National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Brendon Moore

Application Name:	Gumbaynggirr People		
Names of Applicants:	Margaret Boney-Witt		
Region:	New South Wales	NNTT No.:	NC98/15
Date Application Made:	3 June 1998	Federal Court No.:	NG6104/98

The delegate has considered the application against each of the conditions contained in s190B and s190C of the *Native Title Act* 1993 (Cwlth).

DECISION

The application IS ACCEPTED for registration pursuant to s190A of the *Native Title Act* 1993 (Cwlth).

Brendon Moore — Date of Decision

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

Brief history of the application

This application for a determination of native title was lodged with the National Native Title Tribunal on 3 June 1998 and was entered onto the Register of Native Title Claims on the same day.

Amendment #1

On 21 October 1999 the Federal Court provided the Tribunal with a copy of an amended native title determination application, filed in the Court on 20 October 1999. The amended application was accepted for registration pursuant to s.190A of the *Native Title Act 1993* (Cth) on 9 August 2000.

Amendment #2

On 4 October 2000 an amendment to the application was filed in the Federal Court pursuant to leave granted on 23 August 2000. The amended application met the conditions for registration pursuant to s.190A of the *Native Title Act 1993* (Cth) on 31 January 2001.

Amendment #3

On 19 June 2001, a further amended application was filed in the Federal Court. This is the amended application that I am currently considering.

I note that Schedule S states that:

> "The application is an amended application. It replaces the amended application filed on 3 October 2000".

This Schedule then goes on to list the "[d]etails of differences between this Application and the original Application". The differences listed are, however, not a list of the amendments made by the filing of this version of the application compared with the version filed on 3 October 2000, but rather reflect all of the amendments to the "original" application made on 3 June 1998. Thus the list describes amendments made by consecutive re-filing of the application on three occasions – on 20 October 1999, on 4 October 2000 and on 19 June 2001.

The effect of the most recent re-filing on 19 June 2001, compared with the version filed on 3 October 2000, appears to be at:

- Schedule B, where the written description of the application area has been reworded so as to clearly exclude Lot 102, and
- Attachment C to Schedule C, which is a new map of the application area that also excludes Lot 102, which had previously been inside the application area mapped by Attachment C.

Information considered when making the decision

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

- NC98/15 (NG6104/98) Registration Testing File;
- the National Native Title Tribunal Geospatial Database;
- the Register of Native Title Claims; and
- the Native Title Register.

The following material which was provided directly to the Registrar for consideration under s190A was also considered by me:

- Preliminary Report by [name of anthropologist removed], dated 15 October 1999, with covering affidavit affirmed 19 October 1999;
- submission from the Director General of the NSW Department of Land & Water Conservation, dated 1 November 1999
- supplementary confidential submission from the Director General of the Department for Land and Water Conservation, dated 7 June 2000; and
- affidavit of [Name 1 removed], affirmed 24 September 2003
- affidavit of [Name 2 removed], affirmed 28 October 2003
- affidavit of [Name 3 removed], affirmed 6 May 2004.

References to the application refer to the most recent version of the application as filed in the Federal Court on 19 June 2001.

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

On 19 May 2004 Christopher Bellinger Doepel delegated his powers under ss190, 190A, 190B, 190C and 190D of the Native Title Act to me, amongst others. That delegation has not been revoked as at this date.

A. Procedural Conditions

s.190C(2)

Information, etc., required by section 61 and section 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.

Details required in section 61

s.61(1) 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.

Reasons relating to this sub-condition

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

I must consider whether the application sets out the native title claim group in the terms required by s.61. That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a sub-group of the native title group, then the requirements of s.190C(2) would not be met and the claim cannot be accepted for registration.

In *Northern Territory of Australia v Doepel [2003] FCA 1384* Mansfield J said:

> "In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group 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 requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration": at [36]

His Honour went on to say that:

> "My view that s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to

> determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s 190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration.": at [37]

I note that there is no information on the face of the application or the affidavits filed with it which suggests to me that the application does not include all those individuals who, according to their traditional laws and customs hold the common or group rights comprising the particular native title claimed. I also note that the New South Wales Aboriginal Land Council certified that it was of the opinion, based on 'extensive anthropological and genealogical work and community consultation', that the application 'describes or otherwise identifies all the …persons in the claim group'.

I am consequently satisfied that the application meets the requirements of s.61(1).

Result: **Requirements met**

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

Reasons relating to this sub-condition

The application identifies the name of the applicant at the front of the application and the address for service of the applicant at Part B (Filing and Service).

Result: **Requirements met**

s.61(4) ***Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons***

Reasons relating to this sub-condition

The application provides a description of the persons in the native title claim group at Schedule A by way of being descendants of two named individuals and six named couples. This description of the native title claim group is sufficient for it to be ascertained whether any particular person is one of those persons. I have reached this view for the reasons contained in my decision at s190B(3).

Result: **Requirements met**

s.61(5) Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents

Reasons relating to this sub-condition

As required by s61(5)(a), the application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998.*

As required under s61(5)(b), the amended application was filed in the Federal Court.

The application meets the requirements of s61(5)(c) by containing all the information prescribed in s62 - refer to my reasons below in relation to s62.

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

- an affidavit, as prescribed by s62(1)(a); and
- a map, as prescribed by s62(1)(b).

I note that I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, it is my view that the requirements of s61(5) are met.

Result: Requirements met

Details required in section 62(1)

s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)

Reasons relating to this sub-condition

An affidavit sworn by the applicant on 23 April 2001 was filed in the Federal Court as a part of the application. It appears that a competent witness has witnessed this affidavit.

I am satisfied that the affidavit addresses the matters required by s.62(1)(a)(i) - (iv*)* at paragraphs 1 to 4.

Paragraph 5 of the affidavit sets out the basis of the authorisation of the application as being a decision which was taken at a Gumbaynggirr Nation meeting on 2-3 February 1997 at Yarrawarra, Corindi Beach. I note that this meeting also resulted in the certification of the application. I am consequently satisfied that the requirements of s62(1)(a)(v) are also satisfied.

Result: Requirements met

s.62(1)(c) Details of traditional physical connection (information not mandatory)

Comment on details provided

The applicant has provided details of traditional physical connection at Schedule M, which in turn refers to Attachment G. Evidentiary affidavits provided directly to the Registrar and affirmed by [Name 1 removed] on 24 September 2003, by [Name 2

removed] on 28 October 2003 and by [Name 3 removed] on 6 May 2004 also contain material that goes to the physical connection of members of the claim group to the application area.

Result: Provided

Details required in section 62(2) by section 62(1)(b)

s.62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-condition

Information identifying the external boundary of the claimed area is provided at Schedule B of the application.

I am satisfied that the application complies with the requirements of this subsection. See also my reasons set out in relation to s190B(2).

Result: Requirements met

s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application

Reasons relating to this sub-condition

The applicant has provided information identifying the internal boundaries of the claimed area at Schedule B.

I am satisfied that the application complies with the requirements of this subsection. See also the reasons set out in my decision in relation to s190B(2.)

Result: Requirements met

s.62(2)(b) A map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition

The applicant has provided a map at Attachment C, attached to Schedule C. The map provided does identify the external boundary of the area covered by the application.

I am satisfied that the application complies with the requirements of this subsection. See also the reasons set out in my decision at s190B(2).

Result: Requirements met

s.62(2)(c) Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests

Reasons relating to this sub-condition

Schedule D of the application states that a search was conducted in June/July 2000 which disclosed that the area is under claim under the *Aboriginal Land Rights Act 1983 (NSW),* which was an undetermined claim as at 10 July 2000. This sub-condition only requires the applicants to provide details of searches which they have carried out and does not impose any requirement to provide a detailed current tenure search or historical tenure information in relation to the application area.

I am satisfied that the application complies with the requirements of this subsection.

Result: Requirements met/not met

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

Reasons relating to this sub-condition

Each native title right and interest claimed by the applicant is described at Schedule E. As required by s62(2)(d), the rights and interests described at Schedule E do not merely consist of a statement to the effect that the native title rights and interests claimed are those that may exist or that have not been extinguished at common law. The description at Schedule E is a list of individually identifiable rights and interests – a more generalised right is described at Paragraph 1, and 15 particularised rights are listed under paragraph 2.

I am satisfied that the application complies with the requirements of this subsection. See also the reasons set out in my decision at s190B4.

