NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

Reasons for Decision (Edited)

Delegate:	Brendon Moore

Application name:	The Barkandji People
Names of applicants:	Ray Lawson, Noel Johnson, Jennifer Whyman, Patricia Johnson, William Charles Bates, Maureen O'Donnell, Mary-Ann Marton and Cyril James Hunter
NNTT region:	NSW/ACT
NNTT number:	NC97/32
Date application made:	8 October 1997
Application last amended:	29 September 2004
Federal Court number:	NG6084/98

The application is NOT ACCEPTED for registration pursuant to s190A of the *Native Title Act 1993 (Clth).*

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

Date of Decision: 23 December 2004

Brief History of the Application

The application was originally made on 8 October 1997, being lodged with the National Native Title Tribunal on that date and entered onto the Register of Native Title Claims on the same day. This was in accordance with the 'old' *Native Title Act 1993*, prior to the 1998 amendments to this legislation coming into effect in September of that year.

In 1999 the then applicants sought the leave of the Federal Court (hereafter 'the Court') to amend the application. The Court granted leave to amend on 5 August 1999, and an amendment application was filed on that same day.

A delegate of the Native Title Registrar then considered the amended application for registration pursuant to s190A of the *Native Title Act 1993* (hereafter 'the Act'). On 29 August 1999 the application was accepted for registration, and the details of the amended application were entered on the Register of Native Title Claims.

A s66B application (to replace the applicants) was made to the Court on 22 March 2001 by claim group members [name 1 removed] and Noel Johnson. This application was dismissed on 13 July 2001.

On 8 August 2002, NSW Native Title Services Limited (hereafter NSWNTS) filed a notice of motion seeking to amend the application so as to give effect to a number of decisions made at an authorisation meeting of the native title claim group, this meeting having been facilitated by NSWNTS under orders from the Court. These proposed amendments of the application included, amongst other matters, replacing the applicants – [name 2 removed] and [name 3 removed] – with 8 new applicants who were members of the claim group, this meeting having also come to a particular understanding of the membership of the claim group, which was a much larger group than the claim group that was described by the application at that point. On 28 October 2002 Justice Stone ordered that this notice of motion be stood over pending an application under s66B of the Act to replace the applicants.

Consequently, a second s66B application was made on 1 November 2002, this time by 5 members of the claim group, being 5 of the 8 previously-named proposed new applicants; namely, Ray Lawson, Noel Johnson, Mary Ann Marton, Jennifer Whyman and Patricia Johnson.

On 9 December 2002 Justice Stone brought down a decision on this second s66B application in favour of the applicants, and ordered that the five persons making the s66B application jointly replace the previous applicants.

Then on 11 December 2002 the Court ordered that leave be granted to amend the application in accordance with the amendments attached to the notice of motion filed by NSWNTS on 8 August 2002. An amended application was consequently filed on that day. This application replaces the previous 2 applicants with 8 new applicants and makes other amendments to the application, including:

- amendment of the description of the native title claim group at Schedule A, described at Schedule S as " the description of the native title claim group has been expanded to more comprehensively include all persons with native title rights and interests within the whole of the determination area"

- amendment of the description of native title rights and interests at Schedule E, described at Schedule S as "amended so as to remove the delineation between a 'primary determination area' and a 'secondary determination area' such that one set of rights and interests are now claimed in respect of the whole determination area"
- further material provided at Attachment R1, regarding the authorisation of the amended application, and at Attachment F1, regarding commentary on the general description of native title rights and interests.

Subsequent to this amending of the application, the Tribunal's registration test officer provided by letter dated 13 October 2003 a preliminary assessment of the capacity of the application to meet registration test requirements. This was in line with the Tribunal's policy of assistance to applicants and others, as part of the "Registration Test Procedures". This assistance is in accordance with the s78 assistance that the Registrar may provide, and is not request driven. The preliminary assessment set out a number of issues that may need further attention, according to the delegate's preliminary views. The letter also requested that should NSWNTS wish to address these issues, either by way of the provision of further material directly to the delegate or by amendment of the application, they do so by no later than 13 November 2003.

No amendments were filed in Court and no further information was provided directly to the delegate by 13 November 2003. At a directions hearing before the Court on 2 December 2003, the applicants' representative (NSWNTS) sought an adjournment until 10 March 2004, by which time they would be seeking the agreement of key parties to further amend the application. NSWNTS subsequently confirmed with the Tribunal a request that the registration test be delayed until after amendment of the application, as expected to take place on 10 March 2004. The Registrar's delegate agreed to delay testing until that time.

On 4 March 2004, NSWNTS wrote to the State Manager of the NSW Registry of the Tribunal, requesting that the registration test be further delayed until after an authorisation meeting could take place on 17-18 April 2004. The State Manager granted a final extension of time until 7 May 2004, by which time he expected an amended application to be filed in the Court.

No amendment of the application was filed by that date.

The delegate began to proceed with applying the registration test to the application. In June the Tribunal received a potentially adverse submission from applicant Noel Johnson and claimant [name 1 removed] that they sought the delegate have regard to in applying the registration test. Their submission consisted of 2 covering affidavits and various attachments including a further 9 affidavits sworn by them and seven other members of the claim group. The registration test officer forwarded a copy of this submission to the applicant's representative, NSWNTS, for comment, but none was received in the timeframe set.

On 29 September 2004, NSWNTS as the applicant's representative, filed a further amendment application in the Federal Court. A copy of the amendment application was not forwarded to the Tribunal until 15 October 2004. The amendments to the application are various, but this amendment application does not amend the external boundaries of the application, nor the description of the native title claim group at Schedule A, nor the names of the persons who

together make up the Applicant. The parts of the application that are amended include (but not only):

- identification of the claim group as the 'Barkandji Traditional Owners'
- a reduction of the application area to expressly exclude areas subject to western lands leases granted in perpetuity and to expressly exclude the area subject to native title determination application NC95/10 (Federal Court file number NG60118/98)
- amendments to the 'description of the native title rights and interests' (Schedule E), to the 'general description of rights and interests claimed' (Schedule F) and to the description of 'activities' currently being carried out by the native title claim group (Schedule G)
- 'deletion' of various supporting material previously attached to the application – Attachments F(A)-(B) inclusive and Attachment M(A)-M(A)(p) inclusive
- amendment of material in support of the authorisation of the application, including new Attachment R and 'deletion' of previous Attachment R1
- fresh s62 affidavits sworn by each of the 8 applicants.

This version of the application, as filed on 29 September 2004, is the application being considered for registration at this time.

Due to conflicting pieces of information between the newly amended application and the submission made to the delegate in June from applicant Mr Noel Johnson and claimant [name 1 removed], the registration testing officer sought clarification from Mr Johnson by way of a letter sent on 28 October 2004. In response, on 11 November 2004 the Tribunal received a further submission in the form of an affidavit from Mr Noel Johnson. A copy of this submission was forwarded to NSWNTS for comment, due back by 30 November 2004.

Again, no comment was received back from NSWNTS either within the timeframe proposed, or subsequently.

The delegate has now proceeded to test the amendment application, as filed on 29 September 2004.

Information considered when making the decision

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

- the National Native Title Tribunal's working files for NC97/32, including files dated prior to the amendments to the Act that came into effect on 29 September 1998, and registration testing and other files dated after 29 September 1998;
- the National Native Title Tribunal Geospatial Database;
- the Register of Native Title Claims;
- the Schedule of Native Title Applications;
- the Native Title Register; and
- the Register of Indigenous Land Use Agreements.

The following material was provided directly to the Registrar for consideration under s190A and has also been considered:

- submission from the Director General of the NSW Department of Land & Water Conservation, dated 24 January 2003
- submission from applicant, Mr Noel Johnson, and claimant, [name 1 removed], provided for registration testing purposes to the Tribunal in June 2004, consisting of 2 affidavits plus attachments (the covering affidavits being undated documents that were filed in the Federal Court on 1 December 2003)
- submission from applicant, Mr Noel Johnson, provided to the Tribunal for registration testing purposes on 11 November 2004, being an affidavit affirmed on that same day.

Note: I have not considered any information and materials provided in the context of mediation of the native title claim group's native title applications. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

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

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

On 12 November 2002, Christopher Doepel, Native Title Registrar, delegated to specified members of the staff of the Tribunal, including myself, all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Act.

On 1 October 2004, Christopher Doepel, Native Title Registrar, revoked all previous delegations in relation to sections 190, 190A, 190B, 190C and 190D of the Act. He then delegated to specified members of the staff of the Tribunal, including myself, all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Act.

This delegation remains as at this date.

Note to Applicant

The application must satisfy all the conditions in sections 190B and 190C of the Act in order to be placed on the Register of Native Title Claims

Section 190B sets out the merit conditions of the registration test (see pages 31-50).

Section 190C sets out the procedural conditions of the registration test (see pages 7-30).

In the following decision, I test the application against each of these conditions. I consider the procedural conditions first and then the merit conditions.

s190C: Procedural Conditions

Application contains details set out in s61 and s62: s190C(2)

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

Details and other information and documents required by s61

Native Title Claim Group: s61(1)

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

Reasons relating to this sub-condition

Among other matters, section 190C(2) of the Act provides that the Registrar must be satisfied that the application contains all details and other information required by s61(1) of the Act.

I am guided by comments made by Mansfield J in *Northern Territory of Australia v Doepel* [2003] FCA 1384 (hereafter *Doepel*) in relation to the requirements of s190C(2) more generally, and in particular s61(1) as a sub-requirement of s190C(2). These proceedings were a review of a decision made by the Registrar under s190A. Justice Mansfield notes that s190C(2) does not require going beyond consideration of the terms of the application (see para.16 and 37). The authorisation issue arising from s61(1) is also one where Justice Mansfield considered that the Registrar is not required to consider whether *as a fact* (my emphasis) the claimants are properly authorised by all the relevant members of the native title claim group (see para. 73), or to consider the substantive question of the reality of authorisation (see para. 77). Rather, I have considered whether the application contains information that addresses the requirements contained in the wording of s61(1); namely, that the persons who make the claim are authorised to do so by all of the persons who make up the native title claim group, and further that the persons who purport to make up the native title claim group do indeed constitute a native title claim group by virtue of holding the common or group rights and interests comprising the particular native title claimed, and further, that the persons making the application must be members of the claim group.

