National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

Delegate:	Lisa Jowett
Application Name:	Yaegl People
Names of Applicants:	Selena Blakeney, Judy Breckenridge, Joyce Clague, Jacqueline Freeburn, Ron Heron, Thelma Kapeen, Vivienne King, Eileen McLeay, Deidre Randall, William Walker, Lillian Williams
Region:	NSW
NNTT No:	NC96/38
Federal Court No:	NSD6052 of 1998
Date Application Made:	27 November 1996
Application Last Amended:	11 August 2006

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

DECISION

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

Lisa Jowett
Delegate of the Registrar
Pursuant to s 99 of the *Native Title Act* 1993 (Cth)
Of the powers given under ss 190,
190A, 190B, 190C, 190D

Date of Decision

Brief history of the application

The original application was lodged with the National Native Title Tribunal ('NNTT') on 27 November 1996 and placed on the Register of Native Title Claims ('RNTC'). It was lodged in response to a future act notice issued in 1996 under s 29 of the *Native Title Act* 1993 (C'wlth) ('NTA') by the Minister for Land and Water Conservation for the State of New South Wales. The intention of the proposed future act was to grant a licence to the Office of Marine Safety and Port Strategy. The future act was to provide for:

> … the widening of the passage in the entrance reef of the Clarence River and the removal of sand and sediment from the bed of the Clarence River to allow the passage of larger vessels to the Harwood Island Sugar Refinery.[1]

The external boundary of the claim area appears to have been drawn in line with the boundaries of the area the subject of the s 29 notice.

The original description of the native title claim group as provided in the Form 1 in 1996 was:

> All members of the Yaegl, Bundjalung and Gumbanyggirr[2] people who are affiliated with the land and waters which are the subject of this application.

An abbreviated Registration Test was applied to the application on 24 February 2000 which found the application would not be accepted for registration. It was removed from the RNTC.

The applicant filed an amended application in the Federal Court on 26 September 2003. The claim group description (and other relevant parts of the application) no longer included reference to the Bundjalung and Gumbayngirr groups. The external boundaries of the application did not change. On 1 April 2004 the application was again not accepted for registration.

On 1 September 2005, the applicant appointed New South Wales Native Title Services Limited (NSW NTS) to be its representative.

---

[1] *Native Title Act 1993 (Cth) Section 29, Notice of Intention to Do A Permissible Future Act*; copy received by the NNTT from Dept of Land & Water Conservation, NSW on 8 October 1996.

[2] This is spelt variously throughout references, past applications and in affidavits as: Gumbanyggirr, Gumbaynggirr, Gumbayngirr. Unless quoting directly from material where it is spelt differently I have spelt it Gumbaynggirr.

On 11 August 2006 a further amended application was filed in the Federal Court. It is this amended application ("the application") that I now consider for registration pursuant to s 190A as a delegate of the Registrar.

Information considered when making the decision

In making this decision I have had regard to the information and documents listed below:

- The application as filed in the Federal Court on 11 August 2006, including attachments and affidavits;
- Geospatial Assessment and Overlap Analysis as provided on 30 October 2006 by the National Native Title Tribunal's Geospatial Unit ('Geospatial Unit');
- Reports of searches made of the Register of Native Title Claims, Federal Court Schedule of Applications, National Native Title Register and other databases to determine the existence of interests in the application area, namely, overlapping native title determination applications, s. 29 future act notices and the intersection between the Yaegl People application area and any gazetted representative body regions. These reports are found in a Geospatial Assessment and Overlap Analysis against the Tribunal's databases dated 30 October 2006;
- Map provided by the Geospatial Unit, showing the location of Ulaghandi[3] Island, dated 21 November 2006;
- Section 29 Notice – *Notice of Intention to do a Permissible Future Act*, receipt date by NNTT 8 October 1996;
- Original application lodged with the NNTT, 27 November 1996;
- Amended application lodged with the NNTT, 13 June 1997;
- Copies of a published version of the story of Dirrungan[4] as provided to the Case Manager (referred to in correspondence from [name deleted], Barrister, dated 17 Judy 1997);
- Submission by the NSW Department of Land and Water Conservation, pursuant to s 190C(3)(c), dated 4 March 1999;
- Amended application filed in the Federal Court 26 September 2003, including attachments, affidavits etc.;
- Registration Test Reasons for Decision, Delegate – [name deleted], dated 1 April 2004;
- Correspondence from NSW NTS, dated 24 November 2006;
- *Walker on behalf of the Yaegl, Bundjalung and Gumbayngirr People v Minister for Land & Water Conservation(NSW)* [2003] FCA 947;

[3] Ulaghandi Island has different spellings. It is also spelt Ulgandahi. I have spelt it as it appears in the reference I am referring to at the time.
[4] This is spelt variously as Dirrungan, Dirringun in reference and affidavit material.

- Comment by the State of New South Wales pursuant to s 190A(3), dated 10 November 2006;
- Correspondence from NSW NTS, in response to the comment made by the State on 10 November 2006, dated 24 November 2006; and
- Correspondence from NSW NTS, dated 5 December 2006.

Note: Information and materials provided in the context of mediation on any native title determination application by the claim group have not been considered in making this decision. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

The State of NSW provided comment regarding the application on 13 November 2006. This was forwarded to NSW NTS who provided a response on 24 November 2006. NSW NTS provided me with clarification of the basis for the change in the description of the native title claim group on 24 November 2006. This was provided to the State of NSW who responded on 4 December 2006 confirming that no comment would be made in relation to the additional material.

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

NOTE TO APPLICANT:

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

s 190B sets out the merit conditions of the registration test (see pp 24 – 55)

s 190C sets out the procedural conditions of the registration test (see pp 5 – 23)

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

Delegation Pursuant to s 99 of the *Native Title Act 1993* (Cwlth)

On 28 November 2006, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal, including myself, all of the powers given to the Registrar under section's 190, 190A, 190B, 190C and 190D of the *Native Title Act 1993* (Cwlth).

This delegation has not been revoked as at this date.

s 190C Procedural Conditions

s 190C(2) Application contains details set out in ss 61 and 62

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

s 61(1) Native Title Claim Group

Persons who may make application:

Native title determination application:

(1) 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.

RESULT

This condition is met

REASONS

The law

Section 61(1) requires the delegate of the Registrar to be satisfied that the native title claim group includes *all* the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

In forming a view on this, the delegate is not required to go beyond the material contained in the application and in particular the delegate is not required to undertake some form of merit assessment of the material to determine whether she or he is satisfied that the native title claim group as described is in reality the correct native title claim group: (*Northern Territory v Doepel* (2003) 203 ALR 385 ("*Doepel*") at [37]).

If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirements of s 190C(2)

would not be met and the Registrar should not accept the claim for registration: (*Doepel* at [36]).

Information in the application

The description of the persons in the native title claim group is set out in Schedule A of the application and describes the Yaegl People as the native title claim group on whose behalf the applicants make this application. The claim group is said to comprise all the descendents of 5 named apical ancestors.

Consideration

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

For these reasons, I find that the requirements of this section are met.

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

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

RESULT

This condition is met

REASONS

The name and the address for service of the applicant are found on p 12 of the application.

s 61(4) Applications authorised by persons

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;

(a) name the persons; or

(b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

RESULT

This condition is met

REASONS

The application at schedule A does not provide an exhaustive list of names as required by s 61(4)(a) but contains a description of the persons in the native title claim group pursuant to s 61(4)(b). It is my view that a qualitative assessment of the description is not required under s 61(4) - this is the task for the corresponding merit condition in s 190B(3)(b).

The description of the native title claim group is sufficiently clear to ascertain whether any particular person is one of those persons in the group and therefore satisfies this procedural requirement (see my reasons in relation to s. 190B(3)).

s 61(5) Application is in prescribed form

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

RESULT

This condition is met

REASONS

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998* and was filed in the Federal Court as required pursuant to s 61(5)(a) & (b).

It contains the information prescribed by s 62 and is accompanied by the prescribed documents (this is an affidavit from each of the persons who comprise the applicant prescribed by s 62(1)(a)), thereby meeting the requirements of s 61(5)(c) & (d).

s 62(1)(a) Application is accompanied by affidavits in prescribed form

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by ss 62(1)(a)(i) – 62(1)(a)(v)

RESULT

This condition is met

REASONS

The law

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

Information in the application

Affidavits by each of the eleven persons who comprise the applicant are filed with the application.

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

The basis on which the applicant is authorised (as required by 62(1)(a)(v)) is provided by the statement:

> (f) The basis on which we are authorised as mentioned in paragraph (e) is as a member of the native title claim group authorised to make the application and to deal with all matters arising in relation to it at a meeting of the Yaegl People held 23, 24 and 25 March 2006 at Maclean. That meeting arose out of a process of public notification of the Maclean meeting by New South Wales Native Title Services Limited.

