National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION
-EDITED-

DELEGATE:	Graham Miner

Application Name:	Wangan and Jagalingou Peoples		
Name of Applicant:	Janice Barnes, Jessie Diver, Owen McEvoy, Deree King, Patrick Fisher (the applicants)		
Region:	Central Queensland	NNTT No.:	QC04/6
Date Application Made:	27 May 2004	Federal Court No.:	Q85/04

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).

Graham Miner

5 July 2004
Date of Decision

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

Brief History of the Application

The application was filed in the Federal Court, Brisbane Registry, on 27 May 2004. The application was filed in response to a future act notice issued by the State of Queensland with a notification date of 3 March 2004, in relation to the following exploration permits: EPM 14026, EPM 14071 and EPC 854.

Information considered when making the Decision

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

- The National Native Title Tribunal's registration test files for this application.
- The National Native Title Tribunal's registration test files, personnel files and legal services files for related applications Kangoulou People QC98/25, Kangoulou People #2 QC99/6
- The National Native Title Tribunal Geospatial Database.
- The Register of Native Title Claims.
- Schedule of Native Title Applications.
- The Native Title Register.
- Register of Indigenous Land Use Agreements.

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

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

All references to 'the application' or the 'current application' refer to the application filed on 27 May 2004 unless otherwise specified.

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

On 19 May 2004, Christopher Doepel, 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) (the Act).

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*.

S190B sets out the merit conditions of the registration test.

S190C 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 the merit conditions.

A. Procedural Conditions

Applications contains details set out in ss61 and 62: S190C(2)

S.190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s.190C(2).

Native Title Claim Group: S61(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

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

I must consider whether the application sets out the native title claim group in the terms required by s.61. That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a sub-group of the native title group, then the requirements of s.190C(2) would not be met and the claim cannot be accepted for registration (*Northern Territory of Australia v Doepel [2003] FCA 1384 at para 36).*

This consideration does not involve me going beyond the application, 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 (*Northern Territory of Australia v Doepel [2003] FCA 1384 at paras 16-17, 37)*.

The application before me is made on behalf of a group of people described in the application as the Wangan and Jagalingou People. Schedule A of the application contains the following description of the native title claim group:

> '*The native title claim group is made up of families whose members identify as Wangan and Jagalingou, in accordance with traditional laws acknowledged and traditional customs observed by them. Wangan and Jagalingou are tribal names for groups traditionally associated with territory centred around the town of Clermont in Central Queensland. Membership of the native title group must be in accordance with traditional laws acknowledged and traditional customs observed by them and is based on the principle of cognatic descent (ie descent traced through either mother or father), including by adoption. Cases of adoption do not significantly alter the status of the claimants' descent rights neither do they compromise the identification of the group into which the child is adopted.*
>
> *Claimants who identify with the name Wangan are members of the following descent groups:*
> *Descendants of* ***[Ancestor 1- name deleted]*** *of Clermont.*
> *Descendants of* ***[Ancestor 2 – name deleted]*** *of Logan Downs.*

*Descendants of **[Ancestor 3 – name deleted]** of Clermont.*
*Descendants of **[Ancestor 4 – name deleted]** of Logan Downs.*
*Descendants of **[Ancestor 5 – name deleted]***
*Descendants of **[Ancestor 6 – name deleted]** of Clermont.*

Claimants who identify with Jagalingou are members of the following descent groups:
*Descendants of **[Ancestor 7 – name deleted]***
*Descendants of **[Ancestor 8 – name deleted]** of Alpha.*

I have taken descendants to mean biological descendants. I note that there is mention of adoption. Further details of the traditional laws and customs relating to the adoption of children into the native title claim group are provided at Schedule F (page 13) of the application. Some of the language is not clearly expressed (for example see the fifth para under the heading ADOPTION). Nevertheless, I accept that the information sufficiently describes the process of adoption.

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

In the recent decision of Mansfield J in *Northern Territory of Australia v Doepel [2003] FCA 1384* His Honour concludes that for the purposes of the requirements of s.190C(2), the Registrar, (and hence his delegate) may not go beyond the information in the application itself [see in particular paras 37 - 39]. I have consequently confined my considerations to the information contained in the application and accompanying documents.