I see these as three areas to be considered in turn, as follows:

1. Firstly, does the application provide information to indicate that the 8 persons who have made this application are *authorised* to make the application by the native title claim group?
2. Secondly, does the application provide information to indicate that the 8 persons who jointly constitute 'the Applicant' are indeed *members* of the native title claim group?
3. And thirdly, does the application provide information to indicate that the people who purport to make up the native title claim group indeed appear to

constitute a native title claim group by virtue of holding the common or group rights and interests comprising the native title claimed.

However, on the basis of the ruling in *Doepel*, this consideration does not involve me going beyond the information contained in the application and the prescribed accompanying affidavits, and in particular does not require me to undertake some form of merit assessment of the material to determine whether, for example, I am satisfied that the native title claim group is in reality the correct native title claim group.

Applicants authorised to make the application by the native title claim group

The application is made by eight persons who are named at the beginning of the Form 1 filed in the Court, and who jointly constitute 'the Applicant'.

Each applicant has affirmed by affidavit at Attachment A (the s62 affidavits) at paragraphs d) that they are “authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to the application”. The basis of that authorisation is also referred to in those same affidavits at paragraphs e) as being set out in Attachment R.

Attachment R to the application provides a basis to the authorisation of the application largely by relying on the resolutions of a meeting held in Broken Hill on 5 July 2002, and also a further meeting held on 17 to 18 April 2004 in Dareton, to authorise the most recent amendments to the application. This was a meeting of the *previous* native title claim group, being the “Pooncarrie” native title claim group (as constituted prior to the amendments made in December 2002), as well as other Aboriginal people holding or claiming to hold native title in the application area. Attachment R explains that the meeting agreed to nominate a representative working group to, amongst other things, select the individuals to replace [name 2 removed] and [name 3 removed] as the Applicant. Attachment R also explains the processes whereby the representative working group would deal with the future work of the claim.

I quote what I consider the most pertinent parts of Attachment R:

> "On a consensus basis, the meeting nominated a representative working group to, amongst other things, select the individuals to replace [name 2 removed] and [name 3 removed] as the named Applicant. This approach was agreed to and adopted by the members of the claim group in accordance with section 2518 (b) of the NTA. The manner of conduct of the decision making process was informed by the traditions and customs of the native title claim group but in the absence of a binding traditional process for things of this kind the group elected to proceed through consultation and voting by show of hands.
>
> The process adopted at the meeting for the future work of the claim requires reference to the working group of business arising in the course of the claim. The working group will consider such matters and instruct the Applicant. Very important decisions must be made by a full claim group meeting. The persons selected for the working group were representative of the major families of the claim area. Working group members who are unable to attend working group meetings may inform those attending the meeting of their views on the matters arising for discussion. As long as all members of the

> working group have notice of the purpose of a meeting and have the opportunity to convey their views prior to the meeting, no formal quorum for working group meetings was set.
>
> The composition of the Working Group that was settled on 5 July 2002 was as follows [followed by the heading 'Families', under which 10 family groups are listed by surnames, and second heading of 'Representatives' followed by 25 individual names]."

I note that any further information as to exactly how the 25 member representative working group chose the 8 individual applicants on the day of the 5 July 2002 Broken Hill meeting is, however, absent.

I find it somewhat contradictory that on the one hand, business arising in the course of the claim must be referred to the representative working group, while the group must leave very important decisions to full claim group meetings, but on the other hand the question of who the persons who make up the Applicant should be (as in, who would 'make' the application) was left to the representative working group to sort out. Thus there is nothing before me to confirm that the decision about who the new applicants should be was endorsed by the whole claim group. Attachment R only states that "the meeting nominated a representative working group to, amongst other things, select the individuals to replace [name 2 removed] and [name 3 removed] as the named Applicant".

As such, I must assume the representative working group was given the authority by the wider Broken Hill meeting to choose such persons (even though there appears to be no evidence of that occurring at that meeting), and presume that the 8 names that appear on the application are indeed the persons the representative working group chose to jointly make up the Applicant.

Attachment R also briefly describes events in relation to the filing of an amended application, following the Broken Hill meeting, that relate to the replacement of the Applicant. It states that "[o]n 9 December 2002 orders were made by the Federal Court that 5 of the persons nominated who were members of the claim group in accordance with the then description of the claim group initially replace the former applicant (reported in *Lawson v Minister for Land and Water Conservation [2002] FCA 1517,* Stone J)". This refers to the decision made by Stone J in relation to the s66B application filed by NSW Native Title Services on 1 November 2002. As discussed in the 'Brief History of the Application' at the beginning of these reasons, NSW NTS made a s66B application, because when they sought to amend the application in line with the outcomes of the Broken Hill meeting, Justice Stone ordered that the notice of motion regarding these amendments be held over, pending an application under s66B of the Act to replace the applicants. The s66B application listed 5 new applicants, rather than the 8, and it seems likely that only these 5 applicants were put forward because they were all members of the claim group as it existed at that time, unlike the remaining 3 proposed new applicants who were not members of the 'Pooncarrie' Barkandji.

Attachment R also describes that as a result of the s66B decision, the 5 new applicants:

> "then had the necessary authority to seek to leave to amend the application in accordance with the resolutions passed and the instructions given at the meeting of the native title claim group at

> Broken Hill on 5 July 2002. Those amendments introduced the revised claim group description which then allowed for the addition of the 3 extra people who had been selected to also replace the former applicant …".

Any remaining doubts I may have about whether the applicants were in fact actually authorised by the native title claim group as a whole, must be considered on the basis of the more limited test at s61(1) (as opposed to the test at s190C(4)), due to the affirmed statements of each of the applicants in their s62(2) affidavits that they are "authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to the application".

It appears that information has been provided that on the face of it indicates the applicants were authorised by the members of the native title claim group, via the authority they vested in the representative working group, to make the application and deal with matters arising in relation to it.

Applicants as members of the claim group

It is also apparent from Attachment R that each of the 8 applicants considers themselves to be members of the claim group, and were considered as such by the wider meeting that gathered on 5 July 2002. Each of the 8 individuals who jointly make up the Applicant appear in the list of 25 family representatives who make up the representative working group. Attachment R also indicates 5 of the applicants were members of the previous "Pooncarrie" claimant group, and that the other 3 were members of the claim group in accordance with the amended description.

As to the question "who are the members of the claim group?", Schedule A provides a description that is based on descent from a list of named apical ancestors, as well as a description of other who may be included by virtue of marriage and/or adoption into the group who are also accepted as such by the group in accordance with traditional law and custom. Attachment R states that the members of the previous "Pooncarrie" native title claim group who were present at the Broken Hill meeting "acknowledged that the make up of persons at the meeting was appropriate for them to proceed to make decisions about the claim". My reading of the account of the meeting shows only an acceptance that "there [were] enough people [t]here to make a decision." Further, Attachment R states that "[t][he meeting agreed to amend the description of the native title claim group by deleting the word 'Pooncarrie' and more comprehensively define the apical ancestors of the claim group so as to appropriately include all persons who claim native title rights and interests in the area of the Application."

I believe the application contains sufficient information for me to be able to reasonably conclude that the applicants are members of the claim group, as redefined by the authorisation meeting in July 2002 and this amendment application.

Claim group is those who hold the common/group rights (the native title) according to traditional law and custom

On the face of the information presented in the application, the applicants appear to have been authorised by a group of persons who consider themselves to be the native title claim group for the amended application. The link between

descent and traditional attachment to tracts of country is implied through the discussion that is said to have taken place at the Broken Hill meeting of Jul 2002 in Attachment R that "[t]he meeting agreed to amend the description of the native title claim group by deleting the word "pooncarrie" and more comprehensively define the apical ancestors of the claim group so as to appropriately include all persons who claim native title rights and interests in the area of the Application". This is also consistent with statements contained in Schedule F regarding the factual basis of the application and in the evidentiary affidavit that forms Attachment M(B). Together, this satisfies me that information has been provided that on the face of it addresses the aspect of s61(1) that relates to the claim group being made up of persons asserting group rights to country that accord in some way with traditional law and custom.

There is also nothing in the application to suggest that the persons asserting to be the native title claim group are a sub-group of a wider group of persons who might more properly hold the native title rights and interests in the application area; that is, the native title claim group appear to be "all the persons" who claim native title rights and interests in the application area.

My considered view is that the application meets the s61(1) sub-requirement of the test.

Result: **Requirements met**

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

Subsection 61(2) simply sets out who the applicant is in the case of a native title determination application. The applicant is the person, or persons jointly, who is/are authorised by the native title claim group to make the application. The 'name of applicant(s)' is/are listed at the front of the Form 1. the names that appear here are: Ray Lawson, Noel Johnson, Jennifer Whyman, Patricia Johnson, William Charles Bates, Maureen O'Donnell, Mary-Ann Marton and Cyril James Hunter. These persons are jointly 'the applicant', which I refer to in my reasons as 'the Applicant'. I also refer to the eight individual 'applicants', but technically speaking they are jointly the one 'Applicant'.

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

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

Reasons relating to this sub-condition

The applicants' names are provided on the first page of the application. The details of address for service appear at Part B of the application.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. It does so by stating that the native title claim group is made up of persons who "can claim non-unilineal cognatic descent from the following apical ancestors", which is followed by a list of 50 individually named persons. Below that list there also appears the statement:

> "And persons who have been incorporated into the native title claim group through marriage and/or adoption and are accepted as such by the group in accordance with traditional laws and customs".

I am of the view, on reading *Doepel*, that Mansfield J sets out an approach to the registration test which sees the requirements of s190C as being purely procedural and that the Registrar's obligations do not extend to an evaluative assessment under it. On that basis I accept that there is a statement purporting to satisfy s.61(4), notwithstanding my conclusion below that the requirements for s190B(3) (a merit condition) have not been met

Result: **Requirements met**

Application is in prescribed form: s61(5)

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

Reasons relating to this sub-condition

s61(5)(a)

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

s61(5)(b)

The application was filed in the Federal Court as required pursuant to s61(5)(b).

s61(5)(c)

The application meets the requirements of s61(5)(c) and contains all information prescribed in s62. I refer to my reasons in relation to s62 below.

s61(5)(d)

As required by s61(5)(d), the application is accompanied by the prescribed documents.

This amendment application, as filed on 29 September 2004, is accompanied by affidavits sworn by each of the persons making up the new Applicant. Each of these affidavits address all the matters set out in s62(1)(a).