Consideration

The requirements of this condition are met by the information contained in the affidavits sworn by the new applicant.

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

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

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

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

RESULT

Details are provided

REASONS

Schedule M refers to Attachments F(1), F(2), F(3) and F(4) which provide evidence in support of the claim group's traditional physical connection over the application area. Statements are made by Judy Breckenridge, Thelma Kapeen, Ron Heron and Deidre Randall.

Schedule N states that prevention of access to any of the land or waters covered by the application area is not applicable.

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

A claimant application must contain:

(a) information, whether by physical description or otherwise, that enables the boundaries of:

(i) the area covered by the application; and

(ii) any areas within those boundaries that are not covered by the application

to be identified.

RESULT

This condition is met

REASONS

Schedule B of the application refers to Attachment B which describes the external boundaries of the application area. Information about the land and waters within the external boundary which are not covered by the application area is also provided.

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

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

RESULT

This condition is met

REASONS

Schedule C of the application refers to Attachment C, which provides a shaded map produced by the NNTT's Geospatial Unit showing the external boundaries of the application area.

s 62(2)(c) Details and results of searches

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

RESULT

This condition is met

REASONS

Schedule D states that no searches have been carried out.

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

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.

RESULT

This condition is met

REASONS

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

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

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.

RESULT

This condition is met

REASONS

Schedule F refers to Attachment F, which provides information about the factual basis on which it is asserted that the native title rights and interests claimed exist. Further information in relation to the activities of members of the claim group is provided in the statements annexed at Attachments F(1) through to F(4) and in the Schedules G and M.

s 62(2)(f) Activities carried out in application area

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

RESULT

This condition is met

REASONS

Schedule G provides information about the activities carried out by the Yaegl People in the application area. Details of these activities are provided by individuals who comprise the applicant in the Attachments F(1) through to F(4).

s 62(2)(g) Details of other applications

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;

RESULT

This condition is met

REASONS

Schedule H states "None" in relation to this question.

s 62(2)(h) Details of s 29 notices

The application contains details of any notices under s 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

RESULT

This condition is met.

REASONS

Schedule I states "None Known".

s 190C(2) Combined decision

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

RESULT

This condition is met

s 190C(3) Common claimants in overlapping applications

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 s 190A.

RESULT

This condition is met

REASONS

If all three conditions nominated at s 190C(3) apply, I must consider whether any person included in the native title claim group was a member of the native title claim group for any previous application (s).

A search of the Schedule of Native Title Applications and Register of Native Title Claims on 7 December 2006 and the Tribunal Geospatial Assessment and Overlap Analysis dated 30 October 2006 confirm there are no applications which overlap this current application.

I therefore do not need to consider further conditions (b) and (c) of s 190C(3).

s 190C(4) Application is authorised/certified

The Registrar must be satisfied that either of the following is the case:
(a) the application has been certified pursuant to s 203BE 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 s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:
(a) includes a statement to the effect that the requirement set out in s 190C(4)(b) has been met; and
(b) briefly set out the grounds on which the Registrar should consider that it has been met.

RESULT

This condition is met

REASONS

The law

The application is not certified pursuant to 190C(4)(a).

It is therefore necessary to consider if the application meets the condition in s 190C(4)(b) – that is, that the applicant is a member of the native title claim group and authorised by all other persons in the claim group to make the application and deal with matters arising in relation to it.

There are other requirements for uncertified applications. Pursuant to s 190C(5), the Registrar cannot be satisfied of compliance with s 190C(4)(b) 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 sets out the grounds on which the Registrar should consider that it has been met.

A note to s 190C(4) directs the Registrar to s 251B of the Act, for the meaning of the word ***authorise***:

> **251B Authorising the making of applications**
>
> 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.

In *Doepel* at [78], Mansfield J discusses the interaction between s 190C(4)(b) and s 190C(5) and how the Registrar is to be satisfied as to these conditions of the registration test:

> In the case of subs (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 s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.

Information before the delegate

I have had regard for the following material in my consideration of the authorisation of the applicant to make this application and to deal with matters arising in relation to it:

- Schedule R of the application which refers to Attachment R [Attachment R];
- Affidavit of *[name deleted]* dated 7 August 2006 [*[name deleted]*];
- Affidavits of Selena Blakeney, Judy Breckenridge, Joyce Clague, Jacqueline Freeburn, Ron Heron, Thelma Kapeen, Vivienne King, Eileen McLeay, Deidre Randall, William Walker, Lillian Williams, [Attachments R(2) – R(12)]
- Correspondence from NSW NTS dated 24 November 2006

Attachment R provides a statement about the applicant's membership of and authorisation by the claim group and information about the grounds on which the Registrar should consider that requirements of s 190C(4)(b) have been met (s 190C(5(b)).

[Name deleted] is *[position details deleted]* employed by the applicant's representative, New South Wales Native Title Services (NSW NTS).

Attachments R(2) to R(12) are made by the 11 individuals who constitute the applicant. These were all deposed on either the 3rd or 4th of August 2006.

The correspondence from NSW NTS relates to clarification I sought from the applicants about the change in the description of the claim group that occurred between 1996 and 2003.

How the authorisation meeting was convened

The affidavits of members of the applicant in the 2003 application each depose to the conduct of a meeting in February 2006 where it was agreed to hold a native title claim group meeting:

> On behalf of all the individuals who comprise the Applicant Ron Herron, Deidre Randall, Joyce Clague, William Walker and I instructed NSW NTS to arrange a native title claim group meeting so that we could discuss and make decisions about the amendment of the native title application including discussing and making decisions about the authorisation of the Applicant.[5]

[Name deleted], provides detail on the process by which the three day meeting, 23 to 25 March 2006, was notified, advertised, prepared, convened and conducted.

Letters were sent out to claim group members on 9 March 2006 by NSW NTS (Annexure A to [name deleted affidavit). The letter included an Agenda for the 3 day meeting.

Advertisements advising of the claim group meeting and its agenda were placed by NSW NTS in local newspapers (Annexure B):

(a) the Koori Mail on 15 March 2006;
(b) the Coastal View on 16 March 2006; and
(c) the Northern Star on 10 March 2006. [14]

Each affidavit at R(2) to R(12) affirms to the receipt of correspondence from NSW NTS advising of the March 2006 meeting of the claim group, receipt of an agenda for the meeting, and to telling other Yaegl people about the meeting.

The meeting was held at the Jim Thomson Pavilion, Maclean Showground, Cameron Street, Maclean, NSW. It was chaired by *[name and position details deleted]*.

[Name deleted] affirms at [20] that the meeting was attended by "at least 35 persons who were representative of the families who constitute the claim group."

Having regard to the above information, I am satisfied that the meeting held on 23, 24 and 25 March 2006 was properly notified to allow every opportunity for all members of the Yaegl People native title claim group to attend and participate in the consideration of amendments to their application and authorisation by the group of the applicant.

[5] Affirmed in the affidavits of Jacqueline Freeburn (at [7]); Ron Herron (at [7]); Deidre Randall (at [7]); and William Walker(at [7]). Selena Blakeney affirms to her absence from the Feb '06 meeting but to her agreement to the convening of the March '06 meeting. [Name deleted] had passed away.

Representative nature of the group

The affidavit of *[name deleted]* states at [25]:

> The people attending the meeting are all descendants of one or more of the apical ancestors listed in the claim group description. Each person attending is representative of members of their family who are unable to attend. Their families and Elders are aware of this meeting and have been consulted about the issues for discussion. The members of the Yaegl claim group who are in attendance represent the views of their Elders and those who cannot attend.

The affidavits of R(2) to R(12) each contain the following statement:

> The meeting on 23, 24 and 25 March 2006 was well attended by Yaegl People, there were about 30 or 40 people at the meeting and there were people from many different Yaegl families there.

and

> One of the first issues discussed at the native title claim group meeting on 23 March 2006 was whether the Yaegl People at the meeting were sufficiently representative of those not in attendance to make decisions about amendments to the application. Following discussion and consideration of how representative those in attendance were a unanimous resolution was passed that the people attending the meeting were representative of all members of the Yaegl native title claim group and able to make decisions about the matters listed on the agenda.

Having regard to the above information, it appears that those in attendance at the March meeting were sufficiently representative of the claim group in order to allow for the Yaegl native title claim group to properly authorise the applicant to make their application and deal with matters arising in relation to it.

