National Native Title Tribunal

# Registration test decision

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|---|---|
| Application name | Gangalidda and Garawa Peoples |
| Name of applicant | Murray Walden Jr, Jacky Green, Jack Hogan and Terrance Taylor |
| State/territory/region | Queensland |
| NNTT file no. | QC04/5 |
| Federal Court of Australia file no. | QUD84/04 |
| Date application made | 25 May 2004 |
| Date application last amended | 20 May 2011 |

Name of delegate Renee Wallace

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).

**Date of decision:** 26 August 2011

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Renee Wallace

**Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 1 July 2011 and made pursuant to s. 99 of the Act.**

# Reasons for decision

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# Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

## Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Gangalidda and Garawa Peoples claimant application to the Native Title Registrar (the Registrar) on 20 May 2011 pursuant to s. 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

This application was first filed with the Court on 25 May 2004. On 26 July 2004, a delegate of the Registrar accepted the claim for registration, pursuant to s. 190A. The claim has remained on the Register of Native Title Claims (the Register) since that date.

The Gangalidda and Garawa Peoples application, as amended, and provided to the Register on 20 May 2011, was accompanied by an order of Dowsett J dated 13 May 2011. A component of that order dealt with the composition of the applicant, stating that:

> Pursuant to section 66B of the *Native Title Act 1993* (Cth), Murray Walden Junior, Terrance Taylor, Jack Green and Jack Hogan replace the current named Applicant in the proceeding...

The order of 13 May 2011 also had the effect of enabling the applicant to file this amended application, referring to orders of the Court on 7 March 2011 and extending the time for amendment until 20 May 2011.

The amendments made by this amended application are outlined in Schedule S as follows:

- [Person 1 – Deleted] and [Person 2 – Deleted] have been removed as persons comprising the Applicant pursuant to the Court's order made 13 May 2011;
- Schedule A (amended as marked);
- Schedule B (amended as marked);
- Schedule I (amended as marked);
- Schedule L (amended as marked);
- Part B amended due to changes in solicitor and composition of Applicant;
- Attachment A1 and A2 (amended as marked);
- Attachment B (wholly replaced to remove areas subject to the Court's determination on 23 June 2010);
- Attachment C (wholly replaced to remove areas subject to the Court's determination on 23 June 2010);
- Attachment E (amended as marked to clarify claimed rights and interests);
- Attachment J (amended as marked);
- Attachment I (inserted);

- Attachments L1-L7 (have been removed and replaced by Attachment L due to the removal of areas subject to the Court's determination on 23 June 2010);
- Attachment R1 (wholly replaced due to new authorisation and certification); and
- Attachment R2 (wholly replaced due to replacement of Applicant under 66B of the *Native Title Act 1993* (Cth).

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim and my reasons are as follows:

- I am satisfied that s. 190A(1A) does not apply as the application was not amended because of an order made under s. 87A by the Federal Court; and

- I am satisfied that s. 190A(6A) does not apply as the effect of the amendments to the application do not fall within the provisions of s. 190A(6A)(d).

Therefore, in accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

## Registration test

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 among 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.

Pursuant to ss. 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C.

## Information considered when making the decision

Subsection 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.

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.

For the purpose of the registration test, I have had regard to the information contained in the amended application filed by the applicant. I note that on 16 August 2011, the Court forwarded to the Registrar affidavits of [Person 3 – Deleted] and [Person 4 – Deleted], both dated 12 May 2011 and filed with the amended application on 20 May 2011. These affidavits had, inadvertently, not been referred to the Registrar on 20 May 2011 with the amended application. On 17 August 2011, I caused the Tribunal case manager to seek confirmation from the State of Queensland (the State) that they had received copies of the affidavits with the amended application. This was subsequently confirmed by the State on 23 August 2011.

I have also had regard to documents contained in the Tribunal's case management/delegate's file QC04/5—Gangalidda and Garawa Peoples application. Where I have had regard to information in documents contained within that file, I have identified them in this statement of reasons.

I specifically note that Attachment F to the original Gangalidda and Garawa Peoples application was not attached to the amended application as referred to the Registrar on 20 May 2011. However, Attachment F is referenced extensively throughout the amended application and I consider that it was the intention of the applicant that it form part of the amended application. The information within Attachment F is relevant to the requirements of s. 190B(5), and I am not confined for that purpose to considering information contained only in the application—see *Doepel* at [16]. I am also of the view that my consideration of this document does not invoke the need for any procedural fairness steps in relation to the State, given that this document has formed part of previous versions of the application.

I am also the delegate currently considering the amended application for QUD66/2005—Gangalidda and Garawa Peoples #2 (QC05/3) (Gangalidda and Garawa Peoples #2) for the purpose of the registration test.

These two applications are very similar. Whilst they cover different (but proximate) areas, they are made by the same applicant on behalf of the same native title claim group. Further, each application is supported by identical affidavit material and identical factual basis material. Thus, while I have considered each application separately and formed the view that it satisfied the requirements of s. 190B and s. 190C, I have in some instances (given the similarities and identical nature of some of the material provided within both applications) adopted similar reasons for both applications.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been 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. 94D of the Act. Further, mediation is private as between the parties and is also generally confidential: see also 94K and 94L.

## 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 made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

On 3 June 2011, a letter from the Tribunal was sent to the State to confirm that they were in receipt of the amended Gangalidda and Garawa Peoples application. That correspondence also informed the representative for the State of the proposed date for testing and that any submission or comment in relation to the registration of this matter should be provided to the Registrar by 27 June 2011. As at the date of this decision, no such comment or response was received by the Registrar from the State.

On 3 June 2011, a letter from the Tribunal was sent to the Applicant's representative informing them of the proposed date for testing and that any additional material in relation to the registration test could be provided to the Registrar by 27 June 2011. No additional material was received by the Registrar.

# Procedural and other conditions: s. 190C

## *Subsection 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.

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 below.

I note that I am considering this claim against the requirements of s. 62 as it stood *prior* to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

In reaching my decision for the condition in s. 190C(2), I understand that this condition is essentially procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

### 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.

The application contains all details and other information required by s. 61(1).

The application names Murray Walden Jr, Jacky Green, Jack Hogan and Terrrance Taylor as the persons comprising the applicant. Part A of the application contains the statement that '[t]he applicants [sic] are entitled to make this native title determination application as authorised by the native title claim group.'

Schedule A of the application contains the statement that '[t]he native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Gangalidda People and the Garawa People. The Gangalidda People are described in Schedule A1. The Garawa People are described in Schedule A2.'

There are no Schedules to the application that are labelled A1 or A2, however, Attachment A1 and Attachment A2 of the application contain descriptions of the Gangalidda and Garawa Peoples, respectively.

In my view, the application sets out the persons authorised to make the application and the native title claim group in the terms required by s. 61(1).

As such, I am satisfied that the application contains all the details and other information required by s. 61(1) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by s. 61(3).

Part B of the application states the name and address for service of the persons who are the applicant.

As such, I am satisfied that the application contains all the details and other information required by s.61(3) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by s. 61(4).

From the description of the native title claim group contained in Attachment A1 and Attachment A2 (see my reasons below at s. 190B(3)), it follows that the provisions of s. 61(4)(b) apply and that the application must contain the details/information that 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.

I am satisfied that within the application at Attachment A1 and Attachment A2 there is a description which appears to meet the requirements of the Act.

As such, I am satisfied that the application contains all the details and other information required by s. 61(4) for the purpose of s. 190C(2).

## 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 (iv).

The application is accompanied by the affidavit required by s. 62(1)(a).

As noted above in my reasons, one of the amendments to this application is to the persons who comprise the applicant. The amended application was accompanied by an order from the Court stating that '[p]ursuant to section 66B of the *Native Title Act 1993* (Cth), Murray Walden Junior, Terrance Taylor, Jack Green and Jack Hogan replace the current named Applicant in the proceeding...' Thus, it is necessary that the application be accompanied by an affidavit, meeting the requirements of s. 62(1)(a), from those named persons.

The application is accompanied by affidavits from each of the persons comprising the applicant in this matter, namely Murray Walden Jr, Jacky Green, Jack Hogan and Terrance Taylor. The affidavits are in substantially the same form, and I am satisfied that each sets out the matters required by s. 62(1)(a)(i) to (v) for the purpose of s. 190C(2). Relevantly, each of the affidavits provides (extract of affidavit of Murray Walden Jnr):

> 1...
> 2. I believe that the native title rights and interests claimed by the Gangalidda and Garawa native title claim group have not been extinguished in relation to any part of the area covered by the Application.
> 3. I believe that none of the area covered by the Application is also covered by an approved determination of native title.
> 4. I believe that all statements made in the Application are true.
> 5. I am authorised by all the persons in the Gangalidda and Garawa native title claim group to make the Application and to deal with matters arising in relation to it. The basis for that belief is as follows:
>
> ...
>
> (h) On 20 April 2011 a further meeting of the Gangalidda and Garawa native title claimants, as described in this amended Application, was held in Burketown. It is my understanding and belief that all of the Gangalidda and Garawa native title claim group was notified and invited to attend. In my experience the meeting of 20 April 2011 was well attended for a meeting of that kind and an appropriate meeting to make decisions in relation to the Application.
> (i) At the meeting of 20 April 2010 [sic], the Gangalidda and Garawa native title claim group, in accordance with a process of decision making which they had agreed to

and adopted for making applications and dealing with matters arising in relation to them:

(i) removed [Person 2], who is deceased, as an applicant;

(ii) confirmed the authorisation of myself, Jack Hogan, [Person 1], Jacky Green and Terrance Taylor, to the extent that each of us are [sic] willing or able, to remain as the persons comprising the Applicant in this Application and to proceed with it and to deal with matters arising in relation to it;

(iii) confirmed that if any of the applicants should pass away, suffer from mental or physical incapacity which prevents us from performing our responsibilities, or advise in writing that we no longer wish to continue as an applicant, the remaining persons may continue to act as the Applicant; and

(iv) authorised the amendments to the Application.

