NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

EDITED Reasons for Decision

DELEGATE:	Graham Miner

Application Name:	Warrungu People #2
Names of Applicant(s):	Doris Fred and Reginald Joseph Morganson
Region:	North Queensland NNTT No.: QC04/8
Date Application Made:	30 June 2004
Application Amended:	12 April 2005
Federal Court No.:	Q111/04

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

April 2005

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

Date of Decision

Brief History of the Application

The application was filed in the Federal Court on 30 June 2004. A copy was provided to the Native Title Registrar on 1 July 2004.

A notice was given on 22 December 2004 under s. 29 of the Act affecting the application area. This requires the delegate to use his best endeavours to finish the consideration of the claim by the end of four months after the notification date specified in that notice (s. 190A(2)).

An amended application was filed in the Federal Court on 8 April. On 12 April the Federal Court ordered that:

- leave be granted that Application Q111/2004 be amended in accordance with the proposed amended application annexed to the Affidavit of [PLO 1] sworn 7 April 2005, and
- the proposed amended application stand as such and further filing is dispensed with.

It is this application, dated 7 April 2005, that now must be considered.

Information considered when making the Decision

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

- the National Native Title Tribunal's Registration Testing files and Legal Services files for this application;
- the National Native Title Tribunal Geospatial Database;
- the Register of Native Title Claims and Schedule of Native Title Applications;
- the Native Title Register;
- geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Analysis & Mapping Branch dated 4 August 2004 and 15 April 2005.
- decisions of the Court referred to

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

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

Delegation Pursuant to Section 99 of the *Native Title Act 1993* (Cwth)

On 22 November 2004, Christopher Doepel, the Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

This delegation has not been revoked as at this date.

NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C of the *Native Title Act*.

Section 190B sets out the merit conditions of the registration test.

Section 190C sets out the procedural conditions of the registration test.

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions.

Section 190C: Procedural Conditions

Applications contains details set out in s. 61 and s. 62: s. 190C(2)

Section 190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62, namely, does the application contain all details and other information and is it accompanied by any document prescribed by these sections?

Native Title Claim Group: s. 61(1)

The application is made by a person or persons authorised by all of the persons (the **native title claim group**) *who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.*

Reasons relating to this sub-condition

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

I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). That is one of the procedural requirements to be satisfied to secure registration: s. 190A(6)(b). (*Northern Territory of Australia v Doepel* [2003] FCA 1384 [at 36] (*Doepel*).

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group - see *Doepel*, at paras 16-17, 37.

Because of this, I confine my consideration to information contained in the application and any documents that accompany it.

Schedule A of the application states:

> "Membership of the native title claim group - membership of the claim group is based on cognatic descent from apical ancestors known as [Ancestor 1] & his sister [Ancestor 2], well recognised in the regional Aboriginal community as being associated with the Warrungu identity & claim area at the time of European occupation; the one exception to this is the group of claimants descended from [Descendant 5], who was adopted into the Warrungu tribe in accordance with traditional law & custom

> The applicants, members of the claim group, make the claim on behalf of the Warrungu People, who are all members of the following family groups
>
> **i [Family 1],** being descendants of [Descendant 1] & [Descendant 2], daughter of [Ancestor 1] of the Herbert Gorge area
>
> **ii [Family 2],** being the descendants of [Descendant 3], son of [Ancestor 1]
>
> **iii [Family 3],** being descendants of [Member 1], a European immigrant who was initiated into the Warrungu tribe & who married [Ancestor 2], sister of [Ancestor 1]
>
> **iv [Family 4],** being descendants of the [Descendant 4], son of [Ancestor 1]
>
> **v [Family 5],** being descendants of [Descendant 5], who was sent to Greenvale Station on the Herbert River area as a child and was raised by a senior Warrungu man and adopted into the Warrungu according to traditional law and custom."

The decision in *Doepel* suggests that the Court is generally content to allow Aboriginal people and Torres Strait Islanders to define their claim group in whatever way is consistent with their traditional law and customs. But where there is evidence that the claim group does not contain all those individuals who have rights and interests in the area, then it will fail at s. 61(1): *Doepel*, supporting *Risk.*

> "If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration": *Northern Territory v Doepel* [2003] FCA 1384at [36].

On the face of the application there is no information that indicates that all persons in the native title claim group are not encompassed by the description. In my opinion, it follows that the application meets this requirement of the Act.

For these reasons, I am satisfied that this description of the persons in the native title claim group meets the requirement in s. 61(1), as imposed by s. 190C(2).

Result: Requirements met

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

An application must state the name and address for service of the person who is, or persons who are, the applicant.

Reasons relating to this sub-condition

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

Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: s. 61(4)

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must: (a) name the persons or; (b) otherwise describes the persons sufficiently clearly 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 persons in the native title claim group. I am satisfied that the persons described sufficiently clearly so that it can be ascertained whether any particular person is one of the persons said to authorise the applicant.

Result: **Requirements met**

Application is in prescribed form: s. 61(5)

An Application must be in the prescribed form, and be filed in the Federal Court, and contain such information in relation to the matters sought to be determined as is prescribed, and be accompanied by any prescribed documents and any prescribed fee

Reasons relating to this sub-condition

s. 61(5)(a)

This is a claimant application which has been filed substantially in the form (Form 1) prescribed by Regulation 5(1)(a) of *Native Title (Federal Court) Regulations 1998.*

s. 61(5)(b)

This 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 an affidavit as required by s. 62(1)(a) from each of the two persons named as applicant.

I note that s. 190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. For the reasons outlined above, it is my view that the requirements of s. 61(5) have been met.

Result: **Requirements met**

Application is accompanied by affidavits in prescribed form: s. 62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

The application is accompanied by an affidavit from each of the two persons named as applicant. Each affidavit appears competently witnessed. Each affidavit contains the statements required by sub-paragraphs (i), (ii), (iii), (iv). Each of the deponents states the basis on which the applicant is authorised, as required by sub-paragraph (v).

