National Native Title Tribunal

Registration test decision

Application name	Northern Cape York Group # 3
Name of applicant	John Henry Anderson, Francis Jimmy Brisbane, Jonothan Albany Yusia, Gina Marilyn Nona
NNTT file no.	QC2016/009
Federal Court of Australia file no.	QUD780/2016

I have considered this claim for registration against each of the conditions contained in ss 190B and 190C of the *Native Title Act 1993* (Cth) (Act)[1].

For the reasons attached, I am satisfied that each of the conditions contained in ss 190B and 190C are met. I accept this claim for registration pursuant to s 190A.

Date of decision: 7 November 2016

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Nadja Mack

Delegate of the Native Title Registrar (Registrar)

[1] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Reasons for decision

Introduction

[1] The Northern Cape York Group # 3 native title claimant application (application) was filed in the Federal Court of Australia (Court) on 7 October 2016. On 10 October 2016, the Registrar of the Federal Court gave a copy of the application to the Registrar of the National Native Title Tribunal (Registrar) pursuant to s 63. This has triggered the Registrar's duty to consider the claim made in the application under s 190A.

[2] In the following reasons, I consider the claim against the conditions of ss 190B and 190C (referred to as the registration test). Section 190A(6) provides that the claim must be accepted for registration as I have found that it satisfies all the conditions of ss 190B and 190C.

Information considered

[3] As required by s 190A(3), I have had regard to the following information when considering the claim: the application, including its attachments; the geospatial assessment and overlap analysis (Geospatial Report) prepared by the Tribunal's Geospatial Services on 12 September 2016 (2016/1433(a)) and a Native Title Vision Plus analysis undertaken by myself on 7 November 2016. I have also considered the following material which has been provided by the applicant directly to the Registrar:

- [name removed]'s report of 21 May 2014 entitled Northern Cape York Peninsula Regional Aboriginal Society: Summary of Evidence and Opinion (Report);
- Applicant's submissions filed in the Federal Court in Woosup on behalf of the Northern Cape York Group #1 v State of Queensland QUD 157 of 2011 on 3 October 2014 (Applicant's Submissions); and
- Evidence of Occupation History attached as Appendix A, Table 1 to NCYP #1 and #2 Native Title Claims: Supplementary Report – Anthropologist's response to the State of Queensland's assessment and request for further information in regard to the connection materials, [name removed], 26 June 2013 (Evidence of Occupation History).

[4] I have not considered any information that may have been provided to the National Native Title Tribunal (Tribunal) in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act.

[5] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural and other conditions: s 190C

Subsection 190C(2) Information etc. required by ss 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

[6] The application satisfies the condition of s 190C(2), because it does contain all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below[2].

[7] I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)[3].

Native title claim group: s 61(1)

[8] Schedule A sets out a description of the claim group. It is made up of all persons descended by birth or adoption from the apical ancestors listed in Schedule A which consists of 31 individual or partnered apical ancestors.

[9] If it is plain on the face of the application that the native title claim group described in the application is a subgroup or part only, or does not include all, of the persons in the 'native title claim group', then I cannot accept the claim for registration[4]. This is not the case.

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

Name and address for service: s 61(3)

[11] Part B of the application sets out the name and address for service of the applicant.

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

Native title claim group named/described: s 61(4)

[13] The application contains a description of the persons in the native title claim group (as opposed to naming them) in Schedule A. I will consider whether the description is sufficiently

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

[3] *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39].

[4] *Doepel* at [39]

clear so that it can be ascertained whether any particular person is one of those persons, under the corresponding merit condition in s 190B(3).

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

Affidavits in prescribed form: s 62(1)(a)

[15] The application is accompanied by the affidavits required by s 62(1)(a) from each person jointly comprising the applicant, namely John Henry Anderson, Francis Jimmy Brisbane, Jonothan Albany Yusia, Gina Marilyn Nona. Each of these affidavits is signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently addresses the matters required by s 62(1)(a)(i)-(v).

[16] The application **is** accompanied by the affidavits required by s 62(1)(a).

Details required by s 62(1)(b)

[17] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a)–(h). The application **contains** all the relevant details, as identified in the reasons below:

Information about the boundaries of the area: s *62(2)(a)*

[18] Schedule B sets out a description of the application area. Schedule B does not provide a description of the areas that are excluded from the application i.e. no areas are excluded.

Map of external boundaries of the area: s *62(2)(b)*

[19] Schedule C refers to Attachment C which is a map showing the application area.

Searches: s *62(2)(c)*

[20] Schedule D refers to Attachment D which sets out a table that details the results of searches undertaken in relation to the claim area. It appears that the area Attachment D refers to is larger than the claim area but it includes it.

