National Native Title Tribunal

Registration test decision- Edited

Application name	Kalkadoon People # 4 [being the combination of Kalkadoon People # 4 QUD579/2005 and Kalkadoon People # 5 QUD15/2006]
Name of applicant	Ilona Parter, Doug Bruce, William Doyle, Sonny Condren, Pat Kyle, Hazel Munro, Noeleen Dempsey, Sue Sarmardin (Jr), Connie Craigie
State/territory/region	Queensland
NNTT file no.	QC2010/4
Federal Court of Australia file no.	QUD579/2005
Date application made	22 December 2005
Date application last amended	Amendment pursuant to leave granted by the Court on 8 December 2010; the amended application was filed on 14 December 2010.
Name of delegate	Nadja Mack

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

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 15 March 2011

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Nadja Mack

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated** 2 August 2010 and made **pursuant to s. 99 of the Act.**

Reasons for decision

Table of contents

Introduction

This document sets out my reasons, as a delegate of the Native Title Registrar (delegate), for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Kalkadoon People # 4 claimant application to the Native Title Registrar (the Registrar) on 15 December 2010 pursuant to s. 64(4). This has triggered the Registrar's duty to consider the claim made in the application under s. 190A.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. Therefore, in accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C. This is commonly referred to as the registration test.

By way of background I note that:

- The Kalkadoon People # 4 claim (QUD579/2005) was filed in the Court on 22 December 2005 (replacing several previous applications being QUD6031/1999, QUD6032/2002 and QUD6007/2003) and was accepted for registration on 4 September 2006.
- The Kalkadoon People # 5 claim (QUD15/2006) was filed in the Court on 13 January 2006 and was not accepted for registration on 4 September 2006. An amended Kalkadoon People # 5 application was filed on 21 September 2006 and a re-engrossed application was provided to the Tribunal on 24 November 2006. The amended application was accepted for registration on 11 December 2006. A further amended application was filed on 11 November 2010 (see below for further details).

This amended application combines the Kalkadoon People # 4 and Kalkadoon People # 5 claims pursuant to leave granted by the Court on 8 December 2010.

As per the Orders made in both matters, leave to amend the applications was granted as follows:

- Kalkadoon People # 4: so that it is combined with and includes Kalkadoon People # 5.
- Kalkadoon People # 5: so that it is combined with and is included in Kalkadoon People # 4.

Pursuant to the Orders the applications are also to be amended in accordance with the proposed amended application annexed to the affidavit of **[Legal Officer 1 – name deleted]** filed on 6 December 2010. Amended applications were ordered to be filed within 14 days.

The Orders in both matters state that the applications be 'now conducted as one application and continued under file number QUD597/2005', being Kalkadoon People # 4.

The amended applications have been filed pursuant to the Orders on 14 December 2010.

I further note that prior to the 8 December 2010 Orders being made, leave to amend the Kalkadoon People # 5 claim had been granted on 9 November 2010. Pursuant to this Order an amended application was filed on 11 November 2010. It is not subject to this registration test decision. Neither is the amended application filed pursuant to the Orders of 8 December 2010 in Kalkadoon People # 5 the subject of this registration test decision. Both these applications are superceeded by the fact that Kalkadoon People # 5 claim is now combined with, and included in, the Kalkadoon People # 4 claim.

Section 29 future act notices have been issued over part of the area of the amended application. The Act requires that the delegate must use best endeavours to finish considering the application for registration by the end of the four month period specified in the notice. In this matter the relevant notification end date is 14 January 2011. The applicant and State were advised on 10 January 2011 that due to delegate capacity a decision could not be made within the best endeavours timeframe.

Queensland South Native Title Services Ltd (QSNTS), a body funded to perform the functions of a representative body under s. 203FE(1) of the Act in relation to the application area, is the applicant's legal representative.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment B.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

A list of **all** documents and other information that I have considered in coming to my decision about whether or not to accept the application for registration is set out in Attachment B.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that

information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

On 10 January 2011, the Tribunal advised the State of Queensland (the State) that the registration test would be applied to the application, inviting submissions in relation to the registration test by 14 February 2011.

On 21 February 2011, the Tribunal advised the State that additional material has been received by the Tribunal from the Applicant (see reference to this material in Attachment B). Copies of the item 1 and 2 documents were provided to the State. As the item 3 documents were filed by the Applicant in the Court in 2010 and served on the State and/or provided to the State, the Tribunal did not provide the State with further copies of the documents. As the item 1 and 2 documents merely reference or summarise the item 3 documents, a confidentiality agreement imposing confidentiality conditions upon the State was not required by the delegate. The State was invited to comment on the additional material by 4 March 2011.

No submissions in relation to the amended application nor the additional material were made by the State of Queensland.

Procedural and other conditions: s. 190C

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

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

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

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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

My consideration of each of the particular parts of ss. 61 and 62 (which require the application to contain details/other information or to be accompanied by an affidavit or other documents) is detailed below.

Native title claim group: s. 61(1)

> The application must be 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.

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

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). If the description of the native title claim group indicates that not

all persons in the native title claim group have been included, or that it is in fact a subgroup of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I could not accept the claim for registration—*Doepel* at [36].

I am not required to go beyond the material contained in the application and 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 as described is in reality the correct native title claim group—*Doepel* at [37].

The description of the native title claim group, the Kalkadoon People, is set out in Schedule A of the application. The Kalkadoon People are described as 'the biological descendants' of 28 named persons.

There is nothing on the face of the application which leads me to conclude that the above description indicates that not all persons in the native title group have been included, or that it is in fact a subgroup of the native title claim group.

Name and address for service: s. 61(3)

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

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

The name and address for service of the applicant's representative is found in Part B, page 17, of the application.

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

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

The application contains a description of the persons in the native title claim group at Schedule A. In accordance with *Doepel*, I consider whether the description is sufficiently clear so that it can be ascertained whether any particular person is one of those persons, under the corresponding merit condition in s. 190B(3).

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) stating the basis on which the applicant is authorised as mentioned in (iv).

The application **is** accompanied by the affidavit required by s. 62(1)(a).

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn/affirmed by the applicant in relation to the matters specified in subparagraphs (i)–(v). To satisfy the requirements of s. 62(1)(a), the persons comprising the applicant may jointly swear/affirm an affidavitt or alternatively, each of the persons may swear/affirm an individual affidavit.

The application is accompanied by affidavits from each person jointly comprising the applicant, namely: Ilona Parter, Douglas Bruce, William Doyle, Sonny Condren, Pat Kyle, Hazel Munro, Noeleen Dempsey, Sue Sarmardin (Jr), Connie Craigie.

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

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application **contains** all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

The application **contains** all details and other information required by s. 62(2)(a).

Schedule B of the application refers to Attachment B, which contains a description of the external boundaries of the area covered by the application. Schedule B also provides a description of the areas within the external boundaries that are excluded from the application.

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

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application **contains** all details and other information required by s. 62(2)(b).

Schedule C refers to Attachment C, which is a map showing the application area and its boundaries.

Searches: s. 62(2)(c)

> The application must contain the 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.

The application **contains** all details and other information required by s. 62(2)(c).

Schedule D states that no searches have been carried out by the applicant. There is no information before me to indicate that the applicant has made any searches of the kind described in this section.

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

> The application must contain 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 interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

The application **contains** all details and other information required by. 62(2)(d).

Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

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

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

> The application must contain 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.

The application **contains** all details and other information required by s. 62(2)(e).

Kiefel J in *Queensland v Hutchinson* (2001) 108 FCR 575; [2001] FCA 416 notes that it is not enough to merely recite the general or the three particular assertions in s. 62(2)(e); what is required is a 'general description' of the factual basis for the three particular assertions—at [25].

The Full Federal Court (French, Moore, Lindgren JJ) commented in obiter on the requirements of s. 62(2)(e) in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*). Their Honours said:

> The fact that the detail specified by s 62(2)(e) is described as a 'general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description to be true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. —[92].

Schedule F, Attachment F and the additional material contain a description of the rights and interests claimed and the factual basis for the assertions set out in s. 62(2)(e).

The description does more than recite the particular assertions and in my view, meets the requirements of a general description of the factual basis for the assertions identified in this section.