The description at Schedule A indicates that this group consists of a people who identify with two different sets of descent groups. Mansfield J in *Northern Territory of Australia v Doepel* 203 ALR 385 fairly recently considered groups of a similar kind. In that case, the Northern Territory Government challenged a registration decision made by the Registrar. One of the grounds was that the Registrar should not have found compliance with s. 61(1) because of the appearance of what was described as 'a composite claim group' - at [32]. Because of its composite character it was asserted that the claim group did not represent a single identifiable community living under its laws and customs and thus could not constitute a native title claim group as defined in s. 61—at [34]. In support of its argument the Territory referred to material not constituting part of the application supplied directly to the Registrar by the applicants.

His Honour rejected the Territory's argument on the following grounds:

- the Registrar is not entitled to have regard to material other than the application in applying the condition in s.190C(2) - at [37] and [39]; and

- s.190C(2) does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group—at [37].

However, his Honour earlier in *Doepel* said that if the description of the native title claim group (in the application) were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and the Registrar should not accept the claim for registration - at [36].

In Schedule F (at p. 14 of the application) the members of the native title claim group state that they view themselves as a distinct community of native title holders who can trace connection back to those indigenous groups in possession and occupation of the area of the claim at the time of first settlement by Europeans.

In relation to the identification of the native title claim group, the certificate by Gurang Land Council Aboriginal Corporation (GLC) provided at Schedule R of the application states:

- *The identification of the native title claim group has involved GLC staff and consultant anthropologists who have undertaken research in the region.*
- *The identification of the native title claim group has involved consideration of the historical research previously undertaken in the region and by a consultant anthropologist who has developed detailed knowledge of the Wangan and Jagalingou people.*
- *The description of the native title claim group has been the subject of consideration of the Wangan and Jagalingou people, and received their approval in accordance with traditional law and custom, in the consultations referred to above relating to the authorisation process.*

The statement by GLC indicates that the description of the native title claim group is based on sound anthropological and historical research and has been approved by the Wangan and Jagalingou people. In my view there is nothing in the application to indicate 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. Further there is no information in the application to indicate that the native title claim group has been assembled for administrative convenience, and is not a group as required by s.61(1).

See my reasons under s.190C(4) in relation to whether the application has been certified or 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

Name and address of service for applicants: S61(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 names of the persons who are the applicant are provided at Part A of the application. The details of the address for service appear at Part B of the application.

Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: S61(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 name the persons or 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

Attachment A of the application describes the native title claim group. For the reasons which led to my conclusion (below) that the requirements of 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

Application is in prescribed form: S61(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)

The application is substantially in the form prescribed by Regulation 5(1)(a) of the *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. 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 the applicants. I am satisfied that the application has complied with s.61(5)(d) in relation to the requirement for affidavits pursuant to s.62(1)(a). No s.62 affidavits sworn by the applicants were filed in the Federal Court to accompany the original application on 27 May 2004. Affidavits sworn by three of the applicants, **[Applicant 1 – name deleted], [Applicant 2 – name deleted]** and **[Applicant 3 – name deleted]**, were subsequently filed in, and accepted by, the Federal Court on 2 June 2004. The outstanding s.62 affidavits sworn by **[Applicant 4 – name deleted]** and **[Applicant 5 – name deleted]** were filed in, and accepted by, the Federal Court on 1 July 2004 and 2 July 2004 respectively.

See also my reasons in respect of s62(1)(a) below.

s.62 (1)(b)

There has been compliance with the requirement to include a map pursuant to s.62(1)(b).

See my reasons for decision under s.62(1)(a) and s.62(2)(b) below.

Result: Requirements met

<u>Details required in section 62(1)</u>

Application is accompanied by affidavits in prescribed form: S62(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

Affidavits sworn by each of the persons named as the applicant accompany the application. Refer to my reasons under s. 61(5)(d) above. The affidavits are signed, dated and competently witnessed. The affidavits are virtually identical in content and address the matters required by s.62(2)(1)(a) (ii) to (v).

