



## **Brief History of the Application**

This application was filed in the Federal Court, Queensland District Registry, on 30 April 2001. It was made in response to two Low Impact Exploration Permits (application notices) issued pursuant to s486 the Mineral Resources Act 1989 (Qld). The application was accepted for registration on 29 May 2001.

A notice of motion to amend the form of amended application was filed in the Court on 10 January 2002. The amendment sought to replace one of the applicants, [**Name Deleted**] with a new applicant, [**Applicant 1**].

A notice of motion to amend the form of the application was again filed in the Court on 25 March 2002. This amendment sought to reduce the area of land covered by the application in the south east of the claim area. On 23 April 2002 Deputy District Registrar Robson granted leave to the applicants to amend the application in that form. It is this amended application to which I have had regard in making this decision.

## **Information considered when making the Decision**

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

- ◆ The registration test files for this application
- ◆ The registration test files for QC99/13 (Q6009/99) Ewamian #2
- ◆ The registration test decision for QC01/36 (Q6034/01) Gunbara Bulara Group #2 in relation to overlaps
- ◆ The National Native Title Tribunal Geospatial Database
- ◆ The Register of Native Title Claims
- ◆ Schedule of Native Title Applications.
- ◆ The National Native Title Register.
- ◆ Register of Indigenous Land Use Agreements
- ◆ An affidavit by [**Name Deleted**], Legal Officer of NQLCAC dated 28 May 2002
- ◆ An email by [**Name Deleted**], Legal Officer of the NQLCAC, dated 4 June 2002 attaching a letter dated 4 June 2002
- ◆ An email by [**Name Deleted**], Legal Officer of the NQLCAC, dated 4 June 2002

Copies of the material provided directly to the Registrar in relation to the decision under s190A have been provided to the State of Queensland and the State provided with an opportunity to comment. The State has not provided any comments in response to the contents of this material.

**Note:** Information and materials provided in the mediation of any of native title claims made on behalf of this native title group has not been considered in making this decision. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

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

## A. Procedural Conditions

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### **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**

*Has the application been made on behalf of all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed?*

In *Risk v National Native Title Tribunal* [2000] FCA 1589, O'Loughlin J said the following:

*'By operation of subs 190C(2) the Registrar must be satisfied in relation to all the requirements contained in s 61. It follows that, when applying the registration test, the Registrar must consider whether (on the basis of the application and other relevant information) the application has been made on behalf of a 'native title claim group' [30]*

*'The [Native Title] Act now ensures that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held . . . Subsection 61(1) imposes requirements not only in relation to the question of authorisation, but also in relation to the anterior question of whether the application has been made on behalf of a 'native title claim group' . . . An application which is not made on behalf of a 'native title claim group' cannot validly proceed . . .' [29] – [30]*

*'[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group' [60]*

*Risk's case is authority for the proposition that to comply with the requirements of s61(1), the application must be made on behalf of a 'properly constituted group', and 'not individuals or small sub-groups', as happened in *Risk*.*

At Schedule A of the application it is stated that the native title claim group identifies as and is recognised by other Aboriginal groups in the area as Ewamian. It is also stated in Schedule A that membership of the native title claim group is made up of all those persons who are descendants of the Ewamian ancestors named in schedule A, and the adopted children of 5 named persons.

I do not have any other information that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

The names of the applicants are detailed in Part A. Their address for service appears at page 14 of the application.

**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**

Schedule A of the application describes the native title claim group. For the reasons that lead to my conclusions (below) that the requirements for s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

**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**

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

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections. As required by s.61(5)(d) the application is accompanied by supporting affidavits as prescribed by s.62(1)(a) and a map as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

I note that s.190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. 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 s.61(5) have been 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**

There are five applicants. Each applicant has sworn an affidavit – see the five affidavits at attachment R1 to R5 of the application.

The affidavits are all dated, signed by each deponent and competently witnessed. I am satisfied that the affidavits sufficiently address the matters required by s62(1)(a)(i)-(v).

