REGISTRATION TEST

REASONS FOR DECISION

DELEGATE:	Brendon Moore

Application Name:	Djiru People #3		
Names of Applicant(s):	Dawn Hart, John Clumpoint, Charity Ryan, Beryl Buller, Rae Kelly, Margaret Murray, John Andy		
Region:	North Queensland	NNTT No.:	QC03/06
Date Application Made:	07/07/2003	Federal Court No.:	Q6006/03

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

DECISION

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

_____
Brendon Moore

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

20 August 2003
Date of Decision

Brief History of the Application

The application was filed in the Federal Court on 7 July 2003. This application replaces the first application filed by the Djiru People on 7 March 2003, QC03/2, Djiru People #1. Application QC03/2 was discontinued by leave of the Federal Court on 15 July 2003.

Information considered when making the Decision

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

- The National Native Title Tribunal's Administration Files, Legal Services Files, Party Files and Registration Testing Files for QC03/02
- The National Native Title Tribunal's Administration Files, Legal Services Files, Party Files and Registration Testing Files for related applications QC03/2, QC03/3 and QC01/15
- The National Native Title Tribunal Geospatial Database
- The Register of Native Title Claims and Schedule of Native Title Applications
- The National Native Title Register
- Letter from North Queensland Land Council dated 28 May 2003
- Letter from North Queensland Land Council dated 10 June 2003

The following material was made available in relation to Djiru #1, now discontinued, but is directly relevant to the present application which is identical in all but a few particulars:

- Affidavit of (Anthropologist 1 name deleted) dated 21 February 2003
- Affidavit of (Applicant 1 name deleted) dated 3 February 2003
- Affidavit of (Person 1 name deleted) dated 3 February 2003
- Affidavit of (Applicant 4 name deleted) dated 3 February 2003
- Report by Anthropologist 1 (short; undated)

Information provided for consideration by the Registrar's delegate in the application of the registration test in this application was provided to the State. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*. The State provided no comment on this material

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

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

A. Procedural Conditions

s.190C(2)

Information, etc., required by section 61 and section 62:

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

Details required in section 61

s.61(1) Persons who may make an application for a determination of native title – a person or persons authorised by all the persons (the* native title claim group*) who, according to their traditional law and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group

Reasons relating to this sub-condition

I must consider here whether the application has been made on behalf of all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

The applicants state that the current membership of the claim group is identified by the principle of cognatic descent (descent traced through one's father or one's mother). The current membership is described in terms of seven descent groups listed by their family names, together with the names of the apical ancestors from which they trace their descent.

In an affidavit filed with the application and dated 21 February 2003 Anthropologist 1, employed as a research anthropologist by the North Queensland Land Council Aboriginal Corporation (NQLC) deposes that:

- One of her duties has been to undertake research in preparation for the lodgement of the Djiru people's native title claimant application;
- She has undertaken research into the identity of the Djiru people and produced a description of the claimant group by reference to apical ancestors and their descendants;
- She has conducted an extensive review of anthropological and linguistic literature including the unpublished work of other recent researchers pertaining to the claim area, the group's wider traditional country and the claim group.

A copy of the claim group description set out in the native title claimant application in Schedule A is annexed to the affidavit and labelled 'RDG1'.

There is also no evidence before me to suggest that the claim group is only a sub-group of a larger group and thus it is not necessary to consider the findings in *Risk v. National Native Title Tribunal* [2000] FCA 1589

I do not have any other information before me that indicates that the group described in Schedule A does not include, or may not include, all the persons who hold native title in the area of the

application, nor do I have any information that the native title claim group has been assembled for administrative convenience, and is not a properly constituted group, as required by s.61(1).

Having regard to the information from the NQLC and the anthropologist retained by them, the fact that I have not been provided with any adverse information and the application as a whole, I am satisfied that the native title claim group described in the application includes all the persons who, according to their traditional laws and customs, hold the native title claimed over the area covered by the application.

See my reasons under s.190C(4) in relation to whether the applicants have been authorised by all the persons in the group to make, and to deal with matters arising in relation to, the application.

Result: Requirements met

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

Reasons relating to this sub-condition

The applicant's names are detailed at Part A. The details of address for service appear at Part B of the application.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. For the reasons 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

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

Reasons relating to this sub-condition

s.61(5)(a)
The application is in the form prescribed by Regulation 5(1)(a) of *Native Title (Federal Court) Regulations 1998.*

s.61(5)(b)
The application was filed in the Federal Court as required pursuant to s.61(5)(b).

s.61(5)(c)
The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62, including a map as required by s.62(2)(b). I refer to my reasons in relation to s.62 below.

s.61(5)(d)
The application is accompanied by affidavits in relation to the requirements of s.62(1)(a) from each of the seven applicants.

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, I am satisfied that the requirements of s.61(5) have been met.

Result: Requirements met

Details required in section 62(1)

s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)
Reasons relating to this sub-condition

Each of the applicants has sworn an affidavit to satisfy the requirements of s.62(1)(a)(i) – (v) accompanying the amended application. The affidavits are sworn, dated and competently witnessed.

The contents of the affidavits are essentially the same. At para 5 of their affidavits the applicants depose that they have been authorised by all the persons in the native title claim group to make this application and to deal with matters arising in relation to it. The affidavits satisfactorily address the matters required by s.62(1)(a)(i)-(iv). At para 6 of their affidavits the applicants set out the basis upon which they are authorised, in accordance with the requirements of s.62(2)(1)(v).

I am satisfied that the affidavits satisfactorily address the matters required by s.62(1)(a)(i)-(v).

Result: Requirements met

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

Comment on details provided
The application contains details relating to traditional physical connection at Schedules F, G and M.

Result: Provided

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

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and map in the application are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of 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 that are not covered by the application to be identified with reasonable certainty.

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the claim area.

Result: Requirements met

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

Reasons relating to this sub-condition

I am of the view that under this condition, I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition. To expect the applicant to provide details of searches carried out by other persons would be unreasonably onerous.
Schedule D of the application states that no searches have been carried out by the applicants.

I am satisfied that this meets the requirements of this section.

Result: Requirements met

s.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 by the applicants is contained in Schedule 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 the native title rights and interests that may

exist, or that have not been extinguished, at law. I have outlined these rights and interests in my reasons for decision under s.190B(4).

Result: Requirements met

s.62(2)(e) ***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 their predecessors had, an association with the area***
- ***(ii)*** ***traditional laws and customs exist that give rise to the claimed native title***
- ***(iii)*** ***the native title claim group has continued to hold native title in accordance with traditional laws and customs***

Reasons relating to this sub-condition

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

Information relevant to this subsection is contained in Schedules F, G and M of the application which material is verified in the s.62(1)(a) affidavits of the applicants and in the affidavit of Anthropologist 1 at Attachment R8. I accept the material, both as to facts and opinions, in those verified schedules and affidavits, which comes unchallenged, as being true. My reasons both in relation to this section and to the remainder of this application are predicated upon that acceptance. It is my view that this information amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e) (i)-(iii). See my reasons under s.190B(5) for further details of this material.

s.62(2)(e)(i)

In Schedule F of the application the applicants state that members of the claim group continue to:

- have a close association, including a spiritual connection, with the claim area according to their traditional law and custom;
- use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials;
- pass on to their descendants traditional laws and customs, stories and beliefs concerning their traditional country, including the claim area;
- care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears.

The applicants also state that material evidence of physical connection of the claim group's ancestors exists in their traditional country and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation. The evidence includes bora grounds, fish traps and stone axes.

