NATIONAL NATIVE TITLE TRIBUNAL

RECONSIDERATION OF CLAIM

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

Application Name:	**Yugara/YUgarapul People**
NNTT file no:	**QC2011/008**
Federal Court of Australia file no:	**QUD586/2011**
Tribunal:	**Member Helen Shurven**
Place:	**Perth**
Date:	**11 February 2015**

Legislation *Native Title Act 1993* (Cth) ss 29, 61, 63, 64, 123, 190A, 190B, 190C, 190D, 190E, 190F, 223

Cases *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126 ('*Cadbury v Registrar of Trade Marks'*)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*'Gudjala v Native Title Registrar*')

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Waters [2002] FCA 1517 ('*Lawson v Minister for Land and Waters*')

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] 214 CLR 422

Northern Territory of Australia v Doepel 2003 FCA 1384 (**'***Northern Territory v Doepel*')

Powder Family, on behalf of the Jetimarala People v Registrar, Native Title Tribunal [1999] FCA 913 (**'***Powder Family v Registrar, National Native Title Tribunal'***)**

Quall v Native Title Registrar (2003) FCA 145

Risk v National Native Title Tribunal [2000] FCA 1589

Sandy on behalf of the Yugara People v State of Queensland (No 2) [2015] FCA 15 (**'***Sandy v State of Queensland (No 2)*')

Stock v Native Title Registrar [2013] FCA 1290

Introduction

[1] On 27 August 2014, Ms Radhika Prasad, a Delegate ('the Delegate') of the Native Title Registrar ('the Registrar'), gave notice pursuant to s 190D(1) of the *Native Title Act 1993* (Cth) ('the Act'), of her decision not to accept the Yugara/YUgarapul People ('the Applicant') native title determination application for registration, pursuant to s 190A of the Act. The Delegate reached this conclusion because the application did not, in her opinion, meet the following statutory condition:

- s 190C(4)(b) - Applicant is authorised to make the application

[2] By letter dated 27 August 2014, Mrs Tracey Jefferies, Acting Case Manager in the Brisbane Registry, wrote to the Applicant, care of Mrs Ruth James, the representative of the Applicant, notifying of the Delegate's decision. The persons collectively comprising the Applicant are Mr Desmond Sandy, Mrs Ruth James and Ms Pearl Sandy.

[3] On 10 September 2014, Mr Jonathan Fulcher from the law firm Hopgood Ganim, on behalf of the Applicant, applied for reconsideration of the claim, pursuant to s 190E(1) of the Act. An Applicant may not seek reconsideration if an application has already been made to the Federal Court under s 190F(1) for review, or if there has been a previous reconsideration request (s 190E(3) and (4)). Neither of these circumstances applied in this matter. The reconsideration application was made in writing, within 42 days of the s 190D(1) notice and outlined the basis on which the reconsideration is sought (as required per s 190E(2) of the Act). Consequently, the National Native Title Tribunal ('the Tribunal'/'NNTT') is empowered to reconsider the claim. All references in this decision to sections of legislation will be to the Act, unless otherwise specified.

[4] The reconsideration must be conducted by a single member of the Tribunal (as per s 190E(5) of the Act). On 12 September 2014, the President appointed me, pursuant to s 123(1)(cb) of the Act, to be the person to constitute the Tribunal for the purposes of reconsidering the claim.

[5] The application for reconsideration dated 10 September 2014, set out the following grounds for seeking reconsideration (emphasis in original):

Reasons for seeking a reconsideration of the registration test decision by a Tribunal member

1. The only aspect of the native title determination application which did not meet the requirements of the registration test was that associated with section 190C(4)(b). That section provides that the Registrar must be satisfied that 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. As you are aware, the word "authorised" is defined in section 251B.

   In paragraph [82] of her reasons, the Delegate seeks to draw inferences from the evidence before her. In particular the Delegate seems to be unsure about two of the Kittys that are referred to in the Supplementary Report of **[Anthropologist 1 name deleted]** dated 3 December 2013. The Delegate refers to one of these Kittys as the Kitty associated with **[Name 1 deleted]** grandson **[Name 2 deleted]** (paragraph [82], registration test decision). We will refer in this letter to this Kitty as the "**Sandow's Kitty**" The Kitty who is referred to as Kitty (in particular her daughter Molly and husband Ted Myers of Brisbane) is referred to in this letter as the "**Myers Kitty**". The Delegate refers to the Sandow's Kitty as "another apical ancestor" or "ancestor" [84] & [85] [86] & [87].

2. We respectfully request that you note the following:
   (a) The Myers Kitty and Sandow's Kitty are separate and distinct people with different descendants.
   (b) The Sandow's Kitty's connection to the Sandow family was **unknown** to the Yugara/Yugarapul People at the time of the authorisation meeting in March 2013.
   (c) The Myers Kitty was identified as an apical ancestor as part of the amended claim group description and authorised at the authorisation meeting on 24 March 2013.
   (d) The Sandow's Kitty descent line:
      (1) did not attend the authorisation meeting (because no one in the claim group knew of the existence of the Sandow's Kitty at that time);
      (2) were not referred to at all, nor described, nor their Kitty identified as an ancestor, in the notice for the authorisation meeting; and
      (3) are not referred to in paragraph 96 of the registration test decision.

3. **[Anthropologist 1 name deleted]**'s supplementary report that was researched and prepared later in 2013 identified the Sandow's Kitty ***after*** the authorisation meeting on 24 March 2013. Her recommendation in her report to include the Sandow's Kitty in the claim group description was just that, a recommendation. Additionally we respectfully submit that, despite **[Anthropologist 1 name deleted]**'s recommendation about the Sandow's Kitty in the Supplementary Report dated 3 December 2013, the evidence in the body of **[Anthropologist 1 name deleted]**'s 2013 report is equivocal at best in relation to this other Kitty descent line regarding the claim area as **[Anthropologist 1 name deleted]** did not have sufficient evidence to make definitive conclusions.

4. In light of further evidence including an opinion from **[Anthropologist 2 name deleted]**, the First Applicant has requested **[Anthropologist 1 name deleted]** to review of all relevant evidence submitted to date regarding the Sandow Kitty descent line. We will provide this additional information under separate cover.

5. In any event, as you will see from the next paragraph, his Honour was not minded to give leave to include the Sandow's Kitty in the claim group description.

6. In paragraph [84] of the registration test decision, the Delegate refers to a paragraph of an affidavit of Mr Desmond Sandy of 24 February 2014 that was struck out. It was **not open** to the Delegate to refer to this paragraph.
   (a) The reason for the paragraph having been struck out was that in December 2013 his Honour Judge Jessop only gave leave under section 84D of thee NTA (Transcript of the proceedings QUD 586 of 2011 and QUD 6196 of 1998 (**Transcript**), Day 4, page 402 line 31, 2 December 2013) to identify one Kitty as the Myers Kitty and allowed the First Applicant to amend the native title determination application to conform with the Points of Claim filed on 31 May 2014 [sic – 2013] (Transcript Day 13: P-1609 Lines 8 & 9, 16 December 2013) which was based on the authorized claim group in March 2013:

      HIS HONOUR: if you wish to file an amended application which conforms with your Points of Claim filed on 31 May 2013, I will allow that amendment.

   (b) However, his Honour did not give leave for the First Applicant to amend the claim group description to include any additional descent groups, as one of the descent groups proposed during the hearing was the Sandow's Kitty. Consequently, the descendants of the Sandow's Kitty did not, and could not, form part of the claim group at authorisation, both because:
      (1) The Sandow's Kitty was not known to the claim group at all on 24 March 2013 (the date of the authorisation meeting); and
      (2) His Honour would not permit the Sandow's Kitty to be added as an apical ancestor to the claim group description.

7. In conclusion we do not think that it was open for the Registrar's Delegate to make the decision that she does at paragraph [89] of her reasons for decision dated 27 August 2014. We respectfully submit that, based on the information known by the claim group at the time of the authorisation meeting in March 2013 the native title determination application was properly authorised for the purposes of section 190C(4)(b) and section 251B of the Native Title Act 1993 (Cth).

