NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE: Danielle Malek

Application Name:	Wuthathi, Kuuku Ya'u and Northern Kaanju People
Names of Applicant(s):	Phillip Wallis, Jean Mosby, Douglas Wilson, Gordon Pablo, Lloyd Hollingsworth, Bessie Hobson, Geoffrey Pascoe, Albert Doctor, Vincent Temple, Margaret Sellars, Frank Hollingsworth and Norman Lymburner
Region:	Far North Queensland NNTT No.: QC02/26
Date Application Made:	04/07/1995
Federal Court No.:	Q6023/02

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

DECISION – Wuthathi, Kuuku Ya'u and Northern Kaanju People

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

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

26th May 2003
Date of Decision

Brief History of the Application

This is an application on behalf of the Wuthathi, Kuuku Ya'u and Northern Kaanju People filed in the Federal Court on 24 April 2003. On 9 May 2003, the Federal Court granted leave to the applicants to amend the application in the form filed 24 April 2003. In an affidavit accompanying the motion seeking leave to amend, the applicants' legal representative states that the amendments relate to changes in the law following the decision of the High Court in *Western Australia v Ward* [2002] HCA 28 (Schedules E and Q), to the description of the persons in the native title claim group (Schedule A), to the area covered by the application (Schedule B), and some minor consequential changes to other Schedules.

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 National Native Title Tribunal's Working/Personnel Files, Legal Services Files, Party Files and Registration Testing Files for QC02/26 (this is the NNTT file reference for the application)
- The National Native Title Tribunal Geospatial Database
- The Register of Native Title Claims and Schedule of Native Title Applications
- The Native Title Register
- Additional information provided to the Registrar by the applicants in relation to the conditions of the registration test:
    - Affidavit by **[Applicant 1 – name deleted]** (undated)
    - Affidavit by **[Person 1 – name deleted]** (9/11/99)
    - Affidavit by **[Person 2 – name deleted]** (9/11/99)
    - Affidavit by **[Applicant 2 – name deleted]** (10/11/99)
    - Affidavit by **[Applicant 3 – name deleted]** (9/11/99)
    - Affidavit by **[Person 3 – name deleted]** (12/11/99)
    - Affidavit by **[Applicant 4 – name deleted]** (8/11/99)
    - Letter from Cape York Land Council (applicants' legal representative) dated 14 May 2003 and Attachment R description of traditional decision-making processes
    - Letter from applicants' legal representative dated 15 May 2003, and document containing additional information relating to authorisation of the native title application.

Copies of the applicants' additional information have been provided to the State of Queensland and the Commonwealth of Australia in the interests of procedural fairness, in line with the decision by Carr J in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*. The State has not provided any comments in response to the contents of this material.

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

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

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

Under s. 61(1) of the *NTA*, the Registrar or his delegate must be satisfied that the native title claim group for an application includes all the persons "who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed." In *Risk* [2000] FCA 1589, O'Loughlin J commented that:

> "A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group...[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." - at paragraph 60.

In applying s. 61(1), the delegate must be satisfied that the composition of the native title group is not of recent origin but has common rights and interests in the claim area having regard to traditional laws and customs (cf: *Risk* [2000] FCA 1589, O'Loughlin J at paras 30-31, 60; *Ward* (1998) 159 ALR 483 at 505 1-20, 545 35-45, 550 to 552).

I note that the Wuthathi, Kuuku Ya'u and Northern Kaanju people have made separate native title determination applications over areas of their respective traditional country. It appears from information in this application that the present subject area is a discrete parcel of land, subject to a former pastoral holding (Bromley Holdings) and lies within country that is shared by the Wuthathi, Kuuku Ya'u and Northern Kaanju: see first page of Schedule A and commencement of Attachment F.

Schedule A states that membership of the group is determined primarily through the principle of cognatic descent (i.e., descent through both male and female Wuthathi, Northern Kaanju, and Kuuku Ya'u ancestors). It is said that members trace descent from a set of persons recognised in the regional Aboriginal community as Wuthathi, Northern Kaanju and/or Kuuku Ya'u ancestors who occupied the area before the time of and soon after the first European occupation of the region. Schedule A then provides that current membership of the group consists of the cognatic descent groups (commonly called families) listed by their main surnames, together with the apical ancestors from whom they trace their descent. This is followed with a list of ancestors for each of the Wuthathi, Northern Kaanju or Kuuku Ya'u family groups, and the family name or names (in most cases) by which these family groups are now known, e.g. "the descendants of [ancestor name(s)], being members of the [family name(s)] Family."

The list that follows at Schedule A of apical ancestor/family names appears comprehensive. There are 24 Northern Kaanju family groups, 7 Wuthathi family groups, and 8 Kuuku Ya'u family groups. I have compared the Schedule A description with that found in earlier applications by each of the Wuthathi (QG6150/98 & Q6022/02), Northern Kaanju (QG6152/98) and Kuuku Ya'u Peoples (QG6016/98).

These earlier applications also describe the group as the members of descent groups or families, identified by reference to descent from an apical ancestor or ancestors and then the family name by which current members are known. There are some minor differences between the Wuthathi, Northen Kaanju and Kuuku Ya'u descent groups. However, after a close analysis of the two descriptions, I am satisfied that they are sufficiently similar for me to find that the present application includes all people who hold common or group rights and interests in the subject area.

The differences do not suggest to me that there has been a material omission of descent or family groups from the Q6023/02 claim. For example, in QG60152/98 one of Northern Kaanju descent groups is described by reference to the descendants of two or more named ancestors, whereas in Q6023/02, only one ancestor is identified at the head of a descent or family group. I have formed the view that application QG6152/98 provides another layer of information by identifying the apical ancestor and his/her partner and son from whom the members of that particular family or descent group have issued. Another example is that in QG6150/98 & Q6022/02, one of the Wuthathi descent groups identifies a number of families who are descended from a named apical ancestor, whereas in Q6023/02, the group is described as the descendants of the ancestor, but with no identification of family name. In my view, this does not result in a contraction of the claim group; it may be that the identity of all the family groups descended from that ancestor is still being investigated, and the omission of family names reflects the unsettled and on-going nature of anthropological research.

The description of the Kuuku Ya'u family groups was the subject of a change when the application was last amended in May 2003 to match the description of the Kuuku Ya'u family groups that appears in the individual Kuuku Ya'u QG6016/98 application. There are still a few variations between each description; however, I do not find that this has resulted in the exclusion of people from the claim group. In this regard, I see that the main apical ancestors from QG6016/98 all appear to be included in this later application.

In reaching my decision under this section, I have found it material that this application is plainly well-researched, and that the native title claims of the Wuthathi, Northern Kaanju and Kuuku Ya'u people have been the subject of thorough investigation, documentation and testing by the Cape York Land Council (CYLC), including extensive anthropological research and the prosecution of claims under the *Aboriginal Land Act* (Qld) 1991 for the Wuthathi and Kuuku Ya'u. See the additional information from the regional representative body (CYLC) in relation to authorisation of the applicants by the native title claim group to make the application dated 15 May 2003 and these statements:

- The membership of the Wuthathi group has been consistent throughout this period. CYLC has prepared detailed genealogies of the Wuthathi people since 1996 which have continued to be updated.
- The Kuuku Ya'u people are a cohesive group of people who have worked with the CYLC. The membership of the Kuuku Ya'u group has been consistent since the preparation of detailed genealogies for the claim over the National Park in 1997.
- CYLC has undertaken detailed anthropological investigations over the membership of the Northern Kaanju claimant group for the purposes of lodging the native title claim in 1997. Further investigations have confirmed that the claimant group is consistent with this native title application.