Description of native title rights and interests: s *62(2)(d)*

[21] Schedule E provides a description of the native title rights and interests claimed in relation to the application area.

[22] I will assess the adequacy of the description in the corresponding merit condition at s 190B(4) below.

Description of factual basis: s *62(2)(e)*

[23] Schedule F provides a description of the rights and interests claimed and the factual basis for the assertions set out in s 62(2)(e). Further information about the factual basis has been provided to the Registrar directly.

[24] I assess the adequacy of the description in the corresponding merit condition at s 190B(5) below.

Activities: s *62(2)(f)*

[25] Schedule G provides details about activities currently carried out by members of the claim group on the claim area.

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

[26] Schedule H states that the applicant is not aware of any other applications made in relation to the claim area.

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

[27] Schedule HA states that the applicant is not aware of any notifications under s 24MD(6B)(c). There is no information before me that indicates otherwise.

Section 29 notices: s *62(2)(h)*

[28] Schedule I sets out a table of eight s 29 notifications that fall within the application area. There is no information before me to indicate that the applicant is aware of any other notifications of the kind described in this section.

Conclusion

[29] The application **contains** the details specified in s 62(2)(a)–(h), and therefore **contains** all details and other information required by s 62(1)(b).

Subsection 190C(3) No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[30] The Geospatial Report shows that there is no application on the Register of Native Title Claims that covers all or part of the area covered by this amended application.

[31] I am therefore satisfied that no person included in the claim group for the application was a member of the native title claim group for any previous application in relation to the area of the application before me.

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

Subsection 190C(4) Authorisation/certification

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

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

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

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

[34] My consideration is governed by s 190C(4)(a) as the one representative body for the application area, the Cape York Land Council Aboriginal Corporation (CYLC), has certified the application. The signed certification dated 7 October 2016, is attached to the application as Attachment R1.

[35] For the certification to satisfy the requirements of s 190C(4)(a) it must comply with the provisions of s 203BE(4)(a)–(c). I note that it is not the task of the Registrar under s 190C(4)(a) to look behind a certification, nor is he required to be satisfied that the applicant is authorised[5].

[36] In my view the certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it, and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[37] Further, the certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion. The certification states that:

- CYLC engaged anthropologist [name removed] from March 2010 to May 2015 to review existing ethnographic material for areas including the area of this application, do field work with relevant traditional owner groups, including the Northern Cape York Group People and advice CYLC on the composition of the Northern Cape York Group People for this application.

[5] *Doepel* at [79]–[82]

- [name removed] met, along with the CYLC with Northern Cape York Group People for this application on 21 May 2015 where the description of the claim group was reviewed and accepted and the making of this application authorised in accordance with a traditional decision-making process (I note that the certification actually states that the an agreed decision-making process was used, however, later in the certification it is noted that [name removed] advised CYLC that the application was authorised pursuant to s 251B(a), i.e. following a mandated traditional decision-making process. The applicant's legal representative confirmed that reference made to the agreed decision-making process was made in error. The s 62(1)(a) affidavits of the applicant confirm that a traditional decision-making process was used).
- The application covers an area which was previously within and part of the Northern Cape York Group #1 (NCYG#1) application claim area but was excised from that claim area.

[38] Section 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3)'. It is not applicable in relation to this application.

[39] For the above reason I am of the view that the requirements set out in s 190C(4)(a) are **met.**

Merit conditions: s 190B

Subsection 190B(2) Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[40] Schedule B refers to Attachment B for a description of the external boundary of the claim area and Attachment C for a map depicting the boundary. The Geospatial Report provides an analysis of the description and map, and advises whether the application area has been described with reasonable certainty, notes the following:

'**Assessment**

The description and map are consistent and identify this application area with reasonable certainty.

Information Considered

Description: Schedule B describes the application area as all lands and waters within the external boundary described as:

- Part of Lot 8 on MPH14466 north of the Ducie River.
- Lot 1 on SO67
- Part of Lot 8 on SP252492 (formally part of Lot 1 on WP53) being the part north of the Ducie River and South Palm Creek.

Schedule B lists no general exclusions.

Map: Schedule C refers to Attachment C. Attachment C contains an A3 colour map prepared by Geospatial services, titled 'Northern Cape York #3' dated 8 February 2015 and includes:

- The application area depicted by a red outline and stipple;
- Cadastral background;
- Scalebar, northpoint, coordinate grid, legend and locality diagram; and
- Notes relating to the source, currency and datum of data used to prepare the map'.