The affidavits have apparently inadvertently omitted the statement required by s.62(2)(1)(a) (i) that the applicant believes that the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application. However I note that the applicants at para 3 of their affidavits all swear to the truth of the statements in the application. The application contains statements that indicate that the native title claim group does not claim rights and interest that have been extinguished. At Schedule B it is said: "(a) All areas where native title has otherwise been extinguished are excluded from the application. A similar statement appear at para (e) of Schedule E relating to what I see as the intention to exclude " any area in relation to which native title rights and interest have been otherwise wholly extinguished". At Schedule E (attached) it is said at f) that the native title rights and interests claimed: "Do not include rights and interest that are subject to extinguishment by the application of the common law". By reason of the above I am satisfied that is the intention of the native title claim group to exclude any claim in respect of native title rights and interests that may have been extinguished and to only claim those that have not been extinguished in relation to any part of the area covered by the application.

I note that in *Commonwealth v Yarmirr* (2001) 184 ALR 113 at [124] to [125], McHugh J said that:

> 'It is also necessary to keep in mind that, in the second reading speech on the Native Title Bill 1993, the then Prime Minister, Mr. Keating, saw *Mabo (No 2)* as giving Australians the opportunity to rectify the consequences of past injustices. The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the "national legacy of unutterable shame" that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.
>
> [After identifying the purpose of the Act,] the duty of the courts would be to ensure that that purpose was achieved. That would be so even if it meant giving a strained construction to or reading words into the Act. In an extrajudicial speech, Lord Diplock once said that "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed."

In my view those remarks are also applicable in respect of an administrative decision, perhaps even more so. The omission is clearly capable of rectification by filing revised affidavits. Bearing in mind the beneficial nature of the Act and the applicant's verification of the matters in the application, I am of the view that the application should not fail registration as a result of the omission from the affidavits so that the native title claim group are denied such rights as may result from the registration of their claim. The

applicants' legal representative should obtain fresh s.62 affidavits from each of the five applicants containing all the statements required by s.62(1) of the Act and file them in the Federal Court in order to rectify the omission of the statement under s.62(2)(a)(i).

Result: **Requirements met**

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.

Comment on details provided:
Schedule M states that members of the claimant group can demonstrate an ongoing physical connection to the area, through continuity of residence and through ongoing episodes of visitation and cultural practice.

The applicants also provide at Schedule M statements from two of the applicants, **[Applicant 4]** and **[Applicant 1]**, setting out their personal connection to the claim area. While these are not sworn statements they are verified by the evidentiary affidavits sworn by **[Applicant 4]** and **[Applicant 1]**. The statements provide evidence supporting the association of the Wangan and Jagalingou people with the area claimed. **[Applicant 4]** states that she was born and raised in the Clermont area, while **[Applicant 1]** states that her father was removed from the Clermont area and that she continues to return to her family's country. I note that **[Applicant 4]** is a Jagalingou person, and **[Applicant 1]** is a Wangan person.

Examples of activities through which the Wangan and Jagalingou have maintained traditional physical connection are provided at Schedule G of the application, including:

- collection and use of natural resources;
- regular access to, camping on and residing on the land;
- continual self regulation and demarcation of localised family and subgroup interests within the claim area under the direction of senior people in authority;
- speaking for, on behalf of and authoritatively about the claim area.
- engaging in economic life, including collection of resources and the manufacture, sale and trade of artefacts.

- instructing younger generations of the claim group on country, about the traditional laws and customs of the Wangan and Jagalingou pertaining to the land.

Result: Provided

Information about the boundaries of the application area: S62(2)(a)

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 contained in the application are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

62(2)(a)(ii) Information, 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 external boundaries of the claim area which are not covered by the application to be identified.

Result: Requirements met

Map of the application area: S62(2)(b)

The application contains 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

Details and results of searches: S62(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

The application states at Schedule D that no searches have been carried out.

Result: Requirements met

Description of native title rights and interests: S62(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

A description of the native title rights and interests claimed is found at Attachment E of the application. The description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law. See my reasons under s.190B(4) for details of this description.

Result: Requirements met

Description of factual basis: S62(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.

