National Native Title Tribunal

Registration test decision

Application name:	Njamal People
Name of applicant:	Johnson Taylor, Rodney Monaghan, Maurice Coppin, Alice Mitchell, Lorraine Williams, Kevin Allen, Tony Taylor, Willie Jumbo and Jean Walker
State/territory/region:	Pilbara Region, Western Australia
NNTT file no.:	WC99/8
Federal Court of Australia file no.:	WAD6028/98
Date application made:	7 May 1999
Date application last amended:	17 August 2007
Name of delegate:	Georgy Mayo

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the Native Title Act 1993 (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the Native Title Act 1993 (Cwlth).

For the purposes of s.190D(3), my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 28 September 2007

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Georgy Mayo

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth)

Reasons for decision

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Introduction

This document sets out my reasons for the decision to accept the claimant application for registration. Section 190A of the Native Title Act 1993 (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court). Further, the test for registration in s. 190A has also been triggered as a result of the transitional provisions of the Native Title Amendment Act 2007 which commenced on 15 April 2007 (the commencing day). This is because the application falls within item 89(1) of the transitional provisions:

- the application was made before the commencing day, but on or after the day on which Schedule 2 to the *Native Title Amendment Act 1998* (the 1998 amended NTA) commenced—item 89(1)(a),
- the claim in the application was not on the Register of Native Title Claims on the commencing day—item 89(1)(b).

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 27 September 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that all the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C before turning to questions regarding the merit of that material for the purposes of s. 190B.

Information considered when making the decision

Section 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate. However, given that the registration test has in this instance been triggered by item 89 of the transitional provisions of the amendments to the Act referred to above, I must also abide by item 89(4)(c). This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be

accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person after the application was made.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

I have not considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Application overview

This application by the Njamal[1] native title claim group covers some 40,979 sq kms in the Pilbara region of Western Australia. It is a combination of the following native title applications:

Application number(s)	Application name	Date application lodged/filed	Date claim entered on Register *
WAD6028/98, WC95/31	Njamal #1	07/08/1995	12/08/1995
WAD6093/98, WC96/56	Njamal #2	24/05/1996	24/05/1996
WAD6137/98, WC96/112	Njamal #3	09/12/1996	09/12/1996
WAD6139/98, WC96/115	Njamal #4	09/12/1996	09/12/1996
WAD6141/98, WC96/117	Njamal #5	30/12/1996	30/12/1996
WAD6145/98, WC97/8	Njamal #6	03/02/1997	03/02/1997
WAD6165/98, WC97/34	Njamal #7	21/05/1997	21/05/1997
WAD6172/98, WC97/42	Njamal #8	09/06/1997	09/06/1997
WAD6174/98, WC97/45	Njamal #9	26/06/1997	26/06/1997

On 19 March 1999 the Court granted leave for the aforementioned applications to be combined into the current application.

A further amendment application was filed in the Federal Court on 22 April 1999 and the Court granted leave for that amendment on 7 May 1999. This application had the registration test applied to it on 3 June 1999. The delegate's decision was to accept the application for registration and it was entered on the Register on 3 June 1999.

On 23 May 2006 an amended application was filed in the Federal Court and District Registrar Jan granted leave to amend the application on 25 May 2006. The Court provided a copy of the amended application to the Native Title Registrar on 29 May 2006. The test for registration in s. 190A was triggered as a result of this amendment.

[1] Throughout this document I refer to 'Njamal' as appears on the claimant application filed in the Federal Court, however throughout affidavits the term 'Nyamal' is also used – I take these to be interchangeable terms (See: Pilbara Aboriginal Language Centre, *Aboriginal Languages of the Pilbara: Nyamal*, Department of the Arts, Produced with Sandy Brown and Brian Geytenbeek, 1990 – which states that Nyamal has sometimes been spelt Njamal, Namal, Gnamo, Namel, Nyamarl).

In September 2006 the applicant sought an extension of time regarding the registration test date in order to deal with Njamal 'law business' and file a further amended application. 'Law business' commonly commences in the Pilbara around November and continues through until February. The Tribunal's WA State Manager granted the extension of time, until 25 May 2007.

On 28 February 2007 the applicant filed a motion seeking to replace P.C, E.J, E.S (names withheld for cultural reasons), Teddy Allen, Eddie McPhee, Dan Murphy, Biddy Norman, Jan Taylor, Barry Taylor, Colin Malana and Angus Abdullah pursuant to s. 66B of the Act. The proposed new applicant was Johnson Taylor, Rodney Monaghan, Maurice Coppin, Alice Mitchell, Lorraine Williams, Kevin Allen, Tony Taylor, Willie Jumbo and Jean Walker ('the replacement applicant'). The replacement of the current applicant was done with the consent of all the persons jointly comprising the applicant except for Mr Eddie McPhee who opposed the application to remove him. An application to amend the claimant application was also filed on 25 May 2007 and was provided to the Native Title Registrar on 20 August 2007.

On 27 March 2007 Justice Bennett heard the Njamal People's application to replace the applicant (s. 66B application) and amend the claim group description (s. 64(4) application) in WAD6028/98. On 28 May 2007 a further hearing was conducted before Justice Bennett regarding the motions. On 17 August 2007 Justice Bennett granted leave pursuant to s. 66B of the Act to replace the applicant and amend the claimant application as filed on 25 May 2007. It is this amendment that is the subject of the registration test and these reasons.

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker.

In this matter no adverse material was received from third parties. I have been informed by the case manager for this application that all the material filed in the Federal Court and/or provided by the applicant which has been considered in this decision (as listed in Attachment B) has been provided to the State of Western Australia for its consideration. In addition, the case manager has advised me that all additional material which was provided to the Tribunal from the Aboriginal Legal Service of Western Australia (dated 14 and 16 April 1999) was forwarded to the State on 4 September 2007. On 18 September 2007 the State advised that they had no comment regarding any of the material relied upon in this decision.

The applicant was advised by letter dated 27 August 2007 that the decision would be made on 28 September 2007. The Tribunal also provided the applicant with a preliminary assessment of the draft amendment application indicating the delegate's preliminary view that the application may be satisfactory except for some native title rights and interests which had been included but cannot be recognised (see letter to the applicant dated 13 February 2007).
Please note: All references to legislative sections refer to the Native Title Act 1993 (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to

the delegate's result and reasons is in some instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition. For ease of reading, sections, subsections and paragraphs are denoted with s. in headings and elsewhere.

Procedural and other conditions: s. 190C

Section 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 15.

Native title claim group: s. 61(1)

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

Result

The application meets the requirement under s. 61(1).

Reasons

Section 190C(2) of the Act provides that the Registrar must, amongst other things, be satisfied that the application contains all details and other information required by s. 61 of the Act.

I must consider whether the application sets out the native title claim group in the terms required by s. 61. That is one of the procedural requirements to be satisfied to secure registration: s. 190A(6)(b). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a subgroup of the native title group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration: *Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*).

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits. In particular it does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group: *Doepel* at [37].

In light of *Doepel*, I have confined my considerations to the information contained in the application itself. The description of the persons in the native title claim group is contained in Schedule A of the current amended application, which contains the following claim group description:

> The native title claim group, on whose behalf which application is brought consists of:
> (a) the descendants of:

Ngurrpangu / Sally;
Yirlkurani / William Ball;
Pularji and Minparingu / Daisy;
Walykunpangu;
Mujayakirrirri;
Mikarnipirti;
Kutjikurtapa / Fred Mitchell;
Putangaja;
Jarlapangu / Billy Ball;
Wijiringu;
Yirapinya;
Ngamalykarinya;
Wanarngykuranya / Tommy; and

(b) the following incorporated members:
Reggie Malana; and
Colin Malana.

