National Native Title Tribunal

Reconsideration of Claim

Application Name	Evelyn Gilla & Ors on behalf of the Yugunga-Nya People (**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
State/territory/region	East Gascoyne, Western Australia
NNTT file no.	WC1999/046
Federal Court of Australia file no.	WAD29/2019
Date Application first made	9 December 1999
Date of Registrar's registration test decision	7 August 2020
Date reconsideration application made	15 September 2020
Name of Member	Glen Kelly

Claim not accepted for registration

I have conducted a reconsideration of the claim made in this application against each of the conditions contained in ss 190B and 190C in accordance with s 190E of the *Native Title Act 1993* (Cth).[1]

For the reasons attached, I give notice that the Native Title Registrar should not accept this claim for registration pursuant to s 190E of the Act.

For the purposes of s 190E(11), my opinion is that the claim does not satisfy all of the conditions in s 190B(5)-(7) and does not satisfy s 190C(4).

Date of decision: 30 October 2020

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Glen Kelly
Member of the National Native Title Tribunal pursuant to section 190E of the Act

[1] A section reference is to the *Native Title Act 1993* (Cth) ("Act") unless otherwise stated.

Legislation:	*Native Title Act 1993* (Cth) ss 61-63, 190A-190E, 223, 251A, 251B
Cases:	*Hazelbane v Doepel* [2008] FCA 290; [2008] 167 FCR 325 (***Hazelbane v Doepel***)
	Harrington – Smith on behalf of the Wongatha people v The State of Western Australia (No 9) [2007] FCA 31 (***Harrington – Smith***)
	De Rose v South Australia [2002] FCA 1342 (***De Rose***)
	Jango v Northern Territory [2006] FCA 318 (***Jango***)
	Billy Patch and Others on behalf of the Birriliburu People v State of Western Australia [2008] FCA 944 (***Birriliburu***)
	Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water [2002] FCA 1517 (***Lawson***)
	Fesl v Delegate of the Native Title Register [2008] 173 FCR 150 (***Fesl***)
	Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland [2019] FCA 651 (***Akiba***)
	Daniel v Western Australia [2002] FCA 1147 (***Daniel***)
	Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (***Burragubba***)
	Bolton on behalf of the Southern Noongar Families v State of Western Australia [2004] FCA 760 (***Bolton***)
	Strickland v Native Title Registrar [1999] FCA 1530 (***Strickland***)
	Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (***Wakaman***)
	Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (***Doepel***)
	Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538; [2002] HCA 58 (***Yorta Yorta***)
	Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26 (***Sampi FC***)
	Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (***Gudjala 2007***)
	Noble v Mundraby, Murgha, Harris and Garling [2005] FCAFC 212 (***Noble v Mundraby***)
	Kimberley Land Council Aboriginal Corporation (ICN 21) v Williams [2018] FCA 1955 (***KLC v Williams***)
	Risk v National Native Title Tribunal [2000] FCA 1589 (***Risk***)
	Quall v Native Title Registrar [2003] FCA 145 (***Quall***)
	Ashwin on behalf of the Wutha People v State of Western Australia (No 4) [2019] FCA 308 (***Wutha***)
	Doctor on behalf of the Bigambul People v State of Queensland (No 2) [2013] FCA 746 (***Doctor***)
	Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (***Gudjala 2009***)

Reasons for decision

INTRODUCTION

[1] This document sets out my reasons for the decision to give notice to the Native Title Registrar (**Registrar**) that she should not accept the Yugunga-Nya People native title claim made in the native title determination application WC1999/046, WAD29/2019 (**Application**), for registration.

[2] The original application for a determination of native title was filed on 9 December 1999 and was entered onto the Register of Native Title Claims (**Register**) on 12 June 2000 after being accepted for registration pursuant to s 190A(6). The application was amended on 15 December 2014 and was subsequently accepted for registration on 21 January 2015 pursuant to s 190A(6A).

[3] A further amended application was filed in the Federal Court of Australia (**FCA**) on 10 March 2020 and a Registrar of the FCA provided a copy of the application to the Registrar that same day pursuant to s 64(4) of the Act. As the amendments to the application exceeded the changes prescribed in s 190A(6A) a Delegate of the Registrar (**Delegate**) considered whether the amended application should be accepted for registration.

[4] In a decision dated 7 August 2020, the Delegate set out that she was not satisfied that the requirements of s 190C(4) were met and following from this, that the requirements of ss 190B(5), 190B(6) and 190B(7) were not met. The application was therefore, not accepted for registration.

[5] On 15 September 2020 the applicant applied for reconsideration of the registration decision under s 190E of the Act. This section requires the National Native Title Tribunal (**Tribunal**) to apply the 'test for registration' to any claimant applications already considered by the Registrar that did not satisfy the conditions of the registration test, provided that the applicant makes a valid application for reconsideration under s 190E(2) and in accordance with s 190E(3), the applicant has not already made an application to the FCA for a review of the Registrar's decision under s 190F(1).

[6] Subsection 190E(10) requires that I must be satisfied that all the conditions set out in ss 190B and 190C of the Act are met in order for me to give notice to the Registrar that the claim should be accepted for registration.

[7] My reconsideration is by way of review 'de novo', that is, as if the application had not previously been heard or decided. As a de novo reconsideration, I am not conducting an evaluation of the decision of the delegate, it is however open to me to adopt where appropriate, the reasons and the conclusions reached by the delegate. This decision outlines my reconsideration of the claim.

Procedural fairness steps undertaken by the delegate and the background to the request for consideration

[8] As in paragraph [3], the amended application was filed in the FCA on 10 March 2020 and on that same day the Registrar of the FCA provided a copy of the application to the Registrar pursuant to s 64(4) of the Act. As the amendments to the application exceeded the changes prescribed in s

190A(6A) the delegate was required to consider whether the amended application should be accepted for registration (**the registration test**).

[9] Between 13 March 2020 and 29 June 2020, the delegate conducted a number of steps to provide the applicant and other parties with procedural fairness. As set out in the delegates reasons, these steps are outlined as follows.

[10] On 13 March 2020, a senior officer of the Tribunal corresponded with the representative for the State of Western Australia (**State**) to provide an opportunity for the State to make submissions, should it wish to do so, by 20 March 2020. In this the senior officer advised the State that the application was future act affected and that she must use her best endeavours to finalise consideration of the application by 3 April 2020.

[11] On 16 March 2020, the senior officer corresponded with the representative of the applicant to advise that any additional material they wished the delegate to consider should be provided by 20 March 2020. This correspondence also set out that the delegate had reached a preliminary view that the application was unlikely to pass the registration test because it was not accompanied by the affidavits required by s 190C(2) and there was limited factual basis material for the purposes of ss 190B(5)-(7).

[12] On 19 March 2020, the representative of the applicant provided additional material for consideration by the delegate. These materials (**additional materials**) were:

(a) Yugunga-Nya Anthropology Report by Kim McCaul dated 17 December 2019 (**McCaul Report**);
(b) Appendices A-C of the McCaul Report;
    i. Yugunga-Nya Anthropology Report Appendix A: Sites of importance to Yugunga-Nya claimants
    ii. Yugunga-Nya Anthropology Report Appendix B: Sites Register
    iii. Yugunga-Nya Anthropology Report Appendix C: Resources Register
(c) Signed affidavit of Nathaniel (Nathan) Bann dated 28 November 2019;
(d) Signed affidavit of Robyn Kelly dated 28 November 2019;
(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.

[13] In correspondence accompanying the additional material, the representative of the applicant advised that although the affidavits listed above in (i) – (n) were prepared for the purposes of the registration test, the relevant members had not been able to sign them due to their remote location and due to travel restrictions put in place as a result of the COVID-19 pandemic. The representative sought an extension until 10 April 2020 to provide signed affidavits or that alternatively, the delegate could accept unsigned affidavits for the purposes of the registration test.

[14] The delegate decided that an extension of time was reasonable in the circumstances and provided an extension for any additional material to 9 April 2020. The representative of the applicant was advised of this in correspondence from the senior officer dated 23 March 2020. This correspondence also advised that because s 190C(2) sets out that applications must be accompanied by the affidavits prescribed in s 62 (**s 62 affidavits**), in the preliminary view of the delegate it was not open to the Registrar to consider affidavits that had not been filed in the FCA for the purposes of s 190C(2).

[15] The senior officer further advised in the correspondence of 23 March 2020 that the delegate would use her best endeavours to complete the registration test by 29 May 2020, being four months after the notification date of a s 29 notice over the application area. The State were advised of this in correspondence from the senior officer on 24 March 2020.

[16] 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 by the Tribunal from the FCA.

[17] 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 FCA, pursuant to the FCA's Information Note 'Special Measures in Response to COVID-19' (**FCA Information Note**).

[18] As the FCA was accepting unsigned affidavits during the pandemic, the applicant's representative requested the delegate 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.

[19] On 5 May 2020 however, the applicant's representative wrote to the senior officer to advise that he was currently in discussions with the FCA about filing the unsigned affidavits. As the unsigned affidavits remained unfiled and due to the circumstances presented by COVID-19, a further extension of time for the applicant to address the issue of the unsigned affidavits was deemed to be warranted.

[20] On 6 May 2020, the senior officer wrote to the parties to advise that the delegate would now use her 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.

[21] On 12 May 2020 a signed and sealed copy of the s 62 affidavit of Troy Little was received from the FCA.

[22] On 14 May 2020, sealed copies of the remaining five unsigned s 62 affidavits were received from the FCA.