The form of the affidavits is defective in that they have not been signed on each page by the relevant deponent and witness. However, an affidavit may be filed notwithstanding any irregularity in form and may, with the leave of the court, be used notwithstanding any irregularity of form (Order 14 rule 5 (1) & (2)). Further, where an Act prescribes a form, then (unless a contrary intention appears) strict compliance with the form is not required and substantial compliance is sufficient (s. 25C *Acts Interpretation Act 1901* (Cwth)).

Having regard to the above I am of the view that I can accept the affidavits for the purpose of this administrative test notwithstanding the defect as to form. The defect can be readily rectified if so required by the Court.

Result: Requirements met

Application contains details set out in s. 62(2): s. 62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information required in s. 62(2). Because of this, the Registrar's decision for this condition is set out under s. 62(2) below.

Details of physical connection: s. 62(1)(c)

Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate)

Reasons relating to this sub-condition

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

Comments on details provided:
Schedule M states that by residing in the vicinity of the claim area, many members of the native title claim group continue to, amongst other things, visit the claim area, exercise their native title rights by caring for their country, camping, gathering, hunting, fishing and passing on their traditional knowledge, law and custom.

The native title claim group's traditional law and custom provide that within the group there may be certain individuals, families or sub-groups which will have sometimes stronger and sometimes lesser rights and responsibilities in relation to particular parts of the claim area; the nature and incidents of such differentiation is determined in accordance with Warrungu traditional law and custom.

The application contains some details relating to traditional physical connection at Schedules F, G and M. The applicant reserves the right to provide details of prevention of access at a later date (schedule N).

Result: **Provided**

Information about the boundaries of the application area: s. 62(2)(a)

s. 62(2)(a)(i): Information, whether by physical description or otherwise that enables the boundaries of the area covered by the application to be identified;

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.

Result: **Requirements met**

s. 62(2)(a)(ii): ***Information, whether by physical description or otherwise that enables the boundaries of*** *any areas within those boundaries that are not covered by the application to be identified.*

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 application area which are not covered by the application to be identified.

Result: **Requirements met**

Map of the application area: s. 62(2)(b)

The application contains a map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition

A map accompanies the application (Attachment C). 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 application area.

Result: **Requirements met**

Details and results of searches: s. 62(2)(c)

The application contains details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application

Reasons relating to this sub-condition

Schedule D states that: "To the applicant's knowledge no such searches have been conducted". There is no information in the application or otherwise before me to suggest that searches have been made or if they have been that the applicant is aware of them.

Result: **Requirements met**

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

The application contains a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and are all native title rights and interests that may exist, or that have not been extinguished, at law.

Reasons relating to this sub-condition

The application contains a description of the claimed native title rights and interests in Schedule E. 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.

Result: **Requirements met**

Description of factual basis: s. 62(2)(e)

The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

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

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

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

Reasons relating to this sub-condition

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application, and cannot be the subject of additional information provided separately to the Registrar or his delegate. I am satisfied that this information is found in Schedules F, G and M of the application – see my reasons under s. 190B(5) for details of this information.

Result: **Requirements met**

Activities carried out in application area: s. 62(2)(f)

If native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities

Reasons relating to this sub-condition

The application provides details of activities carried out by the native title claim group at Schedule G.

Result: **Requirements met**

Details of other applications: s. 62(2)(g)

The application contains details of any other applications to the High Court, Federal Court or a recognised State/Territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title;

Reasons relating to this sub-condition

Schedule H states that the applicant is unaware of any overlapping applications. The overlap analysis dated 4 August 2004 prepared by the Tribunal's Geospatial Analysis & Mapping Branch confirms this.

Result: **Requirements met**

Details of s. 29 notices: s. 62(2)(h)

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area

Reasons relating to this sub-condition

Schedule I states: Details of section 29 notices are provided in Attachment I.

Result: **Requirements met**

Combined decision for s. 190C(2)

The application contains all details and other information, and is accompanied by the documents, required by s. 61 & s. 62. As all requirements of s 61 and s. 62 are met it follows that the requirements of s. 190C(2) are met.

Result: Requirements met.

Common claimants in overlapping claims: s. 190C(3)

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 relating to this condition

The application was filed in the Federal Court on 30 June 2004. For the purposes of s. 190C(3)(b), the application is taken to have been "made" on that date.

The applicants state that as far as the applicant is aware no members of the native title claim group for the application (the current application) are included in any other application that overlaps any part of this application's claim area (Schedule O).

An assessment by the Tribunal's Geospatial Analysis & Mapping Branch dated 15 April 2005 reveals that there is one overlapping application over the area covered by this application – Djilbalama People QC01/11 which was entered on the Register on 10 April 2001. However, there is no information before me that indicates there are common members of the respective groups. I am consequently satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the previous application

It follows that the requirements of this section are not infringed.

Result: Requirements met

Application is authorised/certified: s. 190C(4)

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

(a) the application has been certified under paragraph s. 203BE(2) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
Note: s. 190C(5) – Evidence of authorisation:
If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:
(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons relating to this condition

The application has not been certified pursuant to s. 190C(4)(a). Consequently, I need to consider whether there has been compliance with s. 190C(4)(b) – authorisation by the native title claim group.

Authorisation is defined in s. 251B and provides that where there is a process of decision making under traditional law and custom for authorising things of this kind then that process must be complied with (s. 251B(a)). Where there is no such process, the native title claim group may authorise the applicant in accordance with a process of decision making agreed to and adopted by the group (s. 251B(b)). It is clear as a matter of law that the requirement that the applicant be authorised by all the persons in the native title claim group does not necessarily mean that each and every member of the

claim group must authorise the applicant[1]. The Act simply requires all those persons who need to authorise an applicant according to traditional law and custom do so. There may well be individual members of the claim group who for one reason or another are incapable of authorising an applicant - for example because they are of unsound mind, ill, or unable to be located or are disinclined to do so for whatever reason.

The Federal Court has consistently emphasised the fundamental importance the Act places on ensuring that claimant applications are properly authorised.[2]

The applicant must be a member of the native title claim group and be 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.* As the native title claim group as described in the application does not in my opinion encompass all members of the group an issue arises as to whether the application can comply with this provision. I am of the view that it can if the process of decision making is under traditional law and custom for authorising things of this kind and that process is complied with (s. 251B(a)).