A general description of the factual basis on which it is asserted that the native title claimed exists and for the particular assertions in s.62(2)(e) is found at Attachments F, G and Schedule M of the application and the affidavits of **[Applicant 4]**and **[Applicant 1]**. See my reasons under s.190B(5) for details of this information.

Result: Requirements met

Activities carried out in application area: S62(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 the activities which the native title claim group currently carries out in relation to the application area at Schedule G. Refer to my reasons for decision under s.62(1)(c) above.

Result: Requirements met

Details of other applications: S62(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 of the application states 'none'.

The assessment of the Tribunal's Geospatial Unit dated 15 June 2004 confirms that no applications as per the Register of Native Title Claims or the Schedule of Applications fall within the external boundary of the application as at 15 June 2004.

Result: Requirements met

Details of s29 notices: S62(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

The applicant is only obliged to give details of notices of which the applicant is aware. The applicant identifies three such notices at Schedule I - EPM 14026, EPM 14071 and EPC 854

The assessment by the Tribunal's Geospatial Unit dated 15 June 2004 states that 21 s.29 or equivalent notices, as notified to the Tribunal, fall within the external boundaries of this application as at 15 June 2004. The only current notices are the three listed at Schedule I of the application: EPM 14026, EPM 14071 and EPC 854.

Result: Requirements met

Combined decision for s190C(2)

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

Result: Requirements met

Common claimants in overlapping claims: S190C(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 for the Decision

This application was filed in the Federal Court on 27 May 2004. For the purposes of s.190C(3)(b), the application is taken to have been "made" on that date.

As a first step, Section 190C(3) requires identification of previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A. The applicants state at Schedule H of the application that they are not aware of any other applications. The assessment completed by the Tribunal's Geospatial Unit on 15 June 2004 confirms that there are no other applications that fall within the external boundary of the current application.

It is therefore not necessary for me to further consider the conditions of s.190C(3).

Result: Requirements met

Application is certified or authorised: s190C(4)

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

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

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

Note: s.190C(5) – Evidence of authorisation:
*If the application has **not** been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:*

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

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

Reasons for the Decision

Under this section, I am only required to be satisfied that one of the two conditions in s.190C(4) is met. This application is certified by Gurang Land Council Aboriginal Corporation (GLC) pursuant to s.203BE of the Act. A signed and dated certificate has been provided, dated 26 May 2004. I have, therefore, limited my consideration to compliance with s.190C(4)(a) – certification by the relevant native title representative body. The requirements of s.190C(4)(b) in relation to authorisation are not applicable.

A search of the Tribunal's Geospatial database reveals that Gurang Land Council Aboriginal Corporation is the sole representative body for the region covered by the application. The relevant provisions of Part 11 of the Act for the purposes of this condition are found in s.203BE(1)(a), (2) and (4). They provide:

(1) The certification functions of a representative body are:

(a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body;

(2) A representative body must not certify under paragraph(1)(a) an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

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

(3) If the land and waters covered by the application are wholly or partly covered by one or moiré applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

(a) achieve agreement relating to native title over the land or waters, between the person in respect of whom the applications are, or would be made;

(b) minimise the number of applications covering the land or waters.

However a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

(4) A certification of an application for a determination of native title by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements in paragraphs (2)(a) and (b) have been met; and

(b) briefly set out the body's reasons for being of that opinion; and

(c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The certification by GLC is in writing and has the common seal of GLC affixed. I am satisfied therefore that the first requirement in s.203BE (found in subparagraph (1)(a)) is met. The certification filed with the original application was unsigned. The executed and dated copy of the certification was filed in, and accepted by, the Federal Court on 2 June 2004.

The second requirement in s.203BE is that the representative body must not certify a native title determination application unless it holds the opinions found in subparagraphs (2)(a) and (b).

In relation to s.203BE(2)(a), the certification describes the authorisation process that has taken place as a contemporary traditional process that involves:

1. Consent of the senior members of the native title claim group;
2. Seniority in accordance with the traditional laws and customs of the native title claim group; and
3. Consensus, reached through debate and dialogue amongst the members of the native title claim group.