In light of this information, and the comprehensive material at Schedules A & M and in Attachment F about the origins and constitution of the Wuthathi, Northern Kaanju or Kuuku Ya'u peoples, I am satisfied that they are a stable, cohesive and properly constituted native title claim group and that any minor differences between the various descriptions has not resulted in a material omission of descent or family groups from the Q6023/02 claim.

Further, I am not provided with any information which would indicate that there are people claiming to hold common or group rights and interests in the area covered by the application who have not been included in this claim.

For these reasons, I am satisfied that the application includes all of the persons who hold common or group rights and interests in this claim.

Result: Requirements met

61(3) Name and address for service of applicants

Reasons relating to this sub-condition

The names of the applicants and address for service are detailed at the commencement of and at Part B of the application.

Result: Requirements met

61(4) Name persons in 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 which led to my conclusion 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

61(5) Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee

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 affidavits from the applicant, as prescribed by s. 62(1)(a). I refer to my reasons in relation to that section 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)

62(1)(a) Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

The application is accompanied by affidavits from each of the applicants. The affidavits are competently witnessed. I am satisfied that the affidavits satisfactorily address the matters required by s.62(1)(a)(i)-(v). An affidavit by the applicant **[Applicant 5 – name deleted]** is sworn and signed by

[Applicant 5]. By e-mail dated 18 March 2003, the applicants' legal representative (Cape York Land Council) confirmed that **[Applicant 5]** and **[Applicant 5]** are the same person.

Result: Requirements met

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

The application contains details relating to 'traditional physical connection' at Schedule M.

Result: Provided

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

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 s.190B(2) have been met, I am satisfied that the information and maps contained in the application are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(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 which are not covered by the application to be identified.

Result: Requirements met

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 s.190B(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

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

Reasons relating to this sub-condition

The application contains details and results of searches carried out in respect of the areas covered by the application at Attachment D. Attachment D is a copy of a tenure search from Dept. of Natural Resources (Qld) showing a previous leasehold interest over the area covered by the application. I am not aware of any other searches carried out by the applicants.

Result: Requirements met

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

Reasons relating to this sub-condition

A description of the native title rights and interests claimed is found at Schedule E (and Attachment E) of the application. The description does not merely consist 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. See my reasons under s.190B(4) for details of this description.

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 the general description of the factual basis must be contained in the application, and can not be the subject of additional information provided separately to the Registrar or his delegate.

A general description of the factual basis on which it is asserted that the native title claimed exists and for the particular assertions in s.62(2)(e)(ii) and (iii) is found at Schedules A, F, G, and M of the application. This is further supported by the material in Attachments E and F of the application. See my reasons under s.190B(5) for details of this information.

Result: Requirements met

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 details of the activities which the native title claim group carries out in relation to the application area at Schedule G.

Result: Requirements met

*62(2)(g) Details of any other applications 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 "Not Applicable" in response to a request for details of any other applications. A search of the Geospatial database reveals that there are no overlapping applications. I am satisfied that the application complies with the requirements of s 62(2)(g).

Result: Requirements met

62(2)(h) Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of

Reasons relating to this sub-condition

Schedule I states "Not Applicable" in response to the request for details of any s29 notices. I am satisfied that the application complies with the requirements of s 62(2)(h).

Result: Requirements met

Reasons for the Decision

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

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

A search of the Geospatial Database and Register of Native Title Claims identifies that there are no applications on the Register of Native Title Claims that cover the whole or part of the claim area. The condition in s.190C(3) is therefore satisfied.

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

The application has not been certified pursuant to s.190C(4)(a). I must therefore be satisfied that the applicants are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group pursuant to s190C4(b).

There are two limbs to s190C(4)(b):
1. the applicants must be members of the native title claim group;
2. the applicants must be authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

Each of the applicants has sworn an affidavit pursuant to s62(1)(a) that they are authorised to make the application and deal with matters arising in relation to it by all the persons in the native title claim group and stating the basis on which they are so authorised. It is stated at Schedule R that the applicants are members of the native title claim group and are authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group in accordance with their traditional laws and customs, and as set out in the attached affidavits. Additionally, CYLC, as the applicants' legal representative and the regional representative body has provided further information to support the authorisation requirement in s.190C(4)(b):
1. Attachment R description of the traditional decision making process that governed authorisation of the applicants
2. Description of their involvement in the events that led to the decision to authorise the applicants.

The First Limb
I am satisfied that the applicants are members of the native title claim group – see statement at Schedule R to this effect.

The Second Limb

Section 251B requires that applicants are authorised using a decision making process that is either:
(a) under traditional laws and customs of the group; or
(b) agreed to and adopted by the native title claim group.

The applicants' s.62(1) affidavits indicate that the claim group has utilised a traditional decision-making process to authorise the applicants to make the application and to deal with matters arising in relation to it. Each applicant states that the basis on which he/she is authorised arises from a meeting of the native title holders of the application area and according to traditional law and custom he/she was chosen as an applicant to represent one of the three groups (i.e. Wuthathi, Northern Kaanju or Kuuku Ya'u) who form part of the native title claim group, being supported by unanimous agreement of the native title holders at the meeting.

The Attachment R description of the traditional decision-making process indicates that the cognatic descent group (commonly called the family in the Cape York region generally) is the principal social-structural unit within the language named tribe through which decision-making takes place. The authorisation process involves the group coming to a collective decision through a process of consultation, discussions and meetings in which each of its constituent descent groups or families is given the opportunity to be involved, with the final decision being one of consensus among those present at meeting, both formal and informal, convened to consider the issue and make the decision. Key members of families have the opportunity to participate (acting as representatives of their family) to come to a collective decision on behalf of the wider group. There are a number of levels or layers for this process:

- Firstly, within each language group there are internal processes within the families to select the person or persons with authority to participate in meetings and discussions of the wider native title claim group, and to decide to what extent the person or persons may speak for the family or part of it. While essentially an intra-family matter, it is the case that others from the native title claim group (especially senior and authoritative individuals, must also recognise the individual's authority if they are to carry authority within the decision making process. Arriving at who should speak is often complex contested, depending on the number of people claiming authority and the claimed extent of the authority to speak for the

family. However there are a number of customary principles entailed in this process, including looking at the person's seniority, specialist knowledge, experience or skills, looking at whether they will or have acted in the interests of the group, the transparency of the process, and ultimately reaching a decision through consensus.

- In this application, which includes three neighbouring language named tribal groups, there may be a similar process of collective decision making which takes place at the level of each of the three tribal groups. The same principles and methods that apply for decision making at the descent or family group level applies at this level also.
- A further level of authorisation for the Wuthathi, Northern Kaanju or Kuuku Ya'u is the collective decision by families and their spokespersons to authorise the claim and the applicants. This does not involve any one single or formally constituted procedure; nor is it a process that is necessarily separate from or subsequent to the process of family and language tribe representation.
- The final authorisation of a claim is one reached by consensus among those who, through the process itself, come to be accepted as holding authority. This process is characteristically flexible and evolves over time to a point at which there is a consensus that the process itself has been sufficient and that there is a commonly accepted decision.
- To summarise the authorisation process combines a number of different mechanisms. These include informal discussions among individuals within families and sub-families; larger meetings at this level; more formally convened meetings among several families at the local community level; larger meetings again where family representatives from several communities are brought together. Outside of the meetings there may be consultations between key individuals both within families and among them. The process may culminate in a final meeting where there is a more or less formal decision made, or through a series of meetings. The final meeting or series of meetings will be facilitated by the representative body.
- Ultimately, the emphasis is on the process and the application of customary principles relevant to group representation and decision-making, rather than on normative rules about representation and individual authority.