I note that each affidavit refers in para. 5 to ‘*paragraph (d)*’ – the reference to (d) is an obvious typographical error; the correct reference should be ‘4’. This minor error does not change my finding that the requirements of the section have been met.

**Result: Requirements met**

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

**Comment on details provided**

Details of traditional physical connection are found in Schedule M of the application, which in turn refers to the information in an anthropologist report and affidavit by a member of the claim group, at attachments F1 and F2 of the application respectively.

**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**

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information in the application are sufficient to enable the area covered by the application to be identified.

**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**

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable any areas within the external boundaries of the claim area not covered in the application to be identified.

**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**

For the reasons that led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the maps contained in the application show the external boundaries of the claim area.

**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**

I am of the view that under this condition, I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition. To expect the applicant to have details of searches carried out by other persons would be unreasonably onerous.

The application contains the details and results of the applicants' search, being a search of tenure GHPL 18/147. A copy of the tenure search is found at Attachment D of the application. There is no indication in the material that is before me that the applicant has conducted any other searches requiring disclosure in the application pursuant to s62(2)(c).

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

Schedule E contains an adequate description of the claimed native title rights and interests. The description does not amount to a mere assertion that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished at law.

Additionally, for the reasons that I find that there has been compliance with s190B(4), I am also satisfied that the requirements of this section are met.

**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 decision in *Queensland v Hutchison [2001] FCA 416* at [25] is authority for the proposition that only material that is part of the application can be relied upon in support of this requirement.

Information relevant to this sub-section is contained in the following:

- Schedule F
- Attachment F1 – Registration Report by a consultant anthropologist
- Attachment F2 – affidavit by [Applicant 5] dated 17 March 1999

It is my view that the information amounts to a general description of the factual basis so as to comply with the requirements of s62(2)(e) (i)-(iii).

**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**

Details of activities carried on in relation to the claim area are found in Schedule G of the application. I am satisfied that this description amounts to compliance with the provisions of s62(2)(f).

**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: “As far as the Applicants are aware, there are no such applications or determinations other than the Native Title claimant application of the Ewamian People #2 QG6009/99, NNTT reference (QC99/13) which covers State Land and Reserves within the boundary set out on the attached map marked “Attachment C1”. These areas are excluded from this application.”

**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**

Details of two Application Notices for Low Impact Exploration Permits under the *Mineral Resources Act 1989* are provided in Schedule I. Copies of the notices are provided at Attachments I1 (EPM 13306) and Attachment I2 (EPM 13308).

I am of the view that s62(2)(h) requires that s29 notices (or their equivalents) that are still current and in respect of which the applicants are aware, to be included in the application.

In this regard, I note that there is a Low Impact Notice EPM 13685 that is currently running. It has a notification date of 20 March 2002, this being prior to the date of lodgement of this amended application. The NQLCAC has stated by way of letter dated 4 June 2002:

*'We note that we have received a copy of the Notice of Application for a Low Impact Exploration Permit (Application Notice) regarding EPM 13685 on 25 March 2002.....*

*...We note that the Ewamian #3 amendment application was lodged on 20 March 2002.'*

By way of further clarification, an email from the NQLCAC dated 4 June 2002 provides that:

*'The amendment application was sent out by us on 20 March 2002 (filed by post). It was received by the Court on 25 March 2002 and date stamped on the same day.'*

On the basis of the above, I have concluded that the applicants were not aware of this Notice as at the date of filing of this amended application. Consequently, the requirements of this condition are satisfied.

**Result: Requirements met**

#### **s.190C(2)**

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

**Aggregate Result: Requirements met**

#### **s.190C(3)**

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*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**

This application was filed in the Federal Court on 30 April 2001. For the purposes of s190C(3)(b), it was "made" on that day.

A search of the Geospatial database and Register of Native Title Claims reveals that there are no applications that overlap with the area claimed in this one as at 25 June 2002.

I am therefore satisfied that this application does not offend the provisions of s.190C(3).

**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 paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or***
- (b) ***the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.***

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

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

- (a) *includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*
- (b) *briefly set out the grounds on which the Registrar should consider that it has been met.*

**Reasons for the Decision**

Under this section, I am only required to be satisfied that one of the conditions in s190C(4) is met.

