National Native Title Tribunal

Registration test decision

Application name	Combined Mandingalbay Yidinji Gunggandji
Name of applicant	Les Murgha, Charles Thomas Garling, Stewart Harris and Vincent Mundraby.
State/territory/region	Queensland
NNTT file no.	QC99/39
Federal Court of Australia file no.	QUD6016/2001
Date application made	25 September 1998 (pre-combined applications)
Date application last amended	20 October 2010

Name of delegate Cobey Taggart

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

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* (Cth).

Date of decision: 16 February 2011

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Cobey Taggart

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 2 August 2010 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 Native Title Registrar's (the Registrar) 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* (Cth) ('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 combined Mandingalbay Yidinji-Gunggandji claimant application (the application) has a long procedural history, which I outline below:

- By order dated 16 December 1999 the Court granted leave for the native title determination applications QUD6018/1998 – Descendants of G Christian – QC98/40 and QUD6104/1998 – Descendants of G Christian – QC98/41 to be combined to form the current application;
- On 4 September 2000 a delegate of the Registrar considered and accepted the combined application for registration under s. 190A of the Act (the application was then known as the Yarrabarra Gungandji native title claim group);
- On 9 February 2001 an amended application was filed in the Court, with leave to amend the application being subsequently granted on 27 April 2001. This amended application effected a substantial change to the native title claim group, such that it included a significant number of additional ancestors from whom the group was descended and became a claim for the Mandingalbay Yidinji-Gunggandji native title claim group. On this occasion also, the Federal Court allocated a new Federal Court reference number, Q6016 of 2001 and the application became known as Combined Mandingalbay Yidinji-Gunggandji;
- By leave granted 2 November 2001, the application was again amended in accordance with an amended application which had been filed on 25 October 2001. On 26 March 2003, the amended application was considered and not accepted for registration pursuant to s. 190A of the Act. Accordingly, the entry in the Register of Native Title Claims (Register) relating to the application was removed;
- On 16 December 2004, the applicant was replaced by order of the Court (Spender J) pursuant to s. 66B of the Act: *Combined Mandingalbay Yidinji-Gunggandji Claim v State of Queensland* [2004] FCA 1703. An appeal to the Full Court (North, Weinberg and Greenwood JJ) regarding the replacement of the applicant was subsequently dismissed and/or not allowed: *Noble v Mundraby, Murgha, Harris and Garling* [2005] FCAFC 212;
- On 21 April 2008 the registration test was applied to the claim made in the application in accordance with the requirements of item 90 of the *Native Title Amendment Act* 2007 (*Amendment Act*). Again, the application was not accepted for registration;
- On 21 April 2010 the applicant filed an amended application in the Court in accordance with leave granted on 2 March 2010. The Registrar of the Federal Court of Australia gave a copy of the application to the Registrar on 23 April 2010 pursuant to s. 64(4) of the Act. This triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act. On

3 September 2010 I considered, and did not accept, the application for registration. I did not accept the application for registration on that occasion as I was not satisfied it met the requirements of ss. 190B(5), (6) and (7) of the Act;

- On 20 October 2010 the applicant filed a further amended application in the Court, which was referred to the Registrar 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. Schedule S of the application identifies the recent amendments made to the application as being limited to changes made regarding the description of land and waters covered by the application and maps depicting that area. While it is not noted in the application, there has also been an amendment to the native title claim group description in that the name of the apical ancestor Nengo has been removed from the claim group description in the application.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. I am satisfied that s. 190A(1A) does not apply in this instance because no relevant order under s. 87A has been made by the Court. I am also satisfied that s. 190A(6A) does not apply in this instance because the application is not currently entered on the Register (see s.190A(6A)(b)).

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 s. 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. A summary of the result for each condition is provided at Attachment A.

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 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.

In making this decision I have had regard to the application and the other documents as filed by the applicant with the application. I have also had regard to document contained in the Tribunal's case management/delegates file QC99/39 (also known as 2010/00956). Where I have

had particular regard to information in documents within that file, I have identified them in this statement of reasons.

While I have identified below particular documents which I have considered or had regard to in making this decision, I note that I have considered or otherwise had available the decision not to accept the application for registration, made on 3 September 2010. I was the delegate who made that decision. Notwithstanding its recent amendment, a substantial part of the application remains unchanged.

Accordingly, given the relatively short timeframe between the 3 September 2010 registration decision, the fact that significant parts of the application remain unchanged and that I was the delegate in both instances, I have where appropriate, adopted similar reasons to those provided in my decision of 3 September 2010. Although the reasons are similar, I have considered the information within the application, and additional information provided directly to the Registrar (further detailed below) afresh and not merely relied on my earlier decision in reaching my conclusions in this instance.

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 ss. 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:

- The State of Queensland is entitled to procedural fairness: see *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 —at [21] to [38]. In this regard the Tribunal wrote to the Queensland government advising that the Registrar had received a copy of the amended application and was required to apply the registration test and further that the Registrar had received additional information from the applicant for consideration in the application of the registration test. The Queensland government was provided with an opportunity to make comment or submission before the registration test was applied to the amended application.

- By letter dated 28 October 2010, the Tribunal wrote to the applicant confirming that the Registrar had received a copy of the amended application pursuant to s. 64(4) of the Act. The letter advised that the registration test was to be applied to the amended application and it was anticipated that this would occur by 17 December 2010. The applicant was provided with an opportunity to make comment or submission before the registration test was applied and this information was to be provided to the Registrar by 25 November 2010.
- By email dated 24 November 2010, the applicant's legal representative sought to extend the date by which the applicant could provide further information to the Registrar. The applicant sought until 20 December to provide such information.
- By letter dated 26 November 2010, the Tribunal wrote to the applicant and advised that I had decided not to alter the provisional date for registration testing from 17 December 2010. In the event the applicant wished to provide further information, it was requested to do so by 16 December 2010. If that information were provided it would likely prove necessary to alter the provisional date by which the registration test would be applied.
- By email dated 14 December 2010, Martin Dore, the Principal Legal Officer for North Queensland Land Council (NQLC) provided four affidavits, on behalf of the applicant, for consideration in the registration test.
- By email also dated 14 December 2010, Mr Dore wrote to the Tribunal explaining that the solicitor on the record in this matter, Mr Kym Elston (who is an employed solicitor within NQLC), was expected to be absent for an extended period due to sudden illness. Mr Dore requested a further extension of time in which information could be provided for consideration in the registration test so that Mr Elston might be able to return and advise whether all information intended to be provided for my consideration had been provided.
- By email and letter dated 22 December 2010, the Tribunal wrote to the applicant advising that as a matter of procedural fairness the additional information provided by Mr Dore on 14 December 2010 (the four affidavits) was to be given to the State of Queensland with an opportunity to make comment or submission for my consideration. The letter advised that in these circumstances the provisional date by which the registration test was to be applied had been altered. As that altered date was later than that requested by Mr Dore when seeking an extension of time, I had formed the view that it was not necessary to consider that request.

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 procedural and 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 [35] to [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.

My consideration 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) is detailed below:

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).

As I have noted above, s. 190C(2) largely directs my consideration to procedural or administrative matters. For the purposes of s. 61(1) my task is limited, with some exception, to considering only whether the information is contained within the application and not whether that information is correct: *Doepel* —at [36] to [37]. That exception relates to instances where, on the face of the application, it is apparent that there are members of the native title claim group who are excluded from the native title claim group description: see *Doepel* — at [35].

Part A[2] of the application provides information which, in summary, states that the persons who jointly comprise the applicant were authorised to be the applicant for this application and to deal with matters arising in relation to it by the members of the Mandingalbay Yidinji-Gunggandji native title claim group at a meeting in October 2004. Reference is also made to judicial decisions which contain further information regarding the decision-making process used by the native title claim group.

Schedule A of the application provides a description of the Mandingalbay Yidinji-Gunggandji native title claim group (an extract of which can be seen in my reasons below at s. 190B(3)).

I am satisfied that the application contains the information required by s. 61(1). That is, who the native title claim group is and that the members of that group have authorised the making of the application. I am also of the view that there is no information *on the face of the application* which indicates that members of the native title claim group have been excluded from the native title claim group description.

As I have averred above, an amendment made to the application on 20 October 2010 was the removal of the named ancestor Nengo from Schedule A of the application. In my view this fact does not give rise to a relevant consideration for the purposes of s. 190C(2). My task is simply to consider the face of the application and whether it contains the information required. While there is a limited exception to this task, that limitation is confined to considering matters on the face of the application. The absence of a previously named ancestor would require consideration of matters beyond that scope. Accordingly I do not consider it in this instance.

For these reasons I am satisfied that this condition is met.

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).

The application identifies by name, the persons who jointly comprise the applicant on page 2 of the application. The address for service of these individuals is provided at Part B of the application.

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).

Schedule A of the application provides a description of the native title claim group (see my reasons regarding s. 190B(3) for an extract). As the application contains a description of the persons who comprise the native title claim group, I am satisfied that this requirement has been met.

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).

In considering whether an application satisfies the requirements of s. 62(1)(a), it will be sufficient where an applicant briefly addresses each requirement of that particular section. Further, I need only be satisfied that the required information is within the affidavit and not whether that information is correct: *Doepel* —at [87].