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

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application **contains** all details and other information required by s. 62(2)(f).

Schedule G, Attachment F and the additional material set out details of activities currently carried out by the native title claim group in relation to the area claimed.

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

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application **contains** all details and other information required by s. 62(2)(g).

Schedule H sets out the details of one other native title determination claimant application over the whole or part of the area covered by the application: QUD15/2006—Kalkadoon People # 5.

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

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(h).

Schedule I refers to Attachment I which is a table of 103 s. 29 notices that fall within the claim area boundary as at 24 November 2010. There is no information before me to indicate that the applicant is aware of any other notices of the kind described in this section.

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and

(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. The Tribunal's geospatial assessment and overlap analysis of 21 December 2010 (the geospatial assessment) confirms the applicant's statement in Schedule H that this application overlaps in part with the Kalkadoon People # 5 native title determination application. As noted above, this application combines the Kalkadoon People # 4 and Kalkadoon People # 5 claims by including the Kalkadoon People # 5 in the Kalkadoon People # 4 claim, as per Court Order of 8 December 2010. The pre-combination applications are conducted as one application and continue under file number QUD597/2005, being Kalkadoon People # 4.

The requirement that I be satisfied that there are no common members between this application and any previous overlapping applications is therefore not triggered.

Subsection 190C(4) Authorisation/certification

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

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

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

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

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

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

Attached to the application as Attachment R is 'Certification of Native Title Determination Application Kalkadoon People # 4', dated 6 December 2010 and signed by **[Legal Officer 2 – name deleted]**, Chief Executive Officer of QSNTS.

Section 203BE(4) sets out that a written certification by a representative (or s. 203FE funded) body must:

- 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; and
- briefly set out the body's reasons for being of that opinion; and

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

Section 203BE(2) sets out that a representative (or s 203FE funded) body must not certify . . . an application for a determination of native title unless it is of the opinion that:

- all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Doepel is authority that the Registrar's consideration under s. 190C(4)(a) is limited to ensuring that:

- the certifying body has power under Part 11 to make the certification; and
- the certification complies with s. 203BE(4) – at [78], [80] and [81]

Upon being so satisfied, the Registrar is not required to address the condition imposed by s. 190C(4)(b). Section 190C(4)(a) 'does not leave some residual obligation upon the Registrar, once satisfied of the matters to which s 190C(4)(a) expressly refers, to revisit the certification of the representative body' – *Doepel* – at [81]. This was approved by Kiefel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 (*Wakaman*) at [32] .

Information before the delegate

A search of the representative body boundaries in the area of the application, based on the geospatial assessment, reveals that QSNTS is the only representative or s. 203FE funded body for the application area. Therefore QSNTS is the only body that can certify the application under s. 203BE.

Consideration

QSNTS is funded under s. 203FE(1) to perform all the functions of a representative body, including the certification function under s. 203BE.

The certificate is expressed as the opinions and certification of QSNTS's chief executive officer rather than those of the representative body. The certificate states that the chief executive officer has been delegated the certification function provided for in s. 203BE on behalf of QSNTS. I am satisfied that a certification by the appropriately delegated chief executive officer of QSNTS sufficiently complies with the requirements of s. 203BE, for the purposes of s. 190C(4)(a).

The certification contains the statements and information required by s. 203BE(4).

For the purposes of s. 203BE(4)(a), the certificate includes a statement that the chief executive officer is satisfied that the provisions of s. 203BE(2)(a) and (b) have been met.

For the purposes of s. 203BE(4)(b), the certificate briefly sets out the chief executive officer's reasons for being of that opinion. The certificate describes the notification of the authorisation meeting held in Mt Isa on 14 November 2010. The certificate also states that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the persons in the native title claim group. This is said to have been done 'through the holding of the

authorisation meeting and the subsequent authorisation of the Applicant by a majority of the known descendants of Nancy Daniels [on 3 December 2010]'. I am satisfied that this complies with the s. 203BE(4)(b) requirement to 'briefly set out the body's reasons for being of that opinion'. I note that there are no overlapping application therefore subsection (3) does not apply.

I am satisfied that the application has been certified in accordance with s. 203BE(4) by the only s. 203FE funded body that could certify it, and the requirements of s. 190C(4)(a) are therefore met.

Merit conditions: s. 190B

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

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

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

The geospatial assessment states the following:

Assessment of map and description

This assessment provides an analysis of the description and map, and advises whether the application area has been described with reasonable certainty. It is based on a copy of the description (Schedule B) and map (Schedule C) for native title determination application QUD579/05 Kalkadoon People #4 (QC10/4) as filed in the Federal Court on 14 December 2010.

The application area is the combined area of former native title determination applications QUD579/05 Kalkadoon People #4 (QC05/12) as accepted for registration 04 September 2006 and QUD15/06 Kalkadoon People #5 (QC06/2) as filed in the Federal Court 12 November 2010.

Amendment(s)

Schedule S notes that:

- Schedule B has been amended to facilitate the combination of this application with Kalkadoon People #5;
- Schedule C has been amended to reflect the new boundary description particularised in Schedule B.

Description

Schedule B refers to Attachment B. Attachment B is entitled 'Technical Description – Combined Kalkadoon Native Title Determination Application – External Boundary Description' and describes the amended application area by metes and bounds referencing specific allotments, rivers, creeks and geographic coordinates. Notes are included referencing the source, currency and datum of information used to prepare the description.

Schedule B lists general exclusions.

Map

Schedule C refers to Attachment C. Attachment C is a colour map prepared by Geospatial Services entitled "Native Title Determination Application – Combined Kalkadoon", dated 24th November, 2010, and includes:

- amended application area depicted by a bold blue outline;
- major localities, rivers and roads shown on a topographic background;
- locality diagram;
- scalebar, north point, coordinate grid;
- notes relating to the source, currency and datum of data used to prepare the map.

Assessment

This combined application does not include any areas which have not previously been claimed in either of the original applications.

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

Having regard to the above assessment, the identification of the external boundary in Attachment B and the areas of exclusions and the clarity of the mapping of the external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty and the information and map contained in the application 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.

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

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met.

As the application does not name the persons in the native title claim group, I must consider if, pursuant to s. 190B(3)(b), the description in Schedule A is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

In considering the operation of s. 190B(3)(b) in *Doepel*, Mansfield J stated that:

> Its focus also 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—at [37].

Further, Carr J in State of *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) found, in the way native title claim groups were described, that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently—at [67].

The native title claim group is described in Schedule A of the application as follows:

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Kalkadoon People.
> The Kalkadoon People are the biological descendants of the following people:

Lardie Roberts (Lardie Moonlight)	Charlie Caldwell (Snr)
Dolly Prosser	Carbine
Kitty Frogg	Jimmy Rolleston and Louisa Muni (parents of Bessie Mowbray)
Annie Whip (mother of Martin Connelly (Snr))	Gypsy Reid (Gypsy Ryan)
Ida (aka Ada) Elston	Nellie Monkira
Leichardt Toby	Polly Wilson (nee Hopkins) Marajundu
Rosie Waddibungera (mother of George Thorpe)	Jack Elston
Willy Malcolm	Jessie Frogg (Snr)
Nancy Daniels	Polly Alroy (Polly George)
Fanny (Nellie) McLennan	Nobie Clay
Nellie and Jimmy (parents of Topsy Harry, Annie Sam and Jack Kippen)	Spider
Maggie Sautelle	Maryann (mother of Annie Reid and Eva Patterson)
Daisy Barton (nee McLean)	Sophie MacDonald
Mundi MacDonald (King Mundie)	Julie (mother of Eulie and Lizzie Hickson)

In my view describing the claim group as the 'descendants' of certain named persons provides a sufficiently reliable and objective means by which to ascertain a person's membership to the group. It may be that some factual inquiry may be required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group has not been sufficiently described.

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

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

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

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

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. The description must be clear and easily understood—*Doepel* at [91], [92], [95], [98] to [101] and [123]. An assessment of whether the rights and interests can be established, prima facie, as 'native title rights and interests' as defined in s. 223 will be made under s. 190B(6) below.