I am satisfied that this description of the native title claim group meets the procedural requirement.

Name and address for service: s. 61(3)

The application must state the name and address for service of the person who is, or persons who are, the applicant.

Result

The application meets the requirement under s. 61(3).

Reasons

The application provides the name and address for service of the Aboriginal/Torres Strait Islander representative body representing the applicant.

Native title claim group named/described: s. 61(4)

The application must:

(a) name the persons in the native title claim group, or

(b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

The application meets the requirement under s. 61(4).

Reasons

The application does not name the persons in the native title claim group but does contain a description of the persons through the identification of apical ancestors as set out in Schedule A (see s. 61(1) above). In my view the description of the native title claim group is described sufficiently clearly so as to meet the procedural requirement set down in s. 61(4) of the Act.

Application in prescribed form: s. 61(5)

The application must:
(a) be in the prescribed form,
(b) be filed in the Federal Court,
(c) contain such information in relation to the matters sought to be determined as is prescribed, and
(d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application meets the requirement under s. 61(5).

Reasons

The application is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998. The amended application I am considering WAD 6028/1998 was filed in the Federal Court as required by s. 61(5)(b) and contains such information as is required by s. 61(5)(c). Section 61(5)(d) states that the application be accompanied by any prescribed documents and these are set out in s. 62 of the Act (see comments under s. 62 in regard to these documents).

I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. I am therefore satisfied that the application is in the prescribed form so as to meet s. 61(5) of the Act.

Affidavits in prescribed form: s. 62(1)(a)

The application must be accompanied by an affidavit sworn by the applicant that:
(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
(ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
(iii) the applicant believes all of the statements made in the application are true, and
(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).

Result

The application meets the requirement under s. 62(1)(a).

Reasons

Section 62(1)(a) of the Act requires an application be accompanied by an affidavit sworn by the applicant pursuant to s. 62(1)(a), which must contain the statements in subparagraphs (i) to (v) of that section.

The applicant for the current application is comprised of nine persons; Johnson Taylor, Rodney Monaghan, Maurice Coppin, Alice Mitchell, Lorraine Williams, Kevin Allen, Tony Taylor, Willie Jumbo and Jean Walker. Affidavits, affirmed on 15 February 2007 by the nine persons comprising the applicant, were filed in the court with the current amendment. The affidavits contain the required statements, therefore I am satisfied that this procedural requirement is met.

Application contains details required by s. 62(2): s. 62(1)(b)

The application must contain the details specified in s.62(2).

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains eight paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 15 below and is one and the same as the result for s. 62(1)(b) here.

Result

The application meets the requirement under s. 62(1)(b).

Information about the boundaries of the area: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

Result

The application meets the requirement under s. 62(2)(a).

Reasons

Schedule B(a) of the application describes the external boundary of the application area. Schedule B(b) lists a number of general exclusions.

I am satisfied that the claim area boundaries are described and mapped as required by s. 62(2)(a) of the Act.

Map of external boundaries of the area: s. 62(2)(b)

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application meets the requirement under s. 62(2)(b).

Reasons

A map showing the external boundaries of the application area is found in Schedule C; which refers to Annexure 1 containing a copy of a map titled 'Map of Njamal Country', prepared by the Land Claims Mapping Unit, DLI dated 9 February 2006.

I am satisfied that the claim areas boundaries are mapped as required by s. 62(2)(b) of the Act.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result

The application meets the requirement under s. 62(2)(c).

Reasons

Schedule D of the application provides that:

> The searches that the applicant is aware of that have carried out [sic] to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application are annexed as "Annexure 2 : Searches to Determine the Existence of Any Non-Native Title Rights and Interests in Relation to the Land Or Waters in the Area Covered by the Application".

Annexure 2 contains a map with a parcel of land highlighted but no description so I can only infer that the map identifies an area over which a search has been conducted. No further information is provided. It is not mandatory that the applicant undertakes searches, therefore despite the lack of clarity with the information at Annexure 2, I am satisfied that s. 62(2)(c) is met.

Description of native title rights and interests: s. 62(2)(d)

> The application must contain a description of native title rights and interests claimed in relation to particular lands and 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.

Result

The application meets the requirement under s. 62(2)(d).

Reasons

Schedule E of the application contains a description of the claimed native title rights and interests.

The description does not merely consist of a statement to the effect that the claimed native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Therefore I am satisfied that this procedural requirement is met.

Description of factual basis: s. 62(2)(e)

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Result

The application meets the requirements under s. 62(2)(e).

Reasons

The applicant provides a general description of the factual basis in Schedule F of the application. Section 62(2)(e) of the Act does not require me to assess the material provided any further than ensuring that a general description is provided that is more than a mere formulaic statement.

Schedule F of the application contains information which is not a mere formulaic re-statement of s. 62(2)(e) and therefore is sufficient to meet this procedural requirement of the Act.

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application meets the requirement under s. 62(2)(f).

Reasons

The application contains these details in Schedule G.

Other applications: s. 62(2)(g)

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

Result

The application meets the requirement under s. 62(2)(g).

Reasons

This information is found in attachment H.

Section 29 notices: s. 62(2)(h)

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application meets the requirement under s. 62(2)(h).

Reasons

Schedule I of the application states:

> The applicant is aware of the following notices under s29 of the *Native Title Act 1993* (Cth) that have been given and that relate to the whole or part of the area. According to the procedure used in the notification process, the following table of s29 notices will cover more than the actual number of notices that have fallen within the claim boundary. Due to the procedure used in the notification process, when a tenement is close to the claim boundary it may be identified as being within the claim boundary, owing to its closeness.

Following this in the application there is approximately 224 pages detailing s. 29 notices. An assessment by the Tribunal's Geospatial Services (reference: GeoTrack 2007/0255) identified one thousand two hundred and ninety six (1296) section 29 or equivalent notices which fall within the boundary of the amended application as at 5 March 2007.

The information contained in the application meets the s. 62(2)(h) requirement.

Combined result for s. 62(2)

The application meets the combined requirements of s. 62(2), because it meets each of the sub-requirements of ss. 62(2)(a) to (h), as set out above. See also the result for s. 62(1)(b) above.

Combined result for s. 190C(2)

The application satisfies the condition of s. 190C(2), because it does contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

Section 190C(3)
No common claimants in previous overlapping applications

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application, and

(b) 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 the previous application being considered for registration under s. 190A.

Result

The application satisfies the condition of s. 190C(3).

Reasons

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) — which essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' — is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied — see *Western Australia v Strickland* (2000) FCR 33 (*Strickland FC)* at [9].

It is my understanding that this section seeks to ensure that two applications are not registered in respect of the same area by claim groups who have common members. If there are claim group members in common between two claims, priority is given to the claim which is registered first in time. Only a prior registered claim still on the Register will keep the second off the Register where there are common claim group members.

Where the current application is a combination application, as in this case, it is 'made' for the purposes of paragraph (b) on the date each of the pre-combination applications was made, i.e. the date the pre-combination application was lodged with the Registrar or, after September 1998, filed in the Federal Court – see *Strickland FC* at [41]–[45].

