

NATIONAL NATIVE TITLE TRIBUNAL  
RECONSIDERATION OF CLAIM

Section 190E *Native Title Act 1993* (Cth)

<b>Application name:</b>	Iman People #4
<b>Name of applicant:</b>	Harold Doyle, Trent White, Samantha Booth and John Waterton
<b>State/territory/region:</b>	Queensland
<b>NNTT file no.:</b>	QC2017/008
<b>Federal Court of Australia file no.:</b>	QUD413/2017
<b>Date application made:</b>	21 August 2017
<b>Date of Registrar's registration decision:</b>	2 March 2018
<b>Date reconsideration application made:</b>	6 March 2018
<b>Name of Member:</b>	Helen Shurven

I have conducted a reconsideration of the claim made in this application against each of the conditions contained in ss 190B–190C, in accordance with s 190E of the *Native Title Act 1993* (Cth) ('the Act'). All sections of legislation referred to in this decision are from the Act.

I have decided the claim in the Iman People #4 application does not satisfy s 190C(3). Therefore, the claim must not be accepted for registration.

**Date of decision:** 30 April 2018

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**Helen Shurven**

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

**Legislation** *Native Title Act 1993* (Cth) ss 29, 61–63, 190A–190F

**Cases** *Dann v Yamera* [2017] FCA 513 ('Dann')

*Northern Territory of Australia v Doepel* [2003] FCA 1384 ('Doepel')

*Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26 ('Sampi')

*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 ('Aplin')

## INTRODUCTION

- [1] This document sets out my reasons for the decision to give notice to the Native Title Registrar ('the Registrar') that she should not accept for registration the Iman People #4 native title claim made in the native title determination application QUD413/2017 ('the Iman People #4 application').
- [2] On 21 August 2017, the Iman People #4 application was filed with the Federal Court of Australia ('FCA'). The claim covers three discrete areas of land and waters in south east Queensland (Areas A, B and C), which cover approximately 16,202 square kilometres. Area A lies to the north, Area B to the east and Area C to the south west of the area covered by the Iman People #2 native title determination (QUD6162/1998) ('the Iman People #2 determination'). Area A overlaps the currently registered Wadja People native title claim (QUD422/2012) ('the Wadja People claim'). Areas B and C do not overlap any other claims.
- [3] If a copy of the claimant application is given to the Registrar under s 63, the Registrar is required to consider the claim made in the application (s 190A(1)). If an application complies with the conditions prescribed by ss 190B–190C, the Registrar must register the claim on the Register of Native Title Claims ('the Register') under s 190A(6). If the claim does not satisfy all the conditions, the Registrar must not accept the claim for registration. A delegate of the Registrar was not satisfied that all of the conditions were satisfied, specifically the requirements of s 190C(3) were not met, and therefore the Iman People #4 claim was not accepted for registration.
- [4] Section 190E requires the National Native Title Tribunal ('the Tribunal') to apply the 'test for registration' to any claimant application already considered by the Registrar that did not satisfy the conditions for registration, provided:
- the applicant makes a valid application for reconsideration under s 190E(2); and
  - the applicant has not already made an application to the FCA for a review of the Registrar's decision under s 190F(1).
- [5] Section 190E(10) requires that I must be satisfied all the conditions set out in ss 190B–190C are met in order for me to give notice to the Registrar that she should accept the claim for registration. This decision outlines my reconsideration of the claim, which is done 'de novo', that is, as if the claim had not been previously heard or decided. I am not evaluating the decision of the delegate. While I must reconsider the claim de novo, it is open to me to adopt, where appropriate, the reasons and conclusions reached by the delegate.

## Basis for reconsideration

[6] The only condition which the delegate was not satisfied the applicant had met, and the only section to which the applicant's grounds for their application for reconsideration relate, is s 190C(3).

[7] The applicant attached to the application for reconsideration the FCA Form 1, a copy of the delegate's registration test decision and the statement of reasons for decision. In their application for reconsideration, the applicant takes issue with the following paragraphs of the delegate's decision, which relate to s 190C(3):

[126] In my view, the consideration of whether I am satisfied that 'no person' is included in both claim groups is dictated by the primacy of the description at Schedule A and not what any supporting or additional information provides about how membership of the claim group is regulated.

[127] I refer to the acknowledged existence of other persons descended from Mary Ann who may also be descendants of Sarah Dodd. Those persons may be limited to the descendants of the union of [name deleted]'s parents, but I have no information before me that would confirm their primary Iman identification. The threshold is that I must be satisfied that no person is a member of both native title claim groups. In my view, there is no certainty that this is the case and I cannot be satisfied as to the terms required of this condition for registration.