I am also provided with information from the representative body (CYLC) about its involvement in the decision of the native title claim group to authorise the applicants to make the application and deal with matters arising in relation to it. CYLC state at the outset that to the best of their knowledge, all adult Wuthathi, Northern Kaanju or Kuuku Ya'u persons have authorised the making of this native title claim through traditional decision making processes. It appears from this information that CYLC has been involved in discussions with the native title holders about lodging a native title claim over this area in 1995 and 1999. CYLC has worked closely with each language group in their individual native title claims, including the identification of the persons that are members of each language group, and prosecution of land claims by the Wuthathi and Kuuku Ya'u under the *Aboriginal Land Act* 1991(Qld). There were two authorisation meetings, in order to maximise attendance. The first meeting was held predominantly for the Wuthathi and Kuuku Ya'u at Lockhart River, where many of them live. Notices of the meeting were sent to every known native title holder, as was a reminder. Notices were also placed at public meeting places, and transport was engaged to assist with bringing native title holders to the meeting. The second meeting was held in Cairns, being a more central location for the Northern Kaanju. Letters and then a follow-up reminder letter were sent to all known native title holders inviting them to the meeting. Transport and accommodation was provided by the land council for those out of town, including from Palm Island, Townsville, Brisbane and around Cape York. The land council also facilitated the attendance at this meeting of representatives from the Wuthathi and Kuuku Ya'u to discuss with the Northern Kaanju what had transpired at the earlier meeting in Lockhart. Wuthathi and Kuuku Ya'u people unable to attend the Lockhart meeting also attended the meeting in Cairns.

I find, on the basis of the evidence outlined above, that:

1. This group has a process of decision-making that, under the traditional laws and customs of the persons in the native title group, must be complied with in authorising the applicants;
2. The process involves the group coming to a collective decision through consultation, discussions and meetings in which representatives from family or descent groups are given authority to speak for their family; the families and their representatives are given the opportunity to be involved in

the decision-making; and the final and collective decision is a consensual one involving those accepted by the group (through consensus and application of customary principles) as having authority for the families comprised in the group. The emphasis is on the process and the application of customary principles relevant to group representation and authority.

3. The applicants are so authorised by the persons in the group in accordance with this traditional decision-making process. This has involved the facilitation by the regional representative body of meetings where there has been widespread participation by the native title holders in the decision to authorise the applicants.

It follows then that I am also satisfied that the requirements of s190C(5) are met as:

- the statement at Schedule R, as elaborated upon in the affidavits of the applicants constitute the requisite statement under s190C(5)(a);
- the information in the applicants affidavits adequately set out the grounds on which I should consider that s190C(4)(b) has been met.

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 Decision

External Boundaries

The area covered by the application is described at Schedule B as two land parcels (with the lot/plan reference by which each parcel is officially known). The application also covers any area of esplanade adjacent to the seaward side of one of the land parcels. The references for the land parcels are derived from the State's land identification and tenure record system. The area of each land parcel is shown on the map at Attachment C. Although not shown as a distinct area on the map in Attachment C, it appears that the esplanade is any strip of land between the boundaries of the land parcel and the High Water Mark: see Tribunal's Geospatial Analysis and Mapping Branch advice dated 7 February 2003.

The map at Attachment C is an A4 monochrome copy of a map prepared by the Geospatial Unit NNTT on 12/02/2002 titled "Native Title Application: Proposed Bromley" including:

- the application area depicted by a bold outline;
- reference cadastre shaded according to tenure and identified by lot on plan numbers;
- reference coastline;
- scale bar, north point, coordinate grid to AGD84 datum, source notes and currency, locality plan and legend.

I am satisfied that application area is clearly described at Schedules B (written description) and C (maps showing external boundaries). This information enables the area covered by the application to be located on the surface of the earth with reasonable certainty.

For these reasons, the requirements of s62(2)(a)(i), s62(2)(b) and s190B(2) are met in relation to the land component of the claim area.

Internal Boundaries

Schedule B contains a written description of areas not covered by the application. I have extracted from Schedule B of the application the relevant internal boundary description (i.e. areas that are not covered by the application).

> A The claim area does not include any land or waters subject to validly granted Previous Exclusive Possession Acts (PEPAs), as defined by s23B of the *Native Title Act 1993* (Cth), except to the extent that sections 47, 47A or 47B of the *Native Title Act 1993* (Cth) may apply.
>
> D To the extent that any part of the claimed area is or has been subject to extinguishment by the application of the common law, then the native title rights and interests claimed in relation to such area/s do not include any native title rights and interests to the extent that they have been extinguished, except to the extent that sections 47, 47A or 47B *Native Title Act 1993* (Cth) may apply.
>
> E In respect of the areas listed in this schedule, the validity of any grants that, if valid, would constitute Previous Exclusive Possession Acts as defined by s23B of the *Native Title Act 1993* (Cth) is contested. If those grants were valid, then the claimed area does not include those areas subject to those validly granted PEPAs, in accordance with A above.

I have read paragraphs A and D together. It is a somewhat clumsy description; however, I find that its meaning is reasonably certain for the purposes of s. 190B(2). I take paragraphs A and D to mean that if any of the discrete land parcels covered by the application (see land parcels and esplanade identified at Schedule B) are found to be affected or subject to a PEPA or PEPAs (as defined in s.23B) and extinguishment by reason of that grant cannot be disregarded pursuant to the provisions of sections 47, 47A or 47B, then this area is not covered by the application.

I am of the view that this stated exclusion amounts to information that enables areas within the external boundaries not covered by the application to be identified with reasonable certainty. This may require 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 information provided by the applicants.

I am satisfied that the information in the application in relation to areas within the external boundaries that are not covered by the application amounts to compliance with s.190B(2) and s.62(2)(a)(ii).

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 Decision

To meet this condition of the registration test, I must be satisfied as to either s190B(3)(a) or (b). The applicants have not named all of the persons in the native title claim group. Consequently, the requirements of s.190B(3)(a) are not met.

To meet the requirements of s190B(3)(b), the persons in the group must be described sufficiently clearly, so that it can be ascertained whether any particular person is a member of the native title claim group.

A description of the persons in native title claim group is found at Schedule A of the application. The description is in these terms:

- Current membership of the group is determined primarily through the principle of cognatic descent (i.e., descent traced through both male and female Wuthathi, Kuuku Ya'u and Northern Kaanju ancestors)
- Descent is traced from a limited set of persons recognised in the regional Aboriginal community as having been identified as either Wuthathi, Kuuku Ya'u and/or Northern Kaanju occupants of the claim area at the time of or soon after the first European occupation of the region
- By these descent principles, current membership of the group consists of the descent groups or families listed at Schedule A by their main surnames (in most cases) and with the apical ancestors from whom they trace their descent cognatically.
- This is followed by a description of each descent/family group in terms similar to this: "the descendants of [apical ancestor/s name], being members of the [family name/s] Family."

Finally in Schedule A is a description of how persons may be adopted or grown-up into a descent group named at Schedule A.

