REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE:	Graham Miner

Application Name:	Gangalidda & Garawa Peoples
Names of Applicants:	Alfie Johnny, Clara Foster, Murray Walden Jr, Terrance Taylor, Jimmy Pyro, Jacky Green, Jack Hogan, Hilton Charlie and Albert Charlie
Region:	North West Queensland
NNTT No.:	QC04/5
Federal Court No.:	Q84/04
Date Application Made:	25 May 2004

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).

Graham Miner

26 July 2004
Date of Decision

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

Brief History of the Application

This application was lodged with the Federal Court on 25 May 2004. The application was made in response to section 29 notices in relation to part of the claim area. Those s.29 notices relate to 5 Exploration Permits (Minerals) – EPM 14262, EPM 14263, EPM 14264, EPM 14265 and EPM 14266.

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 including:

- The National Native Title Tribunal's registration test files for this application.
- The National Native Title Tribunal Geospatial Database.
- The Register of Native Title Claims.
- Schedule of Native Title Applications.
- The Native Title Register.
- Register of Indigenous Land Use Agreements.
- Assessment by the Tribunal's Geospatial Analysis and Mapping Branch dated 11 June 2004.
- Other documents referred to in the reasons.

Note: Information and materials provided in the mediation of any of native title claims made on behalf of this native title group 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* (the Act or NTA) unless otherwise specified.

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

On 19 May 2004, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

This delegation has not been revoked as at this date.

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NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C of the *Native Title Act*.

Section 190B sets out the merit conditions of the registration test.

Section 190C sets out the procedural conditions of the registration test.

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then the merit conditions.

A. Procedural Conditions

Applications contain details set out in ss61 and 62: s190C(2)

Section 190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

Native Title Claim Group: s61(1)

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

Reasons relating to this sub-condition

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 of the Act.

I must consider whether the application sets out the native title claim group in the terms required by s.61. That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a sub-group of the native title group, then the requirements of s.190C(2) would not be met and the claim cannot be accepted for registration (*Northern Territory of Australia v Doepel [2003] FCA 1384 at para 36).*

This consideration does not involve me going beyond the application, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group (*Northern Territory of Australia v Doepel [2003] FCA 1384 at paras 16-17, 37).*

The application before me is made on behalf of a group of people described in the application as the Gangalidda & Garawa Peoples. Schedule A of the application refers to attachments that contain the following description of the native title claim group:

Attachment A1 – Description of the Gangalidda Claim Group

The Gangalidda People are:

1. *The descendants of the following people:-*

    1. *Mingginda country – [descendant group A1]*

2. *Bugajinda/Moonlight Creek country: [descendant group A2]*

3. *Ngawayinda/Point Parker county: [descendant group A3]*

3a. .Mildiji/Allen Island country: [descendant group A3a]

4. *Gaabula/Bayley Point country: [descendant group A4]*

4a. Marranggabayi (Pains Island), Jurrmanggi (Bayley Island), Forsyth Island country: [descendant group A4a]

5. *Dumaji/Old Doomadgee country: [descendant group A5]*

6. *Dalwajinda/Bundella Waterhole country: [descendant group A6]*

7. *Cliffdale Creek country: [descendant group A7]*

8. *Wambilbayi country: [descendant group A8]*

9. *Madara, Dumbara Islands, Eight Mile Creek (Burruluwarra), "Horse Island" (Ngurrurri) country: [descendant group A9]*

And who identify and are identified by others as belonging to the Gangalidda people according to traditional law and custom.

2. The claimant group are the same people who comprised the Gangalidda people referred to in the Order of Justice Cooper in the Lardil Peoples v State of Queensland [2004] 298. The land the subject of this claim is adjacent to the land and waters subject of the determination in that case.
3. It is accepted that adoption takes place. Where adoption has occurred it confers upon the adoptee the right to identify with the Gangalidda People.
4. Some family names associated with the biological descendants of the named Gangalidda ancestors are: [family 1], [family 2], [family 3], [family 4], [family 5], [family 6], [family 7], [family 8], [family 9, [family 10], [family 11], [family 12], [family 13] and [family 14].

<u>Attachment A2 – Description of the Garawa Claim Group</u>

1. The Garawa people are those people who, according to the traditional laws acknowledged and customs observed are traditionally connected with part of the area described in Schedule B through:
- *spiritual, religious. Physical or historical associations;*
- *biological, classificatory or adoptive descent;*
- *processes of succession.*

2. By definition the Garawa people, in relation to the area claimed, are comprised of all persons descended from the nine Garawa persons identified below.

3. The Garawa people are all descended from nine Garawa People. These apical ancestors are [apical ancestor 1], [apical ancestor 2], [apical ancestor 3], [apical ancestor 4], [apical ancestor 5], [apical ancestor 6], [apical ancestor 7], [apical ancestor 8], [apical ancestor 9], are more particularly described as follows:

(a) [apical ancestor 1] was an Aboriginal person whose children included [descendant group 2A];

(b) [apical ancestor 2] was an Aboriginal person whose children include [family group 2B].

(c) [apical ancestor 3] was an Aboriginal person whose children include [family group 2C].

(d) [apical ancestor 4] was an Aboriginal person whose children include [family group 2D].

(e) [apical ancestor 5] was an Aboriginal person whose children include [family group 2E].

(f) [apical ancestor 6] was an Aboriginal person whose children include [family group 2F].

(g) [apical ancestor 7] was an Aboriginal man whose children include [family group 2G].

(h) [apical ancestor 8] was an Aboriginal person whose children include [family group 2H].

(i) [apical ancestor 9] was an Aboriginal person whose children include [family group 2I].

4. Members of the Garawa People were successful claimants in the Robinson River Land Claim and the Nicholson River Land Claim under the Aboriginal Land Rights (Northern Territory) Act 1976. The land the subject of these claims is in proximity to the area subject to the land claims.

I have taken descendants to mean biological descendants.

I have confined my considerations to the information contained in the application and accompanying documents (see *Northern Territory v Doepel* referred to above*).*

In my view there is nothing in the application to indicate that the group described in Schedule A does not include, or may not include, all the persons who hold native title in the area of the application. Further, there is no information in the application to indicate that the native title claim group has been assembled for administrative convenience, and is not a group as required by s.61(1).

Result: Requirements met

Name and address of service for applicants: s61(3)

An application must state the name and address for service of the person who is, or persons who are, the applicant.

Reasons relating to this sub-condition

The names of the persons named as the applicant (the applicants) are provided at Part A of the application. The details of address for service appear at Part B of the application.

One of the applicants was incorrectly named as [applicant 8]. His correct name is [applicant 8]. This error has been rectified.

Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: s61(4)

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this sub-condition

Attachments A1 and A2 of the application describes the native title claim group (see above). For the reasons which led to my conclusion (below) that the requirements of 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

Application is in prescribed form: s61(5)

An Application must be in the prescribed form, and be filed in the Federal Court, and contain such information in relation to the matters sought to be determined as is prescribed, and be accompanied by any prescribed documents and any prescribed fee

s.61(5)(a)

The application is in the form prescribed by Regulation 5(1)(a) of the *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).

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)

The application is accompanied by affidavits from the applicants in relation to the requirements of s.62(1)(a). I am satisfied that the application has complied with s.61(5)(d) in relation to the requirement for affidavits pursuant to s.62(1)(a).

There has been compliance with the requirement to include a map pursuant to s.62(1)(b).

See my reasons for decision under s.62(1)(a) and s.62(2)(b) below.

Result: Requirements met

Application is accompanied by affidavits in prescribed form: s62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

Affidavits sworn by the each of the persons named as the applicant accompany the application. The affidavits are signed, dated and competently witnessed. Each of the affidavits address the matters required by s.62(1)(a)(i)-(v) at paragraphs 1 to 4. I am satisfied that the affidavits meet the requirements of this condition.

Result: Requirements met

Application contains details set out in s61(2): s62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information required in s61(2). Because of this, the Registrar's decision for this condition is set out under s61(2) below.

Details of physical connection s62(1)(c)

Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate)

Comment on details provided

I refer to Schedule M of the application which states that the claim group have maintained a traditional physical connection with the land and waters the subject of the application. Schedule M refers to Attachments F, F1, F4 and Schedule G.

Briefly, Attachments F, F1 and F4 show that the Gangalidda & Garawa Peoples have maintained a traditional physical connection with the land and waters covered by the application, and that Gangalidda & Garawa people reside on or near Gangalidda & Garawa country.

Examples of activities through which the Gangalidda & Garawa peoples have maintained traditional physical connection are provided at Schedule G of the application, including:

- hunting and collecting animals, fish and other food from the land and waters;
- using the natural and mineral resources in the claimed area;
- camping on and travelling across the land and waters, and
- caring for the land and waters including significant sites.

Result: Provided

Information about the boundaries of the application area: s62(2)(a)

62(2)(a)(i) Information, whether by physical description or otherwise that enables the boundaries of the area covered by the application to be identified;

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 maps in the application are sufficient to enable the area covered by the application to be identified.

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

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

Result: Requirements met

Map of the application area: s62(2)(b)

The application contains a map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition

A map of the area claimed accompanies the application. 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 area covered by the application.

Result: Requirements met

Details and results of searches: s62(2)(c)

The application contains details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application

Reasons relating to this sub-condition

At Schedule D of the application the applicants state that "no searches have been carried out by the applicants". However some tenure information is provided as an attachment. I am satisfied the requirements of this provision have been met.

Result: Requirements met

Description of native title rights and interests: s62(2)(d)

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

Reasons relating to this sub-condition

A description of the claimed native title rights and interests is contained in Attachment E. 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 set out these rights and interests below in my reasons for decision in respect of s.190B(4).

Result: Requirements met

Description of factual basis: S62(2)(e)

The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and

(ii) there exist traditional laws and customs that give rise to the claimed native title; and

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Reasons relating to this sub-condition

In *State of Queensland v Hutchison [2002] FCA 416* Keifel J found that the information required by s.62(2) should form part of the application. This decision is therefore authority for the proposition that only material that is part of the application can be relied upon in support of compliance with the requirements of s.62(2)(e). Refer also to my reasons for decision under s.190B(5) below.

Information relevant to this provision is contained in Schedules F, G and M and Attachments F – F4 of the application. It is my view that the information in Schedules F, G and M and in the Attachments F amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e) (i)-(iii). See my reasons under s.190B(5) for details of this material.

I am satisfied that the information provided by the application amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e).

Result: Requirements met

Activities carried out in application area: s62(2)(f)

If native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities

Reasons relating to this sub-condition

At Schedule G of the application the applicants set out activities currently engaged in by the native title claim group in relation to the area claimed. In summary, details of those activities include:

- hunting, gathering and fishing on the application area;
- travelling across the land and waters;
- residing on or adjacent to the area;
- protecting sites, and
- using natural resources.

I am satisfied that the information provided by the application meets the requirements of this section

Result: Requirements met

Details of other applications: s62(2)(g)

The application contains details of any other applications to the High Court, Federal Court or a recognised State/Territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title;

Reasons relating to this sub-condition

Schedule H says:

> "The applicants are not aware of any other native title determination applications that have been made in relation to the whole or part of the area subject of this application. In *The Lardil Peoples v State of Queensland* [2004] FCA 298 Justice Cooper made Orders that native title exists on the adjacent land and waters. Those areas are excluded from this application."

The assessment of the Tribunal's Geospatial Analysis and Mapping Branch dated 11 June 2004 confirms that no applications as per the register of Native Title Claims or the Schedule of Applications fall within the external boundary of the application as at 11 June 2004.

Result: Requirements met

Details of s29 notices: s62(2)(h)

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area

Reasons relating to this sub-condition

At Schedule I of the application the applicant's state that notices have been given under s.29 of the Native Title Act in relation to part of the claim area. Those s.29 notices relate to 5 Exploration Permits (Minerals) – EPM 14262, EPM 14263, EPM 14264, EPM14265 and EPM 14266.

The assessment by the Tribunal's Geospatial Unit dated 11June 2004 states that 10 s.29 or equivalent notices, as notified to the Tribunal, fall within the external boundaries of this application as at 11 June 2004 - EPM 13982, EPM 13980, EPM 13981, EPM 13978, EPM 13979, EPM 14262, EPM 14263, EPM14264, EPM 14265 and EPM 14266. Of these only the last five that are disclosed by the applicant are current. By *current* I mean if the application is registered within the prescribed time the native title claim group will acquire such rights as may be available to the group under the legislation in respect of those EPMs.

I am satisfied that the information provided by the application meets the requirements of this provision.

Result: Requirements met

Reasons for Decision under s.190C(2):

For the reasons identified above, the application contains all the details and other information, and is accompanied by the affidavits and other documents, required by ss.61 and 62 of the Act. I am satisfied that the application meets the requirements of this condition.

Aggregate Result: Requirements met

Common claimants in overlapping claims: s190C(3)

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

This application was lodged with the Federal Court on 25 May 2004. For the purposes of s.190C(3)(b), the application is taken to have been "made" on that date.

Section 190C(3) requires identification of previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A. The applicants state at Schedule H of the application that they are not aware of any other applications. The assessment completed by the Tribunal's Geospatial Unit on 11 June 2004 confirms that there are no other applications that fall within the external boundary of the current application.

It is therefore unnecessary for me to further consider the conditions of s.190C(3).

Result: Requirements met

Application is authorised/certified: s190C(4)

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

Under this section, I am only required to be satisfied that one of the two conditions in s.190C(4) is met. This application is certified by Carpentaria Land Council Aboriginal Corporation (CLCAC) pursuant to s.203BE of the Act.

A search of the Tribunal's Geospatial database reveals that Carpentaria Land Council Aboriginal Corporation is the sole representative body for the region covered by the application. The relevant provisions of Part 11 of the Act for the purposes of this condition are found in s.203BE(1)(a), (2) and (4). They provide:

(1) The certification functions of a representative body are:

(a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body:

(2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the application to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the persons in the persons in the native title claim group.