[41] As noted in the assessment, Schedule B does not list any areas excluded from the claim area, in other words no areas area excluded from the area described as the application area.

[42] I am satisfied that the information and the map contained in the application as required by s 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular areas of the land or waters.

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

Subsection 190B(3) Identification of the native title claim group

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application, or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[44] As noted above, Schedule A of the application describes the persons in the native title claim group as the biological or adoptive descendants of individual or partnered apical ancestors which are listed in Schedule A.

[45] Describing the claim group as the biological or adoptive descendants of certain named persons provides a sufficiently reliable and objective means by which to ascertain a person's membership of the group. Some factual inquiry may be required to ascertain how members of the claim group are descended from the named apical ancestors, or whether they have in fact been

adopted in accordance with the traditional laws and customs of the group, but that would not mean that the group had not been sufficiently described[6].

[46] I am therefore of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

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

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

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

[48] Section 62(2)(d) provides that the application must contain:

> a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

[49] The description of the claimed rights is found in Schedule E.

[50] I am of the view that the description in Schedule E is sufficient to allow the native title rights and interests claimed to be readily identified. The claimed rights have been clearly and comprehensively described in a way that does not infringe s 62(2)(d). Further, the description is meaningful and understandable, having regard to the definition of the expression 'native title rights and interests' in s 223[7].

[51] Whether I consider that the claimed rights can be established prima facie is the task at s 190B(6), discussed below.

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

Subsection 190B(5) Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and

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[6] Carr J in State of *Western Australia v Native Title Registrar* (1999) 95 FCR 93 found, in the way native title claim groups were described, that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[7] In *Doepel*, Mansfield J agreed with the Registrar that s 190B(4) requires a finding as to 'whether the claimed native title rights and interests are understandable and have meaning'—at [99].

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
(c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[53] Following Mansfield J at [17] of *Doepel*, I understand that my assessment is to 'address the quality of the asserted factual basis for [the] claimed rights and interests … but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests' and that it 'is not for the Registrar to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'. [8]

[54] Although the Registrar must not be critical of, nor must he refuse to accept, the facts provided in support of the assertions, there must be more than a mere restatement of the claim. Thus, I am of the view that the Registrar is required to consider whether:

- the information provided is more than merely assertive; and
- there are sufficient and specific facts which support the assertions.[9]

[55] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

[56] Information in relation to the three criteria is set out in Schedule F and the additional information provided by the applicant directly to the Registrar. I have also considered the reasons for judgment given by Greenwood J in the determination of the NCYG#1 application[10] which abuts the claim area to the north (and to the East in relation to the smaller part on the top of Cape York Peninsula). In making his NCYG#1 determination, Greenwood J relied on extensive anthropological reports by [name removed], the applicants' submission, and evidentiary material considered for the purposes of his Northern Cape York Claim Group # 2 (NCYG#2) determination[11], which abuts the claim area in the south. In my view, it is appropriate that I take into account evidence given and findings made in other proceedings where such evidence and findings are relevant to the current application, particularly where the application is made by the same community of native title holders and the application area is surrounded by, or abuts, the earlier determination and the material relied on in support is identical. In the matter before me,

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[8] This was endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*) at [83].

[9] This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* (2009) 182 FCR 63; [2009] FCA 1572 (*Gudjala 2009*):
> … it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

[10] *Woosup on behalf of the Northern Cape York Group #1 v State of Queensland (No 3)* [2014] FCA 1148 (30 October 2014)

[11] *Coconut on behalf of the Northern Cape York #2 Native Title Claim Group v State of Queensland [2014] FCA 629 (20 June 2014)*

the applicant relies on information which was also relied on by the Federal Court when making the NCYG#1 determination. The way in which an administrative decision maker can have regard to the findings of a court was addressed in the decision of *Cadbury Uk Ltd v Registrar of Trade Marks (Cadbury)* [2008] FCA 1126. In that instance, Finklestein J indicated that a Tribunal was entitled to have regard to the findings of a judge, but that it would fall into error if it took the approach that it could not disagree with such findings[12].

[57] Finally, I note in relation to the opinions expressed by [name removed] in the materials before me, that I accept them as a recitation of facts[13]. I note that [name removed]'s extensive specialised knowledge based on his training, study or experience is set out in detail in the Applicant's Submissions.

Reasons for s 190B(5)(a)

[58] The assertion in s 190B(5)(a) relates to the association of the native title claim group and that of their predecessors with the area covered by the application.