It is apparent from the information at Schedule A that a person may be reckoned as a member of the native title claim group through either being:

- descended by cognatic descent (ie. through one's father or one's mother) from the ancestors named at Schedule A, and consequently, as a member of the named family descent group (this, as stated at Schedule A, is the primary method of determining whether a person is a member); or
- adopted or grown-up as a member of the group, in accordance with the traditional laws and customs described at Schedule A.

Members Descended from Named Ancestors

I am satisfied that the descendants of the named persons (described in the listed descent groups in Schedule A) could be identified with minimal inquiry and as such, ascertained as part of the native title claim group. By referencing the identification of members of the native title claim group as descendants of named ancestors, 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.

Members recruited by adoption or by being grown-up by members of a descent group:

The application contains the following description of recruitment by adoption/growing a person up:

"Adoption, under the traditional law and custom of the region (and similar to its meaning and status in the general Australian community) incorporates the adoptee as a member of the family (or corporate descent) group of the adopting parents and subject to the same rights, interests, identity and responsibilities as the biological descendants of group members. In this way, adoption marks the continuation of cognatic descent through a non-biological tie that is nonetheless regarded as one of full "social" parenthood. Thus the adoptee's identity and interests are gained, similar to a biological child's, through their recruitment into a parent's cognatic descent group, and will be confirmed by other members of that group and by the Aboriginal people of the region in general.

Beyond such "full" adoption, others have gained their Northern Kaanju and/or Wuthathi and/or Kuuku Ya'u identity through being "grown up" or "raised" by Northern Kaanju/Wuthathi/Kuuku Ya'u people (a process comparable, though not identical, to 'fostering' in the general Australian community). The process of being "grown up" by such a person may, from time to time, confer interests and identity associated with the per "growing up" the child in a child so raised. The ties to those "growing up" a person will be stressed as "descent-like". A person who "grew up" another is commonly described as "like father/mother to me".

Native Title rights and interests inherited through being adopted or "grown up" will be further confirmed by the other Aboriginal people of the region as proper under tradition law and custom. Adoption and "growing up" typically, though not necessarily, occur within extended family groups, and tend to reinforce existing ties of kinship and identity between close relatives rather than recruiting previously unrelated members. They therefore tend to reinforce the stress on descent as the primary principle for recruitment to the Northern Kaanju, Wuthathi and Kuuku Ya'u people and their several cognatic descent groups, and do not complicate significantly the identification of either the descent group into which a child is adopted, or the larger Northern Kaanju, Wuthathi and Northern Kuuku Ya'u identities."

These are all clearly understandable ideas and I am satisfied that the principles of recruitment by adoption/being grown up is described sufficiently clearly in the application, so that it can be said whether a person is a member by this process.

For these reasons, I am satisfied therefore that the overall description of the claim group is sufficiently clear to ascertain whether any particular person is in the group.

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 the readily identified.

Reasons for Decision

Native Title Rights and Interests Claimed by the Applicants

The native title rights and interests claimed by the applicants are described in Schedule E as follows:

> "The native title in the land and waters covered by the application ('the claim area') is equivalent to the fullest beneficial ownership, including possession, occupation, use and enjoyment to the exclusion of all others subject to the valid laws of the State of Queensland and the Commonwealth of Australia.

In relation to areas where the preceding rights are not recognised the following rights and interests are claimed, subject to the valid laws of Queensland and the Commonwealth of Australia, to: -

1. Speak for, on behalf of and authoritatively about the claim area
2. Inherit and transmit the native title rights and interests
3. Confer certain rights on other Aboriginal people
4. Assert a requirement to be asked for, and to determine the terms of any, permission to enter, remain on, use or occupy the claim area by others
5. Determine as between native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the claim area
6. Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the claim area
7. Be buried on, and to bury members of the native title claim group on, the claim area;
8. Occupy the claim area;
9. Use and enjoy the claim area;
10. Live on and erect residences and other infrastructure on the claim area;
11. Protect and manage the claim area

12. Maintain and protect sites and areas which are of significance to the Native Title Holders under traditional law and custom
13. Hold ceremonies on the land
14. Hold ceremonies concerning the land
15. Take natural resources from the claim area
16. Manufacture materials, artefacts objects and other products from the claim area
17. Dispose of natural resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift
18. Engage in subsistence activities on the land
19. Engage in production, trade and other economic activities on the land
20. Manage the claim area for the benefit of the native title holders;
21. Hunt and fish in the claim area;
22. Use the claim area for social, customary, religious and traditional purposes.

The native title rights and interests claimed:
(a) are not exclusive rights and interests if they relate to tidal waters, and
(b) do not include ownership of any minerals, petroleum or gas wholly owned by the Crown."

The application also contains a number of qualifications to the claimed native title rights and interests to those found at Schedule E:

- *Paragraph B (Schedule B)* - To the extent that any area of the claimed area is or has been the subject of a Previous Non-Exclusive Possession Act (PNEPA), as defined by s23F of the Native Title Act 1993 (Cth), the native title claim group do not claim possession, occupation, use and enjoyment of the area to the exclusion of all others, except to the extent that sections 47, 47A, or 47B (of the *Native Title Act 1993* (Cth) may apply.
- *Paragraph C (Schedule B)* - For any land or waters in the claim area subject to a validly granted PNEPA, as defined by s23G of the *Native Title Act 1993* (Cth), then the native title rights and interests claimed in relation to such land and/or waters do not include any native title rights or interests which were extinguished by that validly granted PNEPA, except to the extent that sections 47, 47A or 47B *Native Title Act 1993* (Cth) may apply.
- *Schedule Q* – The native title rights and interests in relation to the claim area also apply to natural resources within the claim area but only to the extent to which native title has not been extinguished by the valid operation of laws of the Commonwealth of Australia or the State of Queensland. The native title rights and interests claimed do not consist or include ownership of minerals, petroleum, and gas wholly owned by the Crown.

The Requirements of the Act

S.190B(4) requires the Registrar or his delegate to 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 phrases 'native title' and 'native title rights and interests' are defined in s.223 of the *Native Title Act 1993* (Cth).

S.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."

Rights which are not readily identifiable include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[1] rights to minerals and petroleum under relevant Queensland legislation,[2] an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.[3]

To meet the requirements of s. 190B(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.

I am satisfied that the rights and interests claimed are readily identifiable for the purposes of s.190B(4). I am further satisfied that the rights and interests claimed do not amount to "non-exclusive" possession occupation use and enjoyment", noting the concerns expressed by the High Court in *Ward* and by O'Loughlin J in *De Rose v South Australia* [2002] FCA at [919] about describing native title rights and interests in such a fashion.

Although the applicants claim a right to "take natural resources from the claim area" (right 15), they do not claim minerals, petroleum or gas wholly owned by the Commonwealth or State (Schedule Q); and I am satisfied that any rights relating to "natural resources" do not include a claim to minerals and petroleum which are not claimable under the relevant Queensland legislation.

I am satisfied that the claimed native title rights and interests can be readily identified from the description provided at Schedule E of the application. Refer also to my reasons for decision in respect of s.190B(6).

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 Decision

To satisfy the requirements of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements 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. Regard will be had to the application as a whole; subject to s.190A(3), regard will also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

[1] *Western Australia v Ward* (2002) 191 ALR 1 ("Ward"), para [59].
[2] *Western Australia v Ward*, para [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[3] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

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."

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[4]

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 revitalisation 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].

I find these statements in the *Yorta Yorta* decision of assistance in interpreting the terms "traditional laws", "traditional customs" and "native title rights and interests", as found in s.190B(5). However, I am also mindful that the "test" in section 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and it is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing.

