National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

Delegate:	LISA JOWETT
Application Name:	Barkandji Traditional Owners #8
Names of Applicants:	Murray Butcher, Derek Hardman, Jennifer Whyman, William Charles Bates, Maureen O'Donnell, Mary-Ann Marton, Cyril James Hunter
Region:	NSW
NNTT No:	NC97/32
Federal Court No:	NSD6084 of 1998
Date Application Made:	8 October 1997
Application Last Amended:	28 June 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
2 November 2006

Brief history of the application

The original application was lodged on 8 October 1997 with the Native Title Registar by Dorothy and Phillip Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) people. ("Lawsons")

It is important to outline the history of the changes to the applicant and the decisions made in relation to the s 66B applications in respect of this native title determination application.

On 13 July 2001, an application made under s 66B to remove the Lawsons as the applicant was dismissed (*Johnson, in the matter of Lawson v Lawson* [2001] FCA 894 (13 July 2001). Although Stone J accepted that the Lawsons had lost the confidence of some important members of the claim group, the judge was not satisfied that the evidence was sufficient to show that the claim group, by appropriate decision-making processes, had revoked their authority to represent it or had authorised other members of the claim group to replace them.

On 9 December 2002, in a new application under s 66B, [names deleted] Mary-Ann Marton, Jennifer Whyman and [name deleted] replaced the Lawsons as the applicant (*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"*)).

On 29 September 2004, the native title determination application was amended to add the five persons listed above, and additionally William Bates, Maureen O'Donnell and Cyril Hunter to those individuals comprising the applicant, as a result of the s 66B order made on 9 December 2002. On 23 December 2004, the amended application was considered by a delegate of the Native Title Registrar and not accepted for registration. The delegate was not satisfied under s 190C(4) that the new applicant was authorised and the application also failed certain aspects of the merit conditions in s 190B.

A meeting of the claim group was held on 1 October 2005, the proceedings of which are the basis for the authorisation of the applicant of this current amended application.

Finally, the most recent s 66B application was filed on 13 December 2005, in which members of the claim group sort to replace the current applicant on grounds that the current applicant was no longer authorised by the group to make the application and to deal with matters arising in relation to it. Stone J's decision

('Pooncarie' Barkandji (Paakantyi) People v NSW Minister for Land & Water Conservation [2006] FCA 25 ("Pooncarie")) ordered the removal of [names deleted] from the applicant group, and added two new members, Mr Murray Butcher and Mr Derek Hardman.

On 28 June 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 28 June 2006, including attachments, affidavits and claim group member statements
- Geospatial Assessment and Overlap Analysis as provided on 22 August 2006 by the National Native Title Tribunal's Geospatial Unit
- Reports of the 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 Barkandji 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 22 August 2006
- Submission by the State of New South Wales pursuant to s 190A(3) made on 25 September 2006
- Response to the delegate's June 2006 Preliminary Assessment by New South Wales Native Title Services as representatives for the claimants, dated 3 October 2006
- Claimants Response to Submissions Received from NSW Department of Lands, dated 28 September 2006, prepared by New South Wales Native Title Services (NSW NTS)
- Affidavit of [name deleted], Research Manager and Anthropologist with NSW NTS, affirmed 14 November 2005, as attached to the above mentioned 'Claimants Response' dated 28 September 2006
- Submission by NSW NTS dated 26 April 2006 responding to the preliminary assessment of the Pooncarie Barkandji Traditional Owners application (NC95/10; NSD6018/98)
- The decision by Stone J in *'Pooncarrie' Barkandji (Paakantyi) People v NSW Minister for Land & Water Conservation* [2006] FCA 25 (2 February 2006)

- The decision 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 (9 December 2002).
- Material contained in the amended Barkandji #8 application (NC97/32, NSD6084/98) exhibited to the affidavit of [name deleted] dated 7 August 2002. There are two documents in particular from which I draw information:

  (i) Attachment F is the Affidavit of [name deleted] dated 27 July 1999 which contains, amongst other things: *Lake Victoria EIS Anthropological Report – A Report Prepared for the NSW Department of Land and Water Conservation and the Murray-Darling Basic Commission*; [name deleted] – June 1997

  (ii) Schedule M which refers to Attachment M(A) containing, amongst other things: *Report to the Minister of Aboriginal and Torres Strait Islander Affairs.* This report is made under s10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* – in response to a Notice of Application for protection of burial sites at Lake Victoria (my assumption, as detail is lacking, is that the report is by [name deleted] dated about September 1998).

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.

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 ss 190B and 190C of the *Native Title Act*.

s 190B sets out the merit conditions of the registration test (see pages 26 - 63)

s 190C sets out the procedural conditions of the registration test (see pp 6 - 25)

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 31 May 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 ss 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 contained in Schedule A of the application and describes The Barkandji Traditional Owners as the native title claim group on whose behalf the applicants make this application. The claim group is said to be made up of all the descendents of 50 named apical ancestors.

Consideration

For the purposes of this requirement, 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 21 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.