Decision making process

The 2003 application states at Schedule R that the decisions made at a meeting for the purposes of authorisation "were made in accordance with the traditional decision making processes of the Yaegl people".[6] The lack of information before the delegate when she made her decision in April 2004 about the traditional decision making process was key to the application's failure at the time to comply with the conditions of 190C(4).

[6] Application for Determination of Native Title, filed 23 September 2003, p.15, Schedule R (2)b)(iv)

The applicant provided me with an explanation about the apparent change in the method of decision-making, and is one I am willing to accept:

> … *[Name deleted], [position details deleted]* with NSW Native Title Services, who was in attendance at the Yaegl native title claim group meeting in 2003, [advised] that several of the decisions made at that meeting were made by an agreed and adopted method of decision making consistently with the norms of conduct of meetings held by Aboriginal people for native title purposes amongst others. The process involved voting on decisions to be made by show of hands. The description of a traditional process of decision making set out in the 2003 amendments to the Yaegl application does not appear to describe the process of decision making actually employed and observed at the 2003 claim group meeting.

This current application is clear about the kind of decision making the group is using in relation to its native title determination application. Firstly, in the affidavit of *[name deleted]* at [28] and [29]:

> On 23 March 2006 I witnessed the claim group members in attendance at the meeting unanimously pass a resolution to the following effect:
>
> *Yaegl People confirm that when making decisions of this kind (authorising a native title application and dealing with matters arising in relation to it) there is no particular process of decision making under traditional laws and customs that must be complied with by Yaegl People. Accordingly, Yaegl People adopt the following process of decision making in relation to the native title claim:*
>
> 1. *There will be general discussion of issues*
> 2. *Elders input will assist in guiding the discussion*
> 3. *Discussion will continue until there is general consensus*
> 4. *A clearly worded motion reflecting the general consensus will be read to the meeting*
> 5. *The motion must be moved and seconded by Yaegl People before it is decided on*
> 6. *The decision will then be made by Yaegl People by a show of hands vote*
> 7. *A decision of the majority in relation to the motion shall be the decision of the Yaegl People*
>
> On 23 March 2006 I witnessed the claim group members in attendance at the meeting use this method of decision making to authorise a new applicant for the native title application.

Secondly in the affidavits of R(2) to R(12) each contain the following statement:

> We made all the decisions at the Yaegl native title claim group meeting on 23, 24 and 25 March using this agreed to and adopted method of decision making.

Having regard to the above information, I am satisfied that the Yaegl People have agreed to and adopted a decision-making process pursant to s 251B(b) to authorise the making of the application and to deal with matters arising in relation to it.

Authorisation of the applicant

Attachment R contains a statement about the individuals who comprise the applicant, saying that each "is a member of the native title claim group through their descent from one of the apical ancestors described in Schedule A". Each individual affirms in their affidavit (R[2] to R[12]) that they are "members of the claim group through [their] descent from one or more of the apical ancestors named in Schedule A of the form 1 of the application".

All the affidavits of the 11 individuals who comprise the applicant make the following statement:

> I am now one of eleven individuals who, following leave being granted to amend the application, will jointly comprise the Applicant as authorised by the meeting convened by NSW NTS of members of the native title claim group on 23, 24 and 25 March 2006.
>
> The basis on which I am authorised to comprise one of the individuals who are jointly the Applicant in this application for determination of native title is pursuant to the process of decision making agreed to, and adopted by, and resolutions passed at, the meeting of Yaegl People of 23, 24 and 25 March 2006.

Further, *[name deleted]* affirms at [30]:

> On 23 March 2006 I witnessed the claim group members in attendance at the meeting unanimously pass a resolution to the following effect:
>
> *"The Yaegl People attending the meeting agree that it is now appropriate to remove* [name deleted]*, as a person who comprises the Yaegl applicant, and to authorise a new applicant.*
>
> *The new Yaegl applicant is:*
>
> *Ron Herron, William Walker, Deidre Randall, Joyce Clauge [sic], Selena Blakeney, Jacqueline Freeburn, Lillian Williams, Vivien Laurie (King), Judy Breckenridge, Thelma Kapeen and Eileen McLeay.*
>
> *The new applicant is authorised by the Yaegl Claim Group to make the Yaegl native title application and to deal with matters arising in relation to it.*
>
> *The meeting confirms the authority the individuals who comprise the applicant have under s62A of the Native Title Act."*

Having regard to the above information, I am satisfied that the applicant is a member of the native title claim group and that the information addresses the authorisation of the applicant by the other persons in the group.

Consideration

Removal of Gumbanyggirr and Bandjalung groups from claim group description

In order to decide whether the applicant is authorised by the claim group and to deal with matters arising in relation to it, it is necessary to determine who constitutes the "claim group".[7] The original application in this matter, as I have noted previously, was brought by a claim group described as "all members of the Yaegl, Bandjalung and Gunbanygirr peoples who are affiliated with the lands and waters which are the subject of this application". The amended application of 2003 and this current application under consideration are brought on behalf of the Yaegl People alone.

Clarification was sought from the applicant as to why the description of the group changed such that it would appear that a different, or 'new and restricted'[8], group was making the application. According to NSW NTS, the origins of the involvement of the Bandjalung and Gunbanygirr peoples in this application can be found in the reason why the claim was made in the first place. The claim was lodged in response to the intention of the Minister for Land and Water Conservation to grant a licence to the Office of Marine Safety and Port Strategy (OMSPS)[9]:

> The OMSPS preference to blast out the reef lying beneath the surface of the water at the mouth of the Clarence River placed at risk a highly significant site crucial to the creation story for the Clarence River. At the time of lodgement of the claim, each of the groups with a connection to the creation story for the Clarence River, being Gumbanyggirr, Bandjalung and Yaegl people, was consulted. The risk to the reef, called *Dirrungan* by each group, was of deep concern to the three groups … The *Dirrungan*, *[details of sites deleted]*. (p.2 at [5])

The significance of the site of Dirrungan is borne out in the affidavits attached to the application of Judy Breckenridge F[1], Thelma Kapeen F[2], Ron Heron F[3] and Deidre Randall F[4]. The affiliation of the three groups with the site is confirmed by Ron Herron when he states at [19]:

---

[7] *Moran v Minister for Land and Water Conservation (NSW)* [1999] FCA 1637 at [32]
[8] *Walker on behalf of the Yaegl, Bundjalung and Gumbayngirr People v Minister for Land & Water Conservation(NSW)* [2003] FCA 947 at [13]
[9] As notified under s 29 of the NTA on or around 8 October 1996

> Although the Dirrungan is Yaegl's responsibility, if the Dirrungan was destroyed it would effect [sic] Bandjalung and Gumbanyggirr people as well.

I have also considered extracts of a copy of a published version of the stories of Dirrungan (provided by [name deleted] to the Case Manager, NNTT in 1997). A number of stories provide versions of the formation of the Clarence River in New South Wales and the formation of the reef called Dirrungan. I have no reason to doubt the significance of this site to the 3 groups.

The explanation NSW NTS provides in respect of the removal of the Bandjalung and Gumbanyggirr groups of the application is as follows:

> Whilst there is no specific reference in the authorisation process described in the 2003 amendments to the consultation and discussion 'process' by which it was decided the claim group description would change, the delegate can be assured that the senior representatives of all three groups with affiliation to the Clarence River were consulted about the change and the change was made on their instruction. (p.10)

and

> The Gumbanyggirr and Bandjalung Elders and community generally were consulted about the proposed amendments and they declared it was now no longer anything to do with them and it was for the Yaegl people to get on with their claim. [p.3 at [10])

The affidavits attached as R[2] to R[12] to the 2006 application of all 11 members of the applicant state that the representation of the Yaegl People by NSW NTS commenced on 1 September 2005. In filing their application in September 2003, the Yaegl People were represented by [name deleted]. Schedule R of that application, however, states that "NSW Native Title Services Ltd convened, notified and advertised" the claim group meeting held on 21 and 22 June 2003.

With no contrary information before me that would indicate any dissatisfaction of the Bandjalung and Gumbanyggirr people, it is my view that I must consider myself to be sufficiently assured as to the 'authority' of the removal of the two groups from these proceedings:

> Gumbanyggirr and Bandjalung People do not assert to be the native title holders for the area which is the subject of the Yaegl People's native title determination application. Gumbanyggirr and Bandjalung People were

> consulted prior to the 2003 amendments and instructed the then NTRB to remove them from the native title determination application.[10]

Authorisation of the applicant to make the application and deal with matters arising in relation to it

The requirement of 190C4(b) is consideration of two things:

(i) Is the applicant a member of the native title claim group, and

(ii) Do all the current persons in the native title claim group authorise the applicant to make the application and to deal with matters arising in relation to it.[11]

In respect of the first point, there is no information before me that contradicts the application's assertion that the individuals who comprise the applicant are members the native title claim group. They are identified by their descent from one or more of the listed apical ancestors used to define the native title claim group.

