National Native Title Tribunal

Registration test decision

Application name	Yugara/YUgarapul People
Name of applicant	Desmond Sandy, Ruth James and Pearl Sandy
State/territory/region	Queensland
NNTT file no.	QC11/8
Federal Court of Australia file no.	QUD586/2011
Date application made	7 December 2011

Name of delegate Stephen Rivers-McCombs

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

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 31 January 2012

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Stephen Rivers-McCombs

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 24 August 2011 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to not accept the application for registration pursuant to s. 190A of the Act.

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Yugara/YUgarapul claimant application to the Native Title Registrar (the Registrar) on 7 December 2011 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 7 December 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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.

I note that I prepared a preliminary assessment of the application against the conditions of the registration test, which was provided to the applicant via email on 21 December 2011 and by letter of the same date. The preliminary assessment identified a number of areas in which the application was likely to fail to satisfy the requirements of the registration test.

Registration test

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

Pursuant to ss. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment C.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions

of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

I reaching my decision, I have had regard to:

- the information contained in the Form 1 and the accompanying documents filed by the applicant;
- the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 16 December 2011; and
- my own searches against the Tribunal's mapping database and the Register of Native Title Claims.

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 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:

- On 13 December 2011, the case manager for this matter posted a copy of the application and accompanying documents to the State of Queensland (State) and advised the State of its ability to provide submissions in relation to the application.

As at the date of this decision, the Registrar has not received any submissions from the State with respect to the application.

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.

I am **not satisfied** that the application contains all details and other information, and is accompanied by any document, required by ss. 61 and 62 because the application does not contain the information and details required by s. 62(2)(e). This is explained in the reasons below.

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

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

Native title claim group: s. 61(1)

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

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

I understand that, as discussed above, my only concern at this stage is whether the application sets out the information referred to in s. 61(1) – *Doepel* at [16] and [35] to [36]. I may not look

beyond the information contained in the application, nor am I required to undertake any form of merit assessment (except in the limited way outlined below) to determine whether or not the native title claim group described in the application 'is in reality the correct native title group' – *Doepel* at [37] and [39]. I understand that I consider the adequacy of any claim group description provided in the application in my assessment under s. 190B(3) and that I consider whether the applicant has been properly authorised in my assessment under s. 190C(4). I have, therefore, not turned my mind to those matters at this point.

I do note, however, that I may not be satisfied that the information referred to in s. 61(1) is contained in the application if, on its face, it appears that the application has not been made on behalf of '*all* members of the native title claim group' – *Doepel* at [35] (emphasis added).

The application contains the details required by s. 61(1) in relation to the persons who comprise the applicant. The Form 1 sets out the names of each of the persons who jointly comprise the applicant. The affidavits sworn by each of the applicant persons contain statements to the effect that the deponents are members of the native title claim group and are jointly authorised by the other members of the claim group to make the application on their behalf.

A description of the native title claim group is found at Schedule A of the application, as set out below in my reasons for s. 190B(3). The description defines the claim group as comprising those persons who are descended from named apical ancestors. There is nothing on the face of this description, or elsewhere in the application, which indicates that the application has been made by a subgroup of the native title claim group or has otherwise not been made on behalf of all of the group's members.

For the above reasons, I am satisfied that the application contains the information required by s. 61(1).

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).

I note that the heading 'Address for Service' in Part B of the application is not followed by a complete address, as only the state, suburb and postcode are provided. The street name and number of the address for service are, however, given on the cover page of the Form 1 and in the attached s. 62(1)(a) affidavits. I am, therefore, satisfied that the application contains all of the details required by s. 61(3).

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).

A description of the native title claim group is provided at Schedule A.

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 approved determination of native title, 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) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

Affidavits sworn by Desmond Sandy, Ruth James and Pearl Sandy (the persons comprising the applicant) are attached to the application. They contain the statements and information required by s. 62(1)(a) at paragraphs 2 to 6.

With respect to the information required by subparagraph (v), the affidavits outline how claim group members were advised of the relevant authorisation meeting and give the date and location of that meeting. The affidavits also indicate that the decision-making process used was one agreed to and adopted by the claim group and that it involved the attendees at the meeting deciding by consensus to appoint the applicant. In my view, this kind of information is sufficient for the purposes of s. 62(1)(a)(v).

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 does not contain all details and other information required by s. 62(1)(b).

The application does not contain the details specified in s. 62(2)(a) to (h), as indentified 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).

A description of the area covered by the application is provided at Attachment B1. A map of the area's external boundaries is contained in Attachment B2.

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) – see Attachment B2.

Searches: s. 62(2)(c)

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

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

Schedule D of the Form 1 is headed 'Searches' but has been left blank. I take this to mean that no searches of the kind described in s. 62(2)(c) have been carried out by the applicant or on its behalf.

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).

Attachment E contains a description of the native title rights and interests claimed. It consists of more than a statement to the effect that the native title rights and interests claimed are all those that may exist or have not been extinguished.

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 does not contain all details and other information required by s. 62(2)(e).