8. We therefore respectfully request that the Tribunal consider reapplying the registration test to the native title determination application by means of a review internally of the delegate's decision of 27 August 2014 at section 190C(4)(b).

[6] With reference to the 'claim group description' as referred to in the grounds for seeking reconsideration, I note that Schedule A of the Native Title Determination Application (Form 1) filed by the Applicant on 1 April 2014 describes the claim group as follows (emphasis in original):

> The biological and/or traditionally adopted descendants of the following people:
> - *Bilin*/*Bilinba*/Jackey (in particular King Jackey Jackey/*Kawae-Kawae* and 3 wives Nellie, Mary and Sarah; and brother-in-law Minnippi Rawlins);
> - *Gariballie*/*Kerwalli*/King Sandy (and wife in particular *Naewin*/Sarah);
> - Alexander Sandy and *Paimba*/Mary Ann Mitchell;
> - John/Jack *Bungaree*/King Sandy (and in particular his wife Mary Ann Sandy);
> - Lizzie Sandy (and in particular her husband William Mitchell);
> - Lizzie Sandy/Brown (in particular her son Billy Brown who married Topsy);
> - Kitty (in particular her daughter Molly and husband Ted Myers of Brisbane)

[7] In a further letter dated 29 September 2014, the Applicant provided more detail in relation to the reconsideration. While this letter was largely focused on reasons why the Tribunal should not publish the Delegate's original decision at that time, the Applicant's information at paragraph 2 provides some further clarity to the reconsideration grounds, as follows (emphasis in original):

> 2. It is principally in respect of authorisation that we believe the delegate has erred in her assessment of relevant matters under that head if the registration test. In particular it is possible the delegate mis-interpreted section 61(1) of the Act: namely, in relation to "*A person or persons authorised by all the persons in (the native title claim group)…*" meaning "in" the native title claim group was rearranged by the Delegate at [86] to: "*the native title claim group, being all the persons*" implying all (possible) persons. This is not the proper construction of section 61(1), we respectfully submit. It is only "all the persons" from the authorised native title claim group as authorised at the relevant meeting. In the case of the YY (Yugara/YUgarapul) people, they authorised the native title claim group description on 24 March 2013; this was filed in the Federal Court as the YY Points of Claim on 31 May 2013 and was subsequently sent to the NNTT on 1 May 2014.

[8] The Applicant also provided further information in a letter on 17 October 2014, which stated (emphasis in original):

> Without limiting anything said in our previous correspondence to the NNTT on this matter and on which we continue to rely, our respectful submissions is that the applicant was properly authorised for the purposes of section 190C(4)(b) because:

1. The Sandow's Kitty (see page 1 of our letter of 10 September 2014 for the meaning of this term) was not known to the claim group to be part of the group at the time of the authorisation of the applicant on 24 March 2013. Therefore the Sandow's Kitty's descent group simply could not have been present at or involved in the authorisation meeting on that day;
2. As such, respectfully, the delegate could not expect that the Sandow's Kitty's descent group should somehow have been involved in authorisation of the applicant on 24 March 2013. Despite subsequent research being undertaken by **[Anthropologist 1 name deleted]**, the claim group's anthropologist, indicating that the Sandow's Kitty's descent group should be included in the claim, that research was:
   (a) Recently reviewed by **[Anthropologist 1 name deleted]** and her opinion is revised and updated from additional evidence submitted at the trial (see attached updated report by **[Anthropologist 1 name deleted]**; in that report she refers to the Sandow's Kitty as "Old Kitty"); and
   (b) In any event, subsequently his Honour Justice Jessup did not in fact allow the Sandow's Kitty to be included in the claim group description (see Transcript of Proceedings in matter QUD 586 of 2011 and QUD 6196 of 1998, Day 4, p 407, lines 20-26 on 2 December 2013) (see also his judgment in Sandy on behalf of the Yugara People v State of Queensland [2014] FCA 243);
   (c) His Honour allowed the claim group description to be amended to accord with the Points of Claim filed by the applicant and thus to accord with the manner in which the claim group description and the applicant had been authorised on 24 March 2013 (see Transcript of Proceedings in matter QUD 586 of 2011 and QUD 6196 of 1998, Day 4, p 403, lines 38-43 on 2 December 2013).

3. Respectfully we further submit that the delegate should not have referred to a struck-out section of the affidavit of Mr Desmond Sandy of 24 February 2014 which spoke about the Sandow's Kitty. This was simply not evidence available to the Delegate, as it was not in evidence and had never been in evidence in the Federal Court proceedings.

With respect to **[Anthropologist 1 name deleted]**'s revised findings, we make the simple point that the trial in December 2013 provided further evidence for **[Anthropologist 1 name deleted]** to assess in respect of the Sandow's Kitty. This evidence had not been available to her when she compiled her 2013 Supplementary Report prior to the trial dates in December 2013. **[Anthropologist 1 name deleted]** sets out in detail the basis of her reassessment in her report attached to this letter.

Procedural and other requirements

[9] As at the date of the reconsideration application, and as at the date of this decision, there were no s 29 notices involving land and waters that fell within the boundaries of the claim

application under reconsideration. Where there is no s 29 notice, or other relevant time period which applies to the reconsideration, the claim is to be reconsidered 'as soon as is practicable' (see s190E(8) of the Act).

[10] On 1 October 2014, Mrs Jefferies, wrote to the Applicant, care of Mr Fulcher, informing the Applicant that the native title claim would be reconsidered and that I had been appointed to carry out the reconsideration. Mrs Jefferies pointed out that on reconsideration a Member could consider not only the information before the Delegate, but any other information that the Member considers relevant, including any additional material submitted for the purposes of the reconsideration.

[11] Mrs Jefferies also informed the Applicant that procedural fairness may be afforded to the State Government of Queensland ('the State Government'/'the State'), including an opportunity to comment on material relevant to the reconsideration. Mrs Jefferies also provided information on other matters relevant to the reconsideration process.

[12] Between 29 September and 24 November 2014, the Applicant sought to provide additional materials to the Tribunal for the purposes of the reconsideration. The additional materials provided by the Applicant were:

1. Letters dated 17 October and 29 September 2014 from the Applicant's lawyer to the NNTT
2. Further supplementary anthropological report by **[Anthropologist 1 name deleted]**, 17 October 2014
3. Extract from Federal Court Transcript of Proceedings in QUD586 of 2011 Yugara/ Yugarapul People and QUD6196 of 1998 Turrbul People on 2 December 2013 (p400-p407)
4. Extract from Federal Court Transcript of Proceedings in QUD586 of 2011 Yugara/ Yugarapul People and QUD6196 of 1998 Turrbul People on 16 December 2013 (p1608-p1609)
5. Points of Claim filed in this application on 31 May 2013
6. Authorisation meeting minutes dated 24 March 2013
7. A copy of the public notice of the authorisation meeting published in the Courier Mail on 9-10 March 2013
8. The attachment to the notice of an authorisation meeting
9. Material provided by the Applicant on 30 April, 2014 to the Registrar's

Delegate in relation to the registration test:

a. **[Anthropologist 1 name deleted]** FAIRA report 2000 – Amended Genealogy: Sandy, Bungaree and Jackey
b. Greater Society: marriage and song (see Ruth James email dated 22 & 24 Oct and Mrs Jefferies' email dated 23 Oct for items 8-10)
c. **[Anthropologist 1 name deleted]** re Lauterer 1894 re Jackey-Jackey's father song "60 years ago" email 4 October 2013

10. Material provided by the Applicant on 1 May 2014 to the Registrar's Delegate in relation to the registration test:
    a. Sandy – Ugarapul tribe of SEQ
    b. King Jacky Coorparoo in 1896 – two articles
    c. Brisbane tribal name references from 1858 re spellings: Mygun-tian, Meyan-tian, Mygyn-tian, Meeann-jin, Maginn-chin, Magen-jie, Magen-chen, Mi-an-jin
    d. Origin of the Turrubul aka Toorbul name for the Ningi people email **[Anthropologist 2 name deleted]** 19 April 2012
    e. Biographies of Thomas Petrie (1831-1910) and Reverend William Ridley (1819-1878)
    f. Aboriginal Pathways by Steele: Pages 13 and Fig 8 re Tom Petrie misnamed the Brisbane people Turrbul
    g. Reverend Ridley 1855 Appendix 1, page 435 in J.D. Lang, *Queensland, Australia* (Lond, 1861)-
    h. Yugarabul Placenames of the Nundah district (Denis Cleary, BHG PAPERS NO.9: BRISBANE
    i. **[Anthropologist 2 name deleted]** email re J.G. Steele "Brisbane Town in Convict Days" – a word list page 288 and 289 (Eipper)
    j. Watson 1944: Placenames SEQ & Vocab SEQ and SEQ Customs