[23] 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**).

[24] 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 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 FCA Information Note, as it was considered 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.

[25] 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.

[26] On 25 June 2020, the senior officer wrote to Ms [Name removed] and advised that, should she wish the delegate to take into account the information in her submission when making the registration test decision, procedural fairness would require the delegate 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.

[27] The delegate considered the application, the additional information, the sealed copies of the s 62 affidavits and the unsolicited information and formed a preliminary view that there were deficiencies which would mean that the application would be unlikely to meet the condition at s 190C(4).

[28] On 29 June 2020, the senior officer wrote to the applicant's representative to provide the preliminary assessment of the delegate and advised that any additional information the applicant wished the delegate 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 the delegate would now use her best endeavours to complete the registration testing of the application by 7 August 2020.

[29] Also on 29 June 2020, the senior officer wrote to the representative of the State to advise that the delegate had given the applicant until 10 July 2020 to respond to her preliminary assessment of the application, and that she would now use her best endeavours to complete the registration testing of the application by 7 August 2020.

[30] Also on 29 June 2020, the applicant's representative contacted the senior officer and drew attention to a typographical error in the delegate's preliminary assessment. An amended version of

the delegate's preliminary assessment correcting that typographical error was provided to the applicant on 29 June 2020.

[31] No further material was provided to the delegate by the set date of 10 July 2020 so this concluded the procedural fairness process and steps taken by the delegate.

[32] The delegate made the registration decision on 7 August 2020 finding the Yugunga-Nya People's application did not meet the requirements of registration. This was based on the conclusion that the delegate could not be satisfied the application met the registration condition in s 190C(4) and as a result of this, was not able to be satisfied that the conditions set out in ss 190B(5) – (7) were able to be met.

[33] On 7 August 2020 the Registrar emailed notice to the applicant notifying them of the delegate's decision, in accordance with s 190D(1). This notice enclosed a copy of the reasons and provided information about appeal options available to the applicant, being reconsideration by the Tribunal (s 190E(1)) or a review by the FCA (s 190F).

[34] On 15 September 2020, the applicant applied for reconsideration of the claim. On 21 September 2020, the FCA confirmed an application for review under s 190F(1) had not been made. In addition to this, there have been no previous reconsideration requests under s 190E(4).

[35] The reconsideration must be conducted by a single Member of the Tribunal (s 190E(5)). On 21 September 2020 the President of the Tribunal, Hon John Dowsett, appointed me to be the Member to reconsider for registration the claim made in the Yugunga-Nya People application.

Future Act Affected

[36] On 26 June 2020 the State issued a s 29 notice with notification day of 1 July 2020 in relation to tenement application M51/888 which overlaps the Yugunga-Nya People application. This means the application is 'future act affected' and so I must use my best endeavours to complete this reconsideration by 30 October 2020 (s 190E(8)).

Procedural fairness steps undertaken in the reconsideration

[37] The application for reconsideration of the claim was made on 15 September 2020. This application comprised of the following documents (**reconsideration materials**):

(a) Application for reconsideration cover letter (**Hegney letter**);
(b) Application form for reconsideration of claims for registration (**reconsideration form**);
(c) Applicant's submissions in support of registration test reconsideration (**reconsideration submission**);
(d) Attachment SEH 1 being 9 x family information forms (**family information forms**). These materials are marked as confidential.
(e) Attachment SEH 2 being a file note from Yamatji Marlpa Aboriginal Corporation (**YMAC**) Anthropologist [Name removed] (**[Name removed] file note**). This is also marked as confidential.

[38] On 29 September 2020, the senior officer wrote to the representative of the applicant to inform them that the reconsideration would proceed and a Member had been appointed to conduct the reconsideration. The senior officer noted that I must consider all the information that the delegate was required to consider and may consider any further information regarded as appropriate in the reconsideration of the claim (s 190E(7)). This correspondence also notified the applicant's representative that I was proceeding on the basis that the applicant had submitted all the material upon which they sought to rely. The representative of the applicant was also notified that due to the s 29 notice, I would use my best endeavours to consider the application by 30 October 2020. As such, no additional material was received by the applicant aside from the application for reconsideration and its accompanying materials.

[39] On 29 September 2020, the senior officer corresponded with the State to provide notice that the applicant had requested their application be reconsidered for registration and that this reconsideration was proceeding. Due to the time constraints generated by the s 29 notice and due to prior opportunity provided by the initial registration process, the State was not invited to make further submission or comment.

[40] Also on 29 September 2020, the two native title service providers whose area of operation intersect with the Yugunga-Nya application – the Yamatji Marlpa Aboriginal Corporation (**YMAC**) and the Central Desert Native Title Service (**CDNTS**), were corresponded with to notify them that the Yugunga-Nya applicant had requested a reconsideration of their claim for registration and that this reconsideration was proceeding.

[41] On 29 September 2020 a representative of CDNTS corresponded with the senior officer informing her that CDNTS had been instructed to file a native title claim overlapping the Yugunga-Nya application and making a request to provide further information to have regard to in the reconsideration. While this new native title application was not filed at the time of the correspondence, the inference was that it was intended to be during the course of reconsideration deliberations.

[42] Taking the view that this was likely to be the case, it was necessary for me to consider whether CDNTS, as the instructed legal representative or the prospective new native title claimants were owed procedural fairness in this reconsideration.

[43] In *Hazelbane v Doepel* Mansfield J considered s 66(6)(a) of the Act in the context of whether a competing registered native title claimant is entitled to be heard by the Registrar during a registration test. At [26] His Honour said:

> However, in my view s 66(6)(a) makes it plain that in the normal course a competing registered native title claimant is not entitled to be given the opportunity to be heard when the Registrar is considering whether to accept for registration a native title determination application over the same area of land.[2]

[2] *Hazelbane v Doepel* [26].

[44] The context of *Hazelbane v Doepel* was that of a competing registered native title claimant challenging the decision to register an overlapping native title claim. It stands to reason that if a competing registered native title claim group has no entitlement to be heard and make submissions in the context of registration testing, then neither does a prospective native title claim which has not yet been lodged, or their authorised legal representative, even if it should be lodged during the course of the reconsideration.

[45] On 30 September 2020 the senior officer sent correspondence to CDNTS setting out that CDNTS was not on this occasion owed procedural fairness and was not entitled to make a submission. As indicated by CDNTS, the Gingirana #4 application (WC2020/003, WAD230/2020) which overlaps the northern portion of the Yugunga-Nya application, was filed in the FCA on 6 October 2020.

Information considered when undertaking this reconsideration

[46] I have had regard to the materials the delegate had before her in considering her original registration decision. These were:

(a) Amended Form 1 of the Yugunga-Nya native title determination application;
(b) Those documents listed at paragraph [12] (a)-(b) of this reconsideration;
(c) Sealed copies of the s 62 affidavits listed at paragraph [12] (c)-(n) of this reconsideration;
(d) Applicant representative letter of 19 March to NNTT regarding additional material;
(e) Applicant Representative letter of 9 April 2020 to NNTT regarding unsigned affidavits;
(f) FCA Special Measures in Response to Covid-19;
(g) The unsolicited information received from Ms [Name removed]; and
(h) Information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 12 March 2020.

[47] The further information I have had regard to as appropriate in reconsidering the claim pursuant to s 190E(7)(b) are those materials listed at paragraph [37] and a further geospatial assessment and overlap analysis conducted by the Tribunal's Geospatial Services dated 24 September 2020. Like the delegate, I have also considered information on the Register and accessed the Tribunal's mapping database to assist with my consideration. There is no further information to which I have had regard.

NON-CONTESTED FINDINGS OF THE DELGATE

[48] As set out at paragraph [7], while this reconsideration is being conducted de novo, it is open to me to adopt the conclusions made by the delegate. Additionally, I note that neither the applicant or the State have contested the reasons and conclusions regarding the following requirements, all of which were regarded as being met by the delegate (as at the stated paragraphs of the delegate's registration decision):

(a) s 190C(2) – information etc. required by ss 61-2 at [29]-[36];
(b) s 190C(3) – no previous overlapping claim group at [37]-[39];

(c) s 190C(5) – requirements for uncertified applications at [48]-[49] and [95];
(d) s 190B(2) – identification of the area subject to native title at [96]-[105];
(e) s 190B(3) – identification of the native title claim group at [106]-[116] however I make further comment on this at [99]-[103]of these reasons;
(f) s 190B(4) – identification of claimed native title at [117]-[120];
(g) s 190B(8) – no failure to comply with s 61A at [134]-[135]; and
(h) s 190B(9) – no extinguishment etc. of claimed native title at [136]-[137].

[49] Having considered the material afresh and having formed my own opinion, I am also satisfied the requirements of the registration conditions for those sections of the Act listed above in [48] (a)-(h) have been met and therefore adopt the reasons and conclusions reached by the delegate.

CONTESTED FINDINGS OF THE DELGATE

[50] Much of what is contested within the reconsideration application relates to the delegate's inability to be satisfied that the requirements of s 190C(4), and as a consequence of this her inability to be satisfied that the requirements of ss 190B(5)-(7), were able to be met.

