

# ***National Native Title Tribunal***

REGISTRATION TEST

REASONS FOR DECISION

## ***EDITED REASONS FOR DECISION***

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DELEGATE: Linda Piggot

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Application Name: Gunggari People #2

Names of Applicants: Robert John Munn

Region: South Queensland QC01/28

Date Application Made: 23/8/01 Federal Court No.: Q6027/01

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The delegate has considered the application against each of the conditions contained in s.190B and s.190C of the *Native Title Act 1993* (Cwlth).

### **DECISION**

The application is ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993* (Cwlth).

8<sup>th</sup> April 2002  
Date of Decision

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Linda Piggott  
Delegate of the Registrar pursuant to  
sections 190, 190A, 190B, 190C, 190D

## **Delegation Pursuant to Section 99 of the Native Title Act 1993 (Cth)**

On the 28 November 2001 Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all the powers given to the Registrar under sections 190, 190B, 190C AND 190d of the Native Title AT 1993 (Cth).

The delegation of 28 November 2001 has not been revoked as at this date.

### **Brief History of the Application**

This application was filed in the Federal Court, Queensland District Registry on 23 August 2001. With leave of the Court further supporting documentation was filed on 7 September 2001.

### **Information considered when making the Decision**

In determining this application I have considered and reviewed the application and all of the information and documents from the following files, databases and other sources:

- ◆ The National Native Title Tribunal's Registration Test Files and Legal Services files for QC01/28 and QC96/1
- ◆ Tenure information acquired by the Tribunal in relation to the area covered by this application (if any)
- ◆ The National Native Title Tribunal's registration testing files and applications for native title applications that overlap the area of this application (if any);
- ◆ The National Native Title Tribunal Geospatial Database
- ◆ The Register of Native Title Claims and Schedule of Native Title Applications
- ◆ The Native Title Register
- ◆ Register of Indigenous Land use Agreements

**Note:** Information and materials provided in the context of mediation on any of the native title determination applications by the applicants on behalf of their native title groups has not been considered in making this decision. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act 1993* unless otherwise specified.

## A. Procedural Conditions

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### s.190C(2)

*Information, etc., required by section 61 and section 62:*

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

### **Details required in section 61**

*s.61(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.*

### **Reasons relating to this sub-condition**

The Native Title claim group is defined at Attachment A of the application and is repeated at "RJM6" accompanying the applicant's affidavit dated 7 September 2001 and labeled Attachment M.

The native title claim group is a schedule of Gunggari families who are listed as being the descendants of named apical ancestors.

There is no information before me that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

**Result: Requirements met**

*s.61(3) Name and address for service of applicants*

### **Reasons relating to this sub-condition**

The applicant's name is detailed at Part A of the application. The details of address for service appear at Part B of the application.

**Result: Requirements met**

*s.61(4) Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons*

### **Reasons relating to this sub-condition**

Schedule A of the application describes the native title claim group. For the reasons which led to my conclusion (below) that the requirements for s.190B(3) have been met, I am satisfied that the

persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

**Result: Requirements met**

*s.61(5) Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents*

**Reasons relating to this sub-condition**

**s.61(5)(a)**

The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998

**s.61(5)(b)**

The application was filed in the Federal Court as required pursuant to s. 61(5)(b) of the Act.

**s.61(5)(c)**

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to s.62 below.

**s.61(5)(d)**

As required by s.61(5)(d) the application is accompanied by the prescribed documents, being, affidavits as prescribed by s.62(1)(a) and a map as prescribed by s.62(1)(b).

I refer to my reasons for decision in relation to s.62(1)(a) and (b) below. I note that s190C(2) only requires me to consider details, other information and documents required by s.61 and s.62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, it is my view that the requirements of s.61(5) are met.

**Result: Requirements met**

**Details required in section 62(1)**

*s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)*

**Reasons relating to this sub-condition**

An affidavit in relation to this condition has been received from the applicant and is attached to the application. A competent witness has witnessed this affidavit. I am satisfied that the affidavit filed satisfactorily addresses the matters required by s.62(1)(a)(i)-(v).