11. Material provided by the Applicant on 9 May 2014 to the Registrar's Delegate in relation to the registration test:
    a. Miguntyun (Bell 1934)
    b. King Sandy's place names in Yugarabul language 1923 re Mt Cootha and **[Anthropologist 2 name deleted]** 12.2.2013

12. Material provided by the Applicant on 18 June 2014 to the Registrar's Delegate in relation to the registration test:

    - Material for identification list and Exhibit List from Federal Court Proceedings in QUD586 of 2011 Yugara/ Yugarapul People and QUD6196 of 1998 Turrbul People

13. Material provided by the Applicant on 19 August to the Registrar's Delegate in relation to the registration test:

    - "No": Yuggera: Steele 1984 & Yaggaar: Petrie 1904 (& 1901)

14. Copy of Delegate's reasons for decision dated 27 August 2014 (redacted version)

15. Material provided by the Applicant on 24 October 2014 to Member Shurven in

relation to the reconsideration:

- Petrie 1901 & 1906 articles - Annexure in Affidavit of **[Anthropologist 2 name deleted]** 2013

16. Material provided by the Applicant on 24 November 2014 to Member Shurven in relation to the reconsideration:

- The "Duke of York's" / [Miguntyun] Tribe 1838: 'Moreton Bay. From a Correspondent', from The Australian, Thursday 13/12/1838, p 2.
- Duke of York's Language - reply by **[Anthropologist 2 name deleted]** 22 March 2012 1:05:37 PM AEST
- Pathway from Beaudesert to Fingal/Tweed Heads, (JG Steele 1984 extract and Bray's "The Kynnumboon Diaries" 1865-1866 in Exhibit Y31:24 [50e], 120)
- Copy of Death record of William Drumley 1951

[13] As the Delegate had not considered, on the face of it, that the original application was likely to be accepted for registration, quite correctly the State Government had not been provided with additional information provided to the Delegate between 30 April and 19 August 2014 for comment. Given the additional materials provided by the Applicant to me for this reconsideration, and the fact that the reconsideration focused on a single factor (that is, s 190C(4)(b)), I felt it prudent the State now be provided with a copy of the materials provided by the Applicant to the Delegate between 30 April and 19 August 2014 (apart from those the State already had through the Federal Court process), together with the additional materials provided up to 24 November 2014 for the reconsideration process.

[14] The Applicant noted parts of the Delegates decision contained culturally sensitive material and the Delegate considered the request from the Applicant to redact parts of the decision. The Delegate edited the decision taking into account privacy and cultural or customary concerns. The Delegate did not redact any information that was not of a private or cultural nature and which formed part of her reasoning. The redacted version was then sent to the State. As the Applicant had also requested some of these materials be kept confidential, Mrs Jefferies wrote to the State Government on 26 November 2014, outlining those materials (as listed at paragraph [12] of this decision) and requesting a confidentiality undertaking for items 2, 6, 10a, 11b and 14. The confidentiality undertaking

was signed and returned by the State on 2 December 2014. On 3 December 2014, the materials were provided to the State for consideration, with their response due on or by 23 December 2014. The State provided their response on 23 December 2014, and the Applicant was provided with that response on 24 December 2014, and, given the holiday period, was given until 30 January 2015 to provide a reply, should they wish to do so.

[15] The further materials provided in the reconsideration of this matter, as discussed in more detail later in this decision, included the response from the State dated 23 December 2014, and a reply to that response from the Applicant dated 21 January 2015.

[16] For reasons that are outlined below, I have also considered the decision of His Honour Jessup J in *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 ('*Sandy v State of Queensland (No 2)*'), made on 27 January 2015. I notified the parties that His Honours decision would be considered and that they may provide final submissions by 9 February 2015. The Applicant provided final submissions on 3 February, and on 9 February the State indicated it would rely on its previous submissions regarding the reconsideration of the registration test decision.

Nature of a reconsideration under s 190E(1)

[17] Section 190E(1) of the Act provides that the Applicant may apply to the Tribunal 'to reconsider the claim'. The Member undertaking the reconsideration is not evaluating the decision of a Delegate, but is required to independently assess the claim against the relevant statutory conditions. Nonetheless, when seeking a reconsideration the Applicant must, pursuant to s 190E(2)(c), state the basis on which the reconsideration is sought. It necessarily follows that a Member undertaking a reconsideration should have regard to the Applicant's stated basis for seeking reconsideration. In doing so a Member will, where appropriate, have regard to the decision of the relevant Delegate. This will be the case, for example, where there are elements of that decision which are not contested by the Applicant and with which the Member agrees.

[18] Furthermore, in paying due attention to the basis of the reconsideration, where this involves suggested errors in the reasoning or findings of a Delegate, then it is appropriate

that the Member address those issues when making his or her own decision. However, it is not the purpose of a reconsideration to review a Delegate's decision. It would be potentially counter-productive for an Applicant to focus all their attention on the reasoning of the Delegate, and fail to address the broader issues that are before a Member on reconsideration.

[19] It is on this basis that I have had regard to the decision of the Delegate. I have not approached this exercise on the basis that I am reconsidering her decision, but have referred to her reasons, where relevant, in order to ensure that the Applicant's stated basis for seeking reconsideration is fully addressed.

Registration Test General Principles

[20] Section 190A(1) requires the Registrar to consider any claimant application referred by the Federal Court pursuant to ss 63 or 64(4), subject to the proviso outlined in s 190A(1A) and s 190A(6A). If such an application satisfies all of the conditions prescribed by ss 190B and 190C, the Registrar must register the claim on the Register of Native Title Claims – s 190A(6). In other words, all of the conditions prescribed by these sections must be complied with, and there is no discretion vested in the Registrar to accept a claim if only a majority of the requirements of these provisions are met (see Mansfield J in *Quall v Native Title Registrar* (2003) FCA 145 (at [17]) ('*Quall v Native Title Registrar*')).

[21] When considering a claim, the Registrar must have regard to information contained in the application and, where permitted: in any other documents provided by the Applicant; any information obtained by the Registrar when searching registers of interests maintained by a government; and any information provided by a government that is relevant to the matters outlined in ss 190B or 190C (see s 190A(3)). Importantly, the Registrar, may, in addition, 'have regard to such other information as he or she considers appropriate' (see s 190E(7)(b)).

[22] The Registrar, or their Delegate, has a relatively broad discretion to consider additional material where the relevant statutory condition allows it. Starting with the decision of O'Loughlin J in *Risk v National Native Title Tribunal* [2000] FCA 1589 (at [24] - [25]) ('*Risk v*

National Native Title Tribunal'), the Federal Court has emphasised not only the correctness of considering a broader range of material than that specifically prescribed in s 190A(3), but also the risk that the Registrar (or their Delegate) could be in breach of their statutory obligations if such material was ignored.

[23] The decision whether to accept or not accept an application for registration is a purely administrative function, with the decision depending on whether the application satisfies the statutory criteria prescribed by ss 190B and 190C (see *Powder Family, on behalf of the Jetimarala People v Registrar, National Native Title Tribunal* [1999] 913 FCA (at [26] – [27]) ('*Powder Family v Registrar, Native Title Tribunal*').

[24] The State notes, in its letter to me dated 23 December 2014, that:

> The registration test requirements at s 190C of the Native Title Act 1993 (NTA) constitute threshold tests applied prior to the outcome of a determination, that if met, accord the applicant significant procedural rights under both the Native Title Act 1993 and the Aboriginal Cultural Heritage Act 2003 (ACA). It is a possible outcome in the present circumstances that if the Yugara/YUgarapul application is registered at this late stage, yet is unsuccessful at trial, that it would retain its status as an Aboriginal Party under the ACA. In the State's view, this is not an appropriate outcome. Despite the registration test being a lower threshold than that for a Court to be satisfied that the requirements of s 223 of the NTA have been met, it is the State's submission that you should have regard to the testing of the evidence in the Court proceedings in conducting this review.