I note that s. 190C(2) is focused on procedural matters and that it is s. 190B(5) which requires the Registrar or her delegate to 'address the quality of the asserted factual basis' supporting the claimed native title rights and interests – see *Doepel* at [16] to [17]. Having said that, however, the application still must contain a 'general description' of the factual basis in order to satisfy the requirements of s. 62(2)(e). The Full Court addressed this in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala (Full Court)*) in the following way:

> The fact that the detail specified by s. 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s. 62. In other words, it 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 under s. 190A and related sections, and be something more than assertions at a high level of generality* – at [92] (emphasis added).

In a similar vein, the Court has also held that a description which merely restates the assertions described in subparagraphs (i) to (iii) will go 'no way towards compliance with s. 62(2)(e)' – *Queensland v Hutchison* [2001] FCA 416 at [18].

Schedule F of the Form 1 is intended to provide the information needed to satisfy the requirements of s. 62(2)(e). It contains only the following statements:

a) the native title claim group live on their country or visit on a regular basis

b) traditional law and custom is asserted by the native title claim group

c) the native title claim group continue traditional law and custom

In addition, Schedule G contains a list of activities currently carried out on the application area by claim group members. Including what is written in the template Form 1 used by the applicant, Schedule G provides:

> **Activities** ...
>
> Details of any activities in relation to the land or waters currently being carried out by the native title claim group.
>
> 1. Welcome to country
> 2. Story telling
> 3. Fishing
> 4. Celebrations and ceremony
> 5. Dance
> 6. Occupation and physical connection
> 7. Language
> 8. Caring for country

This provides some information that goes to the assertion described in subparagraph (i) of s. 62(2)(e), but it does not relate to subparagraphs (ii) or (iii).

My view is that the information set out above does not provide a general description of the factual basis on which is asserted that the claimed native title rights and interests exist. In my view, Schedule G and the statement at paragraph (a) of Schedule F offer some facts that support the assertion, in subparagraph (i), that the claim group is associated with the claim area (though the information is still very general in nature). However, Schedules F and G do not provide any information regarding the association of the claim group's predecessors with the claim area. Nor, in my opinion, do they contain any information which goes beyond the assertions described in subparagraphs (ii) and (iii). In effect, the application therefore contains no information regarding:

- the association of the claim group's predecessors with the claim area; or
- the traditional laws and customs that relate to the land and waters of the claim area.

An application must provide some details in respect of those matters in order to satisfy the condition of s. 62(2)(e).

The application does not contain all of the information required by 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) – see Schedule G.

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

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

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

Schedule H of the template Form 1 used by the applicant is intended to contain the details required by s. 62(2)(g). It has been left blank. However, the map provided at Attachment B2 of the application shows that the Turrbal People claim (QUD6196/98; QC98/26) is covered by the current application. I am, therefore, satisfied that the application contains the information required by s. 62(2)(g).

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

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

Schedule HA is intended to contain the details required by s. 62(2)(ga). Like Schedule H, Schedule HA does not contain any information. I take this to mean that the applicant is not aware of any notices given under s. 24MD(6B)(c).

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 is intended to contain details of any s. 29 notices relating to the claim area of which the applicant is aware. The applicant has not provided any details at Schedule I, which I take to mean that the applicant is not aware of any s. 29 notices.

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 **does not satisfy** the condition of s. 190C(3).

The requirement that I be satisfied in the terms set out in s. 190C(3) is triggered where the previous application meets all of the criteria contained in paragraphs (a) to (c) – *Western Australia v Strickland* [2000] FCA 652 at [9]. Also, I note that, in assessing whether the application has complied with s. 190C(3), I may have regard to information from outside the application – *Doepel* at [16].

The map provided at Attachment B2 identifies the Turrbal People application (QUD6196/98; QC98/26) as covering part of the area included in the current claim. This overlap is confirmed both by the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 16 December 2011 (the geospatial report) and by my own searches against the Tribunal's mapping database. The Turrbal People application was entered on the Register of Native Title Claims (the Register) on 13 May 1998 and was last amended on 24 October 2008. The decision of the Registrar's delegate dated 15 January 2009 shows that the amended application was accepted for registration pursuant to s. 190A. Paragraphs (a) to (c) of s. 190C(3) therefore apply to the Turrbal People application. As a result, I must be satisfied that its claim group has no members in common with the Yugara/YUgarapul People claim group.

The claim group description set out in the Register extract for the Turrbal People application states that the group is 'comprised of [Person 1 – Name Deleted] and her biological descendants, being the only known descendants of the Turrbal man known as the "Duke of York"'. The claim group description found at Schedule A of the current application defines the claim group as including the descendants of an apical ancestor also named the 'Duke of York'.

Schedule O of the template Form 1 used by the applicant is intended to contain the details of any claim group members who also belong to the claim group for any overlapping application(s). I note that the applicant has not provided any details at Schedule O, which I understand to mean that the applicant is not aware of any claim group members who also belong to the claim group for the Turrbal People application.

On the other hand, however, the 'Duke of York' is an unusual name. Taking that together with the fact that the current application covers the claim area for the Turrbal People application, it seems likely to me that the two (2) claim group descriptions are referring to the same person. In

my view, the information that I have before me would therefore appear to indicate that the two (2) claim groups are likely to have at least some members in common. Given that, I cannot be satisfied on the information before me that no person included in the claim group for the current application is not also a member of the claim group for a previous application to which s. 190C(3)(a) to (c) apply.