A map, as prescribed by s62(1)(b), has also been provided – see Attachment C.

I note that while s61(5) states amongst other matters that an application must be accompanied by any prescribed fee, s190C(2) only requires me to be satisfied that the application contains all details and other information and is accompanied by any affidavit or other document required by s61 and 62, but it

does not specify prescribed fees. As applications are filed in the Federal Court rather than the Tribunal, the matter of prescribed fees is an issue for the Court rather than the Tribunal.

It is my view that the requirements of s61(5) are met.

Result: Requirements met

Combined decision for s61

For the reasons identified above in relation to each sub-condition, the application meets the requirements of s61.

Result: Requirements met

Details and other information and documents required by s62

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

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

Reasons relating to this sub-condition

The amendment application, as filed on 29 September 2004, is accompanied by affidavits sworn by each of the eight persons making up the new Applicant. Each of these affidavits address all the matters set out in s62(1)(a)(i) to(v).

Result: Requirements met

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

Paragraph 62(1)(b) asks the Registrar to consider whether the application contains the information required in s62(2). My decision for this condition is set out under s62(2) below, after the reasons in relation to s62(1)(c).

Details of physical connection: s62(1)(c)

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

Reasons relating to this sub-condition

Schedule M states: "Members of the native title claim group have a traditional physical connection to the land and waters covered by the application. Also see Attachment M(B)."

Attachment M(B) consists of an affidavit affirmed by applicant William Charles Bates, and contains statements that indicate Mr Bates' traditional physical connection with the area. The affidavit states at paragraph 5 that "[t]he lands with which I have primary traditional affiliation are in the north of the claim area". Other statements indicate the location of Mr Bates' upbringing , and his travel "throughout the area of the claim" in his lifetime "for both traditional and non-traditional purposes". Paragraph 7 states that Mr Bates and "[his] people have continued to conduct traditional hunting and fishing over areas of the claim and camped in the area". At [paragraph 8, Mr Bates describes experiences such as travelling as a child within the claim area with his father , including spending

"weeks out bush" and during that time "constantly learning about … traditional country and traditional ways".

I consider that information regarding the traditional physical connection of at least one member of the claim group has been provided.

Result: Provided

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

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

Reasons relating to this sub-condition

Schedule B states "See Attachment B describing the external boundaries of the determination area". Attachment B consists of a written description that references points of latitude and longitude as well as parish boundaries. It is followed by a list of boundary coordinates, with reference to longitude and latitude only. Both of these documents were previously prepared by the Tribunal's own Geospatial and Mapping Unit under the 'Assistance to Applicants Policy'.

The required information has been provided.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule B contains information regarding internal areas that are excluded from the application area. These internal areas are described as:

> "(a) Any areas of land and waters within, either current or former, Applications for Determinations of Native Title Numbered NC97/13 (NG6065/98); NC97/14 (NG6066/98); NC97/18 (NG6070/98); NC97/22 (NG6074/98); NC97/23 (NG6075/98) and NC97/30 (NG6082/98);
>
> (b) All land within the Application for Determination of Native Title Numbered NC95/10 (NG6018/98)
>
> (c) Any areas of land and waters which are *previous exclusive possession acts* as defined and provided for by Division 2B of Part 2 of the *Native Title Act 1993*;
>
> (d) Any area of land which has been subject to a lease in perpetuity validly granted under the *Western Lands Act 1901* (NSW): and
>
> (e) Any areas of land or waters covered by past or present freehold title or such other title as will have fully extinguished native title rights and interests at common law."

While these paragraphs do not describe the internal boundaries of themselves, they do allow such boundaries to be established. For the same reasons that I

consider the application meets the test at s190B(2), I also consider here that s62(2)(a)(ii) requirements are met.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

A map depicting the external boundary of the application area is to be found at Attachment C. This map includes a scale, north point legend and a source reference. For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the claim area.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

The application states at Schedule D: "The Department of Lands is undertaking a programmed search of certain lands identified within the area covered by the application, and is providing the results of those searches to the Applicant." I read this as indicating searches are being undertaken by the State but have not been completed and provided to the Applicant as yet. There is nothing before to suggest this is not the case. I take the view that I am only required to consider whether searches have been undertaken by the applicant, as I do not consider that the Act would intend that applicants be required to provide details of all searches, no matter by whom they were made, unless there were clear evidence before me that the applicants were aware of any such 'third party' searches and had accepted them. I consider this requirement is met.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

A description of native title rights and interests claimed is provided at Attachment E. It states:

> "In accordance with the traditional laws and customs acknowledged and observed by the Barkandji Traditional Owners native title claim

group, the claim to the right of possession, occupation, use and enjoyment of the lands and waters insofar as it is necessary to unbundle the comprehensive native title possessed by the Barkandji Traditional Owners, includes the rights (expressed as activities) to:

1. live on and access the area;
2. use and conserve the natural resources of the area for the benefit of the native title holders;
3. maintain, use, manage and enjoy the area for the benefit of the native title holders by:
    a. maintaining and protecting sites of significance to the native title holders;
    b. inheriting and transmitting native title rights and interests consistently with traditional laws and customs;
    c. resolving disputes between the native title holders in relation to the rights of possession, occupation, use and enjoyment of the area;
    d. conducting social, religious, cultural and economic activities in the area;
    e. exercising and carrying out economic life in the area, including harvesting, fishing, cultivating, management and exchange of economic resources;
4. conserve, use and enjoy the natural resources of the area for social, cultural, economic, religious, spiritual, customary and traditional purposes;
5. make decisions about and control the access to the use and enjoyment of the area and its natural resources by the native title holders;
6. control access and use between the native title holder and any other Aboriginal people who seek access to or use of the claim area in accordance with the native title holders' traditional laws and customs;
7. teach and pass on knowledge of the native title holders' traditional laws and customs relating to the area and specific places within the area;
8. learn about and acquire knowledge concerning the native title holders' traditional laws and customs relating to the area and specific places within the area;
9. own, control and manage the cultural and intellectual property in accordance with traditional laws and customs;
10. possess and manage sacred objects relating to the land and waters subject to the application.

The native title claim group claims exclusive possession, occupation, use and enjoyment of:

1. any areas where there has been no previous extinguishment of native title;
2. any areas of natural water resources that are not tidal;
3. any areas affected by Category C and D past and intermediate period acts;
4. section 47 pastoral leases held by native title claimants;
5. section 47A reservation and other interests covered by the claimant application;

6. section 47B vacant Crown land covered by the claimant application.

The rights claimed above are subject to the rights and interests of those lawfully exercising rights and interests which have been validly created and lawfully vested in them by operation of the laws of the State of New South Wales and the Commonwealth. Such validly created and lawfully vested rights and interests include those defined by the Native Title Act (1993) (Cth) as "Previous Non-Exclusive Possession Act"; "Category B Past or Intermediate Period Act"; 'Category C Past or Intermediate period Act" where those rights and interests are not inconsistent with the native title rights and interests claimed and/or the non-extinguishment principle applies."

This description of the claimed native title rights and interests is clearly more specific than a statement to the effect that the application claims all native title rights and interests that may exist or that have not been extinguished at law. While not all the rights and interests described here are 'readily identifiable', as argued in relation to the requirements of s190B(4) below, I do not consider that s62(2)(d) requires me to go further than a consideration of whether a description is provided within the application that is more specific than a 'catch all' description. I consider the requirement of s62(2)(d) are met.

Result: Requirements met

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

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

- i) *the native title claim group have, and the predecessors of those persons had, an association with the area; and*
- ii) *there exist traditional laws and customs that give rise to the claimed native title; and*
- iii) *the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

Reasons relating to this sub-condition

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application, and can not be the subject of additional information provided separately to the Registrar or his delegate. I am satisfied that there is information addressing the factual basis contained in the application, which is provided in Schedules F, G and M of the application and in the attachments referenced in these schedules.

Result: Requirements met

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

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

Reasons relating to this sub-condition

Information concerning activities conducted in the claim area by native title claim group members is contained at Schedule G. References to such activities being carried out is also found at Attachment M(B), which consists of an evidentiary affidavit affirmed by a single member of the claim group, who is also one of the applicants.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

Schedule H simply lists the following NNTT file numbers: "NC00/03; NPA97/1: NPA97/02; NPA97/03; NPA97/04; NPA97/05; NPA97/06 & NPA97/08".

The geospatial assessment and overlap analysis carried out by the Tribunal's Geospatial Unit on 21 December 2004 confirms that the application is overlapped by the following applications (by Tribunal file number):

NC00/3, NN00/3, NPA97/1; NPA97/2, NPA97/3, NPA97/5, NPA97/6, NPA97/8.

In relation to the fact that the application being considered here does not identify non-claimant application as, I note that the preliminary assessment provided to the applicant's representative in October 2003 by the Tribunal's registration test officer in this matter, which provided assistance with respect to identifying overlapping applications, did not identify this non-claimant application. This was an omission. While it would be surprising if the Applicant's representative, NSWNTS, was not aware of the non-claimant application NN00/3, which was made by the Dareton Local Aboriginal Land Council, it is reasonable to expect that NSWNTS may have relied on the information provided by the Tribunal's preliminary assessment October 2003. On this basis, NSWNTS may have reasonably assumed this application either did not overlap or perhaps was not required to be identified because it was a 'non-claimant' rather than a 'claimant' application.

In relation to the fact that NPA97/4 is identified as overlapping, when in fact the overlap analysis does not pick it up, I note that the preliminary assessment provided to the applicant's representative in October 2003 provided an indicative assessment of the overlaps with compensation applications only "as the Tribunal's Geospatial and Mapping Unit has not yet carried out technical definitions of the compensation applications areas as yet". This indicative information identified NPA97/4 as being likely to overlap with NC97/32. It would appear that the Applicant has relied on the October 2003 preliminary assessment, but that in the meantime the lack of overlap has been identified. The area of NPA97/4 in fact coincides with the area of claimant application NC97/18, being over Lake Victoria, and NC97/18 has been specifically

excluded from the application area of NC97/32, therefore by deduction, NPA97/4 is also excluded.

All other applications identified in the overlap analysis coincide with applications identified as overlapping by the Applicant at Schedule H.