In my view there is a slip in the affidavit of Jack Hogan in that, unlike the other affidavits accompanying the application, he does not refer to the decision-making process utilised by the native title claim group to authorise the making of the application. In my view, this omission does not affect the ability of the affidavit to comply with s. 62(1)(a), as I do not consider that the setting out of the details of the decision-making process is either an implicit or explicit requirement of s. 62(1)(a)(v) as it stood prior to the amendments on 1 September 2007. The affidavit, in my view, does state the basis on which the applicant is authorised as mentioned in (iv). That basis is set out in paragraph [5] of the affidavit.

I am satisfied that the application contains all the details and other information required by s. 62(2)(1)(a) for the purpose of s. 190C(2).

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

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

The application contains all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

## 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.

The application contains all details and other information required by s. 62(2)(a).

Schedule B and Attachment B of the application contain information about the area covered by the application and any areas within those boundaries that are not covered by the application.

I am satisfied that the application contains all the details and other information required by s. 62(2)(a) for the purpose of s. 190C(2).

## 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).

The application contains all details and other information required by s. 62(2)(b).

Attachment C of the application is a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

I am satisfied that the application contains all the details and other information required by s. 62(2)(b) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by s. 62(2)(c).

Schedule D of the application contains the statement that '[n]o searches have been carried out by the applicants' 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.

I am satisfied that the application contains all the details and other information required by s. 62(2)(c) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by. 62(2)(d).

Attachment E of the application contains a description of native title rights and interests claimed in relation to the application area. It does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

I am satisfied that the application contains all the details and other information required by s. 62(2)(d) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by s. 62(2)(e).

Attachments F, F1, F2, F3 and F4 contain details and other information pertaining to the claimant's factual basis. There is also information contained in Attachment A, Schedule G and Schedule M of the application. It is my view that the factual basis material provided in the application contains information of particularity to the native title claim group for each of the assertions at s. 62(2)(e).

I am satisfied that the application contains all the details and other information required by s. 62(2)(e) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by s. 62(2)(f).

Schedule G of the application contains details and other information pertaining to activities currently carried out by the native title claim group in relation to the application area.

I am satisfied that the application contains all the details and other information required by s. 62(2)(f) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by s. 62(2)(g).

Schedule H of the application contains the statement that the 'applicants are not aware of any other native title determination applications that have been made in relation to the whole or part of the area the subject of this application.'

I am satisfied that the application contains all the details and other information required by s. 62(2)(g) for the purpose of s. 190C(2).

### 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.

The application contains all details and other information required by s. 62(2)(h).

Attachment I of the application contains a list of s. 29 notices of which the applicant is aware that relate to the whole or a part of the area covered by the application.

I am satisfied that the application contains all the details and other information required by s. 62(2)(h) for the purpose of s. 190C(2).

# *Subsection 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.

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

The geospatial assessment and overlap analysis dated 30 May 2011 (geospatial assessment) identifies no overlapping applications and only this application as being on the Register of Native Title Claims (Register) and Schedule of Applications—Federal Court (Schedule) in relation to this application area. I agree with this assessment.

Thus, there are no previous overlapping applications pursuant to s. 190C(3).

# *Subsection 190C(4)*
# *Authorisation/certification*

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

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

Note: The word ***authorise*** is defined in section 251B.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

Attachment R1 of the application is a certificate of the Gangalidda and Garawa Peoples application by the Carpentaria Land Council Aboriginal Corporation (CLCAC).

Also provided with the amended application are the affidavits of [Person 3] and [Person 4], both dated 12 May 2011. These affidavits provide information pertaining to the authorisation process and the composition of the applicant. Whilst forming part of the amended application, I consider that these affidavits are of no relevance to the task of the Registrar at s. 190C(4)(a). That is because the nature of the task at s. 190C(4)(a) (as outlined below) is such that I may only address 'the

terms of the certificate' and I am not permitted to look beyond the certificate in order that I may be satisfied that the requirements of s. 190C(4)(a) are met—*Doepel* at [80].

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

***The nature of the task at s. 190C(4)(a)***

Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J in *Doepel,* are straightforward—at [72]. All that the task requires of me is that I be 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78], which necessarily entails:

- identifying the relevant native title representative body and being satisfied of their power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s. 203BE—*Doepel* at [80]-[81].

***Identification of the representative body***

The certificate is dated 5 May 2011 and is signed by the Chairperson of the CLCAC, Thomas Wilson. The certificate states that the CLCAC is a body funded pursuant to s. 203FE(1) of the Act to perform all of the functions of a representative body in relation to the Gulf of Carpentaria region. I am satisfied on the basis of these statements in the certification that the funding extended to CLCAC under s. 203FE enables CLCAC to perfom the certification function in s. 203BE. I have no information before me which would indicate that the funding extended to CLCAC under s. 203FE does not cover the certification function.

The geospatial assessment shows that the application falls entirely inside the CLCAC region. On that basis, I am satisfied that CLCAC is the only representative body that could certify the application.

I am satisfied that CLCAC is the relevant representative body for the application area and that it is within its power to issue the certification.

***The requirements of 203BE***

To be satisfied about 'the fact of certification'—*Doepel* at [78], the certification must meet the requirements of s. 203BE, namely s. 203BE(4)(a)-(c).

***Subsection 203BE(4)(a)***

Subsection 203BE(4)(a) requires a statement from the representative body indicating that they hold the opinion that the requirements of subsections (2)(a) and (2)(b) have been met.

The certificate contains the required statement.

***Subsection 203BE(4)(b)***

Pursuant to s. 203BE(4)(b) the certificate must also briefly set out the body's reasons for being of the opinion set out in s. 203BE(4)(a). Some of those reasons set out in the certificate include:

a. Continuously since 2004, the CLCAC has provided facilitation and assistance in relation to the preparation and conduct of the claim...

   By doing so, the CLCAC has acquired considerable understanding and knowledge of the native title claim group, including its decision-making processes.

b. The Gangalidda People have been the beneficiaries of two determinations of native title in their favour in relation to area of land and waters which are contiguous to the claim area... The description of the Gangalidda People in Attachment A1 to the claim, and the description of the Gangalidda native title holders in the two determinations, are for all intents and purposes, the same.

c. ...

d. The members of the Garawa People have been identified in the reports prepared by the Aboriginal Land Commissioner pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976*...

   The description of the Garawa People in Attachment A2 is a description which the CLCAC understands includes all of the members of the Garawa People.

e. ....

f. On 20 April 2011 a meeting of the native title claim group was held in Burketown. That meeting was notified and facilitated by the CLCAC and attended by officers of the CLCAC as well as external legal advisors. At that meeting the members of the native title claim group confirmed that they do not have a traditional decision making process in relation to the making and conduct of the claim and they agreed to and adopted a decision-making process by which they made decisions to authorise the Applicant to make the amended native title claim and to deal with matters arising in relation to it.

g. ...

The certificate briefly sets out the body's reasons for being of the opinion in s. 203BE(4)(a).

***Subsection 203BE(4)(c)***

Where applicable, the certificate must also set out what has been done by the representative body to meet the requirements of s. 203BE(3) in order to comply with s. 203BE(4)(c). Section 203BE(3) relates to overlapping applications for determination of native title, and in my view is not applicable to this application—see geospatial assessment confirming the absence of any overlapping application. Thus, there is no requirement for the certificate to contain any statement pertaining to s. 203BE(3).

***My decision***

For the above reasons, I am satisfied that the application has been certified under Part 11 by the one representative body that could certify the application, thereby complying with s. 190C(4)(a).

# Merit conditions: s. 190B

## *Subsection 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.

The application **satisfies** the condition of s. 190B(2).

***Areas covered by the application***

Schedule B of the application refers to Attachment B as containing the written description of the application area.

Attachment B of the application contains a written description of the external boundaries of the area covered by the application. The description appears as follows:

> ...all the lands and waters within the following land parcels:
> - That part of Troutbeck Pastoral Holding (Lot 4601) on Plan PH1676) excluding that part subject to Lot 6 on Native Title Determination Plan AP14236
> - That part of Westmoreland Pastoral Holding (Lot 1 on Plan SP217472) subject to Exploration Permit application 14264
> - That part of Wentworth Pastoral Holding (Lot 2353 on Plan PH1515) subject to Exploration Permit applications 14264 & 14265.

Schedule C refers to Attachment C of the application. Attachment C contains a map prepared by the Tribunal and is entitled 'Native Title Determination Application'. The features of the map include that the amended application area is depicted in a solid outline with a stippled fill, labels of other abutting native title determination applications, tenure information including pastoral leases, Reserves and Aboriginal Freehold areas and relevant allotment numbers.

The geospatial assessment states that the description and map are consistent and identify the amended application area with reasonable certainty. I agree that the description and map identify the area covered by the application with reasonable certainty.

***Areas not covered by the application – internal boundaries***

Schedule B of the application lists both general and specific exclusions to the land and waters covered by the application. The more specific exclusions relate primarily to areas that are subject to native title determinations (those part of which would fall within the external boundaries of the application area).

The use of a general formulaic approach, as is utilised by the applicant in part of Schedule B, was discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*), in relation to the information required by s. 62(2)(a) and its sufficiency for the purpose of s. 190B(2). Nicholson J was of the view that such an approach 'could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour noted the difficulty in reconciling the need for detail as specified by

s. 62(a)(i) and (ii), the requirements of the registration test at s. 190B(2) and the 'state of knowledge of the parties at different stages of the application', but formed the view that consideration of these issues was necessary in order to assess the application against these requirements—at [30] to [38].

