



## Registration Decision

<b>Application name</b>	Loretta Dodd & Ors on behalf of the Middamia Native Title Claim Group and State of Western Australia (Middamia)
<b>Name of applicant</b>	Loretta Dodd, Alannah Kelly, A. Dooler(deceased), Anthony Walters, Ben Roberts, Kendall Roe, Rachael Cooyou, Tanya Roe
<b>Federal Court of Australia No.</b>	WAD192/2022
<b>NNTT No.</b>	WC2022/004
<b>Date of Decision</b>	22 November 2022
<b>Date of Reasons</b>	
<b>Claim accepted for registration</b>	

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

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Daniel Deibler

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 19 May 2021 and made pursuant to s 99 of the Act.

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

# Reasons for Decision

## CASES CITED

*Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (*Anderson*)  
*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*)  
*Bell v Native Title Registrar* [2021] FCA 229 (*Bell*)  
*Corunna v Native Title Registrar* [2013] FCA 372 (*Corunna*)  
*Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177 (*Warrie*)  
*Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths*)  
*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)  
*Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*)  
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)  
*Harrington-Smith on behalf of the Wongatha People v Western Australia (No 5)* [2003] FCA 218 (*Harrington-Smith No 5*)  
*Hazelbane v Doepel* [2008] FCA 290 (*Hazelbane*)  
*Martin v Native Title Registrar* [2001] FCA 16 (*Martin*)  
*McLennan v State of Queensland* [2019] FCA 1969 (*McLennan*)  
*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*)  
*Northern Land Council v Quall* [2020] HCA 33 (*Quall*)  
*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*)  
*Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*)  
*Sampi v Western Australia* [2005] FCA 777 (*Sampi*)  
*Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26 (*Sampi FC*)  
*State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*)  
*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)  
*Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 (*Wakaman*)  
*Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*)  
*Western Australia v Ward* [2002] HCA 28 (*Ward HC*)

## BACKGROUND

- [1] This is an application filed on behalf of the Middamia native title claim group (the claim group). It covers land and waters of about 733 sq km in the Gascoyne region in Western Australia. The application area is situated about 140 km north east of Carnarvon and just north of the Kennedy Range. It is surrounded by the Gnulli, Gnulli #2 and Gnulli #3 - Yinggarda, Baiyungu and Thalanyji People (WCD2019/016) native title determination in the south and west, the Thudgari People (WCD2009/002) determination in the east and Budina 2 (WCD2021/002) determination in the north.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (the Registrar) on 19 September 2022

pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.<sup>2</sup>

## Registration conditions

- [3] Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [4] Given that the application was made on 16 September 2022 and has not been amended, I am satisfied that neither s 190A(1A) nor s 190A(6A) apply.
- [5] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision. The information that is to be included on the Register is outlined in Attachment A.

## Procedural fairness

- [6] As a delegate of the Registrar, I am bound by the principles of administrative law, including the rules of procedural fairness, when making a registration decision.<sup>3</sup> Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication.<sup>4</sup> When applying the registration test and making my registration decision I have followed the case law regarding procedural fairness requirements<sup>5</sup> and note that the following steps were undertaken to ensure procedural fairness has been accorded:
- On 28 September 2022 the Tribunal's senior officer for this matter sent a letter to the State of Western Australia (the State) informing the State that any submission in relation to the registration of this claim should be provided by 11 October 2022. No submissions from the State were received.
  - On 28 September 2022 the senior officer also provided the relevant representative body - Yamatji Marlpa Aboriginal Corporation (YMAC) - with a copy of the application.
  - The senior officer, also on 28 September 2022, wrote to inform the applicant that any information additional to the application should be provided by 11 October 2022. By email of 29 September 2022 the applicant submitted the following documents in support of the application:

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<sup>2</sup> Section 190A(1).

<sup>3</sup> *WA v NTR* [37].

<sup>4</sup> *Hazelbane* [25].

<sup>5</sup> See, for instance, *WA v NTR* [21] – [38]; *Hazelbane* [23] – [31]; *Bell* [73] – [84].

- Notice of authorisation meeting;
  - Summary report prepared by YMAC (the report);
  - Affidavit T.D.;
  - Affidavit R.K.
- On 5 October 2022, the notice of the authorisation meeting was provided to the State for comment. As the delegate considered the other three provided documents to be confidential in nature, the State was asked to provide a confidentiality undertaking in regard to those documents, should the State wish to receive a copy. No confidentiality undertaking and no submissions from the State were received.

[7] This concluded the procedural fairness process.

### Information considered

[8] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.

[9] I have had regard to information in the application and accompanying documents. I have also considered the documents provided by the applicant directly to the Registrar on 29 September 2022.<sup>6</sup>

[10] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers.<sup>7</sup>

[11] The State has not provided submissions in relation to the application of the registration test.<sup>8</sup>

[12] I have considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 3 October 2022 (the geospatial report). Moreover I have conducted my own searches using the Tribunal’s registers and mapping database.

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

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

[13] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

[14] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other

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<sup>6</sup> Section 190A(3)(a).

<sup>7</sup> Section 190A(3)(b).

<sup>8</sup> Section 190A(3)(c).

document, required by ss 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.<sup>9</sup>

### Section 61

[15] The application contains the details specified in s 61.

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A, Affidavits of the members of the applicant	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

### Section 62

[16] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits of the members of the applicant	Met
s 62(1)(d)	Section 47C agreement	Schedule L Item 2	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Schedule C, Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis:	Schedule F and G, Attachment F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met
s 62(2)(i)	Conditions on applicant's authority	Schedule IA, Attachment R	Met

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

[17] As outlined in my reasons below, I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

[18] The Explanatory Memorandum that accompanied the *Native Title Amendment Bill 1997* provides that the 'Registrar must be satisfied that no member of the claim group for the

<sup>9</sup> *Doepel* [16], [35]–[39].

application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test'.<sup>10</sup> The Explanatory Memorandum further discusses the general discouragement of overlapping claims by members of the same claim group and encouragement of consolidation of such multiple claims into one application.<sup>11</sup>

- [19] It is therefore my understanding that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied.
- [20] I note that I am permitted to have regard to information, which does not form part of the application, when assessing the requirements of s 190C(3).<sup>12</sup>
- [21] The geospatial report advises that no other native title claim applications or determinations fall within the external boundaries of the Middamia claim. Using the Tribunal's geospatial database and registers, I have verified this information and have also verified that the information is still correct at the time of making this decision. I am therefore satisfied that there is no previous application that covered the whole or part of the area covered by the current application.
- [22] In my view, as there is no previous application to which ss 190C(3)(a) to (c) apply, I do not need to consider the requirements of s 190C(3) further.