[51] In the reconsideration submission, the applicant's representative characterises the issues as follows:

> 17. It appears that the delegate was not satisfied in relation to s 190C(4) for 4 reasons:
>
> 18. First, the decision to hold the 19 November 2019 Meekatharra authorisation meeting nearly three hours earlier than scheduled may have had the effect of excluding people from the decision to authorise the applicant: reasons [87], [90].
>
> 19. Second, the Applicant had not, in the delegate's view, sufficiently explained why particular people were excluded from the 21 November 2019 Perth authorisation meeting despite the broad invitation in the meeting notice: reasons [88], [90], [92]. In connection with this issue, the delegate said that it was unclear whether the claim group members who attended the Perth meeting supported the exclusion of these people: reasons [88].
>
> 20. Third, there did not appear to the delegate to have been any opportunity for claim group members attending the November 2019 meetings to put alternative resolutions forward or to propose alternative applicant members for consideration besides those proposed in the meeting papers: reasons [89]. This meant, the delegate said, the particular voting process used may have predetermined the outcomes of the authorisation meetings to some extent. Also, there was no information about the basis on which the applicant members were chosen: reasons [90].
>
> 21. Fourth, the delegate thought there were too many "discrepancies" in the material to be satisfied that the claim group, as described in Schedule A of the amended Form 1, is properly constituted: reasons [94]. These discrepancies were that it appeared to the delegate from the "unsolicited information" that at least some of the descendants of Wilba (one of the apical ancestors) do not agree with the amendment to the claim group description, including the lead applicant Evelyn Gilla, and that some people were excluded

> from the Perth authorisation meeting: reasons [91]-[92]. This latter point is the same as that set out in [19] above.[3]

[52] I will deal with these contentions in my consideration however in the first instance it is worthwhile summarising the research and authorisation program for the Yugunga-Nya application to establish the facts and circumstances of my reconsideration.

The Research Program and Authorisation

[53] Commencing in 2014 Mr Kim McCaul was commissioned by YMAC (a previous legal representative of the Yugunga-Nya People application) to complete an anthropological report on the constitution of a native title group, the extent of area over which this group may hold native title, the nature and the extent of these rights and interests, their basis in law and custom and how the laws and customs have continued to be practiced or changed since sovereignty.[4] This has been previously referred to as the McCaul Report and generally speaking, has the expectation of serving as the larger part of a connection report.

[54] From an extensive examination of anthropological, historical and cultural information, the McCaul report broadly sets out that the Yugunga-Nya people form part of the Western Desert cultural block at its western extremity and that the Yugunga-Nya people, consistent with the Western Desert cultural block, follow a body of law and custom referred to as *Tjukurpa*.

[55] In relation to the Western Desert cultural block, the McCaul report notes at [447] that:

> The Western Desert land tenure system is well known in Australian anthropology for the seemingly flexible way in which rights and interests in land can be obtained.[5]

[56] But, at [449] that:

> … these are traditional features of the system, rather than symptoms of a system breakdown.[6]

[57] The idea of a Western Desert cultural block and its inherent flexibility has been contested and prosecuted at great length in cases such as *Harrington – Smith*, *De Rose* and *Jango*. While not wishing to re-prosecute the issues contained within these judgements it is worthwhile, as it is relevant in the current situation, to draw attention to some key features relating to the Western Desert cultural block. The first being the findings of Sackville J in *Jango* where he sets out that:

> For these reasons, I do not think that the concept of the Western Desert bloc, in the sense of a society whose members acknowledge and observe a body of laws and customs, can be rejected on the ground that it is an anthropological construct divorced from an underlying reality. The

[3] Reconsideration submission [17]-[21].

[4] McCaul Report, Appendix F: Research Brief.

[5] Ibid [447].

[6] Ibid [449].

evidence supports the conclusion that the Western Desert bloc can be regarded as a society in that sense.[7]

[58] In *De Rose*, O'Loughlin J acknowledged there were multiple ways through which members of the Western Desert cultural block are able to obtain rights and interests in lands by setting out in the Summary of Reasons for Judgement that:

> Only two of the twenty-six Aboriginal witnesses were born on De Rose Hill Station and it was argued against the interests of the claimants that only Aboriginal people who are born on the land can be regarded as Nguraritja for that land. I do not agree nor do I agree that the claimants must establish a biological descent from those who occupied the land at the time of Sovereignty. I have concluded that I should accept the evidence that a person may become Nguraritja for any one of the four reasons that were identified by Mr Craig Elliott, the anthropologist who gave evidence on behalf of the applicants. Those reasons, in relation to a particular person and a particular piece of land, are as follows:
>
> (a) the land is his or her country of birth;
> (b) he or she has had a long-term physical association with the land;
> (c) he or she possesses an ancestral connection to the land; or
> (d) he or she possesses geographical or religious knowledge of the land;
>
> and, in addition to those four criteria, the person is recognised as Nguraritja by the other Nguraritja.[8]

[59] Further emphasising the multiple pathways in which members of the Western Desert cultural block find connection to country, in the *Birriliburu* consent determination, French J sets out that:

> The association of individuals and groups with particular areas of country comes about through a variety of mechanisms. These include conception, birth, growing up or initiation on the country, acquisition of knowledge through long residence or descent from a person who has had such a connection. Landholding groups are not patrilineally-patrilocally structured. The members of the groups are landholders through their shared association with and to the land. The groups are open and inclusive so people have potential access to a number of areas through the mechanisms mentioned above.[9]

[60] In light of findings such as these, based on extensive anthropological research and direct evidence from the traditional owners of the lands referred to, and in light of the McCaul report situating the Yugunga-Nya People as members of the Western Desert cultural block, Mr McCaul at paragraph [14] of his report suggests a revised claim group description for the Yugunga-Nya People:

to something like:

> Under the relevant traditional laws and customs of the Western Desert Bloc, the native title claimants comprise those Aboriginal people who:
>
> 1) have a spiritual connection to the Yugunga-Nya claim area and the *Tjukurpa* associated with it because:
>   a) the Yugunga-Nya claim area is their country of birth (also reckoned by the area where their mother lived during the pregnancy); or

[7] *Jango* [352].
[8] *De Rose* , Summary of Reasons.
[9] *Birriliburu* [20].

b) they have had a long-term association with the Yugunga-Nya claim area such that they have traditional geographical and religious knowledge of that country; or
c) they have an affiliation to the Yugunga-Nya claim area through a parent or grandparent with a connection to the Yugunga-Nya claim area as specified in sub-paragraphs (a) or (b) above – 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; and

2) are recognised under the relevant Western Desert traditional laws and customs by other members of the native title claim group as having rights and interests in the Yugunga-Nya claim area.[10]

[61] The McCaul report provides a second although substantially similar version of a proposed claim group description at paragraph [854] which has the same effect. This was to replace the previous and less expansive claim group description in the application which was:

1. Evelyn Gilla, William Shay, Names withheld for cultural reasons (WG and RS);
2. The biological descendants of 'Wilba' (the grandmother of Evelyn Gilla).[11]

[62] The Hegney letter which accompanies the application for reconsideration sets out steps taken in seeking to amend the claim group description and re-authorise the applicant following the findings and recommendations of the McCaul report.

> Based on letters from YMAC to the Applicant and claim group members sent in January and April 2019, I understand that information sessions and claim group meetings were scheduled for 10 November 2018, 13 February 2019 and 19 March 2019 for the purpose of considering Mr McCaul's connection report and deciding whether the claim group description should be changed.[12]

[63] At paragraph [8] it follows that "the meeting scheduled for 13 February 2019 did not proceed…" but "[a]t the information session on 19 March 2019, Mr McCaul delivered a presentation about the connection research he had undertaken concerning the people who had a connection to the claim area."[13]

[64] The Hegney letter goes on to describe a series of events surrounding an Information Session and Authorisation Meeting at the Meekatharra Town Hall on 19 September 2019:

> 10. On 19 September 2019, an Information Session was convened in Meekatharra commencing at 10.00am, which was attended by nearly 60 people. Mr McCaul and Mr Gaffney delivered presentations to the attendees about the proposal to amend the claim group description to take account of connection research findings.
>
> 11. During the Information Session Mr Gaffney spoke about the need to nominate people to become applicants if the decision was made to change the claim group description. Attendees were seated in three distinct groupings representative of the apical ancestor they belonged to. Key individuals from each group then called out the names of who would be nominated from their respective apical descent group. Robyn Kelly spoke on behalf of the

[10] McCaul Report [14].
[11] Authorisation affidavit, annexure [SEH4].
[12] Hegney letter [7].
[13] Hegney Letter [9].

> Dolly Ward grouping; Jeff Barnard spoke on behalf of the Wheelbarrow grouping; and Leonie Gentle confirmed that there would be no changes to the named applicants for the Annie Wilba grouping. In all, 11 people were nominated to be applicants: 6 nominations representing Annie Wilba; 3 nominations representing Dolly Ward; and 2 nominations representing Jimmy Wheelbarrow. The nominations were recorded and projected on a temporary screen.
>
> 12. After the Information Session on the same day an Authorisation Meeting was convened, commencing at 1pm. Just over 60 people attended.[14]

[65] During the course of the information session, the need to nominate people to be authorised as the new applicant was discussed and it appears as though a level of consensus was achieved through the nomination of 11 people.[15] The authorisation meeting which followed however, was required to be abandoned due to disruption and authorisation wasn't provided to a new applicant or to amend the claim group description.[16]

[66] A further attempt of authorisation, and the one on which this amendment application relies, was made in an authorisation process spanning two meetings, one in Meekatharra on 19 November 2019 and one in Perth on 21 November 2019. According to the authorisation affidavit filed by Mr Hegney, splitting the authorisation process was to alleviate difficulties that Perth based attendees had in taking time off work and the expense of travelling to Meekatharra[17] and that "[t]he point of having two meetings was to allow members of the claim group to have the option of choosing which meeting to attend if one of them was inconvenient financially or due to work commitments."[18]

[67] The authorisation affidavit continues at [9] by setting out that:

> 9. To encourage as many people as possible to participate in the authorisation process … it was proposed that a two-staged authorisation process be convened. The first meeting would be held in Meekatharra and the second meeting in Perth. Both meetings would consider the same resolutions and follow the same process and format, with the applicants being invited to attend both meetings to assure themselves that the same agreed and adopted decision-making process was followed at both meetings. It was also in my mind that the 2 meeting process would minimise the capacity for overwhelming disruption by elements of the group at a single meeting, as I understand that this had happened a number of times previously.
>
> 10. The proposed authorisation process was suggested to the current applicants and by majority they agreed that the proposal could be submitted as a resolution at the next authorisation meeting for the purposes of section 251B(b) of the *Native Title Act 1993* (Cth).[19]

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

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[14] Ibid [10]-[12].
[15] Ibid [11].
[16] Ibid [13]-[15].
[17] Authorisation affidavit at [8].
[18] Hegney letter [31].
[19] Authorisation affidavit [9]-[10].