For the purposes of s. 190C(3)(c), consideration of the entry in relation to the previous application under s. 190A takes place at the time that the Registrar applies the registration test to the current application So the relevant time is not when the current application was made but when it is being considered s. 190A – see *Strickland FC* at [53]–[56].

Information before me

The Njamal People's application is a combined application as a result of an order made by the Federal Court on 19 March 1999. There are two registered claims which overlap the Njamal claim area, namely:

- Birrimaya (WC95/60); and
- Palyku (WC99/16).

Birrimaya has been on the Register since 10 October 1995 and Palyku has been on the Register since 2 August 1999. I have before me the list of applicants and claim group description for both of these applications:

> **Birrimaya**
> Applicant – Mr Ginger Bob
> Claim Group description – The claim is brought on behalf of the Aboriginal people who hold in common the body of traditional laws and customs concerning the land and waters identified as the claim area. These people are:
> Ginger Bob, Selina Brown, Anthony Ginger, Bruce Thomas, Lindsay Ginger, Lisa Ginger, Renae Ginger, Jason Ginger, Marissa Ginger and their biological descendants.
>
> **Palyku**
> Applicants – Mr Frederick Stream, Ms Elsa Derschow, Mrs Cheryl Yuline, Mrs Florrie Sam
> Claim group –
> Mr Albert Brockman (Brian), Mr Ashley Sam, Mr Brian Derschow, Mr Charlie Stream, Mr Claude Brockman, Mr Damien Derschow, Mr David Brockman, Mr David Sam, Mr Dion Mackay, Mr Douglas Yuline, Mr Dudley Wabbie, Mr Dwayne Stream, Mr Frederick Stream, Mr Gary Jaffrey, Mr Gavin Cabalas, Mr Kelvin Stream, Mr Kevin Stream, Mr Lennie Stream, Mr Leo Cabalas, Mr Lindsay Yuline, Mr Michael Stream, Mr Murray Brockman, Mr Paul Stream, Mr Peter Jaffrey, Mr Pixie Christian (Dec), Mr Robert Derschow, Mr Steven Mackay, Mr Terry Jaffrey, Mr Thomas Stream, Mr Walter Stream, Mr William Brockman, Mrs Cheryl Yuline, Mrs Florrie Sam, Ms Annabelle Stream, Ms Anne Smith, Ms Beverley Stream, Ms Carol Stream, Ms Cheryl Mackay, Ms Cheryl Stream, Ms Christine McCan, Ms Claire Gesah (Stream), Ms Diane Jaffrey, Ms Elsa Derschow, Ms Georgina Monaghan, Ms Gillian Derschow, Ms Imelda Cole, Ms Jean Jaffrey, Ms Linda Ruittanen, Ms Lorraine Stream, Ms Margaret Derschow (Brockman), Ms Margaret Yuline, Ms Marilyn Cabalas, Ms Natalie Stream, Ms Rebecca O'Connor, Ms Reneen Stream, Ms Samantha Stream, Ms Sonya Sam, Ms Susan McCan, Ms Susan Sam, Ms Suzie Monaghan, Ms Tamara O'Connor, Ms Tanya Stream, Ms Tarishe Ruittanen, Ms Tracey Geesv (Stream)

The Njamal application was originally made on 7 May 1999, so it was made when the entry for Birrimaya was already on the Register, but Palyku had not yet been entered on the Register. Therefore, here only Birrimaya is a previous application for the purpose of s. 190C(3) of the Act.

Schedule H of the application, expressly refers to both the Birrimaya and Palyku applications, and Schedule O states:

> No applicant or member of the native title claim group is a member of any other 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.

There is no evidence before me which suggests that the information in schedules H and O is not true and correct, and the application is accompanied by a sworn affidavit from each applicant attesting to the truthfulness of the content of the application. I have also examined the applicant and claim group descriptions of the overlapping applications and find no commonalities. Therefore, I am satisfied that no person included in the native title claim group for the Njamal application was a member of the native title claim group for any previous overlapping application.

Section 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

(a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

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

Under s. 203BE(4), certification of a claimant application by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), 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 s. 203BE(3)(regarding overlapping applications).

Under s. 190C(5), if the application has not been certified, the application must:

(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and

(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am satisfied that the circumstances described by s. 190C(4) are the case in this application because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

The representative Aboriginal/Torres Strait Islander body for the area covered by the Njamal Peoples application is Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji) – see Geotrack 2007/0255.

In schedule R of the application it is noted that the applicant has provided a certificate of the representative body. This was provided by Yamatji by letter dated 20 August 2007.

As required by s. 203BE(4)(a) the certificates contain statements to the effect that Yamatji is of the opinion that:

(a) All the persons in the native title group have authorised the applicant (Johnson Taylor, Rodney Monaghan, Maurice Coppin, Alice Mitchell, Lorraine Williams, Kevin Allen, Tony Taylor, Willie Jumbo and Jean Walker) to make the application and deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

As required by s. 203BE(4)(b) the Certificate sets out briefly the reasons for being of that opinion, namely:

- The Yamatji has provided in-house anthropological and legal services to the Njamal native title claimant group.
- The Yamatji is aware that community consultation has been undertaken by its staff.
- The Yamatji is aware that a series of meetings of claimants from across the claim area the subject of the present application have been held and the staff of the Yamatji have observed how decisions are made by the Njamal native title claimant group.
- The Yamatji staff and consultants have taken instructions from the Njamal native title claimant group and observed how such instructions are given.
- The Yamatji staff and consultants have performed preliminary historical, anthropological and genealogical research in relation to the Njamal native title claimant group.
- For this work, all reasonable efforts have been made to identify and consult with the Njamal native title claimant group and the Yamatji has observed that the above named applicants for this application have the authority to make the application and to deal with all matters arising in relation to it under the NTA.

Yamatji has provided its opinion that proper authorisation has occurred and given brief reasons for being of that opinion. Having considered this document I am satisfied that this requirement under the Act is satisfied and the application has been certified under s. 203BE of the Act by the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation.

Merit conditions: s. 190B

Section 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

Result

The application satisfies the condition of s. 190B(2) with respect to what is required by s. 62(2)(a) and s. 62(2)(b).

Reasons

The information required to be contained in the application is that described in ss. 62(2)(a) and (b), namely:

> (a) information, whether by physical description or otherwise, that enables the boundaries of:
> (i) the area covered by the application; and
> (ii) any areas within those boundaries that are not covered by the application to be identified
> (b) a map showing the external boundary of the application area

The application contains a written description of the external and internal boundaries in schedule B(a) and B(b). The written description of the external boundary contained in schedule B(a) is thorough and comprehensive using a mixture of topographic features, cadastral boundaries and geographic decimal coordinates (GDA94), to locate the boundary on the earth's surface.

A written description of the areas within the external boundary that are not covered by the application is found in schedule B(b). This is a generic description that excludes from the application area any land subject to the acts defined in ss. 228, 229, 232A and 232 of the Act. It also excludes land covered by the acts described in s. 23B of the NTA. It then states that if ss. 47, 47A or 47B or the non-extinguishment principle in s. 238 apply to any areas such that any extinguishment must otherwise be disregarded, then the areas so described are in fact covered by the application. It is also stated that the application does not include areas where native title has otherwise been extinguished.