[8] The applicant sets out the grounds for seeking reconsideration in some detail which are annexed to this decision as Attachment A. In summary, those grounds, among others, are that, in the applicant's view, the delegate:

- accepted that membership of the Iman People #4 claim group comes from a combination of self-identification, descent from a relevant ancestor, and recognition as being a member of the claim by others who are accepted as being members of the claim group;
- overly relied on Schedule A of the application showing the Iman People #4 claim group description, and the relevant ancestor factor, in deciding that [name deleted] was a member of the Iman People #4 claim group and the Wadja People claim, and did not sufficiently take into account parts of the application which outlined the traditional laws governing membership of the Iman People #4 claim group, including Schedule O, Attachment F and Schedule R;
- did not sufficiently take into account Dr Powell's December 2017 report which argued that by the traditional law and custom of the Iman People, [name deleted] was not entitled to claim primary rights with the Iman People in the overlap area with the Wadja People claim because her submission 'suggests that she privileges her Wadja affiliation over her Iman connection' in relation to the overlap area;
- did not sufficiently take into account the rules of the Wardingarri Aboriginal Corporation. (I note that while the rules were not provided in full with the reconsideration application, they are available on the Office of the Registrar of Indigenous Corporations website. According to these rules, the Corporation is the

Registered Native Title Body Corporate which holds land in trust on behalf of Iman People).

- could have inferred [name deleted] 'was the only member of her family line to identify as Wadja in preference to Iman'; and
- should have provided the applicant with an opportunity to comment if [name deleted]'s assertions identifying herself as Wadja was going to be regarded 'as an issue that would prevent registration'.

[9] In relation to the final ground summarised above, I do not intend to comment further on it, as my role is to consider the matter de novo. The procedural fairness steps undertaken by the delegate including providing the applicant an opportunity to comment on all of the material provided by [name deleted]. In respect of this reconsideration application, the procedural fairness steps are outlined below.

#### **Procedural fairness steps undertaken by the delegate and background to request for reconsideration**

[10] On 23 August 2017, the Registrar of the FCA provided a copy of the application and accompanying documents to the Registrar in accordance with s 63. This triggered the duty of the Registrar to consider the claim for registration in accordance with s 190A. On 12 September 2017, the applicant provided additional material in relation to the application directly to the Registrar. On 31 January 2018, the delegate gave the State of Queensland ('the State') an opportunity to comment on this material. The same day, the State confirmed it would not be making any submissions in relation to the delegate's consideration of that material.

[11] In between 12 September 2017 and 31 January 2018, a number of steps were taken in relation to the claim consideration.

[12] On 10 November 2017, the delegate wrote to the applicant to request further information and provide them an opportunity to comment in relation to the registration condition at s 190C(3). That is, on the possible existence of claimants in common with the earlier registered and overlapping Wadja People claim. On 17 November 2017, the applicant provided submissions in response.

[13] On 16 November 2017, the delegate received unsolicited adverse material from a third party, [name deleted], in relation to the existence of claimants in common between the applicant in the Iman People #4 application, and the Wadja People claim group. This was relevant to the consideration of s 190C(3) as the Wadja People claim is on the Register and overlaps Area A of the Iman People #4 application. On 20 November 2017, the delegate wrote to [name deleted] advising that if she wanted the delegate to be able to consider the material, she would need to consent to the provision of the material to the applicant for their comment. [Name deleted] consented to the provision of the material to the applicant.

- [14] On 24 November 2017, the delegate provided the applicant with a copy of [name deleted]'s material, including an opportunity to comment by 8 December 2017. On this date, the applicant provided submissions in reply. The delegate did not provide [name deleted] with an opportunity to respond to the applicant's reply to her material as, in the delegate's view, she was not a person or party to whom procedural fairness was owed.
- [15] The delegate of the Registrar made the registration decision on 2 March 2018, finding the Iman People #4 application did not meet the requirements for registration. As noted above, the delegate reached this conclusion on the basis she was not satisfied the application met the registration condition in s 190C(3). That section relates to ensuring there are no common native title claim group members between the application being considered for registration and any overlapping previous application which is on the Register when the current application was made.
- [16] On 2 March 2018, the Registrar sent notice to the applicant via email and registered post 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).
- [17] On 6 March 2018, the applicant applied for reconsideration of the claim. On 7 March 2018, the FCA confirmed an application for review under s 190F(1) has not been made. In addition to this, there have been no previous reconsideration requests under s 190E(4).
- [18] The reconsideration must be conducted by a single Member of the Tribunal (s 190E(5)). On 16 March 2018, the then President of the Tribunal, Raelene Webb QC, appointed me to be the Member to reconsider for registration the claim made in the Iman People #4 application.
- [19] As the delegate found the Iman People #4 application did not meet the registration condition at s 190C(3) and could not therefore be registered, the delegate did not consider it necessary to provide the State with copies of the applicant's or [name deleted]'s material relating to s 190C(3) for comment.