The application identifies that a meeting was held at Mount Garnet on 18 June 2004. At this meeting individual applicants are said to have been authorised in a manner consistent with the traditional law and custom of the members of the native title claim group to bring this application on behalf of the claim group. Each person named as the applicant also attests in their affidavit that accompanies the application that they were authorised according to traditional law and custom at this meeting, which was called by North Queensland Land Council ('NQLC'). NQLC is one of the two regional representative bodies for the application area (see Schedule K). NQLC is the applicant's representative. In support of the authorisation condition, Schedule R refers to affidavits of the applicants and an affidavit by a project officer in the employ of NQLC at 'Attachment R1 - R3'of the application. In his affidavit, the officer tells that he attended the meeting on 18 June 2004 called by the NQLC, that has a database of names and addresses of Warrungu People. He says that NQLC sent letters and a written notice to each individual on the data base (para 6). Copies of the document are attached to the affidavit (para. 6). He contacted a number of Warrungu People were personally to confirm meeting arrangements and offer assistance with travel, and accommodation (para 7). The meeting was also advertised in local newspapers and by notices at appropriate Aboriginal communities across the region. The officer says that at the meeting representatives of families asserting Warrungu ancestry discussed and authorised the filing of the native title claimant application (para 8). The officer states that:

- the two persons named as applicant were authorised at this meeting (para 10)
- he understands from the group and believes to be true that such authorisation occurred in a manner consistent with Warrungu traditional law & custom binding Warrungu people as a whole (para 11).

The applicants both deposed as follows:

"5. I 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.

6. I am so authorised on the following basis. I believe the North Queensland Land Council Native Title Representative Body Aboriginal Corporation, as agent of the native title claim group, contacted all the members of the claim group on their database of Warrungu. people & advised of a meeting of all asserting rights & interests in the areas in and around the claim area.

7. I attended this meeting at Mt Garnet on 18 June 2004.

[1] *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J. Refer also O'Loughlin J, *Quall v Risk* [2001] FCA 378 at paras [33-34].

[2] *Ankamuthi People v Queensland* [2002] FCA 897, Drummond J; *Strickland v Native Title Registrar* (1999) 168 ALR 242, French J; *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637; *Quall v Risk* [2001]; FCA 378 *Daniel v State of Western Australia* [2002] FCA 1147, French J.

8. In accordance with our traditional law & custom, members discussed who would be authorised to act as a representative of the native title claim group & to make decisions about the claim, including this application."

9. The terms of the application were accepted and I was authorised to act as one of the applicants to make the claim & to deal with any matters arising in relation to it on behalf of the native title claim group."

I also note that [Applicant 1] says:

"44. Our elders, in discussion with other Warrungu people, make important decisions, which are final & bind us as a whole.

45. Elders & heads of families discuss issue amongst themselves & their relatives and then reach a consensus after considering & taking into account the views of others."

Similarly [Applicant 2] says:

"38. Important decisions are made by our elders in discussion with other Warrungu people and such decisions are final & bind the group as a whole.

39. Elders & heads of families discuss the issue amongst themselves & their relatives and then reach a consensus among themselves after considering & taking into account the views of others."

The information above leads me to find that this native title claim group has authorised the applicant pursuant to a traditional decision-making process that must be complied with when making decisions of this kind (see s. 251B(a)). The information before me shows that Warrungu People's traditional law and custom requires that Warrungu Elders and their families make this decision and that the applicant was authorised in accordance with this process. I am not provided with any information that would suggest that the Warrungu People did not follow their traditional law and custom when authorising the two persons named as applicant.

For these reasons I find that the condition in s. 190C(4)(b) has been met. I am satisfied that the application contains the statements required by s. 190C(5).

Result: Requirements met.

Merits Conditions: Section 190B

Identification of area subject to native title: s. 190B(2)

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 or waters.

Reasons relating to this condition

External boundaries of the area covered by the application

The Tribunal's Geospatial Analysis & Mapping Branch's geospatial assessment (4 August 2004 and 15 April 2005) provides an analysis of the description and map and concludes that the application area has been described with reasonable certainty. It is based on a copy of the description (Schedule B) as

filed in the Federal Court on 30 June 2004 and map (Schedule C) as filed in the Federal Court on 28 July 2004 for native title determination application Q111/04 – Warrungu People #2 (QC04/8).

Schedule B refers to the external boundary at Attachment B and to the map at Attachment C. Schedule B then defines general exclusions.

Attachment B describes the external boundary referencing:

- Topographic features;
- Land parcels identified by lot on plan numbers;
- Abutting native title determination application QC99/37; and
- Geographic coordinates referenced to the Australian Geocentric Datum 94 (GDA94).

Source and currency notes are provided.

Schedule C refers to Attachment C.
The map at Attachment C (a replacement for an earlier map) is a monochrome A3 copy of a map titled "Native Title Determination Application: Warrungu", produced by Geospatial, NNTT on 17/6/2004 including:

- The application area depicted by a bold outline and stippling;
- Reference cadastre and topographic features;
- scale bar, north point, coordinate grid, locality map, legend, source and datum notes.

There is one minor typographic error on page 2, Line 31 of Attachment B:
"*…Longitude 145.492482º East; then generally easterly along the southern banks…"* should read *Longitude 145.492482º East; then generally westerly along the southern banks…"*
It would be opportune to correct this error if the application were to be amended in future.

Notwithstanding the above I accept that the description and map are consistent and locate the application area with reasonable certainty.

I note that an issue of inconsistency between map and description, noted under an earlier assessment (GeoTrack 2004/1477), have been addressed by the filing of the replacement map on 28 July 2004.

