National Native Title Tribunal

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE:	Mia Bailey		
Application Name:	Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples		
Names of Applicant:	Cecil Goodman, Heather Toby, Valerie Douglas, Roger Kelly		
Region:	Carpentaria	NNTT No.:	QC06/1
Date Application Made:	12 January 2006	Federal Court No.:	QUD7/2006

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).

Mia Bailey

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

Date of Decision:
30 March 2006

Brief History of the Application

The application was filed with the Federal Court on 12 January 2006. A copy was forwarded to the National Native Title Tribunal pursuant to s.63 of the Act on 12 January 2006.

The application was previously known as the proposed Wellesley Island Land Claim and follows the determination of native title in *The Lardil Peoples v State of Queensland* [2004] FCA 298 ('*Lardil*') in which Cooper J made Orders that native title exists on land and waters adjacent to the area covered by this application.

Information considered when making the Decision

In determining this application I have considered and reviewed the following material:

- This application and prescribed accompanying affidavits of the Applicant pursuant to s.62(1)(a) filed in the Federal Court on 12 January 2006.
- The results of searches by the Tribunal's Geospatial & Mapping Unit of the Register of Native Title Claims, Federal Court Schedule of Native Title Applications, National Native Title Register and other databases in relation to the application area (Geospatial assessment dated 25 January 2006; Geotrack 2006/0091);
- The decision of Cooper J in *The Lardil Peoples v State of Queensland* [2004] FCA 298.

A copy of the application was provided to the State of Queensland on 16 January 2006. The State has not provided any comment in relation to this application.

Note: I have not considered any information and materials that may have been provided in the context of any mediation of the native title claim group's native title applications. 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* (Cth) ('the Act') unless otherwise specified.

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

On 22 September 2005, Christopher Doepel, the 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 Act.

This delegation has not been revoked as at this date.

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.

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, I test the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions.

A. Procedural Conditions

Applications contains details set out in ss61 and 62: S190C(2)

S190C(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 condition

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

I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). 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 are included, or that it is in fact a sub-group of the native title claim group, then the requirements of s.190C(2) would not be met and the claim could not be accepted for registration (*AG of Northern Territory v Doepel* [2003] FCA 1384 ('*Doepel*') at [36]).

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits. In particular I am not required 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 (*Doepel* at [16 – 17] and [37 - 39]).

In light of *Doepel*, I have confined my considerations to the information contained in the application and accompanying affidavits.

Schedule A of the application states:

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Lardil People, the Yangkaal People, Gangalidda People and the Kaiadilt People. The Gangalidda people are described in Attachment Al. The Lardil People are described in Attachment A2. The Yangkaal People are described in Attachment A3. The Kaiadilt People are described in Attachment A4.

Attachment Al states as follows:

> The Gangalidda people are:
>
> 1. All of the descendants of the following people:
>
> 1. *Mingginda country*: [Ancestors G1 to G4]
> 2. *Bugajinda/Moonlight Creek country*: [Ancestors G5 to G8]. Descendants include [Descendants G1 to G10].
> 3. *Ngawayinda/Point Parker country*: [Ancestors G9 to G12]. Descendants [Descendants G11to G19].
> 3a. *Mildiji/Allen Island country*: [Ancestors G13 to G16].
> 4. *Gaabula/Bayley Point country*: [Ancestors G17 & G18]. Descendants include [Descendants G20 to G24].
> 4a. *Marranggabayi (Pains Island) , Jurrmanggi (Bayley Island) , Forsyth Island country*: [Ancestors G19 to G22].
> 5. *Dumaji/Old Doomadgee country*: [Ancestors G23 & G24].
> 6. *Dalwajinda/Bundella Waterhole country*: [Ancestor G25]. [Descendents G25 to G27].
> 7. *Cliffdale Creek country*: [Ancestors G26 to G29]. Descendants include [Descendents G28 to G34].
> 8. *Wambilbayi country*: [Ancestors G30 & G31]. Descendants include [Descendents G35 to G38].

9. *Madara, Dumbara Islands, Eight Mile Creek (Burruluwarra), Horse Island" (Ngurrurri) country*: [Ancestor G30 & G31]. Descendants include [Descendants G39 to G44].

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 Orders 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 the 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 G1 to Family G15].

Attachment A2 states as follows:

The Lardil people are:

(1). All of the descendants of the following people:

(i) Descent Group 1 ([removed]): [Ancestors L1 to L3].

(ii) Descent Group 2 ([removed]): [Ancestors L4 to L8].

(iii) Descent Group 3 ([removed]: [Ancestors L9 to L12].

(iv) Descent Group 4 ([removed]): [Ancestors L13 to L16].

(v) Descent Group 5 ([removed]): [Ancestors L17 to L21].

(vi) Descent Group 6 ([removed]): [Ancestors L22 to L29].

(vii) Descent Group 7 ([removed]): [Ancestors L30 to L41].

(viii) Descent Group 8 ([removed]): [Ancestors L42 to L52].

(ix) Descent Group 9 ([removed]): [Ancestors L53 to L57].

(x) Descent Group 10 ([removed]): [Ancestors L58 to L66].

(xi) Descent Group 11([removed]): [Ancestors L67 to L70].

(xii) Descent Group 12 ([removed]): [Ancestors L71 to L76].

(xiii) Descent Group 13 ([removed]): [Ancestors L77 to L83].

(xiv) Descent Group 14 ([removed]): [Ancestors L84 to L93].

(xv) Descent Group 15 ([removed]): [Ancestors L94 to L114].

(xvi) Descent Group 16 ([removed]): [Ancestors L115 to L123].

(xvii) Descent Group 17 ([removed]): [Ancestors L124 to L132].

(xviii) Descent Group 18 ([removed]): [Ancestors L133 to L138].

(xix) Descent Group 19 ([removed]): [Ancestors L139 to L142]

(xx) Descent Group 20 ([removed]): [Ancestors L143 to L152].

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

(2). The claimant group are the same people who comprised the Lardil people referred to in the Orders 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 the 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 Lardil People.

(4). Some family names associated with the biological descendants of the named Lardil ancestors are: [Families L1 to L14].

Attachment A3 states as follows:

The Yangkaal People are:

(1). All of the descendants of the following people:

(i) Descent Group 1 ([removed]): [Ancestors Y1 to Y10].

(ii) Descent Group 2 ([removed]): [Ancestors Y11 to Y15].

(iii) Descent Group 3 ([removed]): [Ancestors Y16 to Y24].

(iv) Descent Group 4 ([removed]): [Ancestors Y25 to Y42].

(v) Descent Group 5 ([removed]): [Ancestors Y43 to Y45].

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

(2). The claimant group are the same people who comprised the Yangkaal people referred to in the Orders 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 the 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 Yangkaal People.

(4). Some family names associated with the biological descendants of the named Yangkaal ancestors are: [Families Y1 to Y7].

Attachment A4 states as follows:

The Kaiadilt People are:

(1). All of the descendants of the following people:

(i) Descent Group 1 ([removed]): [Ancestors K1 to K13].

(ii) Descent Group 2 ([removed]): [Ancestors K14 to K34].

(iii) Descent Group 3 ([removed]): [Ancestors K35 to K49].

(iv) Descent Group 4 ([removed]): [Ancestors K50 to K55].

(v) Descent Group 5 ([removed]): [Ancestors K56 to K61].

(vi) Descent Group 6 ([removed]): [Ancestors K62 to K69].

(vii) Descent Group 7 ([removed]): [Ancestors K70 to K80].

(viii) Descent Group 8 ([removed]): [Ancestors K81 to K89].

(ix) Descent Group 9 ([removed]): [Ancestors K90 to 98].

(x) Descent Group 10 ([removed]): [Ancestors K99 to K106].