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

- [23] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(a) are met.

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

- [24] I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition of s 190C(4) to be satisfied.
- [25] Schedule R Item 1 provides that the application has been certified and refers to Attachment R. That Attachment contains a certificate of YMAC. I therefore consider s 190C(4)(a) to be applicable to the application and will continue assessing the conditions of this subparagraph.
- [26] Section 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body'.<sup>13</sup> It is my understanding that my task here is to identify the appropriate representative body and be satisfied that the

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<sup>10</sup> Explanatory Memorandum 29.25.

<sup>11</sup> Ibid 35.38.

<sup>12</sup> *Doepel* [16].

<sup>13</sup> Ibid [72], [78], and [80] – [82]; see also *Wakaman* [32].

application is certified under s 203BE. Once satisfied that these conditions have been met, I am not required to 'address the condition imposed by s 190C(4)(b)'.<sup>14</sup>

### *Appropriate representative body*

- [27] The geospatial report states that the claim area falls 100% within the area of YMAC. The certificate in Attachment R stems from YMAC, which is a recognised representative body.
- [28] The certificate is signed by the CEO of YMAC. It is my view, based on *Quall*, that a CEO can perform the functions of a representative body based on an instrument of delegation or as an agent.<sup>15</sup>
- [29] I am therefore satisfied that YMAC was the relevant RATSIB for the application area and that it was within its power to issue the certificate.

### *Requirements of s 203BE*

- [30] To meet the requirements of this condition, the certification must comply with s 203BE(4), which reads:

A certification of an application for a determination of native title by a representative body must:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a), (aa) and (b) have been met; and
- (b) briefly set out the body's reasons for being of that opinion; and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

- [31] The certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it, that any conditions under s 251BA on the authority that relate to the making of the application have been satisfied and that reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.
- [32] The certificate further complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion, specifically by the following information:
- The group description is based on anthropological research and fieldwork conducted since 2014 in and around the application area;<sup>16</sup>
  - YMAC organised the authorisation meeting;<sup>17</sup>

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<sup>14</sup> Ibid [80].

<sup>15</sup> *Quall* [48], [63], and [93].

<sup>16</sup> Attachment R [1] – [5].

<sup>17</sup> Ibid [7].

- The notice for the authorisation meeting was posted to all persons on the YMAC database known to YMAC anthropologists as being eligible for inclusion in the proposed claim group description;<sup>18</sup>
- At the authorisation meeting an attendance list was taken and the eligibility of attendees was verified by YMAC anthropologists. 27 persons attended the meeting;<sup>19</sup>
- Based on the aforementioned research, YMAC was aware that no traditional decision-making process existed and an agreed and adopted decision-making process was used at the authorisation meeting;<sup>20</sup>
- The claim group decided on the composition of the applicant, authorised the applicant to bring the application and placed conditions on the authority of the applicant;<sup>21</sup>
- The applicant did not make any decisions which exceeded the conditions placed on it.<sup>22</sup>

[33] I further note that s 203BE(4)(c) is not applicable to the present application, as no overlapping application exists (see above).

### *Conclusion*

[34] Having regard to the above, I am satisfied that the certificate of the relevant representative body meets the requirements of s 203BE(4). I therefore consider the criteria under s 190C(4)(a) to be met.

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

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

[35] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

[36] Attachment B describes the application area by metes and bounds and refers to the boundaries of the three native title determinations mentioned above (see [1] above) and geographic coordinates to six decimal places. Attachment B specifically excludes four native title determinations and Schedule B lists general exclusions.

[37] Attachment C contains a map titled ‘Middamia’, which includes:

- The application area depicted by a bold dark blue outline;
- Commencement point depicted by a pink star and labelled;

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<sup>18</sup> Ibid [8].

<sup>19</sup> Ibid [9].

<sup>20</sup> Ibid [6].

<sup>21</sup> Ibid [7], [10] – [13].

<sup>22</sup> Ibid [14].



- Land tenure depicted as per the legend and labelled;
- General topographic background image;
- Scalebar, locality map and coordinate grid; and
- Notes relating to the source, currency and datum of data used to prepare the map.

[38] The geospatial report concludes that the description and map are consistent and identify the application area with reasonable certainty. I agree with this assessment and am therefore satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

[39] For the reasons below, I am satisfied the claim meets the requirements of s 190B(3).

[40] Section 190B(3) stipulates that the Registrar must be satisfied that:

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

[41] It is my understanding that, when assessing the requirements of this provision:

- I am required to address only the content of the application;<sup>23</sup>
- S 190B(3) ‘requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;<sup>24</sup>
- The focus ‘is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group’;<sup>25</sup>
- Where a claim group description contains a number of paragraphs, the paragraphs should be read ‘as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open’;<sup>26</sup>
- To determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, ‘[i]t may be necessary, on

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<sup>23</sup> *Doepel* [16], [51].

<sup>24</sup> *Gudjala 2007* [33].

<sup>25</sup> *Doepel* [37].

<sup>26</sup> *Gudjala 2007* [34].

occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described'.<sup>27</sup>

[42] Schedule A provides that

The Native Title claim group are those Aboriginal persons who:

(a) are descendants of the following people, who belong to the regional society that includes the Yinggarda, Baiyungu and Tharrkari language groups:

- (i) Janya;
- (ii) Jubilee;
- (iii) Nyardu (also known as Tim Dodd);
- (iv) Maggie Dodd; and
- (v) Mary Harvey,

where descent can be either by birth or adoption in accordance with traditional laws acknowledged and the traditional customs of that regional society; and

(b) identify themselves as having connection to the claim area under traditional law and custom of the regional society that includes the Yinggarda, Baiyungu and Tharrkari language groups and are so identified by other native title claimants.