In Schedule G of the application the applicants state that members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them from

generation to generation by their forebears. Such traditions and customs include those that deal with :

- caring for and controlling access to country;
- holding ceremonies on traditional country;
- hunting and fishing in the claim area;
- camping and occupying country;
- visiting, protecting and preserving special sites and story places;
- participating in consultation processes and land use decision making with third parties.

In Schedule M of the application the applicants state that members of the native title claim group maintain a traditional physical connection with the claim area and carry out activities consistent with the native title rights and interests claimed.

In her affidavit sworn on 21 February 2003 (at Attachment R8) Anthropologist 1 deposes that she has conducted interviews with members of the claim group and recorded details of significant sites within the claim area and conducted an extensive review of anthropological and linguistic literature including the unpublished work of other recent researchers pertaining to the claim area, the group's wider traditional country and the claim group. The findings of this research clearly support the factual basis of the Djiru people's native title claimant applications and that the claimant group have, and the predecessors of those persons had, an ongoing connection under Djiru law and custom, both physical and otherwise, with their traditional country, including the area under claim (para 6).

s.62(2)(e)(ii)

In Schedule F of the application the applicants state that:

- the traditional laws and customs of the Djiru people form part of a body of customary law which is part of a broader system of Aboriginal culture. The broader system includes not just land law but a comprehensive body of law covering cultural values, norms of social behaviour and principles that govern the landed interests of the claim group. The acquisition of land interests is by descent from ancestors and derived from fundamental rights of possession and ownership of land;
- members of the claim group continue to pass on to their descendants traditional laws and customs, stories and beliefs concerning their traditional country, including the claim area;
- members of the claim group continue to care for their traditional country in accordance with traditional laws and customs passed down to them by their forebears;
- members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them by their forebears, including traditions and customs relating to caring for country, controlling access to country, holding ceremonies on traditional country and the use of traditional country.
- the system of common traditional laws includes:
    - recognition of apical ancestors;
    - common and interdependent familial ties which determine traditional rights and customs regarding land and waters;
    - recognition of group and individual responsibilities towards land and waters;
    - transmission of traditional knowledge;
    - recognition of the authority of elders.

In Schedule G of the application the applicants provide further details of the traditional laws and customs which have been passed down to them from generation to generation by their forebears. Such traditions and customs include those that deal with:

- caring for and controlling access to country;
- hunting and fishing in the claim area;
- camping and occupying country;
- visiting, protecting and preserving special sites and story places;
- participating in consultation processes and land use decision making with third parties.

In her affidavit at Attachment R8 Anthropologist 1 deposes that on the basis of her research and interviews with Djiru people and through reviewing the work of other researchers, she has formed the view that there exist traditional laws acknowledged by and traditional customs observed by the claimant group. She believes that these laws and customs give rise to the claim of native title rights and interests as set out in Schedule E of the Djiru people's native title claimant application #1 (para 7).

A copy of Schedule E is annexed to the affidavit and marked 'RDG2'.

s.62(2)(e)(iii)

The material in Schedules F, G and M of the application, and in the affidavit of Anthropologist 1 at Attachment R8 supports the assertion that the native title claim group has continued to hold the native title in accordance with their traditional laws and customs. Refer to my reasons under s.62(2)(e)(ii) above.

At Schedule F the applicants state that members of the claim group continue to exercise a body of traditional laws and customs passed down to them from their forebears and that the native title rights and interests claimed are those of and flowing from the traditional laws and customs of the Djiru people.

In her affidavit at Attachment R8 Anthropologist 1 deposes that many members of the native title claim group continue to exercise their native title rights by caring for their country, camping, hunting, fishing and other traditional activities and passing on their traditional knowledge, law and custom. (para 8).

Conclusion

A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and for the particular assertions in sub-paragraphs (i), (ii) and (iii) is found in Schedules F, G and M of the application, and in the affidavit at Attachment R8. Refer also to my reasons for decision under s.190B(5) below. As a result, I am satisfied that the requirements of s.62(2)(e) are met.

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

Reasons relating to this sub-condition

The application provides details of the activities that the native title claim group carries out in relation to the area claimed at Schedules F and G. The activities include speaking for country, caring for country, controlling access to country, camping, hunting and fishing in the claim area, visiting and protecting significant sites and story places and passing on their traditional

knowledge, law and custom. It is my view that this description of activities is sufficient to comply with the requirements of s.62(2)(f).

Result: Requirements met

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

Reasons relating to this sub-condition
Schedule H of the application states that the applicants are unaware of any other applications that seek a determination of native title or a determination of compensation in relation to native title, for the whole or part of the area covered by this application.
‘

This statement complies with the requirements of s. 62(2)(g).

The assessment completed by the Tribunal's Geospatial Unit on 21 July 2003 stated that one claimant application fell within the external boundary of the current application, application QC03/2. At the time of this assessment the Tribunal’s Geospatial database had not been updated to reflect the discontinuance of this application. Application QC03/2 was discontinued by leave of the Federal Court on 15 July 2003.

The Tribunal’s Geospatial database has now been updated. The registration test officer conducted a search of the Tribunal’s Geospatial database on 5 August 2003. This confirmed that no claimant or non-claimant applications fall within the external boundary of the application.

Result: Requirements met

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

Reasons relating to this sub-condition
Schedule I of the application states that the applicants are not aware of any section 29 notices that have been given in relation to the whole or part of the claim area.

However, the assessment completed by the Tribunal's Geospatial Unit on 21 July 2003 states that one section 29 notice as notified to the Tribunal falls within the external boundary of the application as at 25 March 2003.. This is low impact exploration permit EPM 13401, notified on 19 June 2001.

This is a notice pursuant to s.486 of the Queensland *Mineral Resources Act 1989* (“MRA”). It does not remain relevant from the point of view of the provisions of s.30(1) and s.190A(2) of the Act, given the date of lodgement. One point which should be noted in relation to the Geospatial information is that these s.486 notices do not in fact have a “notification date” as indicated in the schedule attached to the Geospatial assessment. The dates referred to as notification dates are the date of lodgement of an application for a low impact exploration permit.

I believe I have to address whether the applicants have complied with the requirement of s.62(2)(h).

Section 62(2)(h) of the Act requires that the application contain details of any notices issued under s.29 of the *Native Title Act 1993* (Cth) ("or under a corresponding [emphasis added] provision of a law of a State or Territory"). It is my view that when s.62(2)(h) talks of *"corresponding"* legislation, it is referring to legislation that is "analogous" or "equivalent": see the definition of "corresponding" in The New Shorter Oxford Dictionary.

There is, in my opinion, an issue whether the notice issued under s.486 is issued under Queensland provisions that correspond with s.29 of the Act. I am of the view that on a literal reading of s.62(2)(h), this means a notice issued under legislation enacted pursuant to s.43 of the Act. The notice for the EPM relates to activity that corresponds or is equivalent to s.26A of the Act. I conclude that it is therefore not necessary to provide details of this notice in the application, as it is not, strictly speaking, a notice covered by the provisions of s.62(2)(h).

Further, s.29(4) provides that a notice given under s.29(2) or (3) of the Act must:

- specify a notification date for the act, and
- include a statement to the effect that persons have until 3 months after that date to take steps to become native title parties in relation to the notice.

In my view a *corresponding provision* under a law of a State or Territory would be one that contained provisions that reflected all the requirements of s.29. The notices under s.486 of the MRA are not required to, and do not, specify a notification date and such a statement. Hence in my view for the purposes of s.62(2)(h) s.486 notices are not notices *under a corresponding provision of a law of a State"*.