The use of generic or class descriptions to identify the areas of land or waters not covered by an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of a tenure history or other information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In these circumstances, I find that the written description of the areas not covered by the application is acceptable as it offers an objective mechanism to identify which areas fall within the categories described. This may require considerable research and analysis of tenure data held by the particular custodian of that

data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information in Schedule B(b).

The boundaries of the application area are shown on a map at schedule C of the application titled 'Amendments Njamal Native title Application' prepared by the Land Claims Mapping Unit, DLI dated 9 February 2006. The map contains a scale bar, north point, coordinate grid, locality map and source & datum notes. An assessment provided by the Tribunal's Geospatial Services of 5 March 2007 (Reference: Geotrack 2007/0255) concluded that the description and map are consistent and identify the application area with reasonable certainty. Since that time the description and map have not been changed, therefore that assessment remains up-to-date.

For these reasons, I am satisfied that the information and map in the application required by sections 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters and the requirements of s. 190B(2) are therefore met.

Section 190B(3)
Identification of the native title claim group

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.

Result

The application satisfies the condition of s. 190B(3).

Reasons

The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subsection 3(a), or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subsection (3)(b). Although subsection (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subsection (3)(a), it is intended to do so: *Doepel* at [51].

The requirement of s. 190B(3) is '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': *Gudjala People #2 v Native Title Registrar* (2007) FCA 1167 at [33] (*Gudjala*). Further, the fact that some factual inquiry may be required to ascertain whether or not a person is in a claim group does not mean that the group is insufficiently described for the purposes of s. 190B(3)(b): *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67]. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or his delegate to determine whether or not the description is sufficiently clear: *Ward v Native Title*

Registrar [1999] FCA 1732. In my view, s. 190B(3)(b) requires that the description contain an objective method of determining who is in the claim group.

The section of the application reserved for this information (schedule A) contains this statement:

> The native title claim group, on whose behalf which application is brought consists of:
> (a) the descendants of:
> Ngurrpangu / Sally;
> Yirlkurani / William Ball;
> Pularji and Minparingu / Daisy;
> Walykunpangu;
> Mujayakirrirri;
> Mikarnipirti;
> Kutjikurtapa / Fred Mitchell;
> Putangaja;
> Jarlapangu / Billy Ball;
> Wijiringu;
> Yirapinya;
> Ngamalykarinya;
> Wanarngykuranya / Tommy; and
>
> (b) the following incorporated members:
> Reggie Malana; and
> Colin Malana.

A description which relies for identification of the group's members on a formula which says that they are the descendants of named persons is sufficiently certain to identify the members of the claim group. A similar formula was approved by the Court in *Western Australia v Native Title Registrar* (1999) 95 FCR 93. I am therefore satisfied that the requirements of s. 190B(3)(b) have been met.

Section 190B(4)
Native title rights and interests identifiable

> The Registrar must be satisfied that the description contained in the application as required by s. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Result

The application satisfies the condition of s. 190B(4).

Reasons

I am of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified under this section, it must describe what is claimed in a clear and easily understood manner: *Doepel* at [91] to [92], [95], [98] to [101], [123]. Any assessment of

whether the rights can be prima facie established as native title rights and interests will be discussed in relation to the requirement under s. 190B(6) of the Act.

Schedule E of the application contains a description of the claimed native title rights and interests (see s. 186 – Information to be included on the Register of Native Title Claims at page 45 below).

The applicant has listed the claimed rights and interests as activities which, in my view are sufficiently clear to be understood. Exclusive possession as claimed in paragraph 1 can be clearly and easily understood, as can the non-exclusive rights claimed in paragraph 2. Therefore I am satisfied that the description in schedule E is sufficient to allow the native title rights and interests claimed to be readily identified.

Section 190B(5)
Factual basis for claimed native title

> 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 interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Combined result for s. 190B(5)

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

What is required under s. 190B(5)?

In relation to the condition found in this section, Mansfield J said in *Doepel*:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts— at [17].

Mansfield J offered further guidance about the Registrar's task in s. 190B(5) and the related condition in s. 190B(6):

> . . . There is nothing in s 190B(5) or in s 190B generally which indicates that the assertions in the application itself may not be considered by the Registrar in addressing the condition imposed by s

> 190B(5). In both *WA v Strickland* at 54-55 [88 - 89] citing with approval *Strickland v NTR* at 261, and *Martin* at [23] - [26], the Court was prepared to consider the material included in the application as material relevant to the satisfaction of the condition imposed by s 190B(5). The Registrar then, in fact, looked at the extensive material available beyond the application to address the condition—[125]. Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim—[126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). As counsel for the Territory also pointed out, addressing s 190B(6) may also require consideration of controverting evidence. Indeed, in *Martin* at [22] and [27] French J pointed out that the Registrar had erred in formulating the questions posed by s 190B(5) as being whether he was satisfied as to the existence of the three matters referred to in subcl (a), (b) and (c)—[127].
>
> All it requires is that the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist—[128].

Section 190B(5) was recently the subject of consideration by the Federal Court in the decision of *Gudjala* which involved an application for judicial review of a s. 190A registration decision. The following statements were made by his Honour Justice Dowsett in relation to the correct application of s. 190B(5):

- The task at s. 190B(5) 'assumes the identification of the claim group pursuant to s. 190B(3) and identification of claimed native title rights and interests pursuant to s. 190B(4)'—at [36].
- Section 190B(5):

  > [R]efers to the factual basis upon which it is asserted that the claimed native title rights and interests exist. This is clearly a reference to the existence of rights vested in the claim group. Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed native title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—at [39].

- Although the absence of a description of the basis upon which the Gudjala apical ancestors were selected was not a problem at s. 190B(3) it re-emerged as an issue when his Honour considered s. 190B(5):

  > There may be many ways in which to describe a claim group, any of which may be sufficient to satisfy the requirements of subs 190B(3). However that task is undertaken, it will eventually be necessary to address the relationship which all members claim to have in common in connection with the relevant land—at [40].

> Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship. The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5)—[41].

Further, Dowsett J was of the view that it is appropriate for the Registrar to take account of the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) as to the meaning of 'traditional' in the context of the phrase 'traditional laws…and… traditional customs' found in s. 223(1)(a) when considering the condition found in s. 190B(5) at [26].

The asserted factual basis therefore, must describe the relationship between the claim group, the claim area and the claimed rights and interests—see [66].

The information that I have considered

This application contains a considerable amount of information and is accompanied by a number of documents containing information in support of the asserted factual basis, namely:

- The general description of the factual basis found in schedule F and other information from the application relating to the asserted factual basis from schedule E (description of the claimed native title rights and interests) and schedule G (details of current activities).
- Additional information provided by the applicant which includes:
- A document titled: 'Table Factual Basis.' This additional information is provided in support of schedule F to the Minute of the Amended Native Title Determination and the applicant's satisfaction of s. 190B(5). It references the facts pleaded by the applicant in schedule F to the additional registration material the applicant has provided to the Registrar directly. The references in the table are to the following material:
    - Affidavit by [**name deleted**] made 4 May 2005
    - Affidavit by [**name deleted**] made 29 January 1999
    - Affidavit by [**name deleted**] made 29 January 1999
    - Affidavit by [**name deleted**] made 15 May 2007
    - Affidavit by [**name deleted**] made 29 November 2000
    - Statutory declarations of [**name deleted**] and [**name deleted**] made 12 April 1999.

These affidavits provide evidence that the deponents and the whole claim group are strongly connected to their Njamal heritage and country, where they have lived and engaged in activities of a traditional nature all their lives.