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 seven persons who comprise the applicant are filed with the application. These are the affidavits of:

Jennifer Whyman made 19 March 2006
Mary-Ann Marton made 19 March 2006
Cyril James Hunter made 18 March 2006
Derek Hardman made 18 March 2006
Maureen O'Donnell made 9 May 2006
William Charles Bates made 10 May 2006
Murray Duane Scott Butcher made 11 May 2006

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:

(e) the basis on which we are authorised as mentioned in paragraph (d) is set out in Attachment R to this application

Consideration

I am satisfied that 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 M(1) through to M(8), which provide evidence in support of the claim group's traditional physical connection over the application area. Statements are made by [name deleted], Mary-Ann Marton, [name deleted], William Bates, Cyril James Hunter, Murray Butcher, [name deleted] and Maureen O'Donnell.

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. This information has been prepared by the Tribunal's Geospatial Unit and provides the geographic extent of the application (128,497.33 sq km) and a description of the external boundary including the geographic coordinates which delineate the boundary.

Schedule B also provides detailed information about the land and waters within the external boundary which are not covered by the application area.

I am satisfied that this information complies with the requirements of s 62(2)(a)(i) & (ii).

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 Tribunal's Geospatial Unit showing the external boundaries of the application area. I am satisfied that the map contained in the application meets the requirements of s 62(2)(b).

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 provides the following information:

> The Department of Lands has previously undertaken a programmed search of certain lands identified within the area covered by the application. Given the size of the claim area it is understood that further tenure searching will be undertaken at a time yet to be determined by the Department of Lands.

I am satisfied that the requirements of this condition are met by the provision of this information.

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 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 comprehensive description of the native title rights and interests claimed in relation to particular land and waters covered by the application area. The description includes activities in exercise of those rights and interests.

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. More extensive information in relation to the practices of members of the claim group that helps establish the factual basis is provided in the statements annexed at Attachments M(1) through to M(8).

I am satisfied that the requirements of s 62(2)(e) have been met.

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 detailed information about the activities carried out on Barkandji country in exercise of the rights and interests described in Schedule E and cover all the categories listed there. Instances of these activities are included in the statements annexed at Attachments M(1) through to M(8).

I am satisfied that the requirements of s 62(2)(f) have been met.

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 notes the existence of one compensation application (NSD6165/98) and one non-claimant application (NSD6004/00) that have been made in relation to all or some part of the area covered by this application.

I am satisfied that the requirements of this condition are met by the provision of this information.

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 the following and refers to a copy of a s 29 notice included in the application:

> The Applicant is aware that some section 29 notices have been issued in the claim area during the life of the claim – a list is not presently available to the applicant.

> Within the previous three months a s29 notice has been issued in respect of the proposed grant of an exploration licence to Broken Hill Operation *(sic)* Pty Ltd (ACN 054 920 893). A copy of that notice is provided and labelled ***"Attachment I"***.

A Tribunal Geospatial Assessment and Overlap Analysis as at 22 August 2006 lists 68 s 29 or equivalent notices dating back to March 1998 and includes that notice listed in the above statement. I am satisfied that the requirements of s 62(2)(h) have been met.

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

No applications on the Register of Native Title Claims fall within the external boundary of this application. This information is per a Tribunal Geospatial

Assessment and Overlap Analysis as at 22 August 2006. My search of the Register as of 2 November 2006 confirms this.

Any appearance of an overlap by the Pooncarie Barkandji Traditional Owners Native Title Claim (NC95/10; NSD6018/98) does not constitute an overlap as it is specifically excluded at Schedule B.

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 [Murray Butcher] dated 14 November 2005 [Annexure R(1)];
- Affidavit of [Derek Hardman] dated 7 November 2005 [Annexure R(2)];
- Affidavit of [Jenny Whyman] dated 4 November 2005 [Annexure R(3)];
- Affidavit of [name deleted] dated 23 June 2006 [name deleted];
- Affidavit of [name deleted] dated 14 November 2005 [name deleted];
- The decision by Stone J in *'Pooncarrie' Barkandji (Paakantyi) People v NSW Minister for Land & Water Conservation* [2006] FCA 25 (2 February 2006) [*Pooncarie*]; and
- The decision 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 (9 December 2002) [*Lawson*].

Attachment R contains the application's Authorisation Statement which 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)).

Annexures R(1) to R(3) are made by 3 individuals who in part constitute the applicant.

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

[Name deleted] is employed [deleted] with NSW NTS and is responsible for all native title research matters in New South Wales and the Australian Capital Territory. He has been working with Barkandji people and conducting anthropological and genealogical research in relation to this application since 2000 (paras [11] – [12]).

The two decisions by Stone J are made in relation to two separate a 66B applications made by the native title claim group to replace the applicant in the Barkandji Traditional Owners application.

How the authorisation meeting was convened

[Name deleted], provides detail on the process by which the meeting of 1 October 2005 was notified, advertised, prepared, convened and conducted.