**Result: Requirements met**

*s.62(1)(c) Details of traditional physical connection (information not mandatory)*

**Comment on details provided**

At Schedule M, the application refers to Attachment M being an affidavit by the applicant dated 7 September 2001. This affidavit provides detailed information in relation to tradition physical connection of various Gunggari people to the claim area.

**Result: Provided**

**Details required in section 62(2) by section 62(1)(b)**

*s.62(2)(a)(i) Information identifying the boundaries of the area covered*

**Reasons relating to this sub-condition**

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and map in the application are sufficient to enable the area covered by the application to be identified with reasonable certainty.

**Result: Requirements met**

*s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application*

**Reasons relating to this sub-condition**

The applicant has provided information identifying the internal boundaries of the area claimed at Schedule B of the application. For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

**Result: Requirements met**

*s.62(2)(b) A map showing the external boundaries of the area covered by the application*

**Reasons relating to this sub-condition**

The applicants have provided a map showing the external boundaries of the area covered by the application at Attachment M to the application and labeled "RJM5". For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the claim area.

**Result: Requirements met**

*s.62(2)(c) Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests*

**Reasons relating to this sub-condition**

Schedule D of the application states that the State of Queensland has conducted some searches in relation to the claim area. The applicant states that the results of those searches do not indicate that native title has been extinguished in relation to the particular areas. The applicant further states that the applicant has not conducted any searches in relation to the claim area.

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

An adequate description of the native title rights and interests claimed by the applicants is contained in Schedule E of the application. The description does not merely consist 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. I have outlined these rights and interests in my reasons for decision under s.190B(4).

**Result: Requirements met**

s.62(2)(e) *A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*

- (i) *the native title claim group have, and their predecessors had, an association with the area*
- (ii) *traditional laws and customs exist that give rise to the claimed native title*
- (iii) *the native title claim group has continued to hold native title in accordance with traditional laws and customs*

**Reasons relating to this sub-condition**

Schedule F of the application contains a general description of the factual basis. The general description states:

- The native title claim group has, and the predecessors of those persons had, an association with the area
- There exist traditional laws and customs that give rise to the claimed native title
- The native title claim group has continued to hold native title in accordance with those traditional laws and customs.

In addition, Schedule F state that further information supporting these assertions is contained in Attachment M – Affidavit of [name deleted] of 7 September 2001.

I am satisfied that the information contained at Schedule F, along with the information contained in the applicant’s affidavit (dated 7 September 2001) which forms part of the application (attachment M), satisfactorily addresses a general description of the factual basis as required by ss62(2)(e)(i), (ii) and (iii).

**Result: Requirements met**

s.62(2)(f) *If native title claim group currently carry on any activities in relation to the area claimed, details of those activities*

**Reasons relating to this sub-condition**

The application provides some details of the activities that the native title claim group carries out in relation to the area claimed at Schedule G and in the applicant’s affidavit dated 7 September 2001 at attachment M to the application. It is my view that this description of activities is sufficient to comply with the requirements of s.62(2)(f).

**Result: Requirements met**

s.62(2)(g) *Details of any other application to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)*

**Reasons relating to this sub-condition**

Schedule H of the application lists Q6019/01 (Mandandanji#3) as being an application, which overlaps this application.

I also note that at Schedule B the applicant specifically excludes any land covered by other native title claims within the application area. The applicant's intention to exclude any overlapping applications, such as Mandandanji #3, is further supported by the applicant in paragraph 7 of his affidavit (7/9/01) at attachment M to the application. Paragraph 7 states that *"The parcels of claimed land within the application do not include overlapping claims from other Aboriginal groups, and..."*.

**Result: Requirements met**

s.62(2)(h) *Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, of which the applicant is aware*

**Reasons relating to this sub-condition**

Schedule I of the application states that *"the applicant is unaware of any such notices"*.

**Result: Requirements met**

**s. 190C2 Reasons for the Decision**

For the reasons identified above the application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61& 62.

**Aggregate Result: Requirements met**

**s.190C(3)**

*Common claimants in overlapping claims:*

*The Registrar 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) *an entry relating to the claim in 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 consideration of the previous application under section 190A.*

**Reasons for the Decision**

As of 3/4/02, there are no applications on the register that cover the area of this application. As there is no other application affecting the area of this application there is no need for me to further consider the conditions of s190C(3).