[Information of a culturally sensitive or private nature provided in long-form affidavit has been removed from publication of these reasons]

Consideration

In *Gudjala* Dowsett J was of the view:

> There can be no relevant traditional laws and customs unless there was, at sovereignty, a society defined by recognition of laws and customs from which such traditional laws and customs are derived. The starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860. The applicant criticizes the Delegate for seeking to find a society of which the three apical ancestors were members. It submits that it is not necessary to show that they were such members. That is correct. The apical ancestors are used only to define the claim group. However, as I have previously observed, at some point the applicant must explain the link between the claim group and the claim area. That process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage. I infer that the Delegate understood it to be the applicant's case that the apical ancestors were members of the relevant society simply because no other society was identified in the Application—at [66].

I now address the particular assertions which the factual basis must support in turn.

Association with the area— the particular assertion in s. 190B(5)(a)

In *Gudjala* it was held that the two affidavits provided from two members of the claim group:

> [M]ay demonstrate that they and their families presently have an association with the claim area. They may also show that their predecessors have had such association since European settlement. However they have not demonstrated that the claim group as a whole presently has such association. I do not mean that all members must have such association at all times. However there must be evidence that there is an association between the whole group and the area. Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

I derive from this that the factual basis provided must be sufficient to support an assertion that the claim group, as a whole, has an association and that it may not suffice for a few individuals to talk about their particular association or that of their particular predecessors.

Schedule F of the application asserts in respect of s. 190B(5)(a):

> The native title rights and interests claimed in this application exist on the basis that the Njamal people have, and the predecessors of the Njamal people had, an association with the area…as supported by the following facts:
> 1. The Njamal people have had, since prior to the acquisition of sovereignty, and continue to have, a system of traditional laws and customs which they continue to acknowledge and observe.
> 4. Under the traditional laws and customs of the Njamal people, being those who hold the rights in the area claimed in the application and have a connection with the said area, are those who have inherited the rights by descent from the Njamal people who held the rights and have been connected with the said area since sovereignty. Those people defined in Schedule A are all those who in this way constitute the Njamal people under the said traditional laws and customs.

It is the information in the affidavits of the claim group members and material provided, either with or additional to the application, which demonstrates a factual basis for the assertion that

the native title claim group are and its predecessors have been associated with the area, by providing information about the association of the native title claim group with the claim area.

Examples of relevant material are:

[Information of a culturally sensitive or private nature provided in long-form affidavit has been removed from publication of these reasons]

I am satisfied on the basis of this information that the factual basis provided is sufficient to support the assertion that members of the claim group have and their predecessors had an association with the area, whether physical or spiritual, which survived from sovereignty until the present time.

Existence of traditional laws and customs that give rise to the claimed native title rights and interests— the particular assertion in s. 190B(5)(b)

According to *Gudjala*:

> There must be a factual basis sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group, which laws and customs give rise to the Native Title claim. That factual basis must be capable of demonstrating that:
> - there are traditional laws and customs;
> - acknowledged or observed by the Native Title claim group; and
> - giving rise to the group's claim to Native Title rights and interests—at [62].

Dowsett J was clearly of the view that it is appropriate for the Registrar to take account of the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) as to the meaning of 'traditional' in the context of the phrase 'traditional laws…and… traditional customs' found in s. 223(1)(a) when considering the condition found in s. 190B(5) at [26]. In particular attention must be paid to how, as a result of the acknowledgement and observance of traditional laws and customs, there could be said to be possession of native title rights and interests claimed. The relevant findings in *Yorta Yorta* are:

- the traditional laws and customs referred to in s. 223 are those that derive from a body of norms or a normative system that existed before sovereignty was asserted;
- the use of the word 'traditional' refers to a means of transmission of law and custom and conveys an understanding of the age of traditions;
- it is only the normative rules of the indigenous societies that existed before the assertion of sovereignty that are 'traditional' laws and customs;
- when s. 223(1) talks of native title rights and interests in land or waters being possessed under traditional laws and customs observed by the peoples concerned, this requires that the traditional laws and customs must be 'a system that has had a continuous existence and vitality since sovereignty' ;
- a cessation of the normative system for any period will result in the rights and interests owing their existence to the system also ceasing to exist. This is because 'the laws and customs and the society which acknowledges and observes them are inextricably interlinked';
- laws and customs will only be properly described as the traditional laws and customs of the peoples claiming native title if acknowledgement and observance of them has continued substantially uninterrupted since sovereignty — [84] to [86].

- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist from the assertion of sovereignty to the present as a body united by its acknowledgement and observance of the laws and customs'— at [89].

According to the reasoning in *Gudjala* it is in relation to the assertion that traditional laws and customs exist, which give rise to the claimed native title rights and interests, that the applicant must explain the link between the claim group and the claim area. That will involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage—at [66].

The factual basis provided for the purposes of s. 190B(5)(b) must be more than merely 'descriptive of the current position' and should identify 'traditional laws and customs derived from a pre-sovereignty society, which support or justify the claim group's claims'. In particular, it must:

- explain how, by reference to traditional law and traditional custom presently acknowledged and observed, why the claim group is limited to descendants of the identified apical ancestors (where an apical ancestor model is used to describe the group)— at [78]; and
- provide a basis for inferring that there was, at and before first contact, 'a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group'—at [81].

The factual basis provided in this application is to the effect that the group described in schedule A are members of the Njamal community, which comprises numerous families who had, as their apical ancestors, persons alive at or before the turn of the 19th century, who in turn were the descendants of a society identified in the historical record and anthropological studies made after contact as the Njamal people.

Schedule F of the application states:

> The native title rights and interests claimed in this application exist on the basis …that there exist traditional laws and customs which give rise to the claimed native title…as supported by the following facts:
> 1. The Njamal people have had, since prior to the acquisition of sovereignty, and continue to have, a system of traditional laws and customs which they continue to acknowledge and observe;
> 2. The traditional laws and customs of the Njamal people constitute a normative system that has had a substantially continuous existence and vitality since sovereignty was asserted;
> 3. The laws and customs of the Njamal people originate in a body of laws and customs acknowledged and observed by their ancestors at the time sovereignty was asserted;
> 4. Under the traditional laws and customs of the Njamal people, being those who hold the rights in the area claimed in the application and have a connection with the said area, are those who have inherited the rights by descent form the Njamal people who held the rights and have been connected with the said area since sovereignty. Those people defined in Schedule A are all those who in this way constitute the Njamal people under the said traditional laws and customs.

The following material, provided either with the application or additional to the application, provides relevant factual basis regarding the existence of traditional laws and customs possessed by the normative society:

- Affidavit of [**name deleted**], affirmed 4 May 2005 (TA2005)
- Affidavit of [**name deleted**], affirmed 29 January 1999 (TA1999)
- Affidavit of [**name deleted**], affirmed 24 May 2007 (KA)
- Affidavit of [**name deleted**], affirmed 15 May 2007 (BN)
- Affidavit of [**name deleted**], affirmed 29 January 1999 (PC)
- Statutory Declaration of [**name deleted**] 12 April 1999
- Statutory Declaration of [**name deleted**] 12 April 1999

Extracted here are relevant statements which indicate that the Njamal are a distinct group, with traditional laws and customs of their own:

[Information of a culturally sensitive or private nature provided in long-form affidavit has been removed from publication of these reasons]

In my reasons below at s. 190B(6) I have extracted further evidence which draws a link between the traditional laws and customs of the Njamal pre-sovereignty society, which are presently acknowledged by the claim group and provide a sufficient factual basis to support the asserted rights and interests. The material before me provides an explanation of how these laws and customs have been passed on from the time of sovereignty. Having considered the application, and other relevant information provided as a whole I am satisfied that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

Native title claim group has continued to hold the native title rights and interests in accordance with those traditional laws and customs— the particular assertion in s.190(5)(c)

This subsection requires me to be satisfied that the factual basis on which it is asserted that the claim group continues to hold native title in accordance with their traditional laws and customs, is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests in accordance with those traditional laws and customs.