In respect of the second point, comments made by Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) make it clear that it is not necessary to have all the members of the claim group involved in the decision making process:

> … in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process

I am satisfied that reasonable opportunity was given to all the claim group members to participate in the decision making process and that those attending the meeting were sufficiently representative of the claim group.

Pursuant to 190C(5)(a), Attachment R contains the following statement to the effect that the requirement set out in paragraph 190C(4)(b) has been met:

---

[10] NSW NTS submission 24 November 2006, p.3 – final paragraph of *Summary*
[11] as per Martin v Native Title Registrar [2001] FCA 16 at [14]

> The applicant, comprised of Ron Herron, William Walker, Deidre Randall, Jacqueline Freeburn, Selena Blakeney, Joyce Clague, Thelma Kapeen, Eileen McLeay, Judy Breckenridge, Vivienne King and Lillian Williams, 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. (B.)

Pursuant to 190C(5)(b), the information provided in the affidavits made by the applicant in Annexures R(2) to R(12) (and quoted above) go to addressing the grounds on which the Registrar can consider that the requirements of 190C(4)(b) have been met.

Therefore, based on the information before me, I am satisfied that the requirements in 190C(4)(b) and 190C(5) have been met.

s 190B Merits Conditions

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

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

RESULT

This condition is met

REASONS

Information in the application

Schedule B has been prepared with the assistance of NSW Land Information Centre and describes the external boundary of the amended application area by metes and bounds using topographic features and Deposited Plans. The description lists a number of islands specifically excluded from the application area.

A Note references foreshores and river banks to the mean high water mark.

Schedule B also lists general exclusions.

Schedule C refers to a map at Attachment C. Attachment C is an A4 monochrome copy of a map entitled "Native Title Determination Application NSD6052/98 The Yaegl People (NC96/38)" prepared by Geospatial Services, NNTT dated (01/06/2006) and includes:

- The application area depicted by a bold outline and the area stippled;
- Background topographic image showing
- Scalebar, north point, coordinate grid and legend; and
- Notes relating to the source, currency, and datum of data used to prepare the map.

Consideration

The Geospatial Unit provided an assessment of the map and written description (see memo dated 30 October 2006).

The Geospatial Unit's assessment is that "the description and map are consistent and locate the application area with reasonable certainty".

I am satisfied that the stated exclusions detailed in Schedule B enable the areas not covered by the application to be identified with reasonable certainty.

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

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

The Registrar must be satisfied that:

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

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

RESULT

This condition is met

REASONS

The law

In *Doepel*, Mansfield J stated at [16] that:

> Section 190B also has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4).

Mansfield J said also at [37] that the focus of s 190B(3) is:

> … not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, 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. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration.

Further, Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 ("*Western Australia v Native Title Registrar*") found at [67], in the way native title claim groups were described, that:

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

Information in the application

Schedule A of the application contains this description of the group:

> The Yaegl People are the native title claim group on whose behalf the applicant make this application. The Native Title Claim Group comprises all the descendents of the following apical ancestors:
>
> *[Names of People deleted]*

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

Consideration

I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group. It may be that some factual inquiry may be required to ascertain who, in particular, are descended from the named apical ancestors, but it does not mean that the group has not been sufficiently described.

s 190B(4) Native title rights and interests are readily identifiable:

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

RESULT

This condition is met

REASONS

The law

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 identified (*Doepel* at [92]).

Native title rights and interests are defined in the Act at s 223(1), which states:

> 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.

Information in the application

The description of the native title rights and interests claimed in relation to particular land or waters is found at Schedule E:

1. Over areas where a claim to exclusive possession can be recognized (such as areas where there has been no prior extinguishment of native title or where s 238 and/or ss 47, 47A and 47B apply), the Yaegl People as defined in Schedule A of this application, claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
2. Over areas where a claim to exclusive possession cannot be recognized, the Yaegl People as defined in Schedule A of this application, claim the following non-exclusive rights and interests:

    (a) The right to access the application area

    (b) The right to camp on the application area

    (c) The right to erect shelters on the application area

    (d) The right to live, being to enter and remain on the application area

    (e) The right to move about the application area

    (f) The right to hold meetings on the application area

    (g) The right to hunt on the application area

    (h) The right to fish on the application area

    (i) The right to cook food resources harvested from the application area

    (j) The right to have access to and use the natural water resources of the application area

    (k) The right to gather and use the natural products of the application area (including food, medicinal plants, timber, charcoal, ash, stone, ochre and resin) according to traditional laws and customs

    (l) The right to share, offer and exchange resources derived form the land and waters within the area claimed

    (m) The right conduct ceremony including marriage ceremonies on the application area

    (n) The right to participate in cultural activities including those relating to birth and death on the application area

    (o) The right to maintain and protect places of importance under traditional laws, customs and practices in the application area

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

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

(r) The right to make decisions about the use of the application area by other Aboriginal People who recognize themselves to be governed by the traditional laws and customs acknowledged and observed by the Yaegl People

(s) The right to transmit the cultural heritage of the Yaegl people including knowledge of particular sites.

3. The native title rights and interests are subject to and exercisable in accordance with:

(a) The valid laws of the State of New South Wales and the Commonwealth of Australia including the common law;

(b) Valid interests conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of New South Wales;

(c) The traditional laws and customs of the Yaegl people for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes)

Schedule G provides an extensive list of activities in support of the rights and interest claimed.

Consideration

The claim by the Yaegl People to the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world is understood to be made only over areas where a claim to exclusive possession can be recognised. The applicant has listed 19 claimed rights and interests and it is clear that they are rights and interests claimed over areas where a claim to exclusive possession cannot be recognised. It is stated in schedule E that the claimed native title rights and interests are subject to the valid and current laws of the Commonwealth and of the State of NSW, as well as being subject to the interests conferred upon persons by those laws.

It is my view that the requirements of this condition are whether the claimed native title rights and interests are understandable and have meaning.

The State of NSW has expressed a view about the right listed at (s): *The right to transmit the cultural heritage of the Yaegl people including knowledge of particular sites*. The State submits that there is doubt as to whether this "is a right in the land and waters of the claim area, and therefore a native title right and interest as defined in section 223…" The State's submission is that this right "may not be readily identifiable for the purposes of s 190B(4)".

The Courts have generally allowed rights in relation to cultural knowledge provided they can be characterized as rights 'in relation to land and waters' pursuant to s 223(1)(b) (*Yamirr*), and are not in the nature of incorporeal rights not recognized by the common law pursuant to s 223(1)(c) (*Ward*). This was confirmed in *Alyawarr*:

> The right to teach the physical and spiritual attributes of places and areas of importance, if specified as a right to teach on the land, requires access to and use of the land for that purpose. So defined, it is a right in relation to the land [135].

NSW NTS on behalf of the applicant made a submission in response to the State's view relying on the above authority and submitted "that the transmission of the cultural heritage of the Yaegl people in relation to particular sites includes the right of access to the land for that purpose".[12]

It is my view, however, that the right as it is currently expressed is not written with a precision that identifies it as being a right in land and waters – that is, specified as a right to transmit the cultural heritage on the land and waters. I am also of the view that the terms 'cultural heritage' and 'including' further do not set out the nature and extent of the right and the activities in exercise of the right.

To conclude, I concur with the State's view and do not find the right expressed at (s) of Attachment E to be readily identifiable for the purposes of s 190B(4). Please also refer to my consideration at 190B(6). I otherwise consider the rights listed (a) through to (r) readily identifiable.

Whether or not any of the other non-exclusive rights as listed in Attachment E fall outside the scope s 233 are considered at s 190B(6).

[12] Correspondence from NSW NTS dated 24 November 2006, p.2

s 190B(5) Factual basis for claimed native title:

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

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

(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.

RESULT

This condition is met

REASONS

The law

For the application to meet this merit condition, the delegate must be satisfied that a factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particular assertions in subs (a) to (c) of s 190B(5). In *Doepel*, Mansfield J stated at [17] that:

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

In considering this condition, the delegate also must bear in mind the s 223 definition of the terms 'native title' and 'native title rights and interests'. In doing so the delegate must take account of the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*) as to what is meant in s 223(1)(a) by the word 'traditional' in the context of the phrase 'traditional laws and customs'. In considering the traditional laws and customs

referred to in s 233, the delegate must look at whether or not those laws and customs derive from a body of norms or a normative system that existed before sovereignty was asserted:

> [46] A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> [47] Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.[13]

Particularly, the decision in *Yorta Yorta* defines the concept of traditional laws acknowledged and traditional customs observed giving rise to native title rights and interests in land and waters.