As is clear from the wording of s. 62(1)(a), it is also necessary for the affidavit to 'accompany' the application. The application includes affidavits executed by each of the individuals identified within the application as jointly comprising the applicant. Those affidavits were sworn on various occasions in October and December 2009 and appear to have been competently witnessed. As the affidavits were filed with the application, I am satisfied that they accompany it.

Save for personalised details, the affidavits are in identical form and state:

(a) I believe that the native title rights and interest claimed by the Mandingalbay Yidinji-Gungandji native title group have not been extinguished in relation to any part of the area covered by the application; and

(b) I believe that none of the area covered by the application is also covered by an approved determination of native title; and

(c) I believe that all of the statements made in the application are true; and

(d) I am a member of the Mandingalbay Yidinji-Gungandji native title claim group and, together with [each affidavit then names the remaining three individuals who, together with the deponent, jointly comprise the applicant] am authorised by all persons in the Mandingalbay Yidinji-Gungandji native title claim group to make the application and to deal with matters arising in relation to it; and

Paragraph (e) of each affidavit provides information to the effect that a meeting of the native title claim group was held on 6 October 2004 in Yarrabah, Queensland. It is stated in the affidavits that it was decided by the meeting attendees they would follow their traditional laws and customs in relation to the decision-making process for authorising the applicant to make the application and deal with matters in relation to it. This traditional decision-making process requires matters to be referred to elders of the native title claim group for decision and the members of the native title claim group then abiding by those decisions.

Based on the information above, I am satisfied that the affidavits contain the information required by s. 62(1)(a).

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 contains 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).

Attachment B and B1 of the application provide a written description of the area covered by the application and also areas within those boundaries which are not covered by the application.

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 contains a map of the external boundary of land and waters covered by the application.

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 to the application states:

> The Mandingalbay Yidinji-Gunggandji native title claim group has not carried out any searches to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

As I have noted above, I am considering whether the application satisfies the requirements of s. 190C(2) in its form prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (*Technical Amendment Act*) on 1 September 2007. Although, the *Technical Amendment Act* made changes to the wording of s. 62(2)(c) I am not considering the amended s. 62(2)(c).

In its form prior to the commencement of the *Technical Amendment Act*, s. 62(2)(c) appears to require an applicant to provide a significant level of information. A literal understanding of s. 62(2)(c) requires an applicant to provide the results of any search undertaken 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, whether it undertook or is aware of any such searches

In my view the pre-amended s. 62(2)(c) requires an applicant to provide details of relevant searches of which it is aware and has available to it, including those it has undertaken. While not strictly relevant, I note that in its current form s. 62(2)(c) requires details only of searches undertaken by or on behalf of a native title claim group.

The statement extracted above states that the native title claim group itself has not carried out any relevant searches. Having considered the entirety of the application there is nothing to indicate that the native title claim group otherwise has the results or details of non-native title rights and interests within the application area. I am satisfied that, in these circumstances, the information required by s. 62(2)(c) has been provided.

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 s. 62(2)(d).

Schedule E of the application contains a description of the native title rights and interests claimed within particular lands and waters (an extract of these rights and interests can be seen in my reasons for s. 190B(4)). I am satisfied that this description is not merely a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or have not been extinguished, at law.

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).

In *State of Queensland v Hutchison* [2001] FCA 416 (*Hutchison*) the Court (Kiefel J) observed that the requirement to provide a 'general description of the factual basis' would likely not be satisfied where the general description within the application merely repeated the particular wording of subparagraphs (i), (ii) and (iii) —at [17].

As I have previously explained, the task required by s. 190C(2) 'is confined to ensuring the application...contains what is required by ss. 61 and 62': *Doepel* —at [16]. It would appear therefore that where an applicant provides information which is something more than a mere restatement of the requirements of s. 62(2)(e) this will be sufficient.

Schedule F of the application provides a description of the factual basis on which it is asserted that the claimed native title rights and interests exist, having regard to the specific requirements of s. 62(2)(e)(i) to (iii). Schedule G and M provide further information in regards to some of these requirements.

In my view, the information provided in the application is quite general. However having regard to the procedural nature of 190C(2), which does not require me to consider the sufficiency of this information, I am satisfied that this requirement has been met. The information within the application does specifically refer to the Mandingalbay Yidinji-Gunggandji native title claim group and does not merely recite the particular statements at s. 62(2)(e).

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 describes the various activities which are currently carried out by members of the native title claim group in relation to the area claimed. Some information is also provided at Schedule M of the application.

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 provides information that explains the area covered by the application is not presently covered by any other native title determination application. That schedule further explains that historically there have been applications which covered some or all of the lands and waters covered by this application.

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).

Schedule I of the application states:

> The applicant is not aware of any notices under section 29 of the Act (or under a corresponding provision of a law of the State of Queensland) that have been given and that relate to the whole or a part of the area.

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).

Before I am required to consider whether there are members in common between this application and a previous application I must be satisfied that each of the conditions specified at ss. 190C(3)(a) to (c) arise in this application: *State of Western Australia v Strickland* (2000) 99 FCR 33*;* [2000] FCA 652 (*Strickland*) —at [9].

Prior to its amendment on 20 October 2010 the application did overlap the native title determination application QC01/19 – Combined Gunggandji – QUD6013/98 application (the combined Gunggandji application). As I explained in my reasons dated 3 September 2010 that overlap was unintended and arose as a result of an error in describing a particular coordinate point in the written description of the application area.

In considering whether the application area is also covered by any other native title application I have considered a geospatial report dated 9 November 2010 prepared by the Tribunal's Geospatial Service (the geospatial report). The geospatial report states that the application does not overlap any other application (registered or not) for a determination of native title. Further, Attachment B1 of the application states that the area covered by the combined Gunggandji application is excluded from this application. Having regard to this information I am satisfied that the application does not currently overlap any other application for a determination of native title.

While I am satisfied there is not a current overlapping application, the conditions of subparagraphs (a) to (c) are expressed in the past tense. It is not explicitly stated within s. 190C(3) that before the Registrar is required to consider whether the particular conditions of subparagraphs (a) to (c) arise, there must be an overlapping application at the time the Registrar considers the current application for registration. However, in my view, it is reasonable to consider that in the absence of an overlap it is not necessary to consider whether the conditions in

those subparagraphs arise. I am not aware of any judicial consideration of this particular issue and have considered the Explanatory Memorandum to the Native Title Amendment Bill 2007 (EM) which discusses what became s. 190C(3) as follows:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application or amended application is a member of the claim group for a registered claim which was made before the claim under consideration, *which is overlapped by the claim under consideration* [emphasis added] and which itself has passed the registration test ***[subsection 190C(3)]*** [original emphasis]
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and *encourages consolidation of such multiple claims into one application* [emphasis added]— Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth).

The EM speaks in the present tense, i.e. 'a registered claim which was made before the claim under consideration, *which is overlapped by the claim under consideration*'. In my view, this supports my understanding that s. 190C(3) is primarily concerned with whether there is an overlap between a current application and a 'previous application' at the time the registration test is applied to the current application. It would seem that it is not concerned with whether there was historically an overlap involving the current application. In this regard it appears that the intention behind s. 190C(3) is to prevent instances where there were two or more native title applications which were made by the same (or similar) native title claim group over common areas being entered on the Register at the same time.

As there is no longer an application which covers wholly, or in part, the area covered by this application it is my view that I do not need to consider the issue of common members with applications that clearly no longer overlap the current application.

For these reasons, I am satisfied that s. 190C(3) is met.

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.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

Attachment R to the application contains a certificate dated 5 June 2007 issued by North Queensland Land Council Native Title Representative Body Aboriginal Corporation (NQLC).

As is clear by the wording of s. 190C(4)(a), an application must be certified by each Aboriginal/Torres Strait representative body (representative body) that could certify the application. A representative body can certify an application for a determination of native title where that application relates to areas of land or waters wholly or partly within the area for which the body is a representative body: s. 203BE(1)(a). For the following reasons, I am satisfied that the application has been certified by all representative bodies that could so certify.

Schedule K of the application states that NQLC is the representative body for the area covered by the application. I have also had regard to the geospatial report which also identifies NQLC as the only representative body whose area is covered by the application.

The certificate, provided at Attachment R of the application states:

> NQLC, as the representative Aboriginal/Torres Strait Islander body recognised under Section 203AD of the *Native Title Act 1993* ("Act") for the Cairns region hereby certifies...

As I am satisfied that all representative bodies who could certify the application have done so, I need only consider whether the requirements of Part 11, specifically s. 203BE, are satisfied within the certificate and not matters relating to the basis on which the certification was provided, including the sufficiency or legitimacy of the reasons why NQLC holds the opinions it does: *Doepel* —at [80] to [82]; *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA *(Wakaman*) —at [32].

I am required to consider whether the certification contains the necessary information and opinions as required by s. 203BE(4), which provides:

> A certification of an application for a determination of native title by a representative body must:
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
> (b) briefly set out the body's reasons for being of that opinion; and
> (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The requirements of ss. 203BE(2)(a) and (b) are:

> A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:
> (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
> (b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group

Satisfaction of s. 203BE(4)(a)

The certificate contains a statement that NQLC 'is of the opinion that the requirements of paragraphs 203BE(2)(a) and (b) of the Act have been met'. The certificate then sets out these opinions in the same form as they appear at s. 203BE(2).