**Result: Requirements met**

**s.190C(4)(a) or s.190C(4)(b)**

*Certification and authorisation:*

*The Registrar must be satisfied that either of the following is the case:*

- (a) *the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or*
- (b) *the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.*

*Note: s.190C(5) – Evidence of authorisation:*

*If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:*

- (a) *includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*
- (b) *briefly set out the grounds on which the Registrar should consider that it has been met.*

## **Reasons for the Decision**

The application has not been certified pursuant to s. 190C(4)(a). The conditions of s190C(4)(a) are not relevant.

As I am only required to be satisfied that the conditions of either 190C(4)(a) or 190C(4)(b) have been met I have limited my consideration to compliance with s190C(4)(b) – authorisation by the native title claim group.

There are two limbs to s190C(4)(b):

1. each applicant must be a member of the native title claim group;
2. the applicants must be authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

*The first limb*

At attachment A to the application I note that the “[name deleted]” are named as part of the native title claim group. Paragraph (d) of the applicant’s s62 affidavit deposes that he is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it.

I am satisfied therefore that the requirements of the first limb of s190C(4)(b) are met.

*The second limb*

The prerequisites to compliance with s190C(5) is provision by the applicant of a:

- statement to the effect that the requirement in s190C(4)(b) is met; and



- brief statement setting out the grounds on which I should consider that the requirements of s.190C(4)(b) are met.

In *Risk v National Native Title Tribunal [2000] FCA 1589* O’Loughlin J noted that under the *Native Title Act*, native title claimant applications can only be lodged on behalf of properly constituted groups and that authorisation must come from all the persons who hold the common or group rights and interests. He notes that the applicant does not have to be individually authorised by each member of the claimant group. It is sufficient that the applicant has been authorised to make the claim in accordance with a process of decision making recognised under the traditional laws and customs of the claimant group.

The Act, at s251B, recognises that the applicants may be authorised using a decision making process that is either:

- (a) under traditional laws and customs of the group; or
- (b) agreed to and adopted by the native title claim group.

Statements of the kind required by s190(C)(5) are found in the applicants’ s62(1)(a) affidavits as outlined above. Paragraph (e) of the applicant’s s62 affidavit states that the applicant was authorised by resolution passed by consensus as a meeting of the Gunggari People held on 6 & 7 March 1999 in Mitchell. This is further supported by the applicant’s affidavit dated 7 September 2001 at attachment M to the application. Paragraph 2 of the affidavit of 7 September 2001 describes the means by which the applicant was authorised as follows:

- at a meeting of all Gunggari People held at the Yumba at Mitchell on 6 March 1999 the following resolutions were passed:
  - that all Gunggari People agree to use a consensus decision making process for Gunggari native title claims
  - that the Applicant, [name deleted], is authorised to be the Applicant for Gunggari native title claims and deal with matters arising in relation to it by all other persons in the native title claim group

Attached to the Affidavit are the following documents in relation to the authorisation process:

- resolutions of the meeting of 6 March 1999 (“RJM1”)
- minutes of the meeting of 6 March 1999 (“RJM2”)
- attendance sheets of the meeting held on 6 March 1999 (“RJM3”)
- advertisement for the meeting held on 6 March 1999 (“RJM4”)

The minutes confirm the applicant’s statement in relation to the decision making process and the resolutions passed. The attendance sheet indicates that fifty-two adults were present and advises that approximately 30 children were also present.

I am 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.

For these reasons I am satisfied that the requirements of s190C(4)(b) are met.

**Result: Requirements met**

## **B. Merits Conditions**

**s.190B(2)**

*Description of the areas claimed:*

*The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 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 and waters.*

**Reasons for the Decision**

*Written Description and Map of External Boundaries*

At Attachment B to the application the applicants provide a description of the external boundary of the area covered by the application. The description refers to coordinate pairs, lot boundaries, rivers and creeks and other native title determination applications. It also includes a 74-page list of geographic coordinate pairs and a reference datum and source.