Result: Requirements met

s.62(2)(e) The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

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

(ii) there exist traditional laws and customs that give rise to the claimed native title; and

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Reasons relating to this sub-condition

The application includes a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. It appears to address each of the three particular requirements in (i), (ii) and (iii). The requirements of the section have recently been judicially considered in *Northern Territory of Australia v Doepel [2003] FCA 1384,* where at [129] the court said:

> "… Schedule F is in fact designed to provide the factual basis for the assertions: see s 62(2)(e). As Kiefel J in *State of Queensland v Hutchison*

> (2001) 108 FCR 575; [2001] FCA 416 (*Hutchison*) said at 583 - 584 [25], s 62(2)(e) requires only a general description of the factual basis for the assertions as to the existence of the claimed native title rights and interests.", and continued at [131]:
>
> "… Section 62(2)(e) dictates a required content of an application for determination of native title. Its expression is to indicate generally the topic to be addressed, and within that topic particular features or aspects of the topic which must be addressed. It does not provide for two different sets of content obligations which must each be met, but one with a particular focus. In my view, what has apparently been assumed *sub silentio* in those cases, at least by the parties who have not chosen to argue to the contrary, reflects a sensible reading of both s 62(2)(e) and s 190B(5). Each requires the factual basis for the claimed native title rights and interests to be asserted. Each identifies the particular assertions which must be supported by the factual basis set out. It follows, in my view, that the general requirement beyond the particular is not intended to involve a parallel or equally onerous obligation in relation to each of the claimed native title rights and interests separately. Had that been intended, it could readily have been stated. "

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

Schedule F asserts a factual basis for the claim group's predecessors having an association with the application area dating back to before 1788 and that association having been maintained by Gumbaynggirr Aboriginal people to the present day. Attachment G consists of evidentiary affidavits sworn by the applicant and her granddaughter which also attest to the association of claim group members and their immediate predecessors to the application area. The preliminary report of anthropologist [name of anthropologist removed] provided directly to the Tribunal in October 1999 also provides a factual basis for the association of the claim group and their predecessors to the application area, and covers topics such as the territory of the claimant group and history of occupation by claimant group members of the application area.

(ii) there exist traditional laws and customs that give rise to the claimed native title

The existence of traditional laws and customs is given a factual basis in the same material just discussed: Schedule F, Attachment G, and the preliminary report by [name of anthropologist removed]. In particular, Schedule F asserts at paragraph 5 that "the Gumbaynggirr Aboriginal people have maintained a system of laws and customs which have existed since prior to 1788 to the present day even though those laws and customs have undergone some change since white settlement." Attachment G attests to the applicant holding certain knowledge that can be identified as traditional law and custom. [Name of anthropologist removed] report attests to the existence of certain forms of law and custom, including in relation to ownership of and access to land.

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The continued holding of native title by the claim group in accordance with their traditional law and custom is factually supported by the same sources as discussed above.

I am satisfied that the application complies with the requirements of this subsection. For an assessment of the sufficiency of the factual basis provided by the applicant in the application and in other material, refer to my reasons in relation to s190B(5).

Result: **Requirements met**

s.62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-condition

The application provides general details of activities that the applicant and native title claim group carries out in relation to the area claimed at Schedule G. Schedule G refers to Attachment G, which consists of affidavits affirmed by the applicant and her granddaughter.

There is further material supplied in the affidavits of [Name 1 removed] dated 24 September 2003, [Name 3 removed] of 6 May 2004 and of [Name 2 removed] dated 28 October 2003. Whilst those affidavits go primarily to connection, in doing so they evidence certain activities, particularly those governed by law and custom, which are relevant to this section.

I am satisfied that the application complies with the requirements of this subsection.

Result: **Requirements met**

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

Reasons relating to this sub-condition

Schedule H states that there are "no other applications to the High Court, Federal Court or recognised State/Territory body that have been made in relation to the whole or part of any area covered by this application which seek a determination of native tile or compensation in relation to native title.".

A search of the Tribunal's Register of Native Title Claims and Native Title Register and the Tribunal's Schedule of Applications, carried out by the Tribunal's Geospatial Assessment and Mapping Unit on 1 April 2004 confirms that no other native title determination or compensation applications have been made over the area that is the subject of this application as at the date of the search.

I am satisfied that the application complies with requirements of this subsection.

Result: **Requirements met**

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

Reasons relating to this sub-condition

Schedule I states that "[a]s far as the Applicants are [sic] aware no notices have been given under section 29 of the NTA …".

I note that this sub-requirement only requires me to consider information of which the applicant is aware, rather than the broader question of whether in fact any section 29 notices have been issued over any or all of the area ..In any event, an overlap analysis carried out by the Tribunal's Geospatial and Mapping Unit on 1 April 2004 that relies on the State's provision of section 29 notices to the Tribunal, also confirms that the area that is the subject of this application is not the subject of any section 29 notices.

I am satisfied that the application complies with requirements of this subsection.

Result: Requirements met

s.190C(2)

Reasons for the decision

For the reasons outlined above, I consider that the application passes the conditions contained in s190C(2) as a whole.

Aggregate result: Requirements met

s.190C(3)

Common claimants in overlapping claims:

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

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

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

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

Reasons for the decision

As also indicated under my reasons at s62(2)(g), a search of the relevant registers and schedules by the Tribunal's Geospatial and Mapping Unit on 1 April 2004 indicates no overlapping applications exist. As there are no 'previous' applications that cover the whole or part of the area covered by this current application, as described by s190C(3)(a), the circumstances contemplated by s190C(3) as a whole do not apply.

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

Result: **Requirements met**

s.190C(4)(a) or s.190C(4)(b)

Certification and authorisation:

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

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

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

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

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

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

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

Reasons for the decision

The application was certified by the NSW Aboriginal Land Council, according to a document at Attachment R of the application dated 18 August 1999 which was signed by the Executive Director of that organisation. This document was first provided when amendments were filed in the Court on 20 October 1999.

Section 202 was the section in the Native Title Act under which such a body was empowered to certify an application, until the 1988 amendments, after which the operative section became s203BE in 2000. The certification was within power and valid at the time and in my view remains so.

The certification statement refers to NSW Aboriginal Land Council being the Aboriginal/Torres Strait Islander Body for NSW pursuant to section 202 of the Act, and states that it certifies the application pursuant to s202(4)(d). It adopts the terms of s202(5)(a) and (b), by certifying that:

a) the applicants have the authority to make the application, and deal with matters arising in relation to it, on behalf of all the other persons in the native title claim group; and

b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

The certification statement from the NSW Aboriginal Land Council explains the basis upon which this body believed the requirements of s202(5)(a) were met, by reference to a

meeting of the Gumbaynggirr Nation on 2-3 February 1997 held at Yarrawarra. The statement also explains the basis upon which the NSW Aboriginal Land Council believed s202(5)(b) requirements were met, being that "the description of persons in the native title claim group in the application is based on extensive anthropological and genealogical work and community consultation, conducted at NSWALC's request".

The certification document therefore also satisfies the requirements of s202(7) of the Act, in relation to containing statements to the effect that the representative body is of the opinion that s202(5)(a) and (b) requirements are met, as well as setting out the body's reasons for being of that opinion.

I note the statement in the certification document that s202(6) is not relevant, and agree with this assessment, given that the application is not overlapped by any other applications. It follows that s202(7)(c) is also not applicable.

At the time the application was certified by the NSW Aboriginal Land Council, on 18 August 1999, and at the time the document was filed in Court, the NSW Aboriginal Land Council was the gazetted native title representative body for New South Wales.

Since 6 December 2001, the NSW Aboriginal Land Council has ceased to be the representative body for New South Wales. I take the view that this does not in any way invalidate that certification which was given when the Land Council was empowered to do so.

I have also given consideration to whether the application has changed so substantially since that time that the certification might no longer be seen as 'sufficient' to support the applicant's carriage of the matter. There have been no changes of that magnitude, and specifically nothing of significance in relation to the applicant or the claim group's composition. The nature of the application certified in August 1999 is essentially the same as the application in its current form. The amendments made to the application in October 2000 and then in June 2001 were only minor corrections to the description of the application area and the map.

I also note that the certification relies on s202(4)(d) of the Act, which was the relevant section of the Act prior to its amendment in 1998, after which s203BE came into operation on 1 July 2000. As I expressed above, it is my view that the amendment of the Act in no way invalidates the certification properly given earlier. I note also that at s190C(4)(a) of the current Act a note indicates that "an application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d)".

I am satisfied that the application has been properly authorized and certified and meets the requirements of s190C(4).

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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

Reasons for the decision

External boundaries

The first paragraph of Schedule B describes the external boundaries of the application area. It refers to the application as being east of the North Coast Railway line, west of the mean high water mark, with the northern boundary at the southern border of Lot 102 in the Parish of Newry, County of Raleigh, and the southern boundary at Nambucca Shire. I take the last description of the southern boundary as referring to the local government area of the Shire of Nambucca, as at the date the application was made. I am of the view that all four boundaries thus described in Schedule A are sufficient for it to be said with reasonable certainty what the external boundaries of the application are.

The map of the application area that was filed with the application depicts this external boundary by a bold outline, which concurs with the written description. The consistency of the map and the written description and the capacity of both to identify the external boundary with reasonable certainty is confirmed by the assessment of the Tribunal's own Geospatial and Mapping Unit that was carried out on 22 January 2003.

Internal boundaries

The internal boundaries of the application area are described by the remaining paragraphs of Schedule B. Firstly, it describes certain excluded areas through cadastral descriptions, such as reserves and parts of particular conditional purchase areas, as follows:

a. Reserve 37514 for public recreation

b. That part of Conditional purchase 1907/250 Bellingen which did not include DP 583777, parish of Newry, county of Raleigh

c. That part of Additional Conditional Purchaes 1910/171 Bellingen which did not include DP 219743, Parish of Newry, County of Raleigh

d. Part Additional Conditional Purchase 1911/156 Bellingen, and

e. Part Conditional Purchase 1941/25 Bellingen.