[59] I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for the assertion in s 190B(5)(a) needs to address that:

- the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times; and
- there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

[60] The applicant's additional material and the NCYG#1 determination relevantly state the following in relation to this criteria:

- There exists a single regional society uniting the native title holding group for NCYG#1 and 2 and the claim group for this application under a shared body of laws and customs in regard to local and social organisation, language affinities, kinship and marriage customs, ceremonial and cosmological beliefs, ritual prohibitions on eating totemic species, emic perspectives on their relative sameness and difference with their neighbours and regional dispute resolution practices.
- The land holding groups at the time of effective sovereignty were composed of the ancestors of persons who today identify as members of the Angkamuthi Seven Rivers group, the McDonnell Atampaya group and the Gudang/Yadhaigana group:
    - The Angkamuthi Seven Rivers group are the descendants of ancestors whose traditional homelands include places located in the lower catchments of the west coast rivers of northern Cape York, commonly known as the Seven Rivers (an area which includes parts

[12] *Cadbury* at [18] and [19]

[13] see *Gudjala 2008* at [94]

of the catchments of the Jardine River, Crystal Creek, Doughboy River, McDonald River, Jackson River, Skardon River and Ducie/Dulhunty River).
    - The McDonnell Atampaya group are descendants of ancestors whose traditional country includes the upland regions of Northern Cape York Peninsula (NCYP) in the forested highlands of the Great Dividing Range, between approximately the headwaters of the Jardine River in the north, south to Schramm and Nimrod Creeks, east to Catfish Creek and west to the Richardson Range. The group name derives from a place named Atampaya, near the long abandoned McDonnell Telegraph Station.
    - The Gudang/Yadhaigana people are descendants of ancestors whose traditional country includes the north eastern and parts of the north-west coast of Cape York. These two named groupings hold adjacent country, are extensively intermarried and commonly act as a single entity in regard to land and decision-making processes.
- The relationship between these groupings is described as follows:

  In formal linguistic terms, the languages of Northern Cape York belong to a single language category known as the "Northern Pama Sub-Group" of Australian languages (Crowley 1980; Oates and Oates 1970; Sutton 1976; Hale 1976; Alpher 1976). Crowley found that the three prominent surviving languages in the area during his fieldwork period were Atampaya (also known as McDonnell River people), Angkamuthi (Seven Rivers people) and Yadhaykenu (Shelburne Bay to Pudding Pan Hill people; Appendix 1 Map 23b Site 90) (1980:241). Crowley found that these languages in the NCYP region are likely to have arisen from a single proto-language and might properly be described as "dialects of a single language (some of which border on mutual intelligibility)" (1980:242).
- Contemporary members of these groups are descendants of ancestors whose traditional country includes identified parts of the NCYG#1 determination area and the area of this application.
- Sovereignty of mainland Australia was acquired in 1788. Effective sovereignty did not occur in the claim area until many decades later. The arrival of the European settlers at Somerset in 1864 marked the beginning of a permanent European presence in the claim area. The relationship between the Aboriginal people and the new settlers was deeply ambivalent and often violent. Sheep and cattle stations were established from the mid 1860's and the overland telegraph line was constructed in the 1880's. Archibald Meston (later the Protector of Aboriginals) wrote in 1896 wrote about the inhabitants of the Northern Cape York Region which includes the claim area:

  From Newcastle Bay south to Princess Charlotte Bay ... are still in their original condition ... There is no settlement whatever, nor is there a single white man resident over the whole of that extensive territory, except for a few miners on one locality ... the tribes to the westward [of the east coast], between the coast and the telegraph line, are still absolutely wild, and ... free from any intercourse or contamination by white men ... the whole western coast north from the Mitchell to the Jardine River [is] in absolute possession of the wild tribes.
- The Evidence of Occupation History sets out evidence of occupation of particular parts of the area of the NCYG country, including the application area, in particular periods of time, namely: 1623 to 1900; 1901 to 1950; and 1950 to the present. Particular reference is made the Ducie and Dulhunty Rivers which are located within the claim area.

- There are five communities within the external boundaries of the NCYG#1 determination area which are permanently occupied. They are Injinoo (formerly Cowal Creek), Seisia, Bamaga, Umagico and New Mapoon. According to the 2011 census data from Australian Bureau of Statistics, the population of each community was then as follows: Injinoo – 474; Seisia – 203; Bamaga – 1,046; Umagico – 281; New Mapoon – 290. Each of these communities is situated on a Deed of Grant in Trust area that forms part of the NCYG#1 determination area. Members of the claim group live in these communities.
- In addition to these permanent communities, there are semi-permanent camps and outstations with established dwellings and/or other light structures within the NCYG#1 determination area at Second Beach Camp, Umayngulunu/Virilya Point, Top Jardine Crossing and Ussher Point. In addition, the outstation and camp at Captain Billy's Landing appears to be just outside the NCYG#1 determination area and that at Namaleta was within the original NCYG #1 claim area, but outside the determination area and located to the west of the area of this application.
- In addition to residence at one of the permanent communities and use of semi-permanent camps and outstations, there is substantial evidence of other activities physically undertaken on that area by claimants and their predecessors.
- There is also substantial evidence of the spiritual and cultural connection of claimants and their predecessors to their country. Such connection takes a variety of forms, including belief in the presence of Ancestral Spirit Beings and the spirits of deceased ancestors in the country and in their power to control the elements and to keep people safe in the country, talking to the Spirit Beings and deceased ancestors, rituals involving the introduction of strangers to country, reverence for special places and the spirits associated with them and the transmissions of the stories associated with story places.