[25] The Applicant, in their letter dated 21 January 2015, take the view that:

> It is not necessary to review all of the trial material to make the following argument. The Yugara/YUgarapul People, whom the state acknowledge in their final submission as being from the area they have claimed, will not achieve status as an Aboriginal party under the Queensland Indigenous Cultural Heritage Legislation.

[26] As per s 190E(7), regard can be had to any information I consider as appropriate in reconsidering the claim. In reading the judgment of Jessop J in *Sandy v State of Queensland (No 2)*, and the information provided in that judgment, I note the Federal Court proceedings relate to this application. It is appropriate that I consider the factual findings made in the circumstances, and arguably it is necessary for me to do so to reach a conclusion in relation to the reconsideration of this matter. The Applicant suggests it is inappropriate for the State to make a value judgment in relation to the status of the

Applicant under the *Aboriginal Cultural Heritage Act*. My view is that these issues flow on from, rather than being of effect to the careful assessment the relevant information in context of the requirements of the *Native Title Act* and the decision as to whether or not the claim should be registered.

Information considered when undertaking the reconsideration

[27] In reconsidering a claim, a Member must have regard to any information the Delegate was required to have regard pursuant to s 190A(3)–(5) when considering the claim (see s 190E(7)(a)). However, a Member can also have regard to any other information which is considered appropriate for the purposes of the reconsideration (see s 190E(7)(b)).

[28] For the purposes of s 190E(7)(a), I have had regard to the documents mentioned by the Delegate at paragraph [11] of her reasons, namely:

- the information contained in the application and accompanying documents;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2014/0570) prepared by the Tribunal's Geospatial Services on 11 April 2014 (geospatial assessment);
- the additional information provided on behalf of the Applicant on 30 April, 1 and 30 May, 13, 18 and 19 June and 19 August 2014; and
- the results of the Delegates searches using the Tribunal's mapping database.

[29] I have also had regard to the additional materials provided by the Applicant as outlined at [12] of this reconsideration decision, as well as: (a) a letter from the State dated 23 December 2014 outlining their view of whether the conditions of registration are satisfied in relation to the claim; (b) a letter from the Applicant representative dated 21 January 2015 in response to the States 23 December letter; (c) the decision of Jessup J in the matter of *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15; and (d) a final letter from the Applicant dated 3 February 2015.

Background to the Yugara/YUgarapul People native title determination application

[30] The claim covers an area of approximately 1167 square kilometres of land, is located within the State of Queensland and the local government authorities of Brisbane City

Council, Logan City Council, Moreton Bay Regional Council and Redland City Council. No portion of the claim covers any waters.

[31] As noted at [2], the persons collectively comprising the Applicant are Mr Desmond Sandy, Mrs Ruth James and Ms Pearl Sandy. The Registrar of the Federal Court of Australia ('Federal Court'), pursuant to s 63 of the Act, gave a copy of the Yugara/YUgarapul People native title determination application (QUD-586/2011) to the Native Title Registrar ('Registrar') on 7 December 2011. On 31 January 2012, the application was not accepted for registration as it did not satisfy all of the conditions as set out in sections 190B and 190C of the Act. On 16 February 2012, an amended application was filed with the Court, and provided to the Registrar on 21 February 2012 - on 10 May 2012 it was not accepted for registration.

[32] On 1 April 2014, the Registrar of the Federal Court gave a copy of the application to the Native Title Registrar pursuant to s 64(4), which again triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act. The amendments to the application included changes to Schedule A, O and R, as well as Attachment R. Schedule S had been altered to reflect those changes. On 27 August 2014, as outlined at [1] of this decision, the application was not accepted, and subsequently this reconsideration process was commenced at the request of the Applicant.

[33] At the same time as the Registrar has been considering the native title claim application, the native title determination application was being considered by His Honour Jessup J in the Federal Court. As noted earlier, the Federal Court proceedings relate to this application. The State of Queensland is one of the respondents to the matter.

[34] On 27 January 2015, Jessup J handed down a decision in the Federal Court (*Sandy v State of Queensland (No 2)*). That determination relates to the whole of the area covered by the claim made in the application and its effect is, in summary, that native title does not exist in favour of the claim (nor in fact in favour of the overlapping claim of the Turrbul People (QUD6196/1993)).

[35] In a letter to the Tribunal dated 21 January 2015, written when the Federal Court decision had been scheduled for release on 27 January 2015, the Applicant stated that:

> …we do not believe it is necessary for the Member to reconsider all the evidence of the Court proceedings in conducting this review. Indeed, this would be a time consuming process that is not warranted and would only serve to unnecessarily complicate this reconsideration of the Yugara/YUgarapul People's native title determination application, which need only be a question of addressing the deficiencies identified by the Delegate in the initial decision.

[36] However, taking into account the decision in *Sandy v State of Queensland (No 2)*, does not require me to reconsider all the evidence that was before the Federal Court. The Tribunal and the Federal Court are considering different questions, with different thresholds. In their letter to the Tribunal dated 3 February 2015, the Applicant refers to *Stock v Native Title Registrar* [2013] FCA 1290 ('*Stock v Native Title Registrar*') and the conclusion of Barker J (at [64]) that 'the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists'. I agree that is not the role of the Tribunal in relation to a reconsideration. However, where a Court has made findings of fact that relate directly to a matter or matters on which a Member is making a decision, it is my view that those findings of fact must be taken into account in the reconsideration. As emphasised through this reconsideration decision, I have not simply adopted the findings made by the Federal Court in *Sandy v State of Queensland (No 2)* in making this reconsideration decision.

[37] Some guidance is provided by Mansfield J in *Northern Territory of Australia v Doepel* (2003) 2003 FCA 1384 (at [16]) ('*Northern Territory v Doepel*'), who stated that:

> Its [the Tribunal's] task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application.

[38] While this suggests the effect is that the Registrar should not weigh conflicting evidence, my view is that Mansfield J was not contemplating a situation akin to the one which has eventuated in this matter. That is, the situation where a Court had made findings of fact on evidence and information that is also before the Registrar. In their letter to the Tribunal dated 3 February 2015, the Applicant notes the further documents which are before me, and which were not before the Federal Court. These appear to refer to item 2 and 10(b) as outlined at [12] of this reconsideration decision, and the witness statement of

[Name 3 deleted] and his Community and Personal History document (dated 25 November 2013, provided to Ms Ann Stokes, former Tribunal Case Manager, on 1 May 2014).

[39] The decision of Finkelstein J in *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126 ('*Cadbury v Registrar of Trade Marks*') assists in considering this point, as the Federal Court addressed the expectations upon an administrative decision maker, in the course of making a decision and giving weight to findings of a judge. Finklestein J made the following pertinent observations:

> A tribunal may also accept as evidence the reasons for judgment given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error...I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may, as I have said, be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it (at [18]).

[40] When a tribunal is required to decide the matter for itself, it is entitled to have regard to the findings of a Court. What weight it attaches to those findings will depend on a variety of considerations. While Finkelstein J indicated the following list was not intended to be exhaustive, the considerations can include: '(a) whether the tribunal has available to it more evidence than was before the judge; (b) whether the arguments put to the tribunal were made to the judge; and (c) whether the tribunal is a specialist body with expert knowledge of the subject matter' at [19]).

[41] In the present reconsideration process, I have, as a Member of the specialist National Native Title Tribunal, taken into account all documentation provided to me, including those materials which were not before the Federal Court. Nothing in those additional materials has led me to a different conclusion to that made by Jessup J in *Sandy v State of Queensland (No 2)*, particularly given the detailed analysis provided in the Federal Court reasons regarding: native title rights and interests (at [6]-[17]); aboriginal society in the claim area (at [28]-[71]); and the detailed analysis of the Yugara Peoples' ancestry (at [255]-[315]).