#### **Future Act affected**

- [20] On 3 January 2018, the State issued a s 29 notice in relation to tenement application MDL521, which overlaps part of the area of the Iman People #4 application. This means the application is 'future act affected' and so I must use my best endeavours to complete this reconsideration by 2 May 2018 (s 190E(8)).

#### **Procedural fairness steps in the reconsideration application process**

- [21] On 14 March 2018, the Tribunal wrote to inform the applicant that the reconsideration would proceed and a Member had been appointed to carry out the reconsideration. The Tribunal noted that on reconsideration, a Member could consider not only the information before the delegate but any other information the Member considers relevant. The Tribunal invited the applicant to provide any further information for consideration by 23 March 2018.

No additional information was received from the applicant, apart from the application for reconsideration which had already been provided.

[22] On 16 March 2018, the Tribunal wrote to inform the Registrar of the FCA that a request for reconsideration had been received in respect of the Iman People #4 application.

[23] Given that this matter is future act affected and best endeavours must be used to finalise a decision prior to 2 May 2018, the Tribunal wrote to inform the State on 26 March 2018 that the applicant had requested their native title claim be reconsidered, and attached the following documents, which the State had not previously been provided with:

- The application for reconsideration of claim for registration, dated 6 March 2018;
- The submission of [name deleted], dated 14 November 2017;
- An anthropologist's report about Alice Dutton and Harriet Dutton, ('the Dutton report'), dated 17 November 2017; and
- The applicant's additional submission and accompanying anthropologist report about Sarah Dodd ('the Dodd report'), dated 8 December 2017.

[24] The Tribunal invited the State to make any comments in response to this material, so far as it relates to the conditions set out in ss 190B–190C by 9 April 2018. The State advised the Tribunal it did not intend to make any comments in relation to this material.

#### **Information considered when undertaking the reconsideration**

[25] In accordance with s 190E(7)(a), the information to which I must have regard is that which the delegate was required to have regard. This information is listed at paragraphs [7] and [10]–[12] of the delegate's decision. I have also accessed the Tribunal's Registers and mapping database to assist with my consideration below, as well as the rules of the Wardingarri Aboriginal Corporation (as referred to in the reconsideration application). There is no further information to which I have had regard, apart from that contained in the reconsideration application itself.

#### **NON-CONTESTED FINDINGS OF THE DELEGATE**

[26] I note neither the applicant nor the State have contested the reasons or conclusions reached by the delegate, apart from the applicant contesting the reasons and conclusions regarding s 190C(3). Having independently considered each of these conditions and formed my own opinion, I adopt the reasons and conclusions reached by the delegate relating to the following sections of the Act (as at the stated paragraphs of the delegate's registration test decision):

- s 190B(2) – identification of area subject to native title at [16]–[26];
- s 190B(3) – identification of the native title claim group at [27]–[32];
- s 190B(4) – identification of claimed native title [33]–[35];
- s 190B(5) – factual basis for claimed native title at [36]–[81];

- s 190B(6) – prima facie case at [82]–[92];
- s 190B(7) – physical connection at [93]–[97];
- s 190B(8) – no failure to comply with s 61A at [98]; and
- s 190B(9) – no extinguishment etc. of claimed native title at [99].

[27] The delegate was satisfied the application met all of the procedural and other conditions listed in s 190C. I am also satisfied, having considered the material afresh and formed my own opinion, and adopt the reasons and conclusions reached by the delegate relating to the following sections of the Act (as at the stated paragraphs of the delegate’s registration test decision):

- s 190C(2) – information etc. required by ss 61–2 at [100]–[103];
- ss 190C(4)(b), (5) – authorisation at [129]–[146].

**CONTESTED FINDINGS OF THE DELEGATE: Section 190C(3) – no common claimants in previous overlapping applications**

[28] Having formed my opinion about all of the other conditions, as outlined above at paragraphs [26] to [27] above, the remainder of these reasons outline my conclusions regarding whether or not I am satisfied in relation to s 190C(3). As Barker J outlined in *Dann* the Tribunal’s task is ‘not one of finding in all respects the real facts on the balance of probabilities, or on some other basis, and...should not supplant the role of the Court when adjudicating upon [such] matters’ (at [21] citing *Doepel*).