(3) If the land and waters covered by the application are wholly within or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

(a) achieve agreement relating to native title over the land or waters, between the person in respect of whom the applications are, or would be made;

(b) minimise the number of applications covering the land or waters.

However a failure by a representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

(4) A certification of an application for a determination of native title by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements in paragraphs (2)(a) and (b) have been met; and

(b) briefly set out the body's reasons for being of that opinion; and

(c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The certification by CLCAC is in writing. I note that it is not dated but that is not a requirement of the Act. The signatory is [CLC officer 1] of the CLCAC. This was confirmed by the solicitor's acting for CLCAC by letter dated 19 July 2004. I am satisfied therefore that the first requirement in s.203BE (found in subparagraph (1)(a)) is met.

The second requirement in s.203BE is that the representative body must not certify a native title determination application unless it holds the opinions found in subparagraphs (2)(a) and (b). The certification briefly outlines the reasons for CLCAC holding the requisite opinions.

The third requirement is that found in s. 203BE(4)(a)&(b). For a valid certification of a native title determination application pursuant to s.203BE, the certification must include a statement to the effect that the representative body is of the opinion that the requirements in s.203BE(2) have been met and briefly set out the body's reasons for being of that opinion. I am of the view that the certificate contains the statement and briefly sets out the grounds required by this sub-section. The statements, in my view, adequately outline the grounds for CLCAC being of the requisite opinion.

The fourth requirement is that found in s. 203BE(4)(c). The certification must briefly set out what the representative body has done to meet the requirements in subsection (3), being the making of all reasonable efforts to achieve agreement and minimisation of applications over the area of the particular application it is certifying. In this case, the certificate states that CLCAC is not aware of any other application that covers any part of the area of this application. The statement in the certificate meets the requirements of this subsection.

For these reasons I am satisfied that CLCAC is the sole representative body for the area covered by the application and that it has certified the application under Part 11 of the Act.

Result: Requirements met

B. Merits Conditions

Identification of area subject to native title: s190B(2)

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 or waters.

Reasons for the Decision

Written Description and Map of External Boundaries
The written description of the external boundaries is found in Schedule B of the application. Schedule B describes the application area as follows:
1. The area covered by the application is all the land and waters within the following:
- Troutbeck Pastoral Holding (Lot 4601 on Plan PH1676)
- Bundella Pastoral Holding (Lot 4712 on Plan PH1678)
- Konka Pastoral Holding (Lot 4536 on Plan PH2261)
- Brokera Pastoral Holding (Lot 2523 on Plan PH1675)
- Pendine Pastoral Holding (Lot 4597 on Plan PH1605)
- Tarrant Pastoral Holding (Lot 4711 on Plan PH1677)
- Part of Westmoreland Pastoral Holding (Lot 1 on Plan WTH4) subject to Exploration Permit application 14264
- Part of Wentworth Pastoral Holding (Lot 2353 on Plan PH1515) subject to Exploration Permit applications 14264 & 14265
- Part of Escott Pastoral Holding (Lot 118 on Plan PC41) subject to Exploration Permit applications 14262 & 14266
- Lot 1 on Plan PK3 formerly known as Doomadgee Reserve

The claim area includes the areas covered by the following five Exploration Permits (Minerals):
1. EPM 14262
2. EPM14263
3. EPM14264
4. EPM14265
5. EPM14266

Footnote 1 states that these permit numbers were allocated under the *Mineral Resources Act 1989(Qld)*

A map of the claim area is provided at Attachment C. The map was prepared by the Tribunal's Geospatial Analysis and Mapping Branch on 31 March 2004 and clearly depicts the boundaries of each exploration permit. The map is titled "Proposed Native Title Determination Application: Gangalidda and Garawa People" and includes:

- The application area depicted by a bold outline and stippling;
- Lot on plan annotation for those land parcels covered by the application;
- Exploration permits annotation for those EPMs covered by the application;
- Reference cadastral boundaries and locations;
- Scale bar, north point, coordinate grid, locality map, datum and source notes.

The assessment completed by the Tribunal's Geospatial Analysis and Mapping Branch, dated 11 June 2004, concludes that the map and area description are consistent and locate the application area with reasonable certainty.

I am satisfied that the information contained in the application is sufficient to identify the area covered by the application with reasonable certainty. Further, I am satisfied that the description of the claim area by reference to geographic coordinates, meets the requirements of s.62(2)(a)(i).

Internal Boundaries

At Schedule B, the applicants have provided information identifying areas within the external boundaries of the area covered by the application that are not covered by the application. This is done by way of a formula that excludes a variety of tenure classes from the area covered by the application. The information is as follows:

2. Where the acts specified in clauses 3-6 fall within the provisions of
    a. S23B(9), s23B(9A), s23B(9B), s23B(10); or
    b. S47, s47A or s47B

then the area covered by the act is not excluded from this application.

(b) The following areas are excluded from the application:

3. The land and waters the subject of the Lardil Peoples v State of Queensland (2004) FCA 298 (the "Wellesley Sea Claim").

4. Any land and waters which are the subject of:
    a. A scheduled interest
    b. A freehold estate
    c. A commercial lease that is neither an agricultural or a pastoral lease;
    d. An exclusive agricultural lease or an exclusive pastoral lease;
    e. A community purpose lease;
    f. A residential lease;
    g. A lease dissected from a mining lease and referred to in Section 23B(2)(c)(vii);
    or
    h. Any lease (other than a mining lease) that confers a right of exclusive possession over particular land and waters,

which was validly granted or vested on or before 23 December 1996.

5. Any land and waters which are the subject of a validly constructed or established public work;

6. Any land and waters where the native title rights and interests claimed have otherwise been extinguished.

It is my view that the description of areas excluded as set out above 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 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 applicant.

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

The requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: Requirements met

Identification of the native title claim group: s190B(3)

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

Under this section, I am only required to be satisfied that one of the requirements in s.190B(3) is met. The application does not name all of the persons in the native title claim group and consequently, the requirements of s.190B(3)(a) are not applicable.

Turning to s.190B(3)(b), this sub-section requires that the Registrar 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 in Attachments A1 & A2 of the application. I have set that description out under my consideration of compliance with the requirements of s.61 above.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that: "[i]t 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….The Act is clearly remedial in character and should be construed beneficially."

I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group.

I am satisfied that the descendants of the named ancestors can be identified with minimal inquiry and as such, ascertained as part of the native title claim group. By identifying members of the native title claim group as descendants of named ancestors, it is possible to objectively verify the identity of members of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group. I see that adopted persons are included in the group described at Attachment A1.

As with descendants of named ancestors I am of the view that it is possible to objectively ascertain whether any person is adopted and is in the group.

The requirements of s.190B(3)(b) are satisfied.

Result: Requirements met.

Native title rights and interests are readily identifiable: S190B(4)

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 the readily identified.

Reasons for the Decision

Native title rights and interests claimed
Attachment E describes the native title rights and interests claimed as follows.

1. In relation to the land and waters the subject of:

- Lot 1 on Plan PK3 formerly known as Doomadgee Reserve.
- Troutbeck Pastoral Holding (Lot 4601 on Plan PH1676)
- Bundella Pastoral Holding (Lot 4712 on Plan PH1678)
- Brokera Pastoral Holding (Lot 2523 on Plan PH1675)
- Tarrant Pastoral Holding (Lot 4711 on Plan PH1677)

the Gangalidda people claim the right to possess, occupy, use and enjoy that land, and the waters on or over it, to the exclusion of all others. In the alternative the Gangalidda people claim the rights and interests set out in paragraph 2 (below).

2. In relation to the remainder of the land and waters in application area the Gangalidda and Garawa claimants claim the full and free enjoyment of the following native title rights and interests in accordance with their traditional laws and customs. These rights are claimed jointly and severally:

a. The right to occupy and/or use the application area;
b. The right to access and traverse the application area in accordance with and for the purposes allowed under their traditional laws and customs;
c. The right to hunt and/or gather living and plant resources on the application area;
d. The right to fish in the application area;
e. The right to camp on the application area;
f. The right to live on the land, to erect shelters and other structures on the application area;
g. The right to light fires on the application area;
h. The right to conduct burials on the application area;
i. The right to use natural resources, other than minerals and petroleum.
j. The right to:
    i. Take water;

ii. Take fish;
iii. Take plants and animals;
iv. Take ochre, clay and salt;
v. Take sand, gravel and rock;
vi. Take shells; and
vii. Take grass, resin and wood.

k. The right to manufacture or produce traditional items from resources found on or in the application area;

l. The right to carry out economic pursuits on the application area including the barter and/or exchange of natural resources and the products of those resources;

m. A right to receive a part of any living, mineral or other natural resources taken by others on or from the application area;

n. The right to enjoy the amenity of the application area;

o. The right to protect the land and waters and the resources of the land and waters by taking steps to prevent acts which are not carried out in the exercise of statutory rights or any common law rights and which acts may cause damage, spoliation or destruction of the land and waters or the animals, plants or fish on or in the land and waters.

p. An interest in the management and/or use of the application area;

q. The right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the State of Queensland or the Commonwealth in relation to the use of the land and waters;

r. The right to protect the application area from physical damage;

s. The right to maintain, protect and preserve the physical state of sites and areas within the application area that are of significance to the native title holders;

t. The right to maintain, protect and preserve site and areas within the application area that are of significance to the native title holders from inappropriate behaviour;

u. The right to maintain, protect and conserve the natural values and resources of the application area; in the alternative an interest in the maintenance, protection and preservation of the natural values and resources of the application area;

v. The right to protect and look after cultural artefacts from on and within the application area, including rock art;

w. The right to conduct and take part in ceremonial activities on the application area;

x. The right to maintain proper and appropriate custodianship of the application area and the special and sacred sites within and on it, including through ceremonies, to ensure the continued vitality of traditional law and culture.

3. The rights and interests in 2 (above) are claimed to the extent that the exercise of them is consistent with the rights and interests below:

a. With respect to those parts of the application area, other than land or waters to which s47A Native Title Act 1993 applies, which are, or have been, the subject of a previous non-exclusive possession act within the meaning of s23F, NTA, the applicants claim the native title rights and interests set out above subject to the rights and interests created in the "non-exclusive possession act" which are not inconsistent with the rights and interests claimed and, in the case of rights granted which are inconsistent with the rights and interests claimed, subject to any suspension or regulation of the native title rights and interests which those inconsistent rights and interests cause.

b. With respect to those parts of the application area, other than land or waters to which s47A Native Title Act 1993 applies, which are, or have been, the subject of:

i. a Category B intermediate period act within the meaning of s232C, NTA;
ii. a Category C intermediate period act within the meaning of s232D, NTA; or

iii. a Category D intermediate period act within the meaning of s232E, NTA;
the applicants claim the native title rights and interests set out above subject to the rights and interests created in the "non-exclusive possession act" which are not inconsistent with the rights and interests claimed and, in the case of rights granted which are inconsistent with the rights and interests claimed, subject to any suspension or regulation of the native title rights and interests which those inconsistent rights and interests cause.

c. With respect to those parts of the application area, other than land or waters to which s47A Native Title Act 1993 applies, which are, or have been, the subject of:
i. a Category B past act within the meaning of s230, NTA;
ii. a Category C past act within the meaning of s231, NTA; or
iii. a Category D past act within the meaning of s232, NTA;
the applicants claim the native title rights and interests set out above subject to the rights and interests created in the "non-exclusive possession act" which are not inconsistent with the rights and interests claimed and, in the case of rights granted which are inconsistent with the rights and interests claimed, subject to any extinguishment or suspension of the native title rights and interests which those inconsistent rights and interests cause.

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.[1]

Section 62(2)(d) requires that the application 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." This terminology suggests that the legislation is intended to screen out of applications native title rights and interests that are vague, or unclear. Thus, in my view the test to be applied here is whether a claimed native title rights and interests is readily identifiable in the sense that it can be clearly and easily understood what is being claimed.

Furthermore, the use of the phrases 'native title' and 'native title rights and interests' exclude any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the *Native Title Act 1993* (Cth).
s.223(1) reads as follows:

> 'The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia'.

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands

[1] *Queensland v Hutchinson* (2001) 108 FCR 575.

and waters,[2] rights to minerals and petroleum under relevant Queensland legislation,[3] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[4]

The following native title rights and interests claimed are not in my view readily identifiable:

n. The right to enjoy the amenity of the application area;

p. An interest in the management and/or use of the application area;

I am of the view that these rights are vague. I am uncertain as to what is claimed. Consequently I find that they are not readily identifiable.

u. The right to maintain, protect and conserve the natural values and resources of the application area; in the alternative an interest in the maintenance, protection and preservation of the natural values and resources of the application area;

I do not understand what is meant by term "natural values" used in this claim. The term appears in both the first right claimed and in the alternative. As it is not clear it is not, in my opinion, readily identifiable.

I am satisfied that the native title rights and interests claimed in Attachment E are, (with the exception of 2. n. and p. and u,) readily identifiable.

Result: Requirements met

Factual basis for claimed native title: s190B(5)

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;

(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;

(c) 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

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to

[2] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[3] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[4] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c).

To satisfy the requirements of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s.190A(3), regard will also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

This is a convenient place to state that in this application Attachment F has many footnotes referring the reader to sources for statements made. Much of that information has not been made available. My role is not to search for that information. I have had regard to the information supplied in the application. I have not searched for other information. For this reason I have not included the footnotes in my reasons. I have done that so it is not thought I have had regard to information not supplied in preparing my decision and reasons.

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s.62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it."

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[5]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

I find these statements in the *Yorta Yorta* decision of assistance in interpreting the terms "traditional laws", "traditional customs" and "native title rights and interests", as found in s.190B(5). However, I am also mindful that the "test" in section 190A involves an administrative decision – it is not a trial or

[5] See *Ward* at [382].

hearing of a determination of native title pursuant to s.225, and it is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing.