The delegate is not limited to considering information contained in the application but may refer to additional material. The provision of material disclosing a factual basis for the claimed native title rights and interest is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material (*Martin v Native Title Registrar* (2001) FCA 16 per French J at [23]).

Information before the delegate

Information going to the factual basis supporting the assertions in s 190B(5) is found in Schedule F of the application. Evidence about the practices and activities of members of the native title claim group is found in the affidavits affirmed by Judy Breckenridge [Attachment F(1)]; Thelma Kapeen [Attachment F(2)]; Ron Herron [Attachment F(3)] and Deidre Randall [Attachment F(4)].

[13] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538

The applicant has not provided any additional information to the application specifically to meet the requirements of this condition. However, I have considered material contained the application filed in 2003 and the earlier mentioned stories about the reef, Dirrungan, at the mouth of the Clarence River.

Below I consider each assertion separately and use this material to directly address the requirements of each.

Consideration

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

This subsection requires me to be satisfied that the factual material provided supports an assertion that the native title claim group and the predecessors of those persons had an association with the application area.

Schedule F of the application states that:

1. Prior to 26 January 1788, the Yaegl People had rights and interests in relation to an area which includes the area which is the subject of this Application
2. The members of the native title claim group are descendants of persons who were members of the Yaegl People prior to and as at 26 January 1788
3. From prior to 26 January 1788 to the present day, the native title claim group and their ancestors have continuously occupied, been present on, used and enjoyed the area which is the subject of this application, in accordance with the laws acknowledged , and the customs observed, by the Yaegl People
4. The Yaegl people maintained a system of laws and customs which has existed since prior to 26 January 1788 to the present day even through those laws and customs have undergone some change since white settlement.
5. According to traditional laws and customs observed the Yaegl People are, traditionally, the owners of the land and waters in the area claimed.

Statements of members of the claim group contain information regarding the association of the native title claim group with the claim area:

Statement by Judy Breckenridge, affirmed 3 August 2006

- At [8]: The waters and islands in the native title claim area are part of Yaegl country and everyone knows that. We have always used the river. Us kids would go fishing, scrape for prawns and go hopping with a lantern at

night. Our parents would tell us to go fishing and get food. They'd often be working, our parents, so we had an obligation to get food. In that area where they told us to go, the waters were safe.

Statement by Thelma Kapeen affirmed 4 August 2006

- At [10]: As a child my family would row from Ulaghandi[14] Island to Whiting Beach at Yamba. We would go down there for every school holidays, spent Christmas holidays there. My Mum said that the river and the islands and the beaches were left for Yaegl People, that it was our country and we were allowed to use the area. She said it was our pace [sic]?, even at Yamba. We are all Yaegl People, whether we live in Yamba or Maclean. My family would build shelters at Yamba and along the way if they needed to go hunting and fishing there.
- At [15]: My Mum would tell us girls '*This is where you were born and this is probably where you will die. It's your country – don't ever let anyone take it away from you*'…

Statement by Ron Herron affirmed 4 August 2006

- At [5]: Yamba is my home but Yaegl country is wider and at the moment I live in Maclean, which is still Yaegl country of course. My traditional country includes all of the claim area in the native title application, the waters of the claim area and the islands. I grew up knowing that the claim area belongs to Yaegl People. When we went on the rivers, or to gathering or fishing – the old ones would point and tell you "*This is Yaegl*".
- At [7]: Yaegl law and custom is that the lands and waters included in the native title claim are part of Yaegl ancestral country and that the Yaegl connection to the land and waters has been continuous since the Dreamtime when the land and waters were given to Yaegl people. Bundjalung and Gumbayngirr people recognize us and this area as Yaegl country.

Statement by Deidre Randall affirmed 3 August 2006

- At [3]: My traditional country includes the waters of the claim area and the islands within the waters. I grew up knowing that the claim area is part of our country. When we went on the rivers, gatherings, fishing – the old ones would point and tell you "This is Yaegl".
- At [4]: All of the claim area is definitely part of Yaegl country. I have fished there all my life, from Yamba and Pippie Beach to up here in Maclean. There is no difference between the community at Yamba and here in Maclean. Mum and Dad would take us visiting at Pippie Beach, Fishing,

[14] Ulaghandi Island has different spellings. It is also spelt Ulgandahi. I have spelt it as it appears in the reference I am referring to at the time.

pippying, worming with someone older is what I remember, like with our Uncles, we couldn't go alone. The Elders looked after us.

- At [32]: I have travelled everywhere within the claim area. I have fished right along the river both side of the bank. Most Yaegl People have been everywhere there.

It is clear from the above information that the country about which people speak extends beyond the boundaries of the claim area defined in this application. There is enough detail which places people's current and past association well within the claim area. It is worth noting a comment made by Sundberg J in *Neowarra and Others v Western Australia and Others (No 1)* [2003] FCA 1399:

> WAFIC has objected to the admission of material relating to land outside the claim area. Similar objections have been disallowed in relation to witnesses other than those the subject of this ruling. Evidence relating to areas within the Wanjina-Wunggurr region, though outside the claim area, is relevant because it may throw some light on what happens in the claim area. The best evidence is what occurs in the claim area. But given the way the applicants put their case, this relevance objection cannot succeed. It must remain a question of weight. [43]

In addition to this material, a 'literature review' provided at Attachment F of the 2003 application highlights historical records of Aboriginal occupation at the mouth of the Clarence River and in the vicinity of Ulgundahi Island; archaeological surveys in and around the vicinity of the claim area revealing shell middens, open sites or stone artefact scatters, burial sites, and a scarred tree.

All this information refers to past and current association with the Clarence River and its islands and river banks. I am satisfied that there is sufficient factual basis to support the assertion that members of the claim group have and their predecessors have had an association with the area.

(b) that there exist traditional laws acknowledged 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 there is a factual basis for the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

Schedule F provides the following information:

9. The rights and interest described in *Schedule E*, and the traditional laws acknowledged, and customs observed, have been possessed and exercised, and acknowledged and observed, by the Yaegl People, since time immemorial including –
   (a) at the time when sovereignty was asserted by the Crown of the United Kingdom; and
   (b) at the time of contact with non-Aboriginal people
10. The traditional connection of the Yaegl People with the area claimed, and native title rights and interests, were inherited from their ancestors in accordance with traditional laws and customs.
11. The Yaegl People continue to acknowledge traditional laws, observe customs, and possess and exercise their traditional rights and interests, in relation to country which includes the *area claimed* as illustrated by the activities set out in Schedule G.

The statements of the claim group members contain information relating to the existence of traditional laws and customs:

Statement by Judy Breckenridge, affirmed 3 August 2006

- At [9]: We would put the fish in a bag and we shared them. All Yaegl People share their fish and we just knew that's [sic] you did. There was always a feed.
- At [12]: We have always gone out fishing. [Name deleted] will call me up and we will go, sometimes in the middle of the night. We went right around fishing and we share what we catch. Giving is like cooking – I was taught that as part of our people. I have taught my kids the same way I was taught. I'm a river person.
- At [16]: One of our totems is the dog. After dark down on the road in Maclean there is a white dog and I have seen a shadow and there is someone watching over that dog…

Statement by Thelma Kapeen affirmed 4 August 2006

- At [6]: We always had food on Ulaghandi Island. Our young men would go out and help bring the fisherman's nets in and get fish in return and of course we were always out fishing in the river ourselves. We never kept anything all too [*sic*] ourselves, we were always sharing our catch with the families on the island. Elders picked out what was needed and decided how things should be shared out.
- At [11]: My Mum told me about the reef at Yamba and that no one is supposed to touch it. The reef is the Dirringun and it is part of the claim area in our native title application. It is there for a reason and my Mum told me that it has to stay there.

- At [12]: My Mum told me that if something happened to the reef that the sea would come in and drown people. She told us the story about the old woman and the canoe which is part of the story of the reef and it is a very special story to Yaegl People and a very special place. I know from what I have seen myself that Yaegl People can get sick and get bad luck if we don't look after those places in the right way. The native title claim is one way we have tried to protect that place. Protecting those places is part of Yaegl People's responsibility to country.
- At [16]: There are certain places in Yaegl country which belong to men and certain places belonging to females. You couldn't ask why as children. You weren't allowed to listen to the Elders talk. They'd say it was for adults only.
- At [17]: Later on we were taught more about Yaegl law and where we could go and where we couldn't. We were not allowed to go near bora rings when we traveled and I still wouldn't go. We wouldn't go to bora rings anyway because that's men's business. We weren't allowed to go near burial places either.
- At [23]: I have been told many stories about Yaegl country. Mum used to tell us all the time on the island about *jarrawarra* – little hairy men. She said that they would come and mix up with the kids when they counted. She said we had to be careful in the bush with the little ones, 'don't want the little ones to wander off, be home by dark'. They made sure we were home by dark and I believed it without question – I still believe it. It's a story I told my own kids.