(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; and
(e) Koori Mail, 6 November 2019.[20]

[69] The authorisation affidavit also states that the notice was uploaded to the Yugunga-Nya People's Trust webpage on 25 October 2019 and members were sent a text message and email to inform them of the notice on the website.[21] Additionally, personal notice by mail was provided to approximately 250 potential claimants whose postal details were held by the trustee for the Yugunga-Nya Peoples Trust with only nine of those notices returned as 'not at this address'.[22]

[70] The authorisation affidavit also 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.[23]

[71] Annexed to the authorisation affidavit is a copy of the meeting notice as it appeared in the Geraldton Guardian. This notice sets out the time and location for four separate meetings:

i. An information session at Meekatharra from 10am–12pm on Tuesday 19 November 2019 with registration from 9am;
ii. An authorisation meeting at Meekatharra from 1pm–3pm on Tuesday 19 November 2019 with registration from 12pm;
iii. An information session at Perth from 10am–12pm on Thursday 21 November 2019 with registration from 9am; and
iv. An authorisation meeting at Perth from 1pm–3pm on Thursday 21 November 2019 with registration from 12pm.[24]

[72] 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

[20] Ibid [12].
[21] Ibid [13].
[22] Ibid [14].
[23] Ibid [14].
[24] Ibid, annexure SEH4.

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**).[25]

[73] Under the heading 'Registering for an Information Session & Authorisation Meeting', the notice states:

> Registration will occur before each Information Session and Authorisation Meeting commences. 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.[26]

[74] The meeting notice states that the purpose of the information sessions was to provide information about matters to be discussed at the authorisation meetings and to allow informed decisions to be made.[27] The purpose stated for 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.[28]

[75] The meeting notice also 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'.[29]

The Meekatharra Meetings

[76] As discussed by the delegate in her decision, the authorisation affidavit and the Hegney letter, soon after the commencement of the Meekatharra information meeting two of the members of the previous applicant requested the information session be cancelled and that the authorisation meeting commence.[30] This was said to be due to a death in the community on the previous day.[31] A resolution was then put to the meeting that the information session be cancelled and that the authorisation meeting commence, which was unanimously carried by show of hands.[32] Attendees

[25] Ibid, original emphasis.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Delegate Registration Decision [61], Authorisation affidavit [17]-[19].
[31] Authorisation affidavit [19].
[32] Ibid.

were then reminded to ensure they had signed the attendance list for the authorisation meeting[33] and the meeting was said to have commenced at 10:30am.[34]

[77] The Hegney letter sets out that:

> '[h]ad the Information Session occurred, it would have been the fourth information session to have taken place about Mr McCaul's research findings and the claim group description (the previous information sessions having taken place on 10 November 2018, 13 February 2019 and 19 March 2019…[35]

[78] Although I assume the reference here to 13 February 2019 is in error as it was stated not to have proceeded earlier in the Hegney letter, with the correct reference likely to be the 19 September 2019 information meeting which appears to have proceeded as scheduled even though the later authorisation meeting on that same day was abandoned.[36]

[79] The meeting was split into two parts, with Mr Hegney explaining "that there were two ballots taking place at the meeting"[37] and that "[t]he first ballot involved the blue ballot paper and only members of the current claim group could vote in that ballot"[38] (see [61] of these reasons for that claim group description) and "[t]he second ballot paper was yellow … and all members of the proposed new claim group description could vote in that ballot."[39]

[80] The blue ballot paper contained 4 resolutions with the first 2 concerning the decision making process, a third to resolve that the right people were at the meeting and a fourth dealing with changing the claim group description.[40] The yellow ballot contained 8 resolutions with 1-4 being identical, 5 regarding whether to retain the current applicant and 6 regarding whether to authorise a new applicant. Resolutions 7 and 8 were unrelated to claim authorisation and were focussed on the appointment of a working group for a mining agreement and a trustee respectively.[41]

[81] In terms of the conduct of the decision making process, the affidavit of Ms Evelyn Gilla, which is set out in the same or similar terms to others who attended the Meekatharra meeting, reads as follows:

> 13. Mr Hegney told us that the first 3 resolutions concerned the decision-making process at the meeting today. For Resolution 1, Mr Hegney asked the claim group whether the group has a traditional decision-making process in relation to the making or amendment of native title determination applications and instructed us to mark the ballot paper in the 'yes' or 'no' box to indicate our response.
>
> 14. Mr Hegney then discussed an alternative decision–making process to be agreed and adopted in Resolution 2. Mr Hegney proposed the following process:

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[33] Ibid.
[34] Evelyn Gilla affidavit [10].
[35] Hegney letter [19].
[36] Ibid [10]-[17].
[37] Evelyn Gilla affidavit [10].
[38] Ibid [11].
[39] Ibid [11].
[40] Leonie Gentle affidavit at [LG1].
[41] Ibid at [LG2].

(a) That there 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) That members of the claim group can attend and vote at only one meeting;

(c) That voting on each resolution be by secret ballot; and

(d) That resolutions 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.

15. After some brief discussion where Mr Hegney answered some questions, he asked the attendees to indicate on the ballot paper whether they supported Resolution 2.[42]

[82] The remainder of the resolutions on the blue ballot were then also voted on by secret ballot and following the completion of the ballot process in the first part of the meeting, it was then adjourned for a short while. When reconvened, the same process was followed for the yellow ballot paper including the additional resolutions to either maintain the current applicant or authorise a new applicant.[43] The authorisation meeting concluded at approximately 10:50am.[44]

[83] As for the events following the conclusion of the meeting, given that it was still prior to the notified commencement time, the Hegney letter sets out that:

26. Following the authorisation meeting, lunch was delivered at approximately 11.15am (it was scheduled to arrive at 12.15pm, however this was brought forward due to cancellation of the Information Session). After either having lunch on the premises or taking food away with them, by approximately 12.30pm the last of the attendees left the Meekatharra Town Hall.

27. Mr Gaffney and I, along with support personnel, stayed behind to pack up and clean the hall which we completed by approximately 1.30pm. At no time during the period between 10.50pm[sic] and 1.30pm did any person attend the hall to seek to register their attendance at the authorisation meeting, which had been scheduled to commence at 1pm.

28. After we finished cleaning the hall, we crossed the road to have lunch outside the mobile café no more than 75 meters from the hall entrance with a clear view of sight of the hall. At no time between 1.30 and approximately 3.00pm did any person approach the hall to seek entry.

29. At no time subsequently did any person contact me to tell me that they missed the Authorisation Meeting scheduled for 1.00pm because of it having been brought forward. I would expect that if there were any such persons, me or Mr Gaffney would have spoken to them either directly or heard of them from other members of the claim group. Our mobile numbers were widely known, and in the case of Mr Gaffney, his mobile appeared in the public advertisements, public notices and individual correspondence sent to each member of the Yugunga-Nya People's Trust. Before the meetings in Meekatharra and Perth, Mr Gaffney recalls that he received approximately 30 telephone calls from people about attending the meetings in Meekatharra and Perth. Most callers inquired about what measures were being taken to protect their safety in light of the disturbances at the previous meetings.

30. In any event, if any person was prevented from attending the meeting because of the change in timing those persons could have attended the Perth Authorisation Meeting on 21 November

[42] Evelyn Gilla affidavit [13]-[15].
[43] Ibid in paragraphs [16]-[25].
[44] Hegney letter [25].

> 2019 or, if necessary, if they attended the hall before 3.00pm I could have explained the resolutions to them personally and they could have voted using the ballot paper.[45]

The Perth Meetings

[84] The Perth information session and authorisation meeting proceeded as notified and at the notified times. Upon arrival at the information session, attendees were asked to register and those who were not on existing information bases were asked to fill in a family history form to "establish whether the individual falls within the proposed claim group description".[46] Sixteen family information forms were completed, predominantly by members of the Dorizzi and Ashwin families[47] with the Ashwin family asserting connection to the listed apical Jimmy Wheelbarrow.[48]

[85] Through a previously confirmed arrangement, these family history forms were provided to Ms [Name removed], a Senior Anthropologist at YMAC to verify whether these attendees could register for the Authorisation meeting.[49] This arrangement was said to be made due to YMACs previous representation of Yugunga-Nya[50] and Ms [Name removed] personal familiarity with the claim, the research and the group.[51]

[86] Mr Hegney sets out that:

> In our discussion with the persons belonging to the Ashwin family none of them mentioned a connection to the claim area other than by reference to Jimmy Wheelbarrow. In particular, none of them mentioned to Mr Gaffney or I that they were connected to the claim area through birth or through having traditional geographical and religious knowledge of the claim area.[52]

[87] Ms [Name removed] in her file note set out that she received 8 family information forms, these being:

(a) [Name removed];

(b) [Name removed];

(c) [Name removed];

(d) [Name removed];

(e) [Name removed];

(f) [Name removed];

(g) [Name removed]; and

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[45] Hegney letter [26]-[30].
[46] Authorisation affidavit [35].
[47] Ibid [36].
[48] Hegney letter [36]-[37].
[49] Ibid [38].
[50] Reconsideration submission [36].
[51] Ibid [44].
[52] Hegney letter [37].