However, even if the above analysis is incorrect, I am of the view that Parliament's intention in relation to the requirements of s.62(2)(h) is relatively clear. Both the note at the end of that paragraph, which states: "*Notices under s.29 are relevant to subsection 190A(2)"*, and also s.190A(2) itself, make it reasonably clear that the purpose of the provision was to ensure that the Registrar was aware that the claim was affected by the relevant notice and, therefore, expedited the registration test of the application as required under s.190A(2). The Tribunal is of course aware of the notice.

The Explanatory Memorandum to the Native Title Amendment Bill 1997 provides further assistance in relation to the legislature's intent:

> **"Section 29 notices affecting the claim area**
>
> 25.39 The applicant must also include details of any notices about future acts that were given under section 29 and apply to any part of the claim area of which the applicant is aware ***[paragraph 62(2)(h)]***. There is a note drawing attention to the fact that notices under section 29 are relevant to section 190A; if the Registrar is aware that there is a section 29 notice when he or she is applying the registration test to a claim over an area, the Registrar must try to make a decision about registration before the notification period for the section 29 notice expires..."

Finally, I am of the view that the sub-section, in any event, only requires the applicant to give details of any such notice "of which the applicant is aware" – a subjective test-and thus the applicant's statement here that it is not so aware also satisfies the requirements of the section.

For the above reasons I am satisfied that the applicants have not failed to meet the requirements of s.62(2)(h).

Result: Requirements met

Reasons for the Decision

For the reasons identified above the application contains all the details and other information, and is accompanied by the affidavits and other documents, required by s.61 and s.62 of the Act.
I am satisfied that the application meets the requirements of s.190C(2).

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

Section 190C(3) requires me to be satisfied that any person who is a member of the Djiru native title claim group is not also a member of the native title claim group for any previous native title determination application ("the previous application"), where:

(a) the previous application overlaps in whole or part the claim area covered by the current Djiru application (cf. s.190C3(a)); and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current Djiru application was made (cf. s.190C3(b)); and

(c) the entry in the Register was made, or not removed, as a result of consideration of the previous application under s.190A (cf. s.190C3(c)).

The application was filed in the Federal Court on 7 July 2003. For the purposes of s.190C(3)(b), the application is taken to have been "made" on that date.

As noted in my reasons under s.62(2)(g) above, there are no other applications that cover any part of the area covered by the Djiru #3 application on the Register of Native Title Claims, as a result of a consideration pursuant to s. 190A. This was confirmed by the registration test officer who conducted a search of the Tribunal's Geospatial database on 5 August 2003. It is therefore not necessary for me to further consider the conditions of s.190C(3).

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

Result: Requirements met

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

Certification and authorisation:

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

(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d)

(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) and consequently, I need to consider whether there has been compliance with s.190C(4)(b) – authorisation by the native title claim group.

There are two limbs in s.190C(4)(b). The Registrar (or his delegate) must be satisfied that:
(i) the applicant is a member of the native title claim group;
(ii) the applicant is authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

Section 190C(5) further requires that the Registrar cannot be satisfied that the condition in subsection (4) has been met unless the application:
(a) includes a statement to the effect that the requirements in s. 190C(4)(b) are met; and
(b) briefly sets out the grounds on which the Registrar should consider that the requirements of s. 190C(4)(b) are met.

The first limb
The applicants have each sworn in their affidavits at Attachment R that they are a member of the native title claim group for the Djiru native title determination application. On the basis of this information, I am satisfied that the applicants are members of the native title claim group, thereby satisfying the first limb of s.190C(4)(b).

I am also satisfied that the information in the affidavits amounts to the statement required by s.190C(5)(a) that the requirements of s.190C(4)(b) have been met and briefly sets out the grounds required by s.190C(5)(b) on which I should consider that the requirement set out in s.190B(4)(b) has been met.

The second limb

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

At s.251B, the Act recognises that the applicants may be 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.

At Part A2 of the application, details of the authorisation process are provided as follows:

A meeting of Aboriginal people who assert rights and interests in the claim area was held at Clump Mountain, Mission Beach on 1 and 2 November 2002. At the meeting the applicants were authorised in a manner consistent with the traditional laws and customs of the members of the native title claim group to bring this application on behalf of the claim group. The applicants were also authorised by the native title claim group to deal with matters arising in relation to the application.

The grounds for these assertions are set out in the affidavits of the applicants named above and Anthropologist 1, research anthropologist with the North Queensland Land Council.

The statement that the applicants named in this application were authorised in a manner consistent with the traditional laws and customs of the native title claim group is supported by the applicants' s.62(1)(a) affidavits at Attachments R1 to R7.

In paragraph 6 of their s.62(1)(a) affidavits each of the applicants state that they have been 'authorised by all the persons in the native title claim group to make this application and deal with matters arising in relation to it'. Sub-paragraphs 6(a) and 6(b) of the affidavits set out the basis upon which the applicants are authorised as follows:
"6(a) *The North Queensland Land Council called a meeting of Aboriginal people who assert rights and interests in the areas in and surrounding the claim area which was held at Clump Mountain on 1 and 2 November 2002.*
6(b) At the meeting, in accordance with Djiru traditional law and custom, the claim group authorised me and six other members of the claim group to make this claim and deal with matters arising in relation to it."

In her affidavit at Attachment R8 (paras 9 – 14) Anthropologist 1 deposes that:
"The lodgement of this native title claimant application was authorised at a meeting held at Clump Mountain, Mission Beach on 1 and 2 November 2002.

I attended the said meeting together with other staff members from the Land Council.

The meeting was organised by the Land Council who has a database of containing the names and addresses of Djiru people. I understand that Djiru people were personally notified by letter and that the meeting was advertised in several local newspapers and by notices at appropriate Aboriginal communities across the region.

At the meeting Djiru people discussed and authorised native title claimant application areas within their traditional country.

At the meeting Djiru people, on the basis of their laws and customs, authorised the following members of the claimant group to be applicants: Applicant 1, Applicant 2, Applicant 3, Applicant 4, Applicant 5, Applicant 6 and Applicant 7. These said people were authorised to make this application on behalf of Djiru people and to deal with all matters arising in relation to it.

I understand and believe to be true that the authorisation was in a manner consistent with the traditional laws and customs of the Djiru people which provide that decisions on behalf of the Djiru people are made by Djiru elders in discussion with Djiru people and that those decisions bind the group of Djiru people as a whole".

Further information in relation to the authorisation process was sought from the applicants' legal representatives. In a letter dated 28 May 2003 the NQLC state that advertisements of the meeting were run in the *Cairns Post*, *Townsville Bulletin* and *Innisfail Advocate* on 19 October 2003 and the *Tully Times* on 24 October 2002. Fliers were forwarded to Chjowai Housing Cooperative in Innisfail and to Palm Island Council for placement on their noticeboard. The NQLC also state that:
"*After conducting extensive anthropological research we had a considerable database and were aware of the localities in which most Djiru people live… The meeting was attended by representatives of a majority of the family groups that make up the claimant group and who could speak on behalf of their families. In addition, prior to lodgement of the claim, the claim was discussed with representatives of each of the descent groups listed in Schedule A. All Djiru people are bound by the decisions made at the authorisation meeting.*"

A copy of the advertisement that was run in each of the newspapers listed previously was provided to the Tribunal on 10 June 2003.

On the basis of the information contained in the application and subsequently provided by the applicants' representative, I am satisfied that this native title claim group has a process of decision making that pursuant to its traditional laws and customs must be complied with when making decisions about matters such as land business, including a decision to authorise an applicant pursuant to s.190C(4)(b). This information shows that the Djiru authorisation process involves the making of decisions by Djiru elders in consultation with Djiru people. I am also satisfied that the process was followed and that applicants were accordingly authorised to make the application and deal with matters arising in relation to it.