The certificate states that various discussions have been organised and facilitated by the GLC, including the meeting held on 6 and 7 March 2004 at Bundaberg by which all the persons in the native title claim group authorised the applicant to make the application and deal with matters arising in relation to it, on behalf of all the other persons in the native title claim group. A copy of the public notice of the authorisation meeting held on 6 and 7 March 2004 is attached to the application. A document headed 'Item 1' provides further information as follows:

- details of correspondence sent to all persons who identified as Wangan and Jagalingou. A copy of the letter marked "WJI" was not included in the application;
- details of the newspapers that carried the advertisement, and
- an outline of the discussion items covered at the meeting.

In relation to s.203BE(2)(b), the certificate states:

- *The identification of the native title claim group has involved GLC staff and consultant anthropologists who have undertaken research in the region.*
- *The identification of the native title claim group has involved consideration of the historical research previously undertaken in the region and by a consultant anthropologist who has developed detailed knowledge of the Wangan and Jagalingu people.*
- *The description of the native title claim group has been the subject of consideration of the Wangan and Jagalingou people, and received their approval in accordance with traditional law and custom, in the consultations referred to above relating to the authorisation process.*

The GLC do not provide any information in relation to the requirements of s.203BE(3) regarding overlapping applications. This is not necessary given that there are no other

applications overlapping the current application. In any case, a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

The representative body must not certify under this section, if it is of the opinion that proper authorisation has not occurred. The GLC have provided an opinion that proper authorisation has occurred, and their reasons for being of this opinion. Therefore I am satisfied that the GLC have met their requirements under the Act and that the applicants have authority to lodge this application and deal with matters arising in relation to it.

The requirements of this section are met.

Result: Requirements met

B. Merits Conditions

Identification of area subject to native title: S190B(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 for the Decision

Written Description and Map of External Boundaries
The written description of the external boundaries is found in Attachment B of the application. In a preamble Attachment B describes the application area in general terms in relation to the Gurang Land Council Aboriginal Corporation Representative Aboriginal /Torres Strait Islander Body (RATSIB) area boundary, and the boundaries of adjoining native title determination applications QG6230/98 Jangga People (QC98/10), Q6023/01 Barada Barna Kabalbara and Yetimarla People #4 (QC01/25), QG6195/98 Kangoulou People (QC98/25) and QG6156/98 Bidjara #3 (QC97/49).

A detailed technical description of the external boundaries of the application follows, in terms of sets of geographical co-ordinates, cadastral boundaries, native title determination application boundaries, and geographical features (eg road reserves). The description includes notes relating to the source and currency of data used to prepare the description.

A map of the claim area is provided at Attachment C. The map was prepared by the Tribunal's Geospatial Unit on 22 December 2003 and clearly depicts the boundaries of the application area by a bold dark outline; surrounding native title determination boundaries and RATSIB boundaries are also depicted. The map includes geographic co-ordinates and major topographic features, scale bar, north point and notes relating to the source and currency of data used to prepare the map.

The assessment completed by the Tribunal's Geospatial Analysis and Mapping Branch, dated 15 June 2004, concludes that the map and area description are consistent and identify the application area with reasonable certainty.
I am satisfied that the information contained in the application is sufficient to identify the area covered by the application with reasonable certainty. Further, I am satisfied that the description of the claim area by reference to geographic coordinates, meets the requirements of s.62(2)(a)(i).

Internal Boundaries
At Schedule B, the applicants have provided information identifying areas within the external boundaries of the area covered by the application that are **not** covered by the application. This is done by way of a formula that excludes a variety of tenure classes from the area covered by the application. The information is as follows:

All areas where native title has otherwise been extinguished are excluded from this application.

Areas which are subject to valid previous exclusive possession acts ((PEPAs) are excluded from this application.
Exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State.

It is my view that the description of areas excluded as set out above can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicant.

I note that the applicants make exceptions to the particular exclusions cited in the application by claiming the benefit of s.47, s.47A and s.47 of the Act at Schedule L of the application. The applicants identify one specific parcel of land where any of s.47, s.47A or s.47B may apply (a lease for 99 years granted to the Sandy Creek Aboriginal Co-op), but state that they reserve the right to the protections afforded in ss. 47, 47A and 47B of the Act for the whole of the claim area. Consistent with the reasoning set out above in respect of identifying areas excluded from the claim, I am of the view that identifying the areas so excepted from the exclusions in the manner done by the applicant does allow specific geographic location to be identified subject to tenure research.