Statement by Ron Herron affirmed 4 August 2006

- At [6]: I have always considered myself to be a Yaegl Person and that is the way I was brought up. The other Yaegl people were made known to me by my Elders and to my knowledge the persons can be described as the descendants of the apical ancestors referred to in the Native Title application – *[names deleted]*. The Yaegl people are descendant from Yaegl ancestors on the male or female side.
- At [8]: … My maternal grandfather would teach us about Yaegl country during this time and how to live as Yaegl people. He did all the speaking and he would tell us where we could go, where we couldn't and what we could and couldn't do. He told us more and more as we got older. Sometimes it would be the same stories but he would tell us more of the story and advance it.
- At [9]: As well as my grandfather, it was my uncles and my mother and mother's sisters who told me the stories and the yarns of the Yaegl People.

- At [17]: I have been taught to follow the traditional Yaegl rules of how food should be treated and prepared and the relationship between who hunts it and gathers it and the person it is given to. It is called offering in the Yaegl way.
- At [19]: Since I was little, I have been aware of the Dirringun reef in the river's mouth. I was told about it by my grandparents and other Yaegl people. I clearly remember Granny *[name deleted]* and her brother, *[name deleted]*, telling me about it. Everyone in my community knew about it. The Dirringun is within the claim area and the native title application and is a very significant site to Yaegl People and we have an obligation to protect it. Although the Dirringun is Yaegl's responsibility, if the Dirrungun was destroyed it would effect (*sic*) Bundjalung and Gumbayngirr people as well.
- At [20]: I was told the story of the golden dog and the places associated with it. The dog and the dingo are the same thing and the Dingo is the totem for Yaegl, it belongs to this area.

Statement by Deidre Randall affirmed 3 August 2006

- At [14]: There are rules about where we can go within the claim area. We had to be off the back beach near Angourie by dark, for spiritual reasons. We can't stay there after dark. It is a strong spiritual area – we yarn with other Gooris who aren't from country and we tell them not go to there after dark. I still don't go there.
- At [15]: The Elders told us things like that, about where we can where we can't go and we didn't question it. I've told my children. We also have rules about what we can touch and what we can't and we follow those rules still.
- At [16]: The Elders told me about our special places as well, for example the midden at Barry Point on your way up to Pippie Beach.
- At [17]: The story of the *Dirrangun* is a very important story to Yaegl People. We pass the story of the *Dirrangun* on to our kids, as Yaegl People. The story of the Golden Dog is also very important.
- At [18]: The *Dirrangun* is located directly between the two headlands, just where the river meets the sea. She is part of the claim area. If something happened there, she wouldn't be happy. She is strong and powerful and you wouldn't upset her. There would be trouble for the communities if something happened and heaps of bad luck. If we were in a boat, we would steer well clear of that site.

The material at Attachment F of the 2003 application provides historical references to: mapped occupation sites in and around Yamba; the community of people around the lower Clarence River variously identified as Yiegra, Ymbah tribe,

Yeagirr tribe, Yaygir, Yegera; compilations of language informed by the named apical ancestors of the Yaegl People and their descendents; and details of myths and sites of significance and in and around the claim area informed by the named Yaegl ancestors and their descendents.

I am of the view that the material I have considered provides sufficient references to the stories of places, the significance of the Dirrungan, customs relating to access to land, traditions and laws concerning fishing and food as well as the continuity and transmission of language, society and culture.

I am satisfied that there is a sufficient factual basis to support the assertion 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 law's and customs

Under this requirement, I must be satisfied that a factual basis is provided to support the assertion that the claim group continues to hold native title in accordance with their traditional laws and customs.

Schedule F provides the following information:

> Historical, archaeological and site information
> 9. Since time immemorial, and in accordance with traditional laws and customs, the area claimed has been regarded as belonging to the Native Title Claimant Group.
> 10. The area claimed is part of a larger area of land and waters which continued to be owned and occupied by the Yaegl People after the assertion of sovereignty by the Crown of the United Kingdom. The Yaegl people retain a traditional connection both to the area claimed and to country generally. The traditional connection of the Yaegl People to the area claimed is shown both by matters relating directly to it, and by matters relating to other country.
> 11. There are many sites of significance to [sic] Native Title Claimant Group within and near to the area claimed.
> 12. Material evidence of the physical connections of the ancestors of the Yaegl People exists in the claim area and surrounding country. It is illustrated by the presence of archaeological evidence of both pre-contact and post contact Aboriginal habitation. The evidence includes artefacts, fragments, and traditional occupancy sites within and near to the area claimed and traditional

stories told about the creation of the River and the formation of significant sites around, in and beneath the waters of the Clarence River.

Traditional Laws and Customs

13. The Native Title Claimant Group observes common traditional laws and customs. These include a common kinship system and observance of common laws relating to land tenure, and traditional usage of land and waters
14. The kinship system includes:
    (a) recognition of common ancestors;
    (b) common and interdependent familial ties which determine traditional rights and customs regarding land and waters;
    (c) recognition of group and individual responsibilities towards land and waters;
    (d) recognition and acceptance of common patterns of descent;
    (e) recognition of sanctions and prohibitions relating to relationships, access to land and waters, and custodianship;
    (f) recognition of individual or group connection to land and waters;
    (g) affiliation, on a group and individual basis, with totemic beings which related to land/waters and law;
    (h) participation in, and responsibility for, ceremony;
15. Transmission of traditional knowledge from one generation to the next;
16. Common traditional laws and customs acknowledged and observed by the native title claim group relating to tenure in the land and waters include:
17. Fulfilment of spiritual obligations with regards to the land and waters;
18. The observation of restrictions imposed by gender, age and ritual experience;
19. The observance of restrictions imposed by the presence of sites of significance on the land and waters;
20. The observation of restrictions imposed by the presence of Dreamings on the land and waters;
21. Examples of traditional usage of the land and waters in the claim area is contained in Schedule G;
22. These common traditional laws and customs give rise to a connection with the land and waters of the claim area.

The statements of the eight claim group members contain information about the continued acknowledgement and observance of traditional laws and customs:

Statement by Judy Breckenridge, affirmed 3 August 2006

- At [13]: I went looking with *[name deleted]* for witchety grubs just two weeks ago, you look at the tree for saw dust so you know where they are and we hooked them out with a long piece of wire. Carmel was collecting them to fry up and eat. She is really game and goes out all the time getting tucker and worming.

Statement by Thelma Kapeen affirmed 4 August 2006

- At [7]: The Clarence river is part of the area we are claiming in the native title application and Yaegl People still go down to the river and go fishing there and the younger ones still share around what they catch…
- At [13]: … Even though our Elders went to church and told us to, we knew that Yaegl cultural laws were more important, the old people believed that and taught us that. You have to abide by the law – the rules…
- At [20]: My Grandfather *[name deleted]* on my Dad's side talked in his language, hitting sticks like a ceremonial thing but we weren't allowed to talk to anyone about it. My Mum's people talked the Yaegl language and some Yaegl people still can speak the language.

Statement by Ron Herron affirmed 4 August 2006

- At [4]: My Uncles talked about *[name deleted]*, my great grandfather, a lot. He was an Aboriginal man, a Yaegl man. They talked about him and made references to him. There was respect for him. They would say they were told of the places not to go to by *[name deleted]*. He also told them about massacre and burial sites.
- At [21]: It is important to pass the knowledge on and that is our law and custom. Traditional law and custom is still passed on with stories. I talk to men a few years younger than me and that is how I pass it, the men's things. It was the same for me, *[name deleted]*, my Mum's Uncle taught me. Our grandfathers and our uncles would open up to us Yaegl boys, not with the boys from out of town but they did warn them about where they could go. They weren't told everything about that place but they were told where not to go, mainly to protect them at that time. *[Name deleted]* and *[name deleted]* knew the important men's business things.

Statement by Deidre Randall affirmed 3 August 2006

- At [11]: Yaegl people couldn't survive without that river, we go down there always. It is a big part of our lives, from Elders to children, all Yaegl People feel that way about the claim area.
- At [19]: The Dirrangun has done some traveling up the river though. Mainly Yaegl country but the story goes right up the river, so if something happened to her, it would affect them, other Goori communities up river, as well.
- At [20]: Yaegl People are responsible for her. She doesn't want to be touched. It is the same with the canoe. It would be dramatic if something happened which affected her. We wouldn't even consider moving her. There would be consequences like floods and sickness.