I am prepared to accept that despite the fact that the application does not identify overlapping non-claimant application NN00/3 and incorrectly identifies NPA97/4 as overlapping, the requirements of this part of the registration test have been met to what might reasonably be expected from the Applicant, given the preliminary assessment provided by the Tribunal in October 1993, and given the beneficial nature of the *Native Title Act 1993*, and that identification of these overlaps is not a substantive issue.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

Schedule I refers to Attachment I, which is a list of the "[d]etails of Section 29 notices which have [sic] issued in respect of the Determination area, current as at May 2004", and sourced from the National Native Title Tribunal.

This list coincides completely with the list that appears in the 'geospatial assessment and overlap analysis' carried out by the Tribunal's Geospatial Unit on 21 December 2004.

Result: **Requirements met**

Combined decision for s62

The application contains all details and other information, and is accompanied by the documents, required by s 62.

Result: **Requirements met**

Combined decision for s190C(2)

The application contains all details and other information, and is accompanied by the documents, required by s61 and s62. Therefore the application meets the requirements of s190C(2).

Result: **Requirements met**

Common claimants in overlapping claims: s190C(3)

The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application; and

(b) *an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and*

(c) *the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

Reasons relating to this condition

Schedule O states: "Not applicable".

As identified in the 'geospatial assessment and overlap analysis' carried out by the Tribunal's Geospatial Unit, the application is overlapped by claimant application NC00/3 and non-claimant application NN00/3.

NN00/3 is a combined application, having combined the two previously existing applications NC97/27 and NC97/29. Application NC97/27 was made on 15 September 1997 and application NC97/29 was made on 1 October 1997. these application were combined on 8 September 2000.

I must consider whether in fact either of these applications were on the Register of Native Title Claims as a result of having been considered under s190A, as at the date this Barkandji application being considered here was first made. Application NC97/32 was first made on 8 October 1997. The amendments to the Native Title Act 1993, that brought about the registration test under s190A,190B and 190C, only came into effect on 29 September 1998. It is therefore not possible for these other overlapping applications to have been on the Register as a result of having been considered under the registration test, at the time that NC97/32 was first made.

Since the pre-conditions under s190C(3)(b) can not be met, I need not go further and consider whether in fact there is any common membership of the overlapping applications.

The test at s190C(3) has been met.

Result: Requirements met

Application is authorised/certified: s190C(4)

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

(a) *the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or*

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

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

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

(a) *includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*

(b) *briefly set out the grounds on which the Registrar should consider that it has been met.*

Reasons relating to this condition

What does s190C(4) require

The application is not certified pursuant to s190C(4)(a). I must therefore be satisfied that the requirement in subsection 190C(4)(b) is met.

In particular, s.190C(4)(b) requires the Registrar to be satisfied that the persons who make up the Applicant are members of the native title claim group and are 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, pursuant to s190C4(b).

S.190C(5) sets out certain requirements for uncertified applications

> *'(5) If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:*
> *(a)includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*
> *(b)briefly set out the grounds on which the Registrar should consider that it has been met.'*

I am satisfied that such a statement referred to in subsection (a) appears at Schedule R.

I am satisfied that the brief grounds referred to in subsection (b)are provided.

What is authorisation?

Authorisation is defined in s251B and provides that where there is a process of decision making under traditional law and custom then authorisation must be in accordance with that process, but where there is no such process, the native title claim group may authorise the applicant in accordance with a process of decision making agreed to and adopted by the group. It will be of use to set out s251B in full, as follows:

> *"For the purposes of this Act, all the persons in a native title claim group or compensation claim group* ***authorise*** *a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:*
>
> *(a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or*
>
> *(b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind."*

It is clear as a matter of law that the requirement that the applicant be authorised by all the persons in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant[7]. The Act simply requires all those persons who need to authorise an Applicant according to traditional law and custom do so. There may well be individual members of the claim group who for one reason or another are incapable of authorising an applicant - for example because they are of unsound mind, ill, or unable to be located- or are disinclined to do so for whatever reason.

The Federal Court has consistently emphasised the fundamental importance the NTA places on ensuring that claimant applications are properly authorised.[8]

In *Northern Territory of Australia v Doepel [2003] FCA 1384* Mansfield J. said this of the role of the Registrar:

> Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar. Section 190C(4) is set out at [14] above. The contrast between the requirements of subsection (4)(a) and (4)(b) is dramatic. In the case of subsection (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subsection (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s190C(4)(b). The interactions of s190C(4)(b) and s190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given. The nature of the enquiry is discussed by French J in *Strickland v NTR* at 259 - 260, and approved by the Full Court in *WA v Strickland* at 51 - 52. Both *Martin* at [13] - [18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b). [paragraph 78]

What material has the delegate considered?

I have given consideration to a broader range of information than just the application itself, as s190A(3) gives me authority to do (the Registrar may have regard to such other information as he or she considers appropriate), and consistent with the comment of Mansfield J in *Doepel* regarding the differences between the consideration at s190C(2) (of which s61(1) is a sub-requirement) and at s190C(4) .This other material is as follows:

- submission from applicant, Mr Noel Johnson, and claimant, [name 1 removed], provided for registration testing purposes to the Tribunal in June 2004, consisting of 2 affidavits plus attachments (the covering affidavits being undated documents that were filed in the Federal Court on 1 December 2003)

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[7] *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J. Refer also O'Loughlin J, *Quall v Risk* [2001] FCA 378 at paras [33-34].

[8] *Ankamuthi People v Queensland* [2002] FCA 897, Drummond J; *Strickland v Native Title Registrar* (1999) 168 ALR 242, French J; *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637; *Quall v Risk* [2001]; FCA 378 *Daniel v State of Western Australia* [2002] FCA 1147, French J.

- submission from applicant, Mr Noel Johnson, provided to the Tribunal for registration testing purposes on 11 November 2004, being an affidavit affirmed on that same day
- Attachment R and R1 of the application as filed on 11 December 2002, which no longer form part of the current amendment application being considered , since Schedule S of the current amendment application, as filed on 29 September 2004, states (amongst other amendments to the application): "Attachment R amended to include a statement as to the amendments made in this amended application; deletion of Attachment R1"
- judgment of Stone J in *Johnson v Minister for Land and Water Conservation [2003] FCA 981…*
- The delegate has not been supplied with, nor directed to by a party, any material which was before the Court on that s66B application which saw the original applicants replaced, and any such material has thus not been considered. The reported decision has been read.
- The delegate has also considered material filed or submitted in relation to authorisation of other Barkandji claims and the details of those files is to be found at the start of these reasons.

A preliminary assessment of the application was provided to the applicants' representatives in October 2003 drawing attention to a number of significant questions raised by the then-proposed amended application. The 'Brief history of the application', at the beginning of these reasons, sets out subsequent events and should be referred to at this point.

Adverse material about authorisation

Although it has not been raised by the parties it may be argued that the question of authorisation is subject to issue estoppel. The case law provides no certainty. I do not believe that the doctrine of estoppel applies to an administrative decision of the present kind. Authorisation is being considered here pursuant to s190C(4) on the amended application, whereas before Stone J the question was considered for the purposes of s.66B. The requirement that the Registrar be 'satisfied' is not a final adjudication, is for a different purpose, and this consideration relies partly on material not available to the Court, so far as I am aware. The obligation on the Registrar arises at the time of his consideration of the application.

Affidavits and a submission, noted above, have been provided by three members of the claim group which raise issues arising out of the conduct of the Broken Hill meeting.

Information received subsequently from these members of the claim group raised further questions about the authorisation process described in the application. Although they expressed dissatisfaction with a number of aspects of the application, these matters are not relevant to the authorisation condition

I note that Attachment R1 of the application as filed on 11 September consists of an affidavit by [name 4 removed] together with 11 annexures, two of which are accounts of the meeting and the remainder provide details of notice being given etc.:that further material details the kind of information suggested in *Ward v Northern Territory 2002 FCA 171* at paras [*23*]-[*26*] per O'Loughlin J

In relation to the submissions provided directly to me from Mr Noel Johnson and [name 1 removed] referred to above, I note that both times when the Tribunal received these submissions June 2004 and in November 2004, the Tribunal's registration testing officer provided these submissions to the representative of the Applicant, being NSW NTS, in order to afford them with an opportunity to comment on them, in line with procedural fairness principles. On neither occasion was any comment received from NSW NTS, despite indications that there would be.

What does the application say or not say about authorisation?

The material contained *in the application* which addresses the authorisation consists of the most recently filed version of Attachment R, and the statements affirmed in the s62(2) affidavits by each of the applicants. This material has been summarised under the reasons for the test at s61(1) above. However, I quote here 2 pertinent passages from Attachment R:

> "On a consensus basis, the meeting nominated a representative working group to, amongst other things, select the individuals to replace [name 2 removed] and [name 3 removed] as the named Applicant. This approach was agreed to and adopted by the members of the claim group in accordance with section 2518 (b) of the NTA. The manner of conduct of the decision making process was informed by the traditions and customs of the native title claim group but in the absence of a binding traditional process for things of this kind the group elected to proceed through consultation and voting by show of hands.
>
> The process adopted at the meeting for the future work of the claim requires reference to the working group of business arising in the course of the claim. The working group will consider such matters and instruct the Applicant. Very important decisions must be made by a full claim group meeting. The persons selected for the working group were representative of the major families of the claim area. Working group members who are unable to attend working group meetings may inform those attending the meeting of their views on the matters arising for discussion. As long as all members of the working group have notice of the purpose of a meeting and have the opportunity to convey their views prior to the meeting, no formal quorum for working group meetings was set.
>
> The composition of the Working Group that was settled on 5 July 2002 was as follows [followed by the heading 'Families', under which 10 family groups are listed by surnames, and second heading of 'Representatives' followed by 25 individual names] …"

And further:

> "To put beyond any doubt the method of decision making which provides authority to the applicant to make the application and to deal with matters arising in the course of the claim, the meeting agreed for things of this kind, (being processes through which the group must go under the *Native Title Act*) there was no directly applicable traditional decision making process. A process was agreed to and adopted which is consistent with the traditional methods of decision making which, in ordinary circumstances, are binding on the group. That process provides that members of a Working Group were nominated by their family groups to represent them. The Working Group includes all of the individuals who are the applicant. The Working Group has the function of dealing with day to day decisions on matters arising in the course of the claim. Decisions by the working group will take into account the advice of the Elders and will continue the authority of the individuals who are the applicant to take certain steps as they arise in the course of the claim. Important decisions about the claim will be taken to claim group meetings. Most decisions are made by consensus. At large meetings votes on important decisions, expressed through resolutions, will be by show of hands. NSW NTS, as the legal representative of the claim will provide notice of matters which the working group and/or meetings must consider."