Schedule E contains the following description of the claimed native title rights and interests:

> The native title rights and interests claimed are as follows:
> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the Kalkadoon People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group
>
> 2. Over areas where a claim to exclusive possession cannot be recognised, the Kalkadoon People claim the following rights and interests:
>
> (a) the right to access the application area;
> (b) the right to camp on the application area;
> (c) the right to erect shelters on the application area;
> (d) the right to live on the application area;
> (e) the right to move about on the application area;
> (f) the right to hold meetings on the application area;
> (g) the right to hunt on the application area;
> (h) the right to fish on the application area;
> (i) the right to use the natural water resources of the application area;
> (j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
> (k) the right to conduct ceremony on the application area;
> (l) the right to participate in cultural activities on the application area;
> (m) the right to maintain places of importance under traditional laws, customs and practices in the application area;
> (n) the right to protect places of importance under traditional laws, customs and practices in the application area;
> (o) the right to conduct burials on the application area;
> (p) the right to speak for and make non-exclusive decisions about the application area;
> (q) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs;
> (r) the right to control access to the application area by other Aboriginal People who seek access to or use the lands and waters in accordance with traditional laws and customs;
> (s) the right to control use of the application area by other Aboriginal People who seek access to or use the lands and waters in accordance with traditional laws and customs;
> (t) the right to determine and regulate membership of and recruitment to the native title claim group; and

(u) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites.

2 (sic). The native title rights and interests are subject to:
(a) The valid laws of the State of Queensland and the Commonwealth of Australia; and
(b) The rights conferred under those laws.

I am satisfied that the description of all the native title rights and interests claimed is sufficient to allow for them to be readily identified.

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

I have considered each of the three assertions in the three paragraphs of s. 190B(5) in turn before reaching this decision.

Doepel provides authority that the Registrar's task in relation to s. 190B(5) is to consider whether the asserted facts, assuming that they are true, can support the claimed assertions identified in that section; the task is not to 'test whether the asserted facts will or may be provided at a hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts' —at [17]. This approach to s. 190B(5) was approved by the Full Court in *Gudjala FC* —at [83] and [85].

In *Gudjala FC* the Full Court commented that:

> The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not

> required to provide evidence that proves directly or by inference the facts necessary to establish the claim *(emphasis added)* at [92].

Doepel indicates that the delegate should approach the task by 'analysing the information available to address, and make findings about, the particular matters to which s 190B(5) refers' — at [130]. Mansfield J concludes that it is correct to focus primarily upon the particular requirements of s. 190B(5), as this is the way in which the Act draws the Registrar's attention—at [132]. If the factual basis supports the three particular assertions, then the requirements of the section overall are likely to be met.

Information considered by the delegate

Schedule F refers to Attachment F to the application which contains a three-page description of the factual basis on which it is asserted that the native title rights and interests claimed exist. In addition, under cover of a letter dated 9 February 2011 the Applicant has provided a substantial amount of additional material that can be categorised as follows:

1. Affidavits by members of the claim group;
2. Expert Reports; and
3. Kalkadoon Evidence Table Extract – Connection to Whole of the Claim Area.

The affidavits are by the following members of the claim group, most of whom are aged between 50 and 60 years, and who provide substantial information in relation to their connection to the claim group's ancestors, Kalkadoon laws and customs and their connection to, and their use and enjoyment of, the claim area:

- Clive Sam, 23 June 2010;
- Dawn Sam, 24 June 2010;
- Richard Percy, 23 June 2010;
- Margaret Caulton, 29 July 2010;
- James Watts Taylor, 14 July 2010;
- Pat Donovan, 25 June 2010;
- Cornelia Anne Craigie, 23 June;
- Cecil Moonlight, 17 June 2010;
- Lawrence Sonny Condren, 24 June 2010;
- Doug Bruce, 24 June 2010;
- Keith Percy, 30 June 2010 ;
- Ron Nemo, 30 June 2010;
- Noeleen Dempsey, 30 June 2010;
- Judy Sam, 24 June 2010;
- Thelma Sullivan, 28 June 2010;
- Alec Sullivan, 28 June 2010;
- Hazel Munro, 23 June 2010;

The expert reports are as follows:

- Draft genealogy report of **[Expert 1 – name deleted]** dated July 2010;
- Part 1 Preliminary anthropological report "Kalkadoon Society to 1895" of **[Expert 2 – name deleted]** dated 1 July 2010;

- Part 2 Preliminary anthropological report "Continuity of Kalkadoon Society, Law and Custom 1895 to c. 1970" of **[Expert 2 – name deleted]** dated 30 July 2010;
- Part 3 Final anthropological report "Continuity of Kalkadoon Society, Law and Custom 1895 to c. 1970/... continued and the Native Title Group" of **[Expert 2 – name deleted]** dated 1 October 2010
- Draft historical report – Kalkadoon, **[Expert 3 – name deleted]**, dated May 2010 and "Kalkadoon People – A Historical Report", **[Expert 3 – name deleted]**, dated June 2010;
- Archival Report "Cloncurry, the Native Police and Kalkadoon history report", **[Expert 4 – name deleted]** 2010; and
- Linguistic Report, **[Expert 5 – name deleted]**, undated.

A document entitled 'Additional Information – Attachment F Kalkadoon People # 4 (QUD579/2005)' sets out references to the above documents that relate to each of the three particular assertions in s. 190B(5).

Further relevant information is contained in Schedule G of the application.

I note that the scope and depth of the material goes beyond what is required to be provided in support of the requirements of s. 190B(5). As noted above, what the Applicant is required to provide is a general description of the factual basis on which the application is based. In particular, the Applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. In my assessment I have relied mainly on the anthropological reports of **[Expert 2 – name deleted]**, Consultant Anthropologist, dated 1 July 2010, 30 July 2010 and 1 October 2010 outlined above. The reports are each marked as 'report prepared for the Federal Court of Australia' and have been filed in the Federal Court on 6 July 2010, 30 July 2010 and 6 October 2010 respectively. I understand from the reports that they have been provided to the State of Queensland under an order of the Federal Court of 9 April 2010. The first report (dated 1 July 2010) is concerned with the pre-sovereignty society and the traditional laws and customs at sovereignty; the second report (dated 30 July 2010) relates to the maintenance and continuity of Kalkadoon society in the years from 1895 to around 1970; the third report (dated 1 October, 2010) covers continuity of laws and customs, acknowledgement and observance of laws and customs, nature and content of the laws and customs and connection with the claim area (s. 223(1)(b)).

Where reference is made to affidavit material I have quoted from the summaries contained in **[Expert 2 – name deleted]**, reports and their attachments, and have also, in some cases, viewed the original affidavits.

Reasons for s. 190B(5)(a)

I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

Section 190B(5)(a) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the application area.

Schedule F relevantly states the following in relation to the Kalkadoon claimants' present association and their ancestors' past association with the area covered by this application:

- the association of the Kalkadoon predecessors with the claim area is well documented in historical ethnographic literature;
- from early ethnographic accounts it can be inferred that at the time of early contact (1860s, 1870s) the Kalkadoon were a distinctive tribal and language group who occupied an area including the claim area;
- during the contact period (1861 onwards) the Kalkadoon maintained fierce resistance;
- in the period following contact and resistance, the Kalkadoon People who remained in or near their homelands were largely gathered on pastoral stations. By the early twentieth century there were several semi-sedentary communities of people who identified as Kalkadoon, and were identified as Kalkadoon by each other and by others, living on or near the original country of the Kalkadoon. To these communities was added the community based at Mt Isa which was established in the 1920s;
- the Kalkadoon claimants maintain an association with the claim area through, amongst other things, being resident in Mt Isa and surrounding areas, using the claim area for hunting, fishing and gathering, and other activities listed in Schedule G of the application, knowledge of a repertoire of sites of significance in the claim area and sacred stories associated with some sites, asserting traditional ownership of the area, including asserting the right to negotiate in relation to significant developments and by actively participating in the protection of Kalkadoon cultural heritage in respect of such developments.

In addition, the document 'Additional Information – Attachment F Kalkadoon People # 4 (QUD579/2005)' refers to the Evidence Table Extract – Connection to Whole of Claim Area and lengthy sections of **[Expert 2 – name deleted]**, reports.