[43] I note that the description in Schedule A does not entail a list of the names of all of the persons in the native title claim group. I therefore consider s 190B(3)(b) to be applicable.

[44] It is my understanding that there are a number of elements to the claim group description. I will discuss each criterion below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. I am of the view that the description is to be read as a discrete whole.<sup>28</sup>

### *Descent*

[45] I understand that members of the claim group include those who are the biological descendants of the five named apical ancestors. I further understand that the claim group description also provides for adoption in accordance with the traditional laws acknowledged and the traditional customs of the regional society.

[46] I consider that requiring a person to show descent from a specific ancestor provides an objective criterion about whether a person is a member of the claim group and has been previously accepted by the Courts.<sup>29</sup> I consider that factual enquiries would lead to the identification of the people who meet this criterion.

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<sup>27</sup> *WA v NTR* [67].

<sup>28</sup> *Gudjala 2007* [34].

<sup>29</sup> *WA v NTR* [67].

### *Self-identification and social recognition*

[47] As noted above, I understand that the description of the claim group is to be read as a discrete whole. I consider the self-identification and group recognition criteria to be a qualifier to the membership by descent.

[48] I also note that a description of membership containing qualifiers of self-identification and recognition is not one with an external and objective point of reference from which to commence an inquiry. However, the Court has considered that membership to a claim group must be based on group acceptance and that this requirement is inherent in the nature of a society.<sup>30</sup> Moreover, the High Court in *Yorta Yorta* found that the existence of a society depended upon mutual recognition within the group.<sup>31</sup> In *Sampi FC*, the Full Court noted that ‘in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group ... [t]he unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system’.<sup>32</sup>

[49] Based on the information provided in the application, it is my understanding that identification and recognition as a member of the claim group has to be in accordance with the traditional law and customs of the regional society. In my view, it would therefore be possible through enquiries to ascertain whether a person can under traditional law and customs self-identify and be socially recognised as a member of the claim group.

### *Decision*

[50] I am satisfied that the application describes the persons in the claim group sufficiently clearly such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Therefore, only focusing upon the adequacy of the description of the claim group, I consider the requirements of s 190B(3) to be met.

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

[51] To meet the requirements of s 190B(4), the Registrar must be satisfied that the description contained in the application is sufficient to allow the claimed native title rights and interests to be readily identified. It is my understanding that the description must be understandable and have meaning.<sup>33</sup> However, this does not mean that rights broadly described cannot readily be identified within the meaning of s 190B(4).<sup>34</sup>

[52] The description referred to in s 190B(4), and as required by s 62(2)(d), is ‘a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law’.

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<sup>30</sup> *Aplin* [260].

<sup>31</sup> *Yorta Yorta* [108].

<sup>32</sup> *Sampi FC* [45].

<sup>33</sup> *Doepel* [99], [123].

<sup>34</sup> *Strickland* [60].

[53] When assessing whether the claimed native title rights and interests are readily identified I am confined to the material contained in the application itself.<sup>35</sup> Moreover, I will not consider whether the claimed rights and interests are ‘native title rights and interests’, as defined in s 223, as in my view that question is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis.

[54] Schedule E contains a description of the claimed native title rights and interests. Having considered the description, I am satisfied that the description is understandable and has meaning and is sufficient to identify all the claimed rights and interests. I consider s 190B(4) to be met.

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

[55] Section 190B(5) provides 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.

[56] I understand that, when assessing the requirements of s 190B(5), I am not confined to the information contained in the application but can also have regard to additional information pursuant to s 190A(3).<sup>36</sup> Moreover, I must treat the asserted facts as true.<sup>37</sup>

[57] I consider my task to be assessing whether the asserted facts can support the existence of the claimed native title rights and interests.<sup>38</sup> To do so the applicant’s material must be ‘more than assertions at a high level of generality’ and must not merely restate or be an alternate way of expressing the claim.<sup>39</sup> In my view, the factual basis must provide sufficient detail to enable a ‘genuine assessment’ of whether the three assertions outlined in s 190B(5) are supported by the claimants’ factual basis material.<sup>40</sup>

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<sup>35</sup> *Doepel* [16].

<sup>36</sup> *Ibid* [16]; *Strickland* [62] approved in *Strickland FC* [88], [89].

<sup>37</sup> *Doepel* [17]; *Gudjala FC* [57], [83].

<sup>38</sup> *Ibid*.

<sup>39</sup> *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

<sup>40</sup> *Gudjala FC* [92].

### *Factual basis for s 190B(5)(a)*

#### **What is needed to provide a sufficient factual basis for s 190B(5)(a)?**

[58] As summarised in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:<sup>41</sup>

- (a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement;<sup>42</sup>
- (b) there is an association between the whole group and the area, although not all members must have such association at all times;<sup>43</sup> and
- (c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.<sup>44</sup>

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

[59] Regarding the association of members of the native title claim group, and that of their predecessors, with the application area, the applicant has provided the following information:

- European settlement began to substantially impact the claim area around the 1870s and the establishment of pastoral stations in the region started in the 1880s. Middalya station was founded in the mid-1880s and the country around Mia Mia was taken up some time after 1886. The claim area predominantly includes part of the present day Middalya pastoral lease.<sup>45</sup>
- The contemporary local-landed groups of the claim area are a set of 'families', each typically referred to by a surname, who are the descendants of members of the original patrilineal groups of the claim area.<sup>46</sup> The claimants primarily understand that they belong to that area of country and have rights to speak for it because the spirit of their forebears, who also belong there, continue to be present in the landscape. This concept is encompassed by their use of the polysemous term 'Old People', as referring both to the spirits of claimants' known forebears and to those beyond memory, ultimately extending back to mythic origins. They imbue the land and waters with power over the living, and their presence regulates behaviour toward kin and country. The 'Old People' recognise those who are from the country and may guide, assist or protect them, as well as monitor visitors and potentially cause harm to those who do not behave or communicate appropriately with them. Claimants interact with the 'Old People', especially by calling out on country, which in turn influences the actions of

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<sup>41</sup> *McLennan* [28].