In Gudjala Dowset J was of the view that:

> This implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty.

The applicant must demonstrate the existence, at the relevant time, of a society observing laws and customs from which the current traditional laws and customs derive.

Extracted below are relevant statements which indicate that the claim group continue to follow the traditional Njamal laws and customs, including activities in the application area:

[Information of a culturally sensitive or private nature provided in long-form affidavit has been removed from publication of these reasons]

These statements in the affidavits and other material refer to the continuing acknowledgement of laws and observance of customs relating to: access to country; use and sharing of foods; the transmission of stories and language; rules of marriage; the continuing observance of rules governing community and social relationships; and responsibilities in relation to looking after land and the community.

Furthermore, I refer to my reasons above at ss.190B(5)(a) and (b) in which I have extracted material which demonstrates the existence and observance by the Njamal people of their traditional laws and customs at the time of white settlement in the region. I infer from the extensive material before me that the claimed native title rights and interests find their origin in the laws and customs of the Njamal society which existed prior to sovereignty.

In conclusion, I am satisfied that the material provided contains sufficient factual basis to support the assertion that the claim group continues to hold native title in accordance with Njamal traditional laws and customs.

Section 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

Result

The application satisfies the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Reasons

Consideration of this requirement is constrained by the words 'prima facie.' These direct that I do not delve into or attempt to resolve disputed questions of fact or law in my consideration of what rights and interests can be established.

In *North Ganalanja Aboriginal Corporation v QLD* (1996) 185 CLR 595 (*North Ganalanja*) of the term 'prima facie' the majority of the High Court said:

> The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase 'Prima Facie' is: 'At first sight; on the face of it; as it appears at first sight without investigation.' [citing the Oxford English Dictionary (2nd ed) 1989]—at [615] to [616].

The test in *North Ganalanja* was considered and approved by Justice Mansfield in *Doepel* where it was noted that:

> Although [*North Ganalanja*] was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate—at [134].

Justice Mansfield also approved of comments by Justice McHugh in *North Ganalanja*:

> …if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis—at [135].

Doepel also supports the view that it is not for the Registrar to resolve disputed questions of law (such as those about extinguishment and the applicability or otherwise of s. 47B) in considering whether a claimed right or interest is prima facie established under s. 190B(6) of the Act.

Having regard to the above authorities on what is meant by prima facie I am of the view that in assessing compliance with this condition it is not my role to resolve whether the facts claimed in the application as supporting a determination of native title will be made out at trial. The task is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed, having regard to settled law in relation to:

- what is a 'native title right and interest' (as that term is defined in s. 223); and
- whether or not a particular right or interest has been extinguished.

In making my decision under this section I pay particular regard to the definition of the phrase 'native title rights and interests' in s. 223 of the Act:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

If a described right and interest in this application has been found by the courts to fall outside the scope of s. 223(1) then it will not be capable of being established prima facie for the purposes of s. 190B(6).

Considering the Rights Claimed in the Application

In my consideration of the rights claimed in the application, I have grouped together rights which appear to me to be of a similar character and therefore rely on the same evidentiary material or rights which require consideration of the same law as to whether they can be established.

It is clearly indicated that all claimed rights listed under paragraph 1 of schedule E are claimed on an exclusive basis and those under paragraph 2 on a non-exclusive basis and therefore will be discussed in that context.

1. Over areas where a claim to exclusive possession can be recognised, the applicant claims:

(a) Except as stated in Schedule P, the right to possess the land and waters claimed;

(b) the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title group within or affecting the determination area;

(c) except as stated in Schedule P, the right to occupy the land and waters claimed;

(d) except as stated in Schedule P, the right to use and enjoy the land and waters claimed;

(e) except as stated in Schedule P, the right to make decisions about the use and enjoyment of the land and waters claimed;

(f) except as stated in Schedule P, the right to control the access of others to the land and waters claimed;

(g) except as stated in Schedule Q, the right to control the use and enjoyment of others of the resources of the land and waters claimed;

(h) except as stated in Schedule Q, the right to receive a portion of any resources taken by others from the land or waters claimed;

(i) the rights and interest listed in 2 below.

2. *Over areas where a claim to exclusive possession cannot be recognised, the applicant claims:*

(j) the right to maintain and protect places of importance on the land and in the waters claimed;

(k) except as stated in Schedule P, the right of free access to the land and waters claimed;

(l) except as stated in Schedule Q, the right to use and enjoy the resources of the land and waters claimed;

(m) except as stated in Schedule Q, the right to trade in the resources of the land and waters claimed;

(n) the right to carry out the activities set out in Schedule G (a)-(d).

In order for the right as expressed at (n) to be prima facie established, all four activities listed at schedule G must be able to be prima facie established.

Schedule G states:

> Members of the claim group have continuously carried out activities on the land and waters within the claim area. These activities are
> (a) residing on and travelling over the area;
> (b) making use of the resources of the area through activities including, but not limited to, hunting, fishing, gathering bush tucker and bush medicine, camping, extracting ochre and other materials, building dwellings and making ceremonial artefacts and implements;
> (c) exercising the responsibility of looking after the area in accordance with their traditional laws and customs, including exercising native title rights;
> (d) passing on knowledge of the area;
> in accordance with custom and tradition.

I note schedule G(d) lists 'passing on knowledge of the area' as a right. This is a right in relation to cultural knowledge. The High Court in *Western Australia v Ward* [2002] CLR 28 (*Ward HC*) found that such a right may be allowed provided it can be characterised as a right 'in relation to land and waters' pursuant to s. 223(1)(b) and not a right in the nature of incorporeal rights akin to intellectual property rights, not recognised by the common law pursuant to s. 223(1)(c) – at [59]. It

was held in *Northern Territory v Alyawarr Kaytetye, Warumungu, Wakay Claim* [2005] 220 ALR 431 that the 'right to teach the physical and spiritual attributes of places and areas of importance' if specified as a right to teach on the land, requires access to and use of the land for that purpose – at [135]. So defined, it is a right in relation to the land. In my view the introductory statement in schedule G demonstrates that this right is in relation to the land and therefore it can be recognised as a right.

Ward HC is authority for the view that a claim may only be able to be prima facie established in relation to some areas, such as those where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicant claims the benefit of ss. 47, 47A or 47B).

The phrasing of the exclusive rights at schedule E takes account of certain exclusions and at schedule B(b) of the application more particular exclusions regarding extinguishment are listed, following the authority in *Ward HC*. I note that at schedule B(1)(xi) the applicant excludes from the claim, areas in relation to which native title rights and interests have otherwise been extinguished. Justice Mansfield in *Gawirrin Gumana v Northern territory of Australia* (No 2) [2005] FCA 1425 found that the right to exclusive possession in inland waters (e.g. flowing, underground and subterranean water) was stated to be not a right of 'ownership' in those waters. It was:

> 'the right to control access to those waters and the right to use and enjoy (that is take and use) those waters while they are on that part of the claim area' – [33].