Kalkadoon – Evidence Table Extract – Connection to Whole of the Claim Area.

The table summarises information contained in a large number of affidavits of claim group members by reference to specific sections of the external boundary of the claim area. Relevant sections of the affidavits are quoted. The quoted sections include substantial information in relation to the current claimants' and their ancestors' association with the claim area. The table also references and summarises relevant evidence in relation to the claimants' and their ancestors' association to the claim area contained in expert reports (chiefly **[Expert 2 – name deleted]**, reports).

***Anthropological reports of* [Expert 2 – name deleted],**

[Expert 2 – name deleted], relevantly states that in his professional opinion:

- there is sufficient information about the Kalkadoon tribe in the early literature and other records of the time to demonstrate that, at the time of European incursion in north west Queensland and up till the mid 1890s there was an identifiable Aboriginal group named Kalkadoon and that this group can be characterised as what anthropologists today describe as a language-named tribe; it is this tribe that inhabited the claim area at and prior to the time the claim area was effectively occupied by European settlers;

- it is evidenced from the early literature that the first generation of European residents in and around Kalkadoon country recognised Kalkadoon as having possession of their 'country' and exercising 'as of right' a variety of activities on it, including domestic, economic and ritual activities;
- there is consistency in the claimants' statements regarding the boundaries of Kalkadoon country (as distinct from the claim boundaries). This is evident in the claimant affidavits as well as in records of numerous informant interviews dating back to the 1980s, and in the informant statements quoted in other expert reports. There is variation with respect to the southern boundary. The claim boundary does not correspond neatly to either the claimants' more expansive expression of their territory, or the lesser area derived by researchers from the early sources. Having assessed the boundary, however, he comes to the following conclusions:
    - Southern and western claim boundaries: do not encroach upon the traditional country of any other tribe and the country they enclose was Kalkadoon territory at the time of first European settlement.
    - Northern and eastern claim boundaries: it is clear from the literature that these boundaries incorporated territories that would have originally belonged to the Warkabunga, Mayi-Kutuna and Mayi-Yapi tribes:
        - Warkabunga: a process of succession or 'other process' resulted in the disappearance of the Warkabunga group and the identification of its territory in modern times (and possibly much earlier) as Kalkadoon territory.
        - Mayi-Kutuna and Mayi-Yapi: there are three hypotheses to explain the perception by today's Kalkadoon that the Mayi-Kutuna and Mayi-Yapi lands are part of their traditional territory. They are interrelated, a combination of demographic decline of the Mayi-speaking groups, the physical movement of Kalkadoon onto stations in the Mayi areas and the possibility of a more or less conscious amalgamation of groups. Because these areas have been consistently put forward as Kalkadoon country over a long period of time (at least since research undertaken in the early 1970s) and because over this period no alternative claim by any Mayi identifying group has emerged to contest the Kalkadoon claim, despite the fact that there are living descendants of Mayi ancestors from these areas who have been aware of the Kalkadoon claims, he does not reject that the Kalkadoon claims may be lawful under traditional law and custom.

Having outlined the Kalkadoon *claimants' ancestors'* association with the claim area, Appendix 1 to **[Expert 2 – name deleted]**, third report sets out a comprehensive list of examples of rights and interests exercised by *current members of the claim group* on the claim area (and, in some cases, by their parents and grandparents). The appendix includes references to interviews or affidavits which contain the relevant examples. Most of these affidavits have been provided by the Applicant as part of the additional material. The examples are numerous and include exercising the right to live on Kalkadoon land and take things on it, and to speak for Kalkadoon country to ensure it is protected and cared for (Affidavit **[Claimant 2 – name deleted]**), the right to hunt e.g. emu, kangaroo, plains turkey and different types of goanna and catch mussels, yabbies, fish and turtle from the rivers as well as collect bush tucker such as conkerberries and splitjacks and use buffle grass to make a medicine for sores (Affidavit **[Claimant 4 – name deleted]**).

In my view, these numerous examples of the rights and interests exercised by the claim group, demonstrate the claim group's current association with the claim area. Schedule G also lists current activities of the claimants on the claim area.

I am of the view that the material before me sufficiently supports the assertion that the Kalkadoon People currently have an association with the whole of the area and that the predecessors of the claim group had an association with the whole of the claim area.

Reasons for s. 190B(5)(b)

I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

Section 190B(5)(b) requires me to be satisfied that the factual basis is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests. In my view this assertion must be understood in light of the High Court's finding in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*):

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist—at [46]-[47] *(emphasis added)*.

In particular, Dowsett J in *Gudjala* characterised the requisite asserted facts in support of the condition in s. 190B(5)(b) as follows:

> That the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
>
> That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65], [66] and [81];
>
> That there is an explanation of the link between the claim group described in the application and the area covered by the application. In the case of a claim group described by reference to apical ancestors this may involve identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage—[66] and [81] *(emphasis added*).

This approach was not criticised or overturned by the Full Court in *Gudjala FC*.

I use Dowsett J's three-part characterisation as the basis for my assessment. Before I do so, however, I note that Schedule F, in summary, states the following in relation to this condition:

Amongst members of the group there is knowledge and observance of traditional laws and customs. Examples include:

- ritual initiation of male members of the group;
- initiated men keep ceremonial knowledge secret and have knowledge of how to rid people and places of unwanted spirits;
- members of the group retain and recount knowledge of sacred stories and places and dreaming tracks;
- some members of the group have personal totems and beliefs associated with them including food taboos;
- there is belief in rules about how to interpret environmental signs and behave accordingly to avoid breaking the law and suffering consequences;
- members of the group consume bush foods and use bush medicines;
- members of the group have personal encounters with spiritual or supernatural beings;
- members of the group have detailed knowledge of their ancestry and familial relations;
- connectedness to one's people as well as one's country, which has its origins deep within the traditional laws and customs of the group, remain an integral aspect of contemporary Kalkadoon cultural identity.

Focusing on Dowsett J's three-part charactisation of the requirement of s. 190(5)(b) I now consider the more detailed information referred to in the document 'Additional Information – Attachment F Kalkadoon People # 4 (QUD579/2005)' which refers me again to lengthy sections of **[Expert 2 – name deleted]**, reports.

1. That the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society

The consultant anthropologist was briefed to express his expert opinion, amongst other things, on the following question relevant to my assessment: At the time of sovereignty, was there a body of persons united in and by the acknowledgement and observance of laws and customs? In summary, **[Expert 2 – name deleted]**, responds in Part 1 of his report as follows:

- There are four classes of written sources from which it can be shown that there was an Aboriginal group, which anthropologists today describe as a language-named tribe known as the Kalkadoon, who inhabited the claim area at and prior to the time the claim area was effectively occupied by European settlers. These sources comprise reports and analyses of pre-historic sites, firsthand accounts of the first Europeans who traversed or occupied the claim area, accounts based upon interviews with these pioneers and writings by interested observers recording aspects of Aboriginal society and culture;
- While relatively little of the culture and social organisation of the Kalkadoon was recorded in the early literature, what was recorded is sufficient to establish that Kalkadoon society was of the same order as other Aboriginal tribal societies in northern Australia, sharing with them a number of typical characteristics, including:

- A language-named tribe associated with its own identifiable territory, whose members would have identified themselves by the name of the language and considered themselves to belong to the country of its territory;
- The society was a kin-based one in which individuals were related within a grid of classificatory kinship categories based upon blood and marriage familial relations;
- As well as descent-based local estate owning groups, Kalkadoon social organisation recognised a two moiety, four section class system (skins) which classified all humans, as well as species and other phenomena of the natural world (totemic system);
- A hierarchical system of male and female initiation marks the status through life of individuals and is linked to the cosmology of the mythological era. The mythological era was the generative source of laws and ownership and the rights and interests which flow from this. The reproduction of the hierarchical system and the systems of social and local organisation is the basis upon which the individual acquired his or her identity (the principle of filiation). This included membership of the language, local group, moiety and section, as well as the inheritance from earlier generations of rights and interests in the land, and the acquisition of cultural knowledge.
- The Kalkadoon native title application lists some 22 rights and interests, in addition to the right of exclusive possession. Many of these interests can be inferred from the observations of the early writers, and possibly all of them may be able to be identified in these sources. The numerous accounts of Kalkadoon resistance accompanied by threats to drive the white man out of their country, by both physical and ritual means, must be read as the actions of a people who consider themselves to have had an exclusive possessory interest in their territory. Flowing from this possessory interest were various rights to occupy and use their country;
- Authority and decision making about Kalkadoon country is predicated on one overriding traditional law, which is that 'Kalkadoon people are the only ones who can speak for, and make decisions about, the use and enjoyment of Kalkadoon lands and waters'. This is the law as expressed by a senior Kalkadoon claimant today [**[Claimant 1 – name deleted]**, whose affidavit has been provided as part of the additional material], which is unchanged from the law as it can be inferred from the early sources.