For the reasons given above, the application does not satisfy the condition of s. 190C(3).

Subsection 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s. 190C(5), if the application has not been certified as mentioned in s. 190C(4)(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:
> (a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
> (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

I must be satisfied that the requirements set out in either s. 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 **not satisfied** that the requirements set out in s. 190C(4)(a) or (b) are met.

Because the application has not been certified, I must be satisfied both that the application contains the information required by s. 190C(5) and that the application complies with the condition of s. 190C(4)(b). I note that an application which passes the threshold test in s. 190C(5) will not necessarily meet the requirements of s. 190C(4)(b). This is because, under s. 190C(4)(b), the available material must satisfy me that the applicant is, in fact, authorised in accordance with one of the processes described in s. 251B (discussed below) – see *Doepel* at [78]; *Evans v Native Title Registrar* [2004] FCA 1070 at [53].

Does the application contain the information required by s. 190C(5)?

Under section 190C(5), the application must include a statement to the effect that the requirements of s. 190C(4)(b) have been met and then also set out the grounds on which the Registrar or her delegate should consider that that is, in fact, the case.

Paragraph 5 of Part A of the Form 1 contains statements to the effect that the persons comprising the applicant are members of the native title claim group and that they are authorised by the

other members of the claim group to make the application and to deal with matters arising in relation to it. Paragraph 5 also briefly outlines how the authorisation process was carried out (set out in full below). In my view, this information satisfies the requirements of s. 190C(5).

Does the application satisfy the condition of s. 190C(4)(b)?

Section 190C(4)(b) has two (2) requirements. The first is that the persons comprising the applicant must be members of the native title claim group. The second is that the Registrar or her delegate must be satisfied that those persons are authorised by all the other members of the claim group.

In each of the affidavits affirmed by the persons comprising the applicant, the deponents describe themselves '[a]s a member of the native title claim group' – at [6]. There is no information before me which might suggest that those statements are untrue or incorrect. I am, therefore, satisfied that the persons who comprise the applicant are each members of the claim group.

I have formed the view, however, that the application does not satisfy the second limb of s. 190C(4)(b). Below, I set out the authorisation information provided by the applicant. I then outline the reasons for my decision.

The applicant's authorisation material

The applicant's authorisation material is set out at Part A of the Form 1. This repeats the information contained in the applicant person's affidavits and so only the information from the Form 1 is reproduced here. Under the heading 'Authorisation', the applicant states:

1. The authorization process started with Desmond Sandy and Pearl and Desmond Sandy's late brother in the early to mid-1990's [*sic*] with a series of six maps in conjunction with [Person 2 - Name Deleted] and [Person 3 – Name Deleted] as the authorised representative for their family clans.
2. In 2000 FAIRA authorised an anthropological report by [Anthropologist 1 – Name Deleted] on the [Family Clan 1 – Name Deleted], [Family Clan 2 – Name Deleted] and Sandy family clans which supported the Sandy families [*sic*] rights and interests within this claim area. In 2000 the FAIRA linguistic report by [Anthropologist 2 – Name Deleted] supported the language for the Brisbane Valley in the negative as Yugara which distinguished it from neighbouring languages. These reports revealed a Sandy family apical ancestor, Jackey, was called a Yaggara name, Kawae-Kawae, by his tribe ([Anthropologist 3 – Name Deleted]), and Desmond Sandy, as well as, Ruth James were identified as able to speak the Yaggara language (aka Yugara-pul) by [Anthropologist 2 – Deleted] in 2011.
3. In the 1990's [*sic*] to 2003 the late younger brother of Ruth James also participated as an authorised family clan Elder in a process identifying native title rights and interests through law and custom.
4. From 2007 Ruth James and from 2009 Pearl Sandy continued the authorisation process and held regular meetings with their families. In 2010 the Council of Elders monthly meetings with other YUgarapul families authorised the applicants to represent the YUgarapul People as respondents in other Native Title claims over this area under the apical ancestors.
5. The details of the process of decision-making complied with in relation to the native title claim group authorizing the Applicants, Desmond Sandy, Ruth James and Pearl Sandy, to make the Application and to deal with matters arising in relation to it are outlined in the affidavits of the Applicants and include:

(a) The native title claim group used a decision-making process to authorise Desmond Sandy, Ruth James and Pearl Sandy to make the Application and deal with matters arising in relation to it.

(b) Prior to the authorization meeting, which was held on 23rd October 2011 at Inala[,] Elders and other members of the native title claim group met regularly over a period of up to two years to discuss and to consider details of the Application, including arrangements for the authorisation meeting.

(c) As a member of the native title claim group, I consulted, either in person or on the phone, with members of the native title claim group about the proposed Application and informed them about the authorization meeting to be held at Inala.

(d) Authorisation meetings were advertised on the Koori Mail website, Courier Mail and a local paper over a period of two months from 23 August until 23 October 2011.

(e) At the authorisation meeting on 23rd October 2011

i. Elders, senior and other members of the descent groups, that comprise the native title claim group, were in attendance

ii. In accordance with the adopted decision making process, the native title claim group reached consensus on the decision to authorise Desmond Sandy, Ruth James and Pearl Sandy as the persons to make the application and deal with matters arising in relation to it.