[61] Further, genealogies have been filed with the Federal Court in the NCYG#1 proceedings which provide detailed referencing about the claimants and their ancestors. The genealogies formed the basis of the description of the native title holding group in the determination. As stated in the Applicant's Submissions,

> The Redmond Connection Report also included as Appendix 3, NCY #1 genealogies, (in the form of Descendant Indented Charts) which provide detailed referencing about the claimants and their ancestors. The 48 sources listed in the genealogical database incorporate [name removed]'s own field research, as well as a wide range of other sources including the field notes of Sharp (1933-4) and Hinton (1963) and the works of a number of different researchers who have worked in the area in the last 20 years or so. Other sources for the genealogies are the Register of Births, Deaths and Marriages, the records of the Presbyterian Church at Mapoon and extracts from information provided by the Community Personal Histories section of the Queensland Government. Each genealogy contained a bibliography and a series of endnotes which specify the source for each of the large number of pieces of information contained in the genealogy. [...]

[62] Having considered the above information, I have formed the view that the material is sufficient to establish an ongoing association of the claimants with the claim area. British sovereignty was proclaimed over eastern Australia (including the present State of Queensland)

on 26 January 1788. In my view, if the factual basis is sufficient to support the presence of relevant persons at or around first contact (as it is here), it may be inferred that this reflects the situation at and before sovereignty. I can make such an inference on the basis of the material before me. Further, the factual basis material contains information about the association of current members of the claim group with areas and places within the claim area, in particular demonstrating that current claimants have knowledge of their traditional country and boundaries taught to them by their predecessors. The material also supports the assertion of a continuity or history of association. It also provides information that supports the assertion that the whole group have an association with the claim area by explaining the relationship all members have in common with the land and waters.

[63] On the basis of the above, I am **satisfied** that the requirements of s 190B(5)(a) are met.

Reasons for s 190B(5)(b)

[64] For this requirement, the factual basis must identify the relevant pre-sovereignty society and the persons who acknowledged the laws and customs of that society. Where a native title claim group is defined in reference to an apical ancestor model, the factual basis must also explain the link between those persons (the ancestors) and the relevant society. The factual basis must contain a sufficient explanation of how laws and customs can be said to be traditional as well as details sufficient to support the assertion that there has been continuous acknowledgement and observance— see, for instance, *Gudjala [2007]* at [63], [65], [66]; *Gudjala [2009]* at [36], [37], [40].

[65] I refer to the summary of information before me above in my consideration of the requirements of s 190B(5)(a), at the time of sovereignty.

[66] As noted above, the claim group forms part of a regional society uniting the native title holding group which combines the native title holders for the NCYG#1 and 2 determinations and the claim group for this application under a shared body of laws and customs.

[67] While it is noted in the material before me that there is evidence of some variation between the practices of the predecessors of the NCYG #1, 2 and 3 group members, these are said to be minor.

[68] It is stated that based on his research, [name removed] has formed the view that members of the claim group and the identical native title holding group for the NCYG#1 determination continue to be part of the regional society. [name removed] refers to numerous statements from members of the claim group he has obtained attesting to various activities on country such as hunting, gathering, fishing, camping, manufacturing implements for hunting and fishing, burning country and protecting places and notes that continuity is expressed in terms of adherence to particular laws, customs, practices and beliefs. He further states, based on his

research, that knowledge of country, including its cultural traditions and the use of its natural resources, is transmitted across the generations and is important for the maintenance of ties to country.

[69] Further, [name removed], following an examination of the traditional laws, customs, practices and beliefs of the claimants and their ancestors set out below, formed the view that at all relevant times, a normative system of traditional law and custom has governed the lives of the claimants and their ancestors:

- allocation of rights and interests in land and waters
- marriage and affines
- kinship and naming
- kinship and customary adoption or "growing up"
- kinship and normative "demand sharing"
- kinship and the authority of elders
- decision making and dispute resolution dispute resolution and country succession, coalescence and legitimate group membership
- various kinds of ceremonial performances
- spirit conception and birth-places
- food prohibitions
- sorcery and medicines
- cosmology
- the [text removed], the Rainbow Serpent and other Ancestral Spirit Beings
- trade and exchange with other groupings across the region
- occupation and resource use in the claim region.