In undertaking this consideration, I have had regard to the requirements of s. 62(2)(a) and to the particularities of the application. The application could, presumably, be considered to be at a more advanced stage, given that it was first filed in 2004 and that parts of the original application area are now the subject of a consent determination. Nonetheless, I am mindful of the fact that it is often the case that issues of this kind do not reach resolution until close to the conclusion of negotiations or the hearing of the matter. As noted in *Daniel* by Nicholson J '...issues of validity in respect of interests may be incapable of concession until the native title determination decides relevant issues'—at [29].

I have also had regard to information within the application that points to the state of knowledge of the applicant. For instance, Schedule D of the application contains the statement that no searches have been carried out by (or on behalf of) the applicant 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.

It is in my view appropriate, given the above particularities, that the written description contain general exclusions of the kind at Schedule B. In my view, the written exclusions in Schedule B adequately reflect the state of knowledge of the applicant at this time.

***Decision***

I have formed the view that both the written description and the map of the application area are clear and identify the area with reasonable certainty. Thus, it is my view 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 the native title rights and interests are claimed in relation to particular land or waters'.

# *Subsection 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.

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

***The description of the native title claim group***

The description of the native title claim group is in two parts set out in Attachment A1 and Attachment A2 of the application.

Attachment A1 contains a description of the Gangalidda People as follows:

1. The Gangalidda People are all of the descendants of the following people

[A list of named ancestors] and

who identify and are identified by other Gangalidda People as belonging to the Gangalidda People according to Gangalidda traditional law and custom.

**"Descendants"** for the purposes of this description includes those individuals who have been adopted by the Gangalidda People.

2. The claimant group are the same people who comprised the Gangalidda People referred to in the Orders of Justice Cooper in *The Lardil People v State of Queensland* [2004] 298. The land the subject of this claim is adjacent to the land and waters the subject of the determination in that case.

3. Some family names associated with the biological descendants of the named Gangalidda ancestors are: Booth, Butcher, Brookdale, Brown, Diamond, Doomadgee, Douglas, Escott, Evans, Foster, Gilbert, Joe, Johnny, Ned, Walden and Yanner.

Attachment A2 contains a description of the Garawa People as follows:

1. The Garawa People are all of the descendants of the following people:
[A list of named ancestors] [and]

who identify and are identified by other Garawa People as belonging to the Garawa People in accordance with Garawa traditional law and customs.

**"Descendants"** for the purposes of this description includes those individuals who have been adopted by Garawa People.

2. Some family names associated with the biological descendants of the named Garawa ancestors are: Charlie, Bob, Wollogorang, Rory, Dixon, Shadforth, Pyro and Hogan.

### *Consideration of the description*

The task of the Registrar in examining a description of the native title claim group for the purpose of s. 190B(3) was the subject of consideration in *Doepel*, with its focus held to be 'whether the application enables the reliable identification of the persons in the native title claim group'—at [51].

Invariably a description of the native title claim group will involve the application of conditions or criteria upon which membership to the group is determined. In my view the relevant inquiry for the Registrar (or her delegate), as it was for the Court in *Western Australian v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*), is whether applying the conditions specified will allow for a sufficiently clear description of the native title claim group in order to ascertain whether a particular person is in that group. It may be that I will ascertain that the description is such that it necessitates 'some factual inquiry' be undertaken, '[b]ut that does not mean that the group has not been described sufficiently'—*WA v NTR* at [67].

Advancing on that inquiry I have formed the view that the description of the native title claim group contained in Attachment A1 and Attachment A2 of the application is sufficiently clear for the purpose of s. 190B(3)(b) for the following reasons:

The description of the native title claim group is such that it includes those persons who are the descendants of the named Gangalidda and Garawa ancestors. The description also includes additional requirements, namely, that those descendants identify and are identified by other Gangalidda People as belonging to the Gangalidda People (in respect to the Gangalidda descendants) or by other Garawa People as belonging to the Garawa People (in respect to the Garawa descendants). This identity will be determined in accordance with the relevant traditional laws and customs of the Gangalidda and Garawa Peoples.

Describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b)—see *WA v NTR* at [67]. Thus, I too accept that such a method of identifying claim members is compliant with the requirements of s. 190B(3)(b), providing an objective point at which to commence an inquiry about whether a person is a member of the native title claim group.

Insofar as the description of the native title claim group contains criteria additional to membership via descent from the named ancestors, being what I understand to essentially involve self-identification and recognition (or identification) by the Gangalidda People or Garawa People, I am also of the view that this criterion is sufficiently clear for the purpose of s. 190B(3)(b).

Whilst I could envisage some instances where the criteria of self-identification and group recognition would not be sufficiently clear for the task at s. 190B(3)(b), this is not such an instance. In forming this view, it is my understanding of the description that descent from one of the named ancestors will form the primary basis of membership to the native title claim group and that criteria, as expressed in the description, offers a clear starting or external reference point with which to commence an inquiry about whether a particular person is a member. Following that, the inquiry will proceed to consider the additional elements of self-identity and identification by the group, which will be informed by the traditional laws and customs of the Gangalidda and Garawa Peoples.

In my view, the description of the native title claim group is such that it can, with some factual inquiry, be ascertained whether any particular person is a member of the group.

# *Subsection 190B(4)*
# *Native title rights and interests identifiable*

> The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

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

In reference to the task at s. 190B(4), Mansfield J in *Doepel* accepted it was a matter for the Registrar or her delegate to exercise 'judgment upon the expression of the native title rights and interests claimed'. Further, his Honour felt that it was open to the decision-maker to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests—at [99] and [123].

Primarily, the test is one of 'identifiability', that is 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

The native title rights and interests claimed appear at Attachment E of the application. It is my view that the native title rights and interests, claimed in the application, are understandable and have meaning. The description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

# *Subsection 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.

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.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

### Combined reasons for s. 190B(5)

***The nature of the task at s. 190B(5)***

In my view, the Court has established clear principles by which the Registrar must be guided when assessing the sufficiency of a claimant's factual basis. They are:

- the applicant is not required 'to provide anything more than a general description of the factual basis'— *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].
- the nature of the material provided need not be of the type that would prove the asserted facts —*Gudjala FC* at [92].
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at s. 190B(5)(a) to (c)—*Doepel* at [17].

Nonetheless, it is important that each particularised assertion outlined in s. 190B(5)(a), (b) and (c) be supported by the claimant's factual basis material. In that regard, the decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in

*Gudjala [2007]*[1], including his Honour's assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*. Thus, while it is appropriate that I approach the task at s. 190B(5) in line with the general principles articulated above, I will pay particular regard to the matters outlined in both *Gudjala [2007] and Gudjala [2009]* in examining the sufficiency of the claimant's factual basis to support each of the assertions at s. 190B(5)(a)-(c).

***Section 190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area***

*The nature of the claimant's factual basis material in support of the assertion at s. 190B(5)(a)*

Some features of the claimant's factual basis material that elucidate the nature and content of the material in support of this assertion, include that:

- the bulk of the affidavit material submitted in support of this application was prepared in relation to native title determination application QG207/1997—The Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples application, which is now the subject of a determination of native title pertaining to land and waters in surrounding areas—see Attachment F and references to *The Lardil Peoples v State of Queensland* [2004] FCA 298 (referred to throughout as the Lardil Peoples' determination decision);
- the remainder of the affidavit material was prepared in relation to this application and the related application of Gangalidda and Garawa Peoples #2;
- there has been a determination of native title by consent in areas that previously formed part of this application and the Gangalidda and Garawa Peoples #2 application. This consent determination made by the Court on 23 June 2010, which is referenced in the application, recognised the native title rights and interests of the Gangalidda People in those consent determination areas—see *Gangalidda and Garawa People v State of Queensland* [2010] FCA 646 (referred to throughout as the Gangalidda consent determination decision);
- the area the subject of this application is a smaller portion of land and waters (approximately 700 square kilometres) that is entirely surrounded by the land and waters the subject of the Gangalidda and Garawa Peoples #2 application; and
- there has been judicial recognition of a body of, both, Gangalidda People and Garawa People in existence at the time of sovereignty observing identifiable laws and customs and of an ongoing acknowledgement and observance of such by the respective peoples—Attachment F;

The most obvious consequence of the above is that the claimant's factual basis material primarily goes to supporting the assertion of a rather extensive association with land and waters surrounding the application area, as distinct from identifying with much specificity those areas within the application area that members of the native title claim group have, and their predecessors had, an association with. There is, however, in my view, adequate information of specificity pertaining to the native title claim group and the application area. This information is

[1] See *Gudjala FC* [90] to [96].

coupled with the judicial recognition of an association with the land and waters surrounding this application area, as well as facts suggesting that quite extensive travel in and around, and physical presence on, the application area is a feature of the claimant's association with the land and waters.

*Association of the predecessors of the native title claim group with the application area*

The factual basis material at Attachment F asserts that the area claimed is part of a larger area of land and waters, which continued to be owned and occupied by the claimants after the assertion of sovereignty by the Crown and further that the claimants retain a traditional connection both to the area claimed and to their traditional country generally. At sovereignty, there was a distinct body of Gangalidda People and Garawa People acknowledging and observing relevant laws and customs pertaining to land and waters. This assertion, it is stated, has been the subject of judicial recognition.

For instance, in the Lardil Peoples' determination decision, Justice Cooper held that:

> I am satisfied that there was a communal group at the time of sovereignty which was ethnographically and culturally separate group of indigenous peoples (the original Gangalidda peoples) who inhabited the coastal land stretching along the mainland coast of the Gulf of Carpentaria from Massacre Inlet to the eastern bank of the Leichardt River, where it enters the Gulf of Carpentaria, which is claimed as the traditional territory of the Gangalidda peoples—at [67] to [68]; see Attachment F.