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

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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

Reasons for the Decision

External Boundaries

In a letter to the Tribunal dated 28 May 2003 the NQLC advised that a parcel of land had been omitted from the written description in Schedule B of application QC03/2, Lot 2 on SP125433. In order to rectify this, on 7 July 2003 the NQLC filed the current application in the Federal Court to replace application QC03/2. They also filed a notice of motion to discontinue application QC03/2. On 15 July 2003 the Federal Court granted leave to discontinue application QC03/2. A new map of the application area was prepared by the Tribunal's Geospatial Unit (provided at Attachment C of the current application) and Schedule B was revised to include the additional Lot.

A written description of the external boundary of the area claimed is provided at Schedule B of the application. This describes the application area as a number of specific parcels and part parcels of unallocated State land, described by Lot on Plan number, within an external boundary. The external boundary is a metes and bounds description which references other native title applications and topographic features. The written description is supplemented with an A3 colour copy of a map at Attachment C of the application, prepared by the Tribunal's Geospatial Unit and dated 5 June 2003. The map depicts the external boundary of the application by a solid red line and includes scale bar, north point, co-ordinate grid and legend. The land parcels, colour coded on the basis of tenure, are labeled with lot on plan number.

The assessment of the Tribunal's Geospatial Unit dated 21 July 2003 concludes that the description and map are consistent and identify the application area with reasonable certainty. I have taken into account the expert assessment of the Geospatial Unit and I am satisfied that the external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and map that are contained in the application.

I am satisfied that the physical description of the external boundaries meets the requirements of s.62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s.62(2)(c).

Internal Boundaries

The internal boundaries are described in Schedule B of the application. The areas excluded from the application are described as follows:

"2. Any area covered by :
(a) a scheduled interest;
(b) a freehold estate;
(c) a commercial lease that is neither an agricultural lease or a pastoral lease;
(d) an exclusive agricultural lease or an exclusive pastoral lease;

(e) a community purpose lease;
(f) a residential lease;
(g) a lease dissected from a mining lease and referred to in Section 23B(2)(c)(vii); or
(h) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters;
which was validly granted or vested on or before 23 December 1996.

3. Any area covered by the valid construction or establishment of any public work, where the construction or establishment of the public work commenced on or before 23 December 1996.

4. Any area where the native title rights and interests have otherwise been extinguished.

5. Provided that where the acts specified in Clauses 2, 3 or 4 fall within the provisions of:
(a) s.23B(9), 23B(9A), s.23B(9B), s.23B(9C) or s.23B(10); or
(b) s.47, s.47A or s.47B,
then the area covered by the act is not excluded from this application.

I am satisfied that this information is sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of land or waters within the external boundaries of the claim area.

The applicants have detailed a series of land tenure types that are excluded from the area of the application, and which corresponds to the classes of tenure defined in s.23B (previous exclusive possession acts). In my view the information in the application enables the internal boundaries of the application area to be adequately identified.

Accordingly I consider that the description provides a reasonable level of certainty in regard to whether native title rights and interests are claimed in relation to particular areas of land or waters within the external boundaries of the area the subject of the application.

In this regard I have taken into account the judgement of Nicholson J in *Daniel and Ors, et al v The State of Western Australia* [1999] FCA 686 in which the Court considered the appropriateness of 'class exclusion'drafting. I refer specifically to para 32 of Nicholson J's judgement in which he states:
"These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be satisfactory compliance with the statutory requirement."

In the event that the validity of the grants identified is established in due course, in my view, the general exclusion clause in Schedule B of the application effectively excludes those areas which are subject to the identified tenure classes. The areas subject to the grants have been surveyed in the past and are readily identifiable.

I am satisfied that the class exclusions used in the application comply with the statutory requirement in s.62(2)(a)(ii).

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

The requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:
(a) the persons in the native title claim group are named in the application; or
(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons for the Decision

To meet this condition, I must be satisfied that the requirements of either s.190B(3)(a) or (b) have been met.

A list of names of all persons in the claim group is not provided in the application. Consequently the requirements of s.190B(3)(a) of the Act are not met.

Section 190B(3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The Djiru native title claim group is described at Schedule A of the application as follows:

"*The native title claim group is known to itself and all neighbouring Aboriginal groups as Djiru. The claim group is often referred to as the Claim Group 1 mob after the English names of significant cultural areas in their traditional country….*

The current membership of the claim group is identified by the principle of cognatic descent (descent from one's father or one's mother). … By these descent principles the current membership of the claim group consists of descent groups listed by their surnames, together with the apical ancestors from whom they trace their descent'.

[The names of 7 descent groups are then listed, each naming a specific apical ancestor or ancestors].

And includes persons adopted by any of those descendants according to the traditional laws and customs of the claim group.

Further information was sought from the applicants' legal representative regarding the traditional laws and customs of the native title claim group relating to adoption. In a letter dated 28 May 2003 the NQLC states the following:

As in most parts of Aboriginal Australia, the system of law for the Djiru People incorporates adoption as a means of acquiring rights to land. Phrases such as 'reared up' and 'grown up by'

are common expressions meaning 'adopted' into the landholding group. Thus the person incorporated into the group, acquires rights to land through descent from their 'social parent'. This system of law has been observed regionally, and is widely practised throughout most of Aboriginal Australia.

In a letter dated 10 June 2003 the NQLC further states:

The delegate raises the issue of adoption and being able to readily identify members of the native title claim group to comply with s.190B3. Individuals that have been adopted into the Djiru native title claim group can be identified by tracing them back to the apical ancestors listed at Schedule A of the application. These individuals have been recognised and incorporated into the particular family and would in most situations take the family surname. Therefore if one were to inquire of another Djiru people they would be told the adopted person was part of the claim group and this would be referenced to being grown up and socialised by a particular Djiru individual descended from an apical ancestor.'

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that *"[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially."* I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group.

It is apparent from the information in Schedule A that a person may be a member of the native title claim group through being descended from one of the named apical ancestors or by being adopted into the group by any of those descendants.

On the basis of the information contained in the application and subsequently provided by the applicants' representative, I am satisfied that the descendants of the named apical ancestors could be identified with minimal inquiry and as such, ascertained as being a member of the native title claim group. By referencing the identification of members of the native title claim group as descendants of named apical ancestors, or being adopted into the group by any of those descendants, 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.

The requirements of s.190B(3)(b) are met.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

Native title rights and interests claimed

At paragraph 1 of Schedule E, the applicants claim the right to 'possession, occupation, use and enjoyment of the claimed area as against the whole world'. This right is claimed only in relation to unallocated State land where there has been no prior extinguishment of native title or where s.238 (the non-extinguishment principle) applies.

At paragraph 2 of Schedule E the applicants state that with respect to all remaining tenure within the claim area, the native title rights and interests are not to the exclusion of all others, and describe these rights and interests as follows:
The rights to have access to and use the claim area and its natural resources including to:

(i) maintain and use the claim area;
(ii) conserve the natural resources of the claim area;
(iii) protect the claim area and the natural resources of the claim area for the benefit of the native title holders;
(iv) care for the claim area for the benefit of the native title holders;
(v) use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes.

And more particularly to:

A. reside on, camp on and travel across the land;
B. exercise rights of use and disposal over the natural resources;
C. exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the native title rights and interests;
D. discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:
    - preserve sights (sic) of significance to the native title holders and other Aboriginal people on the claim area;
    - conduct secular, ritual and cultural activities on the claim area;
    - conduct burials on the claim area;
    - maintain the cosmological relationship, beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture and the well being of the native title holders;
    - inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition;
    - resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area.
E. construct and maintain structures for the purpose of exercising the native title.