[70] In particular, he notes that '[T]he predecessors of the NCY#1 claimant group used, occupied and enjoyed a lawful and regulated jurisdiction over the NCY#1 Claim Area ("the Claim Area") prior to the assumption of effective sovereignty which coincides with the establishment of the first permanent European presence at Somerset in about 1860. That lawful use and occupation has been perpetuated across succeeding generations to the present day under a body of shared traditional laws and customs'. I understand that it is asserted that the above also applies to the area of this application.

[71] Having considered the above information I have formed the view that the factual basis material does sufficiently address the requirements of s 190B(5). It identifies the pre-sovereignty society and provides some facts in support of the existence of this society in the claim area. It also links some of the identified ancestors with parts of the claim area or areas in its vicinity, thus allowing the favorable inference that those persons formed part of the relevant society. The material also outlines facts that provide some explanation of how laws and customs of the current claim group may be said to be traditional and provides evidence of the transmission and teaching from one generation to the next. I note that of itself, the assertion that laws have been handed

down from generation to generation may not be sufficient to support the assertion at s 190B(5)(b), however, the application also provides facts that elicit a similarity between the laws and customs recorded at sovereignty and those that are acknowledged and observed today. In relation to the adaptation of the laws and customs relating to claim group membership, I note that in a number of determinations of native title, the court has recognised adapted laws and customs as retaining a 'traditional' character[14].

[72] On the basis of the above, I am satisfied that the requirements of s 190B(5)(b) are met.

Reasons for s 190B(5)(c)

[73] Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests[15].

[74] Dowsett J at [82] *in Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed on to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least to European settlement.

[75] The Full Court in *Gudjala 2008* at [96] agreed that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

[76] From the information contained in Attachments F and the additional material received, I understand that the members of the claim group continue to acknowledge and observe the traditional laws and customs passed on to them by their ancestors. This continues today among claim group members. There are numerous examples referred to in [name removed]'s Report – see my summary of the material above at s 190B(5)(b).

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[14] For example changes to descent rules from patrilineal to cognatic *(see Griffiths v Northern Territory* (2006) 165 FCR 300, [501]; *Western Australia v Sebastian* (2008) 173 FCR 1, [121]–[122]; *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [507]) or a shift over time involving an increase in reliance on matrilineal descent where recognised in *Bodney v Bennell* (2008) 167 FCR 84, [116].

[15] *Yorta Yorta*—at [47] and [87]

[77] Having considered the material, I am satisfied that the factual basis provided is sufficient to support an assertion that the members of the claim group and their predecessors have continued to hold native title in accordance with the traditional laws and customs.

[78] On the basis of the above, I am satisfied that the requirements of s 190B(5)(c) are met.

Conclusion

[79] The application **satisfies** the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5).

Subsection 190B(6) Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[80] To meet the requirements of s 190B(6) only one of the native title rights and interests claimed needs to be established prima facie. Only established rights will be entered on the Register—see s 186(1)(g) and the note to s 190B(6).

[81] In relation to the consideration of an application under s 190B(6) I note Mansfield J's comment in *Doepel*:

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
> Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

[82] The definition of 'native title rights and interests' in s 223(1) guides my consideration of whether, prima facie, an individual right and interest can be established[16].

[83] I also need to consider the case law relating to extinguishment when examining each individual right and interest claimed.

Consideration

1. Exclusive rights and interests

[16] In particular I take account of the interpretation of this section in:

- *Yorta Yorta* (see s 190B(5) above) in relation to what it means for rights and interests to be possessed under the traditional laws acknowledged and the traditional customs observed by the native title claim group; and
- The High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'.

[84] Paragraph 1 of Schedule E states that the native title rights and interests claimed in relation to 'the exclusive areas' are 'the native title rights and interests that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, possession, occupation, use and enjoyment to the exclusion of all others'.

[85] *Ward HC* is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the Act.

[86] The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 indicates that the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community, including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'—at [127].

[87] From the material before me I understand that [name removed] has formed the view, based on his research, that

- under the traditional laws and customs of the claim group, the claimants' rights are exclusive in relation to their own countries;
- the claimants continue to assert their right to exclude others from areas where they possess jurisdiction acknowledged by the regional society and the capacity to regulate access to country; and
- incidents of customary ownership of country include the right to grant permission for others to use the country and to exclude them from using it and to make decisions about, to speak for and to resolve disputes about the country.