<sup>42</sup> *Gudjala 2007* [52].

<sup>43</sup> *Ibid.*

<sup>44</sup> *Martin* [26]; *Corunna* [39].

<sup>45</sup> Report [14] – [15].

<sup>46</sup> *Ibid* [29].

the 'Old People'. Claimants believe that when they pass away, their own spirits will return to their country and join those of the 'Old People'.<sup>47</sup>

- These features of local organisation are shared by the landed groups across the region, as are their underlying religious principles. Middamia claimants belong to a wider regional society encompassing others who share laws and customs and mutually recognise each other's connections to particular lands and waters. There is recognition throughout the region that the claimants are the families who belong to and speak for areas of country within the application area.<sup>48</sup>
- The parents of the apical ancestors named in the claim group description were likely in occupation of the claim area before effective sovereignty and have an association with the claim area which has been recorded since at least the 1870s. Historical documentation suggests the approximate year of their birth to be 1875 or before.<sup>49</sup> The apical ancestors Maggie Dodd, *Inbilu/Jubilee* and *Nyardu/Tim Dodd* were born at Middalya station. The birth place of the other two apical ancestors are unknown. *Inbilu/Jubilee* and *Nyardu/Tim Dodd* were born between 1895 and 1904.<sup>50</sup> Some of the descendants of the apical ancestors were also born at Middalya station and lived and worked on it.<sup>51</sup>
- According to the claimants dozens of cultural places are located in the claim area including birth places, burial sites, areas of historical residence, increase sites, water sources and locations of spiritual beings.<sup>52</sup> These places include a massacre site in the northern half of the claim area, a former camp and burial site in the centre of the claim area and a pool in the southern part of the claim area. Some of these places are connected to creatures from the dreamtime, and can only be visited by men or require that a cultural protocol is fulfilled when visiting, such as singing out or throwing sand.<sup>53</sup>
- The claimants also have an extensive knowledge of resources within the claim area, demonstrating a familiarity with their country and customs relating to procuring food, water, medicine and other materials.<sup>54</sup>
- From effective sovereignty until the latter twentieth century claimants have been constantly accessing the claim area. For at least the last 90 years claimants continued to either reside at Middalya station; undergo seasonal work; or maintain connection to country through regular visits to camp, hunt, gather, fish, and teach young people.<sup>55</sup>

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<sup>47</sup> Ibid [30], Affidavit R.K. [33].

<sup>48</sup> Report [38].

<sup>49</sup> Ibid [41], [44].

<sup>50</sup> Ibid [45], [53].

<sup>51</sup> Ibid [51] - [52], [55].

<sup>52</sup> Ibid [23].

<sup>53</sup> Ibid [22], [67], [85], [89]; Affidavit R.K. [13], [21], [23], [31]; Affidavit T.D. [13], [26] - [27].

<sup>54</sup> Report [71].

<sup>55</sup> Ibid [52], [73] - [74].

- Current claimants visit the claim area to hunt and camp.<sup>56</sup>

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

- [60] Based on the above information provided I am satisfied the factual basis is sufficient to the support the assertion that the claim group presently has an association with the application area. This connection is both physical and spiritual in nature. The claimants continue to visit the claim area and hunt and camp in it. They have knowledge of resources, the waterways and pools within the claim area as well as knowledge of cultural places, the cultural protocol associated with those places and dreamtime creatures. Moreover, the claimants understand that they belong to that area because the spirit of their forebears, who also belong there, continue to be present in the landscape. It is their view that they will return to the claim area after they die. Lastly, I note that the claimants are recognised in the general area as the families who belong to and speak for the application area.
- [61] The factual basis also provides for an association with the application area of the apical ancestors and predecessors of the claimants. The parents of the apical ancestors occupied the claim area and were born around the time of effective sovereignty. The apical ancestors were, at least some of them, born in the application area and lived and worked there. According to the traditional laws and customs of the wider regional society they constituted the totemic patriclan connected to the claim area. Subsequent generations continued to live, work on and visit the application area up to the present day claimants.
- [62] I must be further satisfied that there is sufficient information to support the assertion of an association between the group and the whole area. While most of the information about the cultural places in the claim area is of a general nature and has no geographical particularity, there are singular examples of places located in the northern, southern and central part of the claim area. I further note that the claim area predominantly includes part of the present day Middalya pastoral lease, on which some of the apical ancestors and their predecessors were born, worked, lived and are buried.
- [63] Based on the factual basis provided, I consider that the information is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area'.<sup>57</sup> In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

**Decision**

- [64] In sum, given the information before me, I consider the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

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<sup>56</sup> Affidavit T.D. [16].

<sup>57</sup> *Gudjala 2007* [52].

## *Factual basis for s 190B(5)(b)*

### **What is needed to provide a sufficient factual basis for s 190B(5)(b)?**

[65] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests. 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. I therefore consider it appropriate to apply case law regarding s 223(1)(a) to s 190B(5)(b).

[66] Based on the observations made by the High Court in *Yorta Yorta* I understand that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.<sup>58</sup> In the context of the Act, 'traditional' carries, however, two other elements in its meaning, namely:<sup>59</sup>

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

...the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.<sup>60</sup>

[67] In *Warrie*, the Full Federal Court observed that while 'a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character', the Act does not 'require establishment of some overarching 'society' that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title'.<sup>61</sup>

[68] Finally, further guidance for my assessment of the factual basis can be gained from *Gudjala 2009*, in which Dowsett J required:

- that the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;<sup>62</sup>
- that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;<sup>63</sup> and

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<sup>58</sup> *Yorta Yorta* [46].

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* [46] - [47].

<sup>61</sup> *Warrie* [107]; *Alyawarr* [78].

<sup>62</sup> *Gudjala 2009* [37], [52].

<sup>63</sup> *Ibid* [40].



- that the factual basis contains an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).<sup>64</sup>

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

- a link between the pre-sovereignty society, the predecessors and the claim group in the application area; and
- the continued observance of normative rules by the successive generations of the claim group, such that the normative rules can be described as ‘traditional laws and customs’.