In addition to this information, the application contains a copy of the notice used to advertise the meeting held on 23 October 2011. The notice is headed 'Yugara/YUgarapul & Yugambeh People: Native Title Authorisation Meetings' and provides the date, time and location for the meeting, together with a map of the proposed claim area and the surrounding region.

The reference to the Yugambeh People in the heading is explained in the following part of the notice, which states:

> **Native Title Authorisation of the two Native Title claims:**
>
> **Yugara/YUgarapul People**
>
> Claimants: Descendants of apical ancestors:
>
> Bilin/Bilinha/King Jackey Jackey/Kawae-Kawae (and 3 wives Nellie, Mary and Sarah; brother in law Minnippi Rawlins); Gariballie/Kerwalli/King Sandy; Alexander/John Bungaree/King Sandy and Paimba/Mary Ann Mitchell; William Mitchell; Lizzie Sandy/Brown; Kitty (Yelganun); Dakiyakka/Duke of York & daughter Kitty
>
> **Yugara/YUgarapul and Yugambeh Peoples**
>
> Claimants: Descendants of apical ancestors:
>
> [Followed by a list of apical ancestors.]

Not surprisingly, there is considerable overlap between the ancestors contained in the first and second lists of ancestors. I assume that the additional ancestors listed for the Yugara/YUgarapul and Yugambeh Peoples belong to the Yugambeh People.

It also seems clear from the notice, and from the statements in paragraph 5 of Part A, that only the Yugara/YUgarapul group at the meeting is said to have been involved in the process purportedly used to authorise the applicant to make the current claim. I have, therefore, assessed the information before me on the understanding that two (2) decision-making processes were

conducted at the meeting on 23 October 2011 – one to authorise the making of the current application, which involved the descendants of the Yugara/YUgarapul ancestors listed on the notice, and the other to authorise a Yugara/YUgarapul and Yugambeh Peoples claim, which involved the descendants of the ancestors identified on the notice for that group.

Consideration of the authorisation material

What it means to be 'authorised' for the purposes of s. 190C(4)(b) is set out in s. 251B as follows:

> ... all persons in a native title claim group ... ***authorise*** a person or persons to make a native title determination application[,] ... and to deal with matters arising in relation to it, if:
>
> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group[,] ... must be complied with in relation to authorising things of that kind – the persons in the native title claim group[,] ... authorise the person or persons to make the application and to deal with matters in accordance with that process; or
>
> (b) where there is no such process – the persons in the native title claim group[,] ... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group[,] ... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

The applicant's authorisation material states that an 'adopted decision making process' was used to authorise the applicant. I understand this to mean that the decision-making process used was of the kind described in s. 251B(b) rather than s. 251B(a), and have therefore considered the information before me against the requirements of paragraph (b).

I note that under s. 251B a claim group can only use an agreed to and adopted decision-making process to authorise an applicant where the group's traditional law and custom does not provide an applicable and mandated process – see *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [1230]. The authorisation material does not expressly address whether the claim group's law and custom provides a traditionally mandated process and, in the absence of any information to the contrary, I have inferred that it does not. Such an approach is, in my view, in keeping with the Court's characterisation of the Act as one which is remedial in nature and should, therefore, be construed beneficially – see, for example, *Strickland v Native Title Registrar* [1999] FCA 1530 at [55]. I note, however, that I would have been assisted in forming the view that no traditionally mandated process exists if the applicant's material had addressed the issue.

In relation to the substantive requirements of s. 251B(b), I have formed the view that there is one important deficiency in the authorisation material, which prevents me from being satisfied that the condition of s. 190C(4)(b) is met. This is, namely, that there are inconsistencies between the apical ancestors listed in the public notice used to advertise the authorisation meeting and the list used to describe the claim group in Schedule A of the Form 1.

Having compared the list of apical ancestors set out in the notice used to advertise the authorisation meeting with the claim group description in Schedule A, it appears that the list of ancestors in the two (2) documents differs. In particular, 'Naewin/Sarah' is identified as one of the group's apical ancestors in the claim group description in Schedule A, but is not mentioned in the meeting notice. Conversely, 'Kitty (Yelganun)' is included in the ancestors listed in the meeting notice, but does not feature in the Schedule A description.

In my view, the discrepancy between the list of ancestors used to describe the claim group in Schedule A and the list used in the meeting notice gives rise to two (2) difficulties. The first is that it puts into doubt whether claim group members were given a reasonable opportunity to attend the meeting and, therefore, to participate in the decision-making process. The second is that it creates uncertainty as to whether or not the persons who did participate in the decision-making process were all members of the native title claim group. I deal with these two (2) difficulties in turn, below.

Was the claim group given every reasonable opportunity to attend the authorisation meeting?

With respect to this first concern, I refer to the reasons of Stone J in *Lawson v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*). In *Lawson*, her Honour observed that the effect of s. 251B is to give to the word 'all' in s. 190C(4)(b) 'a more limited meaning than it might otherwise have' – at [25]. Specifically with respect to s. 251B(b), her Honour noted:

> The subsection does not require that 'all' the members of the relevant claim [g]roup must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. *It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process* – at [25] (emphasis added).