[88] [name removed] refers to the following historical records in support of his opinion:

- As early as 1852, McGillivray made the observation that "every inch of ground" was owned by somebody;
- In 1934, Sharp reported that '[t]he countries of a clan, with their natural resources, are owned by all clan members in common, the ownership being sanctioned by the common tribal mythology in which certain activities of the clan's ancestors are located in the clan countries. The right of exclusive use of the land, which is distinguished from ownership, is extended to the children of clan women and to members of clans associated in the same patrilineal line. The right of exclusion is exercised only in exceptional cases, in which there is an actual or pretended drain on the resources of the land, indicating that one of the chief functions of clan ownership is the apportionment and conservation of natural resources. The natives state that a clan may even forbid a man crossing clan territory to get from one of his own clan territories to another, but no example of such extreme clan action could be cited. People gather and hunt, ordinarily, in whatever country they will. Thus there is practically a standing

permission which opens a clan's countries to all, but this permission may be withdrawn by the clan for those who are *persona non grata'*.

[89] I note that the court has determined in NCYG#1 that the claimants hold exclusive rights and interest in part of the determination area.

[90] In my view, the material before me establishes that, prima facie, the claim group members have a right under their traditional laws and customs to effectively exclude from their country people not of their community.

[91] For the above reasons, I am of the view that the material before establishes that, prima facie, the claim group members have a right under their traditional laws and customs to effectively exclude from their country people not of their community.

[92] Outcome: prima facie established

Non-exclusive rights and interests

[93] I now assess whether the rights and interests claimed in paragraph [2] of Schedule E can be established prima facie as non-exclusive native title rights in relation to that part of the claim area where exclusive rights cannot be established. I have grouped together those rights and interests that appear to be of a similar character and therefore rely on the same evidentiary material. I refer to them as referred to in Schedule E. I note that the Court in its determination of the NCYG#1 claim has found that the claimants, in areas where native title was not held exclusively, hold the non-exclusive rights claimed, albeit described slightly differently in the determination than in the application before me. In my view, given that I have already found that the claimants established, prima facie, their claim to exclusive native title rights and interests, it follows that they also have established a claim to non-exclusive rights. What I am still required to do, however, is to determine whether the non-exclusive rights described in the application are rights and interests as defined in s 223(1). Any rights that clearly fall prima facie outside the scope of the definition of 'native title rights and interests' cannot be established for the purposes of this requirement.

[94] I note that the Applicant's Submissions contain a table which sets out most of the rights and interest claimed and notes that a substantial number of supporting statements were given by claimants at interviews held by [name removed]. References to relevant parts of [name removed]'s reports are given.

[95] I further note that the applicant relevantly makes the following statement in relation to the claim of non-exclusive rights and interests:

> To the extent that the NCY #1 Applicant's claim is one for non-exclusive native title rights, this is not the result of traditional laws and customs. As noted above, under those laws and customs, the native title holders' rights are exclusive in relation to

> their own countries. Rather, to the extent that the claim is for non-exclusive native title rights, such claim is the result of the extinguishment of exclusive native title rights by the grant of third party interests, legislation, non-recognition by the common law or the like.

a) the right to travel over, to move about, and to have access to those areas;
b) the right to be present on, hunt and to fish on and gather from the land and waters of those areas;
e) the right to live, to camp and for that purpose to erect shelters and other structures on those areas;
f) the right to light fires on those areas;

[96] From the material before me I understand that [name removed], during his research, has collated numerous statements, quoted in his connection report which was submitted to the State in support of a consent determination, of claimants in relation to activities such as hunting, gathering, fishing, camping, burning country, and visiting places exercised in accordance with traditional laws and customs. [name removed] has also observed claimants exercising these rights.

[97] The above rights are rights and interests as defined in s 223(1).

[98] Outcome: prima facie established.

c) the right to take, use, share and exchange the natural resources of those areas such as food, medicinal plants, timber, stone and resin;
d) the right to take and to use the natural water on those areas;
i) the right to share or exchange subsistence and other traditional resources obtained on or from those areas;

[99] [name removed] in his Report attests to the wide range of natural resources used and gathered by claimants as follows:

> In my experience, amongst the many types of natural resources which the claimants continue to utilise are the following: dugong, turtle, turtle eggs, fish, crayfish, oysters, pippies and other shell-fish, stingrays, crabs and other crustaceans, bees and honey, crocodile, kangaroo, wallaby, emu, plains turkey, ducks and other water birds, snakes, lizards and other reptiles, frogs, medicinal plants, yams and vines, fruits, orchids, timbers of many kinds, bird feathers, stones and other minerals including ochres, fresh and salt water, grasses and barks. This list is not intended to be exhaustive but provides a reasonable cross-section of the range of natural resources used and gathered by the claimants.