The rights are listed as activities, but all can be encompassed and recognised in the broader claim to exclusive possession, and therefore are discussed as such. Statements relevant to the claim of exclusive possession, provided with the application are extracted below:

> **[Information of a culturally sensitive or private nature provided in long-form affidavit has been removed from publication of these reasons]**

The material provided is sufficient to prima facie establish that there is control of use and access under traditional laws and customs.

2. *Over areas where a claim to exclusive possession cannot be recognised, the applicant claims:*

   (j) the right to maintain and protect places of importance on the land and in the waters claimed;

   (k) except as stated in Schedule P, the right of free access to the land and waters claimed;

   (l) except as stated in Schedule Q, the right to use and enjoy the resources of the land and waters claimed;

   (m) except as stated in Schedule Q, the right to trade in the resources of the land and waters claimed;

   (n) the right to carry out the activities set out in Schedule G (a)-(d).

These rights are all within the definition of native title rights and interests in s. 223 and have not been found by the courts to fall outside the scope of that section in relation to non-exclusive areas.

Statements relevant to these claimed rights provided in the material are extracted below:

[Information of a culturally sensitive or private nature provided in long-form affidavit has been removed from publication of these reasons]

I am satisfied that the material evidences these rights such that they are prima facie established.

Conclusion for s. 190B(6)

I find the following rights are prima facie established and should be entered on the Register:

1. Over areas where a claim to exclusive possession can be recognised, the applicant claims:

(a) Except as stated in Schedule P, the right to possess the land and waters claimed;

(b) the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title group within or affecting the determination area;

(c) except as stated in Schedule P, the right to occupy the land and waters claimed;

(d) except as stated in Schedule P, the right to use and enjoy the land and waters claimed;

(e) except as stated in Schedule P, the right to make decisions about the use and enjoyment of the land and waters claimed;

(f) except as stated in Schedule P, the right to control the access of others to the land and waters claimed;

(g) except as stated in Schedule Q, the right to control the use and enjoyment of others of the resources of the land and waters claimed;

(h) except as stated in Schedule Q, the right to receive a portion of any resources taken by others from the land or waters claimed;

(i) the rights and interest listed in 2 below.

2. Over areas where a claim to exclusive possession cannot be recognised, the applicant claims:

(j) the right to maintain and protect places of importance on the land and in the waters claimed;

(k) except as stated in Schedule P, the right of free access to the land and waters claimed;

(l) except as stated in Schedule Q, the right to use and enjoy the resources of the land and waters claimed;

(m) except as stated in Schedule Q, the right to trade in the resources of the land and waters claimed;

(n) the right to carry out the activities set out in Schedule G (a)-(d).

Schedule G

Members of the claim group have continuously carried out activities on the land and waters within the claim area. These activities are:

(a) residing on and travelling over the area;
(b) making use of the resources of the area through activities including, but not limited to, hunting, fishing, gathering bush tucker and bush medicine, camping, extracting ochre and other materials, building dwellings and making ceremonial artefacts and implements;

(c) exercising the responsibility of looking after the area in accordance with their traditional laws and customs, including exercising native title rights;
(d) passing on knowledge of the area;

in accordance with custom and tradition.

Section 190B(7)
Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Result

The application satisfies the condition of s. 190B(7).

Reasons

Under s. 190B(7)(a), 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. I am of the view that 'traditional' as it is used here must be understood as it was defined in *Yorta Yorta*. It is necessary to show that the connection is in accordance with the laws and customs of the group that have their origins in pre-contact society.

The information in schedule F and G as well as the affidavit and other material provided and cited throughout these reasons is indicative of the traditional physical connection that claim group members have or had with the application area. It is my view that there is sufficient evidence that members of the claim group have an ongoing physical connection to the land which appears to be consistent with, and which follows the traditional laws and customs of the Njamal People, as explained in the application and examined by me extensively in my reasons under s. 190B(5).

I am satisfied having considered all the information before me that at least one member of the claim group currently has or previously had a traditional physical connection with any part of the land of the application.

Section 190B(8)
No failure to comply with s. 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where

there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 43.

No approved determination of native title: s. 61A(1)

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

Result

The application meets the requirement under s. 61A(1).

Reasons

The Tribunal's geospatial overlap analysis dated 5 March 2007 confirms that no approved determinations of native title fall within the external boundary of the amended application.

No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which
(a) a previous exclusive possession act (see s. 23B)) was done, and
(b) either:
  (i) the act was an act attributable to the Commonwealth, or
  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:
(a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application meets the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

If a previous exclusive possession act was done in relation to an area, a claimant application must not be made that covers any of the area, unless sections 47, 47A or 47B are said to apply. Schedule B(b) excludes from the application any area covered by a previous exclusive possession act.

Schedule L of the application provides information on pastoral leases held by, or on behalf of, members of the native title claim group as well as leases and reserves for the benefit of Aboriginal people or Torres Strait Islanders within the area. Schedule L also provides that all the areas

referred to in Schedule L attract the protection of sections 47, 47A or 47B and hence any prior extinguishment is to be disregarded.

Therefore, in this application s. 61A(4) applies.

No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by ss. 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application meets the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

If a previous non-exclusive possession act was done in relation to an area, a claimant application must not be made that covers any of the area, unless ss. 47, 47A or 47B are said to apply. Schedule B(b) excludes from the application any area covered by a previous non-exclusive possession act.

Schedule L of the application provides information on pastoral leases held by or on behalf of members of the native title claim group as well as leases and reserves for the benefit of Aboriginal people or Torres Strait Islanders within the area. Schedule L also provides that all the areas referred to in Schedule L attract the protection of ss. 47, 47A or 47B and hence any prior extinguishment is to be disregarded.

Therefore, in this application s. 61A(4) applies.

Combined result for s. 190B(8)

The application satisfies the condition of s. 190B(8), because it meets the requirements of s. 61A, as set out in the reasons above.

Section 190B(9)
No extinguishment etc. of claimed native title

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

Delegate's comments

I consider each sub-condition under s. 190B(9) in turn and I come to a combined result at page 38.

Result re s. 190B(9)(a)

The application satisfies the sub condition of s. 190B(9)(a).

Reasons for s. 190B(9)(a)

Schedule Q of the application states that there is no claim for ownership of minerals, petroleum or gas wholly owned by the Crown.

Result for s. 190B(9)(b)

The application satisfies the sub condition of s. 190B(9)(b).

Reasons for s. 190B(9)(b)

Schedule P of the application states that to the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under International Law in relation to the whole or any part of the offshore place.

Result for s. 190B(9)(c)

The application satisfies the sub condition of s. 190B(9)(c).

Reasons for s. 190B(9)(c)

The application and accompanying documents do not disclose, and it is not readily apparent, that the native title rights and interests claimed have otherwise been extinguished.

In addition, schedule B to the application excludes from the application area any areas over which native title has otherwise been extinguished.

I am satisfied that the application meets this condition.

Combined result for s. 190B(9)

The application satisfies the condition of s. 190B(9), because it meets all of the three sub-conditions, as set out in the reasons above.