The NNTT's Geospatial Unit (11 October 2001) confirmed that the description of the external boundaries is sufficient to meet the requirements of s62(2) and s190B(2).

The Tribunal is in receipt of correspondence from the applicant dated 4 April 2002 that clarifies that the applicant's intention is to exclude any land covered by native title claims within the application area at the date this application was filed with the Federal Court (7/9/01). Accordingly I have applied the slip rule and read the exclusionary wording to read "Any land covered by other native title claims within the application area as at 7/9/01."

*Maps*

A map of the application is provided at Attachment M and labeled "RJM5". The map is a monochrome copy of a map composed by the National Native Title Tribunal and clearly defines the external boundary of the application area.

The NNTT's Geospatial Unit confirmed that the map is sufficient to meet the requirements of s62(2) and s190B(2) in their assessment dated 11 October 2001.

It follows that I am also satisfied that the physical description of the external boundaries meets the requirements of s62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s62(2)(c).

*Internal Boundaries*

The internal boundaries of the application are defined in Schedule B of the application. These boundaries are described by way of exclusion as follows:

- specifically named lots are excluded from the application
- land covered by any other native title claims are excluded from the application
- the following areas are also excluded from the application:
  1. *Subject to clauses 3 and 4 below, the area covered by the application excludes any land or waters covered by:*

- (a) *a scheduled interest*
  - (b) *a freehold estate*
  - (c) *a commercial lease that is neither an agricultural lease nor a pastoral lease*
  - (d) *an exclusive agricultural lease or an exclusive pastoral lease*
  - (e) *a residential lease*
  - (f) *a community purpose lease*
  - (g) *a lease dissected from a mining lease and referred to in s23B(2)(vii) of the Native Title Act 1993*
  - (h) *any lease (other than a mining lease) that confers a right to exclusive possession over particular land or waters;*  
*which was validly granted or vested on or before 23 December 1996.*
2. *Subject to clauses 3 and 4, the area covered by the application excludes any area covered by the valid construction or establishment of any public work, where the construction or establishment of the public work commenced on or before 23 December 1996.*
3. *Where the act specified in clauses 1 and 2 falls within the provisions of:*
- (a) *s23B(9) Exclusion of act benefiting Aboriginal or Torres Strait Islanders*
  - (b) *s23B(9A) Establishment of a National Park or State Park*
  - (c) *s23B(9B) Acts where legislation provides for non-extinguishment*
  - (d) *s23B(9C) Exclusion of Crown to Crown grants ; or*
  - (e) *s23B(10) Exclusion by regulation*
- the area covered by the act is not excluded from the application.*
4. *Where an act referred to in clauses 1 and 2 covers land or waters referred to in:*
- (a) *s47 Pastoral leases held by native title claimants*
  - (b) *s47A Reserves etc covered by claimant applications*
  - (c) *s47B Vacant Crown Land covered by claimant applications,*  
*the area covered by the act is not excluded from the application*

It is my view that the description of areas excluded by class can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants. Accordingly I consider that the description provides a reasonable level of certainty in regard to whether native title rights and interests are claimed in relation to particular areas of land or waters within the external boundaries of the area subject to the application.

### Conclusion

For the reasons given above, I am satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

**Result: Requirements met**

**s.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.*

**Reasons for the Decision**

A list of names of persons in the claim group is not provided in the application. The requirements of s190B(3)(a) of the Act are therefore not relevant.

In the alternative, s.190B(3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The native title claim group is described at Attachment A to the application. An attachment to the applicant's affidavit (dated 7 September 2001) labeled 'RJM6' filed with the application, also provides a Schedule of Gunggari Families which the affidavit at para 9 states constitutes the native title group. The Schedule labeled "RJM6" and the description at attachment A are identical, and provide the name of an apical ancestor and ascribes to that ancestor named family groupings. It is these people and their descendants who are the native title claim group.

I am satisfied that this description constitutes an objective means of verifying the identity of members of the native title claim group, by the reference to the list of Gunggari families, such that it can be clearly ascertained whether any particular person is in the group.

The requirements of s190B3(b) are satisfied.