In relation to the Garawa People, the factual basis material states that there has been recognition of their ongoing acknowledgment and observance of traditional laws and customs pursuant to other legislation, such as the *Aboriginal Land Rights Act 1976* (Cth). The material cites the example of the Nicholson River Claim where Justice Kearney made the following observations:

> It becomes apparent very quickly that despite the changes, continuities are strong: eg although a variety of English is the lingua franca, conversations are laced with Waanyi/Garawa when older people are participants and among themselves the older ones use their languages heavily...People speak with strong feeling about their land whether or not they have been able to live on it; about the places of significance in that land, and the stories associated with those places—see Attachment F.

The factual basis material asserts the significance of the Lardil Peoples' determination application to this application area (and to the Gangalidda and Garawa Peoples #2 application area) even though that determination was confined to high water mark and island areas. This is because, for instance, the Gangalidda People in evidencing their connection to coastal areas also gave evidence about their broader interests. Those broader interests in inland areas were also the subject of the findings, such as where Justice Cooper noted:

> Dr Trigger was of the view that the Gangalidda people had greater contact with the rear Country than the other constituent groups because of the existence of other peoples with adjoining territorial lands and because of the existence of food sources other than seafoods—see Attachment F reciting extracts from the Lardil Peoples' determination decision.

The claimant's factual basis is such that it suggests that those inland areas to which the decision refers are those that are the subject of this application and the Gangalidda and Garawa Peoples #2 application.

Further to this, within the affidavit material there are numerous references made to the deponent's predecessors and their association with the land and waters the subject of the application, for instance, the affidavit of [Person 5-Deleted], a family name identified in Schedule A as being a descendant of the named ancestors of the Gangalidda People, where he sets out that:

> My father was a Gangalidda man. His father was [Person 6-Deleted] and his mother was [Person 7-Deleted].
>
> My father's country was Giwagarra and Gunamulla. Those two are really the same country but it is split by the two Dreamings. That is why I am both Barramundi and Devil Dreaming.
>
> [Person 6] worked on Marless Station. My father [Person 8-Deleted] was born on that country. I can show people that birth place. He worked on that country as well.
>
> My father, [Person 8] was from that Escott Station country. My father told me that Escott Station country was my country too. Gangalidda people know the Waldens are from that country.
>
> I know that is my country. My father showed me all that country. I can walk anywhere there. He told me it was all Gangalidda country through there. I was told Gangalidda country goes from the Leichardt River to Massacre Inlet [on the application area]. That is what I was told by my father.

In the affidavit of [Person 9-Deleted] (prepared for the Lardil Peoples' native title determination application), he also speaks to his association, and that of his predecessors, with the application area and surrounding land and waters. He states that:

> I am gangala skin. My father gave me my skin.
>
> My mother was [Person 10-Deleted]. Her skin was Nungarima. She was Gangalidda.
>
> I was told that my mother was born on Allen Island. Her father was Gangalidda. I do not know his name. His skin was Ngarigbalangi. His country was Dumbara and Ngurrurri. That is my mother's country and my country.
>
> I was born at McArthur River Station. My father was working there. When I was small we went back to Wollogorang Station. I was reared up there. From Wollongorang I came into the mission at Doomadgee.
>
> The mark, or painting, for the Shark Dreaming is worn in the marntiwa. The Shark Kujika starts at Dumbara in Gangalidda country. It then goes past Massacre Inlet to the Garawa side and passes through Manangoora on the Yanyula side.
>
> Gangalidda country starts at Gamarrala. That is Massacre Inlet. West of Gamarrala it is Garawa country, [Person 11-Deleted] country. East of Gamarrala it is Gangalidda country.

Based on my understanding, many of the areas referenced in the affidavits are in or surrounding the area for both this application and the Gangalidda and Garawa Peoples #2 application.

*Association of the native title claim group with the application area*

The affidavit material also speaks directly to the native title claim group's continuing association with the application area. Each of the deponents explain that they are either a Gangalidda or Garawa person, although it is clear that they may each have predecessors of both Gangalidda and Garawa ancestry.

The affidavit of [Person 12-Deleted] (a family name identified in Schedule A as being a descendant of the named ancestors of the Gangalidda People), prepared for the Lardil Peoples' native title determination application, contains the following information relevant to his association with the application area:

> I was born on Westmoreland Station [in the application area] in 1939. My skin is Bangarangi. My bush name is [Person 13-Deleted].
>
> My father spoke Gangalidda. My mother was Garawa.
>
> My country is Banggunwuluwi. Banggunwuluwi was my father's country. My father's bush name was [Person 14-Deleted]. My father's father's name was [Person 15-Deleted].
>
> Banggunwuluwi is where the Bushfire Dreaming is. Bungana is the black headed carpet snake. He went up to the hills behind Eightmile Creek towards Westmoreland Station. Those hills are about 70-80 miles inland. He made a fire up that creek.
>
> Banggunwuluwi goes inland back to Hells Gate. It goes to Eightmile Creek in the east. The Gangalidda name for that creek is Burrulawarra. On the eastern side of Eightmile Creek is Dumbara. Dumbara belongs to [Person 16-Deleted] and that mob.
>
> Banggunwuluwi goes from Eightmile Creek to Massacre Inlet in the west. On the other side of Massacre Inlet is Garawa country. There is a sandy beach that goes all the way to Tully Inlet.

Also, in the affidavit of [Person 17-Deleted] (a family name identified in Schedule A as being a descendant of the named ancestors of the Gangalidda People), prepared for this application, he narrates the following in relation to his and his family's association with the application area:

> I learned about culture and bush ways from as early as I can remember. Dad used to take all of us kids to do that, every spare moment he got. He took us all over Gangalidda country. Gunamulla was our favourite spot, its our country and the most isolated. It used to take about 8 hours back then.
>
> I teach my own kids what I know, just like dad did with us as kids.
>
> I collect bush potato with my kids.
>
> We also hunt wallaby and kangaroo, we chase goanna and snakes and blue-tongue lizards. Blue tongues are a delicacy over everything. I was driving with [Person 18-Deleted] my brother the other day and we saw one – we pulled up really quickly but not quickly enough and he got away.
>
> Sea salt, we use for eating. We collect it from behind Escott where there is a big salt deposit, or at Gunamulla.

> We burn off a lot, after the first rains, not the winter rains. We burn off all over our country, usually when we are travelling through it, on our way to places.

The claimant's factual basis material suggests a complex system of traditional laws and customs that define the Gangalidda and Garawa Peoples' relationship with the land and waters the subject of the application. For instance, the affidavit of Jacky Green (prepared for this application) in which he states that:

> *Walalu* he's the main dreaming for that initiation ceremony, doesn't matter what skin you are we use him now for all of the tribes, from Mornington to Moungibi and out west. He is everywhere on our country. We start that *gujiga* from the sea near Old Doomadgee, Nungajabarra is the Garawa name for it, on Gangalidda country. He follows all the way down the coast close to Wollorgorang and then shoots off to the mainland. He comes straight through Robinson River on the northern side of the community now, stays north of Borroloola and then heads straight for Roper.
>
> For us there's no boundary like between Queensland and the Northern Territory, the only boundary we know is where a different tribe starts. With the Walalu gugija we should follow Murrandoo mob in that song because it start on their country.
>
> Branch Creek and Wollorgorang area is Wuyal country- Wuyal comes from Wuyaliya skin. That Garawa country meets Gangalidda country at Buluwarra. The [Person 19-Deleted] mob are mingaringgi for that country.
>
> Most of my knowledge is because I have been too long travelling around with people, older people with knowledge of our country. I got experience about our law and culture in many places over our country, including who is junggayi for that country, and the main mingaringgi for that country.

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

In *Gudjala [2007]* Justice Dowsett considered the requirements of s. 190B(5) generally and, in particular, the necessity to set out within the claimant's factual basis material 'the relationship which all members claim to have in common in connection with the relevant land.' This should be considered in conjunction with his Honour's statement that the facts alleged must '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 interest)'—at [39] and [40]. These principles, in my view, are pertinent in examining the sufficiency of the claimant's factual basis for the purpose of the assertion at s. 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group, and the nature of the association with the application area.

The claimant's factual basis material in this instance reveals a relatively complex scenario of the relationship that all members of the native title claim group have in common with the relevant land. One of the most prominent features of that relationship, in my view, is the Gangalidda and Garawa Peoples' system of skin relations and affiliations which the factual basis material asserts 'link them to each other and the natural world.' The material demonstrates that the claimants retain a thorough knowledge of this system that has been passed down from their predecessors. There is also an interlinked and shared system of dreamings or travelling narratives that are related to the application area and the Gangalidda and Garawa Peoples. This aspect of the

common relationship is prominent in the affidavit material where the deponents give accounts of the different dreamings and how they relate to Gangalidda and Garawa country and define the boundaries of the land tenure system. It appears to be a defining trait of how rights and interests in country are understood.

Whilst it is apparent from the factual basis material that there is a complex set of laws and customs defining various members' rights and interests in the land and waters the subject of the application, it is my view that there is coherence in the articulation of the relationship that the Gangalidda and Garawa Peoples have in common with the application area. That is, the claimant's factual basis material does offer some explanation of the relationship and association that the Gangalidda and Garawa Peoples have in common in connection with the relevant land.

There is in my view, particularly within the affidavits, a factual basis that goes to showing the history of the association that those members of the claim group have, and that their predecessors had, with the application area—see *Gudjala [2007]* at [51]. For instance, each of the persons in the affidavits speaks to their own association as well as to that of their parents and grandparents. In some of the affidavits, the deponents have also provided details of the association of their great grandparents with the application area.