It appears from the material provided that the applicant sought to inform claim group members of the authorisation meeting via the meeting notice (excerpted above) and through personal phone calls and meetings – see [5(c)] of Part A.

The meeting notice was published on the *Koori Mail* website, in the *Courier Mail*, and in 'a local paper' from 23 August 2011 until 23 October 2011. While the 'local paper' is not identified, I am satisfied – having taken into account the location of the claim area (over the city of Brisbane and its surrounds) – that this selection of publications, and the period of publication, would have given claim group members a reasonable opportunity to see the notice. However, I am not satisfied that the terms of the notice sufficiently identified who was invited to the authorisation meeting.

Because the apical ancestor 'Naewin/Sarah' was left off the list of ancestors in the notice, those individuals or families who might associate with the claim group through this ancestor would not, on the face of the notice, appear to have been invited to the authorisation meeting. It is possible that those persons may have known that they were invited through some other means (for example, they may have been aware of a connection with other listed ancestors or they may have been contacted personally by the applicant). However, in my view, the material before me is not sufficient to support such an inference. There is, for instance, no detailed information in relation to who was personally notified of the meeting. In this regard, the authorisation material only includes the statement that the applicant persons 'consulted, either in person or on the phone, with members of the ... claim group about the proposed Application and informed them about the authorization meeting to be held at Inala' – at [5(c)] of Part A.

In my view, I cannot infer from this kind of information that the omission of the name 'Naewin/Sarah' from the meeting notice did not have the effect of denying some claim group

members a reasonable opportunity to attend the authorisation meeting. Therefore, on the information that I have before me, I am not satisfied that claim group members were given every reasonable opportunity to participate in the relevant decision-making process.

Was the decision to authorise the applicant made by claim group members?

The importance of it being claim group members who authorise an applicant to make a native title determination application was outlined by French J (as he was then) in *Bolton v Western Australia* [2004] FCA 760:

> If, as may well be the case, there is no relevant and mandatory traditional decision-making process applicable to the making and conduct of a native title determination application then a process 'agreed to and adopted by the persons in the native title claim group' will suffice as the source of authority for applicants representing members of the group. *That is no light requirement. It means that the authorisation process must be able to be traced to a decision of the native title claim group who adopt that process* – at [44] (emphasis added).

As noted above, the name 'Kitty (Yelganun)' was included in the list of ancestors on the meeting notice but is not in the claim group description at Schedule A. I understand from the information contained in the application that the Yugara/YUgarapul People claim group is limited to the descendants of those ancestors named in Schedule A. I have not been provided with any material which explains why the name 'Kitty (Yelganun)' was included in the meeting notice or how that person relates to the ancestors identified at Schedule A. It may be that Kitty (Yelganun) was a descendant of one of those ancestors and, therefore, that her descendants also fit within the claim group description provided. However, there is nothing in the applicant's authorisation material which suggests that that is the case. Therefore, based on the information that I have before me, the membership status of the descendants of Kitty (Yelganun) would appear to be unclear.

I note that Part A of the application includes the statements:

- that 'Elders, senior and other members of the descent groups, that comprise the native title claim group, were in attendance [at the authorisation meeting]'; and
- that 'the native title claim group reached consensus to authorise [the applicant]' – at [5(e)(i) and (ii)].

These statements are also included in the affidavits affirmed by the persons who comprise the applicant. The statements would seem to confirm the applicant's belief that those persons involved in the relevant decision-making process were all members of the native title claim group.

In my view, however, this does not overcome the difficulty created by the fact that the public notice invited the descendants of Kitty (Yelganun) to the authorisation meeting and that the membership status of those persons is, on the information before me, unclear. In order to satisfy myself that only claim group members participated in the relevant decision-making process, I would need some material that describes either how the descendants of Kitty (Yelganun) are members of the claim group or how the membership of the attendees at the meeting was confirmed. Because the information provided does not address either of those matters, I am not satisfied that the condition of s. 190C(4)(b) is met.

Outcome

For the reasons given above, I am **not satisfied** that the application meets the requirements of s. 190C(4)(b).

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).

Attachment B1 is titled 'Yugara/YUgarapul People – External Boundary Description' and contains a metes and bounds description of the application area. The description was prepared by the Tribunal's Geospatial Services on 19 October 2011 and references the high water mark, topographic features, water catchments, lot on plan descriptions and coordinated points. The attachment also excludes from the application area any land or waters subject to the Jagera People 2 native title determination application (QUD6014/03; QC03/15).

A copy of a colour map of the claim area, titled 'Yugara/YUgarapul People', is found at Attachment B2. The map was prepared by the Tribunal's Geospatial Services and is dated 19 October 2011. The map includes:

- the application area depicted by a bold outline;
- the Turrbal People application (QUD6196/98; QC98/26) shown and labelled;
- the Jagera People 2 application (QUD6014/03; QC03/15) shown and labelled;
- 1:250k topographic background;
- scalebar, north point, coordinate grid and location diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar or her delegate to be satisfied that this is the case, the written description and the map should be sufficiently consistent with each other.