Satisfaction of s. 203BE(4)(b)

As I have noted above, my task at s. 190C(4)(a) is limited to being satisfied that a certificate contains the information required. It does not require me to consider whether that information is sufficient to support the opinions of a representative body or indeed whether the information is correct.

The certificate provides NQLC's reasons for being of the opinions set out at s. 203BE(2). Broadly these reasons relate to the engagement of anthropological consultants who have undertaken 'extensive research in the region, including in relation to the land and waters covered by the application'.

The certificate also explains that the description of the native title claim group has been the subject of consideration by members of the native title claim group with instructions provided to the claim group's legal representative. The certificate also refers to an expert anthropological report which concludes that the claim group as presently described in the application is properly constituted.

As to the authorisation of the applicant, NQLC provides reasons relating to the traditional decision-making process by which decisions regarding authorisation were made by senior elders of the native title claim group. Brief details of this process are provided in the certificate. The reasons also outline steps taken to notify and advertise members of the native title claim group of the authorisation of the application.

As NQLC has briefly provided the reasons as to why it holds the opinions set out at s. 203BE(2), I am satisfied that s. 203BE(4)(b) is satisfied.

Satisfaction of s. 203BE(4)(c)

The certificate states that the area covered by the Mandingalbay Yidinji-Gunggandji native title application is not also covered, in whole or part, by any other application. The certificate also states that NQLC does not intend to lodge any other claim which would overlap the application and is further unaware of any intention by another to do so.

Having regard to this information, I am satisfied that the requirement of s. 203BE(4)(c) is met.

As the certificate is in writing, has been made by all representative bodies who could make it and satisfies the requirements of s. 203BE(4), I am satisfied that the requirements of s. 190C(4)(a) have been met.

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).

Identification of the external boundaries of the area claimed by the application

Attachment B of the application states 'the external boundaries of the area covered by the application are those areas of land and waters more particularly described in Attachment B1'. At Attachment B1, the application area is described by metes and bounds referencing specific land parcels, geographic coordinates, topographic features and the High Water Mark.

Attachment C of the application contains a coloured map which was prepared by the Tribunal's Geospatial Services on 12 May 2010 and is titled 'Native Title Determination Application – Amended QUD 6016/01 (QC99/39) Combined Mandingalbay Yidinji-Gunggandji'. The map contains the following features:

- the external boundary of the application area depicted by a dark solid outline;
- labelled islands;
- tenure information for various parcels of land;
- topographic features shown and labelled;
- scalebar, northpoint, coordinate grid and legend;
- notes relating to the source, currency and datum of data used to prepare the map.

Identification of areas within the external boundary which are not covered by the application

Attachment B lists general classes of activities and non-native title rights and interests. Where any land or waters within the external boundary of the application are burdened by these rights or interests, those land and waters are not covered by the application.

I note the decision of *Daniel for the Ngaluma People and Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*) which considered whether a 'description of a class or formula character of an area of exclusion' could be a sufficient description for the purposes of s. 62(2)(e). In *Daniel* the Court found that a description in this manner could be satisfactory in circumstances where an applicant had no tenure information with which to provide a more fulsome description—at [32].

Schedule D states that no searches have been undertaken by the native title claim group. There is no information within the application, or otherwise available to me, which suggests that this is not the case.

I have had regard to the geospatial report dated 9 November 2010. This provides the opinion of Geospatial Services that the written description at Attachment B1 and the map are consistent and identify the application area with reasonable certainty.

Along with the geospatial report and Schedule D of the application, I have considered Attachment B, Attachment B1 and Schedule C, and have reached the view myself that the information provided is sufficient for it to be said with reasonable certainty whether 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).

Schedule A of the application contains the following description of the native title claim group:

> The individuals who comprise the Mandingalbay Yidinji-Gunggandji native title claim group, on whose behalf the application is made, are all the descendants (whether reckoned by birth or customary adoption) of the following people, or those persons who have been adopted in accordance with the traditional laws and customs of the Mandingalbay Yidinji-Gunggandji native title claim group by such descendants:
>
> Albert Underwood
> Billy Brown
> Billy Church/Goondor
> Kari, father of George Christian
> Kutubi/Bertie Harris
> Djarradjoen
> Jinny Katchewan of Cape Grafton
> Maggie 1
> Maggie 2
> Nora
> Mandi Tjapir
> Mary Ann
> Menmuny
> King John Barlow
> Merumanai
> Nego
> Nellie married to Loui,
> Mandekala and Njemnga/Njewnga of Cape Grafton
> Rosie of Buddabadoo
> Tonkobulo of Kings Beach
> Paddy of Jilji
> Billy of Buddabadoo
> Harry Myngha

Jabulum Mandingalpai (aka Jimmy)

Descent from the above identified ancestors of the Mandingalbay Yidinji-Gunggandji native title claim group can be traced either through patrifilial or matrifilial links.

Whether a particular person has been adopted in accordance with the traditional laws and customs of the Mandingalbay Yidinji-Gunggandji native title claim group is determined where members of the relevant kin network of a child recognise the child as being sufficiently in charge of the adoptive parent(s) or other kin, such that the term to "grow someone up" has become an appropriate description and is in use in the community regarding the relationship between those persons and the child.

As this claim group description does not name each member of the claim group, I must consider the requirements of s. 190B(3)(b).

In considering whether a claim group description is sufficiently clear for the purposes of s. 190B(3)(b) I do not consider the accuracy, or correctness, of the claim group description or whether 'there is a cogent explanation of the basis upon which [the members] qualify for such identification': *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala #2* [2007]) at [33]; *Doepel* —at [47]. Accordingly, the removal of the named ancestor Nengo from Schedule A is not a relevant consideration in this instance.

Rather, I need only consider whether the claim group description is sufficiently clear to allow for it to be ascertained whether any particular person is in that group, even if some factual enquiry would be required before it could be determined whether a particular person is such a member: *Western Australia v Native Title Registrar and Ors* [1999] 95 FCR 93 (*WA v NTR*) —at [67].

As is clear from the naive title claim group description there are broadly two methods of recruitment into the native title claim group:

(i) persons who, through birth, whether from a matrifilial or patrifilial basis, are descendants of the persons named in the claim group description (named ancestors);

(ii) persons who, through adoption, are descendants of the named ancestors.

I note that an explanation is provided at Schedule A as to the rules or principles by which a person is adopted in accordance with the traditional laws and customs of the Mandingalbay Yidinji-Gunggandji native title claim group. Broadly, those rules appear to provide that adoption is recognisable where a person's kin network accepts that the term '"to grow someone up"' is an appropriate description between an individual and their adoptive parent/s. I am satisfied that this explanation of the rules or principles is sufficiently clear so that it can be determined whether a particular person is in the claim group as a result of adoption.

I am also satisfied that the description is sufficiently clear so that it can be ascertained whether a particular person is a member of the native title claim group through birth. Where a person, either through their mother or father, is a descendant by birth of one of the named ancestors, they are a member of the native title claim group. I am satisfied that, whether or not factual enquiry would be required in certain instances, the description is sufficiently clear to enable it to be ascertained whether a person is or is not a member of the claim group.

For these reasons I am satisfied that the requirements of s. 190B(3) have been met.

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 considering whether the description of the claimed native title rights and interests is sufficient to allow the native title rights and interests to be readily identified I must be satisfied that they are understandable and have meaning: see *Doepel* —at [99].

Schedule E of the application contains a description of the native title rights and interests claimed, and states:

> The native title rights and interests claimed are the rights to possession, occupation, use and enjoyment of the claimed area to the exclusion of all others which are exercisable in accordance with the laws of the State of Queensland and the Commonwealth of Australia.
>
> Where any part of the claimed area has been the subject of a previous non-exclusive possession act (s.23F) the native title rights and interests claimed are not to the exclusion of all others, and include the following non-exclusive rights and interests:
>
> (i) to access and be physically present on the claimed area in accordance with traditional laws and customs;
>
> (ii) to camp on the claimed area in accordance with traditional laws and customs, not including the right to reside permanently or build permanent structures or fixtures;
>
> (iii) to hunt, fish and gather on the claimed area for the purpose of satisfying personal, domestic and non-commercial communal needs in accordance with the traditional laws and customs;
>
> (iv) to take, use and enjoy the natural resources of the claimed area for the purpose of satisfying personal, domestic and non-commercial communal needs in accordance with traditional laws and customs;
>
> (v) to maintain and protect from physical harm, by lawful means, places in the claimed area of importance to the native title holders in accordance with traditional laws and customs;
>
> (vi) to perform social, cultural, religious, spiritual or ceremonial activities in the claimed area and invite others to participate in those activities in accordance with traditional laws and customs;
>
> (vii) to pass on native title in relation to the claimed area in accordance with traditional laws and customs;
>
> (viii)to make decisions in accordance with traditional laws and customs concerning access to the claimed area and use and enjoyment of the claimed area by aboriginal people who are governed by the traditional laws of knowledge, and traditional customs observed by, the native title holders; and
>
> (ix) to determine membership and affiliation to the native title holders in accordance with traditional laws and customs.