In considering this condition, I have had particular regard to:

- information contained in Schedules G and M and Attachments F, F1, F4, of the application;
- the affidavit sworn by [Gangalidda claimant 1] dated 10.8.99
- the affidavit sworn by [Gangalidda claimant 2] dated 8.8.99
- the affidavit sworn by [Gangalidda claimant 3] dated 12.8.99
- the affidavit sworn by [Gangalidda claimant 4] dated 12.8.99
- the affidavit sworn by [Gangalidda claimant 5] dated 6.5.04
- the affidavit sworn by [Gangalidda claimant 6] dated 19.5.04

I believe that in respect of this condition I must consider whether the factual basis provided by the applicant is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5) (a), (b) and (c). I have formed the view that the information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

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

At Schedule F of the application, the applicants state that:

"The Gangalidda and Garawa people assert that the native title rights and interests claimed exist by reason that:-

(a) they and their predecessors had, and continue to have a traditional association with the area; and
(b) the Gangalidda and Garawa people maintain traditional laws and customs that give rise to the claimed native title; and
(c) the Gangalidda and Garawa people have continued to hold the native title in accordance with those traditional laws and customs

The area claimed is part of a larger area of land and waters, which continued to be owned and occupied by the claimants after the assertion of sovereignty by the Crown of the United Kingdom. The claimants retain a traditional connection both to the area claimed and to their traditional country generally, parts of the latter which have already been upheld to be traditionally-owned by the claimants."

Annexed to the application as Attachment "F l " are copies of a number of affidavits by Gangalidda people. They are as follows:

Affidavit of [Gangalidda claimant 1] dated 10.8.99;
Affidavit of [Gangalidda claimant 2] dated 8.8.99;
Affidavit of [Gangalidda claimant 3] dated 12.8.99;
Affidavit of [Gangalidda claimant 4] dated 12.8.99;
Affidavit of [Gangalidda claimant 5] dated 12.8.99;
Affidavit of [Gangalidda claimant 6] dated 20.8.99.

The Schedule states in respect of these affidavits that:

"1.10 Although the primary focus of that evidence was in relation to areas below the high water mark, much of that evidence is also applicable to the areas of land and waters the subject of this application. This is not least because the applicants concept of the sea includes areas that are well inland from the high water mark. Furthermore, in giving their evidence about their connection to the coastal seas, the Gangalidda people also gave evidence about their broader interests as well as articulating the laws and customs that exist in their community."

Also I see in a footnote on page 4 of the Schedule that it is said that the sand dunes on the Gangalidda coast such as Horse Island, Wambilbayi Island and Dumaji Island are referred to as islands by the Gangalidda people because the surrounding salt pans become inundated in the wet season and during storm surges.

Later in Attachment F it is said that:

"7.11 The majority of Gangalidda People have been born on Gangalidda country. A number of those whose affidavits are attached were born on the application area. These include [name removed] born at Horse Island and [Gangalidda claimant 1] and [Gangalidda claimant 2] who were born on Westmoreland station.

I refer to the affidavits of [Gangalidda claimant 1] dated 10.8.99, para 1; [Gangalidda claimant 4] dated 12.8.99, para 1. [Gangalidda claimant 4] also notes that most of her children were born on Gangalidda country (para 15). This a convenient place to also refer to the affidavit [Gangalidda claimant 6]sworn on 6 May 2004 who says:

1. My full name is [Gangalidda claimant 6]. I was born in I977. I am 26 years old.

2. [name removed] is my proper skin name, it was given to me by old [names removed], who's my Tjungayi, after I went through law. Those proper names like that you can't get until after you've been through law. It means sea snake, it is a name from the Mambalia estates. Bulanyi is my skin. Mungabayi is Burketown where I am from. [name removed] is one of the first blokes from the Gangalidda tribe.

3. I am a Gangalidda man. Gunamulla is my country. That's my father's country, I get it from him, he was a Balyarinyi man.

4. I learned about culture and bush ways from as early as I can remember. Dad used to take all of us kids out bush to do that, every spare moment he got. He took us all over Gangalidda country. Gunamulla was our favourite spot, it's our country and the most isolated. It used to take about 8 hours back then.

5. We went fishing around the wharf on the Albert River, or to the Leichardt, Beames Brook, Twelve mile, Gregory crossing for turtle, crayfish, fish- black bream and barramundi. Water lily and mud mussel and long-neck turtle are not really found in running water, more in the swamps like lluka and Yarram and Bundella. We went all those places.

6. I teach my own kids what I know, just like dad did with us as kids. That education about Aboriginal culture is as important as any lesson at school, for Aboriginal people.

Attachment F continues:

"7.12 A number of Gangalidda People, such as [Gangalidda claimants] have lived and worked on a number of the pastoral holdings in the application area. In doing so they have maintained their physical presence on the application area and have been able to continue to exercise and observe the native title rights and interests claimed."

7.13 The six pastoral holdings comprising the majority of the application area were in 1980 leased by the CLCAC to be held on trust for the claimant group. This reflects a strong contemporary pursuit by the claimant group of opportunities to exercise traditional rights and interests to the fullest extent, before native title was recognised as a legal concept by Australian courts.

7.14 The Gangalidda have lived at Burketown, Moonlight Creek, Escott Station, Old Dumaji and Doomadgee Reserve, and Horse Island, all places located on their traditional country. While for some years travel to the coast was difficult, the development of infrastructure such as roads and outstation facilities, and the leasing of pastoral properties, has greatly assisted access to coastal areas.

I note that there is an outstation which is used by [Gangalidda claimant 8] on the Doomadgee Reserve. See para 1 of [Gangalida claimant 8] affidavit dated 12.8.99,

7.15 Part of the application area is the subject of a grant under the *Aboriginal Land Act 1991* (Qd) to the Gangalidda Aboriginal Corporation in trust for the benefit of Gangalidda people and their ancestors and descendants. This grant was made in fee simple on 21.9.94 and related to the former Aboriginal reserve called Old Dumaji.

7.16 Old Dumaji was the original mission settlement from 1933 to 1936, and in 1994 was granted in fee simple to the Gangalidda People. Presently, at any one time 20-30 people live at the coastal outstation for 9 months of the year, although most saltwater country is inaccessible through the wet season.

7.17 This outstation, and other smaller ones, are used by those Gangalidda people who wish to live and work out on country, and their invited guests. Main food sources are fresh fish and mudcrab, goanna, plums and berries. Fishing is a primary activity. Other activities include weed control, rubbish collection and fencing.

7.18 Old Dumaji has been a centre for coastal residence since the 1970' s. Even prior to this there was visitation through Gangalidda people visiting their country from Mornington Island and through work on cattle properties. However it is equally clear that use and residence of traditional country is not limited to the location of outstations. Many people camp out on their traditional country regardless of the existence of outstations. Clarence Walden gave evidence of this under cross-examination from the Commonwealth:

> [name removed]: But you'd say - would you say the majority of people, though, would go out on the weekend or spend as much time as they can?
>
> [Gangalidda claimant 3]: Yes.

7.19 He gave evidence that while there was an outstation at Old Dumaji, other people go back to their country and live under a "bough shed". He gave evidence of going to the coast near Tarrant Point often. He said about 40-50 people are "more or less living" on their traditional country but many people go out along the coast on weekends. Alan Ned gave the following description of Old Dumaji:

> "There is usually a big mob of people at Old Dumaji - Gangalidda people. People go fishing every day, like old times. People go out in boats hunting. People from Mornington Island pick people up and they all go hunting. They bring back what they catch and share it around - proper way. They share it before they go back to Mornington. They share because that sea belongs to Gangalidda people there. They know they have to follow that law. It is the same law on their side."

I note that the above passage quoted from [Gangalidda claimant 1] appears at para 31 of this affidavit sworn 10.8.1999.

7.20 [name removed] has given evidence of travelling right across Gangalidda country from the time he was a baby with his father. He recalled such a trip which he made with his father when he was 8, Murrandoo Doomadgee, [names removed]. He noted that those people were living at Old Dumaji at the time and had been since the 1970's. [Gangalidda claimant 8] spoke of going to Point Parker country "often". [Gangalidda claimant 1] said he goes back to Bushfire country to hunt and fish "every weekend, once a month" and other times are spent at Old Dumaji. Wadjularbinna spoke of regular trips to Moonlight Creek country and Dumbara.

In respect of the Garawa people the applicants say amongst other things that:

"1.11 The traditional country of the Garawa people traverse land and waters in the State of Queensland and the Northern Territory. Their ongoing acknowledgement of traditional laws and customs have led to their interests being recognised under the *Aboriginal Land Rights Act 1976* (Cth). Those claims include the Nicholson River (Waanyi/Garawa) Land Claim ('Nicholson River Claim), the GarawalMugularrangu (Robinson River) Land Claim ('Robinson River Claim') and the Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim ('Beds and Banks Claim').

1.12 The Garawa people have maintained a rich and vibrant culture and despite the introduction of western influences. Their society continues to be controlled by traditional values and customs and they have maintained a connection to their country. In the Nicholson River Claim Justice Kearney, summarising in relation to historical factors impacting upon the claimants, quoted:

> "...It becomes apparent very quickly that despite the changes, continuities are strong: e.g. although a variety of English is the lingua franca, conversations are laced with Waanyi/Garawa when older people are participants and among themselves the older ones use their own languages heavily. The kinship system and subsection system are of great importance and people show a preference for kin names over personal names. ... People speak with strong feeling about their land whether or not they have been able to live on it; about the places of significance in that land, and the stories associated with those places."

1.13 Justice Kearney in the Nicholson Claim came to the conclusion, after reviewing the evidence of the claimants', that members of the local descent groups that generally constituted the claimants had a strong traditional attachment to the land claimed."

1.14 The factors considered relevant to measuring the degree of traditional attachment in the Nicholson River Claim included the performance of ceremonies associated with sites and dreaming tracks; the observance of ritual; adherence to the kinship rules defining the claimants and by which their connection to land is created and transmitted; the maintenance of the claimant's social system; the transmission of knowledge of spiritual matters and of the land's natural resources to younger members; and the use of the land by foraging.

1.15 In the Nicholson River Claim Justice Kearney made formal findings which included that:

(1) The claimants, as members of local descent groups, were the traditional Aboriginal owners of the land the subject of the claim; and

(2) The traditional owners were entitled by Aboriginal tradition to the use or occupation of the whole of that land."

Later in the Attachment F it is said:

7.21 The Garawa people have continued to occupy and use the land and waters the subject of this application. Examples are included in the affidavit of [Garawa applicant 1]. In his discussion of historical influences on the Waanyi/Garawa people Justice Kearney noted the period called 'station time' by the claimants, when pastoral pressures meant that many Aboriginal people became consolidated on pastoral properties. One of those properties is Westmoreland station, which is on Gangalidda and Garawa country, parts of which are the subject of this application.

[Garawa applicant 1] in his affidavit sworn 19 May 2004 says:

"1. My full name is [Garawa applicant 1]. I was born in I953. I am 5I years old. All Aboriginal people call me [name removed] which is short for Wongalamurri. Wongalamurri means Crow in the Garawa language. That name was given to me by my father after I went through Aboriginal law. It represents my country, my *ijan*.

2. I am full *mingaringgi* for my father's father's country, Robinson River area. That means I am the traditional owner of it. My skin I also got from my father's father, I am full Bulanyi skin -

Proper way than means I can only marry Nulaynma skin. That was the skin of my first wife, she was a Waanyi woman.

13. Most of my knowledge is because I have been too long travelling around with people, older people with knowledge of country. I got experience about our law and culture in many places over our country. including who is junggayi for that country, and the main mingaringgi for that country. [names removed] and my old father [name removed] (my father's brother again)- those were the leaders of Garawa people that mob.

14. They taught me bush ways too, told me you can't hit some thing on the head kill him. Me I can hit dingo an the head but not that Mambalia snake - I have to walk away from him and all Mambalia people should walk away from that water python. Depends on your skin, what you must leave alone. Could be goanna, or turtle, anything.

15. They taught me where to find sugarbag and how to track things and where and when to look for bush tucker, certain months are better for some things, and when and where to light fire. We still do all that all the time on our own country.

16. White people see fire as a thing of danger but it means a lot to Aboriginal people. It is bushfire, and ceremony, and for cooking and warmth and to make signals- we don't treat him as what you think of fire, we treat him as ours like family. i teach all my kids all this. They don't treat fire as fun, you treat him proper way he treat you that proper way too, like everything else.

17. I teach my kids where to go and fish and what you can't eat (some fish have too much bone for kids) and how to cook it properly (like shark). You have to know how to search the tree for water. You must take what you find, what the country gives you- you might not find it again next place. If you are walking on country you got to do it proper way too, and proper time or you'll perish.

18. There are places I can't go to. Like *yullagungimarra* where Rainbow stays- only my junggayi can go there. My junggayi also don't allow me to go to that crow country wongalamurri i can go past at a distance but I can't muck around, cut a tree down or throw stones. You got to treat that country as a human being, he's your family he's your dreaming.

19. I go hunting and fishing whenever I want to, both in the Territory and the Queensland side. I go hunting and fishing around Westmoreland station and Settlement Creek. I often go there when I a travelling through to Doomadgee. We pull up and camp and go fishing. Might get turkey, kangaroo, goanna, bream, catfish or turtle.

20 I know other Garawa people do the same. I have seen them there or along the road and they have told me where they have beer. and where they are going. I know the [name removed] mob go down that way a lot."

The statements in [Garawa applicant 1] affidavit support the information in the Attachment which relates to the native title claim group having, and the predecessors of those persons having had, an association with the area.

Attachment F also says:

7.22 The evidence of Wadjulabinna in the Wellesley Sea Claim in relation to occupation and use of Westmoreland station, noted above, is directly applicable to the Garawa people in so far as her father was a Garawa man. So too is the evidence of [name removed] who was a Garawa woman.