At Schedule L, the applicants state that the claim area, being unallocated State land and occupied by the members of the native title claim, is an area to which the provisions of s.47B apply.

At paragraph 3 of Schedule E, the applicants state that:
The native title rights are subject to:
(i) the valid and current laws of the State of Queensland and the Commonwealth of Australia;
(ii) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Queensland

I understand these statements to mean that over unallocated state land, where the applicants claim the benefit of s.47B, the applicants claim exclusive possession, occupation, use and enjoyment of the claimed area. In all other areas, the rights and interests in Schedule E are claimed non-exclusively (i.e., subject to other interests).

The rights and interests claimed are further qualified at paragraph 4 of Schedule E. The applicants state that in relation to the native title rights and interests asserted:
- they do not operate exclusive of the Crown's valid ownership of minerals, petroleum or gas;
- they are not exclusive rights or interests if they relate to waters in an offshore place; and
- they will not apply if they have been extinguished in accordance with valid State and Commonwealth laws.

The requirements of the Act

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

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

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

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

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

legislation,[3] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[4]

I have considered the description of native title rights and interests in the present application in light of previous judicial findings. In *Ward*, the High Court confirmed that a right to protect and prevent the misuse of cultural knowledge does not amount to a right in the land or waters and is not therefore a right or interest which is readily identifiable: [64]. Their Honours considered that "recognition" of such a right went beyond denial or control of access to land and would involve, for instance, the restraint of visual or auditory reproductions of what was to be found, or what was to take place there. They stated:

> "However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property…[t]he 'recognition' of this right would extend beyond denial or right of access to land held under native title…It is here that the second and fatal difficulty appears" at [59].

The description of the claimed rights to "possession, occupation, use and enjoyment as against the whole world" in relation to unallocated State land where there has been no prior extinguishment of native title or where s.238 (the non-extinguishment principle) applies is sufficient to allow the native title right and interests claimed to be readily identified. (*Ward*).

The description of the rights and interests claimed in relation to all remaining tenure within the claim area at paragraph 2 of Schedule E is also sufficient to allow those claimed native title rights and interests to be readily identified.

My reasons in relation to those rights and interests that may be *prima facie* established are found under s.190B(6) below.

Result: Requirements met

s.190B(5)

Sufficient factual basis:

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

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

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

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

Reasons for the Decision

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

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

The Registrar (or his delegate) is not limited to consideration of statements contained in the application (as is the case for s.62(2)(e)) but may refer to additional material supplied to the Registrar in order to be satisfied that the requirements of s.190B(5) have been met: *Martin v Native Title Registrar* [2001] FCA 16. Thus, regard will be had to the application as a whole and, subject to s.190A(3), regard will also be had to relevant information that is not contained in the application.

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s.62(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.[5]

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].

Material which addresses the requirements of s.190B(5) is contained in Schedules F, G and M and the affidavit of Anthropologist 1 at Attachment R8. A general description of the factual basis on which it asserted that the three criteria identified at s.190B(5)(a) -(c) are met is provided in Schedule F of the application. Schedule G provides details of activities currently carried out within the claim area. Schedule M provides details of the traditional physical connection of members of the claim group to the area claimed. On 6 March 2003 the NQLC provided additional information to the Tribunal in support of the application. This was in the form of affidavits sworn by three members of the native title claim group, Applicant 1, Person 1 and Applicant 4, and a short anthropological report by Anthropologist 1.

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

I note that it is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicants' relationships with country subject to native title claimant applications. What I must do is consider whether the factual basis provided by the applicants is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5) (a), (b) and (c).
I accept the truth of the facts and opinions in those schedules, affidavits and report-s I have formed the view that the information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

<u>190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area.</u>

To be satisfied under this criterion, it must be evident that the association with the area is and was communal, that is, shared by a number of members of the native title claim group.

In Schedule F of the application the applicants state that members of the claim group:

- continue to have a close association, including a spiritual connection, with the claim area according to their traditional law and custom;
- continue to use the claim area for traditional hunting and fishing and for gathering traditional bush medicines and other materials;
- continue to pass on to their descendants traditional laws and customs, stories and beliefs concerning their traditional country including the claim area;
- continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors;
- material evidence of physical connection of the group's ancestors exists in their traditional country and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation.

In Schedule G of the application the applicants state that members of the claim group continue to exercise a body of traditional laws and customs relating to Djiru country which has been passed down to them from generation to generation by their forebears. Refer to my reasons for decision under s.62(2)(e)(i) above for details of those traditions and customs.

In her affidavit sworn on 21 February 2003 (at Attachment R8) Anthropologist 1 deposes that:

- she has conducted interviews with members of the claim group and recorded details of significant sites in the claimed area and conducted an extensive review of anthropological and linguistic literature including the unpublished work of other recent researchers pertaining to the claim area and the group's wider traditional country.
- The findings of this research clearly support the factual basis of the Djiru people's native title claimant applications and that the claim group have, and the predecessors of those persons had, an ongoing connection under Djiru law and custom, both physical and otherwise, with their traditional country, including the area under claim (para 6).

In her report provided to the Tribunal on 6 March 2003, Anthropologist 1 states that some of the earliest documentary records for the region have recorded Djiru as the people of Clump Point, a central feature of Djiru country. For example in 1891 the missionary J.B. Gribble recorded that the people on Mariah Creek were Jiroo, and in 1938-39 Norman Tindale recorded the following for Djiru: 'Clump Point and vicinity; north to Murdering Point, south to mouth of Tully River.'

In the affidavits of the three members of the native title claim group they depose to their association and the association of their parents, grandparents, children and other family members with the claim area. Such association includes being born and growing up in the claim area, regularly visiting the claim area, camping in the claim area, utilising the resources of the claim area, protecting significant places in Djiru country and being given names relating to their birthplace within Djiru country.
Affidavit of Applicant 1 paras 2 – 4, 9 - 21
Affidavit of Person 1 paras 2, 3, 5 - 14
Affidavit of Applicant 4 paras 2 – 6, 9

This application is made in relation to particular land parcels that are part of a larger area of land and waters that is asserted to be the broader traditional country of the native title claim group. That is to say, it is the larger area, where, in the words of s.223(1)(b), the people "have a connection with the land and waters"

I am of the view that native title can continue to be held by a native title group to all the traditional country, subject to valid extinguishing legislative or executive acts, where sufficient connection has been maintained to that traditional area. This may not be dependent on a native title group having to show physical connection to every parcel or tenement or allotment within that broader traditional area. The applicants state at Schedule F of the application that they continue to care for their traditional country, including the area claimed. In this regard, I repeat the finding above that the information that is provided in relation to factual basis relates to Djiru traditional country and I am satisfied that this particular claim area (being a claim over a number of parcels of unallocated State land) is located within such country.

On the basis of the information provided I am satisfied that there is a factual basis sufficient to support the association of the members of the claim group, and their predecessors, with the area that is the subject of this application.

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

This sub-section requires me to be satisfied that:
- traditional laws and customs exist;
- those laws and customs are respectively acknowledged and observed by the native title claim group, and
- those laws and customs give rise to the claim to native title rights and interests.

In Schedule F of the application the applicants state that:

- the traditional laws and customs of the Djiru people form part of a body of customary law which is part of a broader system of Aboriginal culture. The broader system denotes not just land law but a comprehensive body of law covering cultural values, norms of social behaviour and principles that govern the landed interests of the claim group. The acquisition of land interests is by descent from ancestors and derived from fundamental rights of possession and ownership of land;
- members of the claim group continue to pass on to their descendants traditional laws and customs, stories and beliefs concerning their country including the claim area;
- members of the claim group continue to care for their traditional country in accordance with traditional laws and customs passed down to them by their forebears;

- members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them by their forebears, including traditions and customs relating to caring for country, controlling access to country, holding ceremonies on traditional country and the use of traditional country.
- The system of common traditional laws includes:
  - recognition of apical ancestors,
  - recognition of group and individual responsibilities towards land and waters;
  - transmission of traditional knowledge;
  - recognition of the authority of elders.