- At [23]: The Dingo is our totem. I was camping at Sandon once and I could feel a presence, when I looked over there was a dingo staring at me over the fire and not long after that we lost Mum, It was a warning that something was going to happen.
- At [33]: There are islands in the river which are crown land and as a Yaegl person I would say we own that land and all that area. Yaegl People share land and water but it belongs to us and we belong to the land.

The statements all provide references to continuing laws and customs relating to the current access to country and use and sharing of fish and foods, the transmission of language and culture, the continuing acknowledgement of the Dirrangun, the continuing observance of rules governing community and social relationships.

I am satisfied that the material I have considered contains a sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with those traditional laws and customs.

Conclusion

The test in s 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests *exist*. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicant's relationship with their country as that is a judicial enquiry.

What I must do is consider whether the factual basis provided by the applicant supports the assertion that claimed native title rights and interests exist. In particular this material must support the assertions described in s 190B(5)(a), (b) and (c). Relying on all the material I have read pertaining to this application, some of which has been quoted above, I am satisfied that a sufficient factual basis is provided for in this application.

s 190B(6) Native title rights and interests claimed established prima facie

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

RESULT

This condition is met

REASONS

The law

Under s 190B(6) I must be satisfied that, prima facie, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered. In *Doepel*, Mansfield J noted at [16] the following:

> Section 190B(5), (6) and (7) however clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s 190A(3) may be relevant. Even so, it is noteworthy that s 190B(6) requires the Registrar to consider whether `prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle.

The consideration by the High Court in *North Ganalanja Aboriginal Corporation v QLD* (1996) 185 CLR 595 ("*North Ganalanja*") of the term 'prima facie' as it appeared in the registration sections of the NTA, prior to the 1998 amendments, seem to be still relevant. In that case, the majority of the High Court said:

> 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 the Oxford English Dictionary (2nd ed) 1989]

The test in *North Ganalanja* was considered and approved in *Doepel*, see at [134]:

> Although [*North Ganalanja*] 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…

Mansfield J in *Doepel* also approved of comments by McHugh J in *North Ganalanja* at [638] – [641] as informing what prima facie means under s 190B(6):

> …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.

Doepel is authority that this pronouncement of the meaning of prima facie supports the view that it is not for the Registrar to resolve disputed questions of law (such as those about extinguishment and the applicability or otherwise of s 47B) in considering whether a claimed right or interest is prima facie established under s 190B(6).

Having regard to the above authorities on what is meant by prima facie, it follows that the task under this section is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed. In doing so, I should have regard to settled law about:

- what is a 'native title right and interest' (as that term is defined in s 223);
- whether or not the right has been extinguished; and
- whether or not the right is precisely expressed such that it sets out the nature and extent of the right[15]

If a described right and interest in this application has been found by the Courts to fall outside the scope of s 223(1) then it will not be prima facie established for the purposes of s 190B(6).

Consideration of the claimed right to exclusive possession

1. Over areas where a claim to exclusive possession can be recognized (such as areas where there has been no prior extinguishment of native title or where s 238 and/or ss 47, 47A and 47B apply), the Yaegl People as defined in Schedule A of this application, claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

Not established

The majority decision of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 ("*Ward*") is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can prima facie be established. However, *Ward* is also authority that such a claim may only be able to be prima facie established in relation to some areas, such as those where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicant claims the benefit of ss.47, 47A or 47B).

[15] *Ward* at [51]

This application is primarily a claim to rivers and tidal waters which include the tidal channels and lagoons at the lower reaches and mouth of the Clarence River.

It is my view that it is unlikely that a claim to exclusive possession can be established in relation to land or waters in the application area. The decision in *Gumana v Northern Territory of Australia* [2005] FCA 50 deals with the existence of native title rights and interests in the area of rivers, streams and estuaries. Selway J concludes at [87] that the decision in *Commonwealth v Yarmirr* (2001) 208 CLR also applied to 'those parts of estuaries or navigable rivers where the waters are affected by the flow or ebb of the tide' and that he was bound to accept this principle

It may be possible that tenure detail and analysis may reveal some areas of land within the application area that may be capable of sustaining a claim to exclusive possession. However, on the face of the information currently before me I am unable to find that a prima facie right of possession, occupation, use and enjoyment as against the whole world could be established.

If upon further analysis a claim to exclusive possession could be sustained, based on the material I have considered in making this decision, it is my view that it would not be sufficient to establish the right. There is very little material on the two rights which make up exclusive possession - a right to control access and a right to make binding decisions about the use of the country.

Consideration of non exclusive rights

2. Over areas where a claim to exclusive possession cannot be recognized, the Yaegl People as defined in Schedule A of this application, claim the following rights and interests including the right to conduct activities necessary to give effect to them:

    (a) The right to access the application area

    (e) The right to move about the application area

Established

Statements relevant to these claimed rights which are provided with the application are extracted below:

> Thelma Kapeen at [7]: The Clarence river is part of the area we are claiming in the native title application and Yaegl People still go down to the river and go fishing there and younger ones still share around what they catch…; at [8]: I still go down to Woody Head for pippis …; at [9]: Lots of Yaegl people go

> fishing, it is just part of our lives. People have certain spots. My sister went out not long ago with [name deleted]…
>
> Deidre Randall at [5]: Those Aunts and Uncles taught us about fishing, pippying and about middens. As a kid we would spend the day at Pippie beach collecting pippies, oysters and fish and we would cook it up right there on the rocks.; at [9]: When we go to the beach we get everyone together and go to Sandon or Woody Head or Shark Bay for pippying. We go fishing at the same time and come back and have a barbie.

Schedule G lists a number of activities carried out by the Yaegl People on their traditional land which relate to access to the claim area and moving about the area

This material above provides prima facie support for the right to access the application area and the right to move about the application area. Additionally, throughout all the statements evidence is provided as to the activities which occur on the application area which necessarily require access to the area and a 'moving about' the application area. I can therefore find that these rights can be prima facie established.

(c) The right erect shelters and other structures on the application area

Not Established

Statements relevant to these claimed rights which are provided with the application are extracted below:

> Thelma Kapeen at [10]: …my family would build shelters at Yamba and along the way if they needed to and go hunting and fishing there.
>
> Deidre Randall at [8]: I know a lot of my Uncles – *[name deleted], [name deleted]* – would go to the fish traps to collect fish…
>
> Schedule G at (f): building and using traps on waterways within the area claimed

There is not sufficient material to prima facie establish the right to erect shelters. The right to erect 'other structures' is not specific about the nature and extent of the particular right. As quoted above the only other structures evidenced in the application and other material before me is related to the use of fish traps.

(b) The right to camp on the application area

(d) The right to live, being to enter and remain on the application area

Not Established

There is not sufficient material to prima facie establish the right to camp on the application area or the right to live, being to enter and remain on the application area. The material before me talks about living in Yamba and Maclean, both of which are locations outside of the application area.

(f) The right to hold meetings on the application area

Not Established

There is not sufficient material before me to prima facie establish the right to hold meetings on the application area.

(g) The right to hunt on the application area

(h) The right to fish on the application area

Established

Statements relevant to these claimed rights which are provided with the application are extracted below:

> Judy Breckenridge at [11]: We'd get cobra too, it is like a big worm and also pippies and we'd go out collecting that sort of thing. Occasionally we would get mud crabs, jew fish, '*schoolies*' and pan fish.
>
> Thelma Kapeen at [9]: Lots of Yaegl people go fishing, it is just part of our lives. People have certain spots…
>
> Ron Heron at [13]: We would also travel up and down the river and into creeks looking for cobra logs to get some cobra. We'd pull up the cobra logs out of the water, and chop them into 2 foot lengths. Sometimes the logs were big enough to make four quarters. Then we'd hit each end of the log with something solid like and axe or a stone to knock the cobra out. After we'd got the cobra, we'd throw the pieces of log back into the water as burley for bream…
>
> Deidre Randall at [5]: Those Aunts and Uncles taught us about fishing, pippying and about middens. As a kid we would spend the day at Pippie beach collecting pippies, oysters and fish and we would cook it up right there on the rocks. At [10] I learnt about fishing and getting tucker from the older ones, they told us to watch them, they directed us how to do it. *[Name deleted]* is a good wormer.

This material provides prima facie support to establish the right to hunt and the right to fish on the application area and the right to cook food resources harvested from the application area.