[42] I am comfortable that the findings of fact the Federal Court has made, which are also relevant to this reconsideration, are prima facie correct. Thus, I consider, it appropriate to give significant weight to those findings of fact where they are relevant to the matter that I must decide. In the reasons of *Sandy v State of Queensland (No 2)*, His Honour has made a number of adverse findings of fact which are relevant to this reconsideration of the claim application, and I have regard to those as per s 190E(7)(b). He summarised those findings (at [153]) by stating:

> Much of this evidence is concerned with stories, beliefs, fears, taboos, habits and activities which have relevance at the personal or family levels, and which might be expected to be present in an indigenous society having continuity in the Yorta Yorta [*Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422] sense. But they are not circumstances from which the continued existence of the society which existed at sovereignty might be inferred. In point of content, the matters to which I have referred above do not bespeak the existence of a normative system of laws and customs. Further, and crucially, the evidence does not cover anything more than a fraction of the period with which the court must be concerned: even to go back to the grandparents of the oldest of the Yugara applicants, there remains the better part of a century with respect to which the court does not have any relevant evidence.

[43] Further detailed comment is made in relation to the decision of Jessup J below, as relevant.

Non-contested findings of the Delegate

[44] Reconsideration by a Member is, as previously stated, a review de novo. Nonetheless, it is open to a Member to adopt, where appropriate, the reasons of the Delegate, where having independently considered the claim the Member has reached the same conclusion.

[45] As with the process undertaken by the Delegate, I am required to assess the material before me to determine if the Yugara/YUgarapul People application meets all the conditions prescribed by ss 190B and 190C. Despite their chronological sequence, the initial focus of attention is s 190C, which prescribes conditions about procedural and other matters. Much of the information prescribed by s 190C forms the basis for the application, while s 190B prescribes conditions about the merit of a claim. The absence of information

prescribed by s 190C may prevent a Delegate from determining if any or all of the merit conditions have been satisfied. For example, s 190E(11)(b) notes that where the Registrar is notified that they should not accept the claim, that notification should include reasons as to whether the Member undertaking the reconsideration feels it is not possible to determine whether the claim satisfies all the condition in s 109B, because of a failure to satisfy s 190C.

[46] In this matter, the Delegate was satisfied that the application met all the requirements mandated by s 190C, other than s 190C(4)(b). For the s 190B conditions, the Delegate was satisfied of each of these. However, the Delegate did not consider that all of the native title rights and interests claimed could be prima facie established. These are described in the section of this decision '*Contested findings of the Delegate: Subsection 190C(4)(b)*'. Nonetheless, for the purposes of this reconsideration, I have independently assessed all of the conditions mandated by both section 190B and 190C.

Subsection 190C(2)

[47] This subsection is essentially a procedural condition requiring the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other documents as required by ss 61 and 62 of the Act. The Delegate's decision was that the application did satisfy the condition of s 190C(2) because it does contain all of the details and other information and documents required by ss 61 and 62. As the Delegate herself outlines, it is not the role of the Registrar to undertake any form of merit assessment of the information contained in the application itself. The requirement is that the application contains the information referred.

[48] I have considered the contents of the application and the information, details and documents required by s 190C(2). I am satisfied that the claim itself appears to be brought on behalf of all of the members of the native title claim group for the purposes of this reconsideration. I am satisfied that the application is accompanied by the affidavit referred to in s 62(1)(a) and contains the details and other information referred to in 61 and 62(2). I have formed the same view as the Delegate in relation to this subsection.

[49] The application satisfies s 190C(2).

Subsection 190C(3)

[50] This subsection essentially requires the Registrar to be satisfied that there are no common claimants with any previous overlapping claim groups. On the basis of the information, the Delegate considered that the Turrbal People (QUD6196/1998; QC1998/026) native title determination application (Turrbal People application) was a 'previous application' within the meaning of s 190C(3). The Delegate then assessed whether there were any common claimants in any overlapping claims, specifically with the Turrbal People application. The Delegate formed the view that no person in the native title claim group for the Yugara/YUgarapul People was a member of the claim group for the Turrbal People and so the application satisfied the condition of s 190C(3).

[51] I have considered the Turrbal People application and have similarly formed the view that it is a 'previous application' within the meaning of s 190C(3). I have also considered the information about the claim groups for both applications. I am satisfied there are no common claimants with any previous overlapping claim groups.

[52] The application satisfies s 190C(3).

Subsection 190B(2)

[53] This subsection refers to the proper identification of the area of the claim and the Delegate was satisfied that the description and the map of the application area were sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to these particular land or waters. There is nothing in the materials before me to lead to a different conclusion. I am satisfied that the description and map are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

[54] The application satisfies s 190B(2).

Subsection 190B(3)

[55] This subsection requires satisfaction that persons in the native title claim group are either named in the application or that those persons are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. The application contains a description of the claim group outlined at paragraph [6] of this decision. Thus, I consider it is s 190B(3)(b) of which I must be satisfied.

[56] The native title claim group comprises those people who are biological descendants of the named apical ancestors or those persons who have been traditionally adopted. The Delegate found that 'the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether a particular person is a member of the group. Accordingly, focusing on the accuracy of the description of the native title claim group, I am satisfied of its sufficiency for the purposes of s 190B(3)(b)'. I am similarly satisfied and adopt the Delegates findings.

[57] The application satisfies s 190B(3).

Subsection 190B(4)

[58] This subsection outlines that there must be satisfaction 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 claimed native title rights and interests for this Applicant are as follows:

- The right to exclusive possession, occupation and use of the land;
- The right to live on the land;
- The right to access land and waters in the claim area;
- The right to maintain and protect sites of significance to the native title holders;
- The right to conduct, social, religious and cultural activities within the claim area;
- The right to harvest, fish, cultivate, grow and manage plants, timber, animals, birds and fish located within the claim area;
- The right to exchange plants, timber, animals, birds and fish located within the claim area with third parties for other things;
- The right to make things from plants, timber and animals located within the claim area;

- The right to exchange things made from plants, timber and animals located within the claim area with third parties for other things;
- 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;
- 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;
- 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; and
- 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.

[59] The Delegate was satisfied that 'the rights and interests identified are understandable and have meaning…I note that although the claim to exclusive possession is broadly asserted, I am of the view that it does not offend the requirements of this provision. I have considered the description of the native title rights and interests claimed and find that the rights and interests claimed are sufficient and fall within the scope of s 223 and are readily identifiable as native title rights and interests' (at [118]-[120] of the Delegate's decision). As such, the Delegate was satisfied that the application met the condition of s 190B(4).

[60] I have considered each of the claimed rights and interests in the application and I have also formed the view that they are clear and understandable and have meaning as native title rights and interests (as that term is defined in s 223). I agree that for the purposes of s 190B(4) I need only decide whether the rights and interests claimed are readily identifiable, and my view is that they are, on their face.

[61] The application satisfies s 190B(4).

Subsection 190B(5) and 190B(6)

[62] In consideration of s 190B(5), I must be satisfied (emphasis added):

> (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.

[63] This requires that the Registrar must consider the factual basis is sufficient to support each of the assertions in the relevant subsections. This subsection essentially requires the provision of a general description of the factual basis upon which the claimed native title rights and interests are said to exist. In that regard, I understand that I must consider whether that general description is sufficient to support each of the assertions at s 190B(5).

[64] Section 190B(6) requires the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. The implications of this requirement are explained in the Note to subsection 190B(6) which states that 'if the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established'. It is only those registered rights and interests that can be taken into account in a 'right to negotiate' process or by the arbitral body pursuant to s 39.

[65] 'Native title rights and interests' are defined by s 223 of the Act. There is a difference between those rights and interests that are claimable, and those which can be established.

[66] Of assistance when making an assessment pursuant to this subsection is the following explanation by Mansfield J in *Northern Territory v Doepel* (at [126]-[127]):

> Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim.
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interest are claimed. It does not itself

> require some weighing of that factual assertion. That is the task required by s 190B(6).

[67] This supports a logical nexus existing between s 190B(5) and s 190B(6). It follows that if the factual basis for the claimed native title cannot be satisfied pursuant to s 190B(5), then the Registrar would not be able to be satisfied that, prima facie, at least some of the native title rights and interests can be established. In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*'Gudjala v Native Title Registrar*'), Dowsett J stated (at [39]) that:

> Subsection 190B(5) of the Act refers to the factual basis upon which it is asserted that the claimed Native Title rights and interests exist. This is clearly a reference to the existence of rights vested in the claim group. Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests).