The application has not been certified by the relevant representative Aboriginal/Torres Strait Islander body. Therefore, the requirements of s190C(4)(a) are not applicable.

Consequently, I need to consider whether there has been compliance with s190C(4)(b) – authorisation by the native title claim group.

There are two limbs in s190C(4)(b):

1. the applicant must be a member of the native title claim group;
2. the applicant must be authorised to make the application and deal with matters arising in relation to it by all the other persons in the claim group.

***First Limb - applicants are members of the native title claim group***

The application contains the following information relevant to this first limb of s190C(4)(b):

1. a statement at the commencement of the application, prior to the naming of the applicants, that the applicants are members of the claimant group.
2. a statement under the heading ‘AUTHORISATION’ that the applicants are holders of native title rights and interests in the claim area and are authorised by the Ewamian People under their traditional laws and customs to make the application on behalf of the native title claimant group.
3. four of the applicants bear surnames that are also held by one or more of the ancestors named in Schedule A of the application (from whom current members of the Ewamian group are descended).
4. in Schedule A, it is stated that based on the research of the consultant anthropologist engaged to assist in the research and preparation of this application, the applicants are descendants of

the ancestors named in Schedule A. Therefore, they are members of the native title claim group

5. in preparing the Registration Report for the purposes of s190B(5), membership of the claim group was researched by the consultant anthropologist. The research involved extensive interviews with claim group members and genealogical preparation (refer Attachment F1)
6. the affidavit of (removed) dated 27 April 2001, states that he was employed by the NQLCAC as a (removed). NQLCAC was the body funded pursuant to s203FE to perform representative body functions in the claim area and the applicants' legal representative. He also talks about the NQLCAC having a database of the names and addresses of Ewamian People who reside in three regional centres.

On the basis of the above, I accept the information in Schedule A as satisfying the first limb of s190C(4)(b). I am also satisfied that the information set out in points 1-6 above amounts to the statement required by s190C(5)(a) and the brief setting out of the grounds required by s190C(5)(b) in relation to the first limb of s190C(4)(b).

***Second Limb - the applicants are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.***

In *Risk v National Native Title Tribunal* [2000] FCA 1589, O'Loughlin J noted that under the *Native Title Act 1993*, applications can only be lodged on behalf of properly constituted groups and that authorisation must come from all the persons who hold the common or group rights and interests. He noted that although the applicant did not have to be individually authorised to make the claim, the authorisation must be in accordance with a process of decision making recognised under the traditional laws and customs of the claimant group.

S251B of the *Native Title Act 1993* recognises that the applicants may be authorised using a decision making process that is either:

- (a) in accordance with traditional laws and customs of the group; or
- (b) agreed to and adopted by the native title claim group.

The application contains and is accompanied by these statements and information in relation to the authorisation of the applicants, as required by s190C(5):

- Part A.2 – “The applicants are holders of native title rights and interests in the claim area and are authorised by the Ewamian People under their traditional laws and customs to make the application on behalf of the Native Title claimant group.

The Applicants [**Applicant 2**], [**Applicant 3**], [**Applicant 4**] and [**Applicant 5**] as well as [**Name Deleted**] (who has been replaced as an applicant by [**Applicant 1**]- see below) were so authorised at meetings of Ewamian People held at Brisbane on 17 April 2001, Cherbourg on 18 April 2001 and Mareeba on 22 April 2001.

The grounds for this assertion are set out in the affidavits of the Applicants named above and (name removed), (information removed) for North Queensland Land Council. The affidavits are provided and labeled as Attachments “R1” to “R6”.

[**Name Deleted**] has been replaced by [**Applicant 1**] as an Applicant for this application. [**Applicant 1**] was nominated by [**Name Deleted**] as his replacement and [**Applicant 1**] has been confirmed and authorised by the claimant group as an Applicant for this application at a

meeting held in Cairns on 8 and 9 December 2001. The grounds for this assertion are set out in the affidavit of **[Applicant 1]**, provided and labeled as Attachment "R7".