[29] To meet s 190C(3), the Registrar must be satisfied that (emphasis in original):

*no person included in the native title claim group for the application (the **current application**) [that is, the Iman People #4] was a member of a native title claim group for any previous application [that is, the Wadja People], if:*

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

[30] The focus of the inquiry mandated by s 190C(3) is to identify if there are any common claim group members between the current application and any previous, but still registered, application which overlaps the same land and waters. There must be no common native title claim group members between the application currently being considered for registration and any overlapping previous application in order to satisfy the condition at s 190C(3).

[31] Section 190C(3) is supported by an [Explanatory Memorandum](#), which states (at 29.25):

The Registrar must be satisfied that no member of the claim group for the application or amended 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 (subsection 190C(3)). It is now required that the application name the persons in the claim group or otherwise describe them sufficiently clearly so that it can be ascertained whether any particular person is in the group.

[32] As noted earlier in this reconsideration decision, Part A of the Iman People #4 claim (the 'current application') overlaps the registered claim of the Wadja People. The entry for the Wadja People claim was, at the time the current application was made, on the Register. I am also satisfied, having accessed the entry on the Register, that the entry was made as a result of the Wadja People application being considered for registration under s 190A and that it has not been removed. As the Wadja People application meets the criteria for a 'previous application' required by s 190C(3), I must consider whether there are any members of the Wadja People claim group in common with the claim group for the current application.

[33] An extract from the Register shows that persons claiming to hold native title for the Wadja People are described as follows:

*The names (including Aboriginal names) of the persons (the native title claim group) on whose behalf the application is made or a sufficiently clear description of the persons so that it can be ascertained whether any particular person is 1 of those persons.*

*The native title claim group is comprised of all the persons descended from the following Wadja ancestors:*

- Myra Freeman
- Harriet Dutton
- Sarah Dodd
- Lilla Livingstone

[34] The application for the Iman People #4 claim states (at Schedule A):

*The names (including Aboriginal names) of the persons (the native title claim group) on whose behalf the application is made or a sufficiently clear description of the persons so that it can be ascertained whether any particular person is one of those persons.*

*The Native Title Claim group comprises the descendants of:*

- 1 Mary Arwa
- 2 Jim Waterton
- 3 Ada Robinson
- 4 Maggie Palmtree (known as Aggie)
- 5 Lizzie Palmtree
- 6 Eliza Shields
- 7 Mary Ann (mother of Maggie Dunn)
- 8 Fanny Waddy/Sandy
- 9 Dick Bundi/Bundai and Alice Dutton
- 10 The mother of John Serico

[35] I have examined the claim group description of each of these claims. On the face of it, [name deleted] is part of the Wadja People claim group by virtue of an apical ancestor on her father's side (Sarah Dodd), according to the Wadja People's claim group description on the

Register. [Name deleted] is also part of the Iman People #4 claim group, by virtue of an apical ancestor on her mother's side (Mary Ann, mother of Maggie Dunn), according to the Iman People #4 claim group description in Schedule A of the current application. [Name deleted] is automatically a member of each group, by virtue of those ancestors and claim descriptions.

[36] As Barker J stated in *Dann*, an 'Aboriginal person may, by different traditional pathways, be a member of more than one claim group. A difficulty arises, however, where a claim group makes an application for determination of native title over land and waters already the subject of a claimant application made on behalf of a claim group which has a common member' (at [5]).

[37] The applicant has argued the delegate overly relied on the claim group descriptions in making a decision about whether or not she was persuaded that [name deleted] was a member of both groups. In my view, consideration of s 190C(3) relies predominantly on the construction of the claim group description. The decision of Barker J in *Dann* goes into much detail about what he refers to as the 'conundrum' of the issues of claim group descriptors and self-identification (at [79]-[90]). In *Dann* it was argued that criterion additional to the descent category of membership should be considered, and Barker J outlined that matters such as self-identification were irrelevant given the 'construction of the formula used by the claim group' (at [86]-[90]).

[38] The application for reconsideration suggested I must look at other materials, which the applicant asserts, among other things, shows that [name deleted] cannot or should not be a member of both groups. In regard to this approach, Barker J did determine that it is not an unreasonable exercise of power to make a decision on the basis of information before the decision maker (at [59]). I have taken into account the information provided by the applicant, and in particular, the arguments as outlined at [7]-[8] above, to assist my consideration of the condition at s 190C(3). In my view, this material does not persuasively demonstrate that [name deleted] is not part of both groups for the reasons set out below.