On the basis of the above I am of the view that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society**.**

2. That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content

In summary, **[Expert 2 – name deleted]**, states in his reports that in his opinion:

- the laws set down in the mythic charter ,which derive from the actions and precepts of the creative beings of the 'mythological era' in relation to Kalkadoon country, are normative in nature. They would have been laws which set out all important aspects of Kalkadoon life and society, including its rights to land, its rights to own and use the resources of that land and its cultural institutions, such as language and ritual. These laws would have been prescriptive, and therefore have had a normative content, in the sense that all members of the Kalkadoon society would have been bound by them, and that transgression (such as eating of taboo food, desecrating a sacred site or wrongful marriage) would have been met with sanctions

(including death in some instances) supported by the wider group and enforced by the authority of its elders;

- the laws of filiation are normative in character. They determined membership and composition of the Kalkadoon language-named tribe, established an individual's identity and provided entitlement to share with other members the natural, social and cultural resources handed down from the creators of the 'mythological era'. These laws, too, would have been prescriptive and binding; they defined the structure of the society and apportioned rights and interests in land according to one's place in that structure.

The affidavits provided as part of the additional material include illustrations of the normative content of the Kalkadoon People's laws and customs. **[Claimant 1 – name deleted]**, in his affidavit, at [34] states that he 'was told by the old people not to eat emu or porcupine because our clan of Kalkadoon are not allowed to eat them. I was also told that the blue tongued lizard was a 'dibbil dibbil' lizard and we weren't allowed to eat that'. – at [34]. **[Applicant 2 – name deleted]** states that she was always told that she 'was not allowed to eat emu, because that is my Grandmother's dreaming, or the red kangaroo, because that is my Father's dreaming'. – at [29]

A further illustration is made in the Affidavit of **[Claimant 2 – name deleted]**:

> '**[Person 1 – name deleted]** told me that I had to marry a Kalkadoon woman as it was the traditional way. When I was on Palm Island I met my first wife **[Person 2 – name deleted]**. She was a Kalkadoon woman through her mother **[Person 3 – name deleted]**. If I had married a non-Kalkadoon woman my family would have separated us and made me go and find a Kalkadoon woman to marry'. – at [15].

Numerous additional illustrations are made in the Affidavit of **[Claimant 3 – name deleted]**:

> Under our traditional law, you have to marry the right way. We call that the straight way. The line you have to marry. For my skin, I have to marry *nenama*. That is Kalkadoon language for the woman with the right skin name for you. My wife is *nenama*'. – at [49];
>
> '...if you run off with the wrong woman it is a serious offence, you could get killed. In our traditional custom you can have up to seven wives. It is our law, no jealousy' – at [51] and ' [u]nder our traditional custom we are not allowed to mention by name old people who have passed away'. – at [63];
>
> ...[t]here are rules for fishing and hunting. When you go out, you have to talk to the country and talk to the old people, my ancestors. Their spirit is still in the land, still alive. I believe that. You have to let them know you are there, what for, what reason. I was taught that by my granddad and grandmother'. – at [89]

On the basis of the above, I am of the view that there existed, at the time of European settlement, a society of people living according to a system of identifiable laws and customs, having a normative content.

3. That there is an explanation of the link between the claim group described in the application and the area covered by the application. In the case of a claim group described by reference to apical ancestors this may involve identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage

[Expert 2 – name deleted] second report includes a table of members of, what he calls, the 'intermediate Kalkadoon generation' - people who bridged the period from the 1880s and 1890s through to the post WW II period, with some living into the 1980s and early 1990s. This generation includes most of the apical ancestors listed in the application in Schedule A as can be seen from the analysis below which highlights (*in italics*) members of the intermediate Kalkadoon generation:

Lardie Roberts (Lardie Moonlight)
Dolly Prosser
Kitty Frogg

Annie Whip (mother of Martin Connelly (Snr))
Ida (aka Ada) Elston
Leichardt Toby
Rosie Waddibungera (mother of George Thorpe)
Willy Malcolm
Nancy Daniels
Fanny (Nellie) McLennan
Nellie and Jimmy (parents of Topsy Harry, Annie Sam and Jack Kippen)
Maggie Sautelle

Daisy Barton (nee McLean)
Mundi MacDonald (King Mundie)
Charlie Caldwell (Snr)
Carbine
Jimmy Rolleston and Louisa Muni (parents of Bessie Mowbray)
Gypsy Reid (Gypsy Ryan)
Nellie Monkira
Polly Wilson (nee Hopkins) Marajundu
Jack Elston
Jessie Frogg (Snr)
Polly Alroy (Polly George)
Nobie Clay
Spider

Maryann (mother of Annie Reid and Eva Patterson)
Sophie MacDonald
Julie (mother of Eulie and Lizzie Hickson)

According to **[Expert 2 – name deleted]** the persons listed in his table (which also sets out the lifespans of the members of the intermediate Kalkadoon generation) would have themselves been 'grown up' by a generation which stretched back to the earliest settlement period of the 1870s and beyond. He concludes that for this reason it may be referred to as the intermediate generation in the sense that its members, whose own life-spans overlapped each other, provided a link between members of the pre-contact Kalkadoon society and today's senior generation of Kalkadoon. The affidavits before me link the current claimants to this intermediate generation and illustrate that members of the claim group have been handed down and continue to hand down the laws and customs of the group. For example **[Claimant 1 – name deleted]** at [20] explains that he was taught Kalkadoon customs and rules from his mother, uncles and aunties and that he believes he has a duty to pass on these to his children and nephews. Therefore I am satisfied as to the links of the current group with a pre-sovereignty society.

For the above reasons I am of the view that the material before me, and in particular **[Expert 2 – name deleted]** reports and Appendix 9 to his third report giving numerous examples of how traditional law and custom of the Kalkadoon People govern the claimants' lives (and governed that of their ancestors) and which puts into context the views and opinions of the anthropologist, provide a sufficient factual basis for the assertion that there exist traditional laws acknowledged

and customs observed by the Kalkadoon People and that these give rise to the native title rights and interests claimed.

Reasons for s. 190B(5)(c)

I am satisfied that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta* —at [47] and [87].

In summary, Schedule F relevantly states the following:

- The native title claim group has continued to hold native title in accordance with its traditional laws and customs. The Kalkadoon communities in and near the claim area in the early 20th Century formed a link between the claimants and their ancestors. These communities maintained a physical connection with Kalkadoon country, an identifiable Kalkadoon society and a body of traditional knowledge and practice which has been transmitted to members of the present group;
- Members of the claim group retain a body of cultural knowledge and continue to acknowledge and practice traditional laws and customs.

In part three of his report, **[Expert 2 – name deleted]** sets out his opinion in relation to the continuity of laws and customs in current Kalkadoon society. Citing information contained within the affidavits provided as part of the additional material and which form the basis for his opinions, **[Expert 2 – name deleted]** groups his views under the following subheadings:

- Continuity of the laws and the mythological era
- Knowledge of myths and associated sites
- Contemporary initiations
- Contemporary social organisation
    - Segmentation of Kalkadoon rights in land
    - Group membership and the Diaspora
    - Moieties and sections
    - Totemism
    - Kinship behaviour

In relation to all of the above sub-categories **[Expert 2 – name deleted]** expresses his opinion that there has been continuity in a substantially uninterrupted way. In my view the affidavits support this assertion.