This is followed by general class exclusions and inclusions that refer to areas or to native title rights and interests being *subject to* particular acts or other limitations. While some of the exclusions or inclusions are described as limitations on the native title rights and interests, rather than on the area of the application, I read these as predominantly defining the application area. These class exclusions and inclusions in Schedule B are as follows:

"… subject to paragraph 4 below;
1. a. If:

i. The area covered by the application or a part of the area covered by the application is or was the subject of a "Previous Non- Exclusive Possession Act" as defined by Section 23F of the Native Title Act; and

ii. The Previous Non- Exclusive Possession Act involved the grant of rights and interests which were not inconsistent with the right and interests claimed in Schedule E, then,

The native title rights and interests claimed under Schedule E are claimed subject to the rights and interests granted under the Previous Non-Exclusive Possession Act (as provided by Section 23G(1) (a) of the Native Title Act.

b. If:

i. The area covered by the application or a part of the area covered by the application is or was the subject of a " Previous Non-Exclusive Possession Act as defined by Section 23F of the Native Title Act; and

ii. The Previous Non-Exclusive Possession Act involved the grant of rights and interests which were inconsistent with the rights and interests claimed in Schedule E but did not extinguish them; then,

The rights and interests claimed under Schedule E are claimed subject to any suspension of them during the currency of the Previous Non-Exclusive Act (as provided by Section 23G(1)(b)(ii) of the Native Title Act;

c. If:

i. The area covered by the application or a part of the area covered by the application is or was the subject of a "Category B Past Act: as defined by Section 230 of the Native title Act or a "Category B Intermediate Period Act" as defined by Section 232C of Native Title Act; and,

ii. The Category B Past Act or Category B Intermediate Period Act involved the grant of rights and interests which were not inconsistent with the rights and interests claimed in Schedule E; and

iii. The Category B Past Act or Category B intermediate Period Act was not a Previous Non- Exclusive Possession Act; then,

Those rights and interests referred to in Schedule E which are not inconsistent with the rights and interests granted under the Category B Past Act or the Category B Intermediate Period Act are claimed;

d. If:

i. The area covered by the application or apart of the area covered by the application is or was the subject of:

(1) A "Category C Past Act" as defied by Section 231 of the Native Title Act; or

(2) a "Category C intermediate Period Act" as defined by 232D of the Native Title

Act; or

(3) a "Category D Past Act" as defined by Section 232 of the Native Title Act; or,

(4) a "Category D Intermediate Period Act" as defined by Section 232E of the Native Title Act; and,

ii. The Category C Past Act, Category C Intermediate Period Act, Category D Past Act and/or Category D Intermediate Period Act referred to in the preceding sub-paragraph was not a Previous Non-Exclusive Possession Act; then, Subject to the operation of the "non-extinguishment principle" as defined by Section 238 of the Native Title Act, those rights and interests claimed under Schedule E are claimed.

2. Subject to paragraph 4 below, native title rights and interests are not claimed in respect of any area to which Section 23B of the Native title Act (C'th) applies.
3. Native title rights and interests are not claimed in respect of:
   a. Any land excluded from the area within the boundaries of the area covered by the application by Schedule B;
   b. Any minerals, petroleum or gas which are wholly owned by the Crown.

   Details of the activities in exercise of those rights and interests are provided in Schedule G.
4. Any areas within the external boundary of the Application in relation to which the extinguishment of native title is required by Section 47B of the Act to be disregarded are not excluded from the application. The native title rights and interests claimed in relation to such areas are subject to any interests which fall within subparagraph 47B(3)(a) of the Act."

In *Strickland v Native Title Registrar* [1999] FCA 1530, French J considered this form of drafting. He said:

> "51. In *Daniels v State of Western Australia & Others* [1999] FCA 686, Nicholson J referred to the requirements of s 62 relating to information identifying the area covered by the application and areas within its boundaries not covered by the application. His Honour said:
>
> *"These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment to an application is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be a satisfactory compliance with the statutory requirement. A description of a class or formula character of an area of exclusion such as "areas affected by valid category A Past Acts" may be the fullest description that an applicant can give at the time of an application or application for amendment of an application. It is capable in the light of a subsequent determination of the nature and validity of those Acts of resulting in satisfaction of the legislatively prescribed criteria in s 62(2)(a). Whether that would be so on a later application for amendment when tenure information is available would depend on considerations such as those referred to in the following paragraphs."*

> His Honour went on generally, albeit in the context of a motion for amendment of an application, to hold that whether a class or formula description satisfies the Act requires consideration by the Court in the light of evidence of consideration given to the relevant issues by the applicants and how feasible it was that greater certainty and detail could be provided consistently with the other requirements of the Act.
>
> 52. I respectfully agree with his Honour's approach. However, in the context of the registration test, the kind of judgment which his Honour was contemplating might be undertaken by the Court is undertaken administratively by the Registrar. It is necessarily evaluative in character within the general parameters laid down by the statutory provisions which the Registrar must apply. Having regard to the nature of review proceedings the Court should not interfere with the Registrar's assessment of the sufficiency of the description unless it is shown to be informed by some error of law or procedure".
>
> "55. In my opinion, it is unrealistic to expect a concluded definition of the areas subject to these provisions [referring to s47] to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application. The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court."

I am satisfied that the areas excluded by reference to cadastral description and the class exclusions and inclusions amount to information that enables the internal boundaries of the application area to be adequately identified. While this may require research of tenure data held by the State of New South Wales, it is nevertheless reasonable to expect that the task can be done on the basis of information provided by the applicants. I note that the information regarding searches contained in Schedule D of the application is *only* in relation to searches that identified claims under the *Aboriginal Land Rights Act 1983 (*NSW), but is not an exhaustive search of current tenure or of the tenure history.

I am satisfied that this information is sufficient for it to be said with reasonable certainty what the area of the application is.

Result: Requirements met

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.

Reasons for the decision

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

The description of the persons in the group is found at Schedule A of the application, which describes the claim as being brought on behalf of the descendants of the following named persons:

1. Maggie Buchanan;
2. Frank Whaddy and Vina Duncan;
3. Elsie Taylor and Jack Flanders;
4. Topsy Taylor and Sam Dotti;
5. Henry Duckett and Emily Walker;
6. David Ballengarry and Florence Randall;
7. Wabro Kelly;
8. Ben Bennelong and Dollie 'Tickie' Kelly.

In its submission of 1 November 1999, the State asserted that the description of the claim group is deficient. The State contended that it is necessary for the applicant to provide further clarification about:

a) whether it is intended that where two people are named together that a member of the claim group must be descended from both of the named people; and

b) whether the term 'descendants' refers to biological descendants only, or is intended to include adopted descendants as well, and if so, the customary rules or process by which non-biological descendants may be adopted into the group should be provided.

In reply to the State's submission, the NSW Aboriginal Land Council in its supplementary submission of 15 November 1999 confirm that:

a) it is intended that where two people are named together that a member of the claim group must be descended from both of the named people; and

b) the reference to 'descendants' is intended to include both biological and non-biological descendants.

The NSW Aboriginal Land Council also submits that the description of the group makes it clear that people adopted into the Gumbaynggirr Nation will be included within the native title claim group, and that the customary rules or process by which non-biological descendants may be adopted into a group is a separate question of process that does not go to the question of adequately describing the claimant group.

I agree that it is not necessary for me to enquire at this point whether persons who are members of the claim group may be adopted into the claim group by marriage or by some other customary rule or process, and that a broad concept of 'descent' is an objective criterion that is widely appropriate to Indigenous groups.

On this basis, it is my view that the information provided is sufficient for it to be ascertained whether any particular person is a descendant of the named couples or individuals, and therefore also a member of the native title claim group, or not.

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

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the native title rights and interests in the application is sufficient to allow the claimed rights and interests to be readily identified. To meet the requirements of s190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

The rights and interests claimed

At Schedule E of the application the applicant claims the following rights and interests:

> "1. Subject to paragraphs 3, 4 and 5 below, a right of possession, occupation, use and enjoyment of the area covered by the application as against the whole world.
>
> 2. Further and in the alternative to paragraph 1 and subject to paragraphs 3, 4 and 5 below, in relation to the area covered by the Application:
> a. A right to own the area.
> b. A right to possess the area.
> c. A right to occupy the area.
> d. A right to be present on the area.
> e. A right to use and enjoy the area.
> f. A right to travel through the area.
> g. A right to live on the area.
> h. A right to camp on the area.
> i. A right to speak for the area.
> j. A right to hunt animals on the area.
> k. A right to gather plants, fuel, firewood, freshwater, rainwater and minerals on the area.

> l. A right to manage animals, plants and minerals on the area.
> m. A right to make decisions about the way that the area may be used by non-native title holders.
> n. A right to carry out traditional ceremonies and activities on the area.
> o. A right of free access to the area for the purpose of satisfying the rights identified in the preceding sub-paragraphs."