(h) [Name removed].[53]

[88] Following receipt of these forms Ms [Name removed] conducted a check of the YMAC genealogical database and the McCaul report but could not find any connection of these people to the current Form 1 or the proposed new claim group description and that she provided this advice at 12:53pm.[54] Ms [Name removed] received a further family information form for [Name removed] to which she then spoke. During this conversation Ms [Name removed] explained that "she and her family were told they were not able to vote at the meeting but that her sister was, and that they were all connected to Jimmy Wheelbarrow."[55] Despite this, [Name removed] is recorded as having attended the Perth Authorisation Meeting on the meeting attendance sheet.[56]

[89] In her s 62 affidavit, Ms Verna Vos states that during registration she saw Mr Gaffney speaking to some members of the Ashwin family and was informing them that he had received advice from YMAC that "they were not considered prospective claimants on this claim because … they were not part of Form 1 or research description."[57] The affidavit then lists the people in question which matches those people listed at [87] above and sets out that this was confirmed in a text message from Mr Gaffney containing "what appeared to be a[n] extract of the advice".[58]

[90] Ms Vos then sets out that:

> So that matters did not get out of hand, I approached Mr Gaffney and asked him if it would be ok if I stayed outside [the] meeting with members of the Ashwin family whilst the authorisation was taking place. Mr Gaffney informed me that I could stay outside the meeting and if the group approved the change in the claim group description and the replacement applicant group, which I was a member of, my absence from the meeting would have no impact on me being an applicant.[59]

[91] Despite this Ms Vos is recorded as an attendee of the Perth Authorisation Meeting on the meeting attendance sheet,[60] although this may have been signed prior to the matters that gave rise to her affidavit statements.

[92] None of those people listed at [87] are listed on the attendance sheet as attending the meeting.

[93] The Perth Authorisation Meeting convened at 1:00pm and from the materials provided it appears to have proceeded along the same terms as the Authorisation meeting held in Meekatharra as "[t]wo separate ballots were conducted at the Perth Authorisation Meeting – blue ballot paper for the current claim group and yellow ballot paper for the new claim group."[61]

[94] The affidavit of Elaine King explains that:

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[53] [Name removed] File note.
[54] Ibid.
[55] Ibid.
[56] Authorisation affidavit [SEH9].
[57] Verna Vos affidavit [8].
[58] Ibid [9].
[59] Ibid [10].
[60] Authorisation affidavit [SEH9].
[61] Ibid [41].

8. The claim group authorisation meeting began at about 1.00pm and was convened by Ms [Name removed]. After some introductory comments, Ms [Name removed], the chairperson of the meeting, introduced Mr Hegney and he spoke about the purpose [of the] meeting and resolutions that would be discussed. Mr Hegney explained that there would be two ballots and that members of the current claim group would vote first and then members of the proposed claim group would vote in the second ballot. The first ballot involved the blue ballot paper and only members of the current claim group could vote in that ballot. This ballot paper consisted of 4 resolutions. The second ballot paper was yellow, and it consisted of 8 resolutions and all members of the proposed new claim group description could vote in that ballot.

9. Mr Hegney explained that it was proposed that voting would be by way of secret ballot and each person could indicate on the ballot paper whether they supported the resolution by ticking 'yes' or 'no' next to each resolution. Mr Hegney then said that all the votes would be counted after the two meetings and the results would then be communicated. Mr Hegney then proceeded to explain each resolution.[62]

[95] This account concurs with other materials provided to support the application and the reconsideration application.

[96] The attendance sheets show that 36 people attended the Meekatharra meeting although one attendee, Mr [Name removed], does not appear to have signed the attendance sheet.[63] 27 people attended the Perth meeting although a further attendee, Ms [Name removed], does not appear to have signed the attendance sheet.[64] It is assumed this was an oversight and both people were in attendance.

[97] As set out in [88] and [91], despite information to the contrary, Ms [Name removed] and Ms Verna Vos are recorded as having attended the Perth meeting. This is certainly the case for Ms Vos who then chose to remain outside of the meeting[65] however it is unclear whether Ms [Name removed] had the opportunity to be present in the meeting. The Scrutineer's Report annexed to the Authorisation affidavit may shed light on this as it reports that '[b]ased on the Register of Attendance for the Perth Authorisation meeting, 25 people attended the meeting'[66] although the Register of Attendance clearly shows 27 names and 26 signatures. It could be the discrepancy is Ms [Name removed] and Ms Vos so it is assumed that ultimately Ms [Name removed] was not in attendance in the authorisation meeting.

[98] The Scrutineer's Report shows all resolutions being passed with strong majorities with the exception of resolution 5 on the yellow ballot paper which concerned maintaining the current (as it was then) applicant. This resolution was defeated 57-3 with 2 invalid.[67]

Subsection 190B(3) Identification of Claim Group

[62] Elaine King affidavit [8] and [9].
[63] Authorisation affidavit [SEH6].
[64] Ibid [SEH9].
[65] Verna Vos affidavit [10].
[66] Authorisation affidavit [SEH13].
[67] Ibid.

[99] I have indicated at [49] that I agree with the delegate that the conditions of s 190B(3) are met, specifically the conditions of s 190B(3)(b) as in this case a description of a claim group is provided rather than a group of persons as is contemplated by s 190B(3)(a). I expand on this here as it is of relevance in the assessment of s 190C(4).

[100] The claim group description in Schedule A of the Amended Form 1 reads effectively identically to that set out in the notice at paragraph [72] of these reasons, aside from some small typographical changes. For the sake of clarity it reads:

> 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:
>
> 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
>
> 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.[68]

[101] As set out by the delegate in her reasons at [107], there is no requirement to be satisfied with the correctness of the description, rather the task is to be satisfied that the claim group description allows the identification of a person as being part of the group. Additionally, the consideration of s 190B(3) is limited to the information in the application itself.[69]

[102] Like the delegate in her reasons at [110]-[116], in my view the description clearly establishes a set of qualifying criteria that are consistent with principles that have been previously established for the Western Desert cultural block (see [54]-[59] of these reasons) in which the Yugunga-Nya People is situated such as birth, long association and affiliation[70] and previously established principles for recognition into a claim group such as in *Sampi FC* and *Yorta Yorta.*[71]

[103] My reading of the claim group description is that this criteria will, while some fact gathering and interpretation may be required around any one individual, allow a person to be identified as a group member or otherwise.

Subsection 190C(4) Authorisation/certification

[104] Under s 190C(4), the Registrar must be satisfied either that:

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[68] Amended Form 1, Schedule A.
[69] Delegate Registration Decision [107] citing *Strickland* [55], *Wakaman* [34] and *Doepel* [16].
[70] See for example *DeRose op cit*, *Jango op cit* and *Birriliburu op cit.*
[71] *Yorta Yorta* [108], *Sampi FC* [45].

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

[105] As this is an uncertified application[72] the applicable section I must be satisfied of is s 190C(4)(b) which contains two key criteria being that the applicant is a member of the claim group and they are authorised by all the persons in the native title claim group with the process of authorisation being described in s 251B.

[106] Section 251B sets out that all the persons in a claim group authorise a person or persons to make a native title claim and deal with matters that arise from it in one of two ways. Firstly, if there is a process of decision making under traditional laws and customs that must be complied then that process must be used or secondly, where there is not traditional decision making process, one that is agreed to and adopted by the group.

[107] The authorisation of a claim and applicant is no small thing. As set out by French J in *Daniel*, "[i]t is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so."[73]

[108] While this appears a heavy burden, practical readings of the Act have resulted in a set of circumstances for native title claim groups that are eminently achievable. Perhaps chief amongst these for our purposes surrounds s 251B where the term 'all' is not given to mean every single person in the claim group.[74] Even so, it remains the case that any 'authorisation that ensues must be that of the whole of that claim group'[75] where the term 'whole' is taken to have a meaning which encompasses a reasonable opportunity to participate in the decision making process.

[109] Being provided with every reasonable opportunity to participate in the decision making process is one of the key principles of authorisation and is one that has been subject to extensive consideration by the FCA. Stone J in *Lawson* establishes that 'it is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process',[76] a scheme echoed in *Harrington-Smith* [1265] and *Akiba* [28] . Conducting authorisation in keeping with this principle is key to overcoming issues such as those encountered in *Bolton*[77] and *Burragubba.*[78]

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[72] Amended Form 1, Schedule R.
[73] *Daniel* [11].
[74] See for example *Lawson* [25], *Harrington – Smith* [1265], *Fesl* [61]-[71], *Akiba* [28].
[75] *Burragubba* [22].
[76] Lawson [25].
[77] *Bolton* [43]-[46].