Schedule B states:

> "The area covered by the application comprises all that land within the external boundary described in Attachment B, as set out in the map at Attachment C, but **excluding** any area covered by a Crown to Crown freehold grant, or any grant or vesting of:
>
> (a) a freehold estate
> (b) a residential lease
> (c) a scheduled interest
> (d) a community purpose lease
> (e) exclusive agricultural lease or an exclusive pastoral lease
> (f) a commercial lease that is neither an agricultural lease nor a pastoral lease
> (g) a lease dissected from a mining lease & referred to in s23B(2)(c)(vii), or
> (h) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters,
>
> validly granted or vested on or before 23 December 1996, and any area
>
> (i) covered by the valid construction or establishment of any public work, where such construction or establishment was commenced on or before 23 December 1996
> (j) which has been vested in any person by or under State of Queensland legislation where a right of exclusive possession is expressly or impliedly conferred on the person by or under the legislation, or
> (k) where the native title rights & interests claimed have otherwise been validly extinguished

provided that, where the acts specified in (a) - (k) fall within the provisions of s.47, s.47A, s.47B, s.23B(9), s.23B(9A), s.23B(9B), s.23B(9C) or s.23B(10), then the area covered by the act is not excluded from this application, and

Exclusive possession is not claimed over areas subject to valid previous non-exclusive possession acts of the Commonwealth or State as set out in Division 2B of Part 2 of the Act."

For these reasons, I am satisfied that the information contained in the application describes the external boundaries of the area covered by the application with reasonable certainty. It follows that I am also satisfied that the description and map amount to information that enables the boundaries of the area covered by the application to be identified (required by s. 62(2)(a)(i)) and that the application contains a map showing the area covered by the application (required by s. 62(2)(b)).

I am of the view that this stated exclusion by class amounts to information that enables areas not covered by the application to be identified with reasonable certainty. In some cases, research of tenure data held by the State of Queensland may be required, but nevertheless it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

For these reasons, I am satisfied that the description in the application of areas not covered by the application complies with s. 190B(2) and s. 62(2)(a)(ii).

To conclude, I am satisfied that the information and the maps required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters. In my opinion the requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: **Requirements met**

Identification of the native title claim group: s. 190B(3)

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 relating to this condition
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 and as a result the requirements of s.190B(3)(a) of the Act are not met. Alternatively, s. 190B (3)(b) requires me 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 native title claim group is described in Schedule A as set out under s. 61(1) above.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said, when considering a claim group description that identified members according to a number of rules, such as descent from named people or unions between named people:

> *"[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."* [67]

I note also the comments by Mansfield J in *Northern Territory v Doepel* [2003] FCA 1384 that where an application clearly falls, as this one does, within s. 190B(3)(b), the focus of the Registrar is "whether the application enables the reliable identification of persons in the native title claim group – at [51]. Mansfield J added:

> "Section 190B . . . has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4)." [16]
>
> "Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group." [37]

I am of the view 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 not all of the descendants are 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.

I am of the view that the description of the native title claim group is adequate for the purposes of s.190B(3)(b). Whilst this may involve some investigation, enquiry and consultation as to who comprises each family, I am of the view that it should be possible to objectively ascertain who the members are. It should thus be possible to ascertain whether any particular person is in the group. In my view the description is adequate for this purpose.

For these reasons I find that the requirements of this section are met.

Result: Requirements met

Native title rights and interests are readily identifiable: s. 190B(4)

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

Reasons relating to this condition

Native title rights and interests claimed.

Schedule E describes the claimed native title rights and interests as:

1 *In relation to land where there has been no prior extinguishment of native title or where s238 (the non-extinguishment principle) applies, the native title rights & interests claimed are the right to possession, occupation, use & enjoyment of the claim area as against the whole world, pursuant to the traditional law & custom of the claim group, but subject to the valid laws of the Commonwealth of Australia & the State of Queensland, and*

2 *With respect to all remaining tenure within the claim area the native title rights & interests claimed are not to the exclusion of all others, and are the rights to have access to & use the claim area & its cultural resources, namely to:*

1. *maintain and use the claim area*
2. *conserve the cultural resources of the claim area*

3. *protect the claim area and its cultural resources for the benefit of native title holders*
4. *care for the claim area for the benefit of the native title holders*
5. *use the claim area and the cultural resources of the claim area for social, cultural, economic, religious, spiritual, customary & traditional purposes, & more particularly to*
6. *reside, camp on & travel across the land*
7. *use and dispose of cultural resources*
8. *exercise & carry out economic life on the claim area, including the creation, growing, production, husbanding, harvesting & exchange of natural resources and that which is produced by the exercise of the native title rights & interests*
9. *discharge cultural, spiritual, traditional & customary rights, duties, obligations & responsibilities on, in relation to and concerning the claim area and its welfare,*
10. *preserve sites of significance to the native title holders & other Aboriginal people on the claim area*
11. *conduct secular, ritual and cultural activities on the claim area*
12. *conduct burials on the claim area*
13. *maintain the cosmological relationship between beliefs, practices & institutions through ceremony and proper & appropriate custodianship of the claim area and special & sacred sites, to ensure the continued vitality of culture, and the well being of the native title holders*
14. *inherit or dispose of native title rights & interests in relation to the claim area in accordance with custom & tradition*
15. *resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area,*
16. *determine who are the native title holders in relation to the claim area,*

Provided that the native title rights & interests for both exclusive and non exclusive areas are both subject to the

- *a valid laws of the State of Queensland & the Commonwealth of Australia, and*
- *b rights (past or present) conferred upon persons pursuant to the valid laws of the Commonwealth & the laws of the State of Queensland, and*

The asserted native title rights & interests for both exclusive and non exclusive areas

- *a do not include a claim to ownership of any minerals, petroleum or gas wholly owned by the Crown in a manner which is inconsistent with continuing native title rights & interests residing in those substances*
- *b are not exclusive rights or interests if they relate to waters in an offshore place, and will not apply if they have been extinguished in accordance with valid State & Commonwealth laws*

To avoid doubt, references to cultural resources include natural & traditional resources

I also note the contents of Schedules P and Q. Also the last paragraph of Schedule B states that:

> *Exclusive possession is not claimed over any areas which are subject to valid non-exclusive possession acts done by the Commonwealth or State as set out in Division 2B of Part 2 of the Act.*

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.