I am satisfied that all of the above rights and interests are readily understandable and otherwise identifiable as native title rights and interests for the purposes of s. 190B(4) of the Act.

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 **does** satisfy 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.

The nature of this task was considered by Mansfield J in *Doepel* where his Honour found:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the "factual basis on which it is asserted" that the claimed native title rights and interests exist "is sufficient to support the assertion". That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts —at [17]; affirmed in *Gudjala #2 FC* —at [54] and [83].

The requirements of s. 190B(5) were considered further by the Full Court in *Gudjala #2 FC* where the Court found:

> [I]t is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar . . . and be something more than assertions at a high level of generality. . . [t]he applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim' —at [92].

The requirements of s. 190B(5) were also considered by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala #2* [2009]). In that instance his Honour cautioned that care must be taken not to treat information which was 'really only an alternative way of expressing the claim or some part thereof' as a description of the factual basis —at [29].

In considering whether I am satisfied the requirements of s. 190B(5) have been met I have had regard to information contained within the application and within the following affidavits:

- affidavit of Vincent Mark Hilton Mundraby, sworn on 4 November 2010;

- affidavit of [Deponent 1 – name removed], affirmed on 19 October 2010;
- affidavit of [Deponent 2 – name removed], sworn on 1 October 2010; and
- affidavit of [Deponent 3 – name removed], sworn 25 October 2010.

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

Reasons for s. 190B(5)(a)

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

The term 'association' is not defined in the Act. It is a term which is to be understood and informed having regard to the information provided within an application and what it asserts the nature of a claim group's association to be: *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) —at [26]. That is, association does not necessarily require physical presence of native title claim group members on the land and waters subject to the application, nor does it mandate information to support an assertion that there are spiritual associations with that area.

However, whatever the nature of a claim group's association with the land and waters subject to the application, the factual basis must be sufficient to support an assertion that the association is with the entire area subject to the application: *Martin* —at [26]. Further, the factual basis must also support the assertion that the whole native title claim group have an association with the land and waters subject to the application and that the predecessors of that group had an association with that area since the acquisition of sovereignty: *Gudjala #2* [2007]—at [52].

Nature of the native title claim group's association with the application area

Schedule F of the application states that the members of the native title claim group continue to have a close association, including a spiritual connection, with the claim area in accordance with their traditional laws and customs. Schedule F also provides examples of activities carried out by members of the native title claim group over the application area. Those examples include accessing and using the claim area for hunting, fishing, gathering natural resources and caring for country —Schedule F at (a), (c) and (d). Similar information is provided at Schedule G of the application.

In addition to this, the application also explains that the traditional laws and customs of the Mandingalbay Yidinji-Gunggandji native title claim group acknowledge that there may be certain individuals, families or sub-groups which will have sometimes stronger and sometimes lesser rights and responsibilities in relation to particular areas of land and water within the claim area. These matters are governed and informed by the traditional law and custom of the native title claim group —Schedule M.

Based on this information, I understand it is the applicant's assertion that the native title claim group have, and its predecessors had, a physical and spiritual association with the application area and also the particular association individuals or family groups may have can differ from area to area and person to person in accordance with the traditional law and custom of the native title claim group.

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

Schedule F of the application states that the native title claim group has ancestral connections to (or otherwise has as its predecessors), the community that was present on and connected to the land and waters of the claim area as at 26 January 1788 and at 1 January 1901 —at [1] and [2].

Schedule M of the application also states:

> Throughout the whole time for which written records exist in relation to such matters and throughout the whole of the time for which oral history accounts exist in relation to such matters, the members of the Mandingalbay Yidinji-Gunggandji native title claim group between them (and as their ancestors between them have done continuously in the past) use, occupy and enjoy the whole of the claim area, through the physical presence and residence of the vast majority of them on the claim area.

In addition to this, a number of the affidavits contain information about a time before European settlement where Gunggandji people came into conflict with the Mamu people. In his affidavit, [Deponent 1 – name removed] explains that he was taught by his elders that the Mamu people came into Gunggandji country and plundered and fought against the Gunggandji people. The Yidinji people were also under threat from the Mamu people and so the Gunggandji people invited the Yidinji people to join them and fight against the Mamu people. Later on the Gunggandji elders invited the Yidinji people to camp in the area commonly known as Buddabadoo —affidavit of [Deponent 1 – name removed] at [4].

In his affidavit provides a similar account to that provided by and also explains that the Yidinji people stayed in the area of Bubbabadoo, which was near the fighting ground (and is said by [Deponent 3] to be within the claim area) to prevent the re-entry of the Mamu people into Gunggandji country. During this time there was intermarriage between the Yidinji people and the Gunggandji people —affidavit of [Deponent 3 – name removed] at [5]. The area described as Buddabadoo/Bubbabadoo is also referred to in the affidavit of [Deponent 2 – name removed], who deposes that it is within the application area —at [8].

[Deponent 2 – name removed] also states:

[Paragraphs [6],[11] and [12] from the affidavit removed, where the deponent describes his family's connection to an area within the application area, particular rights he holds and the source of his entitlement to these rights.]

In his affidavit, [Deponent 3 – name removed] explains that he is a member of the native title claim group because he is a descendant of Kutubi/Bertie Harris who was [Deponent 3 – name removed] grandfather —at [4]. Kutubi/Bertie Harris is a named ancestor in Schedule A of the application, which schedule contains a description of the native title claim group. Mr Vincent Mark Hilton Mundraby also deposes that he is a member of the native title claim group as a Mandingalbay Yidinji man and that he is descended from the named ancestor Jabulam Mandinjalvay (aka Jimmy Jabulam) —at [4].

Association of the native title claim group with the application area

The affidavits contain information regarding the association of the deponents and their antecedents with the application area. Each of the deponents explains within their affidavit that they are either a Gunggandji person or a Mandingalbay-Yidinji person and the extent or location

of their country (Gunggandji and Mandingalbay-Yidinji respectively), which is said to include the application area:

- [Affidavit of {Deponent 3 – name removed}]: 'My country is from Palmer Point in the South up to False Cape in the North taking in this claim area' —at [7];
- [Affidavit of {Deponent 2 – name removed}]: [Information has been removed - the deponent describes the geographic extent of his country and the source of his entitlement to rights in this area. He also describes traditional names for 13 locations within the claim area];
- [Affidavit of {Deponent 1 – name removed}]: 'My country is from Palmer River southeast of Yarrabah to False Cape to the adjacent ranges known to me as Bulnar Ranges' —at [6];
- [Affidavit of Vincent Mark Hilton Mundraby]: 'My country as told to me by my ancestor's starts at the low tide mark on the northern side of the [Place 1 – name removed] following the coast around the point known as [Place 2 – name removed] with [Place 3 – name removed] in the background [Place 4 – name removed] along the beach coming upon [Place 5 – name removed] once you go past [Place 6 – name removed] past [Place 7 – name removed] through [Place 8 – name removed] you then get to [Place 9 – name removed] along to a cultural site called [Place 10 – name removed] over to a beach called [Place 11 – name removed], then passing [Place 12 – name removed], [Place 13 – name removed], [Place 14 – name removed] along the spur line to [Place 15 – name removed] following down a creek to [Palce 16 – name removed] following the coast in a southerly direction down the [Place 17 – name removed] till we reach a creek called [Place 18 – name removed] following this it then lows [sic] back on the Western side of [Place 19 – name removed] back to the [Place 1 – name removed]. Mandingalbay Yidinji have a number of traditional walking tracks throughout our country and we continue to use these tracks to access our country' —at [6].

As well as identifying the application area with reference to their country, the deponents also provide information about their particular association with the application area. For example, each of the deponents assert that they access the application area to hunt and fish and that in some instances, these activities were taught to the deponents by older members of their family when they (the deponent) were younger.

Finally, each of the deponents states that they access the application area in order to maintain and protect places of importance. As one example of this, I set out information provided in the affidavit of [Deponent 1 – name removed]:

> [18] I have a right to maintain and protect places of importance in the Claim Area. I have this right because my Elders and Uncle Stafford Murgha, Richard Murgha and six other Uncles who as a Gunggandji male had a right and obligation to maintain and protect our traditional country which is known to me as Binbi (mother).
>
> [19] I exercise these rights where-ever there are places of importance in the claim area including Dumbul, Buddabadoo, Jammalbara, Jalja, Gnyingknu, Gundjrra, Jilji, Lakbunji and all sites that are part of our sacred stories.

Information provided in Schedule G of the application contains information about activities which are carried out by members of the native title claim group in relation to the application area. That information explains that those activities include being present on, using and enjoying the claim area, residing within the claim area, hunting and fishing within that area and visiting, protecting and preserving sites and places of significance to the native title claim group.

Consideration

In my view the information provided in the affidavits is sufficient to support the assertion that the whole native title claim group has, and its predecessors had, an association with the application area.