Paragraphs 1 and 2 above state that the rights claimed are subject to paragraphs 3, 4 and 5 below. However, the drafting is such that the rights and interests sought in paragraphs 1 and 2 are subject to or moderated by both paragraphs 6 and 7, and accordingly I am of the view that the claimed rights and interests are subject to the qualifications described in each of those paragraphs 3 to 7.

Paragraph 3 describes the native title rights and interests as being limited by other rights and interests validly created by the State of New South Wales or the Commonwealth.

Paragraphs 4 and 5 reproduce the information contained in Schedule B, at paragraphs 1 and 2, being formulaic exclusions and inclusions of either areas or rights and interests, as being subject to particular past, intermediate period and previous non-exclusive possessions acts or subject to particular sections of the Act.

Paragraph 6 of Schedule E also repeats information provided at paragraph 3 of Schedule B, stating that:

> "Native title rights and interests are not claimed in respect of:
>
> a. Any land excluded from the application area by Schedule B, and
>
> b. Any minerals, petroleum or gas which are wholly owned by the Crown".

Paragraph 7 of Schedule E is as follows:

> "The Native Title rights and interests referred to in paragraph 1 and/or 2 are claimed in respect of any areas covered by the application in relation to which the extinguishment of native title is required by Section 47B of the Act to be disregarded. Those rights and interests are claimed subject to any interests which fall within subparagraph 47B(3)(a) of the Act."

I now turn to a brief consideration of the nature of the rights and interests described by paragraphs 1 and 2 of Schedule E; that is, whether they appear to be claiming exclusive possession or not.

Paragraph 1 is what could be described as a broad generic right, while paragraph 2 lists particularized rights and interests. Paragraph 1 uses the phrase "a right of possession, occupation, use and enjoyment …as against the whole world". This amounts to a claim for exclusive possession, but paragraph 1 also states that is "subject to paragraphs 3, 4 and 5",(and 6 and 7, as noted above) and which clearly recognize that the rights and interests being claimed are always subject to the lawful and valid rights and interests of others. I take this as meaning that paragraph 1 is a claim for exclusive possession where no such other rights and interest may exist. It may be that no part of the application area is not subject to other interests or previous non-exclusive possession acts, but that is not something I can know on the basis of the information before me .The application refers, at Schedule L, to two parcels of land, DP583777 and DP 219742, which it describes as

'vacant crown land'. No lot numbers are provided and I do not have the benefit of results of searches to enable further consideration of tenure. It does suggest, however, that this may be land where the non-extinguishment principle might be found to apply.

However, "in the alternative", as contemplated by paragraph 2, more specific rights and interests are separated out and are **not** claimed "as against the whole world". I take the rights and interests described by paragraph 2 as amounting to a claim for non-exclusive rights and interests.

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.1

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

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

Subsection 223(1) reads as follows:

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

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,2 rights to minerals and

[1] *Queensland v Hutchinson* (2001) 108 FCR 575.
[2] *Western Australia v Ward* (2002) 191 ALR 1, para [59]

petroleum under relevant Queensland legislation,3 an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.4

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

The majority of the High Court in Ward commented that while the exclusive right to possess, occupy, use and enjoy the claim area was acceptable as a description of the native title rights and interests claimed, this composite right was probably not acceptable where rights other than exclusive rights were being claimed. Therefore exclusive possession, occupation, use and enjoyment of the claim area should be claimed only in relation to those areas where exclusive possession can be made out. Subject to other requirements being met, a claim to exclusive possession may be established prima facie over areas where:

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

The right at para 1 of Schedule E is consistent with the decision in *Ward* and is therefore readily identifiable.

Paragraph 2, claimed "in the alternative", is a list of more specific rights and interests. I take the rights and interests described by paragraph 2 as amounting to a claim for non-exclusive rights and interests. This interpretation is reinforced by the drafting of the draft order at Attachment J.

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

> '[52] It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.
>
> [53] Further, to find that, according to traditional law and culture, there is a right to control access to land, or to make decisions about its use, but that the right is not an

[3] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[4] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

> exclusive right, may mask the fact that there is an unresolved question of extinguishment. At the least, it requires close attention to the statement of "the relationship" between the native title rights and interests and the "other interests" relating to the determination area. (s.225(d))'

It is my view that the rights 2a and 2b – "to own" and "to possess" the area - must fall foul of these strictures, implying as they do a measure of control not available where exclusive possession cannot be shown. For the purposes of s190B(4) they are not readily identifiable.

For the same reasons, the right at 2m, "the right to make decisions about the way that the area may be used by non native title holders", would on its face not be readily identifiable. There is a line of cases, however, in which "remnant" rights of such a type have been recognised in relation to other Aboriginal people. For example, O' Loughlin J in *De Rose v State of South Australia* [2002] FCA 1342 said at [553]:

> "The majority in *Ward* in the High Court did say, at [417], that:
>
> *"... the grants of the respective pastoral leases were inconsistent with the continued existence of the native title right to control access to and make decisions about the land."*
>
> But I take that to constitute a statement of the position between the native title claimants on the one hand and the pastoralist on the other. I do not see that it necessarily takes away the residual rights of control of access and use as between the holders of native title themselves and any other Aboriginal people who seek access to or use of the claim area in accordance with the traditional laws and customs. "

O'Loughlin J was prepared to accept as a determined right at [917]:

> "(4) the right to make decisions about the use and enjoyment of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders."

Subject to that qualification, which I direct be placed on the register, this right is readily identifiable.

In relation to the right sought at 2c, Olney J considered at length the concept of 'occupation' in *Hayes v Northern Territory* (1999) 97 FCR 32 at [124ff], commencing with:

> "Some guidance is found in the judgment of Toohey J in *Mabo* No 2. His Honour there said at p.188-190:

> "*The requirements of proof of traditional title are a function of the protection the title provides. It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connexion with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title. Thus traditional title is rooted in physical presence. That the use of land was meaningful must be proved but it is to be understood from the point of view of the members of the society*."
>
> North American cases have begun to articulate factors which will indicate this kind of presence on, or use of, land. Any such articulation cannot be exhaustive.
>
> First, presence on land need not amount to possession at common law in order to amount to occupancy."

Olney J went on to conclude:

> "By application of the general thrust of the passage from the judgment of Toohey J quoted above to the facts of this case, the following general principles would appear to be appropriate to apply:
>
> c) The occupation of land should be understood in the sense that the indigenous people have traditionally occupied land rather than according to common law principles and judicial authority relating to freehold and leasehold estates and other statutory rights. The use of traditional country by members of the relevant claimant group which is neither random nor co-incidental but in accordance with the way of life, habits, customs and usages of the group is in the context of the legislation sufficient to indicate occupation of the land."

Accepting that reasoning, I do not think that "occupation" cannot exist alongside other rights and interests, nor do I think it requires a level of control such as the rights at 2a and 2b imply. I am of the view also that, given the administrative nature of the test, the same analysis may be made of the right "to live on the area" (at para.2g). At a prima facie level such a right is arguable and the benefit must go to the applicant. For that reason I find that these rights are readily identifiable over land where no exclusive possession may be found.

In *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 (the determination hearing) the Court said, of a non-exclusive right to 'use and enjoy':

> "21. ... A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests."

Accordingly, the right described a paragraph 2e is not readily identifiable.

A question which arises here is whether the right to "speak for country" (as described by paragraph 2i) necessarily amounts to a right to control use of and access to the area which would not be capable of being established over areas where a claim to exclusive possession were not made out.

In *Ward*, the majority of the High Court considered the right to "speak for country" in the following terms [88]:

> "It may be accepted that…'a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'". It is the rights under traditional law and custom to be asked permission and to "speak for country" that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others. The expression of these rights and interests in these terms reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing."

Paragraph [88] of the *Ward* decision, however, should be read in conjunction with para. [14] of the majority opinion which, in my view, qualifies, or rather ameliorates what is said in [88]. In [14], their Honours have this to say of the right:

> " 'Speaking for country' is bound up with the idea that, at least in some circumstances, others should ask permission to enter upon country or use it or enjoy resources, *but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture*." [my emphasis]

It seems clear from this, then, that although the right to speak for the application area may be seen as a right which amounts to a right to control access to and use of the land in some circumstances, it does not *necessarily* amount to such a claim.

To assume that the right is necessarily a right to control access or use of the land would be not only to 'oversimplify' the nature of the connection Aboriginal people have with their land but to fail to apply the *NTA* beneficially as the preamble to the Act requires administrative decision-makers to do. I note that in *Commonwealth v Yarmirr* (2001) 184 ALR 113 at [124] to [125], after noting the warning given by the High Court in *North Ganalanja* about construing the Act, McHugh J went on to say that:

> "It is also necessary to keep in mind that, in the second reading speech on the *Native Title Bill 1993*, the then Prime Minister, Mr Keating, saw *Mabo (No 2)* as giving Australians the opportunity to rectify the consequences of

> past injustices. The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the "national legacy of unutterable shame" that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.
>
> [After identifying the purpose of the Act,] the duty of the courts would be to ensure that that purpose was achieved. That would be so even if it meant giving a strained construction to or reading words into the Act. In an extrajudicial speech, Lord Diplock once said that "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed."