7.23 Justice Olney in the Robinson River Claim commented:

> In spite of the difficulties associated with European settlement in the region, Garawa people in general appear to have remained in the region and have tended to live and work on stations in their own country."

Further, at Schedule G the applicants outline the activities in relation to the land and waters the subject of the application that the claimant group are currently carrying out are as follows:

1 . Members of the claimant group currently reside on or adjacent to the application area, camping, on outstations, or at Old Dumaji. Examples of this are set out in **Attachments 'F'** and **"F1"** to this application.

2. The Gangalidda claimants currently enjoy exclusive possession, occupation and use of part of the application area with the sanction of State law, namely the former reserve of Old Dumaji.

3. Members of the claimant group actively protect sites and areas of significance, cultural heritage and Aboriginal artefacts on and in Garawa and Gangalidda land and waters, including the application area. Members of the claimant group currently participate in cultural heritage surveys and monitoring of any activities occurring on Garawa and Gangalidda land and waters.

4. Members of the claimant group currently use the application area for customary, cultural and ceremonial purposes. The cultural significance of Gangalidda and Garawa country, including the area the subject of this application is set out in detail in **Attachments 'F' and "F1" - "F4** to this application.

5. Members of the claimant group continue to maintain a traditional system of land tenure. The details of this system and the continuing acknowledgement and observance of it are set out in **Attachments "F", "F1 and "F4"** to this application.

6. The claimant group has in the past stopped development activities from taking place upon the application area in the exercise of their native title rights, and obligations to protect Gangalidda and Garawa country. [name removed] in his 1998 Report gives one example of the consultation and negotiation between the Gangalidda People and a major development proponent over the construction and operation of a slurry pipeline and port development on the application area. Confronted by the assertion of Gangalidda interests in those land and waters and opposition to the proposal, the proponent moved elsewhere.

7. Members of the claimant group currently hunt, gather and fish on the application area. Members of the applicant group continue to use living and other natural resources on or in the application area. Examples of these are contained in **Attachments "F", "F1" and "F4"** to this application.

8. Members of the claimant group currently manage the claim area through a variety of means. Examples of these are contained in **Attachments "F" and "Fl"** to this application. Members of the claim group continue to manage the environment *inter alia* through traditional burning techniques and eradication of introduced weeds and pests.

9. Members of the claimant group currently traverse the application area, including for the purposes of carrying out traditional activities, including those referred to in this Schedule.

10. Members of the claimant group use the natural and mineral resources in the claimed area. An example of the use of mineral resources is salt mining, evidence of which was heard in the Wellesley Sea Claim. Further examples can be found in **Attachments "F" and "Fl"** to this application.

11. The applicant group currently exercises its native title right to control the use and enjoyment of living, mineral and other natural resources of the application area through restricting or placing conditions upon the access and use of Gangalidda and Garawa land and waters by others. Examples are as follows:

a. Restricting the access of others to that part of the application area that is Old Dumaji. There has been a permit system by which some access and use was allowed to non-native title holders such as recreational fishermen, upon their request to the Traditional owners through Doomadgee Aboriginal Council. In recent times, however, the permit system has not being employed and visitors are excluded.

b. Access to the Gangalidda coast, and much of the application area, is via the road between Doomadgee and Old Dumaji. This road remains private as a means of controlling access to Gangalidda land and waters.

c. With respect to all of Garawa and Gangalidda country, including the application area, the applicant group requires negotiations with interested parties over access, and any use and/or extraction of resources. There are a number of past and current agreements between the Garawa and Gangalidda people respectively and such interested parties as mineral exploration companies, government and statutory authorities and private enterprise. Access to and use of Garawa and Gangalidda country has not been allowed in the absence of such agreements. It should be noted that the preservation of native title rights and interests has been a consistent feature of any agreed authorised uses of the application area.

d. Use of the application area and its resources has been denied to those without permission from the Traditional owners. Examples are contained in contained in **Attachments "F" and "F1.**

In my opinion all these activities are consistent with and support the assertion that the native title claim group has, and the predecessors of those persons had, an association with the area.

At Schedule M the applicants supply details of traditional physical connection of members of the native title claim group with the land and waters covered by the application as follows:

> "Members of the claim group have maintained a traditional physical connection with the land and waters the subject of this application. The details of that physical connection can be found in Schedule G which lists the current activities of the claimant group. It can also be found in **Attachments "F", "F1" and "F4"** which detail the factual basis upon which native title is claimed. These materials show that members of the claimant group were born on, have lived on, have camped on and hunted and fished on their traditional country, including the land and waters the subject of this application. There is an outstation at Old Dumaji which forms part of this application.

In *The Lardil Peoples v State of Queensland [20041 FCA 298* Justice Cooper outlined the applicants ongoing connection of adjoining land and waters to this application. In doing so he was commenting on the ongoing connection to the traditional country of the Gangalidda people generally. This necessarily included their physical connection.

> "Whether on Mornington Island or at Doomadgee, there were respectively core communities of Lardil, Yangkaal, Kaiadilt and Gangalidda peoples. The dormitory system trained up young men for the pastoral industry and young women for domestic service away from their traditional territories. Despite this relocation of trained men and women, some of that generation, upon retirement, returned to their traditional territories. During their time as stockmen on Escott and the neighbouring pastoral properties, a number of the witnesses had the opportunity to visit the Country to which they belonged and in fact did so."

And later:

> "All the indigenous witnesses called to give oral evidence knew what Country they belonged to and knew that it gave them the right to live there and hunt and fish on the

> land and within the seas of that Country. They also knew their genealogy and that genealogical relationships could create derivative rights in respect of Country to which they did not belong. They also were aware of systems of Dulmadaship which carried rights, particularly in relation to entitlements to parts of dugong and turtle caught within their sea Country. The continuity of that knowledge is recorded over time in the published anthropological material. That some have chosen to return and live on Country in the outstations, satisfies me that each of the communities acknowledge that the right to return to one's Country, to visit it, to live there or to hunt and fish there, has never been lost or abandoned and has at all times remained an option to be exercised by those who have the right to do so."

The material provided at Attachment F4, being an extract from the Report of the Aboriginal Land Commissioner in the Robinson River Land Claim, shows the basis upon which the Garawa People have an association with their traditional country pursuant to their traditional laws and customs.
I am satisfied that the land and waters the subject of this application are part of that traditional country.

To sum up, the information in the schedules and attachments to the application, including the affidavits indicates to my satisfaction that the area the subject of this claim can be accepted as being within a larger area of land and waters that has continued to be owned and occupied by the native title claim group prior to and after the assertion of sovereignty by the Crown of the United Kingdom. I find that much of the information provided relates to the broader traditional country of the claimants that includes the areas the subject of this application. I am satisfied that the schedules, attachments and affidavits to which I have referred establish that the claimants have maintained a continuing connection with their traditional lands and waters and that parts have already been upheld to be traditionally owned by the claimants.

There is a view that the factual basis upon which it is asserted the native title claim group had, and has, an association with **an area** must be proved to the satisfaction of the Registrar, or delegate, in respect of each particular parcel or area of the land and waters claimed. The contention is that it is insufficient for the native title claim group to demonstrate that it previously had and still has connection to land or waters in a broader area of traditional country.

This contention has particular significance to this application, where the application is lodged in relation to a number of specific land parcels. This claimant application is made only in relation to these land parcels rather than to the whole area of what is asserted to be the broader traditional country of the native title claim group.

Native title can continue to be held by a native title claim group to all the traditional country, subject to valid extinguishing legislative or executive acts, where sufficient connection has been maintained to that traditional area. In my view this does not necessarily depend upon a native title claim group having to show physical connection to every parcel or tenement or allotment within that broader traditional area.

Given the beneficial nature of the *Native Title Act 1993*, its objects and preamble, I take the view that so long as there is sufficient factual material to show that the native title claim group have, and the predecessors of those persons had, association with the broader traditional country, then that will be sufficient. It is of course necessary for the area claimed in the application to be within the area asserted to be the broader traditional country. In this regard I repeat the finding above that much of the information provided in relation to the factual basis relates to the traditional country and the acknowledgment of that in judicial determinations in both Queensland and the Northern Territory. I am satisfied that the claim area is located within such traditional country.

I am satisfied that the information that has been provided is a sufficient factual basis to support the assertion that the native title claim group have, and their predecessors had an association with the area.

(b) there exist traditional laws and customs that give rise to the claimed native title

This sub-section requires me to be satisfied that the factual basis on which it is asserted that there exist traditional laws and customs; 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, is sufficient to support that assertion.

At Attachment F the application states that the fact that the Gangalidda and Garawa Peoples have continued to acknowledge traditional laws and customs has been acknowledged in a number of judicial determinations in both Queensland and Northern Territory. The applicants refer to several decisions and affidavits filed in one of those proceedings. The applicants continue stating as follows:

"Laws and Customs of the Gangalidda and Garawa people.

2.1 Set out below is a description of some of the laws and customs which have been maintained by the Gangalidda and Garawa people. These laws and customs have been the subject of judicial recognition and support the rights and interests claimed by the Gangalidda and Garawa people."

The application then refers to the Gangalidda and Garawa peoples continuing to acknowledge and observe similar skin affiliations which link them to each other and the natural world and to their maintaining spiritual beliefs in relation to the claimed area.

The attachment then outlines that the spiritual, religious and cultural relationship includes the following features describing the practices:

(a) The Dreaming;
  (i) Travelling narratives
  (ii) Initiation narratives
  (iii) Dreaming and Totemic Affiliation
(b) Bujimala (the Rainbow Serpent).
(c) Story Places/ Sites of Significance.
(d) Spirits of Deceased People.
(e) Rules for Interaction with Country.
(f) Belief in consequences for doing the wrong thing.

The affidavits to which I have referred above of [Gangalidda claimant 5] and [Garawa applicant 1] provide support for the continued existence of traditional law and custom as do the other affidavits referred to under (a) above.

Attachment F also addresses the native title claim group's maintenance of a system of land tenure. At 5.4 the applicants say that:

> "Under Gangalidda law and custom, the Gangalidda people may obtain rights in country through conception or birth. In the Wellesley Sea Claim, a number of Gangalidda people gave accounts of their parents or previous generations obtaining country in this way, and their children have acceded to the rights in that country. It also accounts for older generations of people having affiliations to many estates. There are also examples of adoption by Gangalidda people. The overlaying principles of affiliation have led to the situation where most people can rightfully assert interests in more than one area.

In the Wellesley Sea Claim Justice Cooper accepted that the Gangalidda people have traditionally had a system of estates and that a system of permission operated in relation to have access to and being able to use the resources in those areas:

> I accept the evidence of the indigenous witnesses and Dr Trigger that access to Country and activities in Country was controlled by a normative system of rights and obligations, and that because of the complexity and range of the mechanisms by which one could acquire rights to enter and engage in activities based on patrician relationships or skin relations, there was a greater fluidity of movement between Countries and places where activities were engaged in, than occurred in the other applicant groups. That of itself gave rise to a range of conduct engaged in by Gangalidda people that Dr Trigger described as appropriate or necessary 'etiquette'. I accept his evidence that behavioural conduct which is described as 'etiquette' may mask, but does not deny, the validity of the core requirement that their must exist a right or rights in respect of Country upon which the rules as to 'etiquette' were built. The rights which went with Country extended to the sea part of Country, and, in the absence of a right to access and engage in particular activities there, the permission or approval of somebody entitled to speak for that Country was required."

(b) Responsibilities and Rights in Estates

5.7 In the Wellesley Sea Claim Justice Cooper observed in relation to the Gangalidda people:

> "I am satisfied from what I have heard from the indigenous witnesses that their concept of 'ownership' of the seas, the sea bed, the subsoil and the sea resources is not one based on common law concepts of property; it is a concept born out of the connection of the peoples to each of the elements through their spirituality. The seas, sea beds, the subsoil beneath the sea bed are important because they are the elements in which the creatures and spirits to which they are bound live. They are the elements necessary to support the resources of the sea upon which the peoples rely for their sustenance and in respect of which they owe obligations to husband and protect because of the kinship ties between them. There is no evidence that the peoples used the sea beds or the subsoil or used the sea water itself for any worldly purpose. However, the sea grasses are critical for the dugong and the spawning of prawns and the clean waters are necessary for the fishery. Further, the spirits of deceased ancestors reside in the waters of the seas, the spirits and creatures of the Dreaming traverse the Dreaming paths in the seas and mystical creatures, including the Rainbow Serpent, live beneath the sea bed in the world below."

5.8 Members of estate groups, and particularly senior members, are not simply endowed with benefits and privileges as owners of the sea and land of their estates, they are also entitled:

- to make decisions in relation to their country - to control what happens;
- to protect the places of significance and Dreaming;
- to pass it on to their children and keep the land for future generations.

5.9 The responsibilities for country are an aspect of the right to manage their country and the natural resources within it. This is concurrent with, but not limited to the need to look after and protect sites of significance which are outlined and referred to above.

(c) Asking

5.10 The traditional laws and customs of the Gangalidda people require a person who wishes to have access to the country of an estate group or to its resources to ask a member of the estate group (preferably a senior person) for permission to do So. 62 In the Wellesley Sea Claim Justice Cooper found that:

> "The right to be asked is the touchstone of the applicants' concept of 'ownership' and underlines that the identifiable right with respect to the land and waters in the area claimed under the traditional laws acknowledged and customs observed was the right to control access and conduct

5.11 He also noted that:

> "The right to control access to Country (which was a common feature in respect of the Countries of each of the constituent groups, so far as they related to the intertidal zone and adjacent waters including access to the reefs and sandbars) meant that within the relevant Country, the permissible uses of the land and waters were held as rights by those entitled to exploit them to the exclusion of all others who did not hold such a right under the traditional laws and customs. This included, for example, the rights to fish and hunt in the sea Country, the right to construct fishtraps as well as the right to harvest the plant resources for use and consumption and the like. ,

5.12 The requirement to ask permission serves a number of functions for the Gangalidda people . Asking permission is an acknowledgment of the status and authority of the owners of the territory. It is an expression of respect for the owners. Asking permission of the owners of the estate ensures that the dangerous influences of ancestral beings or Dreamings are protected from harm or inappropriate behaviour. This is particularly with respect to Story Places. It enables the owners of the country to know which people are on the country, and where they wish to go and for what purpose, and to instruct them concerning places that they should keep away from and how they should behave.