#### **What information has been provided in support of the assertion at s 190B(5)(b)?**

[70] In addition to the information outlined in regard to s 190B(5)(a) the claimants have provided the following information regarding the pre-sovereignty and current society and the traditional laws and customs:

- At the time of sovereignty, the claim area lay within a region of multiple language-owning groups who shared the same or similar system of laws and customs with their neighbours, as well as other more distant groups in the region. The foundation for a connection to country was primarily religious in nature with a system of local organisation where totemic patrilans shared the spiritual essence of the clan’s totems. Totemic patrilans were manifestations of a specific set of religious principles underlying laws and customs at sovereignty. These were inherited from ancestors and transmitted to succeeding generations.<sup>65</sup>
- Membership of the land-holding group at sovereignty was based on a spiritual connection to the ‘Old People’ connected to the country. This spiritual essence was transmitted through serial patrification, ultimately from ancestral totemic spirits, resulting in totemic patrilans. As a result of historical forces including demographic change, the original fine-grained system of local organisation has undergone processes of social and geographic aggregation. Moreover the transmission has changed from patrification to bilateral filiation. Serial filiation continues to be the fundamental principle through which connections to country and rights in country are recognised within the claim area. Today the claim area can be seen as held by the families who are the descendants of those totemic patrilan members who held the land at

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<sup>64</sup> Ibid [29], [54], [69].

<sup>65</sup> Report [24] – [25].

sovereignty. The membership system of the land-holding group today is defined by serial one (parental) or two-step (grandparental) filiation.<sup>66</sup>

- Adopted children were incorporated, socially, into the landed group: understood as imbued with ancestral essence of the social father and his estate, and thus a member of the relevant totemic patriline. Thus, the term 'adoption' can be used in the sense of being raised by a social parent over an extended period, learning the cultural geography of his or her adoptive estate, learning how to interact with the sentient landscape, and so forth.<sup>67</sup>
- The anthropological research shows that the religious system underpinned the socially mandated and reproduced ritual behaviours, such as protocols of access, means of spiritual communication, interpretation of signs and symbols, ideas of safety and danger, health and illness, death and burial. Country itself was, and is, imbued with spiritual forces which can be acted upon through particular ritualised practices.<sup>68</sup>
- Examples of claimants' acknowledgement and observance of their laws and customs include claimants avoiding places such as burial sites, 'men's places', law grounds and massacre places; or activities being prohibited or proscribed in certain places, such as swimming in a pool with a watersnake or throwing sand in the water or 'singing out'.<sup>69</sup>
- Only those who can legitimately communicate with the spiritual forces and be recognised by them are safe on country and gain the benefits of the country's resources. For example, without appropriately greeting and introducing themselves to the watersnake a person may face sanctions through spiritual harm and/or a limited supply of fish, or a flood.<sup>70</sup>
- New family members or visitors have to be introduced to the country and the spirits of the 'Old People'. People not from the country, and therefore unfamiliar to the spirits and 'Old People' there, are in potential danger if they access it. Claimants exercise the right to invite other people, both Aboriginal and non-Aboriginal, onto their country, and therefore to welcome visitors and restrict access if necessary.<sup>71</sup>
- The claimants hold knowledge of significant places in the claim area which are religious, economic, social and historical. By teaching their children how to access places safely and care for them, there is a transmission of law and custom. Regular visits to check on country to protect natural features, such as cleaning out water sources and other places of significance, are vital ways claimants continue to meet their obligations as kin to country.<sup>72</sup>

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<sup>66</sup> Ibid [35] – [37].

<sup>67</sup> Ibid [61].

<sup>68</sup> Ibid [26].

<sup>69</sup> Ibid [67].

<sup>70</sup> Ibid [69]; Affidavit R.K. [27] – [29]; Affidavit T.D. [14].

<sup>71</sup> Report [77]; Affidavit R.K. [27] – [29]; Affidavit T.D. [14].

<sup>72</sup> Report [81].

- The claimants were taught cultural knowledge by their parents, grandparents and other relatives through stories and visiting places. They teach and were taught about hunting, fishing or camping places, traditional names of animals, how to cook and cultural restrictions on eating and hunting animals.<sup>73</sup>

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

- [71] Based on the information provided it is my understanding that at the time of effective sovereignty the forebears of the claimants who lived in the application area were part of a wider regional society encompassing multiple language-owning groups with whom they shared the same or similar system of laws and customs. In this regard, I note, that Lindgren J accepted in *Harrington-Smith No 5* that traditional laws and customs of a claim group might also be the traditional laws and customs of a wider population, without that wider population being a part of the claim group.<sup>74</sup>
- [72] One set of laws of that regional society concerned land tenure, according to which land-holding was based on a spiritual connection to the ‘Old People’ connected to the country. Land-holding rights were transmitted through serial patrilineation, ultimately from ancestral totemic spirits, resulting in totemic patrilineans.
- [73] The factual basis further provides that this system of land tenure is still acknowledged and observed by the current claimants, even though in an adapted form. The membership system of the land-holding group today is defined by serial one (parental) or two-step (grandparental) filiation.
- [74] The claimants are the descendants of the apical ancestors, who were members of the wider regional society at effective sovereignty. Some of the predecessors of the claimants lived and worked in the claim area. The claim area can be seen as held today by the families who are the descendants of the totemic patrilinean members who held the land at sovereignty. These land-holding rights of these families are recognised in the general region.
- [75] The current claimants observe and acknowledge other laws and customs, for example restrictions on eating and hunting animals. Moreover, restrictions concern different places in the claim area. The laws and customs identify some places as no go areas and some as only being approachable after a certain cultural protocol has been fulfilled. It is my understanding that these restrictions are either based on the presence of the spirits of the ‘Old People’ or the presence of creatures from the Dreamtime, such as a watersnake. It is also my understanding that these customs and laws have a normative character as non-observance of these rules will have consequences on a spiritual level.
- [76] Lastly I note that the claimants were taught these rules by their parents, grandparents and other relatives through stories and visiting places and that they transmit their cultural knowledge to their children and grandchildren in the same way. Given effective sovereignty occurred around 1880 and there have only been a few generations between the ancestors and the claimants, I infer the apical ancestors would have also observed these restrictions and

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<sup>73</sup> Ibid [86]; Affidavit R.K. [7] – [8], [15], [17], [18], [24], [26]; Affidavit T.D. [6], [8] – [9], [13], [16], [25], [33], [34].