Letters were sent out to claim group members on 13 and 14 September 2005 by the Dubbo Regional Office of NSW NTS. The letter included a map of the claim area, standard registration and fuel claim mileage forms, a bus schedule and was sent via pre-paid post to all members of the Barkandji traditional owners native title claim group for whom NSW NTS had postal addresses [4]:

> That address list has been compiled over the many years that NSW NTS and its predecessor have worked with the Barkandji traditional owners and is updated whenever further or new information is available. [4]

A letter to all Local Aboriginal Land Councils within the claim area was sent on 12 September 2005 "for the information of their members who are native title claimants advising them of the Claim Group meeting". [6]

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

(a) the *Mildura Midweek* newspaper in Mildura on 20 September 2005;

(b) the *Broken Hill Barrier Daily Truth* on 16 September 2005;

(c) the *Koori Mail* on 21 September 2005; and

(d) the *Wilcannia News* on 20 September 2005 [8]

Copies of all the above mentioned letters and documents have been annexed to the application.

The meeting was held at the Barrier Social and Democratic Club in Broken Hill. It was chaired by [name deleted], NTS Manager of Community Facilitation.

[Name deleted] affirms at [14] that the meeting was attended by "at least 58 persons who were representative of the families who constitute the claim group."

Having regard to the above information, I am satisfied that the 1 October 2005 meeting was properly notified to allow every opportunity for members of the Barkandji native title claim group to attend and participate in the consideration of amendments to the their application and changes to and authorisation of the applicant.

Representative Nature of the group

Attachment R provides details about the representative nature of the group attending the meeting:

> To put the representative nature of the assembled participants beyond doubt it was acknowledged by way of a resolution that
>
> - 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; and
> - The members of the Barkandji claim group who are in attendance represent the views of their Elders and those who cannot attend [5];

[Name deleted] deposes to his knowledge of the claim group:

> [11] … I dealt with this particular claim and other related Barkandji matters. I attended many meetings with the people who have and are presently the applicants for this claim and claim group members. In the course of this work I gained a familiarity with several Barkandji Elders and those with recognised authority in the Barkandji community.

[Name deleted] provides his observations and opinion about the absence of two members of the applicant group as it was constituted at the time of the 1 October meeting and its implication for the representative nature of the group attending (an issue I discuss further below):

> [22] It is my opinion that Mr Lawson and Mr Johnson are elders acknowledged by the wider Barkandji group with recognised authority in the Barkandji community. Some concern was expressed about their absence from the meeting and whether the fact that they were not present would deprive the meeting of authority. I observed those present weigh up this question and decide that the meeting was sufficiently representative of Barkandji people and attended by sufficiently senior group members for the meeting to continue.

> [23] It is my opinion that a number of the attendees are acknowledged as elders by the wider Barkandji group and recognised authority in the Barkandji community.
>
> [24] It is my opinion the attendees were representative of the wider Barkandji community and claim group and that they are descended from the apical ancestors named in the application.

Having regard to the above information, I am satisfied that those attending the 1 October meeting were sufficiently representative of the claim group in order to allow for the Barkandji 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

Attachment R provides details about the means by which decisions would be made (in accordance with s251B);

> The meeting considered the question of authority and decision making within the precise frame work of section 251B of the Act. After a brief discussion the claim group concluded that no method of decision making existed that must be complied with under traditional law and custom in relation to authorising an applicant under the Act. With no applicable method of decision making available under traditional law and custom for decisions of this kind, the group then agreed to and adopted a process of decision making for the purpose of the meeting as well as for the purpose of authorising the applicant to deal with matters arising in the course of the claim. By a unanimous decision of the claim group it was resolved that all decisions taken in the meeting would be by way of clearly worded motions to be read out to the meeting. The motion would then be moved and seconded by members of the claim group with voting in favour of or against to be decided by a majority show of hands. [7]

[Name deleted] provides extensive observations about how the group determined what kind of decision making process the group had in relation to matters pertaining to the application:

> [26] I observed [name deleted] directly ask the group whether the Barkandji had a traditional decision-making process with which they had to comply for matters of this kind, being authorising amendments of the native title claim and dealing with matters arising under the Native Title Act including replacing applicants.
>
> [27] I observed the group discuss in some detail the question put to them by [name deleted]. The discussion lasted a considerable time.

> [28] I observed many attendees answer, "No" out loud and other attendees agreeing with that answer.
>
> [29] I observed that a form of resolution was drafted at the direction of the people attending the meeting pertaining to the decision-making process applicable to the matters of this kind.
>
> [30] Once the drafting of the first resolution was settled following all contributions from the attendees, I observed [name deleted], [deleted], read out the resolution and put the motion to the floor.
>
> [31] I observed William Bates move the motion
>
> [32] I observed [name deleted] second the motion.
>
> [33] I observed [name deleted] ask for those in favour of the motion to raise their hands.
>
> [34] I observed numerous hands raised.
>
> [35] I observed [name deleted] ask for those who opposed the motion to raise their hands.
>
> [36] I observed no hands raised.
>
> [37] I observed [name deleted] ask for those who abstained form voting on the motion to raise their hands,
>
> [38] I observed no hands raised.
>
> [39] I observed [name deleted] declare the resolution passed.
>
> [43] It is my opinion, from my fieldwork, archival research and observations at this meeting, the matters for which the Barkandji have traditional decision-making processes do not apply to the current circumstances, that is, the decision to remove two of the individuals who comprise the Applicant in a Native Title proceeding; to authorise others to replace them to authorise amendments to the claim and also to direct and authorise claim group members to take the necessary steps under the Act to give effect to those decision.
>
> [45] … It is my opinion that this group consensually adopted a process that was suitable for the kinds of decisions called for at this claim group meeting such as voting by show of hands on resolutions drafted for the purpose of expressing decisions made about agenda items….