I also note the issue raised in my reasons at s61(1) that Attachment R indicates that the wider meeting of persons who make up the native title claim group in Broken Hill who appear to be the native title claim group in the current application did not appear to directly authorise the persons who make up the Applicant to "make the application and to deal with matters arising in relation to it", to use the terminology of s251B.

Rather, according to the latest Attachment R, they gave authority for a representative working group, whose make up was decided at the Broken Hill meeting, to "select the individuals to replace [name 1 removed] and [name 2 removed] [who were jointly the Applicant at that time] as the named Applicant".

Further, Attachment R does not appear to reference or in any way confirm the authority of the persons making up the Applicant to "deal with matters arising in relation to" the native title claim, as set out in s215B. Rather, it would appear that the 'representative working group' hold some of the authority to deal with matters arising, given Attachment R states that "business arising in the course of the claim" will be referred to the representative working group (and who will refer this business to them is also not entirely clear, but presumably by the persons who are the Applicant, or by the Applicant's representative, being NSW NTS). And "very important decisions", which are not specified in any way, are to be made by the full claim group. Attachment R states that all the individuals who make up the Applicant are members of the working group. Arguably this might indicate any decisions of the working group would coincide with decisions of the persons who jointly make up the applicant. However, I note that there are 8 applicants but 25 members of the working group. Nor are there apparently any quorum requirements for meetings of the working group, but so long as proper notice of meetings is given, and opportunities are provided for persons who can not attend working group meetings to convey their views prior to a meeting, it would appear that the working group has authority to deal with

matters arising. A further complication is that in paragraph 6 of Attachment R it is said that the working group will 'consider such matters and instruct the Applicant'. This does not seem to be consistent with the Applicant having authority. Further, Attachment R states that the "[d]ecisions of the working group will … continue the authority of the individuals who are the applicant to take certain steps as they arise in the course of the claim". This suggests, at the least, some some interchangeability of the authority of the applicant and the working group.

I am also unable to accept that this characterisation of the decisions of the Broken Hill meeting accords with the detailed notes of the meeting provided as Annexure [name 4 removed] 11 to the affidavit of [name 4 removed] dated 26 July 2002.. For example, at p.616 of that affidavit there is this passage:

"**[name of Chair of meeting removed]** :

The first item on the agenda is the Decision making process. What we have to decide is the right way for decisions to be made about native title matters. So, first thing to deal with is whether people agree that there are enough here to make a decision?

Shouted in many voices from the floor

Yes

[Chair of meeting]:

Do you want to indicate the decisions through show of hands or by sorting into family groups?

Shouted in many voices from the floor

Show of hands"

Then follows motions to this effect being put to the meeting and passed on a show of hands. There is no other question or resolution put to the meeting as to whether a traditional process for decision making exists and is mandatory or whether one exists but is no longer applicable and I can see no discussion of that at the meeting, except to say that some traditional processes are clearly in play.

At pages 623-4 appears the record of the meeting's choice of applicants. It would seem that they were chosen by the working group during the afternoon tea break and then announced to the meeting, which greeted their decision with 'applause from the room", but no vote. Nor was any vote taken on the composition of the working group and contra to the passage above, it was explicitly taken on the basis of 'family groups'.

Finally, I note that at p.625 of that affidavit [name 4 removed] says that:

' The working party is the real engine room. The eight names are there to represent everybody'

and a little further on appears this :

"From the floor

Will the fact that we have formed a working group and that it will direct the applicants become part of the claim?

PH

From the way people have formed the working group and chosen the applicants you have included a number of checks and balances. This is part of your authorisation process. That will be part of the registered claim….The authorisation process figured out here with the working group directing the applicants will be part of the documents attached to an amended claim.'"

I do not believe it is clear that the persons making up the Applicant have authority *in their own right* to deal with matters arising in relation to the claim, as required by s251B.

Traditional vs non-traditional decision making processes

The second passage quoted from Attachment R above appears to go some way towards addressing the question of whether the decision making process by which the applicant is authorised to make the application and deal with matters arising in relation to it is in accordance with a traditional decision-making process or, where no such process exists, a process agreed to and adopted by the persons in the native title claim group. This passage states that "the method of decision making which provides authority to the applicant to make the application and to deal with matters arising in the course of the claim, the meeting [in Broken Hill on 5 July 2002] agreed that, for things of this kind, (being processes through which the group must go under the *Native Title Act*) there was no directly applicable traditional decision making process".

I can find no support, however, for that statement in the records of the meeting.

I note from her reasons in the s.66B application that Stone J refers to a traditional process existing previously (at para 2) and at para 20 notes also that the existence of such a process was 'not directly challenged', but Her Honour appears to have accepted a submission that it had 'broken down and is unable to cope" or was, in counsel's words, 'unable to sustain' the claim group. No such submissions, nor the material on which they were made, appear to be before me.

I note that Attachment R is rather silent about the very specific question of how the representative working group, who had vested in them by the wider claim group the authority to "amongst other things, select the individuals to replace [the previous Applicant]", actually exercised that authority. Given that the wider claim group does not appear to have directly authorised the Applicant to make the application, then how did the representative working group *authorise*, in the very specific terms of s251B, certain persons (ie, the Applicant) to *make the application and deal with matters arising in relation to it*? There is no description of the decision-making processes of that smaller working group on the day of the Broken Hill meeting, where the persons making up the Applicant were chosen (I note the affidavits sworn by each of the persons who are the Applicant in the version of the application filed on 11 December were all affirmed on 5 July 2002, being the same day as the Broken Hill meeting. I interpolate here that it is also of some concern that the s62 affidavits filed with the previous application stated that the basis on which applicants were 'authorised as an applicant in this native title application is pursuant to a process of decision making agreed to and adopted by resolutions passed at the meeting of people who are members of the Barkandji native title claim group *and other Aboriginal people who claim to hold native title rights and interests in the area of the application.* (my italics) Who these 'other Aboriginal people' might be is unknown, nor can I find any mention of them in the meeting record; this seems to suggest that non-members were able to vote on authorisation. No such

assertions appear in the more recent s62 affidavits and I am not able to accept that persons who do not fit the definition of the claim group at s.253 can participate in the authorisation process...

It seems to me that the description of decision-making processes in Attachment R describes the decision-making processes of the wider claim group on that day, but not of the specific decision that authorised the Applicant to make the application and to deal with matters arising. Was this specific decision also one for which there was no applicable traditional decision making process? The statement in Attachment R starting with "to put beyond any doubt", as quoted at length above, suggests an affirmative answer to this question. But the absence of a description of this exact decision raises some doubt in my mind.

This doubt is related to the fact that the application as considered by the Registrar for registration under s190A in 1999 was found to satisfy s190C(4) according to a traditional decision making process that relied on the traditional authority of family heads to make decisions of this kind. The working group established at the Broken Hill meeting consisted of family heads. This was clearly a larger number of family heads than was put forward in the authorisation of the application when it was amended in August 1999. However, this change was also consistent with the widening out of the native title claim group also resolved at the Broken Hill meeting of 2002. From August 1999 through to 11 December 2002, the native title claim group for this application was referred to as the "Pooncarrie" Paakantji or Barkandji (in the formal application documents), and the nature of the claim sought was that this group asserted 'primary' or more full native title rights to the southern part of the native title claim area, but only more limited or 'secondary' rights of access to the northern part of the claim (with a definition of the border between the northern and southern areas forming part of the area description at Schedule B of the application during that same time). The widening out of the native title claim group to " include all persons who claim native title rights and interests in the area of the Application" (to quote from Attachment R), as filed on 11 December 2002, coincided with amendments to the native title rights and interests being claimed, as *full* native title rights and interests across the whole application area.

Given that family heads make up the representative working group membership, and given that these family heads chose the applicants, is it truly the case that the decision-making process had really broken down by the time that a new Applicant was authorised in July 2002 in Broken Hill?

Related to this doubt is the way in which s251B describes two *mutually exclusive* forms of decision-making giving rise to authorisation of an Applicant - traditional and non-traditional - rather than decision making processes that might be interchangeable.

This is confirmed in *Dieri People v State of South Australia [2003] FCA 187* where Mansfield J considered s251B(a) and (b) as follows:

> *"Section 251B provides for two mutually exclusive forms of authorisation. First, where there is a process of decision-making under traditional laws and customs of the native title claim group for authorising such things, the persons in that group must have authorised the applicants to bring the claim in accordance with that process. The alternative, available only where there is no such process, is authorisation by an agreed and adopted process of decision-making by*

persons in the native title claim group. The nature of the authorisation in this instance, as described in the affidavits of Raelene Warren and Angus Warren, and set out briefly in [52] above, does not clearly evidence that the first process of authorisation was adopted and does not set out to establish that the alternative process of authorisation was available, and adopted, because the primary process of authorisation did not exist. "(para 57)

Similar questions have also recently been considered in Evans v Native Title Registrar [2004] FCA 1070 by Nicholson J, in which the same view was taken:

52 In Daniel at [14] French J said:

'[14] ... In so far as s 251B relies upon decision-making under traditional law and custom, it seems to allow for recognition of a process applicable by way of analogy to decision-making relating to the institution of native title proceedings under the Act. For that is hardly a matter likely to have been contemplated explicitly by traditional law and custom. It may be that it is sufficient for the purposes of par (a) of s 251B to identify traditional decision-making applicable to the exercise of responsibility for, or authority over the land and waters in question. Nevertheless it should not be surprising if there is some difficulty in applying traditional decision-making processes, albeit by closest analogy, to the conferring of the kind of authority contemplated by s 251B.'

That statement is not one which provides any support for conflating the two processes provided for by the legislature in s 251B of the NTA.

53 It is necessary, if the Registrar is to be satisfied under s 190A(6), that the information placed by claimants before him demonstrate compliance with either of the processes for which the legislature has allowed. That information may, in cases where the facts require, show that traditional processes have led to the adoption of a certain method by which authorisation has been given. However, that was not the effect of the information here. It is for the Registrar to decide whether or not he is satisfied on the issue of authorisation on the information brought to him. If he is not satisfied, he may either conclude accordingly or seek further information. Here the delegate chose the latter course. The explanation provided, however, did not deal with the specifics of the matter.