<sup>74</sup> *Harrington-Smith No 5* [53].

practised these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are ‘traditional’ in the *Yorta Yorta* sense as they derive from a society that existed at the time of sovereignty.

## Decision

[77] I am satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(b).

### *Factual basis for s 190B(5)(c)*

#### **What is needed to provide a sufficient factual basis for s 190B(5)(c)?**

[78] Section 190B(5)(c) is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[79] Meeting the requirements relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.<sup>75</sup> It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.<sup>76</sup>

[80] Based on *Gudjala 2009* it is my understanding that, if the claimant’s factual basis relies upon the drawing of inferences, ‘[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity’.<sup>77</sup>

#### **Is the factual basis sufficient for the assertion of s 190B(5)(c)?**

[81] It is my view that there is a sufficient factual basis for the assertion that the laws and customs have continued to be observed by the claim group, substantially uninterrupted, since at least the time of effective sovereignty in the application area.

[82] As outlined in my reasons regarding s 190B(5)(b), the applicant has identified a wider regional society of multiple language-owning groups as the relevant pre-sovereignty society and outlined some facts in relation to that society, in particular regarding their land-holding and membership system. Moreover examples of observance and acknowledgement of this system and of other customs and laws by the present claim group have been provided, such as:

- Restrictions on visiting certain places;
- Cultural procedures connected to certain places;
- Introduction of new family members or visitors to the country and the spirits of the ‘Old People’;

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<sup>75</sup> *Martin* [29].

<sup>76</sup> *Gudjala 2007* [82].

<sup>77</sup> *Gudjala 2009* [33].

- Rules governing the consumption of food;
- Rules governing hunting of animals.

[83] The knowledge about country has been transmitted from generation to generation. One claimant explains that the knowledge about country was passed to him by his siblings, since his father and grandfather, who taught his siblings and showed them the country, died when he was still young.<sup>78</sup> He is now passing on his knowledge to his grandchildren, when they visit the claim area together.<sup>79</sup>

### Decision

[84] I am therefore satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(c).

### Conclusion

[85] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is a sufficient factual basis for the three assertions of ss 190B(5)(a)–(c).

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

#### *What is required to meet s 190B(6)?*

[86] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. If a claim is arguable on its face, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.<sup>80</sup> The assessment requires, however, some weighing of the factual basis and imposes a more onerous test to be applied to the individual rights and interests claimed than s 190B(5).<sup>81</sup>

[87] I understand that, when assessing the requirements of s 190B(6), I am permitted to consider material beyond the application.<sup>82</sup>

[88] I note that a claimed native title right or interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.<sup>83</sup>

[89] I also understand the ‘critical threshold question’ for recognition of a native title right or interest under the Act to be ‘whether it is a right or interest “in relation to” land or waters’.<sup>84</sup> The phrase ‘in relation to’ is however ‘of wide import’.<sup>85</sup>

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<sup>78</sup> Affidavit T.D. [6] – [8].

<sup>79</sup> Ibid [33].

<sup>80</sup> *Doepel* [135].

<sup>81</sup> Ibid [127], [132].

<sup>82</sup> Ibid [16].

<sup>83</sup> *Yorta Yorta* [86]; *Gudjala 2007* [86].

<sup>84</sup> *Ward HC* [577].

<sup>85</sup> *Alyawarr* [93].

[90] Taking into account the definition of 'native title rights and interests' in s 223(1),<sup>86</sup> it is my view that under s 190B(6) I must consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[91] Only those rights and interests that I consider to be established prima facie will be entered on the Register.<sup>87</sup>

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

[92] At the outset I note that all the rights and interests claimed in Schedule E are claimed in relation to the application area and therefore, prima facie, rights or interests 'in relation to land or waters'. I also consider that Schedule B and Schedule E of the application sufficiently address any issue of extinguishment, for the purpose of the test at s 190B(6), since the application differentiates between rights and interests claimed in relation to 'Area A' and 'Area B'. Schedule E provides the following definition for Areas A and B:

"Area A" means land and waters within in the Application area that are landward of the high water mark and which comprises:

- (i) areas of unallocated Crown land (including islands) that have not been previously subject to any grant by the Crown;
- (ii) areas to which s. 47 of the Act applies;
- (iii) areas to which s. 47A of the Act applies;
- (iv) areas to which s. 47B of the Act applies; and
- (v) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.

"Area B" means land and waters within the Application area that is not included in Area A above.

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

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

[93] I understand that the above claimed right is one of exclusive possession, and for such claims, there is significant judicial guidance. In *Ward HC*, the High Court commented that

... a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak

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<sup>86</sup> *Gudjala 2007* [85].

<sup>87</sup> Section 186(1)(g).

for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.<sup>88</sup>

[94] In *Griffiths* the Full Court held:

It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is "their country". If control of access to country flows from spiritual necessity because of the harm that 'the country' will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a 'spiritual affair'. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.<sup>89</sup>

[95] Lastly, in *Sampi* the Court held:

The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.<sup>90</sup>

[96] I note that, as outlined in my considerations regarding s 190B(5), the members of the claim group have a spiritual connection to the application area, as the spirit of their forebears, who also belong there, continue to be present in the landscape.<sup>91</sup> This spiritual connection extends via the 'Old People' ultimately back to mythic origins.<sup>92</sup> Their presence regulates behaviour toward kin and country and the 'Old People' recognise those who are from the country and may potentially cause harm to those who do not behave or communicate appropriately with them.<sup>93</sup> One of the claimants stated, for example:

There are no-go zones in the Middamia claim area that only traditional owners can go. If people want to go there they can call me, otherwise they don't know where to go. They might run into something from our Dreamtime. They might get crook. Them things happen.<sup>94</sup>

If people went out there without permission, it would be a problem. If you don't know the sites then you can get into trouble.<sup>95</sup>

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<sup>88</sup> *Ward HC* [88].