[39] As mentioned above, one of the criticisms from the applicant of the delegate's decision was that she overly relied on the claim group description in forming the conclusion that she was not satisfied that no person included in the native title claim group for the current Iman People #4 application was a member of the claim group for the previous Wadja People application. The applicant asserts in its reconsideration application that self-identification and recognition are also important criteria for membership to the Iman People #4 native title claim group under the traditional laws and customs of the claim group. In this regard, the reconsideration application refers to the decision of Dowsett J in *Aplin* who referred to cases such as *Sampi* where the Full Court states that the 'unity among members of the group required by Yorta Yorta means that they must identify as people together who are bound by the one set of laws and customs or normative system' (at [45]). The central issue in *Sampi* was 'whether the primary judge erred in his conclusions that the Bardi and Jawi people did not form a single society at sovereignty' (at [5]). I understand the reference to these cases is to focus on the view that identification as a member of a certain group involves an internal

perspective of the group. Cases such as *Sampi* and *Aplin* refer to membership being based on group acceptance.

[40] Looking in more detail at the arguments raised in the reconsideration application, as outlined in Attachment A and summarised at paragraph [8] above, I make the following observations and conclusions:

- It has been established that [name deleted] has a relevant ancestor which connects her to Iman through her mother's side of the family. It has also been established that [name deleted] has a relevant ancestor which connects her to Wadja through her father's side of the family. The Iman People #4 claim group description show [name deleted] is entitled to claim membership of that group. Similarly, the Wadja People claim group description show [name deleted] is entitled to claim membership of that group. This is not necessarily a mutually exclusive membership. The difficulties which arise from these memberships, for [name deleted] and the Iman People #4 claim group, is apparent in the application for reconsideration.

- Dr Powell's December 2017 report argues (at [31]):

*It is clear from the Deed of Trust of the Iman People's Native Title Charitable Trust and the Wardingarri Rule Book, that primary affiliation or primary identification as a member of the Iman People is part of the Iman traditional law and customs pertaining to membership of the Wardingarri Corporation of the Iman People. It is also clear from her membership of the Wardingarri Corporation that the Iman People regarded [name deleted] to identify primarily as a member of the Iman People. However, it seems from her submission of 14 December 2017 that [name deleted] identifies as Wadja. This indicates that although she is connected by descent to the Iman People and in the past identified primarily as a member of the Iman People, she now privileges her Wadja affiliation or identity over her connections to the Iman People. It seems also from her submission that she has the view that because she claims the Overlap Area as a Wadja person through her father's side, that it cannot be claimed by the Iman People, to whom she is connected through her mother's side.*

As Dowsett J outlined in *Aplin*, '[m]any people claim affiliation with the country of more than one language group. The choice between primary identification with language, name, linguistic territory and bodies of laws and customs is complex. There is no single rule for resolution of multiple inherited potential affiliations' (at [29]).

- I have considered all relevant material and in particular, given the arguments raised in the application for reconsideration, I have focused on:
  - i. Schedules A, O and R to the application;
  - ii. Attachment F to the application; and
  - iii. the rules of the Wardingarri Aboriginal Corporation.

- Schedule A to the application clearly shows [name deleted] is a member of the Iman People #4 claim group on her mother's side by virtue of her family relationship with Mary Ann.

- Schedule O states:

*MEMBERSHIP OF ANY OTHER NATIVE TITLE GROUPS [see Act, s 190C]*

*Details of the membership of the Applicant or any member of the native title claim group in a native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.*

*None of the members of the claim group (including the Applicant) is a member of a native title claim group for any application which is:*

- a. in relation to the whole or part of the area claimed; and*
- b. entered on the Register of Native Title Claims as at the date of this application.*

As [name deleted] is prima facie a member of the Wadja claim group, it is not the case that 'none of the members of the claim group' is a member of another group. More on this is outlined below.

