through a parent or grandparent who themselves was born on the application area or had a long association with it. Describing a claim group with reference to ancestors has been previously accepted by the Court.⁸¹ In my view, persons who meet this criterion can also be ascertained through factual enquiries.

Recognition

[114] 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.⁸² In *Sampi FC*, the Full Court agreed 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'.⁸³ This criterion therefore contains a subjective element.

[115] Attachment F states that the claim group have a connection to the land of the application area which is fundamentally spiritual and manifests through their observance of the *tjukurpa* dreaming stories which permeate the landscape.⁸⁴ I understand that it is this connection to the land which enables other members of the claim group to recognise whether a person has rights in the application area. In my view, with some factual enquiry to the other claim group members and the individuals in question, it will be possible to identify the people who are recognised as members of the claim group. In reaching this view I have also considered the judicial guidance that it is appropriate to construe the requirements of the Native Title Act beneficially.⁸⁵

Conclusion

[116] I am satisfied the application describes the persons in the 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

[117] 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. My consideration at this condition does not go beyond what is in the application.⁸⁶

[118] From Schedule E, I understand that exclusive possession is claimed in the application area, however where exclusive possession cannot be recognised, three non-exclusive rights are

⁸¹ *WA v NTR* [67].

⁸² *Aplin* [260]; *Yorta Yorta* [108].

⁸³ *Sampi FC* [45].

⁸⁴ Attachment F [9]–[12].

⁸⁵ *Kanak* [73].

⁸⁶ *Doepel* [16].

claimed. Schedule E also specifies that the claimed right to exclusive possession is subject to the public rights to navigate and fish.

[119] While the claimed rights may or may not be native title rights and interests in accordance with the definition found in s 223, I consider that assessment 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. I understand my task at this condition is limited to determining whether the claimed rights and interests can be understood and have meaning.⁸⁷ Reading Schedule E as a whole, I consider that the claimed rights and the qualifications on them are clear and understandable.

Conclusion

[120] 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 not met

[121] 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.

[122] In *Gudjala 2007*, Dowsett J was of the view that the reference in s 190B(5) to the factual basis upon which it is asserted that the claimed native title rights and interests exist 'is clearly a reference to the existence of rights vested in the claim group'.⁸⁸ In that matter his Honour held:

...it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests).⁸⁹

[123] Following *Gudjala 2007*, I understand that I must be satisfied that the alleged facts support the claim that the identified claim group in Schedule A holds the identified rights and interests in the application area. As discussed above at s 190C(4), I consider that the information before me raises uncertainties about the composition of the claim group. This means I am limited in my ability to make an assessment about whether or not the factual basis is sufficient to support the assertion that the claim group, as described in Schedule A, is entitled to the claimed native title rights and interests. That the claim group is not sufficiently identified carries over into the consideration required at each of the three assertions of s 190B(5).

⁸⁷ Ibid [99].

⁸⁸ *Gudjala 2007* [39].

⁸⁹ Ibid (emphasis added).

[124] To meet s 190B(5)(a), the factual basis must be sufficient to support the assertion that the claim group have, and its predecessors had, an association with the application area. A primary consideration in this assessment is, therefore, who comprises the claim group? As I am uncertain about the claim group composition, I am unable to proceed with the assessment at s 190B(5)(a) and be satisfied that the factual basis is sufficient to support an association between the claim group and the application area at sovereignty and since that time. This means that s 190B(5)(a) is not met.

[125] Without certainty as to the claim group composition, I am also unable to proceed with my consideration at s 190B(5)(b) as to whether the claim group, as described in Schedule A, observes traditional laws and customs which give rise to the claimed native title rights and interests in the application area. This means s 190B(5)(b) is not met.

[126] Meeting the requirements of s 190B(5)(c) 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.⁹⁰ 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.⁹¹ As I am unable to be satisfied about the existence of traditional laws and customs for the purposes of s 190B(5)(b), it follows that I am unable to be satisfied as to the continuity of any such laws and customs. This means s 190B(5)(c) is not met.

Conclusion

[127] As there is uncertainty regarding the composition of the claim group, it follows that I am unable to make a 'genuine assessment' of the application against the requirements of s 190B(5).⁹² In my view, the application must fail at s 190B(5) because of the uncertainty as to the composition of the claim group. It is not open to me to weigh the information in order to overcome this uncertainty. This means that s 190B(5) is not met.

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

[128] 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 claim group.

[129] As discussed above, I am unable to ascertain the composition of the claim group. This means the claimed rights and interests cannot be shown to be held by the claim group described in Schedule A, in accordance with traditional laws and customs, and thus cannot be established on a prima facie basis as 'native title rights and interests'.

⁹⁰ *Gudjala 2009* [29].

⁹¹ *Gudjala 2007* [82].

⁹² *Gudjala 2008* [92].

Conclusion

[130] I do not consider that the native title rights and interests claimed in the application are established on a prima facie basis. This means s 190B(6) is not met.

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

[131] 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.

[132] In *Gudjala 2009*, Dowsett J observed that it ‘seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.⁹³ Applying this guidance, and given my finding at s 190B(5)(b), that I am not satisfied of the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds, or previously held, the requisite physical connection with the application area in accordance with traditional laws and customs.

Conclusion

[133] I am not satisfied at least one member of the claim group currently has or had a traditional physical connection with a part of the application area and so s 190B(7) is not met.

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

[134] I am satisfied the application complies with ss 61A(1)–(3):

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, paragraphs (2)(c)–(d) states any area in relation to which a previous exclusive possession act has been done, is excluded from the application.	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E paragraph (1) states exclusive possession is only claimed in areas where there has been no extinguishment.	Met

⁹³ *Gudjala 2009* [84].

Conclusion

[135] I am satisfied the requirements of s 190B(8) are met.

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

[136] 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 no claim ownership of minerals, petroleum or gas wholly owned by the Crown is made.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states no claim of exclusive possession of any offshore places is made.	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B paragraph 2(e) states any area where native title rights and interests have otherwise been wholly extinguished are excluded from the application area.	Met

Conclusion

[137] I am satisfied the requirements of s 190B(9) are met.

End of reasons

Attachment A

Summary of registration test result

Application name	Evelyn Gilla & Ors on behalf of the Yugunga-Nya People and State of Western Australia & Ors
NNTT No.	WC1999/046
Federal Court of Australia No.	WAD29/2019
Date of decision	7 August 2020

Section 190B conditions

Test condition	Sub-condition/requirement	Result
s 190B(2)		Met
s 190B(3)		Met
s 190B(4)		Met
s 190B(5)	ss 190B(5)(a)–(c)	Not met
s 190B(6)		Not met
s 190B(7)		Not met
s 190B(8)		Met
s 190B(9)		Met

Section 190C conditions

Test condition	Sub-condition/requirement	Result
s 190C(2)	ss 61–2	Met
s 190C(3)		Met
s 190C(4)	s 190C(4)(b)	Not met
s 190C(5)		Met