The application contains a comprehensive description of the factual basis for the assertion that the claimed native title rights and interest exist and for the particular assertions in subsections (a), (b) and (c) of s. 190B(5) - see Schedules A, F, G and M, and at Attachments E and F. This material is supported by additional information provided by the applicants to the Registrar on a confidential basis:

- Affidavit by **[Applicant 1]** (undated)
- Affidavit by **[Person 1]** (9/11/99)
- Affidavit by **[Person 2]** (9/11/99)
- Affidavit by **[Applicant 2]** (10/11/99)
- Affidavit by **[Applicant 3]** (9/11/99)
- Affidavit by **[Person 3]** (12/11/99)
- Affidavit by **[Applicant 4]** (8/11/99)
- Letter from Cape York Land Council (applicants' legal representative) dated 14 May 2003 and attachment R description of traditional decision-making processes
- Letter from applicants' legal representative dated 15 May 2003, and document containing additional information relating to authorisation of the native title application.

It is stated at Schedule A that Wuthathi, Northern Kaanju and Kuuku Ya'u people have maintained continuous links of biological descent from and identity with the "classical" land-holding groups and identities recorded in and around the claim area from last century[5] and in various written sources since.

[4] See *Ward* at [382].

[5] Presumably a reference to the 19th century from the cited works.

Schedule F states that the factual basis on which it is asserted in the terms set in paragraphs (a), (b) and (c) is that:

- the native title claim group is a community or group;
- the native title claim group has ancestral connections to (or otherwise has as its predecessors) the community that was present on and connected to the land and waters of the claim area at that time when those places became part of the colony of New South Wales, i.e. on 27 January 1788);
- the native title claim group members acknowledge and observe traditional laws and customs;
- those laws and customs are based on the traditional laws and customs of the community that was present on and connected to the land and waters of the claim area at the time when sovereignty was extended to the claim area.

Further information in relation to the factual basis is found in Attachment F. It is asserted that:

- The claimant group is made up of three sub-groups, the Wuthathi, Northern Kaanju and Kuuku Ya'u; these names refer to indigenous languages and the territory with which each language is associated.
- It is said that parts of each of these language territories comprise specific parts of what the European tenure system previously defined as Bromley and Boynton Holdings (the prior pastoral names for the claim area).
- The traditional associations, laws and customs of these sub-groups have been well-documented by anthropologists for a considerable time, including land claims and individual native title claims.
- Their title is a communal title, with individual ownership absent from their land system.
- Rights and interests area are primarily transmitted by descent and acquired automatically at birth or adoption.
- Within their communal title, it is also recognised that certain individuals or families may have special responsibilities to specific areas which might include primary rights to control access, care of story places, songs and dances. In those instances, they would have and hold the responsibilities on behalf of the wider group.
- These rights are accompanied by responsibility for its management and conservation of its resources.

Extracts provided from proceedings under the *Aboriginal Land Act* (Qld) 1991 by the Wuthathi and the Kuuku Ya'u are provided to support the factual basis for the s.190B(5) assertions. In effect, it is asserted that the Wuthathi and Kuuku Ya'u have prosecuted successful land claims under this legislation, and the Land Tribunal accepted the evidence in relation to the traditional affiliation and historical association of two of these subgroups (the Wuthathi and the Kuuku Ya'u) to areas of country in Cape York that went beyond the land subject to those proceedings. It is asserted that the traditional country of these people includes this claim area. In relation to the Northern Kaanju, a description of this group's traditional country is found on p. 8. It is said that both deceased and living ancestors have worked in the cattle industry on Bromley Holding (the pastoral lease that formerly covered the claim area). There are details of a major Northern Kaanju ceremonial site on the claim area, and a visit in 2000 by Northern Kaanju men to that site.

At Schedule M, it is stated that the three sub-groups have maintained traditional physical connection with the claim area, with a history of continuous visitation and physical presence in Bromley Holding. It is asserted that their visits have always occurred within the framework of their traditional cultural attachments and customs. It is said that the Wuthathi were removed from their permanent camps along this coastal area in the 1920s to two mission locations. They maintained their connection to their traditional country working as crews on pearling and beche-de-mer luggers visiting this section of their country constantly for water, firewood, for camping and to visit important traditional sites. The Wuthathi visited their coastal country in 1997 to record important coastal sites over a two week period. In 1985 and 1987 they went on country to protest proposed developments. During the 1990s the Wuthathi acquired more powerful outboard motor boats, and made sporadic visits to their country along the Bromley foreshores to hunt, camp and to visit sites. Today they visit their coastal country on Bromley regularly and a Wuthathi man is a ranger who visits his country when on duty. The Kuuku Ya'u visit the claim area, which is in easy reach from their residence at Lockhart River. They are traditional hunters of dugong and turtle, and their hunting trips frequently take them along the Kuuku

Ya'u section of Bromley coastline. They have been on country in recent times to record their sites, and to perform ceremonial dances there. The Northern Kaanju interests are to inland areas of Bromley. One of their members worked on Bromley up until the late 1980s, and is considered an expert guide for this claim area due to his long residence and travel in the Holding. A Northern Kaanju man took senior Northern Kaanju men back into Bromley to take them to a ceremonial stone arrangement. He was anxious to show it to them before he became too old to travel.

In addition to the extracts from the *Aboriginal Land Act* (Qld) 1991 proceedings, details are provided from the anthropological and historical record that supports the assertions relating to past and present association of the group with the application area.

Of particular interest is an analysis of the traditional laws and customs giving rise to the claimed native title. This identifies the following aspects of the group's traditional laws and customs:

- A customary system of land and sea tenure closely related and derived from their belief in Ancestral beings (called Stories) fashioning the landscapes of their country and putting indigenous names, languages and traditional law and custom on the land.
- The act of the Stories provides the root of the traditional aboriginal title of particular tribal groups and smaller descent groups within them, over specific areas, including Wuthathi, Northern Kaanju or Kuuku Ya'u territories. The traditional oral history narratives of these Ancestral actions provides the title of the claimants and those of their neighbours with ancient authority.
- It is this which forms the foundation of the regional initiation ceremonies along the northeast coastal areas of Cape York (in which the claim area is located) shared in ancient and modern times among the Wuthathi, Northern Kaanju or Kuuku Ya'u. Contemporary Wuthathi, Northern Kaanju or Kuuku Ya'u people have participated in them in the Lockhart River area.
- The doctrine that rights to an area derive from a spiritual connection to it and that rights and interests are acquired on the basis of membership in one of the descent groups comprising these three claimant sub-groups.

Finally Attachment F asserts that:

- A distinct Aboriginal community identifying, and identified by their Aboriginal neighbours as Wuthathi, Northern Kaanju or Kuuku Ya'u respectively persists in relation to the claim area continuing uninterrupted since pre-European intrusion, and since.
- A system of customary law and custom exists in relation to the application area and its characterisation is such that it accords with the well-reported traditional Aboriginal land tenure systems of Cape York Peninsular, supported by the ethnographic literature for this region.
- The application area is acknowledged among north-eastern Cape York Peninsular Aboriginal communities as part of the Wuthathi, Northern Kaanju or Kuuku Ya'u territories, within the regional division of tribal land holdings.