The Act being beneficial in nature, I accept the right described at paragraph 2i as being readily identifiable.

The final right which I must consider here is the right at 2l "to manage animals, plants and minerals on the area." Mansfield J considered a similar question in *The Alyawarr,Kaytetye,Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia [2004] FCA 472:*

> "27. … A more general right to make decisions about the use and enjoyment of the land, subject to the rights of pastoral lessees and to other persons who may use the land under statutory or other entitlements, is not of itself inconsistent with the rights of a lessee to make decisions about the land for pastoral purposes. Examples may be given, such as decisions that a type of bush food should not be exploited in certain areas at particular times of the year, or fishing area restrictions, or the location and timing of ceremonies and the like. They might also include restrictions on members of the public as to where they might camp, if at all, in relation to significant sites."

Whilst this was said in the context of Northern Terriory pastoral leases, which contained reservations not usually found in NSW, (cf *Wilson v Anderson*), I do not have sufficient tenure information to exclude the possibility of it being a right capable of exercise alongside other rights. Notwithstanding the reference to 'minerals', I note the express disclaimer in Schedule E of any rights to minerals and I take the view that the express nature of the wording there would predominate over the use of the word in the composite expression. On these bases I find right 2l to be identifiable.

The rights at 2a, 2b and 2e are not readily identifiable, but the remaining rights are.

Result: **Requirements met**

s.190B(5)

Sufficient factual basis:

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

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

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

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

Reasons for the Decision

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

The parts of the application that address the requirements of s190B(5) are Schedule F and Attachment G, the latter being affidavits by applicant Ms Margaret Boney-Witt and the applicant's granddaughter Ms Margaret Witt, affirmed 21 September 1999 and 10 August 1999 respectively. Schedule F purports to set out a general description of the factual basis for the claimed native title rights and interests.

I note that I am not limited to consideration of material contained in the application (as for s62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar [2001] FCA 16*. Subject to s190A(3), I have therefore also considered relevant information that is not contained in the application and that was provided directly to the Tribunal; namely, the report by anthropologist [name of anthropologist removed] and the 3 evidentiary affidavits by [Name 1 removed], [Name 2 removed] and [Name 3 removed].

In *Queensland v Hutchinson (2001) 108 FCR 575*, Kiefel J said that "[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it."

In *Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58* (the Yorta Yorta decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and

interests would have ceased to exist and could not be effectively reconstituted even by a revitalization of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

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

> "104 He [the Registrar] said:
>
> *'Before dealing with each of the conditions it should be noted that it is not my role to reach definitive conclusions about complex anthropological issues pertaining to applicants' relationships with the country subject to native title claimant applications. What I must do is consider whether the factual basis provided is sufficient to support the assertion that the claimed native title rights and interests exist. In particular, it must support the three assertions in sections 190B(5)(a, (b) and (c).'*

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

> "127. On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)…..
>
> 128. All it requires is that the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist.
>
> 129. The Registrar in this matter was satisfied that the factual basis asserted in Schedules F, G and M of the application established 'some degree of factual basis' for the claimed rights and interests. Schedule F is in fact designed to provide the factual basis for the assertions: see s 62(2)(e). …In fact the Registrar recognised that such material might not establish a 'sufficient' factual basis for them. ….And, as the passage set out in [103] above indicates, he correctly identified the question which s 190B(5) raised."

I have formed the view that the information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

It is my view that the information provided at Schedules F and Attachment G to the application, as well as the additional material described above, amounts to a sufficient factual basis to support the existence of the native title rights and interests listed at Schedule E of the application so as to comply with the requirements of s190B(5)(a), (b) and (c).

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

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

Schedule F makes assertions that:

- Gumbaynggirr Aboriginal people had rights and interests in relation to the application area prior to the acquisition of sovereignty by the Crown in 1788
- The native title claim group are Gumbaynggirr people and are descendants of persons who were those Gumbaynggirr people in 1788
- From prior to 1788 to the present day the native title claim group and their ancestors have continued to occupy, be present on, use and enjoy the area of the application.

The preliminary report by anthropologist [name of anthropologist removed] confirms:

- the existence of "documentary evidence" in support of the application area falling within Gumbaynggirr territory, and in support of the Gumbaynggirr forming a distinct cultural bloc, sharing a body of customs, laws and language
- the occupation of the area by the applicant Ms Margaret Boney-Witt

The evidentiary affidavits by the applicant Ms Boney-Witt and her granddaughter Ms Witt, as well as those of [Name 1 removed], [Name 2 removed] and [Name 3 removed] provide evidence of visits to or residence on, as well as usage of, the application area by claim group members and their immediate family, including known immediate predecessors. For example, Ms Boney Witt's affidavit states: "We spent periods of my childhood at the Second Headland at Urunga … My father knew where the freshwater was … He would hunt for kangaroos here … he would also collect honey … My father told me about significant sites in the Urunga area. He taught me where the men could go and where the women could go. He told me not to go to [name of site/place removed]. I still live by those rules [para.s 7-8]." Ms Boney Witt's affidavit also asserts and explains her lineage from Ben "King" Bennelong.

I am satisfied that there is a factual basis to support the assertion 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*

This subsection requires me to be satisfied that: traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title

claim group, and that those laws and customs give rise to the claim to native title rights and interests.

Schedule F describes at paragraph 7 the rights and interests held by the claimant group (that are the same rights and interests listed under paragraph 2 of 'Schedule E – Description of native title rights and interests') as being held in accordance with the laws and customs of the Gumbaynggirr people.

Paragraph 5 of Schedule F also states that "[t]he Gumbaynggirr Aboriginal people have maintained a system of laws and customs which have existed since prior to 7 February 1788 to the present day even though those laws and customs have undergone some change since white settlement." Further, paragraph 6 states that "[f]rom prior to 7 February 1788 to the present day, the native title claim group and their ancestors have continuously occupied, been present on, used and enjoyed the area which is the subject of this application, in accordance with the laws acknowledged, and the customs observed, by the Gumbaynggirr Aboriginal people."

In her affidavit of 21 September 1999, the applicant states: "I am a recognised Gumbaynggirr Elder from Urunga. I have been in the area all of my life and know the stories, land and the history. I have the right to speak for my country and younger Gumbaynggirr people and outsiders (including white people) ask me for permission to do certain things."

The applicant also demonstrates the active transmission of laws and customs when she states in her affidavit: "I am teaching my children and grandchildren and other children from the area to keep the law in relation top people and country as taught to me by the elders…[para. 20]".

In his report, [name of anthropologist removed] observes "on the basis of the research I have undertaken over the past 9 years, I am of the opinion that evidence exists…to support the proposition that the Gumbaynggirr people are a distinctive cultural block who share a body of customs, laws and language concerning occupation and ownership of lands. Further, as a result of the recent field work carried out with the claimant group, I am satisfied that, prima facie, the rights and interests of the nature described in this report are practiced by the claimant group [p. 1]". [Name of anthropologist removed] also observes: "Her [the applicant's] claim as Elder is based upon having lived in the area all her life and knowing the stories, the land and its history. In my experience, this is not an uncommon occurrence amongst the Gumbaynggirr [p. 2]."

The affidavits by claim group members Ms Witt and [Name 1 removed], [Name 2 removed] and [Name 3 removed] corroborate with the content of Ms Boney-Witt's affidavit. They indicate shared acknowledgement of the applicant's cultural authority and of a system of relationships to particular tracts of land, with shared observance of various behavioural rules such as gender-restricted access to particular areas.

The evidentiary affidavit of [Name 3 removed] also provides a strong indication of a system of law and custom that is acknowledged by Gumbaynggirr people and that has been passed down from before the time of European contact. [Edited to remove quote from confidential affidavit detailing rules governing the occupation and use of Gumbaynggirr country by Gumbaynggirr people]. [Name 3 removed]'s affidavit also

provides information about marriage rules, kinship obligations, rules regarding access to particular areas which may be gender restricted or may be "dangerous for anyone to go to", and also rules regarding hunting and fishing.

While the body of law and custom observed by claim group members may have changed or adapted when compared with that of their predecessors around the time of the acquisition of sovereignty by the British Crown, it would appear that significant aspects of the pre-sovereignty system of law and custom in relation to particular lands has been sustained by the claim group members and continues to be observed and passed on by them.

I am satisfied there exists a factual basis for the traditional laws and customs of the native title claim group that gives rise to the claimed native title rights and interests.

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

This paragraph requires me to be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs. The reasons already set out under s190B(5)(b) are also relevant to this sub requirement. Having regard to the same material, I am satisfied that there is a factual basis for the claim group continuing to hold native title in accordance with those traditional laws and customs.