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

(2). The claimant group are the same people who comprised the Kaiadilt people referred to in the Orders 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 the 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 Kaiadilt People.

(4). Some family names associated with the biological descendants of the named Kaiadilt ancestors are: [Families K1 to K9].

I find that there is nothing on the face of the description in Schedule A, Attachments A1 to A4 or elsewhere in the application and accompanying s.62(1)(a) affidavits to indicate that all the persons in the native title claim group for the application area are not included in the description or that the persons described are in fact a sub-group of the native title claim group.

In relation to the inclusion of the phrase "and who identify and are identified by others as belonging to the [Gangalidda/Lardil/Yangkaal/Kaiadilt] people according to traditional law and custom", following para. 1 of Attachment A1 to A4, refer to my reasons below under s.190B(3).

For these reasons, I am satisfied that the description of the persons in the native title claim group meets the requirement in s. 61(1), as imposed by s. 190C(2).

Result: Requirements met

Applicant in case of applications authorised by claim groups: s61(2)

Section 61(2) simply says who the applicant is in the case of a native title determination application. The applicant is the person or persons jointly (together) who are authorised by the native title claim group to make the application.

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 condition

The name and the address for service of the applicant appears at Part B of the application.

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 condition

Schedule A and Attachments A1 to A4 of the application describe the native title claim group, as set out above under s.61(1). For the reasons that led to my conclusion (below) that the requirements for s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

Application is in prescribed form: s 61(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.

Reasons relating to this condition

s. 61(5)(a)

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

s. 61(5)(b)

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

s. 61(5)(c)

The application meets the requirements of s.61(5)(c) as, for the reasons outlined below in relation to s.62, it does contain the information prescribed by s.62.

s. 61(5)(d)

As required by s.61(5)(d), the application is accompanied by the prescribed documents, being the applicant affidavits prescribed by s.62(1)(a). I refer to my reasons in relation to s.62(1)(a) below.

I note that s.190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, I am of the view that the requirements of s.61(5) have been met.

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 condition

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn by the applicant in relation to the matters specified in sub-paragraphs (i) through to (v).

The application is accompanied by affidavits of each person comprising the applicant, being:

- [Applicant 2] sworn 13 December 2005;
- [Applicant 1] sworn 13 December 2005;
- [Applicant 3] sworn 14 December 2005; and
- [Applicant 4] sworn 13 December 2005.

Each of these affidavits are signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently address the matters required by s. 62(1)(a)(i)-(v).

Result: Requirements met

Application contains details set out in s 62(2): s 62(1)(b)

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

Details of physical connection s: 62(1)(c)

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

Comment on details provided

Schedule M of the application states 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 and F1 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.
>
> In *The Lardil Peoples v State of Queensland* [2004] 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 of the claimants in this matter to their traditional [sic]. This necessarily included their physical connection.

Schedule M then includes quotes of Cooper J from *Lardil* at [200] and [202], which are extracted below under s.190B(7).

Result: Details 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 condition

Schedule B and Attachment B of the application contain a written description of the claim area. For the reasons which led to my conclusion below that the requirements of s.190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable the external boundaries of the claim area covered by the application to be identified.

Result: Requirements met

Information, whether by physical description or otherwise that enables the boundaries of any areas within those boundaries that are not covered by the application to be identified: s 62(2)(a)(ii)

Reasons relating to this condition

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

Result: Requirements met

Map of the application area: s.62(2)(b)

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

Reasons relating to this condition

A map showing the external boundaries of the claim area is found at Attachment C of the application. For the reasons that led to my conclusion below that the requirements of s.190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the claim area.

Result: Requirements met

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 condition

Schedule D states that, "No searches have been carried out by the applicants."

I interpret the reference in s.62(2)(c) to 'details and results of all searches carried out…' to mean searches carried out by the applicant. There is no information in the application or otherwise before me to suggest that such searches have been carried out by the applicant.

Result: Requirements met

Description of native title rights and interests: s 62(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 condition

A description of the claimed native title rights and interests is contained in Attachment E of the application. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law. I am satisfied that the requirements of this section are met.

Result: Requirements met

Description of factual basis: s62(2)(e)

s. 62(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 condition

Schedule F of the application states that the factual basis upon which the native title rights and interests in Attachment E are claimed, (including the nature of the claimant groups association with the claimed area, their traditional laws and customs and their continuing acknowledgement of those laws and customs) is set out in Attachments F and F1 to F2 of the application. For the reasons that led to my conclusion below that the requirements of s.190B(5) have been met, I find that the application satisfies the requirements of s.62(2)(e).

Result: Requirements met

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

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

Reasons relating to this condition

Schedule G states that:

> 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 the application area on Mornington Island and Bentinck Island. Outstations are also located on Forsythe Island and Denham Island. Other islands are visited. Examples of this are set out in Attachments "F" and "F1" to this application.
> 2. Members of the claimant group actively protect sites and areas of significance, cultural heritage and Aboriginal artefacts on and in the application area. Examples of this are set out in Attachments "F" and "Fl" — "F2" to this application.
> 3. Members of the claimant group currently use the application area for customary, cultural and ceremonial purposes. The cultural significance of the application area is set out in detail in Attachments "F" and "Fl" - "F2" to this application.
> 4. 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", "Fl" and "F2" to this application.
> 5. Because the applicant group have control of their traditional country under Queensland legislation the applicant group have been able to control and manage some activities on their country. The fact that the laws and customs of the applicant group include a right to control access and the use

of resources was noted by Justice Cooper in *The Lardil Peoples v The State of Queensland* [2004] FCA 298. This is discussed in more detail in Attachment "F".

6. 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" and "Fl" to this application and is the subject of factual findings in *The Lardil Peoples v The State of Queensland* [2004] FCA 298.

7. 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 find that the information provided in Schedule G of the application satisfies the requirements of s.62(2)(f).

Result: Requirements met

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

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

Reasons relating to this condition

Schedule H of the application states:

> 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 the 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.

In an assessment dated 25 January 2006 the Tribunal's Geospatial Analysis & Mapping Branch confirmed that as at the date of that assessment there are no applications as per the Register of Native Title Claims and Schedule of Applications – Federal Court that fall within the external boundary of this application**.**

Result: Requirements met

Details of s29 notices: s 62(2)(h)

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

Reasons relating to this condition

Schedule I of the application states that, "The applicants are not aware of any s.29 Notices that relate to the claim area."

The assessment of the Tribunal's Geospatial Unit dated 25 January 2006 confirms that, as at the date of that assessment, no s.29 or equivalent notices (as notified to the NNTT) fall within the external boundary of this application.

I am satisfied that the application meets the requirements of this condition.

Result: Requirements met

Combined decision for s.190C(2)

Reasons relating to this condition

For the reasons identified above I find that the application contains all details and other information, and is accompanied by the documents, required by sections 61 & 62.

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 relating to this condition

A search of the Geospatial database and Register of Native Title Claims reveals that there are no overlapping applications that cover the area of this application which are on the Register of Native Title Claims, as a result of a consideration pursuant to s. 190A.

This was confirmed in the overlap analysis dated 25 January 2006 prepared by the Tribunal's Geospatial Unit, which found that there were no applications overlapping the area of this application. Consequently, I need not consider the requirements of this condition further.

I am satisfied that the application meets the requirements 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 relating to this condition

Schedule R of the application states that the application is certified by the Carpentaria Land Council Aboriginal Corporation ('CLCAC'). A copy of the certification is included as Attachment R1 to the application.

As the application is certified, I must be satisfied that the requirements of s.190C(4)(a) have been met, namely, that the application has been certified under Part 11 by each representative body that could certify the application in performing its functions under that Part.