The above applicants are also authorised by the Native Title claim group to deal with matters arising in relation to the application.'

- Applicants' s62(1)(a) affidavits - Each applicant deposes that he/she is authorised by all the persons in the Native Title Claim Group to make this application and deal with matters arising in relation to it

In relation to the authorisation of **[Applicant 2]**, **[Applicant 4]**, **[Applicant 3]** and **[Applicant 5]**:

- On 17 April 2001, there was an authorisation meeting in Brisbane. This meeting authorised **[Name Deleted]** to be an applicant for this native title claim application (refer to par 5(n) of **[Name Deleted]** affidavit dated 30 April 2001)
- On 18 April 2001, there was an authorisation meeting in Cherbourg. This meeting authorised **[Applicant 2]** to be an applicant for this native title claim application (refer to par 5(f) of **[Applicant 2]** affidavit dated 26 April 2001)
- On 22 April 2001, there was an authorisation meeting in Mareeba. This meeting authorised **[Applicant 4]**, **[Applicant 3]** and **[Applicant 5]** to be applicants for this native title claim application (refer to par 5(e) of the affidavits of **[Applicant 4]** and **[Applicant 3]** and par 5(f) of the affidavit of **[Applicant 5]**)
- Each meeting in the three regional centres passed a motion to accept the applicants nominated and authorised by the other meetings.
- The affidavit of **[Name Deleted]** attests to the following:
  4. *On or about 5 April 2001 the NQLCAC produced a proposed meeting schedule for meetings with the Ewamian People in Brisbane on 17 April 2001, in Cherbourg on 18 April 2001 and in Mareeba on 22 April 2001.*
  5. *On or about 5 April 2001 the NQLCAC contacted **[Name Deleted]**, a Ewamian Person and ATSIC Counsellor in Brisbane and asked him to organise a meeting with Ewamian People residing in Brisbane.*
  6. *On or about 6 April 2001 the NQLCAC contacted **[Name Deleted]**, Chairperson of the Ewamian Aboriginal Corporation, to discuss the proposed meeting schedule and invite the Ewamian People to attend these meetings.*
  7. *On or about 10 April 2001 the NQLCAC invited **[Name Deleted]** by facsimile to attend the meeting in Cherbourg.*
  8. *On or about 10 April 2001 the NQLCAC sent out notices to the Ewamian People whose names appeared on our database informing the Ewamian People of the scheduled meetings.*
  9. *On or about 10 April 2001 the NQLCAC forwarded by facsimile to the Cherbourg Community Council a request to post a meeting notice regarding the Ewamian meeting in Cherbourg on the council's notice board.....*
  12. *At the three meetings the Ewamian People discussed the authorisation of a native title application over areas within their traditional country currently not included in the Ewamian Native Title claim QG6009/99.*
  13. *At each of the three meetings it was decided that the applicants for the new Ewamian Native Title claim should be such persons as that meeting nominated and approved of and such persons as each of the other meetings nominated and approved of to be an applicant.'*

In relation to the authorisation of **[Applicant 1]**:

- On 8 and 9 December 2001, there was a meeting in Cairns to discuss, amongst other things, the replacement of **[Name Deleted]** by **[Applicant 1]** as an applicant for the native title claim application. **[Name Deleted]** had approached **[Applicant 1]** prior to the meeting and nominated him as his replacement. The Ewamian People attending the meetings in Cairns confirmed his nomination and authorised him to replace **[Name Deleted]** as an applicant and to deal with matters arising out of the application (refer to par 6 in the affidavit of **[Applicant 1]** dated 3 January 2002).
- I have also been provided with the additional material, being the affidavit of **[Name Deleted]** dated 28 May 2002 attesting to the following:

13. *'Claimant group members present at the meeting on 8 and 9 December 2001 had the authority to make a decision to accept **[Applicant 1]** nomination and authorised him as an applicant and representative of the claimant group for the Ewamian People in Brisbane and to deal with matters arising out of this Ewamian Native Title claimant application.*
14. *Following the amendment of this Ewamian Native Title application and the replacement of **[Name Deleted]** with **[Applicant 1]**, the Ewamian People, at a meeting at Undara National Park on 9 and 10 March 2002, attended by more than 130 Ewamian People, the claimant group instructed the NQLCAC to seek, amongst other things, an amendment of Ewamian #2 Native Title claimant application so that the Ewamian #2 application mirrors the applicants for this application.*

I am satisfied that the application contains the statements required by s190C(5)(a). I am satisfied that the information that is in the application relating to the grounds upon which I should be satisfied about authorisation is sufficient for the purposes of s190C(5)(b).

The information in the application and provided to me separately supports a finding that the authorisation decision was made by the native title claim group in accordance with a traditional decision making process that must be complied with by the group when authorising things of this kind. I am satisfied that the applicants are members of the native title claim group and are authorised to make this application and to deal with matters arising in relation to it by the native title claim group.

**Result: Requirements met**

## **B. Merits Conditions**

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### **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*

It appears from the locality map in attachment C2 that the claim area is located south-west of Cairns, in Far North Queensland. The written description for the external boundaries is found in para. A of Schedule B and attachment B1 of the application. The written description is supplemented with two maps showing the external boundaries at Attachments C1 and C3 of the application.

The written description defines the external boundary by reference to approximate geographic coordinate references, and in some cases to the distances travelled along specific points along the external boundary. The approximate geographic coordinates are referenced to Australian Geodetic Datum 1984 (AGD84) Australian Map Grid Zone 55 and based on the position of 1:250,000 topographic maps and BLIN maps sourced from Department of Natural Resources, Qld. It is stated that these coordinates are intended as a guide only.

The map in Attachment C1 is A4 in size, and contains a valid coordinate system, a map grid and a scale bar. The names of rivers, roads and a local authority shire boundary, being information referred to in the written description, all appear on the map. The external boundary line is shown on this map in black ink, as are the various points described in the written description along which the external boundary travels.

The map in Attachment C3 would appear to be an extracted copy of a government map that shows sections of local authority boundaries referred to in the written description as coinciding with the external boundaries for this claim area.

The written description and map appears to me to satisfactorily locate the external boundaries of the claim area on the earth's surface. In reaching this decision I have had regard to expert assessment from the Tribunal's Geospatial and Mapping division dated 25 June that the written description and map of the external boundaries in the application identify the amended area in the application with reasonable certainty.

I am therefore satisfied that external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and maps contained in the application.

It follows that I am also satisfied that the physical description of the external boundaries meets the requirements of s62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s62(2)(b).

### *Internal boundaries*

The internal boundaries are described in Schedule B of the application. These boundaries are described by:

- a formula that excludes a variety of tenure classes from the claim area, in the terms of s23B of the *Native Title Act 1993*, being the section of the Act that defines Previous Exclusive Possession Acts
- a statement that the area covered by the application excludes land or waters where the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under ss 47(2), 47A(2) or 47B(2)) pursuant to s190B(9)(c).

- a statement that excludes from the claim area the land and waters covered by the Ewamian Native Title claimant application #2 QC99/13 (Q6009/00)
- a statement that excludes from the claim area a parcel described as Lot 4620 PH 1283, and commonly referred to as Bulleringa National Park. This area is under claim by the Wakamin People (QC6148/98).

The applicant has detailed a series of land tenure types that are excluded from the area of the application and, at para. E of Schedule B, has detailed a number of tenure types that are excepted from the general class exclusion. This form of class exclusion amounts to information that enables the internal boundaries of the application area to be adequately identified. This may require considerable research of tenure data held by the State of Queensland, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants.

The areas specifically excluded contain details of the lot, plan and tenure reference, and are further identified according to the native title applications that presently have been made over those areas. This is information that identifies these areas with reasonable certainty, having regard to the State of Queensland's land and tenure identification system.

I am satisfied that the information in the application regarding the internal boundaries of the claim area meets the requirements of s62(2)(a)(ii).

The requirements of s62(2)(a), s62(2)(b) and s190B2 are met.