[68] Given the above, and given the unique nature of the situation before me, where the Federal Court in *Sandy v State of Queensland (No 2)* has made a decision that no native title rights and interests exist in favour of the Yugara YUgarapul People, I am of the view that it is appropriate to address the requirements of both subsections 190B(5) and 190B(6) concurrently.

[69] I have noted above in these reasons that the Federal Court is considering different questions with different thresholds to that which I am considering. His Honour's decision in *Sandy v State of Queensland (No 2)* refers to the nature of the inquiry as concerning the continued existence of a normative system which would give rise to such native title rights and interests being possessed by the current native title claim group, and the threshold as being that required by s 223 in relation to a determination of native title. Whereas I am considering the rights and interests in terms of the registration of the claim. Nonetheless, His Honour's factual findings have resonance in my consideration of both ss 190B(5) and 190B(6).

[70] I have also set out that I consider this situation to be quite different to that which was before Mansfield J in *Northern Territory v Doepel*, where His Honour held the task at s 190B(5) did not involve a weighing of conflicting material, but rather involved the

Registrar accepting the truth of all asserted facts and assessing only their sufficiency (at [17] and [127]).

[71] Where the Court has made adverse findings in relation to those same facts, it is difficult to reconcile that in such circumstances, the task of the Registrar (or Member on reconsideration) at s 190B(5) would involve ignoring the Court's findings and continuing to assume those facts are true.

[72] For the purpose of s 190B(5)(a), the requirement is that I be satisfied of the sufficiency of the factual basis of the claim to support the assertion that there is and has been a continuing association with the application area dating back to the predecessors of the native title claim group (see *Gudjala v Native Title Registrar* at [51]-[52]). His Honours factual findings in *Sandy v State of Queensland (No 2)* are that a number of the identified ancestors of the native title claim group in Schedule A were not present on, or associated with, the claim area. I note, for example, the following findings made by Jessup J, which are of relevance:

> …I would find, therefore, that Jackey Jackey was confined in his domain, his life and his travels to areas to the south of Brisbane [outside the application area], and I shall proceed by reference to such limitation (at 274).
>
> …As mentioned in the previous paragraph, Jackey Jackey's occasional – even regular appearance in Brisbane (which was by then, of course, a city of some size) would not be the kind of event that would justify a finding of association with that area in the native title context (at 278).
>
> …there is nothing in the evidence to suggest that either Lizzie Brown or Lizzie Mitchell lived in, or had any relevant connection with, the claim area (at 307).
>
> …I am not satisfied that the Kitty referred to in the property owner's letter was the mother of Molly Myers, Mr Doyle's great great grandmother. More importantly – and here no amount of generosity in approach would make any difference – there is no evidence that this Kitty lived in, or had any association with, the claim area (at 314).

[73] Even taking into account the materials provided to the Tribunal which were not before the Federal Court (as outlined at [38] of this reconsideration decision), given the findings of Jessup J, I could not conclude that the factual basis is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an

association with the claim area for the purposes of the registration of the claim application.

[74] Flowing on from that and His Honours related findings of there being no evidence that could support an inference of continuity in the acknowledgement and observance of laws and customs, I could not conclude that the factual basis is sufficient to support the assertion that there are traditional laws and customs that give rise to the claimed native title rights and interests, for that particular claim area, or that the native title has been continued to be held for that particular area.

[75] I note that once I form the view that the factual basis is not sufficient to support the assertions at s 190B(5), it necessarily flows that I could not consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established (see *Gudjala v Native Title Registrar* at [85]-[86]).

[76] Even were I to be satisfied that the factual basis was sufficient to support the assertions at s 190B(5), I do not consider that the native title rights and interests claimed in the application could, in any event, be, prima facie, established.

[77] The rights and interests the Applicant claimed are outlined at paragraph [57] of this decision. As was highlighted by Mansfield J in *Northern Territory v Doepel*, s 190B(6) requires the Delegate, or Member on reconsideration, to engage in an exercise of weighing the factual assertions. I must be satisfied, prima facie, that each of the claimed native title rights and interests can be established. In this respect, I consider the findings of fact by Jessup J in *Sandy v State of Queensland (No 2),* were not available at the time the Delegate made her decision.

[78] The Applicant in their letter dated 21 January 2015, state that in relation to s 190B(6):

> We respectfully bring to the Member's attention the salient point that the Yugara/YUgarapul People have not accessed any legal advice in seeking determination of their native title status after their last authorisation meeting on 24 March 2013…that the claim group has been largely successful in their application for registration, bar the adverse finding regarding s 190C(4)(b), despite the absence of legal advice, suggests the group has a prima facie case that satisfies the threshold set out in s 190B(6).

[79] I note the following findings made by Jessup J, which are of relevance (emphasis in original):

> ...ultimately, the present inquiry is concerned with what such a system of laws and customs would say about rights and interests in relation to land and waters *in the claim area*. If, as I would hold to be the case, aboriginal practices and observances within the claim area were not such as would bespeak the continued existence of a system of that kind, the prospect that such practices and observances elsewhere would do so must be regarded as an unlikely one (at [78]).
>
> For the reasons given above, the cases – both Yugara and Turrbal – that members of the claim groups possess communal, group or individual rights and interests in relation to any land or water in the claim area must be rejected. In short, that is because there has not been a continued, substantially uninterrupted, normative system under which the traditional laws and customs which would sustain those rights and interests were acknowledged and observed, and because no member of either claim group would, under those laws and customs as they existed at sovereignty and immediately thereafter, be recognised as possessed of those rights and interests (at [316]).

[80] Based on the findings of fact made by the Federal Court in *Sandy v State of Queensland (No 2)*, I could not then say there was a prima facie case for at least some of the native title rights and interests claimed in the application to exist, for the purposes of the reconsideration.

[81] As such, I do not find that the native title rights and interests claimed in the application can be established, and so s 190B(5) and s 190(B)(6) are not satisfied.

Subsection 190B(7)

[82] This subsection refers to the traditional physical connection by at least one member of the native title claim group to any part of the land or waters covered by the application, or who would previously have had and would reasonably currently be expected to have a traditional physical connection with those land or waters. The Delegate considered, among other things, the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 ('*Members of the Yorta Yorta Aboriginal Community v State of Victoria*'). The Delegate quite rightly noted (at [227]) that 'whilst the test is not the same as would be applied in a determination of native title, it does require

the Registrar to be satisfied of a particular fact, being that at least one member of the native title claim group has or had a traditional physical connection with part of the claim area'. Based on the material before the Delegate, she was satisfied there was a factual basis to support the assertion that the native title claim group acknowledge and observe the traditional laws and customs of the pre-sovereignty society. She went on say (at 229) 'I consider that the factual basis material contains some facts that show a traditional physical connection or association with the Yugara/YUgarapul People with the application area'. She referred, for example, to information about the claimants and their predecessors residing, visiting and travelling across the application area and concluded that the application satisfies the condition of s 190B(7).

[83] His Honour in *Sandy v State of Queensland (No 2)* summarises the question which was before the Federal Court, following a detailed examination of *Members of the Yorta Yorta Aboriginal Community v State of Victoria*, by saying that (at [61]):

> ...the critical issues in the case are, first, what was the nature of the connection with particular land that would give rise to rights and interests in it, and secondly, by what principle, rule or custom would such rights and interests be possessed by people coming later in time who may not have been part of the original community when it was in direct occupation of the lands in the traditional way. In other words, who originally possessed these rights and interests, and who were their successors in future generations?

[84] His Honour referred to and quoted extensively from *Members of the Yorta Yorta Aboriginal Community v State of Victoria*. For example, His Honour found that 'Any suggestion that rights and interests in relation to land and waters within the claim area were held by people whose only connection with that area was that they spoke a common language, or that they acknowledged common laws or observed common customs, must be rejected' (at [67]).