Stone J's decision in *Pooncarie* provides similar detail at [24] that the claim group has an agreed process of decision making pursuant to s 251B(b).

Having regard to the above information, I am satisfied that the Barkandji native title claim group 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. I am satisfied that the information before me is evident of the group's conclusion that no method of decision making for such purposes existed (pursuant to s 251B(a)) that must be complied with under its traditional laws and customs.

Authorisation of the applicant

Attachment R includes a statement that the applicant is a member of the native title claim group and is authorised by that group:

> A. Each of the individuals who comprise the applicant is a member of the native title claim group through descent from one or more of the apical ancestors described in Part A, Item 3, Schedule A of this further amended application (see annexures R(1), R(2), R(3) and R(4) and the statements appearing at attachments M(2), M(3), M(4), M(5) and M(8) confirming the applicants descent from the apical ancestors described in Schedule A). Each has further deposed that they are authorised to make the application and deal with matters arising in relation to it by all the other persons in the native title claim group.

Annexures R(1), R(2) and R(3) all include statements that the deponent is a member of the native title claim group and is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation it. They each state that the basis upon which they are "authorised to comprise one of the individuals who are collectively referred to as the Applicant is pursuant to a process of decision making agreed to, and adopted by resolutions passed at the claim group meeting of 1 October 2005 by people who are members of the Barkandji native title claim group."[1]

Attachment R provides detail about the review and amendment of the group's native title determination application and the changes to and nomination of new members to comprise the applicant:

> The meeting considered the issue of replacing two of the individuals who comprise the applicant – [names deleted] – who had by common agreement lost the confidence of the Claim Group. It was resolved that [name deleted] and [name deleted] be invited to resign as applicants and Murray Butcher and Derek Hardman were selected in their place. The

[1] Affidavit of Murray Butcher R(1) at paragraph 8. Similar wording appears in the affidavits of Derek Hardman R(2) (at paragraphs 7 and 8) and Jennifer Whyman R(3) (at paragraphs 5, 6 and 7).

> nomination of Murray Butcher and Derek Hardman as replacement applicants reflects the Claim Group's decision to maintain the representative nature of the individuals who comprise the applicant. It was accepted that [name deleted] may withdraw as an applicant due to ill health [9].

Consideration

It is important to note that the two members of the applicant group, [name deleted] and [name deleted], did not attend the 1 October 2005 meeting. This fact is noted both in *Pooncarie* at [20] and in the Affidavit of [name deleted] at [10]. Consequently, not all of the persons in the native title claim group have authorised the changes to the applicant. [Name deleted] and [name deleted] are clearly members of the native title claim group ([name deleted] provides an affidavit at M(1) for the purposes of Schedules E, F, G, and M) but did not consent to or authorise the amendments made to the applicant which effectively replaced them (and [name deleted], due to her ill health) with 2 other members of the claim group.

The decision in *Lawson* makes it clear that it is not necessary to have all the members of the claim group involved in the decision making process:

> 25 As indicated above, s 251B specifies what is required to establish that "all the persons in a native title claim ... **authorise** a person or persons to make a native title determination application" (original emphasis). The effect of the section is to give the word "all" a more limited meaning than it might otherwise have. If there is no traditional process of decision-making "in relation to authorising things of that kind" then, in accordance with s 251B(b), authorisation in accordance with a process of decision-making "agreed to and adopted, by the persons in the native title claim group" is sufficient. In s 251B(b) there is no mention of "all" and, 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

There is sufficient information to be found in the application and in *Pooncarie* to satisfy me that every 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.

I have also taken into consideration that the State of NSW submits in relation to this condition that the 'Registrar should be satisfied on the evidence provided that the applicant is a member of the claim group and is authorised to make the application (page 4).

Finally, I am satisfied that the decision making process complies with the requirements of s 251B. I am satisfied that sufficient information is contained in the application and affidavits, in the Affidavit of [name deleted] and in the decision in *Pooncarie* in relation to changes to the applicant and authorisation of the applicant by the native title claim group to make the application and deal with matters arising in relation to it.

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 of the application refers to Attachment B which describes the external boundary of the application area using:

- Administrative boundaries (state border, parish boundaries);

- Land parcel boundaries;
- Geographic coordinates referenced to Australian Geodetic Datum 1966 (AGD66);
- The Murray River.

The description is dated 3 May 2004 and has been prepared by the Tribunal's geospatial and mapping specialists ('Geospatial Unit').

Schedule B provides detailed information in the form of nine points which identify the areas within the external boundaries that are not covered by the application. This description includes a number of general exclusions and specifically excludes current and former native title determination applications: NC97/13 (NG6065/98); NC97/14 (NG6066/98); NC97/18 (NG6070/98); NC97/22 (NG6074/98); NC97/23 (NG6075/98); NC97/30 (NG6082/98); and NC95/10 (NG6018/98).