The claimed native title rights and interests are described at Schedule E. The applicants claim the "fullest beneficial ownership, including possession occupation use and enjoyment to the exclusion of all others". Over areas where this native title cannot be recognised, the applicants identify a detailed list of rights and interests, dealing with their rights of access and use of the application area and its resources. It is said that the native title rights and interests claimed are not exclusive rights and interests if they relate to tidal waters, and, do not include ownership of any minerals, petroleum or gas wholly owned by the Crown. Attachment E contains an account of the things that are said to flow from the proprietary right, namely, occupation and economic rights, control and management rights, cultural property rights and membership and dispute settlement rights. The information in this part at Attachment E is useful when examining whether this native title right and interest is *prima facie* established under s. 190B(6).

This then is the general description of the factual basis found in the application, as is required by s.62(2)(e). I might add that there is a degree of particularity about the factual basis for the assertions outlined in s.190B(5) that assists me considerably in considering the condition in s.190B(5).

I will deal firstly with the particular assertions found at subsections (a), (b) and (c), as my findings here will assist my conclusions in relation to the general assertion. In short, if there is a factual basis for the three particular assertions then it follows that I am satisfied that a sufficient factual basis is provided for the general assertion that the native title rights and interests claim exist.

(a) association with the area;

The comprehensive summary within the application of historical and anthropological records satisfies me that there is a sufficient factual basis for the assertion that the claim group (past and present) are acknowledged and recognised as the traditional owners of substantial areas of country in eastern Cape York Peninsula, which converges for each subgroup in the claim area, a discrete parcel of land on the coast of Eastern Cape York, formerly covered by two pastoral holdings. In addition to the summary that is found within the application, I note the provision of additional information directly to the Registrar, in the nature of written evidence from group Elders.

It is clear from statements in the affidavits identified at the commencement of this section that the deponents and other Wuthathi, Kuuku Ya'u and Northern Kaanju people have an association with the claim area and are descended (in accordance with Wuthathi, Kuuku Ya'u and Northern Kaanju traditional laws and customs) from Wuthathi, Kuuku Ya'u and Northern Kaanju people who also had an association with the claim area. See:

- **[Applicant 1]**, [1]-[3], [5], [8]
- **[Person 1]**, paras [1]-[4], [7]-[8], [11]
- **[Person2]** [4], [5], [10]-16]
- **[Applicant 2]** [4], [8]-[9]
- **[Applicant 3]** [2], [7]-[10], [20]-[27]
- **[Person 3]** [2]-[5]
- **[Applicant 4]** [2]-[7]

For these reasons, I am satisfied that the factual basis provided supports the assertion that the native title claim group have, and the predecessors of those persons had, association with the area.

(b) existence of 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

It is appropriate at this point for me to come to an understanding about what native title rights and interests are claimed in this application. The applicants are claiming particular rights and interests over certain areas depending upon what native title has survived; or is recognised over those areas as a result of the beneficial provisions of the NTA relating to the disregarding of extinguishment, in particular circumstances. Over areas where there has been no extinguishment of native title, or where any extinguishment must be disregarded pursuant to provisions of the NTA, the applicants claim the "fullest beneficial ownership, including possession occupation use and enjoyment to the exclusion of all others". Over areas where this cannot be recognised, the applicants identify a detailed list of rights and interests that relate to their access to and use of their land and resources pursuant to their traditional laws and customs. The particular rights and interests that are claimed over areas where the fullest beneficial ownership will not be recognised, include rights relating to:

- speaking for country; requiring permission from others when entering or using the claim area; and upholding their laws and customs in relation to the claim area;
- rights of inheritance and transmission of the native title rights and interests and determining the particular rights held by certain people within the group;
- the right to use occupy and enjoy the area, including for activities such as burial; erection of residences and living on the area; holding of ceremonies; engaging in subsistence activities; hunting and fishing; engaging in production, trade and other economic activities on the land.
- caring for their country, including protecting and managing the claim area and sites of significance.

I am satisfied that the factual basis provided supports an assertion that there exist traditional laws and customs acknowledged and observed by the Wuthathi, Kuuku Ya'u and Northern Kaanju that give rise to the native title rights and interests described at Schedule E.

The information that is in the application in relation to the existence of traditional laws and customs may be considered to be a summary of the evidence, rather than a wider consideration of it, as is contemplated by Kiefel J in *Queensland v Hutchinson* (2001) 108 FCR 575. In this application, I have also been provided with material of an evidentiary nature that enables me to be satisfied that a sufficient factual basis is provided for the claimed rights and interests. This material enables me to find that there is a sufficient factual basis for this assertion. I refer particularly to the following material:

- Members of the claim group using their country to hunt and fish, and camp out there, as taught to them by their Elders.
- Elders taking younger people on country and also teaching them about it and how to live on it in the traditional way (eg. how to fish and hunt, where to find water, where to camp), sacred stories and places, how to behave at these sacred places.
- Proactively working against and protesting intrusion on their country by outsiders, such as the proposed space-port development and mining
- Requiring outsiders to seek permission to come onto and use the claim area and exercising responsibility for their country.
- Observance of initiation ceremonies and the role this plays in their spiritual connection to their land.
- Making traditional hunting implements and using resources for traditional purposes such as wood to make camp and fire.

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

Having regard to the same material identified in these reasons under s.190B(5)(b), I am also satisfied that there is a sufficient factual basis for the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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 Decision

Under s190B(6) I must consider that, *prima facie*, at least some of the native rights and interests claimed, as defined at s.223 of the Act, can be established. The Registrar takes the view that this requires only one right or interest to be registered.

The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) 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 in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

Schedule E describes the native title rights and interests claimed by the applicants. The applicants are claiming particular rights and interests over certain areas depending upon the native title which has survived, or is recognised over those areas as a result of the beneficial provisions of the NTA relating to the disregarding of extinguishment in particular circumstances. These claims are broadly of two kinds: claims over areas where there has been no extinguishment of native title (or prior extinguishment is disregarded) and claims over areas where there has been partial extinguishment of native title.

Over areas where there has been no extinguishment of native title, or where any extinguishment must be disregarded pursuant to provisions of the NTA, the applicants claim the "fullest beneficial ownership, including possession occupation use and enjoyment to the exclusion of all others". Over areas where exclusive possession cannot be recognised, the applicants claim a detailed list of rights and interests that relate to their access to and use of their land and resources pursuant to their traditional laws and customs, including rights which relate to:

- speaking for country; requiring permission from others when entering or using the claim area; and upholding their laws and customs in relation to the claim area;
- rights of inheritance and transmission of the native title rights and interests and determining the particular rights held by certain people within the group;
- the right to use occupy and enjoy the area, including for activities such as burial; erection of residences and living on the area; holding of ceremonies; engaging in subsistence activities; hunting and fishing; engaging in production, trade and other economic activities on the land.
- caring for their country, including protecting and managing the claim area and sites of significance.

In my consideration of this condition, I have had regard to information at Schedules A, F, G, L and M, and Attachments E and F. This material is supported by additional information provided by the applicants to the Registrar on a confidential basis:

- Affidavit by **[Applicant 1]** (undated)
- Affidavit by **[Person 1]** (9/11/99)
- Affidavit by **[Person 2]** (9/11/99)
- Affidavit by **[Applicant 2]** (10/11/99)
- Affidavit by **[Applicant 3]** (9/11/99)
- Affidavit by **[Person 3]** (12/11/99)

I turn now to a discussion of those rights and interests claimed by the applicants at Schedule E. I will consider firstly the particular rights claimed over areas where a claim to possession occupation use and enjoyment to the exclusion of all others cannot be recognised. My findings in relation to these particular rights will later be useful in considering the claimed exclusive right of possession occupation use and enjoyment.