In Schedule G of the application the applicants state that members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forebears. Such traditions and customs include those that deal with :

- caring for and controlling access to country;
- holding ceremonies on traditional country;
- hunting and fishing in the claim area;
- camping and occupying country;
- visiting, protecting and preserving special sites and story places;
- participating in consultation processes and land use decision making with third parties.

In her affidavit at Attachment R8 Anthropologist 1 deposes that:

- on the basis of her research and interviews with Djiru people and through reviewing the work of other researchers, she has formed the view that there exist traditional laws acknowledged by and traditional customs observed by the claim group. She believes that these laws and customs give rise to the claim of native title rights and interests as set out in Schedule E of the Djiru People's native title claimant application #1 (para 7).

These views are repeated in her short report provided on 6 March 2003

A copy of Schedule E is annexed to the affidavit and marked 'RDG2'.

In the affidavits of the three members of the native title claim group they describe a variety of traditional laws and customs which have been passed down to them by their forebears and which they continue to observe and pass on to their own children. These traditional laws and customs include:

- inheritance of rights to country from their forebears;
- bestowing of language names;
- customary marriage rules;
- knowledge of bush tucker, medicinal plants and special places in Djiru country;
- techniques of making artefacts such as baskets and fishing nets, and food preparation
- sharing resources;
- respect for elders;
- stories relating to special places in Djiru country;
- maintaining Djiru language, part of the Dyrribal language group;
- responsibilities for caring for Djiru country.

Affidavit of Applicant 1 paras 2 – 6, 8 - 22
Affidavit of Person 1 paras 2 – 7, 9, 10, 12 - 14
Affidavit of Applicant 4 paras 2 – 10, 12 -14

The traditional laws and customs described give rise to the rights and interests claimed at paragraphs 1 and 2 of Schedule E, that include residing on country, maintaining and using the claim area including natural resources, conserving the natural resources of the claim area, preserving sites of significance and conducting social and cultural activities.

190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

For the reasons set out in 190B(5)(b) above and having regard to the same affidavits and other material I am satisfied that there is a sufficient factual basis to support the assertion that the claim group has continued to hold native title in accordance with those traditional laws and customs.

At Schedule F the applicants state that members of the claim group continue to exercise a body of traditional laws and customs passed down to them from their forebears and that the native title rights and interests claimed are those of and flowing from the traditional laws and customs of the Djiru People.

In her affidavit at Attachment R8 Anthropologist 1 deposes that members of the native title claim group continue to exercise their native title rights by caring for country, camping, hunting, fishing and passing on their traditional knowledge (para 8).

In her report Anthropologist 1 states that

- Under the law and custom of the claim group, the Djiru people and the traditional land belonging to the Djiru people, exists as part of a regional system of law. Within this regional system of law the customary title system is part of their cosmology and acts in a manner comparable to a register of titles and provides its authority. …
- A distinct Aboriginal community identifying and identified by their Aboriginal neighbours, as Djiru endures in relation to the claim area.
- The character of the customary legal system is such that it is clearly descended from a classical Aboriginal land holding system (ie it is derived from and has explicit continuity with such a system).
- In the division of tribal land holdings recognised among the neighbouring communities, the claim area is acknowledged as Djiru country.

Conclusion
For the reasons set out above, I am satisfied that the requirements of s.190B(5) have been met.

Result: Requirements met

s.190B(6)

Prima facie case:

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

Reasons for the Decision

Under s.190B(6) I must consider whether, *prima facie*, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered.

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*.

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s.190B(4) above. Under my reasons for decision in relation to s.190B(4), I determined that the native title rights claimed at Schedule E are readily identifiable for the purposes of the *Native Title Act*.

Schedule E is constructed in such a way that the exclusive right to possession, occupation, use and enjoyment of the area is claimed only over areas of unallocated State land where there has been no prior extinguishment of native title or where s.238 (the non-extinguishment principle) applies. Over all remaining tenure within the claim area, a separate list of non-exclusive rights is claimed. I have noted the qualifications to these rights and interests under my reasons in relation to s.190B(4) above.

I will now consider in turn each of the rights and interests claimed in the application and whether these can be established *prima facie* as required by s.190B(6). In considering whether the rights claimed by the applicants at Schedule E can be established *prima facie*, I have had regard to Schedules F, G and M and Attachment R5 of the application, and the additional material provided to the Tribunal by the NQLC on 6 March 2003. This was in the form of affidavits sworn by three members of the native title claim group, Applicant 1, Person 1 and Applicant 4, and an anthropological report by Anthropologist 1.

A In relation to unallocated State land where there has been no prior extinguishment of native title or where s. 238 (the non-extinguishment principle) applies.

The right to possession, occupation, use and enjoyment of the claimed area as against the whole world

Established only in relation to areas where a claim to exclusive possession can be sustained.

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, *prima facie*, be established in relation to some parts

of a claim area.[6] A claim to exclusive possession may be able to be established over areas where there has been no previous extinguishment of native title or where the non-extinguishment principle in s.238 of the *NTA* applies (such as areas for which the benefit of ss.47, 47A or 47B is claimed, and in relation to areas affected by category C and D past and intermediate period acts). This is recognised in the wording of this right, which limits it to those areas where there has been no prior extinguishment of native title or where s.238 of the *Native Title Act* applies. At Schedule L, the applicants state that the claim area, being unallocated State land and occupied by members of the native title claim group, is an area where the provisions of s.47B apply. The applicants swear to the truth of this statement in their s.62 affidavits. There is some information in the application which suggests that members of the native title claim group occupy the land covered by the application for a variety of purposes (see for example, Schedules F and G). Since all the land parcels included in the application are unallocated State land, it can be assumed that the applicants assert that they occupy the whole of the claim area. The effect of s.47B is to allow previous extinguishing events to be disregarded in relation to areas of vacant Crown land occupied by one or more members of the claim group at the time when the application was made. Whether or not the applicants have provided sufficient information to bring any area within the ambit of s. 47B is a matter for judicial determination. Refer to my reasons for decision under s.190B(8) below.

Over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms": at [51].[7] Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [919].[8]

In applying the registration test, I must look to the language of the relevant provisions of the *Native Title Act 1993* (Cth).[9] These provisions must be read in context, having regard to relevant court decisions and other principles of statutory interpretation. If, as in *Ward* and *De Rose*, the courts cast serious doubt on whether or not a particular description of a right and interest falls within the definition of 'native title right or interest' in s.223, then those doubts affect the standard applied for the purposes of the test. It should be noted however that where the courts have not given explicit guidance the remedial character of the Act must be borne in mind It would seem, then, that without further investigation, a non-exclusive right to possession, occupation, use and enjoyment is not capable of being established *prima facie* pursuant to s.190B(6).

I will now consider the *prima facie* basis for the right to exclusive possession, occupation, use and enjoyment of the application area.

Possession

The applicants assert at Schedule F of the application that:

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[6] At [51].
[7] Refer also *Ward*, [48], [52], [53] and [89].
[8] Refer also *De Rose*, [918]-[920]
[9] *Western Australia v Ward* (2002) 191 ALR 1 at [2] and [25] per Gleeson CJ, Gaudron, Gummow and Hayne JJ

- The traditional laws and customs of the Djiru people form part of a body of customary law which is part of a broader system of Aboriginal culture, including cultural values, norms of social behaviour and principles that govern the landed interests of the group.
- The acquisition of land interests is by descent from ancestors and derived from fundamental rights of possession and ownership of land.