Schedule C refers to Attachment C. Attachment C is a reduced monochrome copy of a map titled "NC97/032 – NG6084/98 Pooncarie Barkankji (Paakantyi) 8" prepared by the NNTT's Geospatial Unit and dated 3 May 2004 and includes:

- The application area depicted by an outline and by diagonal hatching;
- The NSW state borders;
- Reference topography, including towns, roads, rivers and water features;
- Scalebar, north point, locality map and coordinate grid referenced to AGD84.

Consideration

The Geospatial Unit provided an assessment of the map and written description (see memo dated 22 August 2006).

In respect of the written description (which is dated 03/05/2004) the Geospatial Unit's assessment makes a note:

> … that parish boundaries have changed since that time, so the intent of the description is lost if current parish boundaries are referenced. The description is to be read while referencing parish and cadastral boundaries as at the time it was written.

The assessment also identifies 2 typographical errors:

1. Page 3 line 23: *"…along the western boundaries of Arumpo and Bunchie …"* should read *"…along the eastern boundaries of Arumpo and Bunchie …"*

2. Page 3 line 27: *"…then westerly to the western boundary of Mildelwul Parish …"* should read *"…then westerly to the eastern boundary of Mildelwul Parish …"*

The Geospatial Unit's concluding assessment is that "notwithstanding the above minor errors, the description and map are consistent and identify the application area with reasonable certainty".

I accept that the description needs to be read with the understanding that it is based on "parish and cadastral boundaries as at the time it was written". I am of the view that neither this aspect nor the typographical errors noted above impact on being able to identify with reasonable certainty the particular land or waters claimed. I am satisfied that the intent of the description, together with the map, to identify the external boundaries of the application area with reasonable certainty is clear.

I am also 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 [51] that:

> The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b).

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.

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 Barkandji Traditional Owners are the native title claim group on whose behalf the applicants make this application. It is made up of all the descendents of the following apical ancestors:

Madfred Mary/Mary Johnson	Manfred Tommy
Louise Brown	Cuthero Jack Brown
Susan/Annie Webster (Old Mrs Webster)	Cuthero Mary
Billy Webster	Cuthero Harry
Alec McLean	Nganya
Louisa	Bessie Wattata
Sarah Cabbage	Harry Mitchell
Daniel McGregor	Outalpa George
Cranzie	Jack Tyler
Will Matjulum Gibson	Kitty McFarlane
Kutyi	Cate Newton (aka Maggie Tyler)
Albert Bates	July/May Banks
Thomas Williams	Fanny Williams
Nancy Watts Quimby	Jim Crowe
Topsie Crowe	Alec Bridge
Margaret Payne (Granny Payne)	George Harrison
Kitty Knight	Jacky Knight
Paddy Black	Eva Black
Hero Black	Sam Black
Rosie Black	Rosie Fields
Tall Boy Keegan	Kitty Keegan
Rose Drayton	Polly Draper

Warlo Jemmy (King James)	Queen Polly
Winbar Billy	Tommy Eilliot
Charlie Elliot	Granny Quayle

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 how members of the claim group are descended from the named apical ancestors, but it does not mean that the group has not been sufficiently described.

Each of the affidavits sworn by members of the claim group (at the annexures M(1) to M(8) and at the annexures R(1) to R(3)) provide information as to their descendency from an apical ancestor listed at Schedule A:

- [name deleted] descendent of Sarah Cabbage
- Mary-Ann Marton descendent of Daniel McGregor
- [name deleted] descendent of Manfred Mary
- William Bates descendent of Granny Quayle
- Cyril James Hunter descendent of Kitty Knight
- Murray Butcher descendent of Sarah Cabbage and Jim Crowe
- [name deleted] descendent of Kitty Knight
- Maureen O'Donnell descendent of Cranzie
- Derek Hardman descendent of Sarah Cabbage
- Jennifer Whyman descendent of Billy Webster

I am satisfied that referencing the identification of the members of the native title claim group to named apical ancestors is a means by which it is possible to objectively verify the identity of any particular person in the group.

The State of New South Wales contends in its submission dated 25 September 2006 that:

> Further inquiries would need to be made to ascertain which persons are in the claim group, as who has descended from the named apical ancestors cannot be shown without further material being made available. It is the Minister's submission that the Registrar should not be satisfied that the persons in the claim group are described sufficiently clearly to ascertain whether any

> particular person is in the native title claim group or not on the basis of the information presently supplied to the Minister.

I do not accept the State's contention for the reasons provided above and in light of the authority of the decisions in *Doepel* and *Western Australia v Native Title Registrar*.

I consider that the requirements of s 190B(3)(b) have been met.