Further, I have considered whether the factual basis is sufficient to show the association 'between the whole group and the area'—*Gudjala [2007]* at [52]. In undertaking that task, it is my view that information supporting an assertion of an association between the whole group and the area can be sufficiently demonstrated through the provision of some tangible examples, originating from one or more members of the claim group, of how the whole group and its predecessors are associated with the area over the period since sovereignty.

In my view, each of the affidavits from members of the native title claim group provides sufficient examples that demonstrate an association between the whole native title claim group and the application area.

***Section 190B(5)(b) - that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests***

In *Gudjala [2007]*, Dowsett J formed his understanding in relation to what is required to support this assertion in reference to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*). His Honour, thus, accepted that the expression 'traditional laws acknowledged by, and traditional customs observed by' is of a similar vein to that employed in s. 223 of the Act and, that the meaning to be afforded to the term 'traditional' can be derived from cases that explore s. 223 (see *Gudjala*—at [26] and [62] to [66] noting that this aspect of the judgment was not criticised by the Full Court, and see *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*)—at [19] to [22].

It follows that it is appropriate that my consideration of the claimant's factual basis material in support of this assertion has also been informed by the relevant principles set down in *Yorta Yorta*, including that:

- 'A traditional law or custom is one which has been passed from generation to generation usually by word of mouth or common practice'—at [46].

- '[T]he origins of the content of the law or customs concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty..'—at [46].
- '[T]he normative system...is a system that has had a continuous existence and vitality since sovereignty'—at [47].
- 'When the society whose laws and customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist'—at [53].
- '[D]emonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim'—at [83].

*Pre-Sovereignty society*

In support of the assertion that the Gangalidda and Garawa Peoples maintain traditional laws and customs that give rise to the claimed native title rights and interests, the factual basis material sets out a summary of judicial recognition that is asserted to be relevant to the claim of a communal group of Gangalidda People and Garawa People existing at sovereignty—see Attachment F.

Referring to factual findings of the Court in the Lardil Peoples' determination decision, the factual basis asserts that a community known as the Gangalidda People has always existed. Some of those factual findings include:

> I am satisfied that none of the groups lost their identity or existence as a society. That is, none of the groups presently claiming for a determination is a new society, created or arising after sovereignty, seeking to adopt the traditional laws and customs of a former society.
>
> ...there is a wealth of recorded anthropological materials which chronicle the applicant peoples from the 1930s to the present time...each of the applicant groups has maintained, through successive generations from their forebears at sovereignty, a normative system of traditional laws which are acknowledged and customs which are observed, by which persons are allocated to a Country and rights are allocated to those persons in respect of that Country—Justice Cooper referring to the applicant groups in the Lardil Peoples' determination application (including the Gangalidda People) at [200] and [202]; see Attachment F

The factual basis material asserts that the Garawa People have maintained a rich and vibrant culture and that their society continues to be controlled by traditional values and customs via which they have maintained a connection to their country. This, it is also stated, has been the subject of judicial recognition. For instance:

> In the Nicholson River Claim Justice Kearney made formal findings which included that:
>
> (1) The claimants, as members of local descent groups, were the traditional Aboriginal owners of the land the subject of the claim; and
> (2) The traditional owners were entitled by Aboriginal tradition to the use or occupation of the whole of that land.

Evidently, none of the above judicial findings pertain to the land and waters the subject of this application, but the claimants clearly assert the relevance of those decisions to the application before me. Some direct correlation, however, is made between those findings and this application. For instance, in relation to the description of the Gangalidda People at Attachment A, this is stated to be the same description of persons who comprised the Gangalidda People in the Lardil Peoples' determination decision.

Further factual basis material going to support the assertion of the existence of a pre-sovereignty society, from which the laws and customs of the native title claim group are derived, can be found in the claimant affidavits. These affidavits speak quite extensively of the predecessors of the native title claim group and to the traditional laws and customs that gave rise to their rights and interests in the application area. For instance, in the affidavit of [Person 20-Deleted] (identified in Schedule A as a biological descendant of the named ancestors), he states that:

> My father was [Person 21-Deleted]. He was a Gangalidda man. His skin was Balyarinyi. His parents were [Person 22-Deleted] and [Person 23-Deleted].
>
> [Person 22] was a Gangalidda woman. I heard that [Person 22] was Nangalama skin from [Person 24-Deleted] but I am not sure what her skin was.
>
> [Person 22] had three sisters, [Person 25-Deleted], [Person 26-Deleted] and [Person 27-Deleted]. Her parents were [Person 28-Deleted] and [Person 29-Deleted]. [Person 22] mother was called [Person 30-Deleted] [sic] by the whiteman [sic] but her real Garawa bush name was Landillimurra [named in Attachment A as a Garawa ancestor]. Her Gangalidda name was [Person 31-Deleted]. [Person 30] was a Garawa woman. [Person 30] husband was known as [Person 32-Deleted] by the white fellas. His proper name was was [sic] [Person 28]. He was full blood Gangalidda. [Person 30] was a full blood Garawa.
>
> I come from Gunumulla through my grandmother and great grandfather. [Person 22] mother was from Yallagunjimurra in Garawa country.
>
> For as long as I can remember I have been taught about Gangalidda ways and how to survive in the bush. I have also been taught about traditional law. I learnt those things from my father and from my grandmother. I am still learning about those things.
>
> [Person 22] was born at Gunumulla. It was her father's country. That is why I have strong claim to that country. I get it through my father who got it from his grandfather.

I note, that in my view, there is an obvious peculiarity in the material before me regarding the identification of the relevant society, namely that it is not apparent that the factual basis material either asserts, or is indicative of, the presence of one normative system in existence at the time of sovereignty. Rather, it would appear that the Gangalidda People and the Garawa People maintain separate group identities. This aspect of the claimant's factual basis requires some consideration in examining its sufficiency for the purpose of s. 190B(5)(b).

In undertaking this consideration I am of the view that the Court has taken neither a fixed nor inflexible approach to the concept of society as expounded by the High Court in *Yorta Yorta*. In *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*), the Full Court discussed the notion of society, which 'does not require arcane construction' or initiate 'technical, jurisprudential or social scientific criteria for the

classification of groups or aggregations of people as 'societies''. In that regard, the Full Court proceeded to explore the various connotations and features of society evident in particular native title determinations, along with the applicable legal principles, including that:

- It is unnecessary for a native title claim group to constitute a society or community in its own right, but rather it may form part of a cultural bloc 'whose members are dispersed in groups' over large areas as was found in *De Rose v State of South Australia (No 2)* [2005] FCAFC 110—*Alyawarr* at [80];
- Multiple groups 'which were territorially adjacent and shared economic and social links, could be regarded as a composite community with shared interests' even though individual members only held rights and interests in particular estate areas, as they were found to in *Western Australia v Ward* [2000] FCA 191—*Alyawarr* at [81];
- It may be ultimately sufficient to make a finding that the native title claim group are persons in 'whom native title resides' as opposed to deciding whether claimants are 'a coalition or not', as was held in *Daniel v State of Western Australia* [2003] FCA 666—*Alyawarr* at [85];
- It may be appropriate to make a determination that native title rights and interests are held severally by individual groups as was done in *Lardil Peoples v State of Queensland* [2004] FCA 298—*Alyawarr* at [86].

In *Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26, the Full Court felt it notable 'that the Court has found in a number of cases that a native title claim group which adhered to an overarching set of fundamental beliefs constituted a society, notwithstanding that the group was composed of people from different language groups or groups linked to specific areas within the larger territory which was the subject of the application'—at [71].

Presumably, it may be pertinent that in relation to areas that previously formed part of this application the Court has since made a consent determination in favour of the Gangalidda People severally. In that Gangalidda consent determination decision the Court referred extensively to the findings of the Court in the Lardil Peoples' determination decision as evidencing a body of Gangalidda People in existence in the application area at the time of sovereignty. His Honour, Justice Spender noted that the consent determination was recognising only the rights of the Gangalidda People over their *own* country with the balance of the claim to recognise any rights and interests of the Garawa People—see Gangalidda consent determination decision at [18] to [40] and [50].

Whilst it is not my intention to pre-empt any finding of the Court in relation to the nature of the society existing in pre-sovereignty times that gives rise to the Gangalidda and Garawa Peoples' rights and interests in the application area, it is appropriate that I form some understanding of the relevant facts asserted in support of the claim that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed.

In that regard, I have formed the view that it is neither explicit nor implicit within the material before me that the claimant's assert that the Gangalidda and Garawa Peoples formed one common body of persons at the time of sovereignty. In fact all the information within the

application is such that it suggests that the converse is true, namely that the Gangalidda People and Garawa People are, and were, distinct groups of people. However, I do understand the assertion to be that there is a significant commonality of law and custom that goes to defining the Gangalidda and Garawa Peoples' rights and interests in the application area. The claimant's material also sets out facts in support of this assertion.

Attachment F of the application, for instance, sets out a description of the laws and customs that have been maintained by the Gangalidda and Garawa Peoples, identifying inherent similarities and parallels. Further, in relation to those laws and customs that are set out separately in relation to the Gangalidda and Garawa Peoples, it is also possible to detect intrinsic and central features that have a striking likeness.