**Result: Requirements met**

**s.190B(4)**

**Identification of claimed native title:**

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

**Reasons for the Decision**

Under this limb, I must be satisfied that the native title rights and interests described in Schedule E of the application can be readily identified.

The description of the native title rights and interests claimed must not merely consist of a statement to the effect that the native title rights and interests are "all native title interests that may exist, or that have not been extinguished at law"[see s62(2)(d) of the Act].

The native title rights and interests claimed are described in schedule E of the application as:

*'The Gunggari people claim ... that they are entitled as against the whole world to: possession, occupation, use and enjoyment of the claimed land...'*

I find that the claimed rights and interests of 'possession, occupation, use and enjoyment' are clearly and readily identifiable. The rights claimed do not consist merely of a statement that all native title rights and interests are claimed that exist or that have not been extinguished at law.

The application meets the requirements of s.190B(4) and s.62(2)(d).

**Result: Requirements met**

**s.190B(5)**

*Sufficient factual basis:*

*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:*

- (c) that the native title claim group have, and the predecessors of those persons had, an association with the area;*
- (d) 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;*
- (e) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.*

### **Reasons for the Decision**

I must be satisfied pursuant to s190B5 that:

- a description of the native title rights and interests claimed in relation to the area affected by the application is provided in the application.
- a factual basis is provided to support the assertion that the rights and interests claimed in the application exist.

In particular, I must be satisfied that the factual basis provided to support the assertions that:

- the native title claim group have, and their predecessors had, an association with the area claimed;
- traditional laws and customs, acknowledged and observed by the native title group, exist;
- the native title claim group continue to hold native title in accordance with those traditional laws and customs;

is sufficient to support those assertions: see *Martin v Native Title Registrar* [2001] FCA 16.

I have found pursuant to s62(2)(e) that the application does provide a general description of the factual basis for the existence of the claimed native title rights and interests. I am also satisfied that a description of the claimed native title rights and interests is provided in the application (see schedule E of the application and my reasons under s190B4).

In considering this condition I have had regard to all the information contained in the application and in particular, Schedules E, F and G of the application and the applicant's affidavit dated 7/9/01 and marked attachment M to the application.

Schedule F of the application contains a general description of the factual basis. It asserts

- The native title claim group has, and the predecessors of those persons had, an association with the area
- There exist traditional laws and customs that give rise to the claimed native title
- The native title claim group has continued to hold native title in accordance with those traditional laws and customs.

These assertions are repeated in the applicants affidavit (Attachment M – para 10) dated 7 September 2001.

190B(5)(a) – that the native title claim group have, and the predecessors of those persons had, an association with the area.

To be satisfied under this criterion, it must be evident that the association with the area is and was communal, that is, shared by a number of members of the native title claim group.

At Schedule E of the application the applicant states that *‘The Gunggari People continue to live on, hunt, fish and travel through Gunggari territory including the claimed land as they have done for thousands of years.’*

At Schedule G of the application the applicant states that Gunggari People carry out the following activities on their traditional land:

- Visitation and maintenance of cultural sites by elders and other Gunggari members
- Traditional hunting and fishing
- Cultural heritage work to maintain sites of significance
- Fossicking
- Naming of sites and places

In his sworn affidavit [name deleted] (para 11) states:

- Areas around Dunkeld and Bollon along the Wallam are favourite fishing and camping areas
- That properties such as Teeswater, Kincora, Springfield, Woodlands and Womalbrook feature in the employment histories of Gunggari men and women from the turn of the century until the 1960’s

In addition, as part of the application, the claimants have provided Submissions and Evidence in Support (SEIS) of their native title claim and Applicant’s Evidence (together referred to as the Report) and annexed to attachment M (“RJM7”). The Submissions and Evidence was prepared by [name deleted], barrister, and the Applicant’s Evidence (‘Our Past is Our Future’ [OPOF]) was compiled by Associate Professor [name deleted] and others. The Report is accompanied by a signed statement from [name deleted] describing her methodology as well as a copy of her Curriculum Vitae, which in my view establish her credentials sufficiently to give the Report the necessary weight and probity for consideration in relation to the Registration Test.