- The applicants for reconsideration suggest Schedule R should be considered further. That schedule refers to the authorisation process and attaches the minutes of the authorisation meeting. The minutes in relation to proposed resolution 9, say that 'Several attendees expressed concern that indigenous persons who did not identify as Iman people may seek to be parties to the claim'. Despite this concern, the claim group authorised the composition of the claim group as it appears in Schedule A, even though they assert their traditional laws and customs also require self-identification and recognition.
- Attachment F refers to materials filed in support of the Iman People #2 claim application, which is relied on for the Iman People #4 application. This attachment contains various affidavits and reference to reports. For example, Dr Powell is cited as stating in a 2012 report that she 'found that the principal way that persons are recruited to the cognatic descent groups that comprise the Iman People is through parental filiation back through time' (Attachment F, 6). Subsequent information in the original report indicates this filial connection is a 'blood line to Iman' (39). In the claim application, Dr Powell is also cited as stating, in the same report, that 'Iman Claimants allow only those persons descended from apical ancestors who are recognised as belonging to the Application area the right to speak for the Application area and to assert native rights and interests in the area covered by the Application'. The original report goes on to outline the importance of parental filiation.
- The rules of the Wardingarra Aboriginal Corporation indicate that to be a member of the Corporation, the person must be at least 18 years old, be an Iman person (as described in Schedule 2), and the 'person primarily identifies as an Iman person' (at 5.2.1). Schedule 2 lists the descent groups, which includes descendants of Mary

Ann. Definitions within the rules indicate that to ‘primarily identify as an Iman person’ means:

*an Aboriginal person who: (a) identifies as a member of the Iman People in preference to any right or entitlement they may have as a member any other Aboriginal or Torres Strait Islander Group by virtue of being entitled to exercise native title rights and interests outside Iman Country; (b) is accepted by at least one descendant from a majority of Iman descent groups; and (c) provides evidence sufficient to satisfy the Board of Directors that they meet the criteria set out in (a) and (b) above.*

[Name deleted] has stated: she is currently a member of the Wadja native title claim; she is a member of Wadja through her father’s side and a member of Iman through her mother’s side; she is invited to Iman meetings by word of mouth and the Iman newsletter. The reconsideration application also shows [name deleted] applied for and was accepted as a member of the Wardingarri Aboriginal Corporation. This suggests [name deleted] does, or has, primarily identified as an Iman person.

The questions for this reconsideration do not focus on whether a person can be a member of a Corporation, but rather they are:

- i. Is [name deleted] included in the native title claim group for the current application Iman People #4? The answer is yes.
- ii. Is [name deleted] a member of a native title claim group for any previous application? The answer is yes.

[41] My conclusion is that [name deleted] is simply saying she is a member of both claim groups, although there is nothing simple about the consequences of this belonging. As the delegate outlined (at [121]):

*The possibility of common claim group membership arises in relation to two descent lines used to describe the composition of the Iman native title claim group. On the first, Dr Powell’s report provides sufficient explanation that no link or relationship exists between the Wadja named apical ancestor Harriet Dutton and Iman named ancestor Alice Dutton. This is sufficient for me to be satisfied that none of the descendants of these two ancestors are included in both claim groups. On the second, the information in [name deleted]’s submission and the applicant’s submissions in reply leads me to consider that there is little certainty as to whether some persons included in the Iman People #4 native title claim group are not also members of the Wadja native title claim group, as they are described.*

I have the same difficulty as the delegate. The reconsideration application states that ‘once [name deleted]’s objection was known within the Iman community, a meeting of her family group was held where they decided not to support her objection and to continue to identify as Iman’ (see Attachment A below, at (k)). There is no supporting material or information in relation to that statement. In my view, however, [name deleted], as a consequence of the claim group descriptions, is a member of both groups. As noted above, the claim group authorised the composition of the claim group as it appears in Schedule A, even though they assert that their traditional laws and customs also require self-identification and recognition.

[42] As Barker J stated in *Dann*, where there was a similar factual situation on the basis of s 190C(3) (at [77]-[82]):

*What we have here is a narrow question of a person who has technically become a member of one prior registered claim group through descent, on her father's side, being also a claimant by important asserted traditional rights and interests in what she considers [another claim area], including in the overlap area, through her mother's side, in the second, in time, application group...This conundrum is not easily resolved. It is perhaps a classic example of how current statutory law relating to native title application registration does not always easily engage with traditional law and custom... the current problem only exists because of the overlap. There is no impediment to [the claimant] being a member of [one] claim as well as, at the same time, being a member of [another claim application]. That is because, in traditional terms, she claims along different path lines – through her father...and through her mother...It does not, on one view of things, seem reasonable – and certainly in traditional terms one would not think that it is – for a person to be required to give up their traditional claims either on their father's or their mother's side, simply in order to meet the registration requirements of the [Native Title Act] set out in s 190C(3).*

[43] As long as there is an overlap of claims, and claimants in common in those overlapping claims, the second claim in time cannot be placed on the Register. Part of the current Iman People #4 claim overlaps the registered Wadja People claim. I am satisfied there are persons included in the Iman People #4 who are also a member of a native title claim group for the registered Wadja People claim. I am not satisfied that no person included in the native title claim group for the current Iman People #4 application was a member of the claim group for the previous Wadja People application. The Wadja People claim was on the Register when the current Iman People # 4 application was made, and remains on the Register.