[100] [name removed] also observed that the claimants' use and ownership of the natural resources in the claim area is subject to a range of traditional protocols involving distinctions of gender, seniority and local affiliations.

[101] The above rights are rights and interests as defined in s 223(1).

[102] Outcome: prima facie established.

g) the right to conduct and to participate in the following activities on those areas:
(i) cultural activities;
(ii) cultural practices relating to birth and death, including burial rites and the right to bury native title holders within the area;

(iii) ceremonies;
(iv) meetings; and
(v) teaching the physical and spiritual attributes of sites and places on those areas that are of significance under their traditional laws and customs.

h) the right to maintain and to protect sites and places on those areas that are of significance under their traditional laws and customs;
j) the right to be accompanied on to those areas by persons who, though not native title holders, are:
(i) spouses or partners of native title holders;
(ii) people who are members of the immediate family of a spouse or partner of a native title holder;
(iii) people reasonably required by the native title holders under traditional law and custom for the performance of ceremonies or cultural activities on the areas; and
(iv) people required by the native title holders to assist in, observe, or record traditional activities on the areas;
k) the right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof.

[103] From the material before me I understand that [name removed] has also collated numerous statements of claimants in relation to visiting places and protecting and looking after places.

[104] The above rights are rights and interests as defined in s 223(1).

[105] Outcome: prima facie established

Conclusion

[106] The application **satisfies** the condition of s 190B(6).

Subsection 190B(7) Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
   (i) the Crown in any capacity, or
   (ii) a statutory authority of the Crown in any capacity, or
   (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[107] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application. I take 'traditional physical connection' to mean a physical connection in accordance with the particular laws and customs relevant to the claim group, being 'traditional' in the sense discussed in *Yorta Yorta*.

[108] Sufficient material is provided in the application regarding the traditional physical connection of members of the native title claim group. For example, as noted above at s 190B(5), [name removed] gives plenty examples of claimants continuing to observe traditional laws and customs when undertaking activities on country including the claim area.

[109] I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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

Subsection 190B(8) No failure to comply with s 61A

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If:
> (a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
> (b) either:
> (i) the act was an act attributable to the Commonwealth; or
> (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;
> a claimant application must not be made that covers any of the area.
> (3) If:
> (a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;
> a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
> (4) However, subsection (2) or (3) does not apply to an application if:
> (a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and
> (b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[111] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[112] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. In my view the application does not offend the provisions of s. 61A(1) because the Geospatial Report reveals that there are no approved determinations of native title over the application area.

Section 61A(2)

[113] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. In my view the application does not offend the provisions of s 61A(2). I note that Schedule B does not list any areas excluded from the claim area, however, it does not appear on the face of the application and following my consideration of the current tenure of the application area, that the application area includes areas covered by previous exclusive possession acts.

Section 61A(3)

[114] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. In my view, the application does not offend the provisions of s 61A(3) because Schedule E acknowledges that a claim to exclusive possession is not made over areas where such a claim cannot be recognised.

Conclusion

[115] In my view the application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application **satisfies** the condition of s 190B(8).

Subsection 190B(9) No extinguishment etc. of claimed native title

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

[116] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[117] The application at Schedule Q states that no ownership of minerals, petroleum or gas wholly owned by the Crown is claimed.

Section 190B(9)(b)

[118] The application at Schedule P states that no offshore places are claimed.

Section 190B(9)(c)

[119] There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Conclusion

[120] In my view the application does not offend the provisions of ss 190B(9)(a), (b) and (c) and therefore the application **meets** the condition of s 190B(9).

[End of reasons]

Information to be included on the Register of Native Title Claims

Application name	Northern Cape York Group # 3
NNTT file no.	QC2016/009
Federal Court of Australia file no.	QUD780/2016

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

As per Schedule of Native Title Applications

Date application filed/lodged:

As per Schedule of Native Title Applications

Date application entered on Register:

7 November 2016

Applicant:

As per Schedule of Native Title Applications

Applicant's address for service:

As per Schedule of Native Title Applications, however, please delete the PO Box details (as the street address is given)

Area covered by application:

As per Schedule of Native Title Applications, however please delete the text including and following the word Note to (08 February 2016).

Persons claiming to hold native title:

As per Schedule of Native Title Applications

Registered native title rights and interests:

As per Schedule of Native Title Applications

[End of document]