Relevantly, the Report:

- identifies, by reference to quoted sources, the Gunggari people, as a language group, in an area which includes the claim area (Tindale, Barlow, Howitt, Homer) (OPOF:2)
- refutes the view of Breen (1973) that the Gunggari do not belong to the region by explanation (OPOF:2)
- provides a number of quotes from Gunggari elders which identify the location of Gunggari country ([name deleted], [name deleted], [name deleted]) in an area which includes the claim area (OPOF:4)

- describes how the Initial Anthropological Survey of the Gas Pipeline, South West Queensland to Wallumbilla, asked the Gunggari community to identify sites which continue to be important to their social and emotional well being – thirteen sites were noted and lodged with the Queensland Department of Environment and Heritage and included camp sites, burial grounds, walking tracks and stone arrangements (OPOF:7)
- provides a map, appropriately cited, which indicates the location of bora and camping grounds within Gunggari country (OPOF:29) – reference to the map of the claim area indicates that the majority of these sites are located within the claim area
- quotes [name deleted] (from Eckermann 1977), as a Gunggari woman, describing aspects of her life which took place within Gunggari country between the 1880's and the 1920's (OPOF:31)

There exists evidence of sufficient weight in the application to be satisfied that the claim group and their predecessors have an association with the area.

*190B(5)(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*

To be satisfied under this limb there must be evidence that: traditional laws and customs exist, that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

At Schedule E of the application the applicant states that *'The Gunggari People continue to live on, hunt, fish and travel through Gunggari territory including the claimed land as they have done for thousands of years.'*

At Schedule G of the application the applicant states that Gunggari People carry out the following activities on their traditional land:

- Visitation and maintenance of cultural sites by elders and other Gunggari members
- Traditional hunting and fishing
- Cultural heritage work to maintain sites of significance
- Education of younger members of the native title group in ways of Gunggari culture
- Fossicking
- Naming of sites and places

In addition, the Submissions and Evidence prepared by [name deleted], barrister, and the Applicant's Evidence ('Our Past is Our Future' [OPOF]) compiled by Associate Professor [name deleted] and others:

- states that prior to contact the Gunggari had adopted a matrilineal subsection system of social organisation which established links that unified them as a distinct cultural block which shared a body of customs and laws concerning occupation and ownership of lands (SEIS:3)
- states that the Gunggari identified exclusively with totemic beliefs and symbols associated with animals and that they identify their totem as jurdi or "meat" (OPOF:13)
- states that [name deleted], a claimant, points out that his totem is Dumdol or brown snake and quotes [name deleted] as saying 'you can call him the [name deleted]' and that this reference to [name deleted] has also been recorded by Holmer (1983) (OPOF:14)
- states that young men were introduced to the spiritual knowledge of their ancestors through the bora ceremony (OPOF:15)
- says that Winterbotham (1958) wrote about the initiation of a Gunggari tribesman initiated in 1900 (OPOF:16)

- recites burial practices (OPOF:17)
- states that Gunggari people knew how to harvest the land's produce and how to ensure that its resources were maintained (OPOF:19)
- talks of the Gunggari being recognised by their neighbours as owning the friction method (as opposed to the percussion technique) of making fire and quotes Calley (1957) in this respect (OPOF:20)
- tells of the activities of traditional healers (OPOF:21)
- provides a map indicating the location of bora and camping grounds throughout Gunggari country (OPOF:29)
- provides several quotes from Eckermann (1977) from interviews with Gunggari people e.g. reports [name deleted] as remembering ceremonies, ritual and traditional law and talking about attending corroborees (OPOF:31)
- Mr [name deleted] also describes men hunting and the method of killing their quarry using nullas nullas (OPOF:31)

There exists evidence of sufficient weight in the application to be satisfied that there exists traditional laws and customs that give rise to the claimed native title.

*190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs*

To be satisfied under this limb there must be evidence that the claim group continues to hold native title in accordance with their traditional laws and customs. I have already referred to information relevant to this subsection in the two earlier subsections.