**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**

Under this section, I am only required to be satisfied that one of the requirements in s190B(3) is met.

The application does not name all of the native title claim group and consequently, s190B(3)(a) is not applicable.

Turning my attention to s190B(3)(b), this sub-section requires that the Registrar be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The description of the persons in the group is found at Schedule A of the application. The membership of the group is said to be all those persons who are descendants of named Ewamian

ancestors and adopted children of the five persons named in Schedule A. Each ancestor and adoptive parent is described with a first or Christian name and a surname.

I am satisfied that the descendants of the named persons (ie the ancestors and five adoptive parents named in Schedule A) could be identified with minimal inquiry and as such, ascertained as part of the native title claim group. By identifying members of the native title claim group as descendants of named ancestors and the adopted children of named people, it is possible to objectively verify the identity of members of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group.

I am satisfied that the condition in s190B(3)(b) is met.

**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**

Under this limb, I must be satisfied that the description of the native title rights and interests (found at Schedule E of the application) is sufficient to allow the claimed rights and interests to be readily identified.

The description contained at Schedule E of the application, describes the native title rights and interests as:

*'The native title rights and interests claimed are the right to exclusive possession, occupation, use and enjoyment of the claimed area as against the whole world, pursuant to the traditional laws and customs of the claim group'.*

The claimed rights and interests are qualified by these statements in the application:

- Schedule E – *'Where the area is covered by a valid, previous non-exclusive possession act (s.23F) the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others'*
- Schedule Q – *'The native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown in a manner which is inconsistent with continuing native title rights residing in those substances'*
- Schedule B – *'The area covered by the application excludes land or waters where the native title rights and interests claimed have otherwise been extinguished (except to the extent that extinguishment is required to be disregarded under subsections 47(2), 47A(2) or 47B(2)) pursuant to s190B(9)(c)'*

This description of the claimed rights and interests, and the stated qualifications, enables them to be readily identified and satisfies the requirements of s190B(4).

**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**

There are three criteria to consider in determining whether I am satisfied that there is a sufficient factual basis to support the applicant's assertion about the existence of the native title rights and interests listed at Schedule E of the application.

In *Martin v Native Title Registrar* [2001] FCA 16, French J considered this condition of the registration test. I have had regard to his Honour's findings that:

*"Provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material" [23].*

With respect to paragraph (a) of s190B(5), his Honour said:

*"...What he (the delegate) had to be satisfied of was that the factual basis on which it was asserted that the native title rights and interests claimed exist supported the proposition that the native title claim group and the predecessors of those persons had an association with the area" [22].*

His Honour imparts the same formulation of the question to the circumstances of paragraph (b) – see [27].

With respect to paragraph (c), his Honour noted that:

*"...the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5)" [29]*

A general description of the factual basis is provided in Schedule F of the application. It refers to these matters:

- the native title claim group and their predecessors have possessed, occupied, used and enjoyed the claim area since sovereignty

- Such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that the rights and interests in the land and waters vest in members of the native title claim group on the basis of, but not limited to:
  - descent from Ewamian ancestors
  - birth in the area
  - filiation with Ewamian people
  - death and burial on Ewamian country
  - linguistic affiliation with Ewamian country
  - personal name
- traditional laws and customs being passed on by traditional teaching from generation to generation
- the continuing acknowledgement and observance of traditional laws and customs by the native title claimant group
- the rights and interests being capable of being recognised by the common law of Australia.

It is stated in Schedule F that further information to support the factual basis for the assertions is found in this material:

- Attachment F1 ([**Anthropologist 1**] Ewamian Registration Report)
- Attachment F2 (affidavit by claim group member, [**Applicant 5**] dated 17 March 1999)

I have read this material and am satisfied that it expands on the general description of the factual basis in Schedule F and provides specific and relevant information that supports the factual basis for the existence of the claimed native title.