In the affidavits each of the deponents identifies as either a Gangalidda person or a Garawa person, but it is clear that there are some shared ancestral connections between claimants of both Gangalidda and Garawa descent. It is also apparent that each of the deponents has intimate knowledge of how rights and interests in land are allocated to either Gangalidda People or Garawa People, both separately and collectively. This, in my view, suggests the existence of shared laws and customs that operate to recognise both Gangalidda and Garawa rights and interests in the application area. In her affidavit for the Lardil Peoples' native title determination application, [Person 33-Deleted] relays her understanding of how rights and interests in the application area are defined in reference to shared dreamings and stories of the Gangalidda and Garawa Peoples:

> Gangalidda country goes right up to Massacre Inlet. Its there that the tribes mixed. Yanyulu and Garawa mixed together. My mother told me that story. I have heard old [Person 34-Deleted] from Borroloola tell that story as well. The other way Gangalidda country goes across Harrisons Creek and to the Albert River. Gin Arm Creek is in Gangalidda country. Burketown is in Gangalidda country as is the Ballast ground.
>
> My father was a Garawa and Yanyula. He learnt Gangalidda from my mother. He came from Garawa country but he never went home. He stayed in Gangalidda country. He was born on the Calvert River at Calvert Station. His name was Ned Doomadgee.
>
> My mother's country is Dunbara. That is my country too. My mother told me that country goes out as far as the eye can see out into the water. It is the Shark Dreaming place. The Shark went to Garawa country after it went to Dumbara. It went all the way to Manangoora.

It is my view that this kind of information within the claimant's factual basis material is sufficient to support the assertion that there was a relevant pre-sovereignty society that acknowledged and observed laws and customs.

*Traditional laws and customs regarding skin relations, travelling narratives and initiation narratives*

In reference to these laws and customs, Attachment F of the application sets out that:

> Both the Gangalidda and Garawa people continue to acknowledge and observe similar systems of "skin" affiliations which link them to each other and the natural world.
>
> The major Dreaming with travel routes in Gangalidda country include Dingo (*Ngawa*) Rainbow (*Bujimala* or *Dirra*), Dugong (*Bijarrba*), Groper (*Guridi* or *Bununggaji*), Shark (*Guldiji* or *Bununggaji*), Shark (*Guldiji* or *Yulumunji*), and Travelling Rainbow (*Walalu*).

> The travelling narratives associated with Shark, Travelling Rainbow, and Devil also travel the country of the Garawa people.
>
> The Garawa and Gangalidda people continue the practice of initiation into manhood. Narrative song cycles known as *gujiga* or *kujika* tell of the travels and activities of ancestral beings on land and sea, including the land and waters the subject of this application.
>
> There are three main song cycles relevant to the claimed land and waters.

Jacky Green, a Garawa man, sets out in his affidavit how these laws and customs define the Gangalidda and Garawa Peoples' relationship with their land. He states that:

> *Walalu* is travelling Rainbow. He is for both those ceremony, the initiation and the bigger ones. He is the main *gujiga*, or song. There is a way of singing it. For the young fellow one its light and fast, for the bigger one its much heavier and slower.
>
> *Walalu* he's the main dreaming for that initiation ceremony, doesn't matter what skin you are we use him now for all of the tribes, from Mornington to Moungibi and out west. He is everywhere on our country. We start that *gujiga* from the sea near Old Doomadgee, Nungajabarra is the Garawa name for it, on Gangalidda country. He follows all the way down the coast to Wollorgorang and then shoots off to the mainland.

*Traditional laws and customs regarding a system of land tenure*

Within Attachment F, the laws and customs regarding land tenure are set out separately in relation to the Gangalidda People and the Garawa People, but the summary of each reveals similarities, including:

- A traditional model of land ownership vesting in estate groups and/or affiliations to estate groups that featured patriclans. For instance, Attachment F notes that the Gangalidda traditional model 'obtained country through patrilineal descent rights'. Similarly, the Garawa People's traditional system, it is noted 'would have estates being claimed by a patriclan whose members' semimoiety affiliations are all the same as that of the estate—see Attachment F4;
- Contemporary models of land tenure also recognise matrilineal descent. For instance, Attachment F notes that the Gangalidda contemporary society considers that rights in country are 'also obtained through matrilineal descent and the descent groups can now be considered to be cognatic'. Similarly, the Garawa People 'have a range of kinds of relationships and associated responsibilities to different areas of land. Relationships to country and totems are traced through the four lines of descent from four grandparents'—at Attachment F4;
- Rights and interests in country can also be obtained via birth. For instance, of the Gangalidda People Attachment F notes that 'the Gangalidda people may obtain rights in country through conception or birth'. As a result of this, Attachment F notes that the consequence of members and their predecessors having obtained rights in country via this way is that 'the overlaying principles of affiliation have led to the situation where most people can rightfully assert interests in more than one area'. In Attachment F and Attachment F4 it is also noted that the Garawa People, similarly, obtain such rights and

interests in the land and waters via birth and/or spiritual conception—see Attachment F and Attachment F4;

- In Attachment F, an extract of the findings from the Lardil Peoples' determination decision in relation to the Gangalidda People sets out 'the complexity and range of the mechanisms by which one could acquire rights to enter and engage in activities based on patriclan relationships or skin relations' allowing for 'a greater fluidity of movement between Countries and places where activities were engaged in'. A similar range of mechanisms is also articulated in relation to the Garawa People—see Attachment F, Attachment F4 and the affidavit of Jacky Green (a Garawa man).

*Is the claimant's factual basis material sufficient to support the assertion at s. 190B(5)(b)?*

In considering the sufficiency of the claimant's factual basis in support of the assertion at s. 190B(5)(b), Dowsett J in *Gudjala [2007]* held the starting point to be the 'identification of an indigenous society at the time of sovereignty.' It follows that there must be some basis for my inferring that there was a pre-sovereignty 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'. Those laws and customs must in turn give rise to the claimed native title rights and interests of the native title claim group—*Gudjala [2007]* at [62], [66] and [81].

It is my view that the inference of such, as detailed above, stems primarily from there being some explanation within the claimant's factual basis as to how the current laws and customs of the claim group can be traditional; that is, that they are laws and customs derived from a pre-sovereignty society. This explanation, of course, must be 'fully and comprehensively' furnished and cannot merely consist of statements and assertions that essentially restate the claim—see *Gudjala [2009]* at [29] and [52; *Gudjala FC* at [90].

I have provided a detailed outline above of the claimant's factual basis pertaining to the assertion that the laws and customs acknowledged and observed by the native title claim group are those which have their origins in a society existing at and before the time of sovereignty. I have observed that it is a complex factual scenario, from which it is not abundantly clear as to the actual nature or extent of the relevant society. Nonetheless, it is my view that the claimant's factual basis does provide the necessary explanation and does demonstrate the existence of a relationship between the present laws and customs of the native title claim group and those laws and customs acknowledged and observed by a body of Gangalidda Peeople and Garawa People at the time of sovereignty.

In my view,the source of this explanation is contained in the outline of previous findings of the Court in relation to the Gangalidda People and Garawa People (severally), and in the affidavit material of both the Gangalidda and Garawa persons, which set out in detail the transmission and continued acknowledgment and observance of those laws and customs that are asserted to have their origin in the pre-sovereignty society. For instance, the affidavit material sets out laws and customs currently acknowledged and observed by members of the native title claim group and examples of how those laws and customs were acknowledged and observed by their own immediate ancestors, including their parents, grandparents and great grandparents. Having regard to that material, it is open to me to infer that the factual basis is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

I am satisfied that there is a sufficient factual basis to support the assertion in s. 190B(5)(b).

***Section 190B(5)(c) – that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs***

This assertion compares closely with the second element of the meaning of 'traditional' as discussed in *Yorta Yorta*—at [47]. To say that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs 'implies a continuity of such tenure going back to sovereignty, or a least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty'—*Gudjala* at [82].

In my consideration of s. 190B(5)(b) above, I have outlined some of the claimant's factual details that go to explaining the transmission and continuity of the native title rights and interests held in accordance with the relevant traditional laws and customs.

I am satisfied that there is a sufficient factual basis to support the assertion in s. 190B(5)(c).

# *Subsection 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.

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

***The nature of the task at s. 190B(6)***

The pertinent point in considering the application against the requirements of this section is that the test is prima facie. Thus, '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'—*Doepel* at [135]. Nonetheless, it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

In *Doepel,* Mansfield J held that this section is one that permits consideration of material that is beyond the parameters of the application and requires the Registrar to:

> [C]onsider whether 'prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle—at [16].

***Native title rights and interests***

In undertaking the task at s. 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s. 223(1) of the Act. That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters: see chapeau to s. 223(1); and
- have not been extinguished over the whole of the application area.

The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest' in relation to land or waters'—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to 'are of wide import'—(*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr FC*)).

Having examined each of the native title rights and interests set out in the application, it is my view that, prima facie, each is a right or interest 'in relation to land or waters.'

As to the other requirements for native title rights and interests, this was put succinctly by the majority in *Yorta Yorta* (referring primarily to s. 223(1)(c) but alluding to the requirements of s. 223(1)(a)):

> Native title ***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection ***depends on native title not having been extinguished*** [emphasis added]and its not having incidents that are repugnant to the common laws... requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom—at [110].

It is also my view that the way in which the applicant has framed the rights and interests claimed (Attachment E) in relation to the application area (see Schedule B) sufficiently addresses any issue of extinguishment, for the purpose of the test at s. 190B(6).

I now consider each of the rights and interests as claimed. I note that in some instances I have grouped certain rights and interests together. Further, my reasons at s. 190B(6) should be considered in conjunction, and in addition to, my reasons and the material outlined at s. 190B(5).

*1. In relation to the land and waters the subject of that part of Troubeck Pastoral Holding (Lot 4601 on Plan PH1676) to the west of Massacre Inlet, the Applicants assert that Garawa people claim the right to possess, occupy, use and enjoy that land and the waters over it to the exclusion of all others. In the alternative the Applicants assert that the Garawa people claim the rights and interests set out in paragraph 2 (below).*

In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the majority considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describe a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*), the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

> [T]he question whether the native title right of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usfructuary or proprietary. ***It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom*** [emphasis added]—at [71].