The Garawa people's maintenance of a system of land tenure is described in Attachment F as follows:

6.1 The Garawa people observe common traditional laws and customs. These include a common kinship system, observance of common laws relating to land tenure, and traditional usage of land and waters. The kinship system is integral to the operation of the system of land tenure which regulates ownership, custodianship responsibilities, inheritance and access and *use rights.*

6.2 The kinship system respectively includes:

(a) recognition of common ancestors;
(b) common and interdependent familial ties which determine traditional rights and customs regarding land and waters;
(c) recognition of group and individual responsibilities towards land and waters;
(d) recognition and acceptance of common patterns of descent;
(e) recognition of sanctions and prohibitions relating to relationships, access to land and waters, and custodianship;
(f) recognition of individual or group connection to land and waters;
(g) affiliation, on a group and individual basis, with totemic beings which relate to land/waters and law;
(h) participation in, and responsibility for, ceremony;
(i) recognition of individuals' connection to land and waters through their place of conception, place of birth, their mother's place of birth, and their father's place of birth;
(j) transmission of traditional knowledge from one generation to the next.

6.3 Common laws relating to land tenure respectively include:

(a) fulfilment of spiritual obligations with regard to the land and waters;
(b) the observation of restrictions imposed by gender, age and ritual experience;
(c) the observation of restrictions imposed by the presence of sites of significance on the land and waters;
(d) the observation of restrictions imposed by the presence of Dreamings on the land and waters.

6.4 The system of affiliation for the Garawa People under which they hold an interest in the land and waters the subject of this application is similar to that described by the Aboriginal land commissioner in the Robinson River Land Claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which also forms part of the traditional country of the Garawa people.

An extract from the description of those laws and customs which give rise to those connections is contained as Attachment F4.

6.5 The Aboriginal land commissioner in the Robinson River Land Claim further noted, in relation to the spiritual landscape of the Garawa people, that:

> "...there was a remarkable degree of unanimity between the claimants as to the location of significant sites, their respective importance and the entitlement of members of the relevant claimant groups to speak about and exercise control over those sites and the land."

6.6 The system of land tenure maintained by the Garawa people support the rights and interests set out in Attachment E.

Attachment F 4 describes in some detail the laws and customs of the Garawa People that give rise to those people's traditional ownership of their lands and waters and the rights and obligations that flow there from.

I also refer to the affidavits of [Gangalidda claimant 6] and [Garawa applicant 1] both of which support the existence of traditional laws and customs that continue to be observed by the claim group that give rise to the claimed native title.

I am satisfied that the application contains sufficient information to support the assertion that there exist traditional laws and customs that give rise to the claimed native title.

(c) the claim group has continued to hold native title in accordance with traditional laws and customs

Schedule F and F4 of the application indicate that traditional law and custom has been passed on by traditional teaching, through the past generations to the present generations of persons comprising the native title claim group.

[Garawa applicant 1] in his affidavit to which I have referred above speaks of knowledge having been passed to him and of his passing it on his children (paras 13 -17). Similarly, [Gangalidda claimant 6] speaks of learning about culture and bush ways from as early as he can remember and of his teaching his own children what he knows (see 3 – 6).

As noted above, Schedules G and M of the application and the accompanying affidavits provide details of the continuing exercise of activities according to traditional laws and customs.

I am satisfied that there is sufficient information to support the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs.

To conclude, I am 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.

Result: Requirements met

Native title rights and interests claimed established prima facie: s190B(6)

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

'Native title rights and interests' are defined in s.223 of the *Native Title Act 1993*. 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.190B(5).

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 Ganalanja 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 (2nd ed) 1989]."*

This meaning was recently considered in and approved in *Northern Territory v Doepel* [2003] FCA 1384, see at paras 134 -135. Briefly, the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate.

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 be established on a *prima facie* basis.

The claimed native title rights and interests are found at Attachment E of the application. I have set out these rights and interests under s.190C(4) above. The rights and interests claimed are qualified. Please refer to my reasons under s.190B(4) above for details of the qualifying statements.

I have note that a claim to exclusive possession, occupation, use and enjoyment of lands and waters may only be able to be established *prima facie* in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicants claim the benefit of ss.47, 47A or 47B). In this application the applicants claim the benefit of ss.47, 47A or 47B in respect of the lots referred to in paragraph 1 of Attachment E.

Over areas where a claim to exclusive possession *cannot* be sustained (i.e., where the claim is non-exclusive in nature), the High Court in *Ward* has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests

by using those terms": at [51]. Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [919].

In light of the comments of the majority of the High Court in *Ward* and of O'Loughlin J in *De Rose*, it appears that a non-exclusive right to possession, occupation, use and enjoyment cannot, on the face of it, be established pursuant to s.190B(6).

In considering this condition against the native title rights and interests listed at Attachment E, I have had regard to the following information:

- information contained in Schedules F, G and M and the Attachments at F of the application;
- the affidavits of
  [Gangalidda claimant 1] dated 10.8.99;
  [Gangalidda claimant 2] dated 8.8.99;
  [Gangalidda claimant 3] dated 12.8.99;
  [Gangalidda claimant 8] dated 12.8.99;
  [Gangalidda claimant 5] dated 12.8.99;
  [Gangalidda claimant 7] dated 20.8.99;
  [Gangalidda claimant 6] dated 6.5.2004, and
  [Garawa applicant 1] dated 19.5. 2004.

1 . In relation to the land and waters the subject of:
- *Lot 1 on Plan PK3 formerly known as Doomadgee Reserve.*
- *Troutbeck Pastoral Holding (Lot 4601 on Plan PH1676)*
- *Bundella Pastoral Holding (Lot 4712 on Plan PH1678)*
- *Brokera Pastoral Holding (Lot 2523 on Plan PH1675)*
- *Tarrant Pastoral Holding (Lot 4711 on Plan PH1677)*

the Gangalidda people claim the right to possess, occupy, use and enjoy that land, and the waters on or over it, to the exclusion of all others. In the alternative the Gangalidda people claim the rights and interests set out in paragraph 2 (below).

Established.

In this application the applicants claim exclusive possession, occupation, use and enjoyment of the lands and waters identified. At Schedule L of the application the applicants claim the benefit of ss. 47, 47A or 47B in respect of the above five areas covered by the application. In these circumstances I am of the view that such a composite right is capable of being prima facie established.

I now turn to consider if this right and interest claimed can be prima facie established on the basis of the information I have before me.

The right claimed here is on behalf of the Gangalidda people. The claim has been brought on behalf of the Gangalidda and Garawa people. However I do not see any impediment to the claim group recognising the primary interest of people within the group in respect of particular areas. Although exclusive rights are claimed it may well be that under traditional law and custom the rights of others are recognised by those who hold those rights.

I see from the tenure information that the four pastoral holdings are leased to the CLCAC. The former reserve known as the Doomadgee Reserve (Lot 1 on Plan PK3) is held on trust by the Gangalidda Aboriginal Corporation for the benefit of Aboriginal People. In my view that

information indicates a prima facie right to the quite enjoyment of those areas by those entitled to the benefit of the tenure.

At Attachment F the applicant states that the Gangalidda people maintain a system of land tenure under their traditional laws and customs, see:

5.1 The evidence in the Wellesley Sea Claim identified that the Gangalidda People maintain a system of estates. It is the system through which Gangalidda people divide rights and interests including in relation to the land and waters the subject of this application. The estates however only exist by virtue of the communal ownership of the Gangalidda people.

5.2 The Gangalidda coastal estates are Bangganwuiuwil Ngurrurri, Dumbara, Wambilbayi, Gunamulla/Giwagara, Bundella Waterhole (Dalwajinda), Jalilinda (Old Dumaji), Gaabula (Bayley Point), Ngawayinda (Point Parker) and Moonlight Creek. These estates extend inland and out to sea. The boundaries of the sea estates are most strongly demarcated in coastal areas.

5.3 In addition there is the area between Moonlight Creek and the Albert River that is divided into two areas Moonlight Creek to the Gin Arm, and Mungalbayi which are recognised as the countries of specific families. East of Moonlight Creek to the Albert River is also Gangalidda country.

(a) *Estate Groups and Affiliation to Estates.*

5.4 In the Wellesley Sea Claim Dr Trigger identified that while the Gangalidda may have traditionally obtained country through patrilineal descent rights, in the contemporary society are now also obtained through matrilineal descent and the descent groups can now be considered to be cognatic.

5.5 Under Gangalidda law and custom, the Gangalidda people may obtain rights in country through conception or birth. In the Wellesley Sea Claim, a number of Gangalidda people gave accounts of their parents or previous generations obtaining country in this way, and their children have acceded to the rights in that country. It also accounts for older generations of people having affiliations to many estates. There are also examples of adoption by Gangalidda people. The overlaying principles of affiliation have led to the situation where most people can rightfully assert interests in more than one area.

5.6 In the Wellesley Sea Claim Justice Cooper accepted that the Gangalidda people have traditionally had a system of estates and that a system of permission operated in relation to have access to and being able to use the resources in those areas:

> ‘I accept the evidence of the indigenous witnesses and Dr Trigger that access to Country and activities in Country was controlled by a normative system of rights and obligations, and that because of the complexity and range of the mechanisms by which one could acquire rights to enter and engage in activities based on patrician relationships or skin relations, there was a greater fluidity of movement between Countries and places where activities were engaged in, than occurred in the other applicant groups. That of itself gave rise to a range of conduct engaged in by Gangalidda people that Dr Trigger described as appropriate or necessary 'etiquette'. I accept his evidence that behavioural conduct which is described as 'etiquette' may mask, but does not deny, the validity of the core requirement that their must exist a right or rights in respect of Country upon which the rules as to 'etiquette' were built. The rights which went with Country extended to the sea part of Country, and, in the absence of a right to access and engage in particular activities there, the permission or approval of somebody entitled to speak for that Country was required.’

(b) Responsibilities and Rights in Estates

5.7 In the Wellesley Sea Claim Justice Cooper observed in relation to the Gangalidda people:

> 'I am satisfied from what I have heard from the indigenous witnesses that their concept of 'ownership' of the seas, the sea bed, the subsoil and the sea resources is not one based on common law concepts of property; it is a concept born out of the connection of the peoples to each of the elements through their spirituality.
> The seas, sea beds, the subsoil beneath the sea bed are important because they are the elements in which the creatures and spirits to which they are bound live. They are the elements necessary to support the resources of the sea upon which the peoples rely for their sustenance and in respect of which they owe obligations to husband and protect because of the kinship ties between them. There is no evidence that the peoples used the sea beds or the subsoil or used the sea water itself for any worldly purpose. However, the sea grasses are critical for the dugong and the spawning of prawns and the clean waters are necessary for the fishery. Further, the spirits of deceased ancestors reside in the waters of the seas, the spirits and creatures of the Dreaming traverse the Dreaming paths in the seas and mystical creatures, including the Rainbow Serpent, live beneath the sea bed in the world below.'

5.8 Members of estate groups, and particularly senior members, are not simply endowed with benefits and privileges as owners of the sea and land of their estates, they are also entitled:

- to make decisions in relation to their country - to control what happens;
- to protect the places of significance and Dreaming;
- to pass it on to their children and keep the land for future generations.

5.9 The responsibilities for country are an aspect of the right to manage their country and the natural resources within it. This is concurrent with, but not limited to the need to look after and protect sites of significance which are outlined and referred to above.

(c) Asking

5.10 The traditional laws and customs of the Gangalidda people require a person who wishes to have access to the country of an estate group or to its resources to ask a member of the estate group (preferably a senior person) for permission to do so. In the Wellesley Sea Claim Justice Cooper found that:

> 'The right to be asked is the touchstone of the applicants' concept of 'ownership' and underlines that the identifiable right with respect to the land and waters in the area claimed under the traditional laws acknowledged and customs observed was the right to control access and conduct.

5.11 He also noted that:

> 'The right to control access to Country (which was a common feature in respect of the Countries of each of the constituent groups, so far as they related to the intertidal zone and adjacent waters including access to the reefs and sandbars) meant that within the relevant Country, the permissible uses of the land and waters were held as rights by those entitled to exploit them to the exclusion of all others who did not hold such a right under the traditional laws and customs. This included, for example, the rights to fish and hunt in the sea Country, the right to construct fishtraps as well as the right to harvest the plant resources for use and consumption and the like.'

5.12 The requirement to ask permission serves a number of functions for the Gangalidda people. Asking permission is an acknowledgment of the status and authority of the owners of the territory. It is an expression of respect for the owners. Asking permission of the owners of the estate ensures that the dangerous influences of ancestral beings or Dreamings are protected from harm or inappropriate behaviour. This is particularly with respect to Story Places. It enables the owners of the country to know which people are on the country, and where they

wish to go and for what purpose, and to instruct them concerning places that they should keep away from and how they should behave.

5.13 The system of land tenure maintained by the Gangalidda people support the rights and interests set out in Attachment E.

[Gangalidda claimant 1] in his affidavit (10 August 1999) speaks of people having to ask permission to go on his country (para 32 – 36). Similarly [Gangalidda claimant 2] testifies in his affidavit that if someone wants to hunt, fish on someone else's country, or take resources from that country they have to ask permission (paras 41 – 45). [Gangalidda claimant 3] in his affidavit (18 August 1999) also speaks of need to seek permission to access his country (paras 21 – 22) as does [Gangalidda claimant 8] in his affidavit (12 August 1999) (see para. 44 – 51).