In determining whether the boundary description provided in Attachment B1 and the map in Attachment B2 are sufficient for the purpose of s. 190B(2), I have had regard to the geospatial report prepared by the Tribunal's Geospatial Services (referred to above in relation to s. 190(C)(3)). The geospatial report concludes that the description and map are consistent and that they identify the application area with reasonable certainty. Having considered the description contained in Attachment B1 and the map in Attachment B2, I agree with that assessment.

Therefore, I am **satisfied** that the application meets the requirement of s. 190B(2).

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 is headed 'Native Title Claim Group' and provides as follows:

> Descendants of apical ancestors:
>
> - Bilin/Bilinha/King Jackey Jackey/Kawae-Kawae (and 3 wives Nellie, Mary and Sarah; brother-in-law Minnippi Rawlins);
> - Gariballie/Kerwalli/King Sandy and Naewin/Sarah;
> - Alexander/John Bungaree/King Sandy and Paimba/Mary Ann Mitchell;
> - William Mitchell; Lizzie Sandy/Brown[; and]
> - Dakiyakka/Duke of York and daughter Kitty[.]

Because the application does not name each of the claim group members individually, I have considered it against the requirements of s. 190B(3)(b). That provision requires that the persons in the claim group be described with sufficient clarity to enable one to ascertain whether or not a particular person is a member of that group.

The focus of s. 190B(3) is 'not upon the correctness of the [claim group] description', but upon 'whether the application enables reliable identification of the persons in the native title claim group' – *Doepel* at [37] and [51]. To enable the reliable identification of persons in the group, a description must, according to Carr J, contain 'a set of rules or principles' that define the claim group membership – *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 at [25]. In my view, a claim group description must, in that way, provide an objective basis on which to assess a person's claim group membership. I note also that rules or principles requiring a difficult factual inquiry do not prevent a description from being sufficiently clear – *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67].

My understanding of the claim group description at Schedule A is that the claim group includes all persons who are descended from any of the named ancestors. Although it may require an extensive factual inquiry to determine whether a person is descended from one of the apical ancestors, the description provides a clear and objective basis on which to determine whether a person is a member of the claim group. The claim group description is, in my view, a sufficiently clear description for the purposes of s. 190B(3).

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).

Attachment E sets out the native title rights and interests claimed in the following terms:

> The native title rights and interests which the applicant claims in relation to the application area are the following:
>
> 1. The right to exclusive possession, occupation and use of the land;
> 2. The right to live on the land;
> 3. The right to access land and waters in the claim area;
> 4. The right to maintain and protect sites of significance to the native title holders;
> 5. The right to conduct social, religious and cultural activities within the claim area;
> 6. The right to harvest, fish, cultivate, grow and manage plants, timber, animals, birds and fish located within the claim area;
> 7. The right to exchange plants, timber, animals, birds and fish located within the claim area with third parties for other things;
> 8. The right to make things from plants, timber and animals located within the claim area;
> 9. The right to exchange things made from plants, timber and animals located within the claim area with third parties for other things;
> 10. The right to make decisions about and to control the access to, and the use and enjoyment of the land and waters of the claim area and the plants, timber, animals, birds and fish within the claim area;
> 11. The right to control access and use between the native title holders and any other Aboriginal people who recognise themselves as being governed by the traditional laws and customs acknowledged and observed by the native title holders and who seek access to, or use of, the land in the claim area in accordance with traditional law and custom;
> 12. The right to teach and pass on knowledge of the claimant group's traditional laws and customs pertaining to the area and knowledge of the places in the area;
> 13. The right to learn about and acquire knowledge concerning, the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area.
>
> The claimant group only claims the rights listed [in] (10) and (11) above and the right of exclusive possession, occupation, use and enjoyment in relation to:
>
> a. any areas where there has been no previous extinguishment of native title;
>
> b. any area of natural water resources and the solid land beneath the water where the water [is] found not to be tidal[;]

c. any areas affected by category C and D past and intermediate period acts;

d. s. 47A Reserves covered by claimant applications; and/or

e. s. 47B Vacant Crown Land covered by claimant applications.

Doepel is authority for the proposition that, at s. 190B(4), the Registrar or her delegate must be satisfied that the native title rights and interests claimed are identifiable in the sense that they 'are understandable and have meaning' – at [99]. This does not, in my view, necessarily involve consideration of whether the rights and interests claimed are native title rights and interests as defined in s. 223(1). In my opinion, that assessment is part of considering whether the native title rights and interests claimed can be established, prima facie, and is therefore a matter for consideration under s. 190B(6).

In my view, the rights and interests claimed are readily identifiable because they are described in a way that is understandable and has meaning. The application, therefore, **satisfies** the condition of s. 190B(4).

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 not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

Earlier in this decision, I set out the reasons for my view that the application does not contain the information required by s. 62(2)(e). Section 190B(5) is the merit condition that corresponds to s. 62(2)(e). In *Gudjala (Full Court)*, the Court discussed the relationship between ss. 62 and 190B generally, commenting:

> A convenient starting point, in considering the correctness of his Honour's approach, is to consider the interaction between s. 62 and s. 190A[.] ... The former provision prescribes what an applicant must do to commence an application. The latter provision establishes a statutory regime under which the Registrar of the Tribunal assesses the application to determine whether it should be accepted. It is tolerably clear that what the assessment entails is informed by what is required of an applicant to commence an application. ... Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s. 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying

> affidavit. Of course, if an applicant fails to fully and comprehensively furnish the information required by s. 62 then the there is a risk that the Registrar will not accept the claim although that risk is ameliorated by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s. 190A(3)(a) – at [90].