[44] As such, the Iman People #4 claim does not satisfy the condition of s 190C(3).

## **CONCLUSION**

[45] 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 concluded a reconsideration of the claim made in this application against each of the conditions contained in s 190B and in s 190C in accordance with s 190E.

[46] For the reasons outlined above, I give notice that the Registrar should not accept the claim for registration, in accordance with s 190E. For the purposes of s 190E(11), my opinion is the claim does not satisfy the condition outlined in s 190C(3).

End of reasons.

## Attachment A

### Applicant's grounds for seeking reconsideration

(a) At [125] of the [Registration Test Decision] decision, the delegate accepts that based upon *Dann v Yamera* [2017] FCA 513 (“Dann”) that key to her consideration is whether self-identification is a prerequisite to membership of the claim group.

(b) The delegate acknowledges that “Dr Powell’s Stage 2 and 3 anthropological reports on the Iman landholding group include findings about ‘the importance of descent in determining membership of the landholding group’ as well as ‘that identification as Iman is an essential criterion for membership of the Iman claim group.’” The delegate then goes on to accept Dr Powell’s finding in her later report that:

*“The factual basis then supports Dr Powell’s submission in her report on Sarah Dodd that membership of the Iman People native title claim group ‘derives from a combination of three things’: (a) self-identification, (b) descent from an ancestor who is regarded by others who also self-identify as Iman as having a traditional association with the Claim Area, and (c) recognition as a member of the claim group by others who are accepted as members of the claim group.”*

(c) S190 A (3) (a) of the Native Title Act states that the Registrar must have regard to:

(a) Information contained in the application and in any other documents provided by the applicant.

*The section does not establish a hierarchy of documents that will be given priority in the Registrar’s consideration. It does not, for example, provide that claim group description in schedule A of the Application takes priority over:*

(i) Other parts of the Application, or

(ii) Further information provided by the Applicants relating to their traditional Law and customs.

(d) Nor does the decision of Barker J in *Dann* support such a proposition, rather his honour found at [59] that: “I am not at all satisfied that it was legally unreasonable for the delegate to proceed in the way that she did. I do not consider it was an unreasonable exercise of power, in a relevant sense, for her to make a decision on

*the basis of the information before her.” It is noteworthy that the delegate considered material provided by the applicant in addition to the claim group description in schedule 2 (see [14]) and such consideration did not attract criticism from the Court.*

- (e) *The claim group description in schedule A is at all times subject to the laws and customs of the traditional society which it describes and must be read accordingly. In this respect, the comments of Dowsett J in Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625(18 June 2010) (“Aplin”) at [256] are pertinent:*

*“Inevitably, these requirements lead to the conclusion that for the purposes of the Native Title Act, it is the claim group which must determine its own composition. Any final decision in that regard must be taken pursuant to either of the alternative processes identified in s 251B. The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all of the members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs. As to matters of process, the claim group must act in accordance with traditional laws and customs or, in the absence of relevant laws and customs, pursuant to such process as it may adopt.”*

- (f) *In respect to the criteria of identification Dowsett J in Aplin at [259] refers to Sampi v State of Western Australia [2010] FCAFC 26 where the Full Court (North and Mansfield JJ) said at [45] “The unity among members of the group required by Yorta Yorta means that they must identify as people together who are bound by the one set of laws and customs or normative system.”*

- (g) *At [33 (d)], Dr Powell of her report dated 8 December 2017 makes the following finding:*

*“Although it is not clear which of her affiliations - Iman or Wadja - [name deleted] regards as her primary affiliation, her submission of 14 November suggests that she privileges her Wadja affiliation over her Iman connection, at least in relation to the Overlap Area. If that is so, then by the traditional law and custom of the Iman people she is not entitled to claim primary rights in the overlap area as a member of the Iman landholding group nor it would seem from the rules of the Wardingarri Aboriginal Corporation is she eligible to remain a member of their PBC in respect to the area covered by the existing native title determination immediately to the south.”*

- (h) *The delegate has also failed to consider other parts of the application which seek to clarify the traditional laws governing membership of the claim group. In particular:*