In reaching this view I have had regard to the fact that information within the affidavits provides information about the presence of native title claim group's predecessors within the application area at a time before European contact and/or when sovereignty was acquired. That information is primarily provided in the recounting of the conflict between the Yidinji and Gunggandji people with the Mamu people. Additionally, the deponents also explain that their knowledge of Gunggandji and Mandingalbay-Yidinji matters was received from elders who resided within or otherwise accessed the application area and who also undertook obligations to maintain and protect areas within that country. Finally, each of the affidavits identifies which of the apical ancestors named in Schedule A of the application that the deponent is a descendant of. In many instances the affidavits do not state the relevance of this relationship, however I consider that when read with the application that relevance is apparent. It is that connection which determines the deponents' membership to the native title claim group. So much is said by [Deponent 3 – name removed] in relation to his membership to the native title claim group:

> I am a member of the native title claim group for [the application] because I am a descendant of Kutubi/Bertie Harris —at [4].

In relation to the native title claim group's association with the application area the information explains that the deponents and their antecedent family members have accessed and resided within the application area and that the deponents continue to hunt, fish and obtain natural resources from the application area.

Each affidavit provides a description of the deponent's country and the application area's location within it. In relation to those descriptions, which I have extracted above, I have not been able to identify a number of the locations referred to within the affidavits. However, I am satisfied that some of the areas deposed to by each deponent are within the application area. In some instances those areas appear to align closely with the external boundary of the areas covered by this application. In reaching this satisfaction I have used resources maintained by the Tribunal to identify the locality of these areas in relation to the application and have also had regard to the fact that a number of the deponents assert that the areas referred to do encompass some or all of the application area.

In relation to other members of the native title claim group, the application provides general information about activities carried out by members of the native title claim group which, in my view, is relevant to the association those persons are asserted to have with the claim area.

Having regard to this information I am satisfied that it is sufficient to support the assertion that the native title claim group have, and the predecessors had, an association with the application area.

Reasons for s. 190B(5)(b)

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

The term 'traditional' was considered by the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria and Ors* (2002) 214 CLR 422; [2002] HCA 58. In that instance the majority found that a law or custom would be 'traditional' where:

- the origin or the content of the law or custom concerned is found in the normative rules of the relevant society which existed before the assertion of sovereignty by the Crown—at [46];
- the law or custom has been passed from generation to generation of a society, usually by word of mouth or common practice —at [46];
- the normative system which existed before sovereignty has had a continuous existence and vitality since sovereignty —at [47]; and
- the acknowledgement and observance of the law or custom has continued substantially uninterrupted since sovereignty —at [87].

It is appropriate that I have regard to this understanding of the meaning of 'traditional' when considering whether there is a factual basis which is sufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group, which is the task required by s. 190B(5)(b): see *Gudjala #2* [2007]—at [25], [62], [63] and [82]; *Gudjala #2* [2009]—at [22][1].

Further, as the wording of s. 190B(5)(b) suggests, I must be satisfied that the factual basis is sufficient to support the assertion as it relates to the native title claim group as a whole. In this regard I note Dowsett J's observation or finding that 'it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)': *Gudjala #2* [2007] –at [39].

Assertion of a society existing at, or prior to, the acquisition of sovereignty

As the High Court identified in *Yorta Yorta*, a law or custom will be traditional where the normative system which existed before sovereignty has had a continuous existence and vitality since sovereignty —at [47]. In considering this aspect of 'traditional' for the purposes of the registration test, Dowsett J observed that a sufficient factual basis will, in part, require information which supports the assertion that laws and customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist: *Gudjala Gudjala #2* [2009]—at [22].

In *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya native title claim group and Anor* [2005] FCAFC 135 (*Alyawarr*) the Full Court (Wilcox, French and Weinberg JJ) considered what was meant by the term 'society':

> The concept of a "society" in existence since sovereignty as the repository of traditional laws and customs in existence since that time derives from the reasoning in *Yorta Yorta*. The relevant ordinary meaning of a society is "a body of people forming a community or living under the same government": *Shorter Oxford English Dictionary.* It does not require arcane construction. It is not a word which appears in the NT Act. . . — at [78].

[1] The Full Court in *Gudjala #2* [2008] did not criticise his Honour Dowsett J's understanding or construction of this requirement. In my view the reasoning expounded by his Honour in *Gudjala #2* [2009] does not meaningfully differ from that original decision.

Their Honours also examined the nature or organisational structure of various societies which had been recognised in other determinations of native title, of which I provide an overview:

- A society may be comprised of, or described by, members of a community identified as those persons who enjoy communal ownership of the native title rights and interests, which may be allocated to particular families or persons in specific areas —at [79];
- A society may be described as a cultural bloc which is comprised of members who are dispersed in groups over a large area —at [80];
- A composite community of estate holding groups may comprise a community which enjoys communal ownership of the native title rights and interests, where those rights and interests may be allocated internally between particular family or clan groups, or some other subset, of the community —at [81];
- A community of persons united by their acknowledgement and observance of traditional laws and customs from which their native title rights and interests are derived —at [84].

Having regard to the matters discussed in *Alyawarr*, it is my understanding that the question of a society's composition and existence is not necessarily to be narrowly construed or understood. In terms of the requirements of the registration test I therefore am of the view that I should not have a narrow or rigid understanding of what may constitute a society.

Schedule F of the application provides the following information:

> 1. The Mandingalbay Yidinji-Gunggandji native title claim group has ancestral connections to (or otherwise has as its predecessors) the community that was present on and connected to the land and waters of the claim area at the time that those places became part of the colony of New South Wales, ie on 26 January 1788.
>
> 2. The Mandingalbay Yidinji-Gunggandji native title claim group has ancestral connections to (or otherwise has as its predecessors) the community that was present on and connected to the land and waters of the claim area at the time that those places became part of the Commonwealth of Australia, on or after 1 January 1901.
>
> 3. The members of the Mandingalbay Yidinji-Gunggandji native title claim group acknowledge and observe traditional laws and customs.
>
> 4. Those laws and customs are based on the traditional laws and customs of the community that was present on and connected to the land and waters of the claim area prior to 26 January 1788.
>
>   Examples of facts giving rise to the assertion of native title include:
>
>   (a) . . .
>
>   (b) Members of the Mandingalbay Yidinji-Gunggandji native title claim group continue to pass on to their descendants' traditional laws and customs, stories and beliefs concerning their traditional country including the claim area[.]
>
>   (c) . . .
>
>   (d) . . .
>
>   (e) Members of the Mandingalbay Yidinji-Gunggandji native title claim group continue to exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forebears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring

> for country, controlling access to country, the holding of ceremonies on traditional country, the use and care for traditional country.

Information regarding the laws and customs said to be acknowledged and observed by members of the claim group is provided in the affidavits. In his affidavit [Deponent 3 - name removed], who is a Gunggandji man, explains:

> There was a larger tribe know [sic] as the Yidinji people who were camping in the vicinity of the Green Hill area and we sent a runner to them, asking them to join us in the fight against the Mamu. The fighting grounds were located in the claim area near Bubbabadoo. With Yidinji's peoples assistance we drove Mamu people back over the Russell River. The Yidinji people stayed in the area, to prevent the Mamu people from crossing over the river and coming back into our country. There was intermarriage between the Yidinji and the Gunggandji people.
>
> [Information removed – deponent describes the connection between groups through traditional ancestry stories]—at [5].

[Deponent 1 – name removed], who is a Gunggandji man, also provides some information about the interaction of, or relationship between, Gunggandji and Yidinji people:

> My Elders have passed to me significant stories one of which is well before any white man came to this area about our tribe were at war with fierce tribal people from the Mission Beach/Innisfail area known as Mamu. These people were head hunters and use [sic] to cross the Russell River and come into our country and plunder and fight against us and because they were a larger tribe known as the Yidinji's camping around the Green Hill area that was also under threat from these people we invited them to join us and fight against the Mamu people. The fighting grounds were located in the claim area. Later on the Elders of the Gunggandji tribe invited the Yidinji to camp in the area commonly known as Buddabadoo. The first Yidinji people to enter the area was the Fourmile's and they lived there until Yarrabah mission was established and they were then brought into the main settlement area. The invitation by Gunggandji People was to occupy and camp in the area and was not to give the rights to Yidinji People to take over and claim land —at [4].

In his affidavit, Vincent Mark Hilton Mundraby states that he is a Mandingalbay-Yidinji man and explains:

> I am a member of the native title claim group for the Combined Mandingalbay Yidinji-Gunggandji native title determination application QUD 6016 of 2001 ("the Application") because I am a member of the Mandingalbay Yidinji group through custom and religion of the Mandingalbay Yidinji People as passed down by blood descent within our Mandingalbay Yidinji Society —at [5].

In my view, it is not readily apparent what is being asserted in terms of the society or source of laws and customs which existed at sovereignty and which recognise that the claim group has a connection with the land and waters claimed by this application.

While I consider that it is not readily apparent, I have formed a broad understanding of the assertion made within the application. The assertion, as I understand it, is that while Gunggandji people and Mandingalbay-Yidinji people retain separate identities there is a commonality of custom and law between the two groups. I have formed this understanding for the following reasons.

Firstly, it would appear from the information provided in the application, which I have extracted above, that the application contemplates one system of law and custom which operates over, and binds, the native title claim group. In particular I note that information refers to a single system of law and custom in relation to the native title claim group. For example, paragraph (e) of Schedule F states that the members of the native title claim group 'continue to exercise a body of traditional laws and customs'.