"Readily identified" indicates to me that the legislative intent is to screen out applications that describe native title rights and interests in a manner which is vague, unclear or otherwise do not make sense.

Furthermore, the phrase *'native title rights and interests'* in s. 190B(4) has a statutory meaning under s. 223 of the Act. *rights* Some rights and interests claimed in applications have been found by the Courts to not be a *native title and interests*. They cannot be readily identified under s. 190B(4).

Section 223(1) provides:

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

Rights and interests which the Courts have found to fall outside the scope of s.223 include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[3] rights to minerals and petroleum under relevant Queensland legislation,[4] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[5]

In light of the statements made in Schedule Q[6] it seems clear that the applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown. I am satisfied that insofar as there is a claim to "natural resources" that does not include a claim to minerals, petroleum or gas which are not claimable under the relevant Queensland legislation. I direct that Schedule Q be included on the Register.

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 lands or waters and is therefore not a right 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… the recognition of this right would extent beyond denial of right of access to land held under native title… it is here that the second and fatal difficulty appears…."*: at [59].

In the current application the applicant claims the right to *"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*

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[3] *Western Australia v Ward* (2002) 191 ALR 1, para [59] http://www.austlii.edu.au/au/cases/cth/high_ct/2002/28.html

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

[5] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145. http://www.austlii.edu.au/au/cases/cth/high_ct/2002/28.html

[6] see my reasons under s. 190B9(a) further in relation to this.

the native title holders" [2. 13]. It is my view that this native title right and interest can be distinguished from the right sought to be recognised in *Ward*. The right does not seek to restrain or control the dispersion of cultural knowledge; it does not embody the concepts of protection or prevention of the misuse of cultural knowledge disallowed in *Ward*. In addition, the right refers specifically to practices on land in relation to special and sacred sites; these activities clearly connect the group to their land and waters as required by s. 223, and are linked to traditional laws and customs by use of the word 'through' in the phrase, '[m]aintain… beliefs, practice and institutions *through* ceremony and proper and appropriate custodianship'. As a consequence, I am satisfied that this right is readily identifiable for the purposes of s. 190B(4).

The applicant also claims the right to *resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area [2 15]*.
In my opinion this is a right in respect of the relationship between people and not a right in relation to land or waters. As such it is not readily identifiable as a native title right and interest. (See *Daniel v State of Western Australia* [2003] FCA 666 at [303]).

The applicant also claims the right *to determine who are the native title holders in relation to the claim area [2 16],* In my view this is not a right that gives rise to a connection to land or waters and hence it is not readily identifiable. 'Additionally in the light of the provisions in Pt 2 Div 6 of the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 ... this is a matter to be determined by application of that law and is not therefore to be approached as a native title right and interest.' - *Daniel v State of Western Australia* at [303].
As I find that most of the claimed native title rights and interests are readily identifiable the requirements of this section are met.

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

Result: Requirements met

Factual basis for claimed native title: s. 190B(5)

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 relating to this condition

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.

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.[7]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 558 (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 their native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

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

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that there is a sufficient factual basis to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided to support the following assertions is sufficient to support the assertions:

- that the native title claim group have, and their predecessors had, an association with the area claimed;
- that the traditional laws and customs, acknowledged and observed by the native title group exist, and
- that the native title claim group continue to hold native title in accordance with those traditional laws and customs.

I am satisfied that a general description of the factual basis on which it asserted that native title rights and interests exist, and for the three criteria identified at s. 190B(5)(a)-(c), is provided in Schedules F, G and M of the application and the applicants' affidavits.

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

In Schedule F it is stated that members of the claim group continue to:

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

- have a close association, including a spiritual connection, with the claim area according to their traditional law and custom; (para (c) (i))
- pass on to their descendants traditional laws and customs, stories and beliefs concerning their traditional country including the claim area; (para (c) (ii))
- use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials; (para (c) (iii))
- 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; (para (c) (iv))
- exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country. (para (c) (v))

In Schedule G it is stated that members of the claim group continue to exercise traditional laws and customs which has been passed down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country, hunting and fishing in the claim area, camping and occupying country, visitation to and protection and preservation of special sites and story places and participation process and land use decision making with third parties.

Schedule M states that the members reside in the vicinity of the claim area, many members of the native title claim group continue to, amongst other things, visit the claim area, exercise their native title rights by caring for their country, camping, gathering, hunting, fishing and passing on their traditional knowledge, law and custom

The native title claim group's traditional law and custom provide that within the group there may be certain individuals, families or sub-groups which will have sometimes stronger and sometimes lesser rights and responsibilities in relation to particular parts of the claim area; the nature and incidents of such differentiation is determined in accordance with Warrungu traditional law and custom.

[Applicant 1] and [Applicant 2] depose in their respective affidavits to the extent of Warrungu country (within which the claim area is clearly located, as shown on the map in Attachment C). They also tell of their Warrungu identity and the association that they, other Warrungu people and their Warrungu predecessors have with their Warrungu country. Such association includes being born and growing up on Warrungu country, living and working on country, camping, fishing, using its resources and being given the knowledge of language and identifying particular places on country by their elders.

- [Applicant 2] says in his affidavit (25 June 2004) that he identifies as a Warrungu man and is recognised as a senior Warrungu man (paras 11 & 13), and he was raised on Warrungu country, lived and worked most of his life in the area (paras 10 & 12). His family mixed socially with other Warrungu families who taught him language, stories, history, law and custom, how to survive off the land by fishing, hunting, bush tucker and names of plants and animals (paras 14-32). He has maintained the knowledge of and connection with the claim as a means of fulfilling his obligations as a Warrungu man by passing on his knowledge for the next generation (paras 33 - 41).
- [Applicant 1] says in her affidavit (25 June 2004) that she has a connection to Warrungu country through being born, living and working on or near Warrungu country (paras 10 - 12). She is recognised in the community as a senior Warrungu woman who takes her identify from her mother and has been given a Warrungu language name and has certain rights through law and custom (paras 14 - 17). She has been told about special places, visits, camps and fishes on country (paras 18 - 23). Passes on traditional law and custom (paras 24 - 41).