[110] Given this is the case, I will turn my attention to the Authorisation Meetings, being the forum through which Authorisation is provided.

The Authorisation Meetings

The Meeting Notice

[111] Reeves J in *Burragubba* sets out clear requirements for the notices of authorisation meetings:

> 31 It is also important to note that, while the authorisation that ensues from an authorisation meeting conducted for the purposes of s 251B must be that of the whole of the claim group concerned … it is not necessary that the notice of the meeting must result in all the members of the claim group attending the meeting. Rather, it is necessary that all the members be offered a reasonable opportunity to decide whether to attend … The primary purpose of the notice of an authorisation meeting for the purposes of ss 251B and 66B of the NTA, therefore, is to result in a resolution concerning the authorisation of the applicant … that is both fairly representative of the views of the whole of the native title claim group on that authorisation issue and that constitutes the informed consent, or vote, of those present at the meeting.
>
> 32 Accordingly, the notice of an authorisation meeting must be expressed in a form, and promulgated in a manner, that is likely to result in all the members of the native title claim group being offered a reasonable opportunity to decide whether to attend the meeting and to participate in its deliberations. It must therefore alert those members to the fact the meeting has been called and to give them sufficient time to make arrangements to attend it, if they wish to. It must also give fair notice to the members of the native title claim group concerned of the business to be dealt with at the meeting so that they can make an informed decision whether, or not, to attend. Hence, where the notice relates to a meeting that is being called for the purposes of replacing an applicant, or certain members of an applicant, under s 66B, it must clearly state that that is the main purpose, or one of the main purposes, of the meeting.[79]

[112] The notice of the Yugunga-Nya People authorisation meetings is set out in [72] and the placement of the notice is set out in [68] - [70] of these reasons. It is my view that the notice of the meeting was both comprehensive and wide reaching. It gave a clear view of the business to be conducted and the reasons for this in addition to clarity around the details of the meetings such as the times and locations. In my view, the notice also provided potential participants with fair notice and sufficient time to make plans as to whether to attend or not and where to attend, given the authorisation process was held in two separate meetings in two separate locations on two separate days.

[113] The invitation to the meeting was also broad in that it sets out that the meetings were open to those Aboriginal people who met the claim group description or to those people who "believe they should meet it"[80] which for reasons discussed previously would appear to be in accord with the precepts of the Western Desert Cultural Block. As such, it is my view that any shortcomings in relation to s 190C(4) are not derived from the notice.

The Meekatharra Meeting

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[78] *Burragubba*, op cit.
[79] *Burragubba* [31]-[32].
[80] Authorisation Affidavit [SEH4].

[114] This section addresses the first of the contentions of the applicant's representative as set out in [51] of these reasons.

[115] As set out in [76] of these reasons, the Meekatharra meeting was not held at the notified time and instead, was bought forward approximately 2.5 hours at the request of attendees as a result of a death in the community.

[116] The delegate in her decision states that in her 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."[81] While I understand the rationale behind the request from community members, particularly in light of a bereavement, on this matter I am of the same view as the delegate in that this may have removed a reasonable opportunity to participate in the decision making process.

[117] One contention of the applicant's representative in support of convening the Authorisation meeting earlier is that the information session was unnecessary as there had been several convened over the course of the previous year and that attendees were sufficiently informed, see [77] and [78] of these reasons. This may or may not be the case and is difficult to make a judgement on from the materials before me.

[118] What is more significant is the contention of the applicant's representative that, as outlined in [83] of these reasons, that any issue of claim group members being declined reasonable opportunity to participate was overcome by a continued presence at the meeting venue or close nearby until 3:00pm, with no person seeking entry to the venue during that time in addition to the contention that no members of the claim group contacted them despite their contacts being widely known.

[119] While this may be the case, it remains plausible that communications occurred within the claim group that the applicant's representatives were unaware of whereby members of the claim group who intended not to attend the information session for the very reasons set out by the applicant's representative or to only attend the Authorisation Meeting at the notified time due to other practical reasons such as travel requirements, were informed by fellow claim group members that the meeting had concluded prior to them arriving.

[120] The applicant's representative further contend that, even if this were the case, such people were still able to attend the Perth Authorisation meeting on "21 November 2019 or, if necessary, if they attended the hall before 3.00pm I could have explained the resolutions to them personally and they could have voted using the ballot paper."[82]

[121] I am not convinced of this rationale. The Authorisation affidavit describes the reasons for there being two separate meetings as being the economic imposition of attending meetings and the threat of meeting disruption. The Authorisation affidavit states that following the attempted 19 September 2019 Authorisation meeting, a number of people had expressed the view that "amongst

[81] Delegate Registration Decision [87].
[82] Hegney letter [30].

other things, they could no longer take time off work to travel to Meekatharra at their own expense"[83] and that "the 2 meeting process would minimise the capacity for overwhelming disruption by elements of the group at a single meeting, as I understand that this had happened a number of times previously."[84] The Hegney letter itself explicitly states:

> The point of having two meetings was to allow members of the claim group to have the option of choosing which meeting to attend if one of them was inconvenient financially or due to work commitments.[85]

[122] The rationale for having 2 meetings is sound however it remains plausible that members of the claim group who, having read the notice and then made the choice to attend the Meekatharra meeting due to the above reasons, were then unable to attend due to the meeting proceeding at an earlier time than notified may have been unable to attend the Perth meeting for these very same reasons.

[123] As such, while reasonable opportunity to participate in the decision making process was provided by the notice, this was removed by the Meekatharra meeting proceeding at a time earlier than notified, despite the contentions of the applicant's representative and despite the understandable rationale for attendees for wanting to proceed earlier with the meetings.

The Perth Meeting

[124] This section addresses the second of the contentions of the applicant's representative as set out in [51] of these reasons.

[125] As set out in [84] of these reasons, the Perth Information Session and Authorisation Meeting proceeded as notified. On this occasion however and as detailed in [86] to [91] of these reasons, a number of people were not admitted to the meeting, these being:

(a) [Name removed];

(b) [Name removed];

(c) [Name removed];

(d) [Name removed];

(e) [Name removed];

(f) [Name removed];

(g) [Name removed];

(h) [Name removed]; and likely also

(i) [Name removed].

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[83] Authorisation affidavit [8].
[84] Ibid [9].
[85] Hegney letter [31].

[126] In addition, Ms Verna Vos, while able to attend the Authorisation Meeting as a member of the applicant, chose to remain outside as set out in [90] of these reasons. All of these people are part of the Ashwin family group.

[127] The task here is to understand whether the authorisation of the applicant has come from all the persons of the claim group, noting earlier remarks on the interpretation of 'all'. Authority is found from Lindgren J in *Harrington-Smith* who sets out:

> In my opinion, there must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 of the NTA (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).[86]

[128] This does not entail a general fact finding mission,[87] but it does require critical analysis of the materials before me. Further, the applicant's representative contends (in my view correctly) that it is important to ensure that only those people who are in attendance at an Authorisation Meeting are those entitled to participate in the decision,[88] however as set out by Bromfield J:

> An applicant bears the onus of establishing that its application is authorised. That onus includes the burden of establishing that all native title holders have authorised the application and that no person or persons who hold native title have been excluded. Where there is no suggestion of any native title holders having been excluded, an applicant will ordinarily not need to prove a negative to meet its legal onus. However, where the evidence suggests that native title holders may have been excluded from the authorisation process, an applicant will bear an evidentiary onus to establish that no such exclusion has occurred.[89]

[129] To support the exclusions and to carry this evidentiary onus, the applicant's representative set out there were several steps taken. The first was to interrogate the member list for the Yugunga-Nya People's Trust, although it is probably reasonable to assume this member list was developed in light of the previous and more limited claim group description so was potentially limited. The second step was to seek information from the individuals not on this list through family history forms with a third being to seek external expert advice from the YMAC anthropologist familiar with the group.[90]

[130] Utilising these steps, the applicant's representative set out that they reviewed the family history forms and that they were not familiar with the Ashwin family in connection with the Yugunga-Nya People claim.[91] They then spoke with some of the people concerned who set out they were descendants of a sister of Jimmy Wheelbarrow[92] after which advice was sought from YMAC. The

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[86] *Harrington-Smith* [1216].
[87] *Doepel* [47].
[88] Reconsideration submission [40].
[89] *Wutha* [201] citing *Harrington-Smith* [2967].
[90] Reconsideration submission [41]-[43].
[91] Hegney letter [35].
[92] Ibid [36].

advice returned, following the process outlined at [88] of these reasons, was that they were not part of the Form 1 or research description.[93]

[131] At issue here is that the excluded people are either siblings, nieces or nephews of Ms Verna Vos who is a member of the applicant and who according to the materials before me, agreed to represent the ancestor Wheelbarrow alongside Mr Leonard Barnard.[94] Presumably agreement to accept Ms Vos as a member of the applicant occurred as outlined at the 19 September 2019 Information Session[95] after which a scheduled Authorisation Meeting was abandoned.

[132] According to the family history forms provided,[96] the relationship of each of the excluded people to Ms Vos is set out as follows:

(a) [Name removed] – sibling/brother to Verna Vos;

(b) [Name removed] – sibling/sister to Verna Vos;

(c) [Name removed] – niece of Verna Vos, daughter of [Name removed];

(d) [Name removed] – grand-niece of Verna Vos, daughter of [Name removed], grand-daughter of [Name removed];

(e) [Name removed] – niece, daughter of [Name removed] a sibling/sister to Verna Vos;

(f) [Name removed] – niece of Verna Vos; sister of [Name removed];

(g) [Name removed] – niece of Verna Vos, sister of [Name removed];

(h) [Name removed] – grand-niece of Verna Vos, daughter of [Name removed]; and

(i) [Name removed] – nephew of Verna Vos, son of [Name removed], sibling/sister to Verna Vos.