[Expert 2 – name deleted] first report includes a discussion of 'numerous rights and interests which can be inferred from the observations of the behaviour and customs of the people living on the claim area by many of the authors already cited [in the first report]'. The report sets out 'a sample of the rights and interests which, from the descriptions in the early literature and from the

archaeological record, can be said to have been practised either prior to European settlement and/or during the first two decades of settlement'. The samples include many of the rights claimed in the application, including 'exclusive possessory interest'.

In addition, Appendix 1 to the third report sets out statements and examples of rights and interests exercised by members of the claim group and, in some cases, by their parents and grandparents. The table sets out the rights and interests claimed and notes whether the information was obtained in an interview or is contained in the affidavits provided as part of the additional material. Data on the exercise of some specific rights and interests not included in the Appendix is also set out in the third report.

On the basis of the material before me I am satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way.

Subsection 190B(6)
Prima facie case

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

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be established, prima facie, are identified in my reasons below.

To meet the requirements of s. 190B(6) at least one of the native title rights and interests claimed needs to be established, prima facie. Only established rights will be entered on the Register: see s. 186(1)(g) and the note to s. 190B(6). Where I have found that a particular claimed right cannot be established, prima facie, I refer the applicant to the provisions of s. 190(3A) which allow the applicant to provide additional information in support of a further consideration by the Registrar of the ability of the right to be registered.

Registrar's task

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

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

The definition of 'native title rights and interests' in s. 223(1) guides my consideration of whether an individual right and interest can be established, prima facie. In particular I take account of the interpretation of this section in:

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

In my view a right that clearly falls outside the scope of the definition of 'native title rights and interests' in s. 223(1) cannot be established, prima facie.

The registration test is an administrative decision. It is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is also not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are capable of being established, prima facie.

In summary, s. 190B(6) requires me to carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s. 223(1)); and
- have not been extinguished over the whole of the application area.

As part of my examination, in addition to information on the relevant laws and customs, I also consider information on current and past activities by claimants and their families on the claim area which are said to be in exercise of the claimed native title rights and interests. Whilst such activities are not determinative of the existence of a right and interest, they can be supportive of it.

Consideration of the rights and interests claimed

I first consider the claim to 'exclusive possession' in paragraph 1 of Schedule E and then the claim to non-exclusive rights and interests in paragraph 2 of Schedule E.

1. The right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group

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

[Expert 2 – name deleted] in his reports states that:

- The Kalkadoon native title application lists some 22 rights and interests, in addition to the right of exclusive possession. Many of these interests can be inferred from the observations of the early writers, and possibly all of them may be able to be identified in the sources;
- The numerous accounts of Kalkadoon resistance accompanied by threats to drive the white man out of their country, by both physical and ritual means, must be read as the actions of a

people who consider themselves to have had an exclusive possessory interest in their territory;
- The evidence is that the Kalkadoon not only actively defended their country, but did so with the explicit motive of expelling the settlers. The many attacks and skirmishes of the so-called Kalkadoon guerrilla war were not simply isolated or opportunistic frontier clashes, but had behind them the explicit and wider intent of resisting being dislodged from their territory by the new colonisers;
- Kalkadoon ferocity in defence of their rights and interests may not have been directed only at whites, for there are indications in the early literature that their aggression was possibly equally directed at their Mayi-speaking neighbours;
- Authority and decision making about Kalkadoon country is predicated on one overriding traditional law, which is that 'Kalkadoon people are the only ones who can speak for, and make decisions about, the use and enjoyment of Kalkadoon lands and waters'. This is the law as expressed by a senior Kalkadoon claimant today [see **[Claimant 1 – name deleted]** affidavit at [56] which has been provided as part of the additional material], which is unchanged from the law as it can be inferred from the early sources.

I note that the affidavits provided as additional material support the above statement. For example **[Claimant 1 – name deleted]** at [55] also states that '[i]f non Kalkadoon people go to these places [important places under Kalkadoon laws and customs] without knowing that they are sacred to Kalkadoon people and without a Kalkadoon guide, they will get sick or something awful might happen to them'. **[Claimant 2 – name deleted]** at [26] states that he believes that 'Kalkadoon people have the right to live on our land and to take the things on it. We also have the right and duty to speak for Kalkadoon country, especially the country of our ancestors, to ensure it is protected and cared for'. **[Claimant 3 – name deleted]** at [90] states that '[w]e cannot go to the country of another tribe. If you do that, you get sick. I know of a few incidents like that. I was taught to ask permission from the right people before I went somewhere. They could be from another tribe or another Kalkadoon family. I was told to share what I got with them first. My grandparents told me that if I did not do these things or sing out to the country, I would not get anything. This is still the case today. I expect people to ask my permission to hunt or take things from my ancestor's country'.

Based on the above I find that the exclusive rights claimed are established, prima facie, over areas where there has been no previous extinguishment of native title or where any extinguishment is to be disregarded pursuant to ss. 47, 47A or 47B.

Non-exclusive rights and interests

I now assess whether the rights and interests claimed in paragraph 2 of Schedule E can be established, prima facie, as non-exclusive native title rights in relation to that part of the claim area where exclusive rights cannot be recognised.

As noted above, in my view, on the material before me it is established, prima facie, that under the laws and customs of the Kalkadoon People they hold rights and interests to use, enjoy, occupy and possess all the land and waters within the external boundary of the claim area to the exclusion of other peoples. In my view, the non-exclusive rights claimed in paragraph (2) a) to f), g) to j), k) to o) and q) to s) in Schedule E are incidental to these exclusive rights.

As noted above, I will now consider information on current and past activities by claimants and their families on the claim area which are said to be in exercise of the claimed native title rights and interests.

Appendix 1 to **[Expert 2 – name deleted]** third report, a report entitled "Data in support of Kalkadoon People # 4 QUD579/05 – Native Title Rights & Interests claimed", by **[Expert 6 – name deleted]** gives numerous examples of the exercise of the above rights, mostly quoted from the affidavits provided as part of the additional material. In addition, Appendix 9 to the same report, "Interview Analysis Topics – Data in support of Kalkadoon People # 4 QUD579/05" by the same author, sets out further relevant information quoting from interviews with claimants and expert reports. Below I set out a small sample of these examples.

I have grouped together those rights and interests that appear to be of a similar character and therefore rely on the same evidentiary material. I refer to them as listed in Schedule E.

a) the right to access the application area
b) the right to camp on the application area
c) the right to erect shelters on the application area
d) the right to live on the application area
e) the right to move about on the application area
f) the right to hold meetings on the application area

Many of the affidavits talk about camping and living in the claim area, erecting shelters, meeting regularly; such activities necessitate access to the area and the moving about of people through the claim area:

[Applicant 1 – name deleted]

- As a Kalkadoon I have the right to hunt, gather, participate in ceremony, enjoy other natural resources on Kalkadoon country and have the responsibility to care for Kalkadoon country. Growing up in Cloncurry and Mt Isa, I used to roam around the country with my friends and cousins. No-one told us we could not do these things or that we had to ask anyone's permission — at [10].

[Claimant 4 – name deleted]

- I was brought up to believe that the spirits of Kalkadoon ancestors are in our country. My father and older brother taught me to sing out when I am on country. They told me I needed to do this to tell the spirits of the old Kalkadoon who I am. Doing this will mean that the old people will welcome me and open the country up to me, giving me access to what it has to offer — at [10].

[Claimant 2 – name deleted]

- From my upbringing, and the things my grandparents taught me, I believe that Kalkadoon People have the right to live on our land and to take things on it — at [26].

[Claimant 1 – named deleted]

- My father and mother and the old people told me stories about our Kalkadoon ancestors and took me all around our traditional area. When I was a child, they showed me paintings, burial sites, massacre sites and dreaming places on Kalkadoon country — at [17].
- A number of Kalkadoon people and their ancestors lived at the Aboriginal reserve over on the Eastern side of Mt Isa, behind Deighton Street, which was known as the Compound. Traditional corroborees were held in the Compound and Aboriginal people travelled from Lake Nash in the Northern Territory to attend — at [44].