I am of the view from the above that members of estate groups particularly senior members, have benefits and privileges as traditional *owners* of the sea and land of their estates, they are entitled:

- to make decisions in relation to their country - to control what happens;
- to protect the places of significance and Dreaming;
- to pass it on to their children and keep the land for future generations;
- require a person who wishes to have access to the country of an estate group or to its resources to ask a member of the estate group (preferably a senior person) for permission to do so;
- to manage their country and the natural resources within it.

I am satisfied that the right to possession claimed at 1. above can be prima facie established.

I refer to paragraphs 7.11 to 7.23 of Attachment F which outlines the Gangalidda people's occupation and residence on country. This supported by the affidavits of:

[Gangalidda claimant 1] dated 10.8.99;
[Gangalidda claimant 2] dated 8.8.99;
[Gangalidda claimant 3] dated 12.8.99;
[Gangalidda claimant 8] dated 12.8.99;
[Gangalidda claimant 5] dated 12.8.99;
[Gangalidda claimant 7] dated 20.8.99;
[Gangalidda claimant 6] dated 6.5.2004, and

These affidavits also indicate that the deponents reside on or near the claim area and describe their use and enjoyment of the claim area. For example [Gangalidda claimant 6] deposes in his affidavit sworn 6 May 2004 as follows:

1. My full name is [Gangalidda claimant 6]. I was born in 1977. I am 26 years old.

2. [name removed] is my proper skin name, it was given to me by [names removed] who's my Tjungayi, after I went through law. Those proper names like that you can't get until after you've been through law. It means sea snake, it is a name from the Mambalia estates. Bulanyi is my skin. Mungabayi is Burketown where I am from. Mullanguddu is one of the first blokes from the Gangalidda tribe.

3. I am a Gangalidda man. Gunamulla is my country. That's my father's country, I get it from him, he was a Balyarinyi man.

4. I learned about culture and bush ways from as early as I can remember. Dad used to take all of us kids out bush to do that, every spare moment he got. He took us

all over Gangalidda country. Gunamulla was our favourite spot, it's our country and the most isolated. It used to take about 8 hours back then.

5. We went fishing around the wharf on the Albert river, or to the Leichardt, Beames Brook, Twelve mile, Gregory crossing for turtle, crayfish, fish- black bream and barramundi. Water lily and mud mussel and long-neck turtle are not really found in running water, more in the swamps like lluka and Yarram and Bundella. We went all those places.

6. I teach my own kids what I know, just like dad did with us as kids. That education about Aboriginal culture is as important as any lesson at school, for Aboriginal people.

7. Usually, it is the women who gather fruit and vegetables while the men hunt, but if there is no-one who'll do it you have to get them yourselves. We all find things like that these days anyway. The kids love finding bush tucker.

8. I picked up some wild cucumber *jungula* only today. Its best to get them after wet season. They re-seed themselves after the wet. Those you find before the wet are dehydrated and are small. Also good after the wet are wild blackberries and grapes gunga-gu. Both types of fruit look similar apart from the size. Gunga-gu hang like grapes on tall trees in some areas. You can find them at Escott, Beamesbrook, Almora. The berries are on a smaller shrub-like tree.

9. We don't fertilise our fruit trees like whitefellas do, if they don't grow they don't grow. Sometimes you get them fruiting twice a year, sometimes none, depending on the weather.

10. I collect bush potato with my kids. They are easy to find when you know what you are looking for- their tops stand out of the ground like a carrot. They may be small but they are very nutritious, like all bush tucker.

11. The best time for most game is the wet again, either during or in the months after. Turkeys chase the grasshoppers then. I drive out towards the Leichardt River or around the wharf area nearer to Burketown. We shoot them from the car, or follow them on foot if they are quiet, to get close as possible. Whether you can do this depends on the character of the turkey. There are usually plenty of turkeys around, although they get wary when we chase them too much.

12. We also hunt wallaby and kangaroo, we chase goanna and snakes and blue-tongue lizards. Blue tongues are a delicacy over everything. I was driving with Trinity my brother the other day and we saw one- we pulled up really quickly but not quickly enough and he got away.

13. Porcupines are also good. If you catch one that you aren't going to eat you pull his back quill out and keep it, that's lucky because you let him go.

14. Emu are plentiful between Moungibi and Doomadgee, you see them along the road. You can easily catch them with something bright like a whitefella packet of chips or the foil from a cigarette packet because they are a very, very curious animal- they must be a bit like us. They'll walk right up to you if you shake that foil around. They are good eating.

15. Swamp turtles are very good too. Swamp turtle we dig up, we find the turtle's breathing hole, you can see the hole and hear them breathing. They bury themselves when the wet is going because its easier to dig and they trap some water at the bottom of their holes too. They wait for the rain to come then, before

they come out. Unless we find them first. Sometimes I have found turtle under my own house at Moungibi, when its wet, but we find them mostly at the swamps.

16. We always use a bush medicine if we can, if we know one.

17. Guttapercha is good for sores, especially boils. You get the branch and the leaves from the tree, boil them up. Then you pour it over your in it. Its important to know for kids because they catch sores and boils from each other pretty easily. I have had to bathe all my kids like that.

18. Bush honey, sugarbag, is also good medicine as well as tasting nice. The best time for this is after winter when they are full- I found one last year out near Doomadgee dump about that time. I saw the bee flying in to a hole in a tree, you look for the bees not the trees. Its good for colds and flus.

19. Turtle juice is also good for colds and flus. When you have cooked the turtle you crack the shell and drink the juice, then you eat the turtle.

20. Sea salt, we use for eating. We collect it from behind Escott where there is a big salt deposit, or at Gunamulla. Its better than what you can buy in the shop.

21. We were taught to respect and look after our country, plus our elders. We shoot and kill introduced pests like brumbies, pigs and buffalo because they destroy the land and the habitats of animals with their hoofs. Pigs will dig up turtle eggs and goanna eggs, plus the wild fruit and make a mess of the ground.

22. We bum off a lot, after the first rains, not the winter rains. Unless you're a lawman you don't predict the weather, so you have to wait for that first wet season rain. We bum off all over our country, usually when we are travelling through it, on our way to places. When you burn country it brings the sweet young grass after the rain. That brings the game that we hunt.

I am satisfied that there is sufficient information to support the claim group's occupation, use and enjoyment of the area to which the claim relates.

I find that the right claimed can be prima facie established in respect of the areas to which the claim relates.

Turning now to the native title rights and interests claimed under paragraph 2.
In paragraph 1 the applicants have claimed the rights in paragraph 2 in the alternative. I see this as a claim in respect of those rights if the rights claimed in paragraph 1 were not prima facie established. As the native title rights and interests claimed at 1 have been prima facie established I do not propose considering whether the rights in paragraph 2. can be prima facie established in respect of the areas to which paragraph 1 relates.
The right to possession, occupation use and enjoyment encompasses any other native title rights and interest claimed that can be prima facie established. I say this because the Courts have said that a claim to exclusive possession, occupation, use and enjoyment of lands and waters constitutes the fullest expression of native title there is.

I note that these claims are in respect of the remainder of the land and waters in the application. Exclusive rights having been claimed in paragraph 1, and having regard to the qualifications in para 3 of Attachment E, I see the rights and interests claimed as being claimed as non-exclusive rights.

I will now consider each of the rights claimed at para 2 of Attachment E. I believe they have to be considered separately and hence either stand or fall on their own.

Paragraph 2 states:

2. *In relation to the remainder of the land and waters in application area the Gangalidda and Garawa claimants claim the full and free enjoyment of the following native title rights and interests in accordance with their traditional laws and customs. These rights are claimed jointly and severally:*

a. *The right to occupy and or use the application area;*

Not established

In relation to this right I refer to the decision of the Full Federal Court in *Attorney General for the Northern Territory v Ward* [2003] FCAFC 283 at [16] – [23]. In summary, a determination was sought by the claimants for 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement' certain identified rights - see [16]. Among other things, Wilcox, North and Weinberg JJ rejected the inclusion of the word 'occupy.' saying that:

> *"As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s.225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression. They might be understood as conveying the notion discussed by their Honours, including control of access. This would be inappropriate in this case. The right of absolute control of access must have been extinguished by the grant of the pastoral leases. There might be a surviving right to make decisions, pursuant to Aboriginal laws and custom, about the use and enjoyment of the land by Aboriginal people. That right would not be affected by the grant of a pastoral lease. However, that matter is specifically addressed by sub-para (e) of para 5. We think the word 'occupy' should be omitted from the opening words of para 5 (at [17])."*

Also in *Attorney General for the Northern Territory v Ward*, the Court disapproved the use of a non-exhaustive list of rights and interests said to be 'included' in the right to 'occupation, use and enjoyment of the lands and waters'. The Court substituted the word 'being' for the words 'including, as incidents of that entitlement' (see [16] and [23]).

At [21] the Court said, speaking of 'use and enjoy', that there must be a specification of the contents of the relevant rights and interests to which the reader may look in considering the effect of the determination. Of the specified contents of the right the Court said: "They must exhaustively indicate the determined incident of the right to use and enjoy". There is no specification here of the content of the right to *use the application area* and hence in my view it cannot be prima facie established.

b. *The right to access and traverse the application area in accordance with and for the purposes allowed under their traditional laws and customs.*

Established

Schedule G states at para 9 that "Members of the claimant group currently traverse the application area, including for the purposes of carrying out traditional activities, including those referred to in this Schedule".

I refer to the provision of para 7 of Attachment F and to the affidavit of the deponents to which I have referred above. Please see the contents of [Gangalidda claimant 6] affidavit which I have set out in full above.

I also refer to the affidavit of [Garawa applicant 1] sworn on 19 May 2004. He deposes as follows:

1. My full name is [Garawa applicant 1]. I was born in I953. I am 5I years old. All Aboriginal people call me [name removed] which is short for *Wongalamurri*. *Wongalamurri* means Crow in the Garawia language. That name was given to me by my father after I went through Aboriginal law. It represents my country, my *ijan*.

2. I am full *mingaringgi* for my father's father's country, Robinson River area. That means I am the traditional owner of it. My skin I also got from my father's father, I am full Bulanyi skin - Proper way than means I can only marry Nulaynma skin. That was the skin of my first wife, she was a Waanyi woman.

3. A skin name is from the dreaming for the country. Water Python *Buwinggara* is for all Mambalia people, all Bulanyi and Balyaringi, that snake dreaming belongs to all that *ijan.* Same way we belong to that *ijan.* We Mambalia are the only ones that can use that mark for ceremony. No other skin can use that mark, unless he *is junggayi.* Then he can use that mark (his mother mark) under the instruction of the mingaringgi. So if I say to Burralangi mob, they the junggai for my country and all Mambalia country, I can say to them "You can use your mother mark", but only when we get painted up for ceremony. If we're going to circumcise them young fellas, for example.

4. That mark I talk about which shows we are Buwinggara, that's put on the men's forehead for men, but the mark is only a small one for initiations. We use a larger one for bigger ceremony. No girl is allowed to see that bigger mark.

5. We only do ceremony on certain months, like close to christmas and midwinter. We do ceremony for lots of reasons - to teach our young fellas not to do anything stupid, or if old people have passed away for younger people to carry on the knowledge. We also use that business for when one of our senior man has passed away, maybe a song man or leader or junggai for that ceremony. We bring their spirit into that ceremony and put him away proper, say he is no more.

6. We done one when we put a lot of old fellows away, five or six years ago, including my father's brother and his father. It sometimes takes five or six years to have everything ready and then we.bring them in. put them away. Its like a way of saying goodbye, in Aboriginal law.

7. *Walalu* is Traveling Rainbow. He is for both those ceremony, the initiation and the bigger ones. He is the main *gujiga*. or song. There is a way of singing it. For the young fellow one its light and fast, for the bigger one it's much heavier and slower.

8. *Walalu* he's the main dreaming for that initiation ceremony, doesn't matter what skin you are we use him now for all of the tribes, from Mornington to Moungibi and out west. He is everywhere on our country. We start that *gujiga* from the sea near Old Doomadgee, Nungajabarra is the Garawa name for it, on Gangalidda country - He follows all the way down the coast close to Wollorgorang and then shoots off to the mainland. He comes straight through Robinson River on the northern side of the community now, stays north of Borroloola and then heads straight for Roper.

9 For us there's no boundary like between Queensland and the Northern Territory, the only boundary we know is where a different tribe starts. With that Walalu gugija we should follow [name removed] mob in that song because it starts on their country. Me and [name removed] my father's brother start at the front when it gets to our country, then we get to [name removed] mob country, then they lead in the gugiga and we follow. That makes it work properly.

10. We have all mixed mobs for ceremony now, we all respect one another as we are often junggayi for each other. We are all the same mob, its the same because of the dreaming line, But we don't boss around anyone else's country. When we have ceremony those Wuyaliya people have to sit in with us because they are junggayi for us as well.

11 . Branch Creek and Wollorgorang area is Wuyal country- Wuyal comes from Wuyaliya skin. That Garawa country meets Gangalidda country at Buluwarra. The Charlie mob are mingaringgi for that country. That's sugarbag country, and *ugudu*- black stone dreaming. It also represents that little short man *nguwinya,* its his country too. Family in that area must respect those people. Only junggayi for that country can swear there, but even they have to have the approval of the mingaringgi for there. Me and [name removed] are junggayi for that country, that's his mother country and my *ngabuji* country, belong to my father's mother.

12. That short man *nguwinya,* he's similar to the *gundugundu* down south Nicholson on Waanyi country. *Gundugundu is* a bit shorter and woolly, tough little bastard. There is also *Gurdidawa* further up for Gangalidda- he's slightly longer legged and his legs are red.

13. Most of my knowledge is because I have been too long travelling around with people, older people with knowledge of country. I got experience about our law and culture in many places over our country, including who is junggayi for that country, and the main mingaringgi for that country. [names removed] (my father's brother again)- those were the leaders of Garawa people that mob.