Having regard to the information contained in the application and the affidavits referred to above, I am satisfied that there is sufficient factual information to support an assertion that the native title claim group having, and the predecessors of those persons having had, an association with the area subject to 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 subsection requires me to be satisfied that the factual basis on which it is asserted that there exist traditional laws and customs; that those laws and customs are respectively acknowledged and observed by the native title claim group.

At Schedule F 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.* (para (c) (i))
>
> *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.* (para (c) (ii))
>
> *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*. (para (c) (iii))
>
> *Members of the claim group 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. (para (c) (iv))*
>
> *Members of the claim group continue to exercise a body of traditional laws and customs which has been passes down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country."* (para (c) (v))

Schedule G of the application states that members of the claim group continue to exercise a body of traditional laws and customs that has been passed down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country, hunting and fishing in the claim area, camping and occupying country, visitation to and protection and preservation of special sites and story places and participation process and land use decision making with third parties.

The applicants provide factual information in support of this assertion in their affidavits to which I have referred above. 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 their Warrungu heritage and consequent traditional rights in Warrungu country from their forebears;
- bestowing of language names according to special interests held by particular group members or families to particular places on country;
- customary marriage rules;
- knowledge of bush tucker and special places in Warrungu country;
- stories relating to special places in Warrungu country;
- camping and fishing on country;
- prohibitions on visiting certain places;
- correct behaviour when visiting another family's area;
- maintenance of Warrungu language;
- responsibilities for caring for Warrungu country.

See:

- Affidavit of [Applicant 2], (paras 11- 41)

- Affidavit of [Applicant 1] (paras 11- 45)

I am of the view that the information outlined above provides a sufficient factual basis to support the assertion that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

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

I refer to the information set out above.

A factual basis for this assertion is provided in the affidavits from [Applicant 1] and [Applicant 2], the two group members identified above. Each deponent describes their lives as a Warrungu person and member of the native title claim group. They tell of the observance of Warrungu traditional laws and customs by which they are connected to their country by continuing to have a close association, including a spiritual connection with the claim area according to their traditional law and custom. They regularly visit their country by camping and fishing on country, knowing its special places and stories, engaging in activities so as to honour its stories and laws and to protect and care for their country. Each deponent tells of the acquisition of knowledge about Warrungu traditional laws and customs from their predecessors and the observance throughout their lives of those laws and customs. They also tell of the passing of these laws and customs to their youngsters.

For these reasons I am satisfied that there is a sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

I am satisfied that that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion.

Result: Requirements met

Native title rights and interests claimed established prima facie: s. 190B(6)

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 relating to this condition

Under s. 190B(6) I must consider whether, *prima facie*, at least some of the claimed native title rights and interests can be established. I take the view that this section only requires that one right or interest is established.

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]."

This test was recently considered and approved in *Northern Territory v Doepel* [2003] FCA 1384, see at paras 134 -135. Briefly, the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate.

I have adopted the ordinary meaning referred to by their Honours in *North Ganalanja* in considering this application, and in deciding what native title rights and interests are *prima facie* established.

The claimed native title rights and interests are described in Schedule E of the application. I have outlined these rights and interests under s. 190C(4) above. The rights and interests claimed are qualified by statements in Schedule E – see my reasons under s. 190B(4) for this description.

It is said that the native title rights and interests claimed at paragraph 2 are <u>not</u> to the exclusion of all others and are the right to have access to and use of the claim area and its natural resources. It is said that a number of particular rights derive from the right to have access to and use the claim area. They are identified in paragraphs A through to E. They are said to be *included* in the right *to have access to and use the claim area.*

Under s 190B(4) above I concluded that some of the rights claimed in paragraph 2. of Schedule E were not readily identifiable. I refer to my reasons there. It follows that they cannot be readily identifiable.

I now propose addressing the native title rights and interests claimed under para 2 of Schedule E.

It appears from the express statements at the commencement of paragraph 2 of Schedule E that this is not a claim to the exclusion of all others. Hence I am satisfied that the claimed rights to "conserve" and "protect" the area or its natural resources do not indicate that what is sought is a right to control access to the area or its resources, rather this is a claim for rights to use and have access to the area and its cultural resources. The qualifications stated at par 3 and 4 add further weight to this view (i.e. the rights are subject to rights conferred upon others pursuant to Commonwealth and State laws).

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: "without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use made of the land, are not capable of registration where a claim to exclusive possession cannot be maintained. However, for the reasons I have outlined in the preceding paragraph I am satisfied that this is not a "non-exclusive" claim to possession or to non-exclusive possession, occupation, use and enjoyment. Further the express language of Schedule E does not indicate any claim to rights which seek to control access to or use of the subject area and its resources.

I shall turn firstly to the particular rights claimed over areas where a claim to exclusive possession, occupation, use, and enjoyment to **cannot** be recognised as I think that my findings in relation to these particular rights will later be useful in considering the claimed exclusive right of possession occupation use and enjoyment in para. 1.

In considering this provision of the Act I have had regard to information in the application and the affidavits sworn by the applicants, described in these reasons under s. 190B(5).

Paragraph 2. says:
2. With respect to all the remaining tenure within the claim area the native title rights & interests claimed are not to the exclusion of all others, and are the rights to have access to and use the claim area & its cultural resources namely to:

1. maintain and use the claim area;

Established.

There is evidence describing how members of the group use and maintain the area in accordance with their traditional law and custom. See Schedules F, G, M and affidavit of [Applicant 2] at paras. 10, 12, 13, 16 - 22, 24 - 27, 32 - 35, and affidavit of [Applicant 1] at paras. 10, 11, 12, 19 - 21, 23, 26 - 28, 30, 35, 39, 40 and 41.

2. conserve the cultural resources of the claim area;
3. protect the claim area and its cultural resources for the benefit of native title holders;
4. care for the claim area for the benefit of the native title holders.

All established.