[85] While the material before the Delegate did provide information about the physical connection with the claim area of members of the native title claim group, this together with the further material which was before the Tribunal but not before the Court, is challenged by the findings of Jessop J in *Sandy v State of Queensland (No 2)* - the findings made by the Federal Court cannot be displaced by those materials, even given the

different threshold tests for the reconsideration as compared with the Federal Court's native title claim determination.

[86] The application does not satisfy the condition at s 190B(7).

Subsection 190B(8)

[87] This subsection addresses the requirement that the application and accompanying documents must not disclose that because of a previous native title determination or exclusive or non-exclusive possession act (see s 61A), the application should not have been made. The Delegate was satisfied that: no determinations of native title fell within the external boundaries of the application area; the application was not made over areas covered by any previous exclusive possession acts; the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is or has been subject of a previous non-exclusive possession act.

[88] On that basis, the Delegate considered the application satisfied the condition of s 190B(8). I agree with the Delegate's assessment of this subsection.

[89] The application satisfies s 190B(8).

Subsection 190B(9)

[90] This subsection provides that the native title claim group must not claim ownership of minerals, petroleum or gas where they are wholly owned by the crown, and that there is no claim being made of exclusive possession of all or parts of an offshore place. As such, the Delegate found the application satisfied the sub-condition of s 190B(9)(a) and s 190B(9)(b). In relation to s 190B(9)(c), the Delegate concluded, based on the materials before her, that there was nothing within the application or accompanying documents which indicated the native title rights and interests claimed have otherwise been extinguished.

[91] His Honour in *Sandy v State of Queensland (No 2)* was considering issues apart from extinguishment of native title, and the question he was to answer was that 'but for any question of extinguishment of native title: a) does native title exist in relation to any and what land and waters of the claim area?...'. Based on the decision of His Honour there is nothing which displaces the Delegate's prima facie conclusion in relation to s 190B(9)(c) and I, therefore, conclude that the application satisfies the condition of s 190B(9) because it meets all three sub-conditions based on the materials which are before me for the purposes of this reconsideration.

Contested findings of the Delegate: Subsection 190C(4)(b)

[92] I will deal now with the ground where the Delegate was not satisfied the application met a relevant condition mandated by the Act. In assessing whether the condition is met I will, where relevant, outline the response of the Applicant or the State. I note that the Federal Court in *Sandy v State of Queensland (No 2)* has made no comments in relation to authorisation. I reiterate that I have reviewed the material provided for this reconsideration afresh.

[93] Section 190C(4) states that (hyperlinks provided for convenience):

> (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
>
> Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d). A representative Aboriginal/Torres Strait Islander body may certify the application, even if it is only the representative body for part of the area claimed.
>
> (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.

[94] In relation to this matter, the Delegate has indicated that the application has not been certified as required by s 190C(4)(a). I agree with that assessment. I am also of the view,

similar to the Delegate, that the application contains the statement and grounds referred to in s 190C(5). As such, I turn to s 190C(4)(b), where I must be satisfied firstly, that the Applicant is a member of the native title claim group and then secondly, that the Applicant 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. As noted in s 251B, the authorisation must be either through a process of decision-making under traditional laws and customs of the native title claim group, or where the persons in the native title claim group authorise persons to make the application and deal with the matters via an agreed and adopted process. In the present matter, it is the latter form of authorisation upon which the Applicant relies, being that decision-making process referred to in s 251(b).

[95] *Northern Territory v Doepel* (at [78]) outlines that this task '...involves some enquiry through the material available to the Registrar to see if the necessary authorisation has been given'. As *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Waters* [2002] FCA 1517 ('*Lawson v Minister for Land and Waters*') stated (at [25]), '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'.

[96] In summary, the Applicant is a member of the native title claim group, and consists of:

- Desmond Sandy
- Ruth James
- Pearl Sandy

This is confirmed by various materials. The Delegate concludes this is the case at [135] of her decision. I too am satisfied that the Applicant is a member of the native title claim group.

[97] The question then is, whether the Applicant is authorised to make the application and deal with matters arising in relation to it by all the other persons in the claim group (as per s 251B). The Delegate's decision was that there were various inconsistencies that led her not to be satisfied that the persons who jointly comprised the Applicant are authorised by all members of the claim group to make the application. Those inconsistencies include the reference to two persons named 'Kitty', one being the grandmother of Willy Sandow

and 'Kitty' who was the mother of Molly Myers, as noted at [5] of this reconsideration decision, and which are respectively referred to in this decision as Sandow's Kitty and Myers Kitty.

[98] The Delegate was concerned that Sandow's Kitty was not identified in the claim group description, and whether the two 'Kittys' were in fact the same person. The Delegate was concerned that Sandow's Kitty's descendants did not attend the authorisation meeting (as noted in the affidavit of Mr Desmond Sandy dated 24 February 2014).

[99] In addition, the transcript of the Federal Court proceedings (day 4, page 402, line 31, 2 December 2013) gave leave only to include Myers Kitty, mother of Molly Myers, as an authorised claimant and not Sandow's Kitty. The Applicant states that the Delegate should not have referred to a struck out section of the affidavit of Mr Desmond Sandy which was not evidence available to the Delegate as it was not in evidence in the Federal Court proceedings. On this point, I note it was not clear in the material before the Delegate that the evidence had been struck out in the Federal Court proceedings, and while the evidence was not available for the purposes of the Court, it was information which had been put forward by the Applicant, and which the Delegate could have regard to as part of the separate registration process for the claim.

[100] Mr Sandy's affidavit is also relevant in that it details a further incidence of seeking authority prior to making the application. The Delegate (at [84]) describes this in her reasons for decision:

> ...I note that there is text in the affidavit of Desmond Sandy that has a line marked through it, stating that he 'met with the authorised Elders of the unidentified Kitty descent line…in November who gave permission and authority for the…Applicant to represent the Kitty descent line in the Yugara/YUgarapul Native Title Claim Group' and that after he 'consulted with the Elders of the descent groups and with the authorised Elders of the Kitty descent group (in particular her granddaughter's son **[Name 2 deleted]**) there was an agreement to amend the application to describe this descent group' — at [5] and [6].

[101] In any event, a further supplementary report by **[Anthropologist 1 name deleted]** was provided by the Applicant on 17 October 2014, which was not available to the Delegate on her consideration of the matter. **[Anthropologist 1 name deleted]** indicates that Sandow's Kitty should not, after all, be part of the claim group description. However, it is not clear

what happened in relation to the authorisation that such an ancestor should be included in the claim group description.

[102] On the basis of the material I have reviewed, including material that was not before the Delegate for her original decision, it is difficult to be satisfied that paragraph [6] of this reconsideration decision outlines the claim group as existed at the time of the authorisation meeting on 24 March 2013. The question then is whether a process of decision making has been undertaken in order to authorise the making of the claim in its current form on behalf of the claim group, and whether that that process was agreed to by the group?

[103] I refer then to the supporting affidavits and material which goes to the requirement that the application was authorised by all persons in the native title claim group to make the application. The Delegate refers to the notice of the 24 March 2013 authorisation meeting (at [79] of her decision), which gives notice to a number of persons and family groups who constitute, or whose descendents constitute, the native title claim group. Those persons were invited to attend the authorisation meeting. The names are not all consistent with those names which are in the amendments lodged on 1 April 2014. In addition, even if all members of the claim group as described in the notice have been given reasonable opportunity to attend and participate in the decision making, I agree with the Delegate that there remains 'inconsistency in the material about the proper constitution of the native title claim group on whose behalf the Applicant was authorised to make the application' (at [81]), albeit though for different reasons. For example, one of the issues raised by the Delegate was that related to the two Kitty's, which, as outlined earlier in this decision, has largely been resolved. However, I am confident that, following the various amendments made, the persons who hold the common or group rights and interests claimed (as per s 61(1)(b)) have now been identified in the application as at 1 April 2014. The question is, did those persons authorise the Applicant to make the application I am considering, at the 24 March 2013 authorisation meeting?