The assessment of the Tribunal's Geospatial Unit dated 25 January 2006 confirms that there is one representative body that covers the application area, being CLCAC.

Section 203BE(4) provides that a certification of an application for a determination of native title must:

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

(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) [which relates to overlapping applications].

Section 203BE(2) states that a representative body must not certify under para. 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 authorized the applicant 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 other persons in the native title claim group.

I will now consider whether the certificate at Attachment R1 satisfies the requirements of s.203BE(4)(a) and (b). Subsection 203BE(4)(c) is not relevant to this application as there are no overlapping applications in relation to the claim area.

The certificate is signed by [Chairperson CLCAC], and dated 6 October 2005. The certificate states that CLCAC is of the opinion that the requirements of s.203BE(2)(a) and (b) have been met, as required by s.203BE(4)(a). The certificate also includes brief reasons for why CLCAC is of the opinion that the application has been properly authorized, namely that:

- CLCAC has been instructed by the applicants in matters associated with the Wellesley Islands Sea Claim and Determination since 1997;
- The Lardil, Yangkaal, Gangalidda & Kaiadilt people comprise a well established claimant group, in particular:
    - CLCAC has made a successful application for determination of native title on behalf of the Lardil, Yangkaal, Gangalidda & Kaiadilt people in relation to traditional sea country ('Wellesley Island Sea Claim'). That application was the subject of an approved determination that native title exists: *The Lardil Peoples v State of Qld* [2004] FCA 298.
    - Substantial anthropological, genealogical and historical research into the identity of all Lardil, Yangkaal, Gangalidda & Kaiadilt peoples occurred during preparation for the Wellesley Island Sea Claim.
    - The claimants in this matter are the same people.
- CLCAC has conducted meetings with the Lardil, Yangkaal, Gangalidda & Kaiadilt peoples regarding this application. The named applicants were authorized to make the application and deal with matters arising in relation to it on behalf of all other persons in the native title claim group at meetings held at Mornington Island on 19 May 2005; Burketown on 6 July 2005 and Mornington Island on 30 September 2005.
- These authorization meetings were organized and supervised by CLCAC.

I am of the view that the certificate satisfies the requirements of s.203BE(4)(a) and (b). For these reasons I find that the condition in s. 190C(4)(a) is met.

Result: Requirements met

Merit Conditions: s190B

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 relating to this condition

External Boundaries

Schedule B of this application states:

1. The area covered by the application is all the lands and waters within the boundaries described in Attachment B. A map showing the claim area is Attachment C.
2. Subject to 3 below, the following areas are excluded from the claimed land and waters.
    a. The land and waters the subject of *The Lardil Peoples v State of Queensland* [2004] FCA 298 (the "Wellesley Sea Claim").
    b. Any land and waters which are the subject of:
        i. A scheduled interest;
        ii. A freehold estate;
        iii. A commercial lease that is neither an agricultural or a pastoral lease;
        iv. An exclusive agricultural lease or an exclusive pastoral lease;
        v. A community purpose lease;
        vi. A residential lease;
        vii. A lease dissected from a mining lease and referred to in Section 23B(2)(c)(vii); or
        viii. 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.

c. Any land and waters which are the subject of a validly constructed or established public work that commenced to be established or constructed on or before 23 December 1996; and

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

3. Where the acts specified in clauses 2b — 2d 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.

The written description of the application area at Attachment B was prepared by the Tribunal's Geospatial Unit, (dated 15 August 2005), and describes the area covered by the application area as being all the lands and waters above the High Water Mark ('HWM') on the islands bounded by the determination area QG207/97 Wellesley Islands Sea Claim (QC96/2) as determined by the Federal Court on 23 February 2004. A list of islands that the "application includes but is not limited to" is included. The Geospatial assessment dated 25 January 2006 notes that the wording of this statement is used to indicate that there may be lands above the HWM that are bounded by the determined Wellesley Islands Sea Claim but were not depicted on the data or maps available to Geospatial at the time the description was compiled, and that any such lands are to be included in the application area.

Attachment C is a monochrome copy of a colour map titled "Native Title Determination Application: Wellesley Islands Land Claim" prepared by the Tribunal's Geospatial Unit and dated 15 August 2005.

The Geospatial Unit assessed the map and written description and concluded in its assessment dated 25 January 2006 that:

> The map and description label the application name as the "Wellesley Islands Land Claim" rather than the "Lardil, Yangkaal, Gangalidda and Kaiadilt People.
>
> Apart from the mislabeling of the application name, the description and map are consistent and locate the application area with reasonable certainty.

For these reasons, I am satisfied that the information contained in the application describes the external boundaries of the area covered by the application with reasonable certainty.

I am of the view that the stated exclusion by class amounts to information that enables areas not covered by the application to be identified with reasonable certainty. In some cases, research of tenure data held by the State of Queensland may be required, but nevertheless it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

For these reasons, I am satisfied that the description in the application of areas not covered by the application complies with s. 190B(2) and s. 62(2)(a)(ii).

To conclude, I am satisfied that the information and the maps required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters. In my opinion 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 relating to this condition

In *Doepel* at [51], Mansfield J stated that:

> The focus of s.190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so.

The description of the native title claim group at Schedule A and Attachments A1 to A4 of the application is set out above under s.61(1). The application does not name the persons in the native title claim group for the purposes of s.190B(3)(a). Accordingly, I must be satisfied that the application satisfies the requirements of s.190B(3)(b), that is, the application describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group.

In my view, s.190B(3)(b) requires that an objective method of determining who is in the claim group be described in the application. The fact that some factual inquiry may be required to ascertain whether or not a person is in a claim group does not mean that the group has not been sufficiently described: *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67]. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s.190B(3)(b). It is for the Registrar or his delegate to determine whether or not the description is sufficiently clear: *Ward v Native Title Registrar* [1999] FCA 1732.

The claim group is described as comprising four groups – the Gangalidda, Lardil, Yangkaal and Kaiadilt people – each of which is then described as being comprised of all persons descended from named apical ancestors. In relation to some descent groups, the names of some descendants are provided. I note that each description also includes the phrase, following the list of apical ancestors, "and who identify and are identified by others as belonging to [the particular group] according to traditional law and custom." In relation to each group, it is stated that adoption takes place and is accepted, giving the adoptee the right to identify with the particular group.

I note that the description of the claim group is, in some ways, similar to that in *Doepel*, which also consisted of four groups, being comprised of all persons descended from named apical ancestors. In *Doepel*, Mansfield J stated at [37] that the focus of s.190B(3) is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. In considering whether an application meets the requirements of s.190B(3) the Registrar or his delegate is not required to examine whether all the named or described persons do in fact qualify as members of the native title claim group.

I am of the view 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). By referencing the identification of members of the native title claim group to named apical 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.

A question then arises in relation to the inclusion of the phrase - "and who identify and are identified by others as belonging to the [Gangalidda/Lardil/Yangkaal/Kaiadilt] people according to traditional law and custom" - following para. 1 of Attachment A1 to A4, namely whether this renders the description incapable of satisfying the requirements of s.190B(3). A view may be taken that the inclusion of this phrase introduces an additional criteria for membership of the claim group, such that it is only those descendants of the named apical ancestors that identify and are identified by others as belonging to the particular group according to traditional law and custom. This would, in my view, introduce an element of self identification into the description which would prevent the *objective* identification of members of the claim group.

However, taking into account the description as a whole, I have formed the view that this phrase is intended as a further descriptor of the preceding description, rather than additional criteria for membership. I note that each Attachment describes the particular group as comprising, "*All of the descendants* of the following" named ancestors (my emphasis). Following the list of named ancestors is the phrase, "*and* who identify and are identified by others as belonging to" the particular group (my emphasis). I interpret this to mean that it is all of the descendants of the named ancestors who identify and are identified as belonging to the group.