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 pr 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 (including any activities in exercise of those rights and interests) 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/0r ss 47, 47A and 47B apply), the Barkandji Traditional Owners 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 Barkandji Traditional Owners 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 move about the application area
    (e) The right to hold meetings on the application area
    (f) The right to hunt on the application are
    (g) The right to fish on the application are
    (h) The right to have access to and use the natural water resources of the application area
    (i) The right to gather and use the natural products of the application area (including food, medicinal plants, timber, ochre and resin as well as materials for fabricating tools and hunting implements) according to traditional laws and customs
    (j) The right to participate in cultural activities on the application area
    (k) The right to maintain and protect places of importance under traditional laws, customs and practices in the application area
    (l) The right to conduct burials on the application area
    (m) The right to speak authoritatively about the application area among other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional law and custom

(n) The right to regulate access to and use of the application area by other Aboriginal People in accordance with traditional law and custom

(o) The right to share and exchange traditional resources obtained on or from the land and waters

(p) The right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters to members of the native title claim group who fall within the description contained in Schedule A

3. The native title rights and interests are subject to:

(a) The valid laws of the State of New South Wales and the Commonwealth of Australia

(b) The rights (past and present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of New South Wales.

Consideration

The claim by the Barkandji Traditional Owners 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 16 claimed rights and interests and they are readily identifiable. 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 past and present rights conferred on persons by those laws.

I am satisfied that the requirements of this section are met.

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 *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.

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 for the assertions in s 190B(5) is found, to some degree, in Schedule F of the application. More comprehensive evidence about the practices and activities of members of the native title claim group is found in eight statements annexed at Attachments M(1) through to M(8).

The applicant has also provided additional information to the application which I have taken into account for this condition:

- Correspondence and Attachments from NSWNTS to the NNTT, dated 26 April 2006; re: Pooncarie Barkandji Traditional Owners Native Title Claim (NC95/10, NSD6018/98) [**Attachment B (re: Pooncarie)**]

- Material contained in the amended Barkandji #8 application (NC97/32, NSD6084/98) exhibited to the affidavit of [name deleted] dated 7 August 2002. There are two documents in particular from which I draw information:

  (i) Attachment F is the Affidavit of [name deleted] dated 27 July 1999 which contains, amongst other things: *Lake Victoria EIS Anthropological*

Report – A Report Prepared for the NSW Department of Land and Water Conservation and the Murray-Darling Basic Commission; [name deleted] – June 1997 [**Attachment F1(r)**]; and

(ii) Schedule M which refers to Attachment M(A) contining, amongst other things: *Report to the Minister of Aboriginal and Torres Strait Islander Affairs* [**Attachment M(p)**]. This report is made under s10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* – in response to a Notice of Application for protection of burial sites at Lake Victoria (my assumption, as detail is lacking, is that the report is by [name deleted] dated about September 1998)

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

Consideration

I note the submission of the State of NSW that the 'Registrar should accept that this criteria of the registration test is met'. The submission cites a few examples of information appearing in the statements of the native title claim group which it considers support the three assertions to do with the issue of factual basis.

(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. The ancestors of the Native Title Claim Group were in occupation of the land the subject of the application ('application area') at the time of sovereignty.
2. The ancestors of the Native Title Claim Group exercised a system of traditional law and custom inextricably connected to the topographic, ecological, cultural and religious values vested in the application area.
3. The Native Title Claim Group is descended from the group described in paragraph 1.
4. The Native Title Claim Group continues to practice a system of law and custom derived from the system of traditional law and custom practiced by their ancestors in occupation of the application area at the time of sovereignty

Statements of members of the claim group contain information regarding the association of the native title claim group with the claim area: [statements deleted].

Attachment F(r) provided me with information about historical and current Barkandji association with the claim area:

- Pooncarie mission (referred to throughout the M(1) – M(8) statements) was 'never a Mission but a Reserve for Aborigines'; established in 1909 where people were "able to find work on stations, and rabbiting, snagging and cutting wood for paddle boats". It was a place "for fishing, hunting and gathering traditional foods. Paakantji was the main language spoken. It is "remembered by elders as the last place where their culture was able to flourish…" (page 37)
- Nhaanya's Mob – my assumption is that this is the ancestor named Nganya in Schedule A of this 2006 amended application. Being born about 1830 and Maraura Paakantji, [name deleted] describes his emergence from 'the mallee scrub' in 1893 and traces his descendents, many of whose names appear in Schedule A. (page 32- 40)
- Historical associations with Lake Victoria providing detail about the [name deleted] and its associations with and activities around Lake Victoria from the early 1900s to the present day (page 40-43)

It is clear to me that members of the claim group have and their predecessors have had an association with the area. It is also clear that this association is expansive – including Lake Victoria, Wentworth, the junction of the Murray and Darling Rivers in the south; Pooncarie, Broken Hill, Wilcannia in the central and northern parts of the area claimed.

I am satisfied that this condition is met.

(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:

> These laws and customs have been transmitted and continue to be transmitted to the claimants by the intergenerational transfer of that knowledge.
> Such laws and customs include those relating to:

a) Marriage
b) Burial
c) Birth
d) Communication and transmission of information
e) Religious and spiritual beliefs
f) The maintenance of religious and spiritual connections manifested in the application area for the well being of the Native Title Claim Group
g) The maintenance of resources and ceremonies; and
h) Development of the social and political life of the group

The statements of the eight claim group members information relating to the existence of traditional laws and customs: [statements deleted].