54 I do not accept that the Registrar misconstrued the information before him by wrongly regarding it as not clear on which of the methods of authorisation was being addressed. This was a case where there was genuine inconsistency in the information provided. Nor do I consider the application of the alternative method of authorisation was precluded by him in his approach to that information. There was no error of fact or law in the way contended.

I am unable to conclude on the evidence before me that 'there is no such process' (s.251A(b)) such that an agreed process could be utilised. If anything, the evidence (including the description of what actually occurred at the Broken

Hill meeting rather than how it was described) strongly suggests that such a process does still exist. Other than the two questions posed by [name of Chair of meeting removed] detailed above, I am unable to find evidence that the claim group as a whole even considered that issue.

I find that I cannot be satisfied as to authorisation for all the reasons above. The submissions from Noel and [name 1 removed] raise further queries as to the conduct of the meeting, in a context which must be seen as unhappy, there having been prior attempts to 'unseat' them.

I should also say that these queries were first raised with the applicants representatives in October 2003 but no response has been made.

Result: **Requirements not met**

Merits Conditions: s190B

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

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

Reasons relating to this condition

As discussed under the test at ss62(2)(a) and (b), a map has been provided as well as information that identifies the area subject to the application in the form of a description of the external boundary of the area (both by written description and a list of coordinates) and of internal exclusions.

I simply refer to the geospatial assessment and overlap analysis prepared by the Tribunal's own Geospatial Unit, dated 21 December 2004, which states on page 2:

"Notwithstanding the above minor errors [2 minor typographical errors are identified in the external boundary description], the description and map are consistent and identify the application area with reasonable certainty".

Result: **Requirements met**

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

The Registrar must be satisfied that:

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

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

Reasons relating to this condition

The application does not name all the persons in the native title claim group. The alternative requirement, then, is for the application to meet the test of s190B(3)(b); that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is a member of the native title claim group.

The description of the persons in the group is found at Schedule A of the application, which describes the claim as being brought on behalf of the Barkandji Traditional Owners, who are the native title claim group. Schedule A states that the native title claim group is "made up of those persons who can claim non-unilineal cognatic descent" from a list of named apical ancestors (that is contained in Schedule A) and in addition "those persons who have been incorporated into the native title claim group through marriage and/or adoption and are accepted as such by the group in accordance with traditional laws and customs".

I am satisfied that in order to establish whether a particular individual is a member of the native title claim group or not, I may need to make some further enquiries consistent with the criteria indicated in Schedule A: for example,

enquiring as to a person's descent or as to history of adoption or marriage into the group and indications of their acceptance by the wider group.

The requirement of 'identifiability' of 'any person' is one peculiar to the registration test and arguably is stricter than that required for a determination under s.225(a). I t must be assumed that this requirement relates to the specific pro tem benefits acquired by registration

The claim group description may be paraphrased, if I understand it correctly, as being 'those descendants of named apical ancestors who choose ('cognatic') to identify as Barkandji, and that this class can include adoptees and spouses of Barkandji people who also 'choose' to so identify. There is no reason to think that anything else is the case, nor to suggest that this is not an accurate description, but it does not allow the 'identification' of any one person other than by that person asserting membership; that is, there is no objective test which will allow that to be done.

There is a requirement that persons adopted or marrying in need to be recognised by the larger group, but even that is difficult to regard as objective. There is no such requirement for the wider claim group. Such descriptions have regularly been disallowed by the courts.

In *Doepel* the test was put this way:

> "*"Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group*." [37]

The issue has been considered in a number of cases, both of matters arising under the old Act of 1993 and under the new Act, as amended in 1998. The relevant sections under the old act were s61(2) and(3) which provided as follows:

> *"(2) An application must be in the prescribed form and be given to the Registrar. It must also contain such information in relation to the matters sought to be determined as is prescribed.*
> *(3) An application made by a person or persons claiming to hold native title, or to be entitled to compensation, with others must describe or otherwise identify those others. In doing so, it is not necessary to name them or to say how many there are."*

It is my view that the wording of the old act has the same fundamental requirements as the new, namely, that there be a description or identification in the application. S190B(3)(b) in my view requires an even higher level of description. The principle which may be extracted from these cases is, as I understand them, that the courts will not accept self-identification as a sufficient description, without some objective identifier.

In *Ridgeway on behalf of the Worimi People, in the matter of Russell v Bissett-Ridgeway[2001] FCA 848,* Tamberlin J. said of a claim group description in these terms:

> *"Those members of the Worimi people who are affiliated with the area which includes the land which is the subject of this application. Full genealogical material will be provided at a later date."* that

"...I am not satisfied that the members of the claim group have been sufficiently identified to determine whether there has been a proper decision taken to authorise the Motion."(at paragraph 34)...

In Ford v NSW Minister for Land & Water Conservation [2000] FCA 1913 *Lindgren J. said:*

"In the application as lodged with the Tribunal, Mrs Ford identified the other claimants as "The Elouera people". The Land Council has on many occasions before the Court, contended that this is an inadequate identification of the other claimants, that is, that it does not comply with the requirement of subs 61(2) of the old Act. I agree. Identification in those terms without more is not meaningful to the Court. Identification in those terms alone does not make it clear whether a particular person is a person on whose behalf Mrs Ford is making the claim. I accept that no matter what description is used, there can be debate about whether a particular individual is or is not such a person, but the mere words "The Elouera People", without any elaboration, does not convey meaning to the Court, or to individuals who may be contemplating applying to be joined as a party."

21 I note that a similar approach was taken by Madgwick J to the expression, "the Korewal Aboriginal People", in Korewal People - Longbottom v NSW Minister for Land & Water Conservation (No 2) [2000] FCA 1237, at pars 10-12."

In that case cited with approval by Lindgren J, *Korewal People - Longbottom v NSW Minister for Land & Water Conservation (No. 2) [2000] FCA 1237,* Madgwick J said:

"11 Notwithstanding that an applicant would not be assisted by that marginal note, it is nevertheless clear that there must be some actual description or means of identification of who the other people are. This ought, among other things, to enable potential parties to consider whether they will seek to become actual parties. The information given by the applicants was:

"The Korewal Aboriginal People"

12 There is no means at all, apart from resort to a self-bestowed and unverifiable description, to enable that to be done. It may be that the applicants are justified in using that description, however its use alone does not comply with the then requirements of the Act. For this reason too, it seems to me that the objection to the application is well founded"

In a case where the provisions of the new Act were under examination., *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1594,* Carr J considered a claim group description which was expressed as follows:.

"1. The biological descendants of certain named people;

2. Persons adopted by the biological descendants of the named people."

Carr J referred to this method of identification as "the Two Rules" and went on to consider it in these terms:.

> *"67 The question is whether the application of the Two Rules describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group. In my view it does. The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the descriptions in the Two Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Two Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. 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. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: Kanak v National Native Title Tribunal (1995) 61 FCR 103 at 124"*

Whilst the principle enunciated in Kanak's Case is not to be doubted, I have come to the conclusion that this case must be distinguished from the others cited above. The difference is that in *State of Western Australia v Native Title Registrar & Ors*, both 'legs' of the 'Two Rules" test were matters of objective fact (absolute descent rather than cognatic) and the oft-quoted extract from the passage above, 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." must be read as a reference to an enquiry as to objective facts which define a member of the claim group, not self-identification. I read His Honour's remarks as accepting the necessity for some enquiry to locate members of the claim group (by, say, identifying them as descendants of an apical ancestor), not as an enquiry as to what might be the underlying identifying principle.

It is my view that the information provided is not sufficient for it to be ascertained, whether any particular person is a member of the native title claim group, or not.

I am not satisfied that the application meets the requirements of this subsection.

Result: Requirements not met

Native title rights and interests are readily identifiable: s190B(4)

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

Reasons relating to this condition

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the native title rights and interests in the application is sufficient to allow the claimed rights and interests to be readily identified. To meet the

requirements of s190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.9

Section 62(2)(d) requires that the application contain "a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law." This terminology suggests that Parliament intended to screen out applications which describe native title rights and interests in a manner which is vague, or unclear.

Furthermore, the phrases 'native title' and 'native title rights and interests' are used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s223 of the Act.

Subsection 223(1) reads as follows:

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

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s190B(4). These are rights and interests which the courts have found to fall outside the scope of s223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,10 rights to minerals and petroleum under relevant Queensland legislation,11 an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.12

The majority of the High Court in Ward commented that while the exclusive right to possess, occupy, use and enjoy the claim area was acceptable as a description of the native title rights and interests claimed, this composite right

[9] *Queensland v Hutchinson* (2001) 108 FCR 575.
[10] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[11] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[12] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

was probably not acceptable where rights other than exclusive rights were being claimed. Therefore possession, occupation, use and enjoyment of the claim area should be claimed only in relation to those areas where exclusive possession can be made out. Subject to other requirements being met, a claim to exclusive possession may be established prima facie over areas where:

- there has been no previous extinguishment of native title; or
- the non-extinguishment principle in s.238 of the Native Title Act applies; for example where s.47, s.47A or s.47B applies and in relation to areas affected by Category C and D past and intermediate period acts.

The rights and interests claimed

At Schedule E of the application the Applicant claims the following rights and interests (quoted in full):

> "In accordance with the traditional laws and customs acknowledged and observed by the Barkandji Traditional Owners native title claim group, the claim to the right of possession, occupation, use and enjoyment of the lands and waters insofar as it is necessary to unbundle the comprehensive native title possessed by the Barkandji Traditional Owners, includes the rights (expressed as activities) to:
>
> 1. live on and access the area;
> 2. use and conserve the natural resources of the area for the benefit of the native title holders;
> 3. maintain, use, manage and enjoy the area for the benefit of the native title holders by:
>   a. maintaining and protecting sites of significance to the native title holders;
>   b. inheriting and transmitting native title rights and interests consistently with traditional laws and customs;
>   c. resolving disputes between the native title holders in relation to the rights of possession, occupation, use and enjoyment of the area;
>   d. conducting social, religious, cultural and economic activities in the area;
>   e. exercising and carrying out economic life in the area, including harvesting, fishing, cultivating, management and exchange of economic resources;
> 4. conserve, use and enjoy the natural resources of the area for social, cultural, economic, religious, spiritual, customary and traditional purposes;
> 5. make decisions about and control the access to the use and enjoyment of the area and its natural resources by the native title holders;
> 6. control access and use between the native title holder and any other Aboriginal people who seek access to or use of the claim area in accordance with the native title holders' traditional laws and customs;
> 7. teach and pass on knowledge of the native title holders' traditional laws and customs relating to the area and specific places within the area;

8. learn about and acquire knowledge concerning the native title holders' traditional laws and customs relating to the area and specific places within the area;
9. own, control and manage the cultural and intellectual property in accordance with traditional laws and customs;
10. possess and manage sacred objects relating to the land and waters subject to the application.