I note the following facts are supported by the material:

- past and present transmission of knowledge that maybe construed as constituting the traditional law and custom, and therefore some level of maintenance of what is 'traditional' – see para. 8 and 20 of the applicant's affidavit of 21 September 1999; para.2, 3, 4 and 5 of Ms Witt's affidavit sworn 10 August 1999; para. 2 of [Name 3 removed]'s affidavit sworn 6 May 2004; para. 8 of [Name 2 removed]'s affidavit sworn 28 October 2003; and para. 3 and 6 of [Name 1 removed]'s affidavit sworn 24 September 2003;
- knowledge by claim group members of the existence of "rules [that] govern the occupation and use of Gumbaynggirr country by Gumbaynggirr people" (para. 3 of [Name 3 removed]'s affidavit, and see also para. 8 of Ms Boney-Witt's affidavit), including rules regarding hunting and fishing (para. 7-8, [Name 3 removed]; para. 6, Mr Buchnanan) and rules governing avoidance of certain areas of country (para. 6, [Name 3 removed]; para. 7 , [Name 2 removed]; para. 8, Ms Boney-Witt);
- recognition of elders' cultural authority by a wider Gumbaynggirr community (see para. 9 of Ms Boney-Witt's affidavit); and
- evidence by an anthropological 'expert', [name of anthropologist removed], of there being a "literature since the earliest period of invasion by non-Aboriginal people" indicating the existence of a "complex system of rules concerning the use and occupation of their land" that can be traced back to before 1788 (see para. 4 of page 1 of [name of anthropologist removed] report).

I am satisfied that there is a factual basis which supports the assertion that the native title claim group have continued to hold native title in accordance with traditional laws and customs.

I am satisfied that the application meets the composite requirements of paragraphs (a), (b) and (c) and therefore the requirements of s190B(5) as a whole.

Result: Requirements met

s.190B(6)

Prima facie case:

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

Reasons for the Decision

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

Under s190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

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

And at 35:

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

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

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

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

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision in relation to s190B(4) of the registration test. Under these reasons, I came to the conclusion that a number of the particularised native title rights claimed non-exclusively at paragraph 2 of Schedule E were not readily identifiable for the purposes of the Act*;* namely:

2a. a right to own the area
2b. a right to possess the area
2e. a right to use and enjoy the area.

For the same reasons I reached in considering s190B(5) requirements, the rights listed here are not capable of being established *prima facie* pursuant to s190B(6). Once again, this is not to say that each right may not exist as a matter of fact among Gumbaynggirr people, or that it might not be able to be accommodated by the Crown and other interest holders through agreement.

The rights and interests remaining for me to consider are: the exclusive and generic right to "possession occupation, use and enjoyment of the area … as against the whole world", as described by paragraph 1, and the particularised non-exclusive rights described by subparagraphs 2c, 2d, 2f, 2h, 2j, 2k, 2l, 2m, 2n and 2o of Schedule E.

A right of possession, occupation, use and enjoyment of the area covered by the application as against the whole world

Subject to other requirements being met, a claim to exclusive possession may be able to be established over areas where there has been no previous extinguishment of native title or where the non-extinguishment principle in s238 of the Act applies, such as areas for which the benefit of ss47, 47A or 47B is claimed, and in relation to areas affected by category C and D past and intermediate period acts.

At paragraph 7 of Schedule E and also at paragraph 4 of Schedule B, the applicant claims the benefit of s47B in relation to vacant Crown lands within the application area; and there is information in the applicant's affidavit indicating that she has occupied and does still occupy the land covered by the application – see paragraph 11 of Ms Boney-Witt's affidavit sworn 21 September 1999:

> "Ten years ago, I moved back permanently to the Second Headland near Urunga(which is part of the claim area) to the land where I used to live with my parents years ago. I camp on the land."

The effect of s47B is to allow previous extinguishing events to be disregarded in relation to areas of vacant Crown land occupied by one or more members of the claim group at the time when the application was made. I am not in a position to be able to confirm whether the land occupied by Ms Boney-Witt is indeed vacant Crown land, based on the information before me. I have accepted under s190B(2) that the information describing the area of the application is acceptable, which relies on the internal areas of the application being defined by class exclusions and inclusions. Exhaustive information regarding current tenure and also the tenure history of the area bounded by the external boundaries have not been provided to me by either the applicants or the State. It would in

my view then be wrong to reject that the right described by paragraph 1 of Schedule E can not be established on the basis that I am not sure whether the area is of a suitable tenure status to support such an exclusive right. My decision to accept that this right can *prima facie* be established, is contingent upon there being areas of land within the application area that are of an appropriate tenure type, which is a matter that will no doubt be pursued further by the State once a full tenure search has been conducted.

Subsection 223(1) defines native title rights and interests as being: (a) possessed under the traditional laws acknowledged, and the traditional customs observed, by the claimants; (b) where the claimants, by those laws and customs, have a connection with the land an waters; and (c) the rights and interests are recognised by the common law. I have already considered whether the rights and interests are recognisable or not under the common law in relation to the requirements of s190B(4). An evidentiary basis for the fact of the connection of the claimants to the application area has already been accepted in my reasons under s190B(5). What I am primarily concerned with here is whether or not there is *prima facie* material pointing to an evidentiary basis for the claim to "a right of possession, occupation, use and enjoyment of the area [or parts thereof] covered by the application as against the whole world" (see para.1, Sched. E) where those rights and interests are "possessed under the traditional laws acknowledged, and the traditional customs observed, by" the claimants, as in s223(1)(a).

On the proviso that other requirements for a claim to exclusive possession are met, I consider that the following material points *prima facie* to an evidentiary basis for the claim to the right described by paragraph 1 of Schedule E:

- Ms Boney Witt's affidavit, sworn 21 September 1999, which is contained in Schedule G of the application – para.s 7 to 11 inclusive, which includes information regarding Ms Boney Witt's occupation of the application area, also by her parents before her, and her assertion of her right to "speak for her country"; para. 19, which describes customs regarding which families may use the application area which reflect familial territorial association and law or custom regarding access; and para. 21, which indicates the authorisation of the applicant at a meeting of the Gumbaynggirr nation, and therefore by implication, the recognition of the claimant group of the asserted right to exclusive possession being made by the applicant on their behalf
- Ms Witt's affidavit, sworn 10 August 1999, which is contained in Schedule G of the application – para. 2, which supports the fact of occupation of the area by the applicant, and para. 3 which describes Ms Witt as having been "taught the laws of the country" by her grandmother, being the applicant
- [Name 2 removed]'s affidavit, sworn 28 October 2003 – para. 7, which supports occupation of the application area by the "Boneys" family, being the family of the applicant; para. 12, which describes the applicant's father seeking the permission of the "old people" (including the deponent's father) to occupy the area of the application; and para. 14, indicating use of the application area by the deponent, particularly in the 1950s and 1960s.

- [Name 3 removed]'s affidavit, sworn 6 May 2004 – para. 3, which indicates the existence of "rules [that] govern the occupation and use of Gumbaynggirr country by Gumbaynggirr people".
- The preliminary report by [name of anthropologist removed], dated 15 October 1999 – at the bottom of page 1 he states that "Second Headland [which is inside the application area] was the traditionally held land of Gumbaynggirr speaking people. The Gumbaynggirr people are a distinctive cultural block, sharing a body of customs, laws and language concerning occupation and *ownership* of lands. There are protocols and rights of access to and therefore *ownership* of land that I have evidence are practiced by the claimant group. An example of these rights in practice is the reciprocal recognition of other peoples' land and the protocols expected when visiting or living there [my emphasis]".

I am of the view that a right of "possession, occupation, use and enjoyment of the area covered by the application as against the whole world" can *prima facie* be established, but only in relation to any areas within the application area as a whole where a claim to exclusive possession can be sustained.

A right to occupy the area, and a right to live on the area

As discussed above, I consider these to be arguably non-exclusive rights, and to amount to lesser rights than the right to own the area. The material which points *prima facie* to an evidentiary basis for these rights is as follows:

- Ms Boney Witt's affidavit, sworn 21 September 1999 – para.s 7 to 9 inclusive and para. 11, which describe Ms Boney Witt's past and current occupation of the application area, also by her parents before her, and para. 19, which indicates the applicant and her family, the "Boneys", plus the [Name 3 removed] family, hold primary rights to use the application area for fishing and worming, while other families must seek permission first
- [Name 1 removed]'s affidavit, sworn 24 September 2003 – para. 6, which describes [details of camping on application area removed].
- [Name 3 removed]'s affidavit, sworn 6 May 2004 – para. 3, which indicates the existence of "rules [that] govern the *occupation* and use of Gumbaynggirr country by Gumbaynggirr people [my emphasis]"
- The preliminary report by [name of anthropologist removed], dated 15 October 1999 – at the bottom of page 1 he states "The Gumbaynggirr people are a distinctive cultural block, sharing a body of customs, laws and language concerning *occupation* and ownership of lands [my emphasis]"; and page 2 "Margaret Boney has lived permanently on the site for the past decade, despite the absence of the amenities of water and electricity".

