



Registration test decision

Native title determination application	Gunggandji Kimuy
Applicant	Sarah Addo & Sam Addo
Federal Court No.	QUD580/2014
NNTT No.	QC2014/005

As required by s 190A(1) of the *Native Title Act 1993* (Cth) (the Act),¹ I have considered the claim made in the Gunggandji Kimuy native title determination application, in accordance with s 190A, against each of the conditions contained in ss 190B and 190C of the Act. This document comprises notice to the applicant and to the Federal Court under s 190D(1) and a statement of my reasons for the decision not to accept the claim for registration, which I have made under s 190A(6B).

For the purposes of s 190D(3) of the Act, my opinion is that it is not possible to determine whether the claim satisfies all of the conditions in s 190B because of a failure to satisfy section 190C.

Susan Walsh, delegate of the Native Title Registrar
25 November 2014

¹ All references to legislative sections refer to the *Native Title Act 1993* (Cth), as in force on the day this decision is made, unless otherwise specified.

Introduction

[1] On 11 November 2014, the Registrar of Federal Court (Federal Court) provided a copy of the Gunggandji Kimuy native title determination application and accompanying documents to the Native Title Registrar (Registrar) under s 63 of the Act. This has triggered the duty of the Registrar under s 190A(1) to consider the claim in that application for registration in accordance with the provisions of s 190A.

[2] Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). In light of my decision below that the claim does not satisfy the conditions of s 190C(2) and s 190C(4), the claim must not be accepted for registration.

Section 190C(2)

[3] Section 190C(2) provides:

The Registrar 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.

[4] My decision is that the claim **does not satisfy** the condition of s 190C(2) because the application:

- (a) is not accompanied by an affidavit sworn by the applicant (Sarah Addo and Sam Addo) which complies with s 62(1)(a)(i) to (v);
- (b) does not provide information, whether by physical description or otherwise, that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application, to be identified which complies with s 62(2)(a);
- (c) does not provide a map showing the boundaries of the area mentioned in s 62(2)(a)(i) (the external boundaries of the area covered by the application) which complies with s 62(2)(b).

Affidavit that must accompany the application under s 62(1)(a)

[5] I note that the application names Sarah Addo and Sam Addo as the persons comprising the applicant (see page 2 of the Form 1). Although Sarah Addo and Sam Addo have each made an affidavit dated 6 November and 5 November 2014 respectively neither affidavit contains the following statements set out in ss 62(1)(a)(i), (ii), (iii) and (v):

- that the applicant believes that 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;
- that the applicant believes that none of the area covered by the application is also covered by an approved determination of native title;
- that the applicant believes that all of the statements made in the application are true;
- 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.

[6] I accept that the statement by Sarah Addo in paragraph 2 of her affidavit that she is the authorised applicant to represent Kunggandji Kimuy People meets the requirement in subparagraph (iv) for a statement that 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. Mr Addo's affidavit does not contain the statement required by subparagraph s 62(1)(a)(iv).

[7] I do not accept that the statement at the end of Ms Addo's affidavit that the materials in the affidavit (my emphasis) are true meets the requirement in s 62(1)(a)(iii) for a statement that the applicant believes that all of the statements made in the application are true.

Information & map of the area covered by the application

[8] The requirement for information identifying the area covered by the application and a map showing the boundaries of that area is found in ss 62(2)(a) and (b) which provide that the application must contain the following details:

- (a) information, whether by physical description or otherwise, that enables the boundaries of:
 - (i) the area covered by the application;
 - (ii) any areas within those boundaries that are not covered by the application ;
 to be identified;
- (b) a map showing the boundaries of the area mentioned in subparagraph (a)(i).

[9] The applicant has endeavoured to comply with this requirement via the information that is found in Schedule B, which refers to information in Attachments B and B1 and the map which is found in Attachment C of the application.

[10] Although I understand that it is not the task of the Registrar to undertake an assessment of the merits of the information and map when considering the claim against the condition of s 190C(2),² the conflicting and confusing nature of the materials contained in the application as to the area it covers does not, in my view, even allow a base-line assessment for the purposes of s 190C(2). To illustrate:

² See *Northern Territory v Doepel* (2003) 133 FCR 112; [\[2003\] FCA 1384](#).

- (a) Paragraph 1 of Attachment B and the typewritten list within Attachment B1 indicates that the area covered by the application is made up of the approximately 150 land parcels listed in Attachment B1, plus an additional two areas referred to in the handwritten notes at the end of Attachment B1.³
- (b) There is, however, another handwritten note at the end of Attachment B1 stating 'Marked in Green Gunggandji' which could indicate that the application only covers the 38 land parcels listed in Attachment B1 circled with a green pen and not the entirety of the parcels listed in Att B1.
- (c) Schedule L of the application indicates a claim to the benefit of s 47A in relation to land parcel 113/SP132575, the second parcel listed on the fourth column of Attachment B1. The confusion generated by the statement in Schedule L is that 113/SP132575 is not a parcel circled in green and may therefore not be part of the area covered by the application, if I have correctly interpreted the handwritten note at the end of Attachment B1 that it is only the circled parcels that are claimed;
- (d) The map showing the external boundaries of the area covered by the application shows an entirely different area to that described in Attachment B1. It shows a claim to all claimable⁴ land within the Cairns region from Gordonvale to Palm Cove and not just the land parcels listed in Attachment B1. I also note that of the land parcels circled in green in Attachment B1, some of them lie outside the northern reaches of the boundary shown in the map in Attachment C.