Notwithstanding this, I note that each of the affidavits speaks exclusively of either Gunggandji law and custom or Mandingalbay Yidinji law and custom. That is, there is no explicit information within the affidavits which supports, or goes to, the assertion at Schedule F. Indeed, in his affidavit Mr Mundraby states that his membership to the native title claim group arises because of his membership to the Mandingalbay Yidinji group, as regulated through 'Mandingalbay Yidinji Society' —at [5]. However, as I have extracted above, there is information within the affidavits which explains that there are common stories and ancestors which connect the two groups and that there has historically been intermarriage between members of those groups. The relevance of that connection or history of intermarriage is not explained in either the affidavits or the application. However, given there are common stories, ancestors, intermarriage and a history of interaction between differently named groups it is not, in my view, unreasonable to understand that there are said to be common laws and/or customs which are acknowledged and observed by those two groups. I have formed such an understanding in this instance.

Accordingly, I understand the applicant's assertion to be that before the acquisition of sovereignty there was a society existing in the general locale of the application area which was comprised of Gunggandji and Mandingalbay-Yidinji/Yidinji people who shared common laws and customs. That is, the system of laws and customs that are said to recognise the native title claim group's connection with the land and waters in question is a single system which overarches both Mandingalbay-Yidinji people and Gunggandji people. To the extent that Mr Mundraby refers to a Mandingalbay-Yidinji society I consider that term is not intended to convey anything other than the group of persons known as Mandingalbay-Yidinji.

Additionally, while each of the affidavits refers either to Gunggandji or Mandingalbay-Yidinji law and custom exclusively and the deponents appear to primarily identify as a member of either of those groups, I understand that those groups are asserted to be ordered or bound by that overarching system of law and custom. Further, I am satisfied that the information provided is sufficient to support that assertion. In particular, the recounting of the interaction between Yidinji and Gunggandji peoples against the Mamu people suggests that prior to sovereignty/contact there were persons within the application area who were described as Yidinji and Gunggandji. That information also suggests that those persons interacted and also shared common stories, ancestors, and laws or customs, such as regarding entry to and residence on country by members of those particular groups.

While that information would not, in my view, be anywhere near sufficient to establish native title, the question I must consider is simply whether the information supports the assertion. As I have explained above, an 'applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim': *Gudjala #2 FC* —at [92]. To the extent the information above offers support to the assertion that there was at, and prior to, 1788 a society who acknowledged and observed laws and customs I accept that information is sufficient.

Traditional laws and customs regarding occupation and exploitation of the application area

Schedule F and Schedule M of the application states:

> Members of the Mandingalbay Yidinji-Gunggandji native title claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials —Schedule F (c);
>
> The Mandingalbay Yidinji-Gunggandji native title claim group's traditional laws and customs acknowledge that, within the group, there may be certain individuals, families or sub-groups which will have sometimes stronger and sometimes lesser rights and responsibilities in relation to particular areas of land and waters within the claim area and the nature and incidents of such differentiations will be determined in accordance with their traditional laws and customs —Schedule M.

Information provided in the affidavits is provided in support of this assertion. That information is in my view sufficient to support the assertion that the native title claim group acknowledge traditional laws regarding their right to occupy and exploit the natural resources within the application area.

Affidavit of [Deponent 1 – name removed}

> [8] My Uncle Stafford Murgha known as Dyringi the son of Ghinna Murgha who was a Gunggandji male elder taught me about traditional rights which are part of Gunggandji lore and custom. One of those rights through bloodline as a male I was taught that we carried the responsibility of caring for country and ensuring that traditionally a Gunggandji male person has certain rights by virtue of his belonging in the group and that includes a right to speak for country.
>
> [9] Under my traditional lore and custom I have a right to be present, occupy and traverse the Claim Area this right is given to me by our lores and customs and by being a blood descendant of Gunggandji ancestors and these rights were taught to me by my Elders.
>
> [12] Under our traditional lore and customs I continue to exercise and maintain my rights to hunt, fish and gather from the Claim Area.
>
> [13] I have these rights because they were traditionally handed down to me by my Elders. I have continued to respect and carry out our traditional ways of hunting, fishing and gathering.

Affidavit of [Deponent 2 - name removed]

> [Paragraphs [11], [12], [14], [15] and [18] from the affidavit removed, where the deponent describes:
>
> - Particular rights held in the claim area
> - The source of the entitlement to this rights
> - Customs observed by claim group members

Affidavit of [Deponent 3 – name removed]

> [9] My father and my uncle Hillary, both of whom were Gunggandji men taught me about our lore and custom and our traditional ways. I was taught that as a Gunggandji man we carried the responsibility of caring and protecting our country.

[10] Under our traditional lore and custom I have a right to be present, occupy and traverse the claim area, this right is handed down to me as a blood descendant of the Gunggandji ancestors, elders and in particular my father and uncle Hillary.

[12] When present in the claim area we had a right to camp, hunt and fish as a traditional owner of that area. We continue to do this today and we will continue to do this into the future as part of our acknowledgement and respect for traditional law and custom.

[13] Under Gunggandji lore and custom I continue to maintain my right to hunt, fish and gather in the claim area. This was a right that was handed down to me by my elders as a Gunggandji man.

[14] I was taught by my elders that upon entering country, you would call out to the ancestors to let them know that you are there.

[19] I, together with the Gungganjji [sic] people continue to observe and acknowledge our lores and customs and will continue to do so into the future as part of our respect for our ancestral spirits.

Affidavit of Vincent Mark Hilton Mundraby

[13] I have a right to hunt, gather and take natural resources for the purpose of food, ceremonial purposes and spiritual needs from the Claim area.

[14] I have this right because of the need to sustain my relationship with my country in accordance with our lores and customs handed down over time by our ancestors.

[18] Our traditional lore and custom provide for our rights to use the natural resources in the Claim area for spiritual and cultural purposes.

[22] I have a right to hunt in the Claim area as this right was handed down to me over time by my Ancestors in particular my father and his brothers. My father, brothers and cousins taught me the traditional way to hunt, fish and gather. Our traditional lore and custom is to call out to ancestoral [sic] spirits to seek permission and their support for a successful hunt. We could also only take what natural resources that we needed and then we heard the call of [name removed], we would have to leave the hunting area and return to the camp within the Claim area. If we were late in leaving, we would be warned by our ancesteral [sic] spirits by movement in the water [name removed] and we would hear them calling out to us to leave the hunting location. Another lore and custom was to cook the hunted game or fish before sunset and leave the bone in a bundle on the edge of the camp and not throw it in the fire or dispose of it any other way.

The information set out above explains how under their law and custom Mandingalbay Yidinji and Gunggandji people are entitled to occupy their country and exploit its resources. I note that this country is said to include the whole or part of the application area, for both Mandingalbay-Yidinji and Gunggandji people.[2] It also explains that there are further laws and customs which regulate the behaviour of claim group members when occupying the area or exploiting its resources. Both Gunggandji and Mandingalbay-Yidinji deponents assert they were taught, and acknowledge and observe, laws and customs regarding acknowledging ancestors and obtaining their assistance when hunting/fishing and also ensuring that resources are obtained at appropriate times so as not to offend or disturb those ancestors.

[2] I have previously, within my reasons regarding s. 190B(5)(a), set out information provided in the affidavits about the general area of Gunggandji and Mandingalbay country.

In addition, the information about the period of conflict with the Mamu people also suggests that occupation and residence was regulated by law and custom. In particular the information which I have previously set out regarding this matter speaks of the Yidinji people being invited into Gunggandji country and being given certain rights to camp or reside but not own that area. In my view this does suggest that there were laws and customs acknowledged and observed that clans/groups or members of the claim group had particular areas in which they could occupy or reside.

[Information removed – the contents of an affidavit provided by a member of the claim group is described. The deponent's information relates to the source of their knowledge of traditional laws and customs by reference to ancestral links. Paragraphs [6], [11] and [15] of the affidavit are referred to.

Finally, some information is also provided about the transmission and continued acknowledgement and observance of these laws and customs by younger members of the native title claim group: affidavit of [Deponent 3 – name removed] —at [12]; affidavit of [Deponent 1 – name removed] —at [20].

Having regard to this information, which describes how similar laws and customs have been acknowledged and observed by members of the claim group from a number of generational levels, I am satisfied the factual basis is sufficient to support the assertion in regards to these laws and customs.

Traditional laws and customs regarding protection of country

Schedule F of the application states:

> (d) Members of the Mandingalbay Yidinji-Gunggandji native title claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors.

Information provided in the affidavits is provided in support of this assertion. That information is in my view sufficient to support the assertion that the native title claim group acknowledge traditional laws regarding their obligation to care for and protect the application area.

Affidavit of [Deponent 1 – name removed]

> [5] Under traditional lore and custom only Gunggandji bama (man) speaks for country.
>
> [18] I have a right to maintain and protect places of importance in the Claim Area. I have this right because my Elders and Uncle Stafford Murgha, Richard Murgha and six other Uncles who as a Gunggandji male had a right and obligation to maintain and protect our traditional country which is known to me as Binbi (mother).
>
> [19] I exercise these rights where-ever there are places of importance in the claim area [specific places are then identified].
>
> [20] In accordance with traditional lore and custom I would protect and maintain these important places and sites by ensuring that we carry out our traditional ways of caring for country recognising the changing seasons, the impact of future progress making sure that people use the area and know of the significance of where they are on country. . . [t]his was also done by teaching our young men and the meaning of acknowledging our traditional customs and lore.