<sup>89</sup> *Griffiths* [127].

<sup>90</sup> *Sampi* [1072].

<sup>91</sup> Report [30].

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Affidavit T.D. [14].

<sup>95</sup> *Ibid* [24].

[97] Claimants also believe that when they pass away, their own spirits will return to their country and join those of the 'Old People'.<sup>96</sup> I also note that the claimants are considered in the wider region by other Aboriginal people as speaking for the claim area.<sup>97</sup>

[98] In light of the above, I consider that, as pointed out in *Griffiths*<sup>98</sup>, the claimants consider it a spiritual necessity to control access to country because of the harm that 'the country' will inflict upon unauthorised entry. I am therefore satisfied that an exclusive right against the whole world is prima facie established.

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

- **Area A if the claim to exclusive possession cannot be recognised; and**
  - **Area B**
- 2. The right to hunt, fish, gather, take and use resources (other than minerals, petroleum and gas) in the area for any purpose;**
  - 3. The right to access, enter and to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;**
  - 6. The right to travel over, visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;**
  - 7. The right to light fire within the area;**
  - 8. The right to engage in cultural activities in the area including conducting and participating in ceremony and ritual, and the transmission of cultural knowledge;**

[99] As outlined above, the information before me provides that the apical ancestors and their parents lived in the application area and so did their descendants.<sup>99</sup> The current claimants are aware of birth places of their predecessors and locations of their camps.<sup>100</sup> In addition, while not living in the application area, they regularly visit the area to fish, hunt, cook, camp, collect resources and maintain cultural places.<sup>101</sup> I understand that they also use their visits to teach the younger generations and reconnect with their ancestors and the 'Old People'.<sup>102</sup>

[100] It is my view that the factual basis material prima facie establishes that these rights are possessed under the traditional laws and customs of the native title claim group.

- 4. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;**
- 5. The right to invite and permit others to have access to and participate in or carry out activities in the area;**

[101] As mentioned before, it is my understanding that the claimants are considered in the wider region by other Aboriginal people as speaking for the claim area and that their predecessors were the recognised totemic patriclan for the area.<sup>103</sup> Moreover, it is my understanding that a

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<sup>96</sup> Report [30]; Affidavit R.K. [33].

<sup>97</sup> Report [38].

<sup>98</sup> *Griffiths* [127].

<sup>99</sup> Report [41], [44] – [45], [51] – [55].

<sup>100</sup> *Ibid* [23].

<sup>101</sup> *Ibid* [71], [81]; Affidavit T.D. [16] – [20].

<sup>102</sup> Report [81], [86]; Affidavit R.K. [7] – [8], [15], [17], [18], [24], [26]; Affidavit T.D. [6], [8] – [9], [13], [16], [25], [33], [34].

<sup>103</sup> Report [29] – [30].



connection with the 'Old People', an introduction to them and certain cultural acts, such as singing out, are required to enter the claim area without harm.<sup>104</sup> I consider that the right to invite others is therefore intrinsically connected with a spiritual connection to the 'Old People' as only someone recognised by the 'Old People' can introduce 'others' to the 'Old People'.

[102] Since I consider that the claimants have this spiritual connection with the 'Old People' (see above), it is also my view that these rights are prima facie established.

*Which of the claimed native title rights and interests are not established on a prima facie basis?*

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

- **Area A if the claim to exclusive possession cannot be recognised; and**
- **Area B**

**9. The right to bury people and be buried within the area including conducting burial rites.**

[103] I note that there is information before me of predecessors of the claimants being buried in the claim area. However, I also note that there is no mention in the provided information that the claimants intend to be buried in the claim area or that this would be a necessity so that their spirit can return to the claim area and the 'Old People'. In contrast, I observe that in the report it is stated:

It is evident that there have been changes in the practices surrounding death and burial for a number of reasons (for example, the way in which people are today buried at a cemetery entails different practices).<sup>105</sup>

[104] There is therefore no information before me that this right or custom is still observed by the current claimants. I consider the factual basis material is not sufficient to indicate that this right is held under the laws and customs passed down through the generations to the claimants. I am therefore unable to be satisfied that this right is prima facie established.

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

[105] For the application to meet the requirements of s 190B(7) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done. It is my understanding that the physical connection must be in accordance with the traditional laws and customs of the claim group and that 'traditional' in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.<sup>106</sup>

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<sup>104</sup> Ibid [69], [77]; Affidavit R.K. [27] – [29]; Affidavit T.D. [14].

<sup>105</sup> Report [88].

<sup>106</sup> *Gudjala 2009* [84]; *Yorta Yorta* [86].

[106] I refer to the information above in relation to s 190B(5) of these reasons, which provides a sufficient factual basis supporting the assertion that the native title claim group acknowledges and observes the traditional laws and customs of the pre-sovereignty society.

[107] The factual basis includes information that describes a traditional physical association of members of the claim group with the application area, including claimants visiting the application area, hunting, camping and fishing in the application area, looking after places of cultural importance and teaching the younger generations about places in the application area and cultural protocol connected to these places.<sup>107</sup>

[108] Given the above I am satisfied that at least one member of the native title claim group currently has a traditional physical connection with the land or waters within the application area.

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

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

Requirement	Information addressing requirement	Result
Section 61A(1) No native title determination application if approved determination of native title	Geospatial report, Tribunal's geospatial database and registers	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, Item b) [2]	Met
Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule B, Item b) [3]	Met

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

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

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule E (Rights in Area A and Area B – [2]), Schedule Q	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, Item b) [4]	Met

*End of reasons*

<sup>107</sup> Schedule G; Report [52], [74], [81], [86]; Affidavit R.K. [7] – [8], [15], [17], [18], [24], [26]; Affidavit T.D. [6], [8] – [9], [13], [16], [25], [33], [34].