[11] I am of the opinion that the information provided is of such a contradictory and confusing nature that it cannot be said that the application contains the details required by s 62(1)(a) and (b). It follows that I am not satisfied that the claim satisfies the condition of s 190C(2).

Unable to determine the claim against the conditions in s 190B

[12] The nature of this failing is such that I find myself unable to assess the claim against all of the merit conditions in s 190B. Without information that identifies the area covered by the claim and a map that shows the external boundaries of the area, I am unable to determine if the claim satisfies those of the conditions in s 190B which are predicated on knowing, with reasonable clarity or certainty, the area covered by the application.

³ I note that Attachment B1, minus the handwritten notes, is in the same terms as the description of the area covered by the Yirrganydji (Irukandji) People native title determination application (QUD602/2012).

⁴ By this I mean a claim to land and waters not excluded from claim as a result of the extinguishment described in paragraphs 2 to 5 of Attachment B.

[13] For instance, I am unable to determine under s 190B(5) whether the factual basis on which it is asserted that the native title rights and interests exist is sufficient to support that assertion and, in particular, whether the factual basis supports the assertions of ss 190B(5)(a) to (c):

- (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 interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[14] I am unable to determine whether, *prima facie*, at least some of the native title rights and interests claimed in the application can be established under s 190B(6), in the absence of information which identifies the area covered by the application.

[15] I am unable to determine whether at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the application area under s 190B(7), in the absence of information that identifies that area so covered.

[16] Finally, I am unable to determine whether the claim satisfies the condition of s 190B(8), which assesses the claim against s 61A, which in turn forbids the making of applications where there have been previous native title determination applications or exclusive or non-exclusive possession acts. In the absence of information identifying the area covered by the application, I am unable to assess the claim against this condition.

Section 190C(4)

[17] Section 190C(4) provides:

- (4) The Registrar must be satisfied that either of the following is the case:
 - (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; 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.

[18] I have reached the view that there is significant doubt as to whether the Kungganjdi /Gunggandji People native title claim group described in Schedule A of the application have in fact been given an opportunity to authorise the making of this claim. Part A of the application (page 2 of the Form 1) states that authority stems from a meeting attended by the native title claim group on 30 July 2014 at the Kangaroo Football Park in Irene Street, Cairns. The application is accompanied by documentary evidence concerning this meeting, namely:

- (a) a form of the Notice given for the 30 July meeting titled 'Gunggandji Meeting for Native Title of Gunggandji "Kimuy" (Cairns) People';
- (b) an Agenda for the 30 July meeting stating that it is 'notice to all Gunggandji People ... Cairns, Yarrabah and where ever you reside' to 'discuss the Native Title Application for Cairns' and to particular consider two agenda items for establishing a 'Gunggandji Kimuy Tribal Elders Council' and a 'Gunggandji Kimuy Aboriginal Corporation';
- (c) the Minutes taken at the 30 July meeting.

[19] I refer to the following matters of concern that arise from my consideration of the above documents.

[20] Firstly, the form of Notice does not stipulate that the meeting attendees will be asked to authorise the making of a native title determination application by the Gunggandji/Kunggandji People. The notice merely indicates that there will be a discussion of the native title aspirations of 'Gunggandji "Kimuy" (Cairns) People'.

[21] Secondly, the Agenda indicates that the matters for discussion at the meeting relate only to the establishment of an Elders Council and an Aboriginal Corporation. There is no mention in the Agenda of the Gunggandji/Kunggandji People being asked to authorise an applicant to make a native title application on their behalf.

[22] Thirdly, the meeting minutes do not record the passing of any resolution from which it could be said that those in attendance authorised the making of a native title determination application on behalf of the Gunggandji/Kunggandji People, as they are described in Schedule A of the application.

[23] Finally, the most telling problem with the material is the content of the third resolution documented on pg 3 of the meeting minutes. This resolution is to the effect that those Gunggandji persons whose ancestors are named in Yarrabah native title claims will need to give their permission before their ancestors can be used for a Gunggandji claim over Cairns and this would be achieved by inviting the Gunggandji people to a meeting in October to give their approval.

[24] As is indicated by my consideration of the information, there are significant doubts in my mind as to whether the native title claim group was even asked to authorise the making of this application at the meeting on 30 July 2014. I am also concerned that Sarah Addo and Sam Addo have not turned their minds to explaining in their accompanying affidavits how they claim to be authorised.

[25] In light of these problems with the material before me, I am **not satisfied** that the applicant is authorised by all the other persons in the native title claim group to make the application and to deal with matters arising in relation to it.