It is stated in Schedule F that [**Anthropologist 1**] is a senior anthropologist who has based her report on extensive interviews with members of the Ewamian claimant group, recorded details of sites on the claim area and a review of the available anthropological and linguistic literature. The author's qualifications appear at p1 of the report. On the basis of her qualifications and her work with the Ewamian People, I am satisfied that [**Anthropologist 1**] is an authoritative source of information in relation to the native title claim group.

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

The factual basis provided is sufficient to support the assertion that the Ewamian People have an association with the claim area and are descended from people who also had an association with the claim area. Refer to:

- Affidavit of [**Applicant 5**] dated 17 March 1999 - paras. 1, 3-6, 8, 10
- [**Anthropologist 1**] report, pages 2-6

**(b) existence of traditional laws acknowledged by, and traditional customs observed by, the native title claim group;**

I must be satisfied that the factual basis is sufficient to support an assertion of the existence of traditional laws and customs observed and acknowledged by the native title claim group that gives rise to the claim to rights and interests.

On the basis of the description of the factual basis in Schedule F and the information in attachments F1 [**Anthropologist 1**] and F2 [**Applicant 5**], I am satisfied that the factual basis

provided is sufficient to support this assertion. This information supports an assertion that the native title claim group continue to observe a system of traditional laws and customs that forms the basis of their claim to native title rights and interests in the claim area. Refer to:

- Affidavit of [Applicant 5] dated 17 March 1999 - paras. 5-7, 9-10
- [Anthropologist 1] report pages 7-9

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

Under this criterion, I must be satisfied that the factual basis is sufficient to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs. In this regard, I refer to:

- Affidavit of [Applicant 5] dated 17 March 1999 - paras. 5-7, 9-10
- [Anthropologist 1] report pages 9-10
- Schedule G:
  - members of the claim group continue to have a close association, including a spiritual connection with the claim area according to traditional law and custom
  - members of the claim group continue to pass on traditional laws, customs, stories and beliefs to their descendants
  - members of the claim group continue to use the claim area for traditional hunting and fishing, gathering traditional bush medicines and other materials
  - members of the claim group continue to care for country in accordance with traditional laws and customs
  - members of the claim group continue to exercise a body of traditional laws and customs which has been passed down from generation to generation by their forbears and predecessors eg caring for country, controlling access to country, holding ceremonies on traditional country

I am satisfied that the factual basis provided is sufficient to support the assertion that the claim group continue to hold native title in accordance with those traditional laws and customs.

Consequently, I am satisfied that the factual basis provided sufficiently supports the assertions outlined in s190B(5).

**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 can be established.

'Native title rights and interests' are defined at s223 of the *Native Title Act 1993*. This definition specifically attaches native title rights and interests to land and water, and in summary requires;

- A. the rights and interests to be linked to traditional laws and customs;
- B. those claiming the rights and interests to have a connection with the relevant land and waters; and
- C. those rights and interests to be recognised under the common law of Australia.

The definition is closely aligned with all the issues I have already considered under s190B(5). I will draw on the conclusions I made under that section in my consideration of s190B(6).

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 Galanjanja 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]."*

I have adopted the ordinary meaning referred to by their Honours when considering this application. At Schedule E to the application it is stated:

*'The native title rights and interests claimed are the right to exclusive possession, occupation, use and enjoyment of the claimed area as against the whole world, pursuant to the traditional laws and customs of the claim group.'*

In considering this condition against the native title rights and interests listed in Schedule E, I have had regard to:

- Attachment F1 (**[Anthropologist 1]** Ewamian Registration Report)
- Attachment F2 (affidavit by claim group member, **[Applicant 5]** dated 17 March 1999)
- Schedules F and G

These documents provide sufficient material and information to satisfy me on a prima facie basis that the native title rights and interests claimed by the applicants can be established.