A right to be present on the land and a right of free access to the area for the purpose of satisfying the rights identified in the preceding paragraphs [paras2a – 2n]

These two rights may conveniently be considered together. It may well be the case, as I believe, that both are implicit in the other rights which I have found capable of being established, and thus do not add any 'rights', but there is evidence worth noting

As non-exclusive rights, the material pointing to a *prima facie* basis for these rights to be established is the same as that supporting the right occupy the area, as described immediately above. In addition, the following material also supports such a basis:

- Ms Witt's affidavit, sworn 10 August 1999 – para.s 2 and 3, which indicates the deponent spent time on the application area as a child with her grandmother, the applicant
- [Name 2 removed]'s affidavit, sworn 28 October 2003 – para.s 6 ,7 and 8, which indicate the deponent's memories of various families using the application area, in some cases on a seasonal basis, including in the late 1940s or early 1950s.

A right to travel through the area

The material pointing to a *prima facie* basis for this right to be established, as a non-exclusive right, is the same as that supporting the "right occupy the area", the "right to be present on the area" and the "right to use and enjoy the area", as described immediately above.

A right to camp on the area

The material pointing to a *prima facie* basis for this right to be established, as a non-exclusive right, is the same as that supporting the "right occupy the area", the "right to be present on the area", the "right to use and enjoy the area" and the "right to travel through the area", as described immediately above.

A right to hunt animals on the area

In so far as there may be waters on the subject land, which I do not know, the abundant evidence presented of fishing activities leads me to accept that this is intended as an omnibus right covering the taking of all forms of animals, including fish.

The material pointing to a *prima facie* basis for this right to be established, as a non-exclusive right, is:

- Ms Boney Witt's affidavit, sworn 21 September 1999 – para. 7 "My father … would hunt for kangaroos here and I would go with him"; para. 15 "We still hunt for kangaroos sometimes and use wire snares. We get grey and red kangaroos and pademelons"
- [Name 1 removed]'s affidavit, sworn 24 September 2003 – para. 7 [quote from affidavit detailing Gumbaynggirr people hunting and fishing practises in the area removed].
- [Name 3 removed]'s affidavit, sworn 6 May 2004 – para. 7, which describes that there are rules regarding hunting and fishing that also link in with kinship rules.

See also the references under 'a right to manage animals and plants on the area.'

A right to gather plants, fuel, firewood, freshwater and rainwater on the area

The material pointing to a *prima facie* basis for this right to be established, as a non-exclusive right, is:

- Ms Boney Witt's affidavit, sworn 21 September 1999 – para.17 "I collect pigfaces, lillipillies and yams for food and wattlesap 'janing'"; para.18, which describes the applicant's father having put a well in the area occupied by the applicant, and her use of water from the well for cooking and washing.

While none of the evidentiary affidavits specifically mention the collection of fuel or firewood or rainwater, I do not consider it unreasonable to accept that usage of these materials by Ms Boney-Witt is likely, given that she camps in the application area and has done so for many years, and does so without the amenities of electricity or connected water.

A right to manage animals and plants on the area

The material pointing to a *prima facie* basis for this right to be established, as a non-exclusive right, is:

- [Name 1 removed]'s affidavit, sworn 24 September 2003 – para.7, which describes hunting and fishing practices which included practices with regard to mullet fishing such as 'letting some go back into the sea' and only spearing what was needed' and 'never taking the ones with eggs' and [Name 1 removed] deposes that he still continues such practices and also passes those teachings on to his children and grandchildren
- [Name 3 removed]'s affidavit, sworn 6 May 2004 – para. 7, which describes that there are rules regarding hunting and fishing, including rules about "which animals you can take and when".

In my view, these 'take' restrictions can be seen as an integral part of *managing* animals as a food resource. Given evidence of usage of plants resources is also indicated, then management of these resources also seems self-evident. See also my reasons at 190B(4) in relation to this right.

A right to carry out traditional ceremonies and activities on the area

The material pointing to a *prima facie* basis for this right to be established, as a non-exclusive right, is:

- Ms Boney Witt's affidavit, sworn 21 September 1999 – para. 8, which describes the applicant having been taught about "significant sites" in the Urunga area, including gender-based access restrictions; and para. 20, which describes the applicant teaching her children and grandchildren and other children from the area "to keep the law in relation to people and country…".
- The report by [name of anthropologist removed], dated 15 October 1999 – bottom of page 3 "the historical evidence reveals that young Gumbaynggirr men were 'put through the rule' at Nambucca and that [name of place/site and sensitive detail of purpose removed]. The existing evidence suggests that the traditional ceremonies of this area were incorporated into a broader ritual complex".
- [Name 3 removed]'s affidavit, sworn 6 may 2004 – para. 2 "I was brought up by initiated Gumbaynggirr men. My two grandfathers …taught me about how the Gumbaynggirr people lived in the old days".

In summary, s190B(6) only requires me to consider that at least one of the native title rights and interests claimed by the native title claim group can *prima facie* be established. I have found that 10 of the native title rights and interests described in Schedule E can prima facie be established, one of these as an exclusive right and the other nine as non-exclusive rights.

In my view, the applications meets the requirements of s190B(6).

Result: Requirements met

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.

Reasons for the Decision

Under s190B(7)(a) 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.

Schedule M of the application refers to the affidavits provided at Attachment G to support the applicant's assertion that members of the native title claim group have a traditional physical connection to the land and waters covered by the application.

I must only be satisfied that one member of the claim group has or previously had a traditional physical connection with any part of the land claimed.

The applicant's affidavit sworn 21 September 1999 clearly indicates past and present residence on the application area (see para.s 7 and 11). The affidavit sworn by the applicant's granddaughter also indicates her physical presence on the application area during her childhood, and the affidavits of Messrs [Name 2 removed] and Buchanan referred to elsewhere also indicate their physical connection to a wider Gumbaynggirr territory as well physical connection through a lifetime of visitation to the application area.

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

Result: Requirements 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.

Reasons for the Decision

For the reasons that follow I have formed the conclusion that there has been compliance with s61A and that the provisions of this section are met.

s61A(1) – Native Title Determination

A search of the Native Title Register has revealed that there is no approved determination of native title in relation to the area claimed in this application, as confirmed by the overlap analysis carried out by the Tribunal's Geospatial and Mapping Unit on 1 April 2004.

I am satisfied the application meets this subrequirement.

S61A(2) – Previous Exclusive Possession Acts

Schedule B of the amended application confirms that the application does not include any lands subject to a previous exclusive possession act as defined under s23B of the *Native Title Act*, provided this does not include any areas in which extinguishment of native title is to be disregarded due to the operation of s47B(3)(a) (the latter exception being described by paragraph 4 of Schedule B of the application).

For acts attributable to the Commonwealth that may be previous exclusive possession acts I would need to consider whether the act falls within the definition of a previous exclusive possession act under s.23B of the Commonwealth native title legislation.

If the act is attributable to the State of NSW and may be a previous exclusive possession act then I refer to the *Native Title (New South Wales) Act 1998 No88*. However, when defining what a previous exclusive possession act is (attributable to the State) this NSW legislation refers to the Commonwealth's definitions under s.23B of the Commonwealth legislation. Consequently, the definition of previous exclusive possession acts under s23B of the Commonwealth legislation is relevant, whether the acts are attributable to the State or Commonwealth.

Where there has been extinguishment of native title on areas of land the subject of a previous exclusive possession acts as defined by s23B, I find those areas to have been excluded from the claim area. I am satisfied that the applicants have excluded any areas of land from inside the external boundaries of the application area where there has been a previous exclusive possession act as defined by the *Native Title Act 1993* (Clth) and the *Native Title (New South Wales) Act 1998.*

I am satisfied that the application meets this subrequirement

S61A(3) – Previous Non-Exclusive Possession Acts

Numbered paragraphs 1.a. and 1.b. of Schedule B confirm that if the rights and interests being claimed are in an area where previous non-exclusive possession acts have occurred, as defined by s23F of the Act, then they are subject to those non-exclusive rights and interests to the extent of any inconsistency between them and the claimed native title rights and interests, as provided for by s23G(1)(a), and are also subject to any suspension by the previous non-exclusive possession acts, as provided for under s23G(1)(b)(ii). These class restrictions amount to the application not being a claim for rights and interests that "confer possession, occupation, use and enjoyment … to the exclusions of all others" (to use the terms of s61A(3)) in any parts of the application area where such non-exclusive possession acts have taken place.

I am satisfied that the application meets this sub-requirement.

Composite result: Requirements met

s.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

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

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

Reasons for the Decision

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

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

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

The area claimed does not include any offshore area, as is evident form the area description at Schedule B, including the attached map. Further, the application states at Schedule P that the "native title claim group does not claim exclusive possession of all or part of an offshore place".

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

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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

Reasons for the Decision

The application and accompanying documents do not disclose, nor am I otherwise aware, that the application contravenes the criteria set out in s190B(9)(c).

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

Result: Requirements met

ATTACHMENT A

THE FOLLOWING IS TO BE ENTERED AS CONTENTS OF THE REGISTER OF NATIVE TITLE CLAIMS PURSUANT TO S186

S186 (1)

(a) whether the application was filed in the Federal Court or lodged with a recognised State/Territory body

Filed in the Federal Court of Australia.