[104] In their letter dated 23 December 2014, the State argue that **[Anthropologist 1 name deleted]** 's 2014 report '...may assist in explaining the late attempt to add the Sandow family to the

claim group, but does not remedy the authorisation flaws'. The State summarises their view of the Delegate's decision in relation to this sub section of the Act to be based on concerns about 'who was included in the claim group at any point of time and what was being authorised'. They note that the Applicant's Form 1 was filed in the Federal Court on 12 February 2012. It outlined the following as making up the claim group:

- Bilin/Bilinba/King Jackey Jackey/Kawae-Kawae
- Gariballie/Kerwalli/King Sandy and Naewin/Sarah
- Alexander/John Bungaree/King Sandy and Paimba/Mary Ann Mitchell
- William Mitchell; Lizzie Sandy/Brown
- Dakiyakka/Duke of York and daughter Kitty

[105] The State then notes the points of claim filed by the Applicant in the Federal Court on 31 May 2013, and the subsequent amendment requests by the Applicant. The State argue that in relation to the points of claim '...it is not particularly clear as to whether descent from all named individuals qualifies someone as a member or only descent from certain unions. There is also some confusion as to whether some individuals are the same person or different...This alone would seem to create difficulties for satisfying s 190B(3)(b) of the NTA and accordingly, s 190C(4)(b)'.

[106] The State go on to outline a number of additional comments in relation to authorisation, including no evidence of: the resolutions made at the 24 March 2013 authorisation meeting; the agreed decision making process; or how much notice was given of the authorisation meeting, as 'these details are not deposed to in the applicant's affidavits'. The State conclude by outlining that '[t]he entire purpose of an affidavit filed pursuant to s. 62 NTA is to make a legally binding statement that the particular application was authorised. It is not a document that can be interchangeably employed to support different versions of an application [referring to the various amendments, as noted above]'.

[107] In their letter dated 21 January 2015, the Applicant refer t*o Lawson v Minister for Land and Water*, stating that (emphasis in letter):

> The Courts have recognised the need for a 'practical approach' in considering the issue of authorisation. Specifically, Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and*

> *Water Conservation for the State of New South Wales* [2002] FCA 1517 states at [28]:
> "In an ideal situation one might wish for more precise identification of the Claim Group members and information on what proportion of the membership actually attended the meeting. I do not think, however, that the Act requires decisions of native title claim groups to be scrutinised in an overly technical or pedantic way. Unless a practical approach is adopted to such questions the ability of indigenous groups to pursue their entitlements under the Act will be severely compromised (emphasis added)."
>
> This practical approach is explained at [25]:
>
> "In 251B(b) there is no mention of 'all' and, in my opinion the subsection does not require that 'all' the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member…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 (emphasis added)."

[108] The Applicant states that using this practical approach to authorisation, the claim has been properly authorised.

[109] I understand that the task at s 190C(4)(b) requires me to be satisfied about the facts pertaining to authorisation, primarily that the Applicant was given authority to make the application by all the persons in the native title claim group, pursuant to one of the processes described in s 251B. This, in my view, envisages that there will be clear and cogent material before me upon which I can reach a reasonable state of satisfaction of the matters under s 190C(4).

[110] Whilst I have acknowledged that the word 'all' in the context of authorisation generally has a more limited meaning that it might otherwise have, and that an overly technical approach is not be required for s 251B (*Lawson v Minister for Land and Waters* at [25]), it is the inconsistency and the ambiguity in the information about the Applicant's authorisation that essentially prevents me from being satisfied in this matter about the requirements of s 190C(4)(b).

[111] At the time of authorisation there appears to have been a considerable lack of clarity around the persons who might comprise the native title claim group. This is, perhaps,

most evident from the meeting notice advertised in the Koori Mail. The notice identifies the native title claim group as being those persons descendant from a list of named persons. It also identifies a list of persons who are 'proposed amended Apical Ancestors' and 'Proposed additional Apical Ancestors.' The notice set out that the purpose of the meeting is to:

> Authorise the apical ancestor amendment in the Yugara/YUgarapul People application to the Federal Court. The proposed amendments are to: omit *Dakiyakka/ Duke of York;* add *Ted Myers and Molly;* identify Kitty (*in particular her daughter Molly*); add *Menvil Wannaurn* aka *King Jackie Delaney* (*in particular his daughter Topsy*); add Jackey Jackey's brothers Mark and Harry; separate John/Jack Bungaree and Alexander Sandy; and make any other amendment required to best describe the native title claim group...

[112] In that regard, it may be said that the meeting notice lent itself to creating some confusion for the persons who were required to authorise. Whilst the Delegate tended to the view that the persons in the native title claim group were given a reasonable opportunity to attend the meeting and to participate in the decision-making (at [80] to [81]), my own view is that the notice was, at best, messy and may have caused some confusion.

[113] The attendance sheet, as set out by the Delegate, shows that twelve (12) persons in total attended the meeting. It is not clear from the material what proportion of membership of the claim group this number is representative of. However, given the number of ancestors referred to in the notice, this would seem to be a relatively small representation. Whilst a small proportion of membership in attendance at an authorisation meeting is not necessarily conclusive of whether persons were afforded a reasonable opportunity to attend, I cannot discount that the ambiguity of the notice may have been a contributing cause of this relatively low number of attendees.

[114] There is also the issue of the conduct of the authorisation and the lack of clarity around the resolutions passed, and ultimately, on whose behalf the Applicant was given authority to make the application.

[115] The Delegate was particularly concerned about the material which demonstrated that the claim group had, subsequent to the meeting, considered and agreed on the native title claim group as including the ancestor Sandow's Kitty. The application she was

considering did not include this Kitty in the description of the native title claim group at Schedule A, despite the Delegate's understanding that the native title claim group authorised the Applicant to make the application on behalf of a native title claim group which includes this ancestor. As noted in the Applicant's referral for this reconsideration, the Applicant's did seek leave to have this ancestor included, but 'his Honour was not minded to give leave to include the Sandow's Kitty in the claim group description' (see [5] of this reconsideration decision).

[116] This confusion likely emanates in part from the somewhat disjointed manner in which authorisation was conducted. Even taking the view that the struck out portion of Mr Desmond's affidavit was not available to form part of the materials for this reconsideration, there is other material in relation to such difficulties with authorisation. For instance, the notice published in the Koori mail suggests that it was at the meeting held on 24 March 2013 that the Applicant was to be authorised to make the application. However, a subsequent letter of 27 March 2013 sent out to 'Elder claimants' suggests that the authority given at the meeting was conditional on further assent by the elders. The Delegate (at [62] of her reasons) describes the contents of the letter dated 27 March 2013:

> The letter dated 27 March 2013 is addressed to the 'Elder claimants'. The letter refers to documents that were emailed and handed out on 24 March 2013, namely the 'Meeting Code of Conduct', 'Decision Making', 'Agenda' and 'Resolutions 1 to 12'. A response was required by 4 April 2013 regarding whether they supported the resolutions and if their family wanted any amendments made to the resolutions. This document was signed by five elders including the persons comprising the applicant.

[117] While I acknowledge the Applicant's comments that I need not take an overly technical approach, this type of information again evidences the somewhat disjointed manner in which authorisation was conducted, such that it is difficult to be satisfied that the persons who jointly comprise the Applicant are authorised by all members of the claim group to make the application as it is in its current form.

[118] Accordingly, I conclude that the application does not satisfy the requirements of s 190C(4)(b).

Conclusion

[119] Under s 190E(10) I must notify the Registrar to accept the claim if it satisfies s 190B and s 190C. Otherwise (as per s 190E(11)), I must notify the Registrar to not accept the claim and include my reasons for that decision.

[120] If, on reconsideration, I was provided only with the material that was before the Delegate, I would have reached the same conclusions as the Delegate.

[121] I reaffirm that this is a fresh and original decision as to whether or not, in my view, the claim meets all of the conditions for registration specified in ss 190B and 190C of the Act.

[122] I conducted a reconsideration of the claim made in this application against each of the conditions contained in ss 190B and 190C in accordance with s 190E of the *Native Title Act 1993*. For the reasons outlined above, I give notice that the Native Title Registrar should not accept the claim for registration pursuant to s 190E of the *Native Title Act 1993.*

[123] In particular, I have formed the view that the Native Title Registrar should not accept the claim for registration because I am not satisfied pursuant to the following provisions:

(a) subsection 190C(4)(b)

(b) subsection 190B(5)

(c) subsection 190B(6)

(d) subsection 190B(7)

Helen Shurven
Member