[133] The mother of [Name removed], Mrs [Name removed], is recorded as being in attendance at the Perth Authorisation Meeting although the entry against her name is one of two unsigned entries.[97]

[134] The question arises, if Ms Vos is a member of the applicant and if one of her siblings being Mrs [Name removed] was able to attend, why were her other siblings, nieces and nephews excluded? This question remains even if Mrs [Name removed] was not in fact present and her entry in the attendance list is an error.

[135] Given the sister or aunty (in Verna Vos) of the excluded individuals was put forward as an applicant, this would give rise to the idea that they believed themselves to be a part of the claim group, as is provided for in the notice. Additionally, even though there is a sequence of steps taken in the process to verify each individual's ability to attend, there is a potential that these enquiries were

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[93] Ibid [39].
[94] Authorisation affidavit [SEH15] [Att R].
[95] Hegney letter [11].
[96] Reconsideration attachment [SEH1].
[97] Authorisation affidavit [SEH9].

ultimately struck narrowly and the individuals were tested mainly as to their descent from one of the ancestors mentioned in the claim group description.

[136] My reading of the claim group description is that it is expansive and inclusive, and that it succeeds in being in accord with the Yugunga-Nya People being part of the Western Desert Cultural block and the various judicial examinations of the claim group descriptions of this cultural block.

[137] Reading each paragraph of the claim group description together as 'part of one discrete passage, and in such a way as to secure consistency between them …',[98] I read the final sentence "[t]his currently includes the descendants of Annie Wilba, Dolly Ward Bootha and Jimmy Wheelbarrow"[99] as a situation that has arisen as a result of the criteria set out before it and providing explicit but not exclusive recognition of the descendants of those ancestors.

[138] It reflects that the criteria set out before it in the claim group description can and has been tested in relation to these ancestors and in the use of the word "currently" it reflects the possibility that other ancestors or people may be added if and when new evidence comes to light. This is reflected by the emergence of the Dorizzi family group who as McCaul sets out 'at the very end of the research for this report a further family approached YMAC to assert rights and interests'[100] – being the Dorizzi family. Members of this family are recorded as attending both the Meekatharra[101] and Perth Authorisation meetings.[102] In my view, this serves as a demonstration of the flexibility of the claim group description, struck as it is within the society of the Western Desert cultural block.

[139] As such, it seems to be a reasonable expectation that, if there is a connection through a sibling of one of the currently named ancestors, that these individuals would believe themselves to be members of the claim group and would believe themselves to be able to attend as this was provided for in the notice. This belief would be bolstered by the fact that a sibling or close relative was intended to be authorised as a member of the applicant as a result of the authorisation process.

[140] Given that Ms Vos is a member of the applicant but her siblings and their children and grandchildren were excluded from the meetings, this could mean one of two things. Firstly, that she is not in fact a member of the claim group and therefore the claim cannot be registered as it does not fulfil the requirement at s 190C(4)(b) that the applicant is a member of the claim group or secondly, that she is a member of the claim group and that members of the claim group who are her siblings and close relatives have been excluded from participating in the decision making process. This is compounded if another of her siblings in Mrs [Name removed] was actually present in the authorisation meeting, but the son of Mrs [Name removed] ([Name removed]) was excluded.

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[98] *Gudjala 2007* [34].
[99] Amended Form 1, Schedule A.
[100] McCaul Report [638].
[101] Authorisation Affidavit [SEH6].
[102] Ibid [SEH9].

[141] The applicant's representative contends that even though these nine individuals were not allowed into the meeting that this would not have had an impact upon the outcome and in any case, given their stated connections with Jimmy Wheelbarrow that their interests were catered for due to his inclusion into a new claim group description. The first point may be true however it doesn't hold that the second point is, given the contestation is around their membership of the claim group rather than any controversy around Jimmy Wheelbarrow. In any case, these issues do not form part of the consideration of the registration test.

[142] Taking the position that Ms Vos is a member of the claim group and is recognised as such by her acceptance as a member of the applicant, it can only be concluded that the excluded individuals, by virtue of their relationship with Ms Vos, are also members of the claim group. As such the evidentiary onus carried by the applicant described at [128] has not been fulfilled, especially given the materials provided show the siblings and close family of a member of the applicant were the ones excluded.

[143] Through the exclusion of these individuals, I cannot be satisfied that all members of the claim group have been provided with the opportunity to take part in the decision making process and cannot conclude the application is duly authorised by all the members of the claim group.

The Decision Making Process

[144] This section addresses the third of the contentions of the applicant's representative as set out in [51] of these reasons.

[145] Decision making in the Authorisation Meetings was split into two parts, one with the claim group as it was at the time (the blue ballot paper) and one with the proposed claim group (the yellow ballot paper). In this, the meetings followed the process contemplated by Reeves J in *Doctor* being

> …if an existing claim group wishes to alter its composition, it must first meet as a whole and resolve to do that. If it does, then the new or reconstituted native title claim group must then meet and resolve in accordance with the process set out in s 251B to authorise an applicant to make a claim on its behalf under s 61.[103]

[146] As previously mentioned, s 251B sets out that all the persons in a claim group authorise a person or persons to make a native title claim and deal with matters that arise from it in one of two ways. Firstly, if there is a process of decision making under traditional laws and customs that must be complied with or secondly, where there is no traditional decision making process, one that is agreed to and adopted by the group.

[147] In *Noble v Mundraby*, concerning s 251B the Full Bench of the FCA remarked that "[s]ection 251B does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question."[104] Logan J effectively summarised requirements in *Fesl* at [71] which includes that, where there is no traditional decision making process a particular

[103] *Doctor* [57].
[104] *Noble v Mundraby* [2005] FCAFC 212 [18].

alternative is not mandated, only that the process of arriving at the decision making process be agreed to and adopted where 'agreed to and adopted' "imports the giving to all of those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process".[105]

[148] The issue around the adoption of a decision making process was confronted in *KLC v Williams* where Barker J upheld the decision of a delegate of the Registrar not to register a claim as the question of a traditional decision making process was not properly addressed. In the judgement Barker J says:

> 63 In substance, the delegate here decided that the group of native title claimants who attended the authorisation meeting, in effect were never asked whether there was a traditional decision-making process …
>
> 64 Rather, the delegate found that the claim group never addressed that question but were asked and simply decided whether one of four nominated options of decision-making, including by "the land group" or "by majority" should be adopted. By simply voting upon which one of four decision-making processes of authorisation should be followed, the delegate concluded that the group never addressed the question whether there was a traditional process that had to be complied with in relation to the authorisation of an ILUA of that kind.[106]

[149] While this case concerned the making of an Indigenous Land Use Agreement and decision making under s 251A the language is very similar and as a result of this Logan J in *Fesl* states "[i]n my opinion therefore, each of the propositions which I have distilled from cases concerning s 251B has like application, *mutatis mutandis*, to the meaning and effect of s 251A."[107] This remains the case following the amendment of these sections in 2017.

[150] In the case of the application of the Yugunga-Nya People, like the delegate I find it difficult not to form the view that the decision making process was determined prior to the meetings taking place. Obviously when conducting one single authorisation process over two separate meetings, one of the risk factors for the success of the process is whether the two meetings disagree on whether there is a traditional decision making process or if they seek to implement different decision making processes.

[151] A series of resolutions to authorise a new claimant and to amend the claim group description that were proposed to go before the 19 September 2019 Authorisation meeting were agreed by the applicants to be carried forward into the November 2019 meetings. I am of the view that this is acceptable as while it presupposes a type of outcome, it doesn't necessarily hold that the meeting would settle on a decision making process that then results in those resolutions being decided upon in the manner anticipated.

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[105] *Fesl* [71].
[106] *KLC v Williams* [63]-[64].
[107] *Fesl* [72].

[152] A more significant issue is the seeming lack of discussion on whether a traditional decision making process exists and agreement on a decision making process prior to engaging in the decision making process itself.

[153] As set out in various materials provided by the applicant's representative, at the commencement of discussion it was "explained that there were two ballots taking place at the meeting"[108] or that "there would be two ballots and that members of the current claim group would vote first and then members of the proposed claim group would vote in the second ballot"[109] and that "it was proposed that voting would be by way of secret ballot."[110]

[154] The Authorisation affidavit sets out at [20] and [21] that attendees were provided with an explanation as to the parts of the meetings, the different ballot papers and the resolutions on the ballots, with the first two resolutions on each being concerned with the decision making process and that "[a]fter I explained of the resolutions, the current claimants voted by placing a tick or cross next to their preferred choice on each of the first three resolutions."[111] The process proceeded in the same manner at both Authorisation Meetings.

[155] The issue here is that there does not seem to have been discussion on whether there was a traditional decision making process or the decision making process to adopt at either meeting, with the direction towards a secret ballot appearing to be a *fait accompli* for both of these topics. The question of whether there was a traditional decision making process was itself put as a secret ballot as resolution 1 on the ballot paper amongst all the other resolutions rather than as a discussion to and with the group. This is the same for the decision making process itself.