In her report Anthropologist 1 states that under the law and custom of the claim group, the Djiru People and the traditional land belonging to the Djiru People, exists as part of a regional system of law. In the division of tribal land holdings recognised amongst the neighbouring communities, the claim area is acknowledged as Djiru country.

In the affidavits of Applicant 1 and Applicant 4, they each depose that their identity as Djiru women has been passed down to them through their mother who was a traditional owner of Mission Beach and a Djiru person. Person 1 deposes that he is a traditional owner of the Mission Beach area and that his identity as a Djiru man has been passed down to him by his father.
Affidavit of Applicant 1 para 2
Affidavit of Person 1 para 2
Affidavit of Applicant 4 para 2

Occupation

I note that the notion of occupation in this context should be understood in the sense that indigenous people have traditionally occupied land rather than according to common law principles and judicial authority relating to freehold and leasehold estates and other statutory rights (Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32 at [162]).

In her affidavit at Attachment R8, Anthropologist 1 deposes that many members of the native title claim group continue, amongst other things, to visit the claim area and continue to exercise their native title rights by caring for their country, camping, hunting fishing and passing on their traditional law and custom.

In Schedule F of the application the applicants state that members of the claim group:

- continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials;
- continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors.

In Schedule G of the application the applicants state that members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forebears. Such traditions and customs include those that deal with :

- caring for and controlling access to country;
- holding ceremonies on traditional country;
- hunting and fishing in the claim area;
- camping and occupying country;
- visiting, protecting and preserving special sites and story places;
- participating in consultation processes and land use decision making with third parties.

In the affidavits sworn by three members of the native title claim group they depose to their occupation of the claim area, through growing up in the claim area, regularly visiting the claim

area and carrying out traditional activities such as camping, hunting, fishing and visiting significant sites.
Affidavit of Applicant 1 paras 2 – 4, 11
Affidavit of Person 1 paras 2, 3, 5, 8 – 10, 13
Affidavit of Applicant 4 para 2

Use and Enjoyment
In her affidavit at Attachment R8, Anthropologist 1 deposes that many members of the native title claim group continue, amongst other things, to visit the claim area and continue to exercise their native title rights by caring for their country, camping, hunting fishing and passing on their traditional law and custom (para 8).

In Schedule F of the application the applicants state that members of the claim group:
- continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials;
- continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors.

In Schedule G of the application the applicants state that members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forebears. Such traditions and customs include those that relate to use and enjoyment of the claim area. Refer to my reasons under the heading 'occupation' above.

In Schedule M of the application the applicants state that many members of the native title claim group reside in the vicinity of the claim area and continue to visit the claim area and exercise their native title rights by camping, fishing and hunting.

In the affidavits sworn by three members of the native title claim group they depose to their use and enjoyment of the claim area, through such activities as camping, hunting, fishing, collecting shellfish, bush foods and medicinal plants and visiting significant sites.
Affidavit of Applicant 1 paras 3 – 5, 11 – 13, 16 - 18
Affidavit of Person 1 paras 3, 5,, 6, 8 – 10, 12, 13.
Affidavit of Applicant 4 paras 5 - 9

Conclusion
I am satisfied that this right is *prima facie* established over areas where exclusive possession can be made out. All the land parcels included in the application are unallocated State land. This was confirmed by a search of the Tribunal's Geospatial database on 17 July 2003. As noted above, the applicants can therefore claim the benefit of s.47B and any prior extinguishment must be disregarded. Accordingly the right to exclusive possession, occupation, use and enjoyment of the application area is established over the whole of the claim area.

B. In relation to all remaining tenure within the claim area

I have no information before me that there is any other tenure included in the application other than unallocated State land. As noted above, all the land parcels included in the application are unallocated State land and the right to exclusive possession, occupation, use and enjoyment of the application area as against the world is established over the whole of the claim area. I therefore may not need to consider further the rights and interests claimed in relation to all remaining

tenure within the claim area as I am of the view that they are all 'lesser' rights and interests than exclusive possession and would be subsumed into it.

If, however, the applicants should fail to establish exclusive possession for some reason not as yet apparent or if I am wrong in the above analysis then the applicants would need to look to those rights and interests which could be established on a non-exclusive basis and accordingly I find as follows.

The rights to have access to and use the claim area and its cultural resources including to:
(i) maintain and use the claim area;

Established

At Schedule F of the application the applicants state that:

- members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials.
- members of the claim group continue to care for their traditional country, including the area claimed, in accordance with traditional laws and customs passed down to them by their forebears and predecessors.
- The body of traditional laws and customs exercised by the native title claim group includes traditional laws and customs which deal with caring for country and the use of traditional country.

In Schedule the applicants, in a footnote, define the words 'cultural resources' as 'includ[ing] natural and traditional resources'

In Schedule G of the application the applicants state that members of the native title claim group continue to exercise a body of traditional laws and customs passed down to them by their forebears, that includes traditional laws and customs which deal with hunting and fishing in the claim area, camping and occupying country, caring for country, holding ceremonies on traditional country and visiting and protecting special sites and story places.

In Schedule M of the application the applicants state that many members of the native title claim group reside in the vicinity of the claim area and they continue to visit the claim area and exercise their native title rights by caring for their country, camping, fishing, hunting and passing on their traditional knowledge, law and custom.

In her affidavit at Attachment R8, Anthropologist 1 deposes that: many members of the native title claim group continue, amongst other things, to visit the claim area and continue to exercise their native title rights by caring for their country, camping, hunting fishing and passing on their traditional law and custom (para 8).

I find that the particularised rights at A, B, C, and E are established.

(ii) conserve the cultural resources of the claim area

Established

I note that in Schedule E the applicants state that to avoid any doubt, where they refer to cultural resources, this includes natural and cultural resources.

In Schedule F of the application the applicants state that:

- members of the claim group continue to care for their traditional country, including the area claimed, in accordance with traditional laws and customs passed down to them by their forebears and predecessors.
- the body of traditional laws and customs exercised by the native title claim group includes traditional laws and customs which deal with caring for country.

In Schedule G of the application the applicants state that members of the native title claim group continue to exercise a body of traditional laws and customs passed down to them by their forebears, that includes traditional laws and customs which deal with caring for country and visiting and protecting special sites and story places.

In Schedule M of the application the applicants state that many members of the native title claim group reside in the vicinity of the claim area and they continue to visit the claim area and exercise their native title rights by caring for their country and passing on their traditional knowledge, law and custom.

In her affidavit at Attachment R8, Anthropologist 1 deposes that: many members of the native title claim group continue, amongst other things, to visit the claim area and continue to exercise their native title rights by caring for their country (para 8).

In their affidavits Applicant 1 and Person 1 depose that as Djiru people they have responsibility for protecting and managing sites of significance in Djiru country. They give examples of some of the sites they have been working to protect, for example the site of Hull River Mission, the fish traps and bora ground at Clump Point, and the walking tracks on Clump Mountain. Applicant 1 deposes that as a Djiru elder she has been meeting with Johnstone Shire Council regarding the setting up of a protocol for the protection of their sites.
Affidavit of Applicant 1 paras 16 – 19.
Affidavit of Person 1 paras 5, 7,.9, 10, 12

I find that the subsidiary right at D is established.

(iii) protect the claim area and the cultural resources of the claim area for the benefit of the native title holders

Established

This right is closely linked to the right to conserve the cultural resources of the claim area at (ii) above. Refer to my reasons under the right at (ii) above.