There is nothing else in the application that would indicate that the above view is incorrect. I am therefore satisfied that the application includes a sufficiently clear description of the native title claim group so that it can be objectively ascertained whether any particular person is in that group.

I am satisfied that 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 relating to this condition

Schedule E of the application refers to Attachment E, which states as follows:

> **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).**
>
> 1. The applicants claim the right to possess, occupy, use and enjoy the land the subject of the application, to the exclusion of all others. In addition, and in the alternative the applicants claim the rights and interests set out in paragraph 2 (below).
> 2. In relation to the whole of the land and waters in application area the applications claim the following non-exclusive 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[1].

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;

[1] "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.

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 sites 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 1 and 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.

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests 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.[2]

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 Parliament intended to screen out applications which describe native title rights and interests in a manner which is vague, or unclear.

It may be argued that the inclusion of the phrases 'native title' and 'native title rights and interests' in this condition are used to exclude any rights and interests that are not native title rights and interests as defined by s.223.

Section 223(1) reads as follows:

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

> 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.

On this basis it may be argued that rights and interests that have been found by the courts to fall outside the scope of s. 223 are not 'readily identifiable' for the purposes of s.190B(4).

On another view, s.190B(4) is only intended to cover those rights and interests that are not readily identifiable in the sense of not making sense or being understandable. On this view, rights that fall outside the scope of s.223 should be considered under s.190B(6) as not able to be prima facie established. I have adopted the latter interpretation and will consider those rights that fall outside the scope of s.233 under s.190B(6) below.

I have considered the description of native title rights and interests in Attachment E and am satisfied that all the rights and interests claimed are readily identifiable for the purposes of s.190B(4).

Result: Requirements met

Factual basis for claimed native title: s. 190B(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 in relation to this condition

For satisfaction 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 may 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].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s62(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.[3]

In *Doepel*, Mansfield J stated at [17] that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.

In essence, I must be satisfied, pursuant to s.190B(5), that a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided is sufficient to support the assertions that:

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

Schedule F, as set out above, refers to Attachments F and F1 to F2, as material in support of the above assertions.

Attachment F is a 20 page document that provides information in relation to the assertions at s.190B(5). Attachment F1 consists of the following affidavits:

- Affidavit of [Person 1] dated 9 August 1999;
- Affidavit of [Person 2] dated 7 August 1999;

[3] See *Western Australia v Ward* (2002) 191 ALR (*Ward)* at [382].

- Affidavit of [Person 3] dated 5 August 1999;
- Affidavit of [Person 4] dated 12 August 1999;
- Affidavit of [Person 5] dated 4 August 1999;
- Affidavit of [Person 6] dated 17 August 1999.

These affidavits were filed as evidence in *Lardil*. In Attachment F it is stated that 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 (para. 1.9).

I turn now to the particular assertions of this section:

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

Attachment F (para's 1.2 – 1.3) refers to the decision of the High Court in *Yanner v Eaton* [1999] HCA 53 at [4], in which the majority acknowledged that the appellant, Mr Yanner, was a "member of the Gunnamulla clan of the Gangalidda tribe" and then noted that:

> "The Magistrate found that the appellant's clan "have a connection with the area of land from which the crocodiles were taken" and that this connection had existed "before the common law came into being in the colony of Queensland in 1823 and ... thereafter continued".

Attachment F (para's 1.4 – 1.7) also refers to *Lardil* in which Cooper J made factual findings that each of the Lardil, Yangkaal, Gangalidda and Kaiadilt People were organised societies that have existed since sovereignty. His Honour stated at [52]:

> "I am satisfied on the materials, and find that:
>
> (a) (i) At the time of sovereignty, an ethnographically and culturally separate group of indigenous peoples ('the original Lardil peoples') inhabited islands in the area claimed as the traditional territory of the Lardil peoples.
>
> (ii) Since the time of sovereignty, there has continued to exist an ethnographically and culturally separate group of indigenous peoples who were, and are, the direct descendants of the original Lardil peoples.
>
> (iii) The people named in the genealogy prepared by Dr Paul Memmott in respect of the constituent applicant group, identified as the Lardil peoples, are direct descendants of the original Lardil peoples.
>
> (b) (i) At the time of sovereignty, an ethnographically and culturally separate group of indigenous peoples ('the original Yangkaal peoples') inhabited islands in the area claimed as the traditional territory of the Yangkaal peoples.
>
> (ii) Since the time of sovereignty, there has continued to exist an ethnographically and culturally separate group of indigenous peoples who were, and are, the direct descendants of the original Yangkaal peoples.

(iii) The people named in the genealogy prepared by Dr Paul Memmott in respect of the constituent applicant group, identified as the Yangkaal peoples, are direct descendants of the original Yangkaal peoples.

(c) (i) At the time of sovereignty, an ethnographically and culturally separate group of indigenous peoples ('the original Kaiadilt peoples') inhabited islands in the area claimed as the traditional territory of the Kaiadilt peoples.

(ii) Since the time of sovereignty, there has continued to exist an ethnographically and culturally separate group of indigenous peoples who were, and are, the direct descendants of the original Kaiadilt peoples.

(iii) The people named in the genealogy prepared by Dr Paul Memmtt in respect of the constituent applicant group, identified as the Kaiadilt peoples, are direct descendants of the original Kaiadilt peoples."

Hi Honour also stated at [200] that:

"I am satisfied that none of the groups lost their identity or existence as a society. That is, none of the groups presently claiming for a determination is a new society, created or arising after sovereignty, seeking to adopt the traditional laws and customs of a former society, which has ceased to exist, as was the case in *Yorta Yorta*. Whether on Momington 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 stockman 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."

The evidence in the affidavits at Attachment F1 also support the assertion that the native title claim group have, and their predecessors had, an association with the claim area.

I am satisfied that there is sufficient factual information to support an assertion of the native title claim group having, and the predecessors of those persons having had, an association with the area subject to this application.

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests

In *Lardil*, Cooper J stated at [202] that:

"Notwithstanding the shift to the administrative centres, there is a wealth of recorded anthropological materials which chronicle the applicant peoples from the 1930s to the present time. That material in essential respects, supports the expert evidence given in these proceedings by [Anthropologists 1, 2 &3]. The anthropological material and the expert reports satisfy me that each of the applicant

> groups has maintained, through successive generations from their forebears at sovereignty, a. normative system of traditional laws which are acknowledged and customs which are observed, by which persons are allocated to a Country and rights are allocated to those persons in respect of that Country. 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."

In relation to the Gangalidda people, His Honour at [208] found, on the basis of the evidence before him, that:

> "Like the Lardil, Yangkaal and Kaiadilt peoples, they have retained the knowledge of the local Countries; the identity of the people who belonged to them and the basis of their right to belong; the rights which go with Country; the stories, the Dreaming and the obligations, and within their community people continue to acknowledge the existence of these rights in themselves and others."

Attachment F (para's 2.1 to 4.17) sets out in some detail a description of some of the laws and customs which have been maintained by the Lardil, Yangkaal, Gangalidda and Kaiadilt people, as summarised below. Much of this information is supported by evidence given by members of the claim group in *Lardil*.

Spiritual and cultural connection to the land and waters claimed

- Creation narratives – the claim group maintain beliefs in narratives relating the claim area.
- Dreaming narratives – initiation narratives – the claim group maintain initiation narratives; the song cycles and accompanying dance are performed in ceremony associated with the initiation of men.
- Other narratives
- Thuwathu/Bujimala – the Lardil, Yangkaal, Gangalidda and Kaiadilt people maintain beliefs in relation to the Rainbow Serpent, known as to Thuwathu to the Lardil, Yangkaal and Kaiadilt and Bujimala to the Gangalidda people.
- Dreaming and totemic affiliations
- Story places/sites of significance – in *Lardil* the applicants identified numerous sites of significance that were either on, or adjoining the land and waters the

subject of this application – some of those sites are listed in Attachment F2 to this application.