(i) *Schedule O which states that “None of the members of the claim group (including the Applicant) is a member of a native title claim group for any application which is: (a) in relation to the whole or part of the area claimed; and (b) entered on the Register of Native Title Claims as at the date of this application.”*

(ii) *Attachment F which refers to Dr Powell’s stage 3 Anthropological report. At [15] Dr Powell states: “My previous research (2003 – 2008) found that*

*identification as Iman is an essential criterion for membership of the Iman claim group. My previous research also found that membership of the Iman claim group is based on the recognition by Iman People that a person is descended from an apical ancestor who has a traditional affiliation with the Application Area and who can be established by the available records or family oral tradition as a member of the Aboriginal land-holding group who occupied the Application Area at the time of effective sovereignty."*

(iii) Attachment F which refers to Dr Powell's stage 6 Anthropological report. At [48] of that report, Dr Powell includes statements of identification by claim group members: "As shown in the following sample of claimants' statements, the claimants identify as Iman, which some spell as 'Jiman' or as 'Emon'and/or 'Eman' or as 'Yeeman':

a) *I'm Iman through family ancestral ties, family knowledge, my mother and grandmother told me;*

b) *I know that I am Iman because I heard my Dad say he was Iman and he told me that I was Iman. We Iman people say "Eemoon" or "Yeemoon" with the "oo" like the "oo" in "book" and not "Eye-man" like some people do. I know that "Eemoon" is the right way to say our tribal name because I heard my parents say it in this way;*

c) *I am an Iman Traditional Owner and an Iman Elder – the name of my group is Iman – I come from Maggie Palmtree – the name is spelt Jiman but my grandfather [name deleted] told me it's pronounced Yeeman;*

d) *My grandmother [name deleted] told me that I belonged to Iman; I only belong to Iman;*

e) *I am Yeeman ... My Elder, my Auntie [name deleted] told me this; and*

f) *My Auntie [name deleted] – she is the mother of [name deleted] and [name deleted] – said we belonged to the Yeeman tribe – I was only a kid at the time and didn't understand what she meant – I do now."*

*Dr Powell concludes at [51] that: "I found at [18] of the Iman Report Stage 3 that descendants of Mary Arwa, Jim Waterton, Ada Robinson, Fanny Waddy/Sandy, Mary Ann (mother of Maggie Dunn), John/James Serico and Lizzie Palmtree (who are among the persons listed above in Table4) stated that they themselves identify as 'Iman' and that they had been told this by immediate forebears who were also descended from these ancestors. These archival records and the claimants' orally transmitted information about the identity of themselves and their forebears are evidence of the transmission of the Iman socio-territorial identity (irrespective of how those who self-identify as Iman choose to spell this socio-territorial identity)."*

*Further and most importantly, on page 6 of attachment F of the Application, Dr Powell concludes at [68]: "My research found that members are recruited to the claim group on the basis of (a) self-identification; and (b) descent from an ancestor who is regarded by others who also self-identify as Iman as having a traditional association with the claim area, and (c) recognition as a member of the claim group by others who are accepted as members of the claim group"*

- (iv) *Schedule R attaches the minutes of the authorisation meeting for the new claim. At page 12 of the minutes briefly record a discussion that took place, when the claim group decided to authorise the claim. During that discussion the minutes record: "Several attendees expressed concern that indigenous persons who did not identify as Iman people may seek to be parties to the claim." This confirms that identification as an Iman person was at the forefront of the claim group's consideration when deciding whether to authorise the new claim.*
- (j) *Based upon above, the delegate made an error by only concentrating on the wording of schedule A and not considering the other parts of the application which were specifically included to inform the Court of the Application of traditional laws and customs of the Iman people especially upon membership and recruitment.*
- (k) *In relation to the second point referred to above by the delegate, it is submitted that she was entitled to be satisfied on the material before her that [name deleted] was the only joint descendant who is asserting a Wadja identity. In her objection at [6] she claims to be from a large family. However, at [8] she makes it clear that she is speaking only on behalf of herself. She has also signed her objection as an individual and not on behalf of other members of her family. In addition at [5] she refers to the fact that one of her family (Trent White) is an Applicant for the Iman #4 claim. From this, it was open to the delegate to infer that [name deleted] was the only member of her family line to identify as Wadja in preference to Iman. Secondly, if the delegate regarded this as an issue that would prevent registration of the Iman#4 claim the Principles of Natural Justice mandate the Applicant being provided with an opportunity to comment. As it was, once [name deleted]'s objection was known within the Iman community, a meeting of her family group was held where they decided not to support her objection and to continue to identify as Iman.*