(iv) care for the claim area for the benefit of the native title holders;

Established

This right is closely related to the rights at (ii) and (iii) above. Refer to my reasons under the right at (ii) above.

(v) use the claim area and the cultural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes.

Established

The information provided in Schedules F. G and M and the affidavits of the three members of the native title claim group establish a *prima facie* basis for this right. Refer to my reasons under the heading 'use and enjoyment' above.

The particularised rights at A, B, C and D and E are established.

In relation to the use of the natural resources of the claim area, at Schedule Q, the applicants state that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown (in compliance with the requirements of s.190B(9)(a)). Given this qualification, I am satisfied that this right can be established *prima facie* (subject to the satisfaction of other requirements) whether or not a claim to exclusive possession can be sustained over the lands and waters of the claim area.

In relation to the right to preserve sites of significance to the native title holders on the claim area, this appears to amount to a claim to control access to and use of the area which could only be capable of being established *prima facie* over areas where a claim to exclusive possession can be made out. Nevertheless, in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. For this reason, this right appears to be capable of being established *prima facie* (subject to the satisfaction of other requirements) whether or not a claim to exclusive possession can be sustained over the lands and waters of the claim area. In any event, the applicants only claim this specific right in relation to all remaining tenure within the claim area where a claim to exclusive possession cannot be made out.

Conclusion

A. The following rights and interests can be established *prima facie* pursuant to s.190B(6) in areas where a claim to exclusive possession can be sustained (such as areas where the applicant claims the benefit of s.47B):

Possession, occupation, use, and enjoyment of the claimed area as against the whole world

B. Over areas where a claim to exclusive possession cannot be sustained, the following native title rights and interests have been established *prima facie* pursuant to s.190B(6):

The rights to have access to and use the claim area and its natural resources including to:

(i) maintain and use the claim area;
(ii) conserve the natural resources of the claim area;
(iii) protect the claim area and the natural resources of the claim area for the benefit of the native title holders;
(iv) use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes.

And more particularly to:

A reside on, camp on and travel across the land;
B exercise rights of use and disposal over the natural resources;

C exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the native title rights and interests;
D discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:

- preserve sights (sic) of significance to the native title holders and other Aboriginal people on the claim area;
- conduct secular, ritual and cultural activities on the claim area;
- conduct burials on the claim area;
- maintain the cosmological relationship, beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture and the well being of the native title holders;
- inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition;
- resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area.

E construct and maintain structures for the purpose of exercising the native title.

I direct that the following statements from the application also be entered on the Register of Native Title Claims:

The native title rights are subject to:
(a) the valid laws of the State of Queensland and the Commonwealth of Australia;
(b) the rights(past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Queensland

In relation to the rights and interests asserted:
- they do not operate exclusive of the Crown's valid ownership of minerals, petroleum or gas;
- they are not exclusive rights or interests if they relate to waters in an offshore place; and
- they will not apply if they have been extinguished in accordance with valid State and Commonwealth laws.

As at least some of the native title rights and interests described in Schedule E of the application have been *prima facie* established, I am satisfied that the requirements of s. 190B(6) are met.

Result: Requirements met

s.190B(7)

Traditional physical connection:

The Registrar must be satisfied that at least one member of the native title claim group:
(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity; or
(ii) a statutory authority of the Crown in any capacity; or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Reasons for the Decision

Under s.190B(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.

At Schedule M of the application the applicants make general statements about the physical connection of members of the native title claim group to the claim area. However they do not provide details of the physical connection of any particular member of the claim group with the land covered by the application.

The affidavits of the three members of the native title claim group provided to the Tribunal on 6 March 2003 contain information that establishes the association of all these members of the native title claim group with the area claimed. However, I will consider the affidavit of only one member, Person 1, in relation to this condition.

In his affidavit sworn on 3 February 2003 Person 1 deposes that as a child he regularly went camping with his family and members of the Family 1 around Clump Point and Boat Bay, in the claim area (para 3). He has been working at Clump Mountain since 1980, and has been a cultural tutor at the Clump Mountain Youth Wilderness Camp at Mission Beach since 1993, teaching children about the Aboriginal uses of the plants and animals in the area (paras 8, 9). He further deposes that he is on Djiru country daily and goes all over Djiru country, and goes diving and spearfishing off Clump Point. (para 13).

I am satisfied that Person 1 has the requisite physical connection with the land and waters covered by the application and that consequently the requirement of this section is met.

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

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

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s.61A.

S61A(1)- Native Title Determination

A search of the Tribunal's GIRO database by the Registration Test Officer on 5 August 2003 revealed no overlap with a previous approved determination of native title.

S61A(2)- Previous Exclusive Possession Acts

In paragraphs 2 and 3 of Schedule B of the application, areas covered by a previous exclusive possession act, as referred to in s.23B of the Act, are excluded from the claim area.

S61A(3) – Previous Non-Exclusive Possession Acts

The applicants do not state in Schedule B that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State as set out in Division 2B of Part 2 of the Act.

However the application only covers parcels of unallocated State land, that are not subject to previous non-exclusive possession acts. The applicants state at Schedule E that they only claim the right to exclusive possession, occupation. use and enjoyment of the claimed area in relation to unallocated State land where there has been no extinguishment of native title or where the non-extinguishment principle applies. In my reasons for decision under s.190B(6) above I found that the right to exclusive possession, occupation ,use and enjoyment of the application area can be established over the whole of the application area.

I therefore find that it is not necessary to include a statement that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts in the application.

S.61A(4) – Applicability of s.47, s.47A, s.47B

At Schedule B the applicants state that:
"Where the acts specified in clauses 2, 3 or 4 fall within the provisions of:
(a) s.23B(9), s.23B(9A), s.23B(9B), s.23B(9C) or s.23B(10); or
(b) s.47, s.47A, or s.47B
then the area covered by the act is not excluded from the application.

At Schedule L of the application the applicants state that:
'The claim area, being unallocated state land that is occupied by claim group, is an area to which the provisions of s.47B apply."

I am required to ascertain whether this is an application that should not have been made because of the provisions of s.61A. In my opinion, the applicants' express statements with respect to the provisions of that section are sufficient to meet the requirements of s.190B(8). Subsection 61A(4) of the Act provides that an application may be made in the terms expressed in Schedule B and L. Whether or not the applicants have provided sufficient information to bring any area within the ambit of s.47B is a matter to be settled in another forum.

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

Result: Requirements met

s.190B(9)(a)

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

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

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

Reasons for the Decision

At Schedule Q of the application, the applicants state that they do not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown in a manner which is inconsistent with continuing native title rights residing in those substances.

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

It is stated in Schedule P that no offshore places are included in this application. The applicants do not claim exclusive possession of any 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).

Reasons for the Decision

The application and accompanying documents do not disclose, and I am not otherwise aware of, any area where an extinguishing act has occurred and yet the application seeks native title rights and interests over such an area. In paragraph 4 of Schedule B of the application the applicants state that any area where the native title rights and interests claimed have otherwise been extinguished is excluded from the application. Similarly in Schedule E the applicants state that the rights and interests asserted will not apply if they have been extinguished in accordance with

valid State and Commonwealth laws. I am satisfied that the requirements of this section have been met.

An overlap analysis carried out by the Tribunal's Geospatial unit on 21 July 2003 indicates that no agreements as per the Register of Indigenous Land Use Agreements fall within the external boundary of this amended application as at 21 July 2003. This was confirmed in a search conducted by the registration test officer on 5 August 2003. There has therefore been no extinguishment of native title rights and interests by agreement.

Result: Requirements met

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