With regard to ss. 62(2)(e) and 190B(5) specifically, the Court went on to say:

> Of central importance in this appeal are the details specified by s. 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed [*sic*] and, in particular, the matters referred to in ss. 62(2)(e)(i), (ii) and (iii). ... The fact that the detail specified by s. 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s. 62. In other words, it 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 under s. 190A and related sections, and be something more than assertions at a high level of generality – at [92].

It is clear from the above-quoted passages that if an application furnishes 'fully and comprehensively' the information required by s. 62(2)(e), the application will likely satisfy the condition of s. 190B(5). On the other hand, however, an application that fails to provide the information required by s. 62(2)(e), will not meet the requirements of s. 190B(5) unless the applicant submits additional factual material to the Registrar or her delegate.

As I explained in relation to s. 62(2)(e), my view is that the application does not contain a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist. In particular, I have formed the view that the application does not contain a general description of the factual basis supporting the assertions:

- that the claim group's predecessors had an association with the claim area;
- that there exist traditional laws and customs that give rise to the claimed native title; or
- that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The applicant has not provided the Registrar or me, as her delegate, with any additional information addressing these issues. My view, therefore, is that the application does not satisfy the condition of s. 190B(5).

Nonetheless, I also make the following comments with respect to the applicant's factual basis material in light of the requirements of s. 190B(5). I note that case law has established the following principles in relation to the test at s. 190B(5):

- The applicant does not need to submit evidence proving the asserted facts; the Registrar or her delegate must assume that the applicant's factual basis material is true – *Gudjala (Full Court)* at [92]; *Doepel* at [17].
- The asserted factual basis must relate to the particular native title claimed by the particular claim group over the particular application area. As Dowsett J has held, s. 190B(5) requires 'that the alleged facts support the claim that the identified claim group (and not some other group) h[o]ld the identified rights and interests (and not some other

rights and interests)' – *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala [2007]*) at [39].

- The term 'traditional', which is used in s. 190B(5)(b) and (c), must be interpreted in line with the High Court's decision in *Yorta Yorta Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) – see *Gudjala 2007* at [26] and [62] to [66].

Following the definition of 'traditional' in *Yorta Yorta*, an applicant's factual basis material must first be sufficient to identify the society (being a group united by the acknowledgement and observance of a body of law and custom) which existed at sovereignty and from which the claim group is descended – see *Yorta Yorta* at [46] and [49]. In order to support the assertion that the laws and customs giving rise to the claimed native title are 'traditional' laws and customs, the factual material must also be sufficient to support the proposition:

- that the relevant laws and customs are ones 'which [have] been passed from generation to generation of [the] society, usually by word of mouth and common practice' – at [46];
- that the content of the laws or customs has its origins in the normative rules of the society which existed at sovereignty – at [46];
- that the normative system has had a 'continuous existence and vitality since sovereignty' – at [47]; and
- that the society's descendants have acknowledged the laws and observed the customs, which that normative system gives rise to, since sovereignty and without substantial interruption – at [87].

As I mentioned in my consideration of s. 62(2)(e), Schedules F and G of the application do contain some information regarding the claim group's association with the application area. This relates to the first limb of the assertion described in s. 190B(5)(a). Having considered the information against the principles set out above, however, my view is that the material provided is not sufficient to support that component of the s. 190B(5)(a) assertion. The generally framed list of activities at Schedule G and the assertion at Schedule F that the claim group lives on and visits the claim area could be applied equally to claims by other groups over other areas. The information, therefore, lacks the level of particularity needed to support the first limb of the assertion described in s. 190B(5)(a).

Also as noted above, I have formed the view that the applicant's statements regarding the traditional laws and customs that give rise to the claimed native title rights and interests are so general in their nature that they do not amount to anything more than a restatement of the assertions described in s. 62(2)(e)(ii) and (iii) (and, therefore, also the corresponding provisions of s. 190B(5)(b) and (c)). In particular, Schedule F contains the statements:

> b) traditional law and custom is asserted by the native title claim group
>
> c) the native title claim group continue traditional law and custom

Having considered these broad assertions in light of the principles outlined above, I note that they do not contain any information relating to the matters which must be addressed under the *Yorta Yorta* definition of 'traditional' laws and customs.

For the reasons given, the application **does not satisfy** the condition of s. 190B(5).

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 **does not satisfy** the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can be established, prima facie.

For the reasons given in relation to ss. 62(2)(e) and 190B(5), I have formed the view that the application does not contain a sufficient factual basis to support the assertion that the claimed native title rights and interests exist. It necessarily follows that I am not satisfied that any of the native title rights and interests claimed can be established, prima facie.

I note that the term 'native title rights and interests' in s. 190B(6) must be interpreted consistently with the term's definition in s. 223(1) – see *Gudjala [2007]* at [85] to [87]. This, among other things, requires that the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the native title claim group. As with the assessment under s. 190B(5), the requirements of s. 190B(6), therefore, also involve a consideration of an applicant's factual basis material in light of the *Yorta Yorta* definition of 'traditional'. As I noted in relation to s. 190B(5), the applicant has not provided any information that addresses the matters identified in *Yorta Yorta*.