(b) if the application was lodged with a recognised State/Territory body – the name of that body

N/A

(c) the date on which the application was filed or lodged

3 June 1998

(c.a) the date on which the claim is entered on the Register

3 June 1998

(d) the name and address for service of the applicant

Applicant name: Maragaret Boney-Witt

Address for service: Simon Blackshield
Blackshield and Co.
50 Denham Street
Bondi NSW 2026

Phone: 02 93652122
Facsimile: 02 9475 0093

(e) the area of land or waters covered by the claim

All crown land and waters east of the North Coast Railway line, west of the mean high water mark of the Pacific Ocean, with the northern boundary at the southern border of Lot 102 in the Parish of Newry, County of Raleigh and the southern boundary at Nambucca Shire.

The Applicant excludes from the application those areas which were subject to :

(a) Reserve 37514 for public recreation;
(b) That part of Conditional purchase 1907/250 Bellingen which did not include DP 583777, Parish of Newry, County of Raleigh;
(c) That part of Additional Conditional Purchase 1910/171 Bellingen which did not include DP 219743, Parish of Newry, County of Raleigh;
(d) Part Additional Conditional purchase 1911/156 Bellingen; and
(e) Part Conditional purchase 1941/25 Bellingen.

And subject to paragraph 4 below;

1. a. If:

i. The area covered by the application or a part of the area covered by the application is or was the subject of a "Previous Non- Exclusive Possession Act" as defined by Section 23F of the Native Title Act; and
ii. The Previous Non- Exclusive Possession Act involved the grant of rights and interests which were not inconsistent with the right and interests claimed in Schedule E, then,
The native title rights and interests claimed under Schedule E are claimed subject to the rights and interests granted under the Previous Non-Exclusive Possession Act (as provided by Section 23G(1) (a) of the Native Title Act.

b. If:

i. The area covered by the application or a part of the area covered by the application is or was the subject of a " Previous Non-Exclusive Possession Act as defined by Section 23F of the Native Title Act; and
ii. The Previous Non-Exclusive Possession Act involved the grant of rights and interests which were inconsistent with the rights and interests claimed in Schedule E but did not extinguish them; then,
The rights and interests claimed under Schedule E are claimed subject to any suspension of them during the currency of the Previous Non-Exclusive Act (as provided by Section 23G(1)(b)(ii) of the Native Title Act;

c. If:

i. The area covered by the application or a part of the area covered by the application is or was the subject of a "Category B Past Act: as defined by Section 230 of the Native title Act or a "Category B Intermediate Period Act" as defined by Section 232C of Native Title Act; and,
ii. The Category B Past Act or Category B Intermediate Period Act involved the grant of rights and interests which were not inconsistent with the rights and interests claimed in Schedule E; and
iii. The Category B Past Act or Category B intermediate Period Act was not a Previous Non- Exclusive Possession Act; then,
Those rights and interests referred to in Schedule E which are not inconsistent with the rights and interests granted under the Category B Past Act or the Category B Intermediate Period Act are claimed;

d. If:

i. The area covered by the application or apart of the area covered by the application is or was the subject of:
(1) A "Category C Past Act" as defied by Section 231 of the Native Title Act; or
(2) a "Category C intermediate Period Act" as defined by 232D of the Native Title Act; or
(3) a "Category D Past Act" as defined by Section 232 of the Native Title Act; or,
(4) a "Category D Intermediate Period Act" as defined by Section 232E of the Native Title Act; and,

ii. The Category C Past Act, Category C Intermediate Period Act, Category D Past Act and/or Category D Intermediate Period Act referred to in the preceding sub-paragraph was not a Previous Non-Exclusive Possession Act; then,
Subject to the operation of the "non-extinguishment principle" as defined by Section 238 of the Native Title Act, those rights and interests claimed under Schedule E are claimed.

2. Subject to paragraph 4 below, native title rights and interests are not claimed in respect of any area to which Section 23B of the Native title Act (C'th) applies.
3. Native title rights and interests are not claimed in respect of:
a. Any land excluded from the area within the boundaries of the area covered by the application by Schedule B;
b. Any minerals, petroleum or gas which are wholly owned by the Crown.
4. Any areas within the external boundary of the Application in relation to which the extinguishment of native title is required by Section 47B of the Act to be disregarded are not excluded from the application. The native title rights and interests claimed in relation to such areas are subject to any interests which fall within subparagraph 47B(3)(a) of the Act.

(f) a description of the persons who it is claimed hold the native title

The claim is brought on behalf of the descendants of:

1. Maggie Buchanan;
2. Frank Whaddy and Vina Duncan;
3. Elsie Taylor and Jack Flanders;
4. Topsy Taylor and Sam Dotti;
5. Henry Duckett and Emily Walker;
6. David Ballengarry and Florence Randall;
7. Wabro [Name 3 removed];
8. Ben Bennelong and Dollie ‘Tickie’ [Name 3 removed]

(g) a description of the native title rights and interests in the claim that the Registrar in applying the subsection 190B(6); considered, prima facie, could be established.

1. Over land where exclusive possession may be found or where the provisions of s 47 apply:

A right of possession, occupation, use and enjoyment of the area covered by the application as against the whole world.

2. Where non-exclusive possession is found:

c. A right to occupy the area.
d. A right to be present on the area.
f. A right to travel through the area.
g. A right to live on the area.
h. A right to camp on the area.
i. A right to speak for the area.
j. A right to hunt animals on the area.
k. A right to gather plants, fuel, firewood, freshwater, rainwater and minerals on the area.
l. A right to manage animals, plants and minerals on the area.
m. A right to make decisions about the way that the area may be used by non-native title holders; that is, Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders.
n. A right to carry out traditional ceremonies and activities on the area.
o. A right of free access to the area for the purpose of satisfying the rights identified in the preceding sub-paragraphs."

These rights are subject to the following provisions:

1. a. If:
   i. The area covered by the application or a part of the area covered by the application is or was the subject of a "Previous Non- Exclusive Possession Act" as defined by Section 23F of the Native Title Act; and
   ii. The Previous Non- Exclusive Possession Act involved the grant of rights and interests which were not inconsistent with the right and interests claimed in Schedule E, then,
   The native title rights and interests claimed under Schedule E are claimed subject to the rights and interests granted under the Previous Non-Exclusive Possession Act (as provided by Section 23G(1) (a) of the Native Title Act.

   b. If:
   i. The area covered by the application or a part of the area covered by the application is or was the subject of a " Previous Non-Exclusive Possession Act as defined by Section 23F of the Native Title Act; and
   ii. The Previous Non-Exclusive Possession Act involved the grant of rights and interests which were inconsistent with the rights and interests claimed in Schedule E but did not extinguish them; then,
   The rights and interests claimed under Schedule E are claimed subject to any suspension of them during the currency of the Previous Non-Exclusive Act (as provided by Section 23G(1)(b)(ii) of the Native Title Act;

   c. If:
   i. The area covered by the application or a part of the area covered by the application is or was the subject of a "Category B Past Act: as defined by Section 230 of the Native title Act or a "Category B Intermediate Period Act" as defined by Section 232C of Native Title Act; and,

ii. The Category B Past Act or Category B Intermediate Period Act involved the grant of rights and interests which were not inconsistent with the rights and interests claimed in Schedule E; and

iii. The Category B Past Act or Category B intermediate Period Act was not a Previous Non- Exclusive Possession Act; then,

Those rights and interests referred to in Schedule E which are not inconsistent with the rights and interests granted under the Category B Past Act or the Category B Intermediate Period Act are claimed;

d. If:

i. The area covered by the application or apart of the area covered by the application is or was the subject of:

(1) A "Category C Past Act" as defied by Section 231 of the Native Title Act; or

(2) a "Category C intermediate Period Act" as defined by 232D of the Native Title Act; or

(3) a "Category D Past Act" as defined by Section 232 of the Native Title Act; or,

(4) a "Category D Intermediate Period Act" as defined by Section 232E of the Native Title Act; and,

ii. The Category C Past Act, Category C Intermediate Period Act, Category D Past Act and/or Category D Intermediate Period Act referred to in the preceding sub-paragraph was not a Previous Non-Exclusive Possession Act; then,

Subject to the operation of the "non-extinguishment principle" as defined by Section 238 of the Native Title Act, those rights and interests claimed under Schedule E are claimed.

2. Subject to paragraph 4 below, native title rights and interests are not claimed in respect of any area to which Section 23B of the Native title Act (C'th) applies.

3. Native title rights and interests are not claimed in respect of:

a. Any land excluded from the area within the boundaries of the area covered by the application by Schedule B;

b. Any minerals, petroleum or gas which are wholly owned by the Crown.

4. Any areas within the external boundary of the Application in relation to which the extinguishment of native title is required by Section 47B of the Act to be disregarded are not excluded from the application. The native title rights and interests claimed in relation to such areas are subject to any interests which fall within subparagraph 47B(3)(a) of the Act."

S186 (2)
The Registrar may include in the Register such other details about the claim as the Registrar thinks appropriate.

No other details.