Attachment B (re: Pooncarie) of the additional material provides approximate birth dates of the apical ancestors of the claim group for Pooncarie application (NC95/10) as well as some clarification of relationships. Those listed below are common to this Barkandji application:

Manfred Mary /Mary Johnson – b.1852-1862, d.1925
Manfred Tommy – b.1857
Susan/Annie Webster "Old Mrs Webster" – b.1870
Bill Webster – b.1861
Louisa Mclean – b.1860; d.1919
Alec Mclean – b.1870; d.19191
Sarah Cabbage – b.1870; d.1940
Nganya – b.about 1830
Harry Mitchell – b.1846
Daniel Mcgregor – b.1836

Attachment F(r) of the additional material, provided me with further information:

- Oral history providing an understanding of the sacredness of Lake Victoria, having "a number of very important functions; economic, burials, a meeting place for trade and exchange, and a vital link in the Murray-Darling social and economic network" (page 55)
- Detail about the mythological connections to Lake Victoria "with at least four major stories" associated with the area (page 57-64)

Attachment M(p) of the additional material, references the Cultural Heritage Report prepared as part of an Environmental Impact Statement (EIS) under the auspices of the Murray Darling Basin Commission:

- The Lake is identified as "part of the traditional country of the Maraura, sub-group of Aboriginal people known as the Barkandji; the Lake's significance "is said to be embedded in storylines, mythology, spiritual and cultural connections, and the passing down of this knowledge by Aboriginal elders" (pp 38-40).
- Information about ceremonies, laws and customs, traditional knowledge relating to the burial sites found in the area (approximated at between 6000-16,000 sites) (p.40)

The following summary is made in the report:

> In summary, there is comprehensive evidence establishing the significance of Lake Victoria to Aboriginal people, historically, culturally, and spiritually …
>
> - The identification of people with both historical and traditional ties to Lake Victoria
> - Explorers' journals, family diaries, reminiscences, government records and local history provide evidence of the occupation of Lake Victoria by Aboriginal people
> - The River Murray was an important Aboriginal trade route
> - Early explorers found the area more popular than they had expected discovering whole Aboriginal settlements
> - Some of the densest and best-preserved aboriginal living sites are found along the Rufus and Frenchmans channels on the southern lake bed
> - The cultural material at Lake Victoria is the result of the life and activities of the people who lived there
> - The Rufus River massacre of 27 August 1841 described as the final event in a war of resistance by Aboriginal people living along the northern bank of the Murray River and the white intruder
> - The continuing traditional and historic associations with local families.

I am of the view that the material I have considered provides extensive references to the stories of places, customs relating to access to land, traditions and laws concerning burials and food as well as the transmission of language and culture. In addition to these, there is explanation about the relationship to members of the claim group of some of the apical ancestors listed in Schedule A.

I am satisfied that there is a 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 of the current application contains no relevant evidence pertaining to this assertion other than a number of declarations which go to the rights and interests being claimed which simply appear to expand upon those listed at Schedule E.

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

The statements all provide references to continuing traditions relating to the current access to country and use of bush tucker, the transmission of language and culture, the continuing acknowledgement of *[name deleted],* the continuing observance of food prohibitions and burial customs.

At Attachment M(p) of the additional material:

> The EIS concludes:
> "Lake Victoria is an extremely significant place for its present day Aboriginal custodians because it tells of their spiritual and traditional connections with the Lake's previous Aboriginal inhabitants and their country… The Lake's spiritual importance is tied to the existence of the burial grounds, the memory of the Rufus River Massacre, and the Lake's association with the sacred stories and myths of the region."(p.38)

I am satisfied that the material I have considered contains a 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 the material identified 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); and
- whether or not the right has been extinguished.

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/0r

ss 47, 47A and 47B apply), the Barkandji Traditional Owners 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).

There is evidence repeated throughout the 8 statements at Attachment M(1) – M(8) as to the exercise of consultation processes that occur between members of the claimant group and various local and state government authorities. For example, [name deleted] talks (at [29]) of the Wentworth Shire Council talking with him about 'anything that goes on around here'; William Bates talks (at [28]) about being consulted in relation to 'salvage and destroy operations in the area'; Maureen O'Donnell talks (at [32]) about speaking with 'mining companies, the Roads and Traffic Authority or anybody who wants to do something in the area'.

These, however, are consultation protocols which do not in my view amount to a control of access to and use of any particular and specific areas where there has been no previous extinguishment of native title.

The information provided at Schedule F (Attachment F) and Schedule G does not go any further to supporting a right of the claim group, under traditional law and custom, to control access of non-Aboriginal people to the claim area. The information, in my view, takes the form of assertions and statements about rights and interests which have already been provided at Schedule E. They do not add anything factual about access to and use of the claim area by non-Aboriginal people.

The submission of the State of NSW is that 'a claim for exclusive possession is unsustainable over any areas of the claim and prima facie this right cannot be established. The State's contention is that there is 'insufficient evidence in any of the affidavits that there is a right to exclude everyone from the areas where

exclusive possession subject to valid interests granted by the State the Commonwealth is claimed. The response provided by the NSW Native Title Services as representative for the claimants does not specifically address this contention in relation to exclusive possession.