14. They taught me bush ways too, told me you can't hit some thing on the head kill him. Me I can hit dingo on the head but not that Mambalia snake - I have to walk away from him and all Mambalia people should walk away from that water python. Depends on your skin, what you must leave alone. Could be goanna, or turtle, anything.

15. They taught me where to find sugarbag and how to track things and where and when to look for bush tucker, certain months are better for some things, and when and where to light fire. We still do all that all the time on our own country.

16. White people see fire as a thing of danger but it means a lot to Aboriginal people. It is bushfire, and ceremony, and for cooking and warmth and to make signals- we don't treat him as what you think of fire, we treat him as ours like family. I teach all my kids all this. They don't treat fire as fun, you treat him proper way he treat you that proper way too, like everything else.

17. I teach my kids where to go and fish and what you can't eat (some fish have too much bone for kids) and how to cook it properly (like shark). You have to know how to search the tree for water. You must take what you find, what the country gives you- you might not find it again next place. If you are walking on country you got to do it proper way too, and proper time or you'll perish.

18 There are places I can't go to. Like *yullagungimarra* where Rainbow stays only my junggayi can go there. My junggayi also don't allow me to go to that crow country wongalamurri I can go past at a distance but I can't muck around, cut a

tree down or throw stones. You got to treat that country as a human being, he's your family he's your dreaming.

19. I go hunting and fishing whenever I want to, both in the Territory and the Queensland side. I go hunting and fishing around Westmoreland station and Settlement Creek. I often go there when I am travelling through to Doomadgee. We pull up and camp and go fishing. Might get turkey, kangaroo, goanna, bream, catfish or turtle.

20. I know other Garawa people do the same. I have seen them there or along the road and they have told me where they have been, and where they are going. I know the Charlie mob go down that way a lot.

Based on the above information I am satisfied that the right claimed at para 2. b. can be prima facie established.

c. The right to hunt and/or gather living and plant resources on the application area.

Established

Schedule G of the application states at para 7. that: "Members of the claimant group currently hunt, gather and fish on the application area. Members of the applicant group continue to use living and other natural resources on or in the application area. Examples of these are contained in **Attachments "F", & F1 and "F4"** to this application.

I refer to the provision of para 7 of Attachment F and to the affidavits of the deponents to which I have referred above. Please see the contents of [Gangalidda claimant 6] affidavit (6 May 2004) which I have set out in full above. He speaks of hunting, fishing and gathering.
I also refer to the affidavit of [Garawa applicant 1] sworn on 19 May 2004 set out above. He also speaks of hunting fishing and gathering (see paras 14 – 17 and 19).

I am satisfied that the information to which I have referred is sufficient to prima facie establish the right claimed at para 2. b.

d. The right to fish in the application area;

Established

Based on the same information to which I have referred under 2. b. above I am satisfied that this right can be prima facie established.

e. The right to camp on the application area;

Established

Schedule G states at para 1 that: "Members of the claimant group currently reside on or adjacent to the application area, camping, on outstations, or at Old Dumaji. Examples of this are set out in **Attachments 'F'** and **"F1"** to this application".

I refer to the provision of para 7 of Attachment F and to the affidavits of the deponents to which I have referred above. Please see the contents of [Gangalidda claimant 6] affidavit which I have set out in full above.
I also refer to the affidavit of [Garawa applicant 1] sworn on 19 May 2004 and set out above. See in particular paras.13 – 20.

Based on the above information I am satisfied that this right can be prima facie established.

f. The right to live on the land, to erect shelters and other structures on the application area;

Established

This right is akin to that claimed at e. above. However a question arises whether the right amounts to a right to control access to and/or use of the application area. If so it can only be established on areas where exclusive possession can be sustained. The right is claimed here in respect of *the remainder of the land and waters in the application.* Those are areas where exclusive possession is not claimed and presumably cannot be sustained as pastoral leases are involved. To the extent that it would amount to a right to control access to and use of those areas of the claim, such a right cannot be prima facie established.

There is no indication here of the nature of the shelters and other structures sought to be erected. However para 2 of Attachment E claims the rights itemised *"in accordance with traditional laws and customs"*. I accept that the erection of shelters and other structures of some kind would be involved. However, in the context of traditional practices the description of this right does not convey to me a likely intention or capacity on the part of the members of the native title claim group to control access to, or use of, those areas where shelters or structures are established. In my view it follows that the right is capable of being prima facie established.

Can the right be prima facie established? Schedule G states:

1 . Members of the claimant group currently reside on or adjacent to the application area, camping, on outstations, or at Old Dumaji. Examples of this are set out in **Attachments 'F'** and **"F1"** to this application.

3. Members of the claimant group actively protect sites and areas of significance, cultural heritage and Aboriginal artefacts on and in Garawa and Gangalidda land and waters, including the application area. Members of the claimant group currently participate in cultural heritage surveys and monitoring of any activities occurring on Garawa and Gangalidda land and waters.

4. Members of the claimant group currently use the application area for customary, cultural and ceremonial purposes. The cultural significance of Gangalidda and Garawa country, including the area the subject of this application is set out in detail in **Attachments 'F' and "F1" - "F4** to this application.

Based on the above information to which I have referred above, and that to which I have referred in respect of the right claimed at para e. above, I am satisfied that this right can be prima facie established.

(g) The right to light fires on the application area;

Established

I note in considering this right and interest that it, and all the others claimed at para 2, are subject to the qualifications in para 3.

At para 7.25 of Attachment F it is said that:

> The Garawa and Gangalidda People also continue to manage country through traditional burning practices. The Affidavits of [Gangalidda claimant 6 and Garawa applicant 1] which are included in Attachment F1 support this view.

Mr [Gangalidda claimant 6] says in his affidavit:

> 21. We were taught to respect and look after our country, plus our elders. We shoot and kill introduced pests like brumbies, pigs and buffalo because they destroy the land and the habitats of animals with their hoofs. Pigs will dig up turtle eggs and goanna eggs, plus the wild fruit and make a mess of the ground.
>
> 22. We bum off a lot, after the first rains, not the winter rains. Unless you're a lawman you don't predict the weather, so you have to wait for that first wet season rain. We bum off all over our country, usually when we are travelling through it, on our way to places. When you bum country it brings the sweet young grass after the rain. That brings the game that we hunt.

Also see [Garawa applicant 1] affidavit set out above. In particular he attests that:

> 15. They taught me where to find sugarbag and how to track things and where and when to look for bush tucker, certain months are better for some things, and when and where to light fire. We still do all that all the time on our own country.
>
> 16. White people see fire as a thing of danger but it means a lot to Aboriginal people. It is bushfire, and ceremony, and for cooking and warmth and to make signals- we don't treat him as what you think of fire, we treat him as ours like family. I teach all my kids all this. They don't treat fire as fun, you treat him proper way he treat you that proper way too, like everything else.

Based on the above information I am satisfied that this right can be prima facie established.

h. The right to conduct burials on the application area;

Established

At Para 4.5.10.3 of Attachment F4 the application it is said:

> (2) The second role of *junggayi* discussed by claimants is keeping the safety of sites where *laala,* or hollow log coffins, are stored. This is said to entail the placing of marks in the area, to let people know where they should not go, and generally supervising the safekeeping of the place, until the log coffin is disposed of according to appropriate procedures. The role of *junggayi* in this matter can entail giving instructions to relevant *ngimaringgi* for the site area, although they can also receive relevant instructions from senior ngimaringgi. Those said to be "main *junggayi*" for these *laala* sites would not necessarily be actual descendants of the women of the patrician of the estate in which the site was located (though in the past this appears to have been quite common). Only one or more senior *junggayi* appear to have exercised spiritual responsibility for *laala* sites, i.e. the responsibility does not appear to have been held solely through an estate standing to a person as *buwaraji* through matrifiliation.

[Gangalidda claimant 2] deposes in his affidavit of 8 August 1999 at para 35 that:

> We have laws about when somebody dies. We don't call the name of the dead person. We don't call the proper name of the person who has passed away. We call him Mudinyi. Garawa side he is called Mudinyi. Gangalidda side he is called Damarrda. When the mother of my sister [name removed] passed away she was called Mudinyi When [name removed] father passed away he was called Mudinyi. When [name removed] mother passed away she was called Mudinyi. After a death we have Yalgawarru, to out the spirit of the dead person. After Yalgawarru takes place, the children and the grandchildren won't worry about it any more. They'll be clear. That is blackfella law. The place of the dead fella is locked up and left. Later on leaves and grass are burnt and the place is smoked, inside and outside, to hunt the spirit away. Then the countrymen can go and live there. Sometimes a house is marked with red ochre to show that Mudinyi has been there- The spirit of the dead person comes to Giwagarra, to the tree there.

In relation to burial [Garawa applicant 1] states:

> 5. We only do ceremony on certain months, like close to christmas and midwinter. We do ceremony for lots of reasons - to teach our young fellas not to do anything stupid, or if old people have passed away for younger people to carry on the knowledge. We also use that business for when one of our senior man has passed away, maybe a song man or leader or Junggai for that ceremony. We bring their spirit into that ceremony and put him away proper, say he is no more.
>
> 6. We done one when we put a lot of old fellows away, five or six years ago, including my father's brother and his father. It sometimes takes five or six years to have everything ready and then we bring them in, put them away. Its like a way of saying goodbye, in Aboriginal law.

I am satisfied that this information supports the existence of traditional customs associated with burial and the continued observance of burial customs and practice.

I am satisfied that the claimed right can be prima facie established.

i. The right to use natural resources, other than minerals and petroleum.

Established

I note that "Minerals" has the meaning attributed to it in the *Mineral Resources* Act 1989 (Qld) as in force at the date of this application. Petroleum" has the meaning attributed to it in the Petroleum Act 1923 (Qld) as in force at the date of this application (see footnote 1, Attachment E).

Schedule G states at para 10:

> Members of the claimant group use the natural and mineral resources in the claimed area. An example of the use of mineral resources is salt mining, evidence of which was heard in the Wellesley Sea Claim. Further examples can be found in **Attachments "F" and "Fl"** to this application.

Attachment F states:

7.26 The Gangalidda people continue to exploit other resources in their traditional country as they please. The Gangalidda people have traditional used salt to preserve food.

7.27 They have also used timber resources to build traditional shelters, hunting implements, domestic implements, canoes and rafts and for the purpose of burning. Grasses have been used for weaving of bags and making nets. Clays and ochres have been used for the purpose of painting. Stones have been used to make implements and fishtraps.

The affidavits of [Gangalidda claimat 6 and Garawa applicant 1] both speak of their use of natural resources.

I am satisfied that the application contains sufficient information to prima facie establish this right.

j. The right to:

i. take water;
ii. take fish;
iii. take plants and animals;
iv. take ochre, clay and salt;
v. take sand, gravel and rock;
vi. take shells; and
vii. take grass, resin and wood.

Established

This right is relates to those claimed at c. and i. It sets out particular activities associated with, or relating to hunting, gathering and using natural resources for various purposes. I note that Schedule G says that an example of the use of mineral resources is salt mining, evidence of which was heard in the Wellesley Sea Claim (see para 10).

Based on the same information to which I have referred in relation to the rights at c. and i. I am satisfied that this right can be prima facie established.

k. The right to manufacture or produce traditional items from resources found on or in the application area;

Established

At Schedule F it is said:

7. Members of the claimant group currently hunt, gather and fish on the application area. Members of the applicant group continue to use living and other natural resources on or in the application area. Examples of these are contained in **Attachments "F", & F1 and "F4"** to this application.

At Attachment F the application says:

7.24 Trading of resources occurred in the past and continues, between the applicants and neighbouring language groups, particularly those from the Wellesley Islands. This was described by [name removed] in the Wellesley Sea Claim:

> 'In the old times, and today as well, we would trade between Mornington Island and the Mainland. We traded red and white ochre from the island country and also the bailer shell and other shells as well. We also have wood for spears - fighting spears especially shiny ones - we get Kurrburu - an acacia species. It has very hard wood for spear prongs. Boomerang or anything to be made from that hard wood.
> We sent that way for shovels, and things to carry water. From the mainland we could get stone axe's from Alan Ned's country and also stone knives. We would also trade for emu feather. We only had one dreaming emu here. We used the feathers for dancing hats which we use in ceremony.
> Bayley Point and Point Parker were the major trading places for the islands and then from there to Burketown. People from the mainland wouldn't come to Gunana. They would go as far as Robert Island and put their order in. People would use letter stick -

> Ngunyingu - until somebody had the required thing and then they would send the red ochre and they would got axe/knives in return. In the early days we would trade for bits of steel and wire - we would get worn out horseshoes. It was done on trust.'

This indicates to me that the native title claim group engaged in, and continues to engage in, the manufacture or production of traditional items from resources found on or in the application area and that they were, and are, traded. I am satisfied that this right can be prima facie established.

l. The right to carry out economic pursuits on the application area including the barter and/or exchange of natural resources and the products of those resources;

Established.

As part of the right to carry out economic pursuits the applicants include an activity that may be seen as akin to a right to trade, i.e. barter and/or exchange.

In *Yarmirr v Northern Territory (No 2)* at 587, Olney J considered that a right to trade in goods did not meet the definition of 'native title' because it was not a right in relation to land or waters. In my opinion barter and exchange may involve the same problem. On appeal in *Yarmirr*, the majority of the Full Court were of the tentative view that a right to trade could be an integral aspect of a broader right to exclusive possession but, given that this broader right was not available (in that case), it was not necessary to decide the right to trade issue in this case: *Commonwealth v Yarmirr* at [250].

In this application the right claimed is essentially to *carry out economic pursuits on the application area.* In my view *barter and/or exchange of natural resources and the products of those resources* is one of the incidents of that right and the claim falls short of being a claim for a right to trade. I am of the opinion that the right claimed relates to the land and waters and that it can be prima facie established.