- Unseen people/Gurdidawa - the Lardil, Yangkaal, Gangalidda and Kaiadilt people maintain traditional beliefs in the unseen people, little people or little devils who punish wrong doers and trespassers in their country. The Gangalidda people also believe in Gurdidawa who are little short devils who punish people who do the wrong thing.
- Spirits of deceased people - the Lardil, Yangkaal, Gangalidda and Kaiadilt people maintain beliefs in relation to the presence of their ancestors in their traditional country.

Maintenance of a system of land and sea tenure

- Each of the Lardil, Yangkaal, Gangalidda and Kaiadilt people maintain a system of law and custom under which their traditional country is divided into a system of estates – it is the system through which the societies divide rights and interests in relation to their traditional country. [Attachment F, para. 3.1]
- Para's 3.3 to 3.9 of Attachment F outline how the rights and interests in the states of each of the constituent groups is attributed to people through different concepts of affiliation, including relevant evidence and findings of Cooper J from *Lardil*.
- Para's 3.10 to 3.14 of Attachment F provide information in relation to Dulmada/Dulkurra and estate groups in relation to each of the constituent groups. Affidavit evidence tendered in *Lardil* is referred to in support of the claim that 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 also have responsibilities:
    - To make decisions in relation to their country – to control what happens;
    - To care for and protect their country and its resources;
    - To protect the places of significance and Dreamings;
    - To ensure the safety of those who access their country;
    - To pass it on to their children and keep the land for future generations.

Asking

In *Lardil* at [152], Cooper J observed 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.

Para. 3.16 of Attachment F notes that the evidence in *Lardil* contained extensive evidence supporting the laws and customs of the claim group. For example, the affidavit evidence of [Person 7] dated 7 August 1999 stated:

> "We have a very strong law. That missionary made trouble with our law but we still have to keep it strong. You have to ask permission to walk through different Dulmada's country. You can't just walk through. You have to ask permission - that's the proper law. Kubelaka - proper strong law. You must get permission from the family who belongs to that place.. Even if walking through you have to ask permission."

And in the affidavit of [Person 4] dated 12 August 1999:

> "You need to get permission before you go to someone else's country. After a while though they get to know you and they let you go without asking because they know you will do the right thing. I can go to lots of places on Gangalidda country without asking every time because they know me and they would know that I will not do the wrong thing in their country. It is still their country though and they could tell me to leave if they wanted to. They could tell me not to come back if they wanted to. They may do that if I started to do the wrong thing."

An Entitlement to a Share of Resources

Para. 3.18 of Attachment F states that under the laws and customs of the Lardil, Yangkaal, Gangalidda and Kaiadilt people, the dulmada are entitled to a share of the resources taken from their country. For example, in *Lardil*, [Person 2] stated in his affidavit dated 7 August 1999 that:

> In Yangkaal law if you go hunting in someone else's country then you should come back and share with Dulmada people. Dulmada means maybe only one person or a group of people. The sea is part of our country so the same rules apply. Same for Lardil sea. If you want to fish in that area, you have to get permission from Dulmada. It is the same again for Gangalidda sea.

Traditional Use and Occupation

Para. 4.1 of Attachment F states that:

> The Lardil, Yangkaal, Gangalidda and Kaiadilt people have maintained their connection to the claimed waters through their continuing enjoyment and use of it. This use and enjoyment supports the rights and interests claimed in this application. In the Wellesley Sea Claim, the Lardil, Yangkaal, Gangalidda and Kaiadilt people gave extensive evidence of their fishing practices in the coastal waters of their country. This evidence was accepted by Justice Cooper as is reflected in the orders given in that case. That evidence is equally applicable to the land and waters the subject of this claim.

Traditional Hunting, Fishing and Gathering

Para. 4.2 of Attachment F states that:

> In the Wellesley Sea Claim, the Lardil, Yangkaal, Gangalidda and Kaiadilt people gave extensive evidence in relation to their ongoing traditional hunting, fishing and

gathering activities. It was evidence supported by non-Aboriginal people who have resided on Mornington Island from time to time.

In his affidavit dated 4 June 2000, [Person 8] states that:

> "I still go hunting and fishing all the time. We go in a small aluminium boat. I often go with [names removed]. [name removed] is from Forsyth Island. His mother is one of the [family name removed]. I usually go down fishing in that country with him. That way I know I will not get into trouble. We go around Forsyth Island and Bayley Island. [name removed] is from Bentinck Island. Sometimes we go over there with him. You do not have to ask if you have someone from that country with you.
>
> We often go fishing and hunting on the large reefs off Bech-dér-mer Point. There is good dugong and fishing country there. We go other places as well. [name removed] showed me those places.
>
> When I go fishing around the islands and towards the mainland I see other people from Mornington Island hunting and fishing as well. [names removed], all have boats. They are among the people from Mornington Island that I see hunting and fishing down that way.
>
> Sometimes I go to Old Dumaji and pick up Gangalidda people and go hunting. I do that with [name removed] and his brothers. We go to Gunamulla and go hunting there. It is all shallow water along there. Itis a big feeding ground for turtle and dugong. My brother [name removed] goes to Old Dumaji with [name removed] and West along the coast there as well.
>
> Other times I go hunting on [name removed]. That is all around Milji reef. I have been there hunting with [names removed]. We go out in boats. We sometimes go a little bit further from Milji where there's some lower flat reef.. It is still [name removed] country there. Sometimes when it is real low tide we cut dugong and turtle on the Milji reef.
>
> I go fishing or hunting whenever I can. Whenever I am not working. I mainly eat sea-food. We live off that seafood.

The Affidavits in Attachment Fl also detail the continuity of traditional use of the claimed area and the adjoining waters.

Camping and Outstations

Attachment F includes the following information:

- The Lardil and the Gangalidda have always lived on their traditional country. With the coming of the mission, the lives of the Lardil people became increasingly centred around Gununa [Mornington Island]. Knowledge of the countries of the estate groups was maintained, along with a strong sense of affiliation with those countries (para 4.7).

- The Yangkaal people too became resident at Gununa. But as Gununa is just across the Appel Channel from Denham Island, the Yangkaal continued to live in immediate proximity to their own country and have access to it (para. 4.8).
- There are currently numerous outstations on traditional country at which the applicants reside. The Lardil and Yangkaal have a number of coastal outstations on Mornington Island and on Denham Island and Fowler Island (para. 4.9).
- Visitation and camping on the traditional estates has been a continuous activity for the Lardil and Yangkaal. In *Lardil*, [Person 5], in his affidavit dated 12 August 1999, described how his father would "camp out in the bush all the time ... He only come into mission for, for ration, whatever." and never permanently moved into town. He stated himself that "I grew up on Mundanyeri. I have always been going there. I made a wind break and used to camp before I had a house. That windbreak was my home. I never worried about a house so long as I could shelter behind a windbreak." The outstations merely facilitated that process and allowed permanent residence more achievable (para. 4.11).
- For the Gangalidda, Old Dumaji has been a centre for coastal residence since the 1970. Old Dumaji is in close proximity to the Islands the subject of this application. Even prior to this there was visitation through Gangalidda people visiting their country from Mornington Island and through work on cattle properties (para. 4.12).
- 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 (para. 4.13).
- The Kaiadilt people have also established outstations on Bentinck Island. The Kaiadilt people left Bentinck Island for the mission at Mornington Island in the mid-1940's. During the 1970's some visited and camped on Bentinck Island and attempted to establish an outstation there. Since the mid 1980's they have been returning to their traditional country in growing numbers, and establishing outstations there. People live there permanently while others travel backwards and forwards (para. 4.15).