To conclude, I am unable to find that the material establishes a prima facie right of possession, occupation, use and enjoyment as against the whole world.

Consideration of non exclusive rights

2. Over areas where a claim to exclusive possession cannot be recognized, the Barkandji Traditional Owners as defined in Schedule A of this application, claim the following non-exclusive rights and interests:

(a) The right to access the application area

(d) The right to move about the application area

Established

Statements relevant to these claimed rights are provided with the application: [statements deleted].

This material 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.

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

(c) The right erect shelters on the application area

Established

Statements relevant to these claimed rights are provided with the application: [statements deleted].

This material provides prima facie support for the right to hold meetings on the application area and the right to erect shelters on the application area.

(b) The right to camp on the application area

Established

Statements relevant to these claimed rights are provided with the application: [statements deleted].

This material provides prima facie support for the right to camp on the application area.

(f) The right to hunt on the application area

(g) The right to fish on the application area

Established

Statements relevant to these claimed rights are provided with the application: [statements deleted].

This material provides prima facie support for the right to hunt and a right to fish on the application area.

(h) 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 natural recourses (see above under 'right to fish'). However, there is no evidence to support the right to use the natural water resources of the area.

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

(i) The right to gather and use the natural products of the application area (including food, medicinal plants, timber, ochre and resin as well as materials for fabricating tools and hunting implements) 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. Statements relevant to some of these claimed rights which are provided with the application are extracted below: [statements deleted].

This material provides prima facie support for the right to gather and use the natural products of the application area – being food, medicinal plants, timber,

ochre. However, there is not sufficient material to establish prima facie the right to use "resin as well as materials for fabricating tools and hunting implements" under traditional laws and customs. Given that I am unable to sever the right as claimed, this right cannot currently be prima facie established.

(j) The right to participate in cultural activities on the application area

Established

Statements relevant to these claimed rights are provided with the application: [statements deleted].

This material provides prima facie support for the right to participate in cultural activities on the application area.

(k) 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 are provided with the application: [statements deleted]

This material evidences that places of importance and activities in respect of them, do exist in the application area – including the snake caves and other sites as mentioned in the statement of William Bates at [20] and [23] respectively. However, I find it difficult to extract from this information any support about activities involving the maintenance and protection of these sacred sites.

Clearly the existence and extent of the burial sites and systems throughout the application area hold deep significance under the traditional laws and customs of the Barkandji people. Given the extensive cultural heritage information about these sites detailed in the additional material provided (as noted under the 190B(5)), I can accept the necessary inference that such sites will require maintenance and protection.

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.

(l) The right to conduct burials on the application area

Established

Statements relevant to these claimed rights are provided with the application: [statements deleted]

This material provides prima facie support for the right to conduct burials on the application area. Further detail throughout all the statements refers to the 'repatriation' of remains to Barkandji country.

(m) The right to speak authoritatively about the application area among other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional law and custom

(n) The right to regulate access to and use of the application area by other Aboriginal People in accordance with traditional law and custom

Not established

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.48. 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.

I therefore do not consider that these rights can currently be prima facie established.

(o) The right to share and exchange traditional resources obtained on or from the land and waters

Not established

There is no information in the application nor in any of the statements by members of the claim group that provides any prima facie evidence to support this right.

(p) The right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters to members of the native title claim group who fall within the description contained in Schedule A

Established

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 [135].

Statements relevant to these claimed rights are provided with the application: [statements deleted]

This material provides prima facie support for the right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters to members of the native title claim group.

Conclusion for 190B(6)

The State of NSW submits that 'at first sight, without investigation and relying on the affidavits there is sufficient evidence that some of the non exclusive rights can be established prima facie.

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
(c) The right erect shelters on the application area
(d) The right to move about the application area
(e) The right to hold meetings on the application area
(f) The right to hunt on the application area
(g) The right to fish on the application area
(j) The right to participate in cultural activities on the application area
(k) The right to maintain and protect places of importance under traditional laws, customs and practices in the application area
(l) The right to conduct burials on the application area
(p) The right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters to members of the native title claim group who fall within the description contained in Schedule A

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.

Extensive material is provided in the statements at Attachments M(1) to M(8) 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.

I am satisfied that the requirements of s. 190B(7) are met.

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

RESULT

This condition is met

REASONS

A search of the Native Title Register as at 22 August 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)

RESULT

This condition is met

REASONS

Schedule B of the application at para 3, provides for the exclusion of any 'areas of land or waters covered by past or present freehold title or by previous valid exclusive possession acts as defined in s 23B of the Native Title Act 1993'..

I am therefore satisfied that the claim is not made over any such areas.

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

RESULT

This condition is met

REASONS

Schedule B of the application at para 5, states that 'exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State.'

I am therefore satisfied that the claim is not made over any such areas.

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

RESULT

This condition is met

REASONS

Schedule B of the application provides at para 7 that areas covered by ss 47, 47A and 47B of the Act are not excluded from the application.

Accordingly, the conditions in s 61A(4) have been met.

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 the 'Applicant 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 the 'Applicant does not claim 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]