## Attachment A

### Information to be included on the Register of Native Title Claims

Application name	Middamia
NNTT No.	WC2022/004
Federal Court of Australia No.	WAD192/2022

#### Section 186(1): Mandatory information

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

#### Application filed/lodged with:

Federal Court of Australia

#### Date application filed/lodged:

16 September 2022

#### Date application entered on Register:

22 November 2022

#### Applicant:

As appears on the extract from the Schedule of Native Title Applications but replace 'Anthony Dooler' with 'A. Dooler (deceased)'

#### Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

#### Conditions on Applicant's authority

1. At the Authorisation meeting on 25 June 2022 in Carnarvon the Claim Group authorised the Applicant to bring the Application in accordance with the following "Resolution E" which was passed by consensus:

*(a) To authorise the Applicant (identified in Resolution F) to bring a native title claim application on behalf of those Aboriginal persons who:*

*1. are descendants of the following people, who belong to the regional society that includes the Yinggarda, Baiyungu and Tharrkari language groups:*

*1. Janya;*

*2. Jubilee;*

*3. Nyardu (also known as Tim Dodd);*

4. *Maggie Dodd; and*

5. *Mary Harvey,*

1. *where descent can be either by birth or adoption in accordance with traditional laws acknowledged and the traditional customs of that regional society; and*
2. *identify themselves as having connection to the claim area under traditional law and custom of the regional society that includes the Yinggarda, Baiyungu and Tharrkari language groups and are so identified by other native title claimants.*

*(b) The claim is to be brought over the claim area depicted in the map labelled Attachment C.*

*(c) The rights to be claimed in the new claim include the following:*

1. *The right to possession, occupation, use and enjoyment of that area as against the whole world (exclusive possession).*
2. *Where exclusive possession cannot be recognised, the Applicant is authorised to claim the following native title rights and interests:*
  1. *The right to hunt, fish, gather, take and use resources (other than minerals, petroleum and gas) in the area for any purpose;*
  2. *The right to access, enter and to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;*
  3. *The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;*
  4. *The right to invite and permit others to have access to and participate in or carry out activities in the area; and*
  5. *The right to travel over, visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;*
  6. *The right to light fire within the area;*
  7. *The right to engage in cultural activities in the area including conducting and participating in ceremony and ritual, and the transmission of cultural knowledge;*
  8. *The right to bury people and be buried within the area including conducting burial rites.*

*(d) The Applicant, on the advice of YMAC, is authorised to add to the application any additional rights that the research indicates may be able to be established for the claim.*

2. At the authorisation meeting the Claim Group then placed conditions upon the authority of the Applicant pursuant to s. 251BA of the NTA, which conditions relate to the making of the Application in accordance with the following “Resolution G” which was passed by consensus:

- (a) The Applicant is authorised to bring the claim in a form that is consistent with the claim as set out in Resolution E above.*
- (b) There are conditions imposed on the Applicant such that the Applicant is not authorised to make any amendments to the claim inconsistent with Resolution E or Resolution G except if explicitly authorised or directed by the Claim Group in accordance with its decision making process at a Claim Group meeting (for the avoidance of doubt, the members of the Applicant may participate in the Claim Group decision making process as members of the Claim Group).*

3. At the Authorisation Meeting the claim group also placed conditions upon the authority of the Applicant pursuant to s.251BA of the NTA requiring the Applicant to deal with matters in relation to the Application (including consent to act and ceasing to act) in accordance with the following “Resolution H” which was passed by consensus:

- (a) The Applicant is authorised to make day to day decisions about the claim.*
- (b) There are conditions imposed on the authority of the Applicant such that the Applicant is not authorised to make decisions about the following matters related to the claim except to the extent explicitly authorised or directed by the Claim Group in accordance with its decision making process at a Claim Group meeting (for the avoidance of doubt, the members of the Applicant may participate in the Claim Group decision making process as members of the Claim Group):*
  - 1. Decisions to authorise a new claim;*
  - 2. Decisions to authorise a change to the claim group description;*
  - 3. Decisions to authorise a change to the rights claimed in the native title application which is inconsistent with Resolution E;*
  - 4. Decisions to authorise a change to the geographical boundaries of the native title claim;*
  - 5. Decisions to authorise an ILUA;*
  - 6. Decisions on who forms part of the Applicant group, except as specifically allowed in resolution I.1 below;*
  - 7. Decisions to change the decision making process pursuant to sections 251A, 251B, and 251BA of the NTA;*
  - 8. Decisions relating to matters to which the right to negotiate applies (other than right to negotiate matters arising from the expedited procedure process); and*

9. *Decisions about where compensation monies including money arising out of future act agreements is to be distributed or paid.*

4. "Resolution I.1" was passed by the Claim Group at the Authorisation Meeting by consensus and was as follows:

1. *A member of the Applicant group ceases to be authorised where:*
  - (a) *the person does not swear or affirm an affidavit today for section 62 of the Native Title Act in relation to the proposed claim;*
  - (b) *the person provides the NTRB with a signed, written document that says they do not consent to be a member of the Applicant Group for the proposed claim; or*
  - (c) *the person or persons seek to amend the claim without the authorisation of the Claim Group, or make or purport to make a decision/s in relation to any of the matters listed in resolution 3(b) above without the authorisation or direction of the Claim Group;*
  - (d) *the person refuses a request by the NTRB to sign a document where the request is made in accordance with a decision of the Claim Group or the Applicant Group, and the remaining members of the Applicant later resolves that the person shall be removed as a member of the Applicant; or*
  - (e) *an appropriate medical practitioner certifies that the person does not have mental capacity to understand or make reasonable judgments about legal matters, and where the remaining members of the Applicant Group later resolve that the person shall be removed as a member of the Applicant Group; or*
  - (f) *the person dies.*

**Area covered by application:**

As appears on the extract from the Schedule of Native Title Applications but under b) 4. Replace 'Schedule 8' with 'Schedule B'

**Persons claiming to hold native title:**

As appears on the extract from the Schedule of Native Title Applications

**Registered native title rights and interests:**

As appears on the extract from the Schedule of Native Title Applications but delete space before especially in 'Subject to laws and customs' 3.; format 'Rights in Area A' and 'Rights in Area A and Area B' to bold; and delete '9. The right to bury people and be buried within the area including conducting burial rites.'

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Daniel Deibler

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 19 May 2021 and made pursuant to s 99 of the Act.

22 November 2022