In relation to areas where the preceding rights are not recognised the following rights and interests are claimed, subject to the valid laws of Queensland and the Commonwealth of Australia, to: -

1. Speak for, on behalf of and authoritatively about the claim area;

Not established

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: "without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use made of the land, are unlikely to be capable of

registration where a claim to exclusive possession cannot be maintained. While the right to 'speak for country' does not appear to amount to a right to control use of or access to land or waters, the word "authoritatively" in the above formulation suggests to me that the right sought by the applicants does amount to such a right, and is consequently not a right or interest that may be recognised over areas where a claim to possession occupation use and enjoyment to the exclusion of all others cannot be sustained.

2. Inherit and transmit the native title rights and interests;

Established – see the information at paragraph 2.4 of Attachment E under the heading "Membership and Dispute Settlement Rights" relating to inheritance and transmission of rights in country, and how ambiguities/disputes concerning this is resolved internally within the group according to traditional law and custom.

3. Confer certain rights on others

Not Established – The difficulty I find with the formulation of this right is that it does not suggest that the native title claim group limit their right to confer certain rights on others in the native title claim group or, even on other Aboriginal people who seek use of or access to the area according to traditional laws and customs. As a result, I am not satisfied that this is a right that may be recognised over areas where the right to possession, occupation, use, and enjoyment to the exclusion of all others is not available: refer comments in *Ward*, above.

4. Assert a requirement to be asked for, and to determine the terms of any, permission to enter, remain on, use or occupy the claim area by others;

Not established – This right is not one that may be recognised over areas where the right to possession, occupation, use, and enjoyment to the exclusion of all others is not available: refer comments in *Ward*, above.

5. Determine as between [the] native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the claim area;

Established – see:

- information at Attachment E under the heading "Membership and dispute settlement rights".

6. Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the claim area

Not Established – The difficulty I find with the formulation of this right is that it does not suggest that the native title claim group limit their right to 'uphold, regulate and *enforce*' [my emphasis] customary laws only among members of the native title claim group or, even against other Aboriginal people who seek use of or access to the area according to traditional laws and customs. As a result, I am not satisfied that this is a right that may be recognised over areas where the right to possession, occupation, use, and enjoyment to the exclusion of all others is not available: refer comments in *Ward*, above.

7. Be buried on, and to bury members of the native title claim group on, the claim area;

Established – See paragraph 41, **[Applicant 3]**.

8. Occupy the claim area;
9. Use and enjoy the claim area;

Established – The applicants have provided a great deal of material which goes to establish that the Wuthathi, Kuuku Ya'u and Northern Kaanju occupy the subject area, and use and enjoy the claim area. See, for example, the affidavits of:

- **[Applicant 1]** at [5]
- **[Person1]** at [8]
- **[Person 3]** at [7], [13], [15]
- **[Applicant 4]** at [7], [9]-[10], [13]
- **[Person 2]** at [10]-[13], [16]-[17]
- **[Applicant 2]** at [8]-[11], [14], [19], [23]
- **[Applicant 3]** at [10]-[11], [28]-[32], [40]-[41]
- See also the material identified in my reasons in relation to the right of possession occupation use and enjoyment to the exclusion of all others.

10. Live on and erect residences and other infrastructure on the claim area;

Established – A question which is raised here is whether the right to live on and erect residences or other infrastructure *necessarily* amounts to a right to control access to and use of the claim area. To the extent that is would do so, such a right is not *prima facie* capable of being established.

In *Ward*, the majority of the High Court considered the terms of a pastoral lease pursuant to Northern Territory legislation, and the way the provisions of this lease interacted with native title. At para. [182], their Honours asked: "Did the grant of a pastoral lease over Crown land prohibit the continued use or occupation of that land, in accordance with native title rights and interests by the holders of those rights?...[183] That would be so *only* if a pastoral lease gave the holder the right, either absolutely or contingently upon the taking of certain steps…to exclude native title holders from the land. Pastoral leases granted under the statutes and Land Regulations in issue in these matters did not grant that right."

As McHugh J noted in his separate judgment, the term 'occupation' can convey a range of meanings, and can connote anything from 'residence' to 'possession' itself [519]: "In *Wik*, the majority Justices thought that the known presence of Aboriginals on pastoral leases was inconsistent with the grant of exclusive possession. But with great respect this was to confuse occupation with possession." And at [522] McHugh J concludes: "The occupation of the land by Aboriginals is no more inconsistent with the legal possession of the land being in the pastoral lessee than the sole occupation of a room by a lodger is inconsistent with legal possession of the room being in the owner of the boarding house."

Reading this right in the context of those statements at para. 2 and in light of the judicial statements noted above, I am of the opinion that this right does not amount to a right to control access to or use of the claim area. That said, there is sufficient information in the application and accompanying material to satisfy me that this right can be established *prima facie*. See:

- **[Applicant 1]** at [2] and [8] and also at [11] describing their use of vegetation to make camp.
- **[Person 1]** at [11]
- **[Person 2]** at [29]
- **[Applicant 4]** at [12]

See also information at Attachment F relating to findings in the *Aboriginal Land Act* (Qld) 1991 proceedings that members of the claimant group who gave evidence have also maintained their association with the land in matters related to living off the land (at p. 7, half-way down the page).

11. Protect and manage the claim area;
12. Maintain and protect sites and areas which are of significance to the Native Title Holders under traditional law and custom;

Both established – I am satisfied that this is not a right which amounts to a right to control access to or use of the subject area. The deponents' affidavits indicate that under their traditional laws and customs, they are responsible for care of their traditional country. There is evidence by **[Applicant 2]**, **[Person 2]** and **[Applicant 3]** of the proactive work that they have undertaken to protect their country from unwelcome development. See also Attachment E under the heading "Control and management

rights" discussing the group having the responsibility for country, which includes resource protection and management of country, including the observance of ritual practices when visiting some sites.

13. Hold ceremonies on the land;
14. Hold ceremonies concerning the land;

Both established – see [5] of **[Person 1]** which states that his people still practice sacred ceremonies and are planning one for next year. See also **[Applicant 2]** at [9] telling of a visit by elders to old bora grounds in their country, which he was not allowed to enter as he had not been initiated. See also **[Applicant 3]** describing how he sang in language on returning to his country.

15. Take natural resources from the claim area;
16. Manufacture materials, artefacts objects and other products from the claim area;

Both established – There are many examples in the affidavits of members of the group who fish, hunt and gather traditional foods on their country. For example **[Applicant 1]** at [11] tells of gathering traditional resources to make fishing spears and the *warp* for hunting dugong and turtle, and also for camps and to make fire.

17. Dispose of natural resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift;

Not Established. In *Yarmirr*, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that "[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land" [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

On appeal, the Full Federal Court spoke of this right in these terms: "It may well be right, as the argument runs, and as seems logical, to view the right to trade as 'an integral part,' or integral aspect of a right to exclusive possession." The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 of the *NTA*, but made no finding on the issue. The issue was not raised before the High Court.

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to exclusive possession, occupation, use and enjoyment of lands and waters. It follows that I am not satisfied that the right can be established *prima facie* where a claim to exclusion possession is not made out.

18. Engage in subsistence activities on the land;

Not Established – I can not find any material in the application or accompanying materials which indicates that the native title claim group engage in subsistence activities in the application area.

19. Engage in production, trade and other economic activities on the land with respect to indigenous cultural resources;

Not Established – Refer my reasons for the right claimed at 17.