[156] Aside from there appearing to be no discussion and no apparent ability for attendees to propose alternatives, there was also no actual resolution of those questions at either meeting until after the entire process was complete. This means that it was not actually decided whether there was a traditional decision making process or not or what the decision making process should be prior to the decision making process being engaged in. There is nothing inherently wrong with the proposed decision making process itself, the issue is that it was presupposed, that it would occur as set out in the introduction of the meetings and on the ballots provided.

[157] As a further pointer towards this issue, when discussing the possibility of late comers at the Meekatharra meeting, it was stated that "… if they attended the hall before 3.00pm I could have explained the resolutions to them personally and they could have voted using the ballot paper."[112] In my view, such a suggestion does not pay heed to the scheme anticipated by the authorities in the FCA and these together do not show proof of a proper process to authorise under s 251B.

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[108] Evelyn Gilla affidavit [10].
[109] Elaine King affidavit [8].
[110] Ibid [13].
[111] Authorisation affidavit [23].
[112] Hegney letter [30].

[158] In my view, the process undertaken falls into the same set of issues as *KLC v Williams* in that the group were not asked in any effective way whether there was a traditional decision making process and instead a process was set out in anticipation if it being followed.

[159] As I am of this view and for the reasons set out in my consideration of the Meekatharra and Perth Authorisation meetings, I cannot be satisfied that the application has been properly authorised in accordance with s 251B and a reasonable opportunity was given in the adoption of a particular process.

Composition of the Claim Group

[160] This section addresses the fourth contention of the applicant's representative.

[161] At [94] of her reasons, the delegate set out that in her 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."[113] This arose due to the exclusion of people from the Perth Authorisation meeting and receiving the unsolicited material.

[162] The composition of the claim group as described here differs from the requirements for s 190B(3) which calls for a clear explanation of the basis upon which a person will be eligible to be recognised as a member of the group.[114] The composition of the claim group is more focussed on whether the people who call themselves a claim group actually are a group. As quoted by the delegate, O'Loughlin J in *Risk* set out that:

> 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.[115]

[163] By fulfilling the terms of s 190B(3) by sufficiently describing the claim group therefore, it doesn't necessarily hold that the claim group composition will be adequate for matters of authorisation or other parts of the registration test. This is of course of particular importance in authorisation as:

> 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.[116]

[164] This summarises the reasons I am of the view that both the Meekatharra and Perth meetings did not properly authorise the making of the amended application or the new applicant.

[165] As I am of the view that members of the claim group were excluded from the Perth authorisation meeting it is difficult to agree that the people who call themselves the group in this instance

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[113] Delegate Registration Decision [94].
[114] See for example *Doepel* [37] and *Gudjala 2007* at [28]-[34].
[115] *Risk* [60].
[116] *Quall* [35].

actually are. Certainly it is my view as expressed before, that the amended application was not authorised by all the persons in the native title group.

[166] The unsolicited information compounds this, strongly questioning as it does the legitimacy of the additionally noted ancestors in the claim group description and calling for these parties to demonstrate their *bona fides* as group members and potential native title holders.

[167] The reconsideration submission contends that the unsolicited materials are "too vague and uncertain to really amount to anything"[117] and on this I am inclined to agree. Almost all signatories attended the authorisation meetings and although the unsolicited information is signed by the lead applicant whereas her sealed affidavit is not, this was allowed by the FCA's special measures in response to COVID-19 at the time of its filing so the affidavit must be taken as authority.

[168] Even discounting the unsolicited materials I remain of the same view as the delegate, particularly given the exclusion of individuals from the Perth authorisation meeting and the materials provided in relation to this issue, to be satisfied that the claim group is properly constituted. This is another reason for my view that the applicant is not properly authorised to make the amended application and therefore I consider the requirements of s 190C(4) are not met. This has further implications for the consideration of ss 190B(5)-(7) which I discuss below.

Subsection 190B(5) Factual Basis for claimed native title

[169] The legislation requires at s 190B(5) that:

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
>
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
>
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
>
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[170] As is generally set out in deliberations such as these, Dowsett J in *Gudjala 2007* in considering s 190B(5) provides some authority for considering these questions where he states that it is "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)"[118]

[117] Reconsideration submission [76].
[118] *Gudjala 2007* [39].

and that "there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty."[119]

[171] In light of this, examining the materials provided and in particular the McCaul report, it is clear that an Aboriginal society existed at the time of European contact and that there is evidence to contend that strong knowledge of this society and country remains. The question is however, is there a link between the members of that society and the claim group, the 'whole group' at is it now defined and constituted?

[172] From my reasons above, I am of the view that there is uncertainty as to the composition of the group leaving open the possibility that the rights and interests claimed may be held by 'some other group', that is, a claim group that is more widely constituted than the one which sought to authorise the new applicant to make the amended application. This is not to say that the people in attendance at the Meekatharra and Perth meetings aren't the right people, they most probably are. Rather they may not be the whole group and may not have been composed of all the people who may hold native title in the claim area.

s 190B(5)(a) – factual basis supporting the claim group and their predecessors association with the area

[173] As set out by the delegate in her reasons at [124], in assessing an applications ability to meet the terms of s 190B(5)(a), there must be sufficient factual basis to support the assertion in the application that the claim group and the predecessors of the claim group had an association with the application area. A primary consideration in this is understanding or being satisfied of who comprises the claim group.

[174] As with the delegate and due to the reasons outlined above, I also have uncertainties as to the composition of the claim group and therefore am unable to proceed with the assessment of s 190B(5)(a). This uncertainty around the composition of the claim group does not allow me to be satisfied that there is sufficient factual basis to support an association between the claim group and the application area at sovereignty and since this time. This means that like the delegate, I am of the view that s 190B(5)(a) is not met.

s 190B(5)(b) – factual basis for the existence of traditional laws and customs acknowledged and observed by the native title claim group

[175] Having drawn this conclusion for s 190B(5)(a) with uncertainty as to the composition of the claim group and having considered this matter afresh, like the delegate in her decision, I am unable to proceed with a consideration of s 190B(5)(b) on the factual basis for the existence and observation of traditional laws and customs. Due to uncertainty around the composition of the claim group, I am unable to consider whether the factual basis is sufficient to support the assertion that there exists traditional laws and customs, acknowledged and observed by the claim group that give rise to native title rights and interests. In my view therefore, s 190B(5)(b) is not met although it is also my view that resolving uncertainty around the composition of the group will likely overcome this.

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[119] Ibid [52].

s 190B(5)(c) – factual basis supporting continued observance of traditional laws and customs

[176] This condition relies upon whether the factual basis exists to support the assertion at 190B(5)(b) that there are traditional laws and customs which give rise to the claimed native title rights and interests. As I have found that I cannot be satisfied that the terms of s 190B(5)(b) are met, then it holds that I cannot be satisfied there is a factual basis for the continued observance of traditional laws and customs. In my view therefore, s 190B(5)(c) is not met.

Subsection 190B(6) – prima facie case for the claimed native title rights and interests

[177] The Act at s 190B(6) sets out that "[t]he Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established". This is followed by a note which sets out that if the claim is accepted onto the Register, then the Registrar must enter onto the Register "only those claimed native title rights and interests that can, prima facie, be established." This is of significance as the note further sets out that only those rights and interests can be taken into account in good faith negotiations in the right to negotiate process and criteria for making arbitral body determinations in the right to negotiate process.

[178] The Act at 223(1)(a) sets out that the native title rights and interests are "possessed under the traditional laws acknowledged, and the traditional customs observed" by the group. *Gudjala 2007* cited this at [85] and went on to refer to findings in *Yorta Yorta*, that:

> …it is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question.[120]

[179] As I have concluded that I am not satisfied of the factual basis for supporting traditional laws and customs at 190B(5), given the above, it follows that I cannot be satisfied that s 190B(6) has been met. As a result of this and as set out by the delegate in her original decision, I cannot be satisfied that the native title rights and interests claimed in the application are established on a prima facie basis and therefore s 190B(6) is not met.

Subsection 190B(7) – physical connection

[180] The Act at s 190B(7) sets out that 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 a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters)…

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[120] *Gudjala 2007* [86].

[181] This revolves around the word 'traditional' in ss 190B(7)(a) and (b) and as I was unable to be satisfied of the factual basis for traditional laws and customs at s 190B(5) then I am unable to be satisfied that s 190B(7) has been met. Because of this, I adopt the delegates reasoning and conclusion that:

> 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'. 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.[121]

Conclusion

[182] I reaffirm this is a fresh and original decision as to whether or not in my view, the claim meets all the conditions for registration specified in ss 190B-190C. I confirm that I conducted a reconsideration of the claim made in this application against each of the conditions contained in s 190B and s 190C in accordance with s 190E.

[183] For the reasons outlined, I give notice that the Registrar should not accept the claim for registration. For the purposes of s 190E(11), my opinion is the claim does not satisfy all the conditions outlined in s 190B and s 190C of the Act.

[184] A summary of the result for each condition is provided at Annexure A to these reasons.

[121] Delegates Registration Decision [132] citing *Gudjala 2009* [84].

Annexure A

Summary of Registration Test Result

Application Name	Yugunga-Nya People
NNTT file no.	WC1999/046
Federal Court of Australia file no.	WAD29/2019
Date of Decision	30 October 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)	s 190B(5)(a)	Not met
	s 190B(5)(b)	Not met
	s 190B(5)(c)	Not met
		Aggregate Result: Not met
s 190B(6)		Not met
s 190B(7)(a) or (b)		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)		Not met
S 190C(5)		Met