Further, the Full Court in *Griffiths FC* was of the view that control of access to country could flow from 'spiritual necessity', due to the harm that would be inflicted upon those that entered country unauthorised—at [127].

This claim to exclusive possession vested in the Garawa People is claimed in relation to a specific portion of the application area, referred to as that portion of Troubeck Pastoral Holding (Lot 4601 on Plan PH1676) to the west of massacre inlet. I understand this portion of the application area to be subject to the claim by the applicant that ss. 47, 47A or 47B applies (see Schedule L and Attachment L of the application), and that any extinguishment of the native title rights and interests is to be disregarded in accordance with those sections—see ss. 47(2), 47A(2) and 47B(2). It may be that given the nature of the land and waters covered by the application (see Schedule B, Attachment B and Attachment C), it is unlikely that any right to exclusive possession could be claimed without the benefit of these, or similar, provisions. These are issues, however, that will be determined by the Court in due course.

The claimant's factual basis material demonstrates the existence of traditional laws and customs acknowledged and observed by the Gangalidda and Garawa Peoples in relation to a land tenure system, where rights and interests in the relevant land and waters are obtained via a range of mechanisms. Prominent features of the land tenure system include land ownership and rights vesting in estate groups or those with affiliations to estate groups that recognise both matrilineal and patrilineal descent, the importance of skin affiliations and association via birth. The affidavits from the Gangalidda and Garawa Peoples exhibit a meticulous understanding of their descent based affiliations with the application area and of the skin system, including the distinction between various rights and interests that are held in specific portions of the application area by members of the native title claim group.

The affidavit material sets this out with some specificity. For instance, in the affidavit of [Person 12], he sets out the boundaries of his country taught to him by his father and also identifies other Gangalidda and Garawa country. He states:

> On the other side of Massacre Inlet is Garawa country. There is a sandy beach there that goes all the way to Tully Inlet [I understand this to be a reference to the portion identified as subject to exclusive possession by the Garawa People].
>
> My father told me the boundaries of my country. He told me my country goes out into the sea as far as the eye can see.
>
> On the Gangalidda side of Massacre Inlet, out in the sea, is Manggabarda [I understand this to be a reference to a portion of the application area the subject of the consent determination].

The affidavit of [Person 35-Deleted] also makes reference to the various boundaries within the application area, stating that:

> The Shark Kujika starts at Dumbara in Gangalidda country. It then goes past Massacre Inlet to the Garawa side and passes through Manangoora on the Yanyula side.
>
> Gangalidda country starts at Gamarrala. That is Massacre Inlet. West of Gamarrala it is Garawa country, [Person 11] country.

Each of the affidavits also evidences a system of permission to access and use the land and waters the subject of the application area. For instance, in the affidavit of [Person 20], he states that:

> You should get permission before you got [sic] to someone country. If I go to Gregory in Waanyi country and I hunt turtle there, I ask that Biddunguu mob. If I want to go to [Person 12] country I have to ask him. That is even though I am Gangalidda as well. I would toss out Gangalidda people from Gunamulla who were not from there if they were there without asking anyone. They would do the same to me.
>
> I have seen Gangalidda people enforce Gangalidda rules against white people.

This kind of material within the claimant's factual basis suggests that the right to exclude is explicit. Even so, there is an inherent complexity within this system, primarily stemming from the existence of some portions of land and waters within the application area where rights and interests are asserted to be shared and other portions of land and waters where rights and interests are considered to be vested exclusively in either some or all of the Garawa People and/or some or all of the Gangalidda People.

I have, however, formed the view that there is probative material before me that establishes, prima facie, the Gangalidda and Garawa Peoples have a traditional land tenure system where rights and interests in the application area vest collectively or severally in some or all of the Garawa People and/or some or all of the Gangalidda People. Within that system the content of the traditional laws and customs demonstrates the existence of 'a measure of control over access to land' that vests in certain persons over certain portions of the application area—see *Ward HC* at [89].

**Outcome:** established, prima facie.

*2. In relation to the remainder of the land and waters in the application area the Applicant asserts that the Gangalidda People and Garawa People have the following non-exclusive native title rights and interests in accordance with their traditional laws and customs:*

*[4. The holding of native title rights and interests in accordance with traditional laws and customs referred to in 2 above, includes laws and customs which provide that:*

*a. only some or all of Gangalidda people may exercise those rights in a particular area;*

*b. only some or all of Garawa people may exercise those rights in a particular area; or*

*c. the rights are shared between Gangalidda and Garawa people in a particular area.]*

*a. The right to occupy and/or use the application area;*

*b. The right to access and traverse the application area in accordance with and for the purposes allowed under their traditional laws and customs;*

*e. The right to camp on the application area;*

*f. The right to live on the land, to erect shelters and other structures on the application area;*

In my view, the claimant's factual basis material elucidates that the Gangalidda and Garawa Peoples' right to occupy, use, access, traverse and live on the application area exists under the traditional laws and customs of the native title claim group. The affidavit material provides details of the claimant's ancestors' occupation and use of the application area. The affidavit material also suggests that the claimant's maintain an intimate knowledge of the traditional laws and customs that dictate their right to occupy, use, access, traverse and live on the application area.

**Outcome:** established, prima facie.

*c. The right to hunt and/or gather living and plant resources on the application area;*

*d. The right to fish in the application area;*

*i. The right to use natural resources in their entirety, other than minerals and petroleum;*

*j. The right to:*

> *i. take water;*
>
> *ii. take fish;*
>
> *iii. take plants in their entirety and animals;*
>
> *iv. take ochre, clay and salt;*
>
> *v. take sand, gravel and rock;*
>
> *vi. take shells; and*
>
> *vii. take grass, resin and wood.*

*k. The right to manufacture or produce traditional items from natural resources found on or in the application area;*

*l. The right to carry out economic pursuits on the application area including the barter and/or exchange of natural resources, all parts of natural resources and the products of those resources;*

*n. The right to enjoy the amenity of the application area;*

*y. The right to use minerals not wholly owned by the Crown*

There is, in my view, information within Attachment F of the application and the affidavits that speaks to the possession of these rights under the traditional laws and customs of the Gangalidda and Garawa Peoples. For instance, in the affidavit of [Person 36-Deleted] he sets out how these kind of rights were exercised by his predecessors and other 'old people', supporting the inference that they are rights possessed under the traditional laws and customs of the native title claim group:

> My mother's country includes the sea. That is where we get out food- crab, oysters, fish, turtle eggs, turtle, dugong.
>
> At Point Parker there were traps built on the reefs. The ones close into shore have been destroyed by cyclones. They were made from placing those ironstone rocks around rock pools.

> When the tide was up the fish would come into feed. When the tide went out they would be caught.
>
> By traditional law Gangalidda people own the land and the sea. Gangalidda country goes from Albert River to Massacre Inlet. Our food is in the sea. We are taught to hunt there.
>
> Old People used to go out hunting dugong and turtle in walpas. Those walpas were strong. I have seen them made. They are made from wood going in different directions in layers.
>
> Later Gangalidda people had dug out canoes. They were cut from a tree with two floaters attached on the side. The hunter would stand up when spearing and allow the rope to run through their hand.
>
> Old People did not have to go far to go fishing. The tide will go right out, you'll see people walk out then.
>
> Our rights have passed down through the ages, way back to our ancestors. By Gangalidda law nobody can stop us hunting in our own sea.

The affidavit of [Person 20] also speaks to existence of these rights, stating that:

> I spent a lot of time at Dumaji with the old people there when I was growing up...They taught me about Gangalidda law and culture and about Gangalidda sea.
>
> They told me how to get water on the beach and get turtle eggs. They told me about story places and how to get rid of little devils by singing out in language.
>
> They taught me how to make fish spears. They taught me how to get bush tucker.

In her affidavit, [Person 33] states that:

> I learnt these things from my parents. I also learnt them from old people such as [Person 37-Deleted], [Person 38-Deleted] who was a Gangalidda woman from Moonlight Creek and [Person 39-Deleted]. They were the old ladies I used to sit around with and go hunting for bush tucker. They told me things in Gangalidda language. They used to take me into the bush around Doomadgee every second day. Most of the time we went looking for bush tucker. In those days we lived on bush tucker.

**Outcome:** established, prima facie.

*g. The right to light fires on the application area;*

Attachment F asserts that the Gangalidda and Garawa People 'continue to manage country through traditional burning practices'.

This is evidenced in the affidavit material, including in the affidavit of [Person 17], where he states that:

> We burn off a lot, after the first rains, not the winter rains. Unless you're a lawman you don't predict the weather, so you have to wait for that first wet season rain. We burn off all over our country, usually when we are travelling through it, on our way to places. When you burn country it brings the sweet young grass after the rain. That brings the game that we hunt.

While the factual basis material speaks primarily to the current exercise of this right, it is in my view implicit that this right is possessed under the traditional laws and customs of the native title claim group.

**Outcome:** established, prima facie.

*h. The right to conduct burials on the application area;*

There is no probative material within the claimant's factual basis that goes directly to supporting the existence of this right under the traditional laws and customs of the group. Nonetheless, given that I have accepted the claimant's right to occupy, use, traverse and live on the application area is possessed under the traditional laws and customs, in my view it follows that this right to conduct burials on the application area is also possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** established, prima facie.

*m. A right to receive a part of any living, mineral or other natural resources taken by others on or from the application area [definition of natural resources is contained at Attachment E and does not include minerals as defined in the Minerals Resources Act 1989 (Qld)];*

In *Ward HC* in the joint judgment, the Court stated that:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But ***without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put*** [emphasis added]. To use those expressions in such a case is apt to mislead—at [52].