20. Manage the claim area for the benefit of the native title holders;

Established – See the examples in the affidavits of members of the group observing traditional laws and customs they look after the land in the claim and the rest of their traditional country. See also Attachment E under the heading "Control and management rights" discussing the group having responsibility for country, which includes resource protection and management of country, including the observance of ritual practices when visiting some sites.

21. Hunt and fish in the claim area;

Established – Again there are numerous examples in the affidavits of members of the claim group hunting and fishing on their country.

22. Use the claim area for social, customary, religious and traditional purposes.

Established – For the reasons outlined above, I am also *prima facie* satisfied that this right and interest is established.

It is now necessary to consider the primary right set out in Schedule E that "… Native title is equivalent to the fullest beneficial ownership, including possession, occupation, use and enjoyment to the exclusion of all others subject to the valid laws of the State of Queensland and the Commonwealth of Australia*"*. These native title rights and interests can only be registered over those areas covered by the application where such a claim can be made out (e.g. where there has been no prior extinguishment of such rights or interests, or any extinguishment must be disregarded under ss.47, 47A or 47B of the NTA.

Established, *prima facie*

The material I have referred to above in relation to the particular rights over certain areas where possession occupation use and enjoyment to the exclusion of all others cannot be established provides ample evidence for this right.

The evidence of members of the native title claim group, and the material that is in the application establish that members of the group:

- were born in the bush and live on country in traditional ways
- teach young Wuthathi, Kuuku Ya'u and Northern Kaanju traditional way of camping, hunting and fishing on their country and about the Stories for the land, as was handed down to them by their elders
- regard themselves as the owners of the land under traditional laws and customs
- in some instances, have given evidence in statutory proceedings in support of claims over their land
- require permission from outsiders to enter their country
- live on their country
- visit and camp in traditional ways on their country
- hunt, fish and gather in traditional ways, albeit using improved technologies such as outboard motors for fishing
- make traditional products such as spears, using the natural resources of their country
- engage in traditional ceremonies
- look after the land and are responsible for the land according to traditional laws and customs.

Based on this information, I am satisfied that the claimed native title rights of the 'the fullest beneficial ownership, including possession, occupation, use and enjoyment to the exclusion of all others' is established *prima facie*.

Summary: The following rights and interests can be established *prima facie*.

The native title in the land and waters covered by the application ('the claim area') is equivalent to the fullest beneficial ownership, including possession, occupation, use and enjoyment to the exclusion of all others subject to the valid laws of the State of Queensland and the Commonwealth of Australia.

In relation to areas where the preceding rights are not recognized the following rights and interests are claimed, subject to the valid laws of Queensland and the Commonwealth of Australia, to: -

~~1. *Speak for, on behalf of and authoritatively about the claim area*~~
2. *Inherit and transmit the native title rights and interests*
~~3. *Confer certain rights on others*~~
~~4. *Assert a requirement to be asked for, and to determine the terms of any, permission to enter, remain on, use or occupy the claim area by others*~~
5. *Determine as between native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the claim area*
~~6. *Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the claim area*~~
7. *Be buried on, and to bury members of the native title claim group on, the claim area;*
8. *Occupy the claim area;*
9. *Use and enjoy the claim area;*
10. *Live on and erect residences and other infrastructure on the claim area;*
11. *Protect and manage the claim area*
12. *Maintain and protect sites and areas which are of significance to the Native Title Holders under traditional law and custom*
13. *Hold ceremonies on the land*
14. *Hold ceremonies concerning the land*
15. *Take natural resources from the claim area*
16. *Manufacture materials, artefacts objects and other products from the claim area*
~~17. *Dispose of natural resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift*~~
~~18. *Engage in subsistence activities on the land*~~
~~19. *Engage in production, trade and other economic activities on the land*~~
20. *Manage the claim area for the benefit of the native title holders;*
21. *Hunt and fish in the claim area;*
22. *Use the claim area for social, customary, religious and traditional purposes.*

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 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.

Traditional physical connection is not defined in the *Native Title Act*. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.

For the reasons given at s.190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

The affidavits/statements material provided by the following members of the group satisfy me that they are members of the native title claim group who currently have and have had traditional physical connection to parts of the claim area. I refer specifically to:

- **[Person 1]**, 1-2, 4, 5-10, 24
- **[Applicant 1]**, 1-5, 7-8, 11
- **[Person 2]**, 8-10, 16, 17, 20-21
- **[Applicant 2]**, 8-11, 14, 19, 23-25
- **[Applicant 3]**, 28-32
- **[Person 3]**, 14
- **[Applicant 4]**, 7, 9, 10-13, 17

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 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.

Result: Requirements Met

S61A(2)- Previous Exclusive Possession Acts

Para A. of Schedule B states that the claim area does not include any land or waters subject to validly granted Previous Exclusive Possession Acts (PEPAs) as defined by s23B of the *Native Title Act*, except to the extent that sections 47, 47A or 47B of the NTA may apply. I note that para. E of Schedule B states that "[i]n respect of the areas listed in this schedule, the validity of any grants that, if valid, would constitute Previous Exclusive Possession Acts as defined by s23B of the Native Title Act is contested. If those grants were valid, then the claimed area does not include those areas subject to those validly granted Previous Exclusive Possession Acts, in accordance with A. above."

I see from a search found at Schedule D that one of the two claimed parcels of land was formerly subject to a lease for a term that expired in 2000. I am unable to determine if it is a PEPA. However,

I see also from Schedule L that it is said that s. 47B applies to the entire subject area on the basis that when the application was made the area was unallocated state land, and one or more members of the native title claim group occupied the area. I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In accordance with s47B, the claim group has made an application in relation to an area; there is no information before me to indicate that the area was covered by a freehold estate or other tenure type listed at s47B(1)(b) at the time the application was made; and there is evidence in the application that at the time the application was made, one or more members of the native title claim group occupied the area. As a result, I am of the opinion that the applicants' express statements with respect to the provisions of section 47B are sufficient to meet the requirements of s190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants will succeed in their claim to the benefit section 47B is a matter to be determined in another forum.

Result: Requirements Met

S61A(3) – Previous Non-Exclusive Possession Acts

I am satisfied that the applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts – refer to the statements at paragraph B of Schedule B.

Result: Requirements Met

Conclusion

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of Section 61A the application should not have been made.

Aggregate 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 Decision

Schedule Q of the application states:

> "The native title rights and interests in relation to the claim area also apply to natural resources within the claim area but only to the extent to which native title has *not* been affected or extinguished by the valid operation of laws of the Commonwealth of Australia or the State of Queensland. The native title rights and interests claimed do not consist or of [sic] include ownership of minerals petroleum of gas wholly owned by the Crown."

In light of the express statement at the end of Schedule Q, I am satisfied that the requirements of this section are met.

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 Decision

Schedule P of the application, which requires the applicants to detail claims to exclusive possession of offshore places reads "Not Applicable." Having regard to the description of the claim area at Schedule B and the accompanying map at Attachment C, I am satisfied that the claimed native title rights and interests claimed do not relate to waters in an offshore place.

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).

Para D. of Schedule B reads:

> "To the extent that any part of the claimed area is or has been subject to extinguishment by the application of the common law, then the native title rights and interests claimed in relation to such area/s do not include any native title rights or interests to the extent that they have been extinguished, except to the extent that sections 47, 47A or 47B of the *Native Title Act 1993* (Cth) may apply."

I am not aware of any other extinguishment of native title rights and interests in the area covered by the application.

Result: Requirements met

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