This claimed right is similar to those claimed at i, j, and k. Based on the same information to which I have referred there I am satisfied that this right can be prima facie established.

m. A right to receive a part of any living, mineral or other natural resources taken by others on or from the application area;

Not established

The right of senior members ... to receive a portion of major catches [of fish] and 'the right of clan members to receive a portion of a major catch taken from the waters or land of the clan's estate are not rights and interest in relation to lands or waters - Y*armirr v Northern Territory of Australia* at [118].
In the present claim the living resources are included. They would include game and fish. Hence for the same reason as appears above I am of the opinion this right cannot be prima facie established. It seem to me that the right is one relating to the relationship between people rather that a right relating to land and waters.

I add that I am unable to omit “living resources” from the right claimed and consider whether the right can be established in relation to minerals and other natural resources. To do so would be to amend the application. In any event the same reasons may also be applicable to the claim to receive a part of minerals and other natural resources taken by others from the area.

n. The right to enjoy the amenity of the application area;

Not established
As I am of the view that this right is not readily identifiable it follows that it cannot be prima facie established (see reasons under s190B(4) above).

o. The right to protect the land and waters and the resources of the land and waters by taking steps to prevent acts which are not carried out in the exercise of statutory rights or any common law rights and which acts may cause damage, spoliation or destruction of the land and waters or the animals, plants or fish on or in the land and waters.

Established

I refer to my reasons in respect of f. above.

I note that this right is limited to preventing acts which *are not carried out in the exercise of statutory rights or any common law rights*. Consequently this right does not convey to me a likely intention or capacity on the part of the members of the native title claim group to control access to or use of the land and waters by others contrary to their rights. I am of the view that it is capable of being prima facie established.

Schedule G states:

3. Members of the claimant group actively protect sites and areas of significance, cultural heritage and Aboriginal artefacts on and in Garawa and Gangalidda land and waters, including the application area. Members of the claimant group currently participate in cultural heritage surveys and monitoring of any activities occurring on Garawa and Gangalidda land and waters.

I refer also to paragraphs 5 and 6 of Attachment F.

I am satisfied that this right can be prima facie established.

p. An interest in the management and/or use of the application area;

Not established

As I am of the view that this right is not readily identifiable (see under s190B(4)) it follows that it cannot be prima facie established.

q. The right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the State of Queensland or the Commonwealth in relation to the use of the land and waters;

Established.

This right appears to involve the control of access to the area and/or the control of the use and enjoyment of the resources of the area. As such it may not be capable of prima facie establishment over areas where exclusive possession cannot be sustained. However, I see that this right is limited making decisions about the use and enjoyment of the land and waters and resources by people *other than those exercising a right conferred by or arising under a law of the State of Queensland or the Commonwealth in relation to the use of the land and waters.* Consequently this right does not convey to me a likely intention or capacity on the part of the members of the native title claim group to control access to or use of the land and waters by others contrary to their legal rights that may be inconsistent with the native title right. The right being so qualified, and not interfering with the legitimate rights of others, I am of the opinion that it is capable of being prima facie established. Further, I note that a right in almost identical terms was accepted in *Alyawarr & Ors v Northern Territory* [2004] FCA 472 (see 179 – 181, 257 - 277).

I am satisfied there is sufficient information in the application to support the prima facie establishment of this right.

Schedule G says:

> 3. Members of the claimant group actively protect sites and areas of significance, cultural heritage and Aboriginal artefacts on and in Garawa and Gangalidda land and waters, including the application area. Members of the claimant group currently participate in cultural heritage surveys and monitoring of any activities occurring on Garawa and Gangalidda land and waters.
>
> 8. Members of the claimant group currently manage the claim area through a variety of means. Examples of these are contained in **Attachments "F" and "FI"** to this application. Members of the claim group continue to manage the environment inter alia through traditional burning techniques and eradication of introduced weeds and pests.

I refer to paragraphs 5.10 to 5.13 and para 6, particularly para 6.1, of Attachment F which indicate the observance of traditional laws and customs that involve decision making in respect of land and waters

See also the affidavits of :

[Gangalidda claimant 1] dated 10.8.99;
[Gangalidda claimant 2] dated 8.8.99;
[Gangalidda claimant 3] dated 12.8.99;
[Gangalidda claimant 8] dated 12.8.99;
[Gangalidda claimant 5] dated 12.8.99;
[Gangalidda claimant 7] dated 20.8.99;
[Gangalidda claimant 6] dated 6.5.2004, and
[Garawa applicant 1] dated 19.5. 2004.

r. The right to protect the application area from physical damage.

Not established

This right appears to me to be a general right to protect the application areas from physical damage. It is not qualified as are the rights claimed at paragraphs o. or q. The rights claimed at s. and t. are also not so qualified.

A question arises whether the right involves a right to control access to and use of the claim area. If so I believe it can only be established on areas where exclusive possession can be sustained. The right is claimed here in respect of *the remainder of the land and waters in the application.* Those are areas where exclusive possession is not claimed and presumably cannot be sustained. To the extent that it would amount to a right to control access to and use of those areas of the claim, such a right cannot in my view be prima facie established.

There is no indication here of how the area would be protected. I have noted that para 2 of Attachment E claims the rights itemised *"in accordance with traditional laws and customs"*. However, even in the context of traditional practices the general description of this right conveys to me the likelihood that protection of the area would have to be by controlling access to, or controlling the use of the application area. In my view it follows that the right is not capable of being prima facie established.

s. The right to maintain, protect and preserve the physical state of sites and areas within the application area that are of significance to the native title holders.

Not established

Please see my reasons under r. above.

This right is similar to the right to protect the application areas from physical damage claimed at r. above It differs in that the right claimed is to *maintain, protect and preserve* the physical state of *significant sites and area.* It is limited to significant sites and areas.

Again the question arises whether the right involves the control of access to and/or the control of the use of the claim area. Whilst it may be possible to maintain and preserve the physical state of sites without controlling access to and/or use of them, I find it difficult to see that they can be maintained, *protected* and preserved without the exercise of such control. Again, as with r., this right indicates to me the likelihood that protection of the area would have to be by controlling access to, or controlling the use of the sites and areas by others. In my view it follows that the right is not capable of being prima facie established.

t. The right to maintain, protect and preserve sites and areas within the application area that are of significance to the native title holders from inappropriate behaviour.

Not established

This right is similar to that claimed at paragraph s. above but is limited to the protection of significant sites from *inappropriate behaviour.* I find it difficult to see that inappropriate behaviour can be prevented other than through the control of access to, and/or use of the sites and areas of significance. I refer to my reasons in respect of s. For the same reasons as appear there I am of the opinion that this right cannot be prima facie established.

u. The right to maintain, protect and conserve the natural values and resources of the application area; in the alternative an interest in the maintenance, protection and preservation of the natural values and resources of the application area.

Not established

As I am of the opinion that the claimed native title right and interest is not readily identifiable it follows that it cannot be prima facie established (see s190B(4)).

v. The right to protect and look after cultural artefacts from on and within the application area, including rock art.

Not established

The right to protect and look after cultural artefacts *from the application area* is not in my view a right that relates to land and water. The wording indicates to me that artefacts would be separated from the land and waters and may be retained anywhere for the purpose of protection.

The right to protect cultural artefacts *on and within* the application area may well be related to the land and water. However, I believe I must consider the claimed right as a whole. I am unable to remove the reference to artefacts *from* the application area. To do so would be to amend the application.

I do not intend to say that the right claimed does not exist. It well may exist. However, in my view, as expressed it is not a native title right and interests capable of being prima facie established.

I am not satisfied that this right can be prima facie established.

w. The right to conduct and take part in ceremonial activities on the application area;

Established

At para 4 of Schedule G the applicant states that: “Members of the claimant group currently use the application area for customary, cultural and ceremonial purposes. The cultural significance of Gangalidda and Garawa country, including the area the subject of this application is set out in detail in **Attachments 'F' and "F1" - "F4** to this application”.

Attachment F refers to the continuity of the group’s ceremonial life – see paras. 4.22 – 4.37.

In particular [Garawa applicant 1] in his affidavit (19 May 2004) gives examples of recent ceremonial life practised by the Garawa and Gangalidda people:

> "We only do ceremony on certain months, like close to Christmas and mid-winter. We do ceremony for lots of reasons- to teach our young fellas not to do anything stupid, or if old people have passed away for younger people to carry on the knowledge. We also use that business for when one of our senior man has passed away, maybe a song man or leader or junggai for that ceremony. We bring their spirit into that ceremony and put him away proper, say he is no more (para 5).

Based on the above information I am satisfied that the right claimed can be prima facie established.

x. The right to maintain proper and appropriate custodianship of the application area and the special and sacred sites within and on it, including through ceremonies, to ensure the continued vitality of traditional law and culture.

Established

Does this right involve the control of access to the area and/or the control of the use and enjoyment of the area? If so, it may not be capable of prima facie establishment over areas where exclusive possession cannot be sustained.

At para 2 the native title claim group claim full and free enjoyment of the listed rights *in accordance with traditional law and custom*". In my view the right to *maintain proper and appropriate custodianship* of the specified areas must be considered in accordance with traditional law and custom. I see it as being proper and appropriate custodianship in accordance with traditional law and custom. Consequently this right does not convey to me a likely intention or capacity on the part of the members of the native title claim group to control access to or use of the land and waters by others contrary to their legal rights that may be inconsistent with the native title right. I am of the opinion that this right is capable of being prima facie established.

I refer to the information set out in Schedule G and Attachment F. This information indicates that the native title claim group have maintained their connection to the claimed lands and waters through their continuing extensive use and enjoyment of the land and waters. This use and enjoyment is supported by the affidavits to which I have referred above. This indicates the groups continuing custody of the area. I am satisfied that there is sufficient information to support the prima facie establishment of the native title claim group's custodianship of the application area. I am satisfied that the right claimed can be prima facie established.

To sum up:
I am satisfied that at least some of the claimed native title right and interests can *prima facie* be established in respect of the area covered by the application.

I find that the rights described at paragraph 1 can be *prima facie* established in respect of:
- Lot 1 on Plan PK3 formerly known as Doomadgee Reserve.
- Troutbeck Pastoral Holding (Lot 4601 on Plan PH1676)
- Bundella Pastoral Holding (Lot 4712 on Plan PH1678)
- Brokera Pastoral Holding (Lot 2523 on Plan PH1675)
- Tarrant Pastoral Holding (Lot 4711 on Plan PH1677)

I find that the rights described in para 2 of Schedule E that I have found can be *prima facie* established are so established in respect of the remainder of the area covered by the application.

The rights and interests in para. 2 are subject to the qualifications in para. 3 of Schedule E.

Result: Requirements met

Traditional physical connection: s190B(7)

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.

At Schedule M, the applicant state that:

> '*Members of the claim group have maintained a traditional physical connection with the land and waters the subject of this application.*

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. This evidence is to be found in Attachment F, F4 , Schedule G and the affidavits to which I have referred above. For instance, in his affidavit dated 12.8.99, [Gangalidda claimant 3] states that he is a Gangalidda Man (para 2), he has lived and worked in the area (para 1). Similarly, [Garawa applicant 1], who is a Garawa man, in his affidavit sworn 19.5.2004 outlines his traditional physical connection with land or waters covered by the application.

Based on this evidence, I am satisfied that [Gangalidda claimat 3 and Garawa applicant 1] are members of the claim group and that they along with other members of the native title claim group have the requisite traditional physical connection.

Accordingly, I am satisfied that at least one member of the native title claim group currently has and previously had a traditional physical connection with any part of the land or waters covered by the application. I find that the application passes this condition.

Result: Requirements met

No failure to comply with s61A: s190B(8)

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 contains four conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four conditions.

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s.61A.

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 any part of the claim area. This has been confirmed by the Tribunal's Geospatial Branch in its assessment dated 11 June 2004.

S61A(2)- Previous Exclusive Possession Acts ("PEPAs")

The exclusion clauses of Schedule B effectively exclude any lands subject to a previous exclusive possession act as defined under s.23B of the Act save where the Act allows those lands to be part of a native title determination application.

The exclusion clauses meet the requirement of this sub-section.

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

Paragraph 3 of Attachment E confirms that the application does not include a claim for exclusive possession over areas that are or were subject to a non-exclusive possession act as defined in s23F of the Act.

S.61A(4) – s47, 47A, 47B

The application contains the following at Schedule L:

The areas in which it is maintained that ss.47, 47A or 47B apply are as follows:

- Lot 1 on Plan PK3 formerly known as Doomadgee Reserve.
- Troutbeck Pastoral Holding (Lot 4601 on Plan PH1 676)
- Bundella Pastoral Holding (Lot 4712 on Plan PH1 678)
- Brokera Pastoral Holding (Lot 2523 on Plan PH1675)
- Tarrant Pastoral Holding (Lot 4711 on Plan PH1677)

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 express statements with respect to the provisions of those sections is sufficient to meet the requirements of s.190B(8). Subsection 61A(4) of the Act provides that an application may be made in the terms expressed in Schedule L. Whether or not the applicants have provided sufficient information to bring any area within the ambit of the sections is a matter to be settled in another forum.

Result: **Requirements met**

No claim to ownership of Crown minerals, gas or petroleum: s190B(9)(a)

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 the applicant does claim any minerals, petroleum or gas wholly owned by the Crown. The applicants also assert that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application. The latter issue is a matter to be resolved elsewhere.

Result: Requirements met

No exclusive claim to offshore places: s190B(9)(b)

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

At Schedule P the applicants state that:
"The application does not include a claim by the native title claim group to exclusive possession of all or part of an offshore place."

Result: Requirements met

Native title not otherwise extinguished: s190B(9)(c)

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.

I note that Schedule B excludes from the application any land and waters where native title rights and interests claimed have otherwise been extinguished (para 6).

A search of the Register of Indigenous Land Use Agreements reveals that there are no agreements entered on the Register that affect any part of the claim area. This was confirmed in the assessment prepared by the Tribunal's Geospatial Unit dated 11 June 2004.

Result: Requirements met

End of Document