There is information describing the involvement of members of the group in processes to see the protection of their country and its resources. See:

- Schedule F para (iv);
- Schedule G – visiting protecting and preserving special sites and story places and participating in consultation processes and land use decision making with third parties;
- [Applicant 2] deposes that the Warrungu people are responsible for protecting and managing sites, and caring for and respecting the country (para 24);
- [Applicant 1] deposes that the Warrungu people have the responsibility to protect and manage sites and it is part of their law to care for and respect the country (para 30), and under law she has the responsibility to protect Warrungu country and to preserve it for the future generations (para 39).

5. 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:

Established
There is material that demonstrates that the claim group use the claim area and its natural resources for camping, visiting, knowing and observing its stories and laws relating to special places, fishing, collecting bush-tucker and the passing of traditional knowledge between the generations. See

- [Applicant 2] 's affidavit - see paras 15 – 18, 20 – 22, 24 – 41;
- [Applicant 1]'s affidavit – see paras 15 – 19, 21 – 45

The words "*and more particularly to"* may have been inserted inadvertently. This seems likely having regard to the whole paragraph. The rights and interest at 6 – 12 that follow may perhaps be seen as being the particularisation referred to in 5. However, I propose considering them separately.

6 reside, camp on and travel across the land;

Established
Schedule G (see under 7. below) refers to the current activities of members of the native title claim group in relation to the land or waters currently including hunting and fishing in the claim area, camping and occupying country.

There is evidence from members of the group in relation to this right and interest:

- [Applicant 2]'s affidavit - see paras 12, 19 – 23;
- [Applicant 1]'s affidavit – see paras 10 – 12, 20 – 23, 26, 29, 30.

7. use and dispose of cultural resources;

Established

Schedule F indicates that the group continues to use the claim area for traditional hunting, fishing and gathering (para iii.).

Schedule G sets out details of activities in relation to the land or waters currently being carried out by the native title claim group as follows:

> "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 forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country, hunting and fishing in the claim area, camping and occupying country, visitation to and protection and preservation of special sites and story places and participation process and land use decision making with third parties."

There is evidence that the group uses natural resources, including engaging in camping, visiting country, fishing, foraging for bush tucker. See

- [Applicant 2]'s affidavit – paras. 19 - 22
- [Applicant 1]'s affidavit - paras 19 - 26

8. exercise & carry out economic life on the claim area, including the creation, growing, production, husbanding, harvesting & exchange of natural resources and that which is produced by the exercise of the native title rights & interests

Not established

Despite information in the material relating to personal use by members of the claim group and their families of traditional foods, there is insufficient information in the application to establish *prima facie* the existence of a traditional economic system relating to production, husbanding, harvesting and exchange of natural resources.

I refer the applicant to s. 190(3A) of the Act that is applicable when an application is accepted for registration. Briefly, that section permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested and accepted for registration. In brief, provided that additional information satisfies the Registrar (or his delegate) that, had it been before him at the time of testing, the right would have been accepted for registration, then, subject to meeting the other conditions of the test, the right in question will be entered in the Register of Native Title Claims.

9. discharge cultural, spiritual, traditional & customary rights, duties, obligations & responsibilities on, in relation to and concerning the claim area and its welfare

Established

I refer to the information set out in respect of the rights and interests claimed at 10 – 12. Based on the information outlined there I am satisfied that this right claimed here can be prima facie established.

10. preserve sites of significance to the native title holders and other Aboriginal people on the claim area;

Established
Schedule G says that the native title claim group, amongst other activities, currently engage in "visitation to and protection and preservation of special sites and story places".

There is evidence that the claim group observe traditional law and custom relating to special sites on country and the related stories, and evidence of preservation of these sites according to Warrungu law and custom. See:

- Schedule G;

- affidavit sworn by [Applicant 2] - paras 16 & 17, 24 - 29, 33 – 39, and
- affidavit sworn by [Applicant 1] - paras 16, - 19, 24 -28, 30 - 36, 39, 40 – 45.

11. conduct secular, ritual and cultural activities on the claim area;

Established

Evidence to support the prima facie establishment of this right is provided by the applicants in their affidavits. They describe their life-long connection with their country and conduct of activities under Warrungu law and custom. For instance [Applicant 1] says in her affidavit

20. I have visited my country, including the claim area, from time to time throughout my life.

21. My family lived on, visited, camped and fished on our Warrungu country, including areas in & around the claim area.

22. As a child &.younger woman I used to walk long distances across Warrungu country, e.g. the roughly 12 km from Glen Dhu to Kinnarra to visit my sisters.

23, I am not as fit as I used to be and it is harder for me to travel but I take the opportunity whenever it is available to me to visit important places to my family in Warrungu country.

24. My children have been initiated according to our traditional custorn & law.

25. I've taught my children and other Warrungu children about their traditional country and pass on law and custom I have be taught by the old people.

26. I take them bushwalking and tell them all the sorts of things that they need to know in the bush. I tell them the correct behaviour at certain places

27. My family have taken up their rights and responsibilities under Warrungu law & custom, learning and seeking to have our rights and interests recognised through our native title application.

See also paragraph 33 – 37

Similarly [Applicant 2] deposes:

23. When I go to places on country, I feel at home, that I belong there. My family & I feel part of that land.

24. The special places are a link with our ancestors. We have the responsibility to protect and manage these sites. It's part of our law to care for & respect the country.

25. There are many important places on Warrunau country, including story places & burial sites, like my [Member 2] grave. Many are within or close to the area under our native title claim.

26. Warrungu country has spirits still living in it, spirits of our old people. Some places are involved with our sacred stories.

27. Our law & custom says we can't go onto some sacred ground, and only older people from that area should visit those places.

28. Warrungu tradition says that these spirits make themselves known to people, by singing Out, showing themselves or by giving signs to the living. Strangers are not allowed to go unless invited. For many places only rnen are permitted to be there.

29. The land is home for spirits of departed relatives & ancestors - if you die far away your spirit travels back to your traditional country. We teach children to act respectfully in their presence. When I visit sites of significance I am supposed to introduce myself to the spirits.

30. The spirits of our old people are still in Warrangu country. They watch over & chase away from the area people who they don't know.