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

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: S190B(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 for the Decision

Under this section, I am only required to be satisfied that one of the requirements in s.190B(3) is met. The application does not name all of the persons in the native title claim group and consequently, the requirements of s.190B(3)(a) are not applicable.

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

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

> '*The native title claim group is made up of families whose members identify as Wangan and Jagalingou, in accordance with traditional laws acknowledged and traditional customs observed by them. Wangan and Jagalingou are tribal names for groups traditionally associated with territory centred around the town of Clermont in Central Queensland. Membership of the native title group must be in accordance with traditional laws acknowledged and traditional customs observed by them and is based on the principle of cognatic descent (ie descent traced through either mother or father), including by adoption. Cases of adoption do not significantly alter the status of the claimants' descent rights neither do they compromise the identification of the group into which the child is adopted.*
> *Claimants who identify with the name Wangan are members of the following descent groups:*
> *Descendants of* ***[Ancestor 1]*** *of Clermont.*
> *Descendants of* ***[Ancestor 2]*** *of Logan Downs.*

*Descendants of **[Ancestor 3]** of Clermont.*
*Descendants of **[Ancestor 4]** of Logan Downs.*
*Descendants of **[Ancestor 5]***
*Descendants of **[Ancestor 6]** of Clermont.*

Claimants who identify with Jagalingou are members of the following descent groups:
*Descendants of **[Ancestor 7]***
*Descendants of **[Ancestor 8]** of Alpha.*

I have taken descendants to mean biological descendants. I note that there is mention of adoption. Further details of the traditional laws and customs relating to the adoption of children into the native title claim group are provided at Schedule F of the application. The characteristics of acceptance of an adopted person into the native title claim group are described as follows:

> 'A person taken as a child into one of the applicant descent groups by an adult who raises the child as on of their own. This person may frequently be a niece or nephew of a deceased brother or sister of the mother or father who accept the adoption.
>
> The child was growing up … is identified and identifies as a member of the adopted family and was commonly identified as such by the other members.
>
> As an adopted child reached maturity he/she is recognised as a member of the adopting adult's descent group, by other descent groups and by a majority of the senior people of the wider regional community.
>
> The adopted person has been closely associated with the applicants' group throughout their life and held an active association with, knowledge of etc the traditional country of the applicants group.
>
> It is noted that cases of adoption are the exception rather than the rule, and the fact and practise of adoption do not alter the fact that descent is the primary principle for recruitment to the cognatic descent groups or families.'

While the wording of this section of the Schedule F is not always clear, I am satisfied that the traditional laws and customs of the native title claim group relating to adoption are adequately described. The description in this form is sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

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 be necessary in these instances to determine if any one person is a member of the group.

I am satisfied that the descendants of the named ancestors can be identified with minimal inquiry and as such, ascertained as part of the native title claim group. By identifying members of the native title claim group as descendants of named ancestors or as adopted persons, 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 satisfied.

Result: Requirements met.

Native title rights and interests are readily identifiable: S190B(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 for the Decision

Native title rights and interests claimed
Attachment E describes the native title rights and interests claimed as follows.
The following rights and interests are claimed, subject to the valid laws of Queensland and the Commonwealth of Australia, to

1. Speak for, on behalf of and authoritatively amongst Aboriginal people about the area covered by the application;
2. Inherit and transmit the native title rights and interests;
3. Speak for, on behalf of and authoritatively amongst Aboriginal people about the use and access under traditional law and custom of the area covered by the application;
4. Confer customary use and access rights on other Aboriginal people who seek to use and access the area covered by the application under the traditional laws and customs of the native title claim group;