[Claimant 5 – name deleted]

- My grandparents were **[Person 1 – name deleted]**, who was called **[Person 1 – name deleted]**, and **[Person 4 – name deleted]**. I knew my grandparents. I used to live with them at the Compound in Camooweal. I remember that **[Family 1 – name deleted], [Family 2 – name deleted], [Family 3 – name deleted], [Person 5 – deleted] and [Person 6 – name deleted]** lived at the Compound too. We lived in 5 or 6 old tin humpies along the Georgina River...— at [4].

Based on all the material I have considered, I am of the view that these rights are established, prima facie, over areas where exclusive rights cannot be recognised.

g) the right to hunt on the application area
h) the right to fish on the application area
i) the right to use the natural water resources of the application area
j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs

Many of the affidavits talk about hunting, fishing and using and gathering the resources of the claim area:

[Claimant 4 – name deleted]

- My grandparents and older siblings taught me how to recognize bush tucker and how to get it. Fruits we used to get were conkerberries and splitjacks. We also used to get bush bananas, oranges and mungeroo (wild onions). They also taught me how to recognise animal tracks and hunt them. Animals we used to eat were emu, kangaroo, plains turkey and different types of goanna. From the river, we used to catch mussels, yabbies, fish and turtle.**[Person 1 – name deleted]** used to boil buffle grass with water to make a medicine for sores and she also used to use the sap from the bloodwood tree for sores — at [8].

[Claimant 1 – name deleted]

- Wherever I went on Kalkadoon country when I was growing up my dad and mum and the old people taught me about Kalkadoon 'bush tucker'. They also taught me about fishing and hunting on our traditional country. We used to get bush tucker at The Paddock a lot because there was always lots of bush tucker there. Most bush tucker out here, such as konkaberry bushes, wild bananas, wild cucumbers, or 'junjlar', wild orange and split jacks and little black figs are seasonal. We also used to get sugar bag when we could find it. Some food is available

all year around through, including kangaroo, goanna, wallaroos, plains turkeys and pigeons. We caught the wallaroos and kangaroos with a snare when I was a child— at [33].

- I was told by the old people not to eat emu or porcupine because our clan of Kalkadoon are not allowed to eat them. I was also told that the blue tongued lizard was a 'dibbil dibbil' lizard and we weren't allowed to eat that— at [34].

[Claimant 5 – name deleted]

- In those days, I used to walk with the old people all over the hills around Camooweal and Lake Allan and follow the river to the Rocklands. The old people included **[Person 1 – name deleted]** and old **[Person 7 – name deleted]**. My sister **[Applicant 3 – name deleted] and [Claimant 6 – name deleted]** would come along too. The old people would also take us hunting. In particular, old **[Person 8 – name deleted]** used to take us hunting for yam, konkaberries, split jacks and sugarbags. We also used to catch goannas and other lizards too— at [6].

- **[Person 1 – name deleted]**, my grandfather **[Person 4 – name deleted]** and old **[Person 9 – name deleted]** would also take us hunting this side of Camooweal, where the cave is. We mainly went hunting for sugarbag. The way I was taught to get sugarbag is to follow the bees to the tree where the hive is located. Then you see where they are going into the tree, listen to the trunk to find where the hive is. Then you cut out the honey— at [8].

- When **[Applicant 3 – name deleted]** and I were big enough we would take ourselves hunting and go on country all day. We had learned from our elders where to go and what to eat. The main place we used to go for bush tucker was along the ridge to the east of Camooweal. We would eat water lily, lily stalk, lily seeds, mussel shells and fish all day long— at [9].

[Claimant 6 – name deleted]

- I was taught how to gather and use bush medicine for healing. **[Person 5 – name deleted]** showed me bush medicines like the caustic soda bush, gum leaves to boil up for a bath, and one that looks like salt bush which is good for sores, colds, and as a chest rub. I was taught by **[Person 5 – name deleted]** how to prepare an ointment from the plant that looks like saltbush. I recently made some for a friend whose son had a sore that would not go away. After I applied the bush medicine, the sores went away in about two days — at [51].

- I still go and get these things when I have the chance. I take my family out into Carlton Hills and we camp out there. I show my grandchildren and other Kalkadoon kids how to find these things and what to do with them— at [52].

Based on all the material I have considered, I am of the view that these rights are established prima facie over areas where exclusive rights cannot be recognised.

k) the right to conduct ceremony on the application area
l) the right to participate in cultural activities on the application area

m) the right to maintain places of importance under traditional laws, customs and practices in the application area
n) the right to protect places of importance under traditional laws, customs and practices in the application area
o) the right to conduct burials on the application area

The affidavit material contains many examples of the exercise of the above rights and interests:

[Claimant 6 – name deleted]

- I know many sites that are important to Kalkadoon People on Kalkadoon country. The emu is very important to Kalkadoon People because the emu travelled throughout the Kalkadoon country. Carvings and engravings of emu footprints can be found throughout Kalkadoon country. I know where many of these places are. In some places, the emu made nests with eggs in them. I have seen one of these nests on Carlton Hills. I have also heard about two other nest sites, one on Carlton Hills and the other on White Hills. I have seen many carvings and paintings and emu tracks on Chidna station — at [42].

- Other places like old Kalkadoon campsites, ceremonial grounds and burial sites are important places that need to be cared for and protected by Kalkadoon People. I know the location of many of those places, like Carlton Hills, and nearby Gunpowder at Chidna station. Gum Hole is also a special place for my family. **[Person 5 – name deleted]** taught me that it had been a meeting place a long time ago — at [43].

- I have told many different researchers over the years about these places and I visit them whenever I am on country for cultural heritage surveys and for monitoring. I am often asked to do cultural heritage work because of my knowledge of sites and artifacts, and the country... — at [44].

[Claimant 7 – name deleted]

- I was told by my mother, grandmother and other senior relatives that I came from Kalkadoon country. They told me that under Kalkadoon law, I have a duty to protect Kalkadoon country and make sure other people do not harm or damage our country. For example, I object to people going and wrecking places with graffiti. I am a member of the Board of Directors for the Kalkadoon Tribal Council. We have had to go and clean up damage which people did to Three Steps where there are Kalkadoon carvings. There is another important site at Painted Rock, just east of Mt Isa where damage has been caused which I and other people from KTC have gone to fix up. Grandmother told me that was a men's business site. There are some excellent carvings and paintings there of Kalkadoon men in head dress. There are emu foot prints there too. My uncle took me there and made me feel responsible to look after those sites. I have got feelings towards them and when I go to those places I sometimes feel a bit eerie because I know something is there. I just get a funny feeling. I get feelings because I am a Kalkadoon person. They are good feelings but you get a bit sad and angry if you see someone wrecking them — at [34].

[Claimant 1 – name deleted]

- I would like to be buried on my country. I was told by my Dad and the other old people that it is proper, under Kalkadoon law, to be buried on your country— at [29].

- The cultural heritage work that I and other Kalkadoon people do is an important activity in the management, conservation and protection of our natural resources, material, culture and of Kalkadoon sites throughout our traditional country — at [57].

- When we look after Kalkadoon country and our cultural heritage this way, we keep Kalkadoon country strong so that we can pass it on to the younger Kalkadoon people. This is what I was taught and am now doing so in return. For example, I had my daughter **[Person 12 – name deleted]** christened at Fountain Springs to make sure she has a strong link to her country — at [59].

[Claimant 8 – name deleted], [Claimant 9 – name deleted], [Person 10 – name deleted], [Applicant 2 – name deleted] and [Person 11 – name deleted] (on 7 March 2005; no affidavits provided):

- When the family lived in Dajarra we remember each year most of the families from Dajarra would hire two/three trucks and go down to the Georgina River (Tommy's Hole) for periods of three/four weeks to do ceremony. They would hunt wild bush tucker e.g. emus, turkey, goanna etc. and all set up their camps behind the break wind made from branches of trees or tents if you were lucky to have one. Corroborees were held every night, and the children never knew who danced in the Corroboree as they were not allowed to watch the men paint up. Other ceremonies and dances took place to decide who was given all the dreaming stories and dances, who practised witch doctor ways, arranged marriages and all such things, took place over this period out bush so it was big business time for everyone. Initiation time for young men also.

- **[Applicant 2 – name deleted]** remembers her mum telling her about the big bush camp that was on the other side of Stanbroke station across the river, where the cattle yards used to be. **[Claimant 8 – name deleted]** and her husband got married in the bush way there and then married in the white man's way later. The old people used to have big ceremonies there too, e.g. Corroborees, arranged marriages took place, teaching young women about culture and law and customs etc.