The application does not satisfy the condition of s. 190B(6).

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 **does not satisfy** the condition of s. 190B(7).

As with subsections 190B(5) and (6), the term 'traditional' in subsection 190B(7) must be interpreted in line with the High Court's decision in *Yorta Yorta* – see *Gudjala [2007]* at [89]. The information provided must, therefore, show that the connection referred to in s. 190B(7) is practiced under laws and customs rooted in the normative system of the pre-sovereignty society from which the claim group is descended. Unlike s. 190B(5), s. 190B(7) also requires that the Registrar or her delegate must 'be satisfied of a particular fact or particular facts', which

'therefore requires evidentiary material to be presented to the Registrar' or her delegate – *Doepel* at [18]. Mansfield J has made it clear, however, that:

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

It follows from my views in respect of s. 190B(5) that the applicant has not, in my opinion, provided sufficient information to indicate that the claim group has any traditional laws and customs under which a claim group member might have a physical connection with the claim area. I note also that Schedule M of the template Form 1 used by the applicant, which is intended to contain details of a claim group member's traditional physical connection with the claim area, has been left blank. There is also no other information in the application which is said to relate to any claim group member's traditional physical connection with any part of the application area.

Given the dearth of information just described, the application does not satisfy the condition of s. 190B(7).

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 **does not satisfy** 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).

There are no approved determinations of native title over the claim area.

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** offend the provisions of s. 61A(2).

According to the terms of Attachment E, the rights listed at 1, 10 and 11 of the attachment are not claimed in relation to areas where native title has been extinguished. Because the effect of s. 23C is to extinguish native title in relation to land and waters covered by a previous exclusive possession act (PEPA), I take this exclusion to include areas affected by such an act. The proviso in Attachment E, however, does not extend to the other rights and interests claimed, nor does Attachment B1 (which contains a written description of the claim area) contain any provision which might have that effect. These other rights and interests appear to be claimed in relation to all of the land and waters covered by the application.

The application area includes the city of Brisbane and some of its surrounding suburbs and towns. In my opinion, these places must include areas where PEPAs have been done. My view, therefore, is that the application does offend the provisions of s. 61A(2).

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).

Attachment E includes the statement that the application 'only claims the rights listed in (10) and (11) above [which involve the right to control access to the claim area] and the right of exclusive possession, occupation, use and enjoyment in relation to ... any areas where there has been no previous extinguishment of native title'. Nowhere in the application are lands and waters covered

by previous non-exclusive possession acts (PNEPAs) specifically excluded from the area over which the rights conferring exclusive possession, occupation, use and enjoyment are claimed.

Section 23F(2) defines PNEPAs as the valid grant of non-exclusive pastoral or agricultural leases on or before 23 December 1996 (s. 23F(3) operates to also include some leases granted after that date). Unlike PEPAs, PNEPAs do not necessarily extinguish native title – see s. 23G(1). My view, therefore, is that the general exclusion clause in Attachment E does not necessarily apply to lands and waters over which PNEPAs have been done. Whether the application must exclude PNEPAs from the claim area in order to avoid offending s. 61A(3) is, however, another matter.

Having considered the location and coverage of the application area, I am not willing to make an adverse inference of the kind I have made in relation to s. 61A(2). The area covered by the application appears to be predominately urban in nature and is relatively confined in its area (covering approximately 1,169 square kilometres). As a result, there does not seem to be, in my view, a particularly high likelihood of the claim covering areas that are affected by PNEPAs. I am not therefore able to assume that the claim area must include places where PNEPAs have been done. As I do not have any information before me which shows that the application area definitely does include such areas, I have formed the view 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 **does not satisfy** the condition of s. 190B(9), because it **does not meet** all of the three subconditions, as set out in the reasons below.

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

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

The claimed rights and interests, which are set out at Attachment E, do not include a claim to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory.

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

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

No native rights or interests are claimed in relation to any offshore places.

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

The application **does not satisfy** the subcondition of s. 190B(9)(c).

As noted in relation to the assessment at s. 190B(8), only those rights and interests listed at 1, 10 and 11 of Attachment E are not claimed in relation areas where there has been previous extinguishment of native title. The other rights and interests claimed are claimed in relation to the entire application area. It is highly likely, in my view, that, because the application area covers the city of Brisbane and its surrounds, those other native title rights and interests are claimed in relation to areas where they have been extinguished and where ss. 47, 47A and 47B do not apply. Therefore, the application does not, in my opinion, meet the subcondition of s. 190B(9)(c).

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Yugara/YUgarapul People**
NNTT file no.	**QC11/8**
Federal Court of Australia file no.	**QUD586/2011**
Date of registration test decision	**31 January 2012**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Not 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:** **Not 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)	**Not met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Not met
s. 190C(4)			Overall result: Not met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		Not met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Not met
	re s. 190B(5)(a)	Not 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: Not met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Not met

Test condition	Subcondition/requirement	Result
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Not met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Not met**

[*End of document*]