Further, the Submissions and Evidence prepared by [name deleted], barrister, and the Applicant's Evidence ('Our Past is Our Future' [OPOF]) compiled by Associate Professor [name deleted] and others:

- states that Gunggari people continue to maintain food taboos in relation to eating their totems, a rule governing behaviour in the past. (OPOF:14)
- states that the spirits of the dead continue to exert influence on the living today (OPOF:18)
- states that ties with Gunggari country are so strong that Gunggari people will go to extraordinary lengths to be buried in their own country (OPOF:19)
- states that Gunggari continue to gather wild bananas, bush lemons, yams and other pre-contact food (OPOF:19)
- states that as recently as 1985 one of the Gunggari sought help for a serious liver condition from a traditional healer in Charleville (OPOF:21)
- states that the Gunggari continue to use the traditional bush medicines of their parents, grandparents and great-grandparents (OPOF:21)
- describes how the Gunggari, to maintain and enhance their cultural traditions, among other things, hold biannual events which celebrate the Gunggari culture, language and history (OPOF:44)
- describes how the Anthropological Survey of the Gas Pipeline produced a report identifying sites and stories associated with Gunggari land (OPOF:45)

There exists evidence of sufficient weight in the application to be satisfied that the claim group continues to hold native title in accordance with their traditional laws and customs.

I am satisfied that the information found at schedules E, F and G and attachment M accompanying the application is sufficient to meet the requirements of s190B(5)(a-c).



**Result: Requirements met**

**s.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.*

**Reasons for the Decision**

Under s.190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

‘Native title rights and interests’ are defined at s.223 of the Native Title Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- A. the rights and interests to be linked to traditional laws and customs;
- B. those claiming the rights and interests to have a connection with the relevant land and waters;
- and
- C. those rights and interests to be recognised under the common law of Australia.

The definition is closely aligned with all the issues I have already considered under s.190B5. I will draw on the conclusions I made under that section in my consideration of s.190B6.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term “prima facie” was considered in *North Galanjanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

*“The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie” is: “At first sight; on the face of it; as it appears at first sight without investigation.” [citing Oxford English Dictionary (2<sup>nd</sup> ed) 1989].”*

I have adopted the ordinary meaning referred to by their Honours in considering this application, in deciding which native title rights and interests claimed can prima facie be established.

I have considered the same material against this section as was detailed in my reasons relating to s.190B(5).

The claimed native title rights and interests are found at Schedule E of the application. The rights claimed are an entitlement ‘as against the whole world to: possession, occupation, use and enjoyment of the claimed land’.

In considering this condition against the native title rights and interests listed at Schedule E, I have had particular regard to the Submissions and Evidence prepared by [name deleted], barrister, and the Applicant’s Evidence (‘Our Past is Our Future’ [OPOF]) compiled by Associate Professor [name deleted] and others.

*Possession*

At pages 1-7 of the Applicant’s Evidence (‘Our Past is Our Future’ [OPOF]) compiled by Associate Professor [name deleted] and others, the author provides details of anthropological and

historical material which shows that Gunggari people were living on the claimed area at the time of white contact in the 1840's. Annexed to Associate Professor [name deleted] statement is a table named "Gunggari Native Title Claim Chronology", which provides dates, events and reference material. This information substantiates that the area claimed was traditionally held by Gunggari speaking people and that the native title claim group are descendant of those people.

*Occupation*

At paragraph 12 (a) of his affidavit [name deleted] deposes that [name deleted] and other members of the native title claim group visit and maintain cultural sites. He further deposes at paragraph 12 (h) the members of the native title claim group have worked on properties in the vicinity of Dunkeld and Bollon.

*Use and Enjoyment*

The applicant states at Schedule G of the application that the native title claim group currently carry out activities on their traditional land and include:

- visitation and maintenance of cultural sites by elders and other Gunggari members;
- traditional hunting and fishing;
- cultural heritage work to maintain sites of significance;
- education of younger members of the native title claim group in ways of Gunggari culture
- fossicking
- naming sites and places

I note the following qualifications to the rights and interests claimed:

*'...subject to any rights or interests created by the State of Queensland or the Commonwealth of Australia which do not conflict with the Racial Discrimination Act 1975, the Native Title Act 1993 or the Australian Constitution.'* (Schedule E)

*'The application does not make any claim to an offshore place.'* (Schedule P)

*'This application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown.'* (Schedule Q)

At paragraph 10 of the affidavit at attachment M to the application, the applicant states that:

*"... The Applicant's rights and interests claimed in the application are as follows:*

*(a) .....*

*(b) ..... The application for rights regarding previous non-exclusive possession acts is not a claim for native title rights and interests which confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others"*

In light of these express qualifications to the claimed native title rights and interests, and having regard to the material that is provided to support the factual basis (see reasons under s190B(5)) and the prima facie establishment of the claimed rights and interests, I am satisfied that the claimed native title rights of possession, occupation, use and enjoyment are prima facie established.