- **[Claimant 8 – name deleted]** also remembers the Mount Isa racecourse as a place where they had big Corroborees by the light of cars when people came in from out bush.

Based on all the material I have considered, I am of the view that these rights are established, prima facie, over areas where exclusive rights cannot be recognised.

q) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional law and customs

r) the right to control access to the application area by other Aboriginal People in accordance with traditional laws and customs
s) the right to control use of the application area by other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional laws and customs

As noted above, **[Expert 2 – name deleted]** in his reports states that authority and decision making about Kalkadoon country is predicated on an overriding traditional law that 'Kalkadoon people are the only ones who can speak for, and make decisions about, the use and enjoyment of Kalkadoon lands and waters' [a quote from **[Claimant 1 – name deleted]** affidavit which has been provided to me as part of the additional material]. The right to speak for country, however, can only be recognised over areas where there has been no previous extinguishment of native title or where any extinguishment is to be disregarded pursuant to ss. 47, 47A or 47B.

The above rights are qualified in that they only relate to 'other Aboriginal People in accordance with traditional law and customs'. In *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward FC*), the Court, in making a consent decision, recognised a similar but qualified 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' as a non-exclusive right—at [27]. Also in *Jango v Northern Territory of Australia* [2006] FCA 318 (*Jango*), Sackville J considered that he was bound by the Full Court in *Ward FC* and held that a non-exclusive right 'to make decisions about the use or enjoyment of the Application Area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert bloc' could be recognised—at [571].

The assertion of the existence of the above rights and interests is supported by the affidavits provided as additional material. For example **[Applicant 3 – name deleted]** at [36] states that '[a]ccording to our customs, non Kalkadoon people should talk to us first out of respect if they want to go on our land and use it because Kalkadoon people are the ones who can speak for and make decisions about the use and enjoyment of Kalkadoon land and waters'. **[Applicant 2 – name deleted]** at [25] states that 'I have lived most of my life on my family's country. I have always felt welcome on Kalkadoon country generally but would not go wandering around on other family's country without asking permission...'. And at [26] that '[t]he same rules apply when non-Kalkadoon people come onto Kalkadoon country. They need to ask permission, especially if they want to go onto sacred sites. If they don't ask permission, they can also get sick'. As noted above, **[Claimant 3 – name deleted]** at [90] states that '[w]e cannot go to the country of another tribe. If you do that, you get sick. I know of a few incidents like that. I was taught to ask permission from the right people before I went somewhere. They could be from another tribe or another Kalkadoon family. I was told to share what I got with them first. My grandparents told me that if I did not do these things or sing out to the country, I would not get anything. This is still the case today. I expect people to ask my permission to hunt or take things from my ancestor's country'.

Based on the above I find that these rights claimed are established prima facie over areas where exclusive rights cannot be recognised.

I note in relation to all of the above rights and interests that they are native title rights and interests in relation to land or waters and there is no information before me that suggests that they have been extinguished over the whole of the application area.

Rights and interests claimed that cannot be registered

In my view, the following rights cannot be established, prima facie, for the reason outlined below:

p) the right to speak for and make non-exclusive decisions about the application area

As noted above, in my view the exclusive rights claimed are established, prima facie, over areas where there has been no previous extinguishment of native title or where any extinguishment is to be disregarded pursuant to ss. 47, 47A or 47B.

The right to speak for, and make decisions about, the application area claimed as a non-exclusive right has been the subject of a number of Court decisions.

In *Ward HC*, the Court was of the view that:

> ...a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses, occupy, use and enjoy land to the exclusion of all others—at [88]; see also at [90] – [93].

In *Neowarra v State of Western Australia* [2003] Sundberg J was of the view that 'the right to speak for country involves a claim to ownership' and could only be recognised in relation to areas of exclusive native title rights and interests —at [494].

In *Sampi v State of Western Australia* [2005] FCA 777 the Court held that:

> ...the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation —at [1072].

Based on the above authorities, I do not consider the right to speak for, and make non-exclusive decisions about, the application area can be established, prima facie, in relation to areas where a right to exclusively possess, occupy, use and enjoy is not claimed.

t) the right to determine and regulate membership of and recruitment to the native title claim group

In my view this is not a right or interest in relation to land and waters but is a characteristic of the claim group's laws and customs. In *Northern Territory v Alyawarr, Kayteye, Warumungu, Wakay Native Title Claim Group* [2005] FCAFC 135 Wilcox, French and Weinberg JJ found:

> Paragraph 3(i) identified a further right in the following terms:
> *'the right to determine and regulate the membership of and recruitment to a landholding group.'*
> Notwithstanding the inclusion of this right in the determination, the applicants accepted that it is more appropriately recognised as part of their laws and customs rather than as a right or interest in relation to the claim area**. It does not appear to be a native title right or interest in relation to the land or waters.** In any event it is subsumed by the provisions of par 2 of the

> determination in relation to the identification of the native title holders. Paragraph 3(i) should therefore be deleted from the determination—at [165] *(emphasis added)*

For this reason I do not consider that the right can be established, prima facie.

u) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites

In my view this is not a right or interest in relation to land and waters but part of the claim group's laws and customs. Whilst the reference to 'particular sites' indicates that it least some of what is claimed under this heading relates to land and waters, it is difficult to conclude that the 'right' *as a whole* has this characteristic. As currently expressed, it appears that these are activities of the claim group associated with the established rights claimed at paragraph 2 l), n) and m).

For this reason I do not consider that the right can be established, prima facie.

Conclusion

I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient information to establish, prima facie, their existence. I am satisfied, having considered the information before me, that some of the rights claimed in this application can be established prima facie. Therefore the rights to be registered on the Register of Native Title Claims are as follows:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group

2. Over areas where a claim to exclusive possession cannot be recognised, the following rights and interests:

a) the right to access the application area
b) the right to camp on the application area
c) the right to erect shelters on the application area
d) the right to live on the application area
e) the right to move about on the application area
f) the right to hold meetings on the application area
g) the right to hunt on the application area
h) the right to fish on the application area
i) the right to use the natural water resources of the application area
j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs
k) the right to conduct ceremony on the application area
l) the right to participate in cultural activities on the application area

m) the right to maintain places of importance under traditional laws, customs and practices in the application area
n) the right to protect places of importance under traditional laws, customs and practices in the application area
o) the right to conduct burials on the application area
q) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional law and customs
r) the right to control access to the application area by other Aboriginal People in accordance with traditional laws and customs
s) the right to control use of the application area by other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional laws and customs.

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

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

Sufficient material is provided in the application, in particular in Schedule F and the additional material regarding the traditional physical connection of members of the native title claim group. For example, as noted above at s. 190B(6), **[Claimant 6 – name deleted]** collects plants to make bush medicines and takes his grandchildren and other Kalkadoon children on country to show them how to find certain plants that can be used for medicinal purposes, such as he was shown by his **[Person 5 – name deleted].**

On the basis of the information before me I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provision as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provision as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous exclusive possession act or previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it.

The application **satisfies** the condition of s. 190B(8).

I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application **does not** offend the provisions of s. 61A(1) as the geospatial analysis of 21 December 2010 and a search that I made of the Tribunal's geospatial databases on 8 March 2011 reveal that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2) as the application at Schedule B, paragraph 1 excludes from the application area any areas covered by previous exclusive possession acts as defined in s. 23B.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

In my view, the application **does not** offend the provisions of s. 61A(3) as the application at Schedule E, paragraph 3 acknowledges that a claim to exclusive possesson is not made over areas where such a claim cannot be recognised.

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

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

The application **satisfies** the condition of s. 190B(9), because it meets all of the three subconditions, as set out in the reasons below.

Reasons for s. 190B(9)(a):

The application **satisfies** the subcondition of s. 190B(9)(a).

The application at Schedule Q states that the native title claim group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Reasons for s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

The application at Schedule P states that the application does not include a claim by the native title claim group to exclusive possession of all or part of an offshore place.

Result for s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

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

[End of reasons]