The native title claim group claims exclusive possession, occupation, use and enjoyment of:

1. any areas where there has been no previous extinguishment of native title;
2. any areas of natural water resources that are not tidal;
3. any areas affected by Category C and D past and intermediate period acts;
4. section 47 pastoral leases held by native title claimants;
5. section 47A reservation and other interests covered by the claimant application;
6. section 47B vacant Crown land covered by the claimant application.

The rights claimed above are subject to the rights and interests of those lawfully exercising rights and interests which have been validly created and lawfully vested in them by operation of the laws of the State of New South Wales and the Commonwealth. Such validly created and lawfully vested rights and interests include those defined by the Native Title Act (1993) (Cth) as "Previous Non-Exclusive Possession Act"; "Category B Past or Intermediate Period Act"; 'Category C Past or Intermediate period Act" where those rights and interests are not inconsistent with the native title rights and interests claimed and/or the non-extinguishment principle applies."

I now turn to a consideration of the nature of these rights and interests; that is, whether they appear to be claiming exclusive possession or not, and related to this, whether they are readily identifiable.

The first paragraph of Schedule E uses the phrase that the native title claim group claim "the right of possession, occupation, use and enjoyment of the lands and waters…". I note this paragraph does not use the term "exclusive" possession, occupation, use and enjoyment".

Later in Schedule E the statement also appears that "[t]he native title claim group claims *exclusive* possession, occupation, use and enjoyment of… [my emphasis]" and then lists 6 types of areas, such as "any areas where there has been no previous extinguishment of native title" and "any areas affected by Category C and D past and intermediate period acts" and "section 47 pastoral leases held by native title claimants".

This is then followed by the final paragraph that states that the rights and interests being claimed are "subject to the rights and interests of those lawfully exercising rights and interests which have been validly created and lawfully vested in them by operation of the laws of the State of New South Wales and the Commonwealth" which is then explained in further detail with examples of such validly crated and lawfully vested rights and interests and with the further caveat "where those rights and interests are not inconsistent with the native title rights

and interests claimed and/or the non-extinguishment principle applies". Thus the exclusive rights and interests sought are limited by the existence of other co-existing rights. In essence this amounts to a claim for exclusive possession, where it can be established by virtue of the lack of existence of other validly and lawfully created rights and interests, or by virtue of ss47, 47A and 47B. A claim to non-exclusive possession is also further confirmed by the draft determination statement at Schedule J that:

> "The native title rights and interests are exercisable concurrently with any other valid interests arising from the operation of laws of the Commonwealth of Australia and the State of New South Wales. To the extent that they are not exercisable concurrently with those other interests, those other interests may regulate, control, curtail, restrict, suspend or postpone that exercise of the native title rights and interests."

However, as alluded to above, there are problems with use of the terminology "possession, occupation, use and enjoyment of the lands and waters" as non-exclusive rights and interest in the first paragraph of Schedule E.

In the High Court's majority judgment in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ), their Honours said:

> "[52] It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.
>
> [53] Further, to find that, according to traditional law and culture, there is a right to control access to land, or to make decisions about its use, but that the right is not an exclusive right, may mask the fact that there is an unresolved question of extinguishment. At the least, it requires close attention to the statement of "the relationship" between the native title rights and interests and the "other interests" relating to the determination area. (s.225(d))."

I can not accept "possession, occupation, use and enjoyment" as a non-exclusive generalised right as being readily identifiable.

This first paragraph also goes on to "unbundle" the "comprehensive native title possessed by the Barkandji Traditional Owners" ("comprehensive" although not described here as "exclusive", as noted above), by listing activities that are "included" in this bundle. The use of the term "included" is fatal (precisely because it does not 'unbundle') to the non-exclusive native title rights and interests listed as activities being readily identifiable if I am to follow the reasoning in *Attorney-General of the Northern Territory v Ward* [2003] FCA FC 283 (hereafter 'Attorney General NT'):

“[16] The opening words of clause 5 of the proposed determination identify the native title holders’ rights as being ‘non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement’ certain identified rights. Counsel for the Commonwealth and the State of Western Australia argue for two changes to these words: the omission of the word ‘occupy’ and the substitution of ‘being’ for the words ‘including, as incidents of that entitlement’. These changes are resisted by counsel for the claimants, Mr J Basten QC.

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

[18] The argument for an exhaustive, rather than inclusive, list of the incidents of the entitlement is based on para (b) of s 225 of the Act. That paragraph requires ‘a determination of ... the nature and extent of the native title rights and interests in relation to the determination area’.

[19] In their High Court joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ said (at [51]):

*‘A determination of native title must comply with the requirements of s 225. In particular, it must state the **nature** and **extent** of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.’*
(Original emphasis)

[20] Mr Basten argues that s 225(b) is satisfied by the reference in clause 5 of the proposed determination to ‘non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs’. He says this is the required specification of the nature and extent of the rights and interests; sub-

> clause (a) to (e) merely identify some incidents of those rights and interests.
>
> [21] We cannot agree with this approach. A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy."

I can only establish that a right to "exclusive possession, occupation, use and enjoyment" has been readily identified, and this is limited to the 6 types of areas described in Schedule E, as follows:

"exclusive possession, occupation, use and enjoyment of:

1. "any areas where there has been no previous extinguishment of native title;
2. any areas of natural water resources that are not tidal;
3. any areas affected by Category C and D past and intermediate period acts;
4. section 47 pastoral leases held by native title claimants;
5. section 47A reservation and other interests covered by the claimant application;
6. section 47B vacant Crown land covered by the claimant application."

Not all rights and interests purported to be described in the application under Schedule E need be readily identifiable for the requirement of s190B(4) as a whole to be met. It is sufficient that at least one of the rights and interests described in Schedule E are readily identifiable, as is the case here.

The application meets the test at s190B(4).

Result: **Requirements met**

Factual basis for claimed native title: s190B(5)

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;
(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs

Reasons relating to this condition

Subsection 190B(5) requires that the Registrar (or his delegate) must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c).

The parts of the application that address the requirements of s190B(5) are Schedules F and G and Attachment M.

I note that I am not limited to consideration of material contained in the application (as for s62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar [2001] FCA 16*. However, I have chosen not to consider any further material.

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

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 the role of the Registrar in considering the requirements of s190B(5) was examined. In that matter the test to be applied was set out by the Registrar in these terms:

> *"104 He [the Registrar] said:*
>
> *'Before dealing with each of the conditions it should be noted that it is not my role to reach definitive conclusions about complex anthropological issues pertaining to applicants' relationships with the country subject to native title claimant applications. What I must do is consider whether the factual basis provided is sufficient to support the assertion that the claimed native title rights and interests*

exist. In particular, it must support the three assertions in sections 190B(5)(a, (b) and (c).'

Of this 'test' the Court went on to say:

> *"127. 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).....*
>
> *128. All it requires is that the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist.*
>
> *129. The Registrar in this matter was satisfied that the factual basis asserted in Schedules F, G and M of the application established 'some degree of factual basis' for the claimed rights and interests. Schedule F is in fact designed to provide the factual basis for the assertions: see s 62(2)(e). …In fact the Registrar recognised that such material might not establish a 'sufficient' factual basis for them. ….And, as the passage set out in [103] above indicates, he correctly identified the question which s 190B(5) raised."*

I now consider whether the information provided at Schedules F and G and Attachment M to the application, amounts to a sufficient factual basis to support the existence of the native title rights and interests listed at Schedule E of the application so as to comply with the requirements of s190B(5)(a), (b) and (c). I note again that under s190B(4) I found that only a right to "exclusive possession, occupation, use and enjoyment" in relation to specified types of areas was readily identifiable.

a) <u>*the native title claim group have, and the predecessors of those persons had, an association with the area.*</u>

To satisfy this criterion, it must be evident that the native title claim group has, and the predecessors of those persons had an association with the area that is and was communal (that is, shared by a number of members of the native title group).

In relation to the association of native title claim group to the area, I note the following:

- Schedule F makes asserts that "[t]he native title claim group is a group of people who hold a common world view fashioned by their belief system inextricably connected to the topographic, ecological, cultural and religious values embedded in the area of land the subject of the application."
- Schedule G refers to activities such as "a long historical and constant contemporary collection and use of natural resources", "continual access to, camping upon, and residing on the traditional lands", "physically occupying the area" and "physically enjoying and using the area covered by the application".

- Attachment M indicates the association of applicant Mr Bates to at least parts of the application area – para.5 explains that Mr Bates holds "primary traditional affiliation" to the lands in the north of the claim.

In relation to the association of the predecessors of the native title claim group I note the following:

- Schedule F asserts that "the native title claim group has ancestral connections to the people that were present on and connected to the land and waters covered by the application"
- Attachment M includes affirmed statements by the applicant Mr William Bates that: "My people and I have continued to conduct traditional hunting and fishing over areas of the claim and camped in the area. My parents also conducted such activities before me as did their parents and ancestors going back to the time before European contact".

As to whether this amounts to a sufficient association, both past and present, and one that might be traditional in the terms considered in *Yorta Yorta*, I consider that the following passage in Schedule F go some way to suggesting a factual basis exists for the assertion of a normative society who share common beliefs and values that maintain a continuity with the society that existed at the time of the assertion of British sovereignty:

> "a) The native title claim group is a group of people who hold a common world view fashioned by their belief system inextricably connected to the topographic, ecological, cultural and religious values embedded in the area of land the subject of the application;
> …
> c) The native title claim group members acknowledge and observe traditional laws and customs;
> d) Those laws and customs are based on the traditional laws and customs of the people that were present on and connected to the land and waters of the area covered by the application at the time when sovereignty was extended to the area covered by the application;
> e) These laws and customs have been transmitted to the claimants by the intergenerational transfer of that knowledge and as such have ensured a continuity of the way of life of the members of the claim group with that of their forebears;
> f) Such laws and customs include those relating to:
> - Marriage
> - Burial
> - Birth
> - The provision of sufficient sustenance for the whole community
> - Communication and transmission of information
> - Religious and spiritual beliefs
> - The maintenance of religious and spiritual connections which are manifested in the area of the claim by the landscape
> - The maintenance of resources
> - Development of the social and political life of the group."