In reference to the expression of non-exclusive rights, the High Court in *Ward HC* observed that it would be neither appropriate nor sufficient to convey the nature and extent of a right or interest in terms equivalent to an exclusive claim where 'those rights and interests that are found to exist do not amount to a right, as against the whole world'—at [51]. Whilst this observation was made in the context of a determination of native title, specifically the requirements of s. 225, I am of the view that this principle is applicable to the registration test and the rights and interests claimed. Where it is clearly not the intention of the applicant to claim the right or interest as an exclusive claim against the whole world, then it should not be expressed in those terms. That is because the expression of the right or interest explicitly contradicts the intended nature of the right or interest.

It is my view that the 'right to control access' is implicit within the expression of this claimed right. In essence, I understand this right, as expressed, to entail control over whom, and to what extent, others have access to the use (and enjoyment) of all the resources of the land and waters. It follows that the claimed right to 'receive a part of any living, mineral or other natural resources...' would necessarily entail controlling the terms upon which people may access and use the application area and its resources. This, in my view, creates a contradiction, given that this right is claimed as non-exclusive.

In *Yarmirr v The Northern Territory of Australia* [1998] FCA 77, Olney J observed that:

> In a practical sense, control over use of resources is exercised by controlling who goes into the claimed area. It must necessarily follow that the right of control over resources of the claimed area is co-extensive with the right to control access—at [117].

Further, in *Neowarra v Western Australia* [2003] FCA 1402, Sundberg J held that the right to control the use and enjoyment of others of resources of the claim area 'asserts an entitlement to control access to the land and the use to be made of the land' and was inconsistent with the pastoral leases that existed in the area of the claim. Of the argument put by the applicant that the decision of *Ward HC* was not applicable as it did not address the issue of resources, Sundberg J stated that '[w]hat was said in *Ward* in relation to control of access and use is applicable to the presently asserted right even though their Honours were not directing themselves to resources.'—at [479].

Given that this right, as expressed, would not be confined in its possession or exercise, I consider that the decision of *Ward HC* is applicable. In my view, to use the expression that the native title claimants have a right to 'receive a part of any living, mineral or other natural resources taken by others on or from the application area' [but without a right of possession as against the whole world] 'is apt to mislead'—*Ward HC* at [52].

**Outcome:** not established.

*q. The right to make decisions about the use and enjoyment of the land and waters and their natural resources and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred or arising under a law of the State of Queensland in relation to the use of the land and waters;*

The same contradiction noted above is true of the 'right to make decisions about the use and enjoyment of the land and waters and their natural resources and the subsistence and other traditional resources thereof, by people', albeit it contains the qualification that it is not applicable to 'those exercising a right conferred or arising under a law of the State of Queensland in relation to the use of the land and waters.' This qualification, however, does not prevent its expression having a broad, and perhaps unintended, application.

In *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward FC*), the Court in making a consent decision recognised 'a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs' as a non-exclusive right and held that it was not inconsistent with the existence of pastoral lease entitling the lessee to determine who has access to the area—at [27]. Also in *Jango v Northern Territory of Australia* [2006] FCA 318 (*Jango*), Sackville J considered that he was bound by the Full Court in *Ward FC* and held that a non-exclusive right 'to make decisions about the use or enjoyment of the Application Area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert bloc' could be recognised—at [571]. A number of consent determinations have also recognised a similarly expressed right[2].

In my view, the above authorities demonstrate that the nature and extent of the right to make decisions about the use and enjoyment of the area has, as a non-exclusive right, been limited or significantly qualified in its expression and meaning by reference to such decisions binding only those Aboriginal persons who will recognise such decisions or, more specifically, the native title holders.

In contrast, the claimed right to make decisions about the use or enjoyment of the area in this application is not limited or qualified in that way. As noted above, the High Court in *Ward HC*

[2] See for instance *Mundraby v Queensland* [2006] FCA 436 and *Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142.

observed that it would be neither appropriate nor sufficient to convey the nature and extent of a right or interest in terms equivalent to an exclusive claim where 'those rights and interests that are found to exist do not amount to a right, as against the whole world'—at [51]. Thus, while *Ward FC* and *Jango* make the distinction from the decision in *Ward HC*, that distinction does not apply in this instance as the circumstances are not analogous. There is a clear difference in how the right is expressed in this application as compared to *Ward FC* and *Jango*.

Again, I consider that the decision of *Ward HC* is applicable in regard to this claimed right. In my view, to use the expression that the native title claimants have a right 'to make decisions about the use and enjoyment of the land and waters and their natural resources and the subsistence and other traditional resources thereof, by people...' [but without a right of possession as against the whole world] 'is apt to mislead'—*Ward HC* at [52].

**Outcome:** not established.

*o. The right to protect the land and waters and the resources, including natural resources, of the land and waters by taking steps to prevent acts which are not carried out in exercise of statutory rights or any common law rights and which acts may cause damage, spoliation or destruction of the land and waters or the animals, plants or fish on or in the land and waters;*

*p. An interest in the management and/or use of the application area and the natural resources in the application area;*

*r. The right to protect the application area from physical damage;*

*s. The right to maintain, protect and preserve the physical state of sites and areas within the application area that are of significance to the native title holders;*

*t. The right to maintain, protect and preserve sites and areas within the application area that are of significance to the native title holders from inappropriate behaviour;*

*u. The right to maintain, protect and conserve the natural values and resources of the application area; in the alternative an interest in the maintenance, protection and preservation of the natural values and resources of the application area;*

*v. The right to protect and look after cultural artefacts from on and within the application area, including rock art;*

*w. The right to conduct and take part in ceremonial activities on the application area;*

*x. The right to maintain proper and appropriate custodianship of the application area and the special and sacred sites within and on it, including through ceremonies, to ensure the continued vitality of traditional law and culture;*

I consider that, prima facie, these claimed rights exist under the traditional laws and customs of the native title claim group. The claimant's factual basis material, demonstrates, prima facie, that members of the native title claim group and their predecessors have maintained a continuous connection with the land and waters in the application area and that via their traditional laws and customs they hold a responsibility for the maintenance, protection and preservation of the land and waters and its resources.

Attachment F of the application states that '[t]he Gangalidda and Garawa People continue to maintain knowledge of, and protect and manage, sites of significance in the land and waters the subject of this application.'

The affidavit material at Attachment F1 is revealing of the strong and continuous link that the native title claim group have, and that their predecessors had, with the application area and how that link is informed by the various responsibilities of members for the maintenance of the physical and spiritual attributes of the land and waters. For instance, in the affidavit of [Person 20] he states that '[w]hen a person owns country that country is his. He is responsible to it. Under Gangalidda ways he has a responsibility to look after and to ensure that it is good for his children and their children. That is what I was taught.' There are numerous and varied examples within the affidavit material of the responsibilities that members of the native title claim group possess in accordance with the traditional laws and customs of the Gangalidda and Garawa Peoples.

**Outcome:** established, prima facie.

# *Subsection 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.

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

This section imposes 'some measure of substantive (as distinct from procedural) quality control upon the application'. It requires that the evidentiary material be capable of satisfying the Registrar or delegate of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area—*Doepel* at [18]. Although, the focus must necessarily continue to be one that is confined, as:

> It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area—*Doepel* at [18].

I also hold the understanding that the term 'traditional,' as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89]. In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> [T]he connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be

> understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty—at [86].

In my reasons above I set out that the claimant's factual basis is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests. I also consider that the affidavits of current claimants provide numerous and varied examples of their own, and their predecessors', traditional physical connection with the application area. Specifically, the affidavit of [Person 20] is an example of the kind of material that goes to supporting this requirement, in which he states that:

> I come from Gunumulla through my grandmother and great grandfather. [Person 22] mother was from Yallagunjimurra in Garawa country.
>
> For as long as I can remember I have been taught about Gangalidda ways and how to survive in the bush. I have also been taught about traditional law. I learnt those things from my father and from my grandmother. I am still learning those things.
>
> I have been fishing right along Gangalidda coast from Massacre Inlet to Burketown. When I went over to the west I went with my father and [Person40-Deleted]. Over that side I have been fishing on the beach and out in the sea in a boat.

I am 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.

# *Subsection 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.
>
> Section 61A provides:
> (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.
> (2) If :
> (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;
> a claimant application must not be made that covers any of the area.
> (3) If:
> (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;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (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 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

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

### Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application does not offend the provisions of s. 61A(1).

The geospatial assessment states that no determinations as per the National Native Title Register fall within the external boundary of this application. I agree with this assessment.

### Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application does not offend the provisions of s. 61A(2).

Schedule B of the application lists a number of general exclusions to the application area. It is my view that these general exclusions cover any areas the subject of previous exclusive possession acts.

### Reasons for s. 61A(3)

Section 61A(3) provides that an 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 previous non-exclusive possession act was done, , unless the circumstances described in s. 61A(4) apply.

In my view, the application does not offend the provisions of s. 61A(3).

It is my view that the native title rights and interests claimed in relation to the application area at Attachment E are framed in such a way so as to not offend the provisions of s. 61A(3) .

# *Subsection 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.

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons below.

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

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

Schedule Q of the application contains the statement that '[t]he claimant group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown. The claimants assert that the Crown does not wholly own minerals, petroleum or gas in the area the subject of the application.'

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

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

Schedule P of the application contains the statement that '[t]he application does not include a claim by the native title claim group to exclusive possession of all or part of an off-shore place.'

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

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

Schedule B of the application excludes from the claim any land or waters where native title rights and interests have been extinguished. Each of the affidavits of the persons comprising the applicant contains the statement that they 'believe that the native title rights and interests claimed by the Gangalidda and Garawa native title claim group have not been extinguished in relation to any part of the area covered by the application.'

*[End of reasons]*