The affidavits at Attachment F1 contain considerable information in support of the existence of traditional laws and customs and that those laws and customs are acknowledged and observed by the claim group. The affidavit evidence supports the claims made in Attachment F in relation to the nature of the traditional laws and customs and their observance by members of the claim group.

I am of the view that the information outlined above provides a sufficient factual basis to support the assertion that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

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

The information outlined above under s.190B(5)(a) and (b) also supports the assertion at s.190B(5)(c). I am satisfied that there is a sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

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 relating to this condition

Under s. 190B(6) I must consider that, *prima facie*, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered.

In *Doepel*, Mansfield J noted at [16] that s.190B(6), together with sections 190B(5) and (7), "clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s.190A(3) may be relevant."

The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) 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].

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

I add that the meaning of *prima facie* was recently considered in and approved in *Doepel* at [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 am of the view that my task under s.190B(6) is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed, having regard to relevant law about what is a "native title right and interest (as that term is defined in s.223) and whether or not the right has been extinguished.

As noted in my reasons under s.190B(4) above, I have taken the view that it is under this condition that I must consider whether the claimed rights and interests have been found by the courts to be "native title rights and interests" within s.223. If a claimed right and interest has been found by the courts to fall outside the scope of s.223, then it will not be capable of being 'prima facie established' for the purposes of s.190B(6).

I have outlined the description of native title rights and interests claimed by the applicants in Schedule E of the application under my reasons for decision for s.190B(4) above.

I turn now to a consideration of whether each of the native title rights and interests claimed in Attachment E can be prima facie established:

1. **The applicants claim the right to possess, occupy, use and enjoy the land the subject of the application, to the exclusion of all others. In addition, and in the alternative the applicants claim the rights and interests set out in paragraph 2 (below).**

Established prima facie – in relation to those areas where a claim to exclusive possession can be recognised

In *Western Australia v Ward* (2002) 191 ALR 1 at [51] ('*Ward*'), the majority of the High Court found that a right of possession, occupation, use and enjoyment is the fullest expression of native title there is, and where "native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, 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".

and at [89]:

> The expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to

> identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

I am of the view that there is sufficient information in Attachment F and the affidavits in Attachment F1 to establish, prima facie, the right of the claim group to control access to and use of those parts of the claim area in relation to which a right to exclusive possession can be recognized.

For example, Attachment F refers to the observations of Cooper J in *Lardil* at [104 - 107] where his Honour stated in relation to the Lardil people:

> Within each Country there existed a system of Dulmadaship, whereby one or more persons had, or acquired under the traditional laws and customs of the people, the right to control access to the Country and the activity of the persons within the Country, which involved the right to say when native foods were to be harvested, how much fish or game was hunted and the like. With these rights came the obligations to protect the Country and its resources, to protect its peoples, to protect sacred places and to warn persons where not to go within the Country. I am satisfied that the Dulmada had the right to allow a person, who was not otherwise entitled to be in a Country, to have access to it and to there engage in an activity which the person did not otherwise have the right to engage in. The favourable exercise of the right to grant approval was ordinarily required because of the obligation to share and provide succour to strangers to Country as taught by the Dreaming story of Thuwathu, the Rainbow Serpent.

And at [116] in relation to the Yangkaal people:

> As with Lardil Countries, a system of Dulmadaship existed and the Dulmada controlled access to Country and activity within it. Absent a right to be in the Country and to engage in an activity there, permission to do so was required of the Duimada. Ordinarily, permission would not be refused because of the existence of underlying obligations based in spiritual belief to share the resources of Country with persons who are out of their own Country. Yangkaal Countries included land and water components with identifiable side boundaries and imprecise rear and seaward boundaries.

And at [137 – 138] in relation to the Gangalidda people:

> "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 [Anthropologist 3] 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.

And at [124 – 125] in relation to the Kaiadilt people:

> I am also satisfied that Bentinck and Sweers Islands were notionally divided into Countries or estates with defined boundaries and a frontage to the sea. People belonged to particular Country in accordance with a complex system of normative rules determining the relationship between a Kaiadilt person and Country. Some indication of the rights which went with Country and the manner in which rights in respect of Country were acquired, is contained in the evidence of [Applicant 4] set out earlier in these reasons. [Applicant 4] lived the traditional life of a Kaiadilt person prior to the Kaiadilt peoples move to Mornington Island and the exposure of the people to the mission there. His evidence, as with all of the evidence of the elder witnesses from all constituent groups, carries much weight because it is evidence of pre-contact society, or evidence of people who had direct contact and received the stories from people who had lived the traditional life before significant European contact. I am satisfied that at the time of sovereignty, a system of normative laws and customs relating to the division of Bentinck and Sweers Islands into identifiable Countries, with complicated rules for the allocation of person to Country and the granting to that person of rights to reside in and engage in activities in that Country, existed in the same or substantially similar form as existed in the 1940s on Bentinck and Sweers Islands. I am also satisfied that such Countries had identifiable side boundaries with indefinite rear and sea boundaries.

As extracted above under s.190B(5), in *Lardil*, Cooper J observed at [152] 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.

The affidavit evidence at Attachment F1 also supports the existence of a right to control access and use of parts of the claim area, for example, [Person 1] states in her affidavit dated 9 August 1999:

> Under Lardil law, people have to ask if they want to go to another person's country. In the old days, a person wanting to visit another country would send a message stick. They would ask permission before they left their own country… [para. 42]
>
> The owner of the country would protect their country from intruders who hadn't asked permission. If someone was seen coming into the country across the water, the owners would stand on the shore with spears and would force the people to land so that they could search their belongings for weapons. [para. 43]

> Those rules still apply today… [para. 44]
>
> If new people want to hunt or fish on the country, they still have to do the same [ask permission]. That's the proper law. White people ask to go out to our outstation… [para. 48]

On the basis of the material before me I am satisfied that this right can be prima facie established in relation to those areas where a claim to exclusive possession can be recognised.

2. In relation to the whole of the land and waters in application area the applications [sic] claim the following non-exclusive 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

I note that all of the rights under para. 2 of Attachment E are claimed on a non-exclusive basis, that is, not to the exclusion of all others.

In relation to right 2(a), I refer to the comments of the High Court in *Ward*, extracted above under right 1, at [89]:

> The expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

I also note the Court's view that where a right to "possession, occupation, use and enjoyment" is found not to be established as a native title right and interest, it is preferable to express the claimed right by reference to the activities that may be conducted, as of right, on or in relation to the land or waters, eg. hunting, fishing, etc. (at [52]). I note that this is what the applicants have done in relation to the remaining rights claimed under para. 2 of Attachment E.

I understand from *Ward* that where rights and interests claimed amount to a right to "possession, occupation, use and enjoyment" or to any constituent element of this composite expression, I am unable to find that such rights can be prima facie established.

The right claimed at para. 2(a), to occupy and/or use the application area, comprises constituent elements of the composite right to possession, occupation, use and enjoyment, and in light of *Ward*, I find that it is not capable of being established prima facie.

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

I am satisfied that there is sufficient information in the affidavits at Attachment F1 and in Attachment F to prima facie establish this claimed right. The affidavit evidence indicates that members of the claim group live on and/or regularly access and travel within the application area. For example, the affidavit of [Person 2] dated 7 August 1999 states:

> I have had an outstation on Forsyth Island [part of Yangkaal country] for about 7 or 8 years… It is at Lamakan point. I go there on weekends. I mainly go during the dry season and as early as February if its not a bad wet season. Sometimes family members go for a couple of weeks at a stretch, particularly during school holidays. [para. 19]

And the affidavit of [Applicant 4] dated 4 August 1999, who lives on Mornington Island, states:

> I teach my sons … in the same way that my father taught me. I teach the boys by taking them through the country. I take them through their country and their mother's country. We go footwalking. I show my children the land, how to hunt, how to fish, how to make spears, and different camping areas and different parts of the sea… [para. 35].