Affidavit of Vincent Mark Hilton Mundraby

[19] I have a right to maintain places of importance in the Claim area;

- I have this right because it has been passed down to me over time by my ancestor's [sic]. My father and his brothers passed down to me the lores and customs in relation to maintenance of places of importance and where those places of importance were located in the Claim area [some examples are then given]. A lot of these places are in or adjacent to the fighting ground within the Claim area. I exercise this right by the use of fire to maintain the rainforest growth in and around the places of importance.

[20] I have a right to protect places of importance in the Claim area, I exercise this right by the use of traditional fighting tools to prevent Aboriginal and non Aboriginal persons from damaging our places of importance.

Affidavit of [Deponent 2 - name removed]

[Paragraphs [19], [20], and [21] from the affidavit removed, where the deponent describes:

- A particular right held in the application area
- The source of the entitlement to this right
- The exercise of this right.

Affidavit of [Deponent 3 – name removed]

[6] Under my traditional lore and custom, only Gunggandji man (elders) can speak for our country.

[9] My father and my uncle Hillary, both of whom were Gunggandji men taught me about our lore and custom and our traditional ways. I was taught that as a Gunggandji man we carried the responsibility of caring and protecting our country.

[15] I have a right to maintain places of importance in the Claim areas as a Gunggandji man, as this right was handed down to me by my ancestors. I maintain the places of importance by regularly visiting the area and often we maintain the tracks by planting further fruit trees to identify our tracks. Whenever we go into the area we will always sing out to our ancestors, to let them know that we are going through our country and we will be maintaining our places of importance.

[19] I, together with the Gungganjji [sic] people continue to observe and acknowledge our lores and customs and will continue to do so into the future as part of our respect for our ancestral spirits.

Insofar as I have previously outlined information regarding the various generational levels and ages of members of the native title claim group who provided the deponent with their knowledge of law and custom, I rely on that information here also.

The above information discloses that under their traditional law and custom, members of the native title claim group are required to protect and care for their country. That information is also directed to the acknowledgement and observance of those laws and customs over an extended period of time. Some information is also provided about the deponents passing on some of this knowledge to younger members of the native title claim group.

In my view the information above is sufficient to support the assertion that the native title claim group acknowledge and observe traditional laws and customs surrounding the obligation to protect and care for country, including the application area.

Reasons for s. 190B(5)(c)

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

Section 190B(5)(c) requires a factual basis to support the assertion that the native title claim group have continued to hold native title in accordance with traditional laws and customs.

The information summarised above in my reasons regarding ss. 190B(5)(a) and (b) supports the assertion that the native title claim group continue to hold native title in accordance with their traditional laws and customs.

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). I am of the view that all of the claimed native title rights and interests can be established, prima facie, for the reasons that now follow.

My task at s. 190B(6) is to consider whether at least some of the rights and interests claimed can be established, prima facie. A claim should be accepted on a prima facie basis if 'on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law': *Doepel* —at [135].

I note that 'native title rights and interests' is defined at s. 223(1) of the Act. In considering whether a particular right or interest is established prima facie, it is my view that I must be satisfied that the application establishes prima facie that:

1. *The right or interest exists under traditional law and custom in relation to any of the land or waters under claim;*

As defined under s. 223(1)(a), a native title right or interest must be possessed under the traditional laws acknowledged and traditional customs observed by the claim group. As I have discussed in my reasons at s. 190B(5), *Yorta Yorta* offers authority on what is meant by 'traditional law and custom'. I rely on that summary here.

While I am not required to be satisfied that the claimed native title right or interest can be made out at trial, I must be satisfied that there is some evidentiary material which establishes prima facie that the claimed right or interest exists under traditional law or custom: see *Gudjala #2* [2007] —at [86]; *Doepel*—at [126].

2. *The right or interest is in relation to land or waters; and*

Section 223(1) requires a native title right or interest to be in relation to land or waters. In my view, where a claimed right or interest is not one which is prima facie in relation to land or waters it could not be considered established prima facie as a native title right or interest.

In considering each of the claimed native title rights and interests, I am satisfied that prima facie they are each in relation to land or waters. Having regard to the particular rights and interests claimed, I consider that my reasons for holding this view are reasonably understandable and do not require further explanation.

3. The right or interest has not been extinguished over the whole of the application area.

In my view the requirement that a native title right or interest be recognised by the common law of Australia (s. 223(1)(c)) requires me to have regard to settled law regarding extinguishment of native title rights and interests when considering whether a particular right or interest is established prima facie by an application.

For example, if there is evidence that the application is or was entirely covered by a non-exclusive pastoral lease, I could not (unless ss. 47, 47A or 47B applies) consider exclusive rights or interests to be established prima facie, having regard to settled law regarding the extinguishing effect of non-exclusive pastoral leases on exclusive native title, including *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*).

I now consider whether each of the claimed native title rights and interests are established prima facie. Where it is reasonable to do, on the basis of similarity, I will provide my reasons for separate rights and interests together.

> *The native title rights and interests claimed are the rights to possession, occupation, use and enjoyment of the claimed area to the exclusion of all others which are exercisable in accordance with the laws of the State of Queensland and the Commonwealth of Australia.*

Result

This is established, prima facie.

Reason

The nature of exclusive possession was considered by the Full Court of the Federal Court in *Griffiths v Northern Territory of Australia* (2007) (2007) 243 ALR 72; [2007] FCAFC 178 (*Griffiths*). In that case, the Court found a claim to exclusive possession, use or occupation did not require demonstration that a native title claim group could exclude people from their country in a manner analogous to a proprietary right of exclusion:

> The relationship to country is essentially a "spiritual affair" … The question of exclusivity depends upon the ability of [a native title claim group] to effectively exclude from their country people not of their origin—at [127].

Such effective exclusion is determinable by reference to the content of traditional law and custom. On the specific facts of *Griffiths*, the Court found that the traditional laws and customs of the native title holders included spiritual sanction being visited upon unauthorised entrants to country. The Court further found that through the relevant law and custom, the native title holders were the 'gatekeepers' for the purposes of preventing such harm and avoiding injury to country. On this basis the Court found that exclusive possession was held by the native title holders: see *Griffiths*—at [127].

As I have outlined in my reasons regarding s. 190B(5)(b), I am satisfied that the factual basis is sufficient to support the assertion that under their traditional law and custom the native title claim group have the right to occupy their country but such a right is subject to countervailing obligations to protect that country. While the information I have outlined at s. 190B(5)(b) does not, in my view, address the question of whether such occupation is exclusive, there is information within the affidavits in this regard.

The affidavits provide the following information in support of the claim that the native title claim group has exclusive possession within the land and waters covered by this application, where such a claim can be recognised:

Affidavit of [Deponent 3 - name removed]

> [Paragraph [17] of the affidavit removed. Deponent describes the practice of rights and the observance of laws and customs.

Affidavit of [Deponent 1 – name removed]

> [13] . . . Under our traditional lore it is important that the correct preparation be carried out by the tribe. Special ceremonies are held, special tools are made and it is normally a time when traditional dancing is performed to allow us to be successful and to be protected from danger eg; crocodiles, snakes and other bad spirits.

Affidavit of [*Deponent 2 – name removed*]

> [Paragraph [18] of the affidavit removed. Deponent describes the practice of rights and the observance of laws and customs

Based on this information I am satisfied that the claim to exclusive possession is established prima facie. The affidavits explain that there are spirits and areas within the native title claim group's country that can cause harm or difficulty to people when certain laws and customs are not acknowledged or observed. That information suggests that such harm or difficulty can only be avoided by complying with the particular requirements of law. In this way, having regard to *Griffiths*, I am satisfied that the affidavits demonstrate that the native title claim group can effectively exclude people from their country and therefore that the claimed right of exclusive possession is established prima facie.

> *Where any part of the claimed area has been the subject of a previous non-exclusive possession act (s.23F) the native title rights and interests claimed are not to the exclusion of all others, and include the following non-exclusive rights and interests:*
>
> *i. to access and be physically present on the claimed area in accordance with traditional laws and customs;*
>
> *ii. to camp on the claimed area in accordance with traditional laws and customs, not including the right to reside permanently or build permanent structures or fixtures;*

Result

These are established, prima facie.

Reason

Within my reasons regarding s. 190B(5)(b), I have explained that I am satisfied information provided by the applicant is sufficient to support the assertion that the traditional law and

custom of the native title claim group recognises that members of that group have a right to occupy and exploit resources within their country, which includes the application area. I have also explained that I am satisfied those laws and customs are acknowledged and observed by the native title claim group. Having regard to the information I have set out at s. 190B(5)(b), I am satisfied that the above rights and interests are established prima facie.

iii. to hunt, fish and gather on the claimed area for the purpose of satisfying personal, domestic and non-commercial communal needs in accordance with the traditional laws and customs;

iv. to take, use and enjoy the natural resources of the claimed area for the purpose of satisfying personal, domestic and non-commercial communal needs in accordance with traditional laws and customs;

Result

These are established, prima facie.