12. conduct burials on the claim area;

Established
[Applicant 2] refers to there being important places on country including story places and burial sites. He refers to his uncle's grave - see para 22 – 25.

13. 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;

Established

In my reasons for decision under s.190B(4), I said that I was satisfied that this right did not amount to a right 'approaching an incorporeal right akin to a new species of intellectual property' and could be distinguished from the right to cultural knowledge disallowed in *Ward.* Rather, the right appears to relate to the conduct of ceremony on country and proper custodianship of the native title land, activities which clearly connect the native title claim group to their land and waters pursuant to s.223 of the Act.

In Schedule G the applicant provides information relating to people visiting and travelling over their country for the protection and preservation of sacred sites and story places. There is evidence of the transmission of cultural knowledge between generations relating to Warrungu country. The evidence of [Applicant 2] and [Applicant 1] in their affidavits paints a clear picture of lifelong associations with the Warrungu country, including camping, residing and travelling over it and the acquisition of knowledge from their elders about its sites and stories and the use of its resources via fishing and collection of bush tucker. The evidence shows that members of the group continue to access their land and its resources to camp, fish and visit special places. They continue to pass on knowledge of these customs and practices to younger generations. [Applicant 1] says that when she is on or near certain places on country that she feels at home and that she belongs there. [Applicant 1] also says that she and her family have always felt part all that land (para. 29). [Applicant 2] expresses similar sentiments in his affidavit – see para 23 and the paragraphs quoted above.

14. Inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition;

Not established

There is no information that I can find that supports the existence of this is claimed native title right and interest under Warrungu traditional law and custom.

I refer the applicant to s. 190(3A) of the Act – see above.

15. Resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area;

Not established

This right is not readily identifiable and hence cannot be prima facie established.

16. Determine who are the native holders in relation to the claim area;

Not established.

This right is not readily identifiable and hence cannot be prima facie established.

I turn now to consider the following claimed native title right of the exclusive possession, occupation, use and enjoyment:

1. *In relation to land where there has been no prior extinguishment of native title or where s238 (the non-extinguishment principle) applies, the native title rights & interests claimed are the right to possession, occupation, use & enjoyment of the claim area as against the whole world, pursuant to the traditional law & custom of the claim group, but subject to the valid laws of the Commonwealth of Australia & the State of Queensland, and*

Established

I am satisfied that the material I have referred to above provides adequate evidence to support the prima facie establishment of this right.

The evidence of applicants and the material that is in the application *prima facie* establish that members of the group:

- were born on and lived on country in traditional ways;
- know the stories for the places on their country, which have been passed down the generations, and continue to be so passed;
- regard themselves as the owners of the land under traditional laws and customs;
- live on their country;
- hunt, fish and gather in traditional ways;
- visit, walk over their country and observe ritual practices when entering story places or burial places,
- look after the land and are responsible for the land according to traditional laws and customs.

Based on this information, I am satisfied that the claimed native title rights of the exclusive possession, occupation, use and enjoyment to the exclusion of all others is *prima facie* established in respect of areas where exclusive possession can be sustained.

I have found that at least some of the claimed rights and interests can be prima facie established. Consequently I am satisfied that the requirements of this section are met.

Result: Requirements met

Traditional physical connection: s. 190B(7)

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 relating to this condition
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.

Traditional physical connection is not defined in the *Native Title Act*. I interpret this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. The explanatory memorandum to the *Native Title Act* 1993 explains that this "connection must amount to more than a transitory access or intermittent non-native title access" (para 29.19 of the 1997 EM on page 304).

I am satisfied that [Applicant 2] and [Applicant 1] are members of the native title claim group who currently have, and previously have had, a traditional physical connection with the area of this application. [Applicant 1] states that she was born in Herbertson (Herberton). She tells of living on Warrungu country around Herberton, her parents worked and raised her on Glen Dhu Station later moving to nearby townships such as Mt Garnet and Townsville (paras 10, 11, 12). She further deposes that she and her family have always lived on, visited, camped and fished on their traditional country including in the vicinity of the claim area (paras 19 - 21).

Evidence of a similar nature is provided by [Applicant 2] in his affidavit. He states that he has lived and worked on or near Warrungu country virtually all his life (see paras 10, 12) and speaks of his traditional physical connection with the area (see paragraph 19 – 32).

Result: Requirements met

No failure to comply with s. 61A: s. 190B(8)

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

Section 61A contains three sub-conditions. Because s. 190B(8) asks the Registrar to test the application against s. 61A, the decision below considers the application against each of these four sub-conditions. For the reasons that follow I have concluded that there has been compliance with s. 61A.

s. 61A(1)- Native Title Determination
Reasons relating to this sub-condition

There are no determinations of native title over the area of this application.

Result: Requirements met

s. 61A(2)- Previous Exclusive Possession Acts (PEPAs)

Reasons relating to this sub-condition
In Schedule B of the application, areas covered by any previous exclusive possession act, as defined in s.23B of the Act, are excluded from the application area.

Result: **Requirements met**

s. 61A(3) – Previous Non-Exclusive Possession Acts (PNEPAs)

Reasons relating to this sub-condition
In Schedule B, the applicant states that exclusive possession is not claimed over areas subject to valid previous non-exclusive possession acts.

Result: **Requirements met**

No claim to ownership of Crown minerals, gas or petroleum: s. 190B(9)(a)

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 relating to this sub-condition

At Schedule Q of the application, the applicants state that they do not claim ownership of any minerals, petroleum or gas wholly owned by the Crown.

Result: **Requirements met**

No exclusive claim to offshore places: s. 190B(9)(b)

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 relating to this sub-condition

At Schedule P the applicants state that "the application claims no offshore places".

Result: **Requirements met**

Native title not otherwise extinguished: s. 190B(9)(c)

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 relating to this sub-condition

The application and accompanying documents do not disclose, and I am not otherwise aware of, any area where the native title rights and interests have otherwise been extinguished.

Para (k) of Schedule B excludes from the application any area where native title rights and interests have otherwise been extinguished

Result: Requirements met.

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