5. Determine as between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application;
6. Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the area covered by the application against other Aboriginal people;
7. Resolve disputes about who is and is not a Jagalingou or Wangan person;
8. Be buried on, and to bury members of the native title claim group on, the area covered by the application;
9. Occupy non-exclusively the area covered by the application;
10. Use and enjoy in a non-exclusive manner the area covered by the application;
11. Live on the area covered by the application;
12. Establish residences on the area covered by the application;
13. Establish outstations the area covered by the application;
14. Establish and maintain seasonal camps on the area covered by the application;
15. Construct other infrastructure on the area covered by the application;
16. Protect and care for the natural and cultural resources of the area covered by the application;
17. Maintain and protect sites and areas within the area covered by the application which are of significance to the native title holders under traditional law and custom;
18. Hold ceremonies on the land;
19. Hold ceremonies concerning the land;
20. Take natural resources from the area covered by the application;
21. Manufacture materials, artefacts, objects and other products from the area covered by the application;
22. Dispose of cultural resources taken from, and manufactured items derived from, the area covered by the application by customary trade, exchange or gift with other Aboriginal people;
23. Engage on subsistence activities on the land;
24. Engage in production, customary trade and other customary economic activities on the land as they relate to other Aboriginal people with respect to indigenous cultural resources;
25. Care for the area for the benefit of the native title holders;
26. Hunt and fish in the area covered by the application;
27. Use the area covered by the application for social, customary, religious and traditional purposes.

The particularised description of these rights and interests is qualified in Attachment Schedule E of the application as follows:

'The native title rights and interests claimed:-

a) are pursuant to the traditional laws and customs of the native title holder;
b) are not exclusive rights and interests if they relate to tidal waters, and;
c) do not include ownership of any minerals, petroleum or gas wholly owned by the Crown;

d) Over any areas covered by the application that are subject to a Previous Non-Exclusive Possession Act (PNEPA), as defined by s23F of the Native Title Act 1993 (Cth) do not confer possession, occupation, use and enjoyment of the area covered by the application to the exclusion of all others, except to the extent that the non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) applies, including any areas to which section 47, 47A or 47B of the Native Title Act 1993 (Cth) applies;
e) That are subject to a validly granted PNEPA, as defined by s23F of the Native Title Act 1993 (Cth), then the native title rights and interests claimed do not include any native title rights or interests which were extinguished by that PNEPA, except to the extent that sections 47, 47A or 47B or the non extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) may apply;
f) Do not include rights and interests that are subject to extinguishment by application of the common law.'

The applicant states in Schedule E that the native title in the land and waters covered by the application ('the claim area') are subject to the following qualifications

The common law native title and its qualifications

The native title in the land and waters covered by the application ('the claim area') are, subject to the following qualifications:

a) the valid laws of the State of Queensland and the Commonwealth of Australia; and
b) any valid rights and interests conferred upon non-native title holders, or the subject of an agreement made under the Native Title Act 1993 (Cth.), or by the principles of Aboriginal law and custom.
c) Any area that is or was subject to any of the following acts as these are defined in either the Native Title Act 1993 (Cth) as amended (where the act in question is attributable to the Commonwealth) or the Native Title Act (Qld) 1993 (where the act in question is attributable, to the State of Queensland);
   (i) Category A past acts;
   (ii) Category A intermediate acts;
   (iii) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests
   (iv) Category B intermediate period acts that are wholly inconsistent with the continued existence , enjoyment or exercise of any native title rights or interests
   (d) Any area in relation to which "a previous exclusive possession act" as defined in Section 23B of the NTA was done and the act was an act attributable to the Commonwealth or the State of Queensland.
   (e) Any area in relation to which native title rights and interests have been otherwise wholly extinguished.
   (f) The area of land and waters covered by the application includes any area within the boundary in relation to which the non-extinguishment

> principle (as defined in Section 23B of the Native Title Act 1993) applies, including any areas to which Sections 47, 47A and 47B of the NTA apply.

- The applicants claim the benefit of ss.47, 47A and 47B of the *Native Title Act* in relation to the whole of the claim area (Schedule L).
- The applicant does not claim any minerals, petroleum or gas wholly owned by the Crown (Schedule Q).
- The applicant does not claim exclusive possession over any offshore place (Schedule P);
- Exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State (Schedule B)

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 legislation is intended to screen out of applications native title rights and interests that are vague, or unclear.

Furthermore, the use of the phrases 'native title' and 'native title rights and interests' 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*".