Reason

I have explained in my reasons regarding s. 190B(5)(b) that I am satisfied the factual basis is sufficient to establish that under their traditional law and custom, the native title claim group is entitled to exploit natural resources found within their country, subject to any laws and customs directing how or when exploitation must occur. I rely on those reasons and explanation here as to why I am satisfied that these claimed rights and interests are established prima facie.

v. to maintain and protect from physical harm, by lawful means, places in the claimed area of importance to the native title holders in accordance with traditional laws and customs;

Result

This is established, prima facie.

Reason

Again, I consider that my reasons set out above in relation to s. 190B(5) are also relevant to this claimed right or interest. That information explains that while the native title claim group's traditional law and custom vests rights of occupation and exploitation, it also imposes a responsibility on members of the claim group to care for and protect their country.

I have also extracted information deposed in the affidavits that members of the claim group continue to protect and maintain places of significance or importance within the claim area and further that those members received that knowledge from older members of the native title claim group. I rely on those reasons and explanation here as to why I am satisfied that this claimed right or interest is established prima facie.

vi. *to perform social, cultural, religious, spiritual or ceremonial activities in the claimed area and invite others to participate in those activities in accordance with traditional laws and customs;*

viii. *to make decisions in accordance with traditional laws and customs concerning access to the claimed area and use and enjoyment of the claimed area by aboriginal people who are governed by the traditional laws of knowledge, and traditional customs observed by, the native title holders; and*

Result

These are established, prima facie.

Reason

As I have outlined in my reasons regarding s. 190B(5)(b), I am satisfied that the factual basis is sufficient to support the assertion that under their traditional law and custom the native title claim group have the right to occupy their country. I have also explained within my reasons regarding s. 190B(5)(a) that I am satisfied the factual basis is sufficient to support the assertion that the native title claim group have an association with the application area which is of a physical and spiritual nature. In my view it is implicit that where traditional law and custom enables occupation of an area it also contemplates that activities will occur within that area.

I have also previously explained that some information provided in the affidavits suggests that members of the native title claim group with particular rights or affiliations with tracts of country can invite other people into that area and permit them to reside or occupy that area. Principally this information is directed towards the invitation of Yidinji people into Gunggandji country during, and after, the conflict with Mamu people.

Information provided in the affidavits further addresses the specific right as claimed:

> . . . The tools were often painted with red ochre and dye made from bush trees. These tools became part of a cluster that was used for ceremonies only and were not allowed to be traded and had to be kept until the next traditional ceremonies came around once a year, this was a period of great joy and happiness in the tribe because often a time when young men were made warriors by initiation. A time when young women were allowed to gather food and a time for tribal marriages. The ceremony was usually carried out during the Gunggaar (north windy season) which was hot and dry: affidavit of [Deponent 1 – name removed] —at [21]

In his affidavit, [Deponent 2 – name removed] also explains that natural resources are taken from the application area to manufacture items for use in ceremonies and dances —at [15] and [18].

I note that the information I have referred to above does not address if and how this claimed right is exercised today. In my view, this is not something I must necessarily consider before I can be satisfied that this right or interest is established prima facie. The non-*exercise* of a native title right or interest for a period of time does not necessarily lead to a conclusion that that right or interest is no longer *possessed* under a claim group's traditional law or custom—see *Yorta Yorta* at [84]. Accordingly, while it would appear there has been a long period of non-exercise of these claimed rights or interests it does not lead to a conclusion that they are no longer possessed by the native title claim group. In my view, it is arguable that these rights and interests are possessed by the claim group. For these reasons I am satisfied they are established prima facie.

vii. *to pass on native title in relation to the claimed area in accordance with traditional laws and customs;*

ix. to determine membership and affiliation to the native title holders in accordance with traditional laws and customs.

Result

These are established, prima facie.

Reason

Information provided in the application and affidavits states that membership to the native title claim group is based upon descent from earlier members of the native title claim group. I have previously outlined information provided in the affidavits where the deponents explain that their identity and membership to the native title claim group, and more specifically Gunggandji or Mandingalbay-Yidinji, arises from being descendant from named individuals and ultimately from one of the ancestors named in Schedule A of the application.

Information provided in the affidavits explains that particular members of the native title claim group have certain rights and interests because they are members of the native title claim group. To the extent that native title rights and interests are obtained through descent from an earlier member of the native title claim group I am satisfied that it is established prima facie, the native title claim group possesses the right to pass on native title in accordance with traditional laws and customs.

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).

In *Doepel* Mansfield J explained the requirement of s. 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar . . . [t]he focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration —at [18].

While it is not defined in the Act, the term 'traditional physical connection' was considered by Dowsett J in both *Gudjala #2 [2007]* and *Gudjala #2 [2009]*. In each instance his Honour considered that this term should be understood as requiring a physical connection to any part of the land and

waters subject to the claim 'in exercise of a right or interest in land or waters held pursuant to traditional laws and customs': *Gudjala #2 [2009]* —at [84]; *Gudjala #2 [2007]*—at [89].

The information within the affidavits provides evidence of one or more members of the claim group having, both currently and previously, a traditional physical connection with the claim area. Numerous examples are provided regarding instances of members of the claim group accessing the claim area for camping and hunting and attending to sites of significance. In my reasons regarding s. 190B(5) and s. 190B(6), I have provided specific examples of this information and do not restate that information here.

Each of these activities is said to be carried out in accordance with the traditional law and custom and in exercise of native title rights and interests possessed by the native title claim group. I have variously outlined and discussed these activities, such as accessing the application area to hunt, fish, camp, reside in, or visit particular sites, within my reasons set out under ss. 190B(5) and (6) above. As these activities are physical actions taken on the land or waters covered by the application in accordance with traditional law and custom I am satisfied that this requirement has been met.

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).

I have had regard to the geospatial report which, inter alia, confirms that the application is not made in relation to an area for which there is an approved determination of native title. I accept this information and on this basis am satisfied that the application does not offend the provisions of s. 61A(1).

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).

Attachment B of the application defines the lands and waters which are covered by the application (which are then particularised at Attachment B1). Attachment B also describes the lands and waters within the application area which are not claimed (the excluded areas). At [2] of attachment B, the excluded areas are defined as including lands and waters presently or previously covered by a series of interests or rights. These rights and interests reflect s. 23B(a) to (h) of the Act, which section defines a Previous Exclusive Possession Act.

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).

Schedule E of the application states:

> Where any part of the claimed area has been the subject of a previous non-exclusive possession act (s. 23F) the native title rights and interests claimed are not to the exclusion of all others...

On this basis I am satisfied that the application does 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 sub-conditions, as set out in the reasons below.

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

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

Schedule Q of the application states '[t]he Mandingalbay Yidinji-Gunggandji native title claim group does not claim ownership of minerals, petroleum or gas which are wholly owned by the Crown'.

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

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

Schedule P to the application states '[n]o off-shore places form part of the claim area which are covered by the application'.

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

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

Attachment B, at [3] states '[s]ubject to paragraphs 5 and 6, the area covered by the application excludes any land or waters where native title has otherwise been extinguished'. Paragraphs 5 and 6 refer to particular sections of the Act which deal with circumstances where extinguishment is to be disregarded.

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Combined Mandingalbay Yidinji-Gunggandji**
NNTT file no.	**QC99/39**
Federal Court of Australia file no.	**QUD6016/01**
Date of registration test decision	**16 February 2011**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(h)	**Met**

Test condition	Subcondition/requirement	Result
s. 190C(3)		**Met**
s. 190C(4)		**Overall result:** **Met**
	s. 190C(4)(a)	**Met**
	s. 190C(4)(b)	**NA**

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		**Met**
s. 190B(3)		**Overall result:** **Met**
	s. 190B(3)(a)	**NA**
	s. 190B(3)(b)	**Met**
s. 190B(4)		**Met**
s. 190B(5)		**Aggregate result:** **Not met**
	re s. 190B(5)(a)	**Met**
	re s. 190B(5)(b)	**Not met**
	re s. 190B(5)(c)	**Not met**
s. 190B(6)		**Not met**
s. 190B(7)(a) or (b)		**Not met**
s. 190B(8)		**Aggregate result:** **Met**
	re s. 61A(1)	**Met**
	re ss. 61A(2) and (4)	**Met**
	re ss. 61A(3) and (4)	**Met**

Test condition	Subcondition/requirement	Result
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**

[End of document]

REGISTRATION DECISION

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

CORRIGENDUM

Application Name:	**Combined Mandingalbay Yidinji Gunggandji**
NNTT file no:	**QC99/39**
Federal Court of Australia file no:	**QUD6016/01**
Delegate:	**Cobey Taggart**
Date of decision:	**16 February 2011**

[1] At Attachment A of the Registration Decision made on 16 February 2011, amend the result of the following registration conditions to 'Met':

a. s. 190B(5);
b. re s. 190B(5)(b);
c. re s. 190B(5)(c);
d. s. 190B(6); and
e. s. 190B(7)(a) or (b).

Cobey Taggart
Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the *Native Title Act* 1993 (Cth) under an instrument of delegation dated 2 August 2010 and made pursuant to s. 99 of the Act.

Date: 22 February 2011