(i) The right to cook food resources harvested from the application area

Not Established

Whilst there is some reference to the cooking of 'food resources' in the affidavit material, the right as it is expressed is not, in my view, precise. Is it expressing a right to cook on the application area or elsewhere? The activities listed in Schedule G do not include cooking on the application area which may have assisted in clarifying the right.

Therefore, as currently expressed I cannot find that this claimed right can be prima facie established.

(j) The right to have access to and use the natural water resources of the application area

Not established

The material in the statements provides prima facie support for the right to access the natural water recourses of the area (see above under 'right to fish'). However, there is no material to support the right to use the natural water resources of the area (what defines 'use' is unlcear'). Additionally, it is my view that the right is not currently expressed with a precision which sets out the nature and extent of the right.

I cannot alter the rights as claimed by the applicant, and therefore cannot find that this claimed right can be prima facie established.

(k) The right to gather and use the natural products of the application area (including food, medicinal plants, timber, charcoal, ash, stone, ochre and resin) according to traditional laws and customs

Not established

This is a right that sits within the definition of native title rights and interest in s 233 and has not been found by the Courts to fall outside the scope of this section. The affidavit material provides prima facie support for the right to gather and use some of the natural products of the application area – being food and medicinal plants. However, there is not material to establish prima facie the right to use "timber, charcoal, ash, stone, ochre and resin" under traditional laws and customs. Given that I am unable to sever the right as claimed, this right cannot currently be prima facie established.

(l) The right to share, offer and exchange resources derived from the land and waters within the area claimed

Not established

There is sufficient material in the application to indicate the sharing and exchange of food (particularly fish) in accordance with traditional law and custom, for example,

> Deidre Randall at [13]: Its automatic, if you get a catch you share it. Take what you need but you share with family. I share my catch with my brother and sisters and also then I might go up to the mission and pass on the rest of the catch it's always been a sharing thing and the kids come first.

However, it is my view that the term 'resources' does not define the right with any precision. This right cannot currently be prima facie established.

(m) The right to conduct ceremony including marriage ceremonies on the application area

Not established

There are assertions listed in Schedule G associated with this right: at *(h) conducting ceremonies*; at *(k) carrying out traditional responsibilities … in accordance with spiritual, ceremonial, economic and social obligations such as – traditional ceremonies*…

None of the affidavit material refers to the conduct of any type of ceremony. The use of the term 'including' does not allow for a specific identification of the nature and extent of the right being claimed. This right cannot currently be prima facie established.

(n) The right to participate in cultural activities including those relating to birth and death on the application are

Not established

The nature and extent of the kinds of 'cultural activities' carried out is not set out in any of the material before me. The use of the term 'including' also does not allow for a specific identification of the right being claimed. No reference is made in the affidavit material to any cultural activities relating to birth and death This right cannot currently be prima facie established.

(o) The right to maintain and protect places of importance under traditional laws, customs and practices in the application area

Established

Statements relevant to these claimed rights which are provided with the application are extracted below:

> Thelma Kapeen at [12]: f. At [12]: My Mum told me that if something happened to the reef that the sea would come in and drown people. She told us the story about the old woman and the canoe which is part of the story of the reef and it is a very special story to Yaegl People and a very special place. I know from what I have seen myself that Yaegl People can get sick and get bad luck if we don't look after those places in the right way. The native title claim is one way we have tried to protect that place. Protecting those places is part of Yaegl People's responsibility to country.
>
> Deidre Randall at [19]: Yaegl People are responsible for her. She doesn't want to be touched … it would be dramatic if something happened which affected her. We wouldn't even consider moving her. There would be consequences like floods and sickness. At [21]: The native title claim was lodged, in part, to protect her. At [31] Yaegl People have the obligation to protect our places and stories and to maintain them and that goes for everywhere in Yaegl country, land and water.

There is recent authority where the Court has discussed whether the term 'protect' necessarily involves an intention to exclude or control access. The Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 220 ALR 431 (*Alyawarr*) (at [140]) found that the notion of protection of sites may involve physical activities on the site to prevent destruction, but need not be read as implying a general right to control access. There is nothing implied or otherwise in either the expressed right or the information before me that conveys an intention to control access by others to any areas of importance.

I therefore consider that the right to maintain and protect places of importance in the application area can be prima facie established.

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

Established

Statements relevant to these claimed rights which are provided with the amended are extracted below:

> Thelma Kapeen at [25]: Like the reef, we have a responsibility to all Yaegl country and the rivers and sea. I think we own this country – the water and the land. We have obligations and rights, we should be able to go freely whenever and

> wherever we want to. There should be no damage to anything, not even a tree. Yaegl People have the right to say what happens here and we have the obligation to protect it.

This material provides prima facie support for the right

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

Not established

Thelma Kapeen in her affidavit at Attachment F(2) refers to issues of permission to access Yaegl country by other Aboriginal people at [19] and[26].

The right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group could not be prima facie established – see above p.44. Without this right to exclusive possession, the right to speak authoritatively about the application area and the right to regulate access to and use of the application area cannot be prima facie established. This was confirmed in *Alyawarr* at [148] by reference to *Ward*:

> … their Honours said at [52] that without a right, as against the whole world, to possess the land 'it may greatly be doubted that there is any right to control access to the land or make binding decisions about the use to which it is put'. Having regard to what was said in the High Court it seems that the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world. The underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty.

This right cannot currently be prima facie established.

(r) The right to make decisions about the use of the application area by other Aboriginal People who recognize themselves to be governed by the traditional laws and customs acknowledged and observed by the Yaegl people

Not established

In his affidavit, Ron Herron affirms at [7] that "… the Bundjalung and Gumbayngirr people recognize us and this area as Yaegl country". I have addressed earlier the links of the Bundjalung and Gumbayngirr groups to the

application area and accepted their affiliation with the Clarence River and the Dirrungan.

With considerable inference I am assuming that this right refers to the right of Yaegl people to make decisions about how Bundjalung and Gumbayngirr people use the application area. There are no specific references in the material before me as to the intersection of activities or rights and interests which occur or may occur between the three groups within the application area.

Again, I am of the view that this description does not set out the full nature and extent of the right claimed and therefore cannot be prima facie established.

(s) The right to transmit the cultural heritage of the Yaegl people including knowledge of particular sites

Not established

Please refer also to my consideration of this right at 190B(4).

In addition to my reasons provided at 190B(4), I am of the view that were the right 'identifiable' at that condition, the material before me about the activities in exercise of the right is neither precise nor sufficient to satisfy me that it can be prima facie established.

Conclusion for 190B(6)

In conclusion, I am satisfied, having considered all the information before me, that the following rights as claimed can be prima facie established under s 190B(6) and should be registered:

(a) The right to access the application area
(b) The right to camp on the application area
(e) The right to move about the application area
(g) The right to hunt on the application area
(h) The right to fish on the application area
(o) The right to maintain and protect places of importance under traditional laws, customs and practices in the application area

s 190B(7) Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity; or

(ii) a statutory authority of the Crown in any capacity; or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

RESULT

This condition is met

REASONS

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

Sufficient material is provided in the statements at Attachments F(1) to F(4) regarding the traditional physical connection of members of the native title claim group. The material has been quoted at length in my consideration for both 190B(5) and 190B(6).

On the basis of the statements by members of the claim group, I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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

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

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

Section 61A(1)	**No native title determination application if approved determination of native title**

REASONS

A search of the Native Title Register as at 30 October 2006 and 7 December 2006 has revealed that there are no determinations of native title in relation to the area claimed in this application.

Section 61A(2)	**Claimant applications not to be made covering previous exclusive possession act areas (PEPAs)**

REASONS

Schedule B of the application at point B, provides for the exclusion of any 'land covered by past or present freehold title or by previous exclusive possession acts as defined by s 23B of the Native Title Act 1993' and lists a number of specific exclusions.

Section 61A(3)	**Claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas (PNEPAs)**

REASONS

Schedule B of the application at para 3 of point B, states that 'exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth, state or territory.'

Section 61A(4)	**To which ss 47, 47A or 47B may apply**

REASONS

Schedule B of the application provides at para 5 of point B that areas covered by ss 47, 47A and 47B of the Act are not excluded from the application.

Conclusion for s 190B(8)

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

s 190B(9)(a) No claim to ownership of Crown minerals, gas or petroleum

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 of 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;

RESULT

This condition is met

REASONS

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

s 190B(9)(b) No exclusive claim to offshore places

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;

RESULT

This condition is met

REASONS

The application at Schedule P states that 'This application does not make any claim to exclusive possession of any offshore place'.

s 190B(9)(c) Native title not otherwise extinguished

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 ss 47(2) and 47A(2) or s 47B(2).

RESULT

This condition is met

REASONS

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

[End of document]