**Result:            Requirements met**

**s.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 have been expected currently to 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.*

### **Reasons for the Decision**

Under s.190B(7)(a) 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.

For the reasons given at s190B(5) I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application.

The applicant in his affidavit of 7 September 2001 (Attachment M) states that members of the native title claim group:

- have visited and maintained cultural sites, in particular [name deleted] (para 11(a))
- have fished, hunted and camped in the area of Dunkeld and Bollon and worked on properties surrounding the claimed area (paras 11(b) & (h))
- have undertaken cultural heritage work including site clearance (para 11 (c))

Based on this evidence, I am satisfied that [name deleted] and other members of the claim group have the requisite traditional physical connection.

**Result: Requirements met**

### **s.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.*

### **Reasons for the Decision**

For the reasons that follow I have concluded that there has been compliance with s61A.

### **S61A(1) Native Title Determination**

A search of the National Native Title Register has revealed that there is no determination of native title in relation to the area claimed in this application.

**S61A(2)- Previous Exclusive Possession Acts**

In Schedule B of the application class exclusions are made. For the reasons provided above at s190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded which includes all previous exclusive possession acts.

The exclusion clause meets the requirements of this subsection.

**S.61A(3) – Previous Non-Exclusive Possession Acts**

The applicant in his affidavit of 7/9/01 labeled Attachment M to Schedule M of the application states at paragraph 10 that: “... *The Applicant’s rights and interests claimed in the application are as follows: (a) ..... (b) ..... The application for rights regarding previous non-exclusive possession acts is not a claim for native title rights and interests which confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others*”

In light of this express statement in the applicant’s affidavit accompanying the application, I am satisfied that there is no claim to exclusive possession over areas covered by PNEPAs, as defined under s. 23F of the Act.

**S.61A(4) – s47, 47A, 47B**

At Schedule L of the application the applicants do not claim the benefit of ss.47, 47A and 47B for any area within the area covered by the application. However, I note that the applicants claim the benefit of ss.47, 47A and 47B at paragraph 4 of Schedule B of the application, and at paragraph 13 of the applicant’s affidavit, labeled M, to the application.

I have inferred from this that the applicants do claim the benefit of these sections, even though they acknowledge that they are not aware of any such area within the area of the application as at the date the application was filed in the Federal Court.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s.61A. In my opinion, the applicants’ express statements in respect to the provisions of that section are sufficient to meet the requirements of s190B(8). Whether or not the applicants have provided sufficient information to bring an area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum.

**Conclusion**

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of Section 61A the application should not have been made.

**Result: Requirements met**

**s.190B(9)(a)**

***Ownership of minerals, petroleum or gas wholly owned by the Crown:***

*The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*

- (a) *to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;*

**Reasons for the Decision**

Schedule Q of the application states that ‘*This application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown*’.

**Result: Requirements met**

**s.190B(9)(b)**

*Exclusive possession of an offshore place:*

*The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:*

- (b) *to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;*

**Reasons for the Decision**

The claimed area does not include any offshore places. At Schedule P the applicants state that ‘*This application does not make any claim to offshore places*’.

**Result: Requirements met**

**s.190B(9)(c)**

*Other extinguishment:*

*The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:*

- (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 subsection 47(2), 47A(2) or 47B(2)).*

**Reasons for the Decision**

The application does not disclose, and I am not otherwise aware that the native title rights and interests have otherwise been extinguished. A search of the Register of Indigenous Land Use Agreements dated 11/10/01 reveals that, as at that date, native title over the claim area has not been extinguished by agreement.

**Result: Requirements met**

*End of Document*