I also refer to the information extracted above, under s.190B(5), from Attachment F as being relevant to this claimed right.

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

Rights 2(c) and (d) - Established

I am satisfied that there is sufficient information in the affidavits in Attachment F1 and in Attachment F to prima facie establish both these claimed rights. There is considerable information in the affidavits in relation to members of the claim group hunting, fishing and gathering resources from the claim area as part of their traditional law and custom. For example:

Affidavit of [Person 2] dated 7 August 1999:

> When we go to Forsyth Island we go out fishing and hunting. We go dugong hunting, turtle hunting and dragging for mullet. We also get oysters on the reefs

> and also tucker on the land. We get water-lillies around April and May. We also go swamp turtle hunting. [para. 24]
>
> We set nets along the beach to catch whiting, mullet, salmon, queenfish, and we get barramundi in the rivers. We have just one river on Forsyth Island. We get fish and crabs there. There are good hunting grounds on both sides of the islands. We can get enough to feed the community all year round. [para. 34]

Affidavit of [Person 6] dated 17 August 1999:

> We lived at Dunkurrurri in grass shelters there… For food we ate fish, big fish. We didn't have fishing lines. We just used fish spears. We also ate food from the bush; fruits, wild figs, native cherry, and other bush foods like wardirr and wulunku. Then we would go down to the sea and get food from the fish traps. [para. 9]

Affidavit of [Person 1] dated 9 August 1999:

> We live on the sea, dugong, turtle, fish. That's always been the way. We have to look after the sea to make sure we can still survive and can feed our families. [para. 50]

I also refer to the information extracted from Attachment F above in relation to s.190B(5) under the sub-heading, 'Traditional Hunting, Fishing and Gathering', as being relevant to these rights.

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;

Rights 2(e) and (f) - Established

I am satisfied that there is sufficient information in Attachment F and in the affidavits at Attachment F1 to prima facie establish both these claimed rights. I refer to the information extracted from Attachment F above in relation to s.190B(5) under the sub-heading, 'Camping and Outstations', as being relevant to these rights. The affidavit evidence in Attachment F1 also provides considerable information in relation to members of the claim group living, camping and erecting shelters on the application area. For example:

Affidavit of [Person 1] dated 9 August 1999:

> I am a Lardil woman. I am also Gangalidda. I live on Gununa. That is the Lardil name for Mornington Island. [para. 1]

Affidavit of [Person 3] dated 5 August 1999:

> When I was small I remember living on Denham Island… I lived there with my brothers and mum and dad. We had no home just a windbreak. [para. 3]
>
> I have an outstation at Kuwalurra. It is just a shack there. We have had that outstation there since the 1980's… I go camping there. My children go now… [para. 34]

g. The right to light fires on the application area

Established

I am satisfied that there is sufficient information in the affidavits at Attachment F1 to prima facie establish this claimed right. For example:

Affidavit of [Person 2] dated 7 August 1999:

> People would light fires to give signal that they [visitors] were coming. People would be letting people know they were coming and ask permission in a silent way. They would know from the fire that there would be a messenger coming to the camp. My mother's uncle, [name removed], used that method all the time. He lived in bush all his life and he would always use the bushfire method… [para. 41]

Affidavit of [Person 3] dated 5 August 1999:

> People used to light a fire if they caught something on the Dulmada's country to let them know to come and get some meat. Also you light a fire so people see the smoke to let that person know you are coming. That was the proper way to light the fire and the Dulmada knows someone is going through his place. [para. 55]

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

Established

I am satisfied that there is sufficient information in the affidavits at Attachment F1 to prima facie establish this claimed right. For example:

Affidavit of [Applicant 4] dated 4 August 1999:

> Both my father and and my kangku were buried according to the Lardil law and custom. They have a special ceremony where warama, luruka or lingka pass away. They bury them on a baraban. That is the special ceremony for them. [para. 32]

Affidavit of [Person 6] dated 17 August 1999:

> We put someone in the grave and sing the song to send them off to Mawurru. We also do a stomping dance. We stomp towards the grave from the west, and strike the two sides of the grave with a stick, and say: "Go ahead, we'll follow later!" People are buried high up on the shoreline. They dance there around the grave. That helps the spirit go off to the east… [para. 63]

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

Established

I am satisfied that there is sufficient information in Attachment F and in the affidavits in Attachment F1 to prima facie establish this claimed right.

I refer to the affidavit evidence extracted above in relation to rights 2(c) and (d), as being relevant to this right. There is considerable evidence in the affidavits of members of the claim group using the natural food resources of the claim area, such as fish, animals and plants.

I also note that there is information in the affidavits in relation to members of the claim group and/or their ancestors using the natural resources of the claim area to make rafts and canoes. For example:

Affidavit of [Person 3] dated 5 August 1999:

> … [my parents] made a raft. They cut mangrove wood and tied it up. To make string you have to get the flat leaf tree which grows along the beach. You get the bark from that and you roll the bark on your thigh to make string and use the string to tie up the mangrove trees and then pile grass on top and you can keep dry… [para. 18]
>
> If we had a good wind we used to make a sail. We would make a pole for the sail out of mangrove wood. [para. 22]

Affidavit of [Person 4] dated 12 August 1999:

> Old People used to go out hunting dugong and turtle in walpas… I have seen them made. They are made from wood going in different directions in layers… Walpas are tied together by rope. We call that rope bulija. We make it out of that big leaf tree in the mangrove… [para's 26 – 27]

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

Because this right is expressed as a composite right, I must be satisfied that there is sufficient information to establish each of the constituent parts of the right in order for the overall right to be prima facie established.

I have referred above to affidavit evidence in relation to the right to take fish, plants and animals. I am satisfied that there is sufficient information in the affidavits to prima facie establish rights 2(j)(ii) and (iii).

I am also satisfied that there is sufficient information in the affidavits to prima facie establish rights 2(j)(i), (v), (vi) and (vii). The affidavits contain evidence about members of the claim group taking water and other natural resources of the claim area, as part of their traditional law and custom.

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

Established

I am satisfied that there is sufficient information in the affidavits in Attachment F1 to prima facie establish this claimed right. I refer to the affidavit evidence extracted above under right 2(i), showing that members of the claim group use the resources of the application area to manufacture or produce traditional items such as walpas.

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

Not established

This claimed right appears to involve elements of a right to trade. The Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [153] ('*Alyawarr*')found that the right to trade is a right in relation to land and waters, stating that the "right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied".

However, in *Commonwealth v Yarmirr* (1999) 101 FCR 171 the Full Bench of the Federal Court indicated that it seemed logical to view the right to trade as an integral part of a right to exclusive possession. As such I am of the view that the right at para. 2(l) is capable of being prima facie established only in those areas where a claim to exclusive possession can be recognized. I am therefore not able to find that it is capable of being prima facie established in those parts of the claim area where a claim to exclusive possession cannot be recognized.

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

I note that the right to receive a portion of any resources taken by others from the determination area was recognized in Lee J's determination at first instance in *Ward*. However, with no explanation, it was not included in either the Full Court's determination or the High Court's reasons for decision.

In *Yarmirr v Northern Territory* (1998) 82 FCR 533 at [118] Olney J held at first instance that the "right to receive a portion of a major catch taken from the waters or land of the clan's estate" was not a right or interest in relation to land and waters and therefore did not fall within the ambit of the statutory definition of a 'native title rights and interest' in s.223.