#### Possession

Refer to Affidavit of **[Applicant 5]** dated 17 March 1999 – paras 1-4  
**[Anthropologist 1]** Report – p2 para7, p4 paras 5-6, p5 para 3, p7 paras 4-5

#### Occupation

Affidavit of **[Applicant 5]** dated 17 March 1999 – paras 4-6, 9-10  
**[Anthropologist 1]**– p4 par 2, p7 par 6, p9 par 3-4

#### Use and Enjoyment

Affidavit of **[Applicant 5]** dated 17 March 1999 – para 9  
Schedule G – members of the claim group continue to:

- pass on traditional laws, customs, stories and beliefs to their descendants

- use the claim area for traditional hunting and fishing, gathering traditional bush medicines and other materials
- care for country in accordance with traditional laws and customs

I note that the exclusivity of the native title rights and interests claimed is subject to the express qualification contained in Schedule E being:

*'Where the claim is covered by a valid, previous non-exclusive possession act (s23F) the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.'*

I note also in Schedule Q that the *'native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown in a manner which is inconsistent with continuing native title rights residing in those substances.'*

Taking into account:

- the express qualifications to the claimed native title rights and interests; and
- the material that is provided to support the factual basis (see reasons under s190B(5)) and the prima facie establishment of the claimed rights and interests,

I am satisfied that the claimed native title rights and interests to **possession, occupation, use and enjoyment** are prima facie established.

**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.

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the

application. This is found in the affidavit of [Applicant 5], dated 17 March 1999, at Attachment F2 of the application.

In his affidavit, [Applicant 5] deposes that:

- he is an Ewamian elder (par 1)
- he was born in Georgetown in 1929 (par 3). On the basis of the map of the claim area in Attachment F1, I note that this is a town that is within the external boundaries of the claim area;
- he lived on the claim area, as did his father before him, and has a strong connection to his country: ‘We know it is our land because no one else can speak for that area. No one else can go and live there. It has always been our country’ (par 3)
- he knows the location and significance of sacred places on Ewamian country, and has to look after those places according to his culture, his Law (par 5)
- he is teaching his sons to make traditional artefacts like spears and boomerangs, using traditional timbers from the Georgetown area (par 9).

I am satisfied on the basis of his sworn testimony, that the deponent is a member and elder of the native title claim group. He provides information to support the assertion that he has an association and connection with the claim area that is continuous and current.

Accordingly, I am satisfied that he has the requisite traditional physical connection with the claim area.

**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 concluded that there has been compliance with s61A.

**S61A(1) Native Title Determination**

A search of the Native Title Register has revealed that there is no determination of native title in relation to the area claimed in this application as at 25 June 2002.

**S61A(2) Previous Exclusive Possession Acts**

In Schedule B of the application, any area that is covered by a previous exclusive possession act, as defined in s23B of the *Native Title Act 1993*, is excluded from the claim area (refer to Schedule B par B(3), C).

### **S61A(3) Previous Non-Exclusive Possession Acts**

In light of the express statements to this effect in Schedule E, I am satisfied that there is no claim to exclusive possession over areas covered by PNEPAs, as defined in s23F of the Act.

### **S.61A(4) – s47, 47A, 47B**

It is stated in Schedule L that ‘*All vacant Crown Lands, National Parks and Forest Reserves or State Forest within the claim area are areas to which the provisions of section 47B apply*’.

Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of s47B is a matter to be settled in the Federal Court. S61A(4) provides that an application may be made in these terms.

### **Conclusion**

For the reasons set out above, I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s61A the application should not have been made.

**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**

At Schedule Q of the application, it is stated that: ‘*The native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown in a manner which is inconsistent with continuing native title rights residing in those substances.*’

This exclusion is consistent with the requirements of s190B(9)(a).

**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**

No offshore places are claimed in this application – Schedule B and the maps in Attachment C of the application establish that this claim area is located inland from the coast. See also the statement in Schedule P that the claim area does not include any offshore areas.

**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 does not disclose and I am not otherwise aware of any other extinguishment of native title rights and interests in the area claimed.

I note also the statement in Schedule B of the application that native title rights and interests are not claimed where they have otherwise been extinguished pursuant to this section, except in the limited circumstances permitted by s47, s47A and s47B. A search of the Register of Indigenous Land Use Agreements reveals that there are no agreements registered over the claim area which provide for the extinguishment of native title by surrender.

I am satisfied that the requirements of this section have been met.

**Result: Requirements met**

*End of Document*