[End of reasons]

Attachment A
Information to be included on the Register of Native Title Claims

Application name:	Njamal People
NNTT file no.:	WC99/8
Federal Court of Australia file no.:	WAD 6028 of 1998
Date of registration test decision:	28 September 2007

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

7 May 1999

Date application entered on Register:

3 June 1999

Applicant:

Johnson Taylor, Rodney Monaghan, Maurice Coppin, Alice Mitchell, Lorraine Williams, Kevin Allen, Tony Taylor, Willie Jumbo and Jean Walker.

Applicant's address for service:

Principal Legal Officer

Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

Level 5, 256 Adelaide Tce

PERTH WA 6000

Area covered by application:

Pilbara Region, Western Australia

Persons claiming to hold native title:

The native title claim group, on whose behalf which application is brought consists of:

(c) the descendants of:
Ngurrpangu / Sally;
Yirlkurani / William Ball;
Pularji and Minparingu / Daisy;
Walykunpangu;
Mujayakirrirri;
Mikarnipirti;
Kutjikurtapa / Fred Mitchell;
Putangaja;
Jarlapangu / Billy Ball;
Wijiringu;
Yirapinya;
Ngamalykarinya;
Wanarngykuranya / Tommy; and

(d) the following incorporated members:
Reggie Malana; and
Colin Malana.

Registered native title rights and interests:

1. Over areas where a claim to exclusive possession can be recognised, the applicant claims:

(a) Except as stated in Schedule P, the right to possess the land and waters claimed;

(b) the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title group within or affecting the determination area;

(c) except as stated in Schedule P, the right to occupy the land and waters claimed;

(d) except as stated in Schedule P, the right to use and enjoy the land and waters claimed;

(e) except as stated in Schedule P, the right to make decisions about the use and enjoyment of the land and waters claimed;

(f) except as stated in Schedule P, the right to control the access of others to the land and waters claimed;

(g) except as stated in Schedule Q, the right to control the use and enjoyment of others of the resources of the land and waters claimed;

(h) except as stated in Schedule Q, the right to receive a portion of any resources taken by others from the land or waters claimed;

(i) the rights and interests listed in 2 below.

2. Over areas where a claim to exclusive possession cannot be recognised, the applicant claims:

(j) the right to maintain and protect places of importance on the land and in the waters claimed;

(k) except as stated in Schedule P, the right of free access to the land and waters claimed;

(l) except as stated in Schedule Q, the right to use and enjoy the resources of the land and waters claimed;

(m) except as stated in Schedule Q, the right to trade in the resources of the land and waters claimed;

(n) the right to carry out the activities set out in Schedule G (a)-(d).

Schedule G

Members of the claim group have continuously carried out activities on the land and waters within the claim area. These activities are:

(a) residing on and travelling over the area;

(b) making use of the resources of the area through activities including, but not limited to, hunting, fishing, gathering bush tucker and bush medicine, camping, extracting ochre and other materials, building dwellings and making ceremonial artefacts and implements;

(c) exercising the responsibility of looking after the area in accordance with their traditional laws and customs, including exercising native title rights;

(d) passing on knowledge of the area;

in accordance with custom and tradition.

_____

Georgy Mayo

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** **(Cwlth)**

Attachment B
Documents and information considered

The following lists all documents and other information that were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

Material on file for Njamal (Federal Court No: WAD6028/1998, NNTT No: WC99/08);

- Amended Claimant Application filed in Federal Court on 23 May 2006.
- Amended Claimant Application filed in Federal Court on 25 May 2007.
- Affidavit of [**name deleted**], affirmed 15 February 2007.
- Affidavit of [**name deleted**] 15 February 2007.
- Affidavit of [**name deleted**] 15 February 2007.
- Affidavit of [**name deleted**] 15 February 2007.
- Affidavit of [**name deleted**] 15 February 2007.
- Affidavit of [**name deleted**] 15 February 2007.
- Affidavit of [**name deleted**] 15 February 2007
- Affidavit of [**name deleted**] 15 February 2007
- Affidavit of [**name deleted**], affirmed 15 February 2007
- Letter from YMBBMAC to Tribunal, dated 20 August 2007, attaching signed certification documents.
- Letter from Aboriginal Legal Service of Western Australia to Tribunal, dated 16 April 1999, including: 'Additional material for the purposes of the Registration Test'
    - *Preliminary Survey of Historical and Anthropological Material in support of the Factual basis of the Nyamal Amended Native Title Determination Application, April 1999* including attachments:
        1. White, I (ed) (1985) *Daisy Bates: The Native Tribes of Western Australia* - An edited version.
        2. Horton, D. (ed) (1994) *Encyclopaedia of Aboriginal Australia, Canberra*: the Australian Institute of Aboriginal and Torres Strait Islander Studies, Vol 2:678.
        3. Horton, D. (ed) (1994) *Encyclopaedia of Aboriginal Australia, Canberra*: the Australian Institute of Aboriginal and Torres Strait Islander Studies, Vol 1:229-230.
        4. McCarthy, F.D. (1961) *The Story of the Mungan or Bagadjimbiri Brothers* in *Mankind* 5(10):420-425.
        5. Brown, A. R. *The Distribution of Native Tribes in Part of Western Australia*, in *Man* (1912) London 12:143 -146.
        6. McKenna, C and K. Palmer, *Somewhere Between Black and White: The story of an Aboriginal Australian* MacMillan Co of Australia Pty. Ltd, Sydney, 1978 (Ch.2).
        7. McKenna, C and K. Palmer, *Somewhere Between Black and White: The story of an Aboriginal Australian* MacMillan Co of Australian Pty. Ltd, Sydney, 1978 (Chapter 4).

8. McKenna, C and K. Palmer, *Somewhere Between Black and White: The story of an Aboriginal Australian* MacMillan Co of Australian Pty. Ltd, Sydney, 1978 (pg 6).
9. Morgan, S. *Wananmurraganya: the story of Jack McPhee*, Perth: Fremantle Arts Centre Press, 1985.
10. Tindale, N. *Aboriginal Tribes of Australia,* University of California Press 1974.
11. Mc Phee, J. / Konigsberg, P. *Bee Hill River Man: Kandulangu - bidi Memories of Jack Mc Phee*, Broome: Magabala Books, 1994 - Map of Nyamal Country.
12. Mc Phee, J. / Konigsberg, Patricia *Bee Hill River Man: Kandulangu - bidi Memories of Jack Mc Phee*, Broome: Magabala Books, 1994 - index page.
13. Pilbara Aboriginal Language Centre, *Aboriginal Languages of the Pilbara: Nyamal*, Department of the Arts, Produced with Sandy Brown and Brian Geytenbeek, 1990.

- Letter from Aboriginal Legal Service of Western Australia to Tribunal, dated 14 April 1999, including:
    - Statutory Declaration of [**name deleted**], declared 12 April 1999.
    - Statutory Declaration of [**name deleted**], declared 12 April 1999.
- Letter from YMBBMAC to Tribunal, dated 28 May 2007, including:
    - Affidavit of [**name deleted**], affirmed 24 May 2007.
    - Affidavit of [**name deleted**], affirmed 15 May 2007.
    - Affidavit of [**name deleted**], affirmed 29 January 1999, previously provided.
    - Affidavit of [**name deleted**], affirmed 29 January 1999, previously provided.
    - Affidavit of [**name deleted**], affirmed 4 May 2005, previously filed in Federal Court.
- Tribunal Memorandum *Geospatial Assessment & Overlap Analysis* (*Reference: GeoTrack 2007/0255)*, dated 5 March 2007.