In light of the above, I am not able to find that this claimed right is capable of being prima facie established for the purposes of s.190B(6).

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

Not established

I note that in *Lardil,* Cooper J at [179] found that such a right as claimed at para. 2(n) did not satisfy the requirements of s.223(1) as it did not translate into a right in relation to land and waters at sovereignty.

In light of this judicial authority, I am not able to find that this right is capable of being prima facie established for the purposes of s.190B(6).

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.

Not established

I note that such a right as claimed in para. 2(o) was not recognized as a native title right or interest by Cooper J in *Lardil* at [191 – 193].

In light of this judicial authority I am unable to find that this claimed right is capable of being prima facie established for the purposes of s.190B(6).

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

Not established

I am of the view that this right involves some degree of ownership in the sense that it implies a right to make binding decisions about the use to which the land is put. As discussed above, such a right is not sustainable in areas where a right to exclusive possession cannot be recognized. I note again the comments of the High Court in *Ward* at [52], that "… without a right…[as against the whole world to possession, occupation , use and enjoyment of the land] it may be greatly doubted that there is any right to … make binding decisions about the use to which it is put."

I am therefore of the view that this right is not capable of being prima facie established in areas where a right to non-exclusive possession is not recognized.

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;

Not established

I refer to my comments in relation to right 2(p) above, which are equally relevant in relation to this right.

I also note that in *Ward* the court recognised "a clear distinction between a right to control access, generally and as a matter of law, and a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs." The court was of the view that while the former right is incompatible with a claim to non-exclusive possession, the latter right is not (at [27]).

I note that the right claimed here appear to go beyond making decisions about the use and enjoyment of the land by Aboriginal people, as expressed by the court in *Ward*.

I am therefore unable to find that this claimed right is capable of being prima facie established in relation to those areas subject to a claim to non-exclusive possession.

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 sites 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.

Rights 2(r), (s), (t), (u), (v) - Established

In relation to the use of the word 'protect' in each of the above claimed rights, I am satisfied that it does not involve an assertion of a right to control access and to exclude others from the claim area. In this regard, I note the comments of the Full Court in *Alyawarr* in relation to a claimed right to "have access to, maintain and protect places and areas of importance on or in the land and waters …" where it was found that such a right did not necessarily imply a general control of access.

In light of the above, I find that each of these rights are capable of being prima facie established in relation to those areas where a claim to exclusive possession cannot be recognized.

I am satisfied that there is sufficient information in the affidavits at Attachment F1 to prima facie establish each of the above rights for the purposes of s.190B(6). Schedule G of the application states that "Members of the claimant group actively protect sites and areas of significance, cultural heritage and Aboriginal artefacts on and in the application area. Examples of this are set out in Attachments "F" and "Fl" — "F2" to this application."

I refer to para's 2.22 and 2.23 of Attachment F in relation to story places/sites of significance and to Attachment F2 to this application, which sets out some of the sites of significance to the claim group.

Para. 2.23 of Attachment F states that in *Lardil*, many witnesses described the need to be very careful around sites of significance with the risk of markirri, bad weather or other dire consequences not only for the perpetrator but for others as well. Prohibition on visitation by certain people to certain sites were likewise expressed on a number of occasions as was the right to stop people going to those places generally (eg, affidavit of [Applicant 4] dated 12 August 1999 at para's 49, 57 – 58) and the requirement for particular conduct at those sites (eg. affidavit of [Applicant 4] at para's 27, 43, 57, 58, 60 and affidavit of [Person 3] at para's 36 - 37).

The responsibility of the owner of the country to look after and protect those places was also expressed on numerous occasions (eg. affidavit of [Person 5], para. 41).

I also note the following from the affidavit of [Person 4] dated 12 August 1999:

> … We said no [to a proposal] because it was poisonous and if a cyclone came it would be like acid going into our shells and turtle and dugong. By our law we have to protect our land and sea.. [para. 51]
>
> When I go fishing with young fellas I lay the law down. You can't throw rubbish in the water, you'll see that Rainbow. I have to warn these young fellas not to do certain things… [para. 52]

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.

Rights 2(w) and (x) - Established

I am satisfied that there is sufficient information in the affidavits at Attachment F1 to prima facie establish the rights claimed at para. 2(w) and (x) for the purposes of s.190B(6). Schedule G of the application states that, "Members of the claimant group currently use the application area for customary, cultural and ceremonial purposes. The cultural significance of the application area is set out in detail in Attachments "F" and "Fl" - "F2" to this application."

I note for example the following statements from the affidavits at Attachment F1:

Affidavit of [Person 5] dated 4 August 1999:

> My father told me that even in the old times people would travel to meet with [the Garawa mob] for big ceremonies and law business. Garawa, Gangalidda and Yangkaal have the same ceremony as we do… There was a big ceremony place at Point Parker before the missionary came. There is also a big ceremony ground at Yerrbarrkan Creek here on Gununa. [para. 17]

At para. 18, [Person 5] talks about initiation ceremonies for the young men and then at para. 19:

> Before they go into the ceremony we teach them about their sea country and their land and then after we teach them real business. Nobody can know that. Only people who have been through the business. We teach them about their sea first…

Affidavit of [Person 2] dated 7 August 1999:

> … We call that place Gurubun. It means quiet place. You can't talk or sing out or whistle – just make sign. If you sing out you get trouble. My father told me about that country. There was a Dreamtime initiation ceremony out on the reef there. There are blowholes in there. That's why you must keep quiet at all times. You can't talk around there… [para. 20]

[Person 4], in his affidavit dated 12 August 1999, talks of traditional Gangalidda dances which are performed by himself and other Gangalidda people and are taught to the children at school (para. 54).

Conclusion: I have found that at least some of the claimed rights and interests in Attachment E of the application can be prima facie established. Consequently I am satisfied that the requirements of this section are met.

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 relating to this condition

Under s.190B(7) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

I refer to Schedule M of the application:

> 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" and "Fl" 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.
>
> In *The Lardil Peoples v State of Queensland* [2004] 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 of the claimants in this matter to their traditional [sic]. This necessarily included their physical connection.
>
> "Whether on Mornington Island or at Doomadgee, there were respectively core communities of Lardil, Yangkaal, Kaiadiit 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" (at [200]).

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" (at [202]).

Based upon the information in Schedule M and the affidavits in Attachment F1 I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the application area. I am therefore satisfied the requirements of the section are met.

Result: **Requirements met**

No failure to comply with s.61A: s.190B(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.

Reasons in relation to this condition

Section 61A contains four sub-conditions. Because s.190B(8) asks the Registrar to test the application against s. 61A, the decision below considers the application against each of these four sub-conditions.

S.61A(1) Native Title Determination

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

S.61A(2) Previous Exclusive Possession Acts

In Schedule B of the application, any area that is covered by the categories of previous exclusive possession acts defined in s. 23B is excluded from the claim area. I am therefore satisfied that the application is not made over any such areas.

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

Attachment E, para. 3(a), states that the rights and interests claimed in Attachment E are subject to any previous non-exclusive possession act within the meaning of s.23F.

Conclusion

For the reasons as set out above I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s. 61A the application should not have been made.

Result: Requirements met

s.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:
The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

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

Reasons in relation to this condition

Schedule Q of the application states that: "The claimant group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown. The claimants assert that the Crown does not wholly own minerals, petroleum or gas in the area the subject of the application."

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:
The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:

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

Reasons relating to this condition

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

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

(c) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2).

Reasons relating to this condition

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the claim area have been extinguished. Schedule B excludes from the claim area any "land and waters where the native title rights and interests claimed have otherwise been extinguished."

Result: Requirements met

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