I consider a sufficient factual basis appears able to be provided in relation to s190B(5)(a).

b) *that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests*

This subsection requires me to be satisfied that: traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

The same passages of Schedule F quoted above indicate a factual basis can be established in with respect to the existence of a body of traditional law and custom also, in particular paragraphs c), d) and e).

There are also passages in the affidavit of Mr William Bates at Attachment M that refer to the transmission of traditional knowledge, for example paragraphs 8), 9) and 11).

However, I am not convinced, on the basis of the information before me, that the application points to a factual basis for this body of traditional law and custom necessarily giving rise to the native title rights and interests being claimed in this application. This is given the nature of the claim being made. Under s190B(4) I found that the application amounts to a claim for "exclusive possession, occupation, use and enjoyment" only, as other rights and interests in Schedule E are not readily identifiable in the form currently described. I note also my reasons in relation to s190B(6) below.

I consider a sufficient factual basis has not been indicated in relation to s190B(5)(b).

c) *that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

For the same reasons, and based on the same information, as under s190B(5)(b), I am of the view that an insufficient factual basis has been indicated, consistent with the reasons for the decision in *Yorta Yorta*, that the native title claim group continue to hold native title in accordance with traditional law and custom. Inote also my reasons in relation to s190B(6) below

Result: **Requirements not met**

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

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

Reasons relating to this condition

Under s190B(6) I must consider that, *prima facie*, at least some of the native title rights and interests claimed by the native title group can be established. The Native Title Registrar takes the view that this requires only one right or interest to be registered.

Under s190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by

their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

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

And at 35:

> "However, the notion of a good prima facie claim which, in effect, is the concern of s63(1)(b) and, if it is still in issue,of s 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success."

This test was explicitly considered and approved in *Northern Territory v Doepel* 2003 FCA 1384 at paras 134-5 :

> 134. "Although North Ganalanja Aboriginal Corporation v The State of Queensland (1996) 185 CLR 595 (Waanyi) was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima facie' there adopted is no longer appropriate: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided."
>
> 135. "……see eg. the discussion by McHugh J in Waanyi at 638 - 641. To adopt his Honour's words, if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis."

I have adopted the meaning approved in *Doepel* in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision in relation to s190B(4) above. Under these reasons, I came to the conclusion that only the right to "exclusive possession," of certain specified areas was readily identifiable. I need not consider whether any other rights in Schedule E can be prima facie established, given that in order to be established they must be readily identifiable in the first instance.

I now turn to whether the generic right to exclusive possession, occupation, use and enjoyment can be established *prima facie*.

The material I have drawn on is limited to the material at Schedules E, F and G and at Attachment M of the application as filed on 29 September 2004. I note that a variety of material that might go to the question of prima facie evidence that was attached to previous versions of the application has been specifically removed from this most recently filed amendment application. As noted elsewhere, Schedule S indicates that Attachments F(A) – F(B) and M(A), as well as Attachment R1 are "deleted".

Previous Attachment F(A) includes a document labelled Attachment F(1), which consisted of an evidentiary affidavit by a now deceased member of the claim

group, [name 5 removed]. Attachment M(A) included an outline of information about the previous applicant [name 2 removed], now a member of the claim group only, this information being based on the content of an affidavit sworn by [name 2 removed] that was attached to the application as filed in the Court on 5 August 1999. Returning to the material now before me as filed on 29 September 2004, I must consider whether prima facie the right to "exclusive possession, occupation, use and enjoyment" can be established.

The strongest evidence before me is the affidavit of applicant Mr William Bates found at Attachment M. I do not consider that the material in Schedules E, F and G is of a sufficient probative value for the purposes of s190B(6), as it largely consists of assertions and not the facts giving rise to them. This is not to say that such rights and interests do not exist, nor that they cannot be pursued at trial, merely that there is insufficient evidence supplied to meet the requirements of the test.

In summary, the affidavit by Mr Bates at Attachment M gives an indication of Mr Bates' descent and upbringing and the transmission of traditional law and custom to him by his father while spending time out bush, doing woodcutting. This includes in relation to travel for traditional purposes, hunting and gathering of bush tucker and learning about traditional country and traditional ways. It also indicates that Mr Bates actively passes on this knowledge to his children and grandchildren, that he engages in a variety of traditional activities to care for the country such as the protection of endangered flora and fauna, and he carries out traditional responsibilities to country through more formal institutions such as the Mutawintji Board of Management under the National Parks and Wildlife (Aboriginal Ownership) Act and the Mutawintji Local Aboriginal Land Council. It suggests he has some authority within his community given that he holds prominent positions such as the chair of the two previously mentioned organisation and that he "participate[s] in a variety of meetings of [his] people whenever important decisions need to be made or discussions had about matters relating to the protection or development of [his] traditional lands".

However, I am not of the view that this affidavit contains sufficient material to prima facie support a claim to "exclusive possession, occupation, use and enjoyment" of the application area as a whole. In particular I note the statement at paragraph 5 of the affidavit that Mr Bates has "primary affiliation" with lands in the north of the application area. While I do not consider that there must be evidence that each individual applicant or claim group member holds all native title rights and interests to all of the application area, I would expect some more evidentiary material establishing the connection of the group as a whole to the wider application area. I should not have to rely on material in previous versions of the application, especially when that material has been specifically deleted from the current version of the application, such as the affidavits of claim group members [name 2 removed] and [name 5 removed] who assert primary affiliation with the southern portion of the current application area..

I also note that the content of Attachment M also fails to convince me that the fullest, most robust form of native title rights and interests - that is, "exclusive possession, occupation, use and enjoyment" – are likely to be able to be exercised by the native title claim group in the application area. Rather, a more limited form of native title rights and interest seems more likely to exist, given that the overwhelming majority of the area within the external boundary of the

application area is subject to extinguishing events such as the granting of leases in perpetuity under the *Western Lands Act 1901* (NSW).

I am not satisfied that prima facie the readily identifiable rights and interests in Schedule E of the application are able to be established.

Result: **Requirements not met**

Traditional physical connection: s190B(7)

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

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

Reasons relating to this condition

I am satisfied that at least one member of the native title claim group currently has a traditional physical connection to at least parts of the application area, on the basis of the affidavit of applicant Mr William Bates, found at Attachment M to the application. As noted under my reasons for s190B(6) above, this affidavit indicates that Mr Bates has a primary traditional affiliation with the northern parts of the application area and amongst another things he affirms that he "engage[s] in a variety of traditional activities to care for the country, including the protection of Aboriginal sites of significance … and the protection of endangered species of both flora and fauna."

Result: **Requirements met**

No failure to comply with s61A: s190B(8)

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

Section 61A contains four sub-conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four sub-conditions.

No previous native title determination: s61A(1)

Reasons relating to this sub-condition

There is nothing contained in the application to indicate that the area of this application overlaps with any areas subject to a determination of native title determination.

I note that the geospatial assessment and overlap analysis carried out by the Tribunal's own Geospatial Unit on 21 December 2004 states: "No determinations as per the National Native Title Register fall within the external boundary of this amended application as at 21 December 2004". In fact, a full approved determination does fall within the external boundaries of the application area, being compensation application NPA97/4, as determined on 16 February 2004. However, the internal exclusions that appear in Schedule E include exclusion of the area subject to NC97/18. On further inquiry, it is evident that the area for NPA97/4 is the exact same as for claimant application NC97/18. By deduction, the area of NPA97/4 is excluded from the application area.

Result: Requirements met

No claim where Previous Exclusive Possession Acts (PEPAs): s61A(2)

Reasons relating to this sub-condition

Schedule B lists at paragraph (c), amongst other internal areas excluded from the application: "[a]ny areas of land and waters which are *previous exclusive possession acts* [sic] as defined and provided for by Division 2B of Part 2 of the *Native Title Act 1993*".

This sub-requirement is met.

Result: Requirements met

No exclusive possession claimed where Previous Non-Exclusive Possession Acts (PNEPAs): s61A(3)

Reasons relating to this sub-condition

Schedule E provides a description of the native title rights and interests being claimed. As discussed in relation to the test at s190B(4), the language used in the description at Schedule E amounts to a claim for exclusive possession. However, Schedule E also describes the rights and interests being claimed as being "subject to the rights and interests of those lawfully exercising rights and interests which have been validly created and lawfully vested in them by operation of the laws of New South Wales and the Commonwealth". This limits the exclusive possession being sought by making it subject to other rights and interests, which could be said to be a claim for non-exclusive possession where exclusive possession is not possible, because of the existence of other rights and interests. I am satisfied that in effect, no exclusive possession is sought in areas where previous non-exclusive possession acts have taken place.

Result: Requirements met

Areas to which sections 47, 47A or 47B may apply: s61A(4)

Reasons relating to this sub-condition

The application seeks to claim the benefit of ss47, 47A and 47B. Schedule L states that: "[t]he native title claim group claims the benefit of sections 47, 47A and 47B in respect of all those areas of land that come within the categories provided for in paragraphs (a), (b) or (c) above, including…[followed by a list of specific parcels]".

This statement clearly satisfied s614(b), which requires that the application states that s47, 47A and 47B applies to it, in order for such benefit to be claimed.

I simply note that the benefit of ss47, 476A and 47B have been appropriately claimed. I consider I am not required to consider the matter further than this.

Result: Benefit claimed

Combined decision for s190B(8)

For the reasons identified above in relation to each sub-condition, the application meets the requirements of s190B(8).

Result: Requirements met

No extinguishment etc.: s190B(9)

Subsection 190B(9) contains three sub-conditions. The decision below considers the application against each of these three sub-conditions.

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

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

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

Reasons relating to this sub-condition

Schedule Q states that: "[t]he application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown".

Result: Requirements met

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

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

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

Reasons relating to this sub-condition

Schedule P states that: "[t]he application does not make any claim to any offshore place".

Result: **Requirements met**

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

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

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

Reasons relating to this sub-condition

There is nothing in the application to suggest or indicate that the native title rights and interests have been otherwise extinguished.

Result: **Requirements met**

Combined decision for s190B(9)

For the reasons identified above in relation to each sub-condition, the application meets the requirements of s190B(9).

Result: **Requirements met**

[End of document]