[1] *Queensland v Hutchinson* (2001) 108 FCR 575.

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[2] rights to minerals and petroleum under relevant Queensland legislation,[3] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[4]

I have considered the description of native title rights and interests in the present application in light of previous judicial findings.

7. *Resolve disputes about who is and who is not a Jagalingou or Wangan person.*

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] Federal Court of Australia 666 at [303])

9. Occupy non-exclusively the area covered by the application.
This right is claimed as a non-exclusive right.

In relation to this right I refer to the recent decision of the Full Federal Court in *Attorney General for the Northern Territory v Ward* [2003] FCAFC 283 at [16] – [23] and the 'Wandjina' decision at 471-522. In summary, a determination was sought by the claimants for 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement' certain identified rights - see [16]. Among other things, Wilcox, North and Weinberg JJ rejected the inclusion of the word 'occupy.' saying that:

> *"As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s.225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression. They might be understood as conveying the notion discussed by their Honours, including control of access. This would be inappropriate in this case. The right of absolute control of access must have been extinguished by the grant of the pastoral leases. There might be a surviving right to make decisions, pursuant to Aboriginal laws and custom, about the use and enjoyment of the land by Aboriginal people. That right would not be affected by the grant of a pastoral lease. However, that matter is specifically addressed by sub-para (e) of para 5. We think the word 'occupy' should be omitted from the opening words of para 5 (at [17])."*

[2] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[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.

In the light of this decision I am of the view this right claimed at 9 is not readily identifiable.

10. Use and enjoy in non-exclusive manner the area covered by the application.
In *Attorney General for the Northern Territory v Ward*, the Court disapproved the use of a non-exhaustive list of rights and interests said to be 'included' in the right to 'occupation, use and enjoyment of the lands and waters'. The Court substituted the word 'being' for 'including, as incidents of that entitlement' (see [16] and [23]).

At [21] the Court said, speaking of 'use and enjoy', that there must be a specification of the contents of the relevant rights and interests to which the reader may look in considering the effect of the determination. Of the specified contents of the right the Court said: "They must exhaustively indicate the determined incident of the right to use and enjoy". There is no specification of the content of this right and hence in my view it is not readily identifiable.

In the light of this decision I am of the view this right claimed at 10 is not readily identifiable.

Paragraphs: 13 and 15.
The cases suggest that if the claimants are not able to maintain a claim to exclusive possession over certain areas within the boundaries of the application area, then rights which suggest the right to *control* use of or access to land and waters are not be readily identifiable native title rights and interests (except among other Aboriginal people and Torres Strait Islanders who seek to access or use the land in accordance with traditional law and custom) (*Western Australia v Ward* (2002) 191 ALR 1). In my view if an applicant claims a right that involves *control of* use of or access to land then it must be limited to areas where exclusive possession can be sustained. Such a claim is not readily identifiable in respect of areas where exclusive possession cannot be sustained.
For the following reasons I am of the view that the rights claimed at paragraph 13 and 15 fall into this category and hence are not readily identifiable in respect of areas where exclusive possession cannot be sustained.

13. Establish outstations on the area covered by the application.
A question which arises here is whether the right to establish outstations on the land amounts to a right to control access to and use of the claim area. If so it can only be established on areas where exclusive possession can be established. The claim is not limited to such areas. The right is claimed here in respect of *the area covered by the application*, i.e. the whole area. That would include areas where exclusive possession cannot be sustained. To the extent that it would amount to a right to control access to and use of those areas of the claim, such a right is not readily identifiable.

There is no indication here of the nature of the outstations sought to be established. Unlike the right claimed at 12 it is not *subject to the rights and interests of other parties.* The

erection of structures of some kind would be involved. The description of this right conveys to me likely intention or capacity on the part of the members of the native title claim group to control access to or use of those areas where outstations are established. In my view it follows that the right cannot be readily identified in respect of areas where exclusive possession cannot be sustained.

15. Construct other infrastructure on the area covered by the application.

The erection of structures and works of some kind would be involved. For the same reasons as appear in respect of 13 above is my view that this right cannot be readily identified in respect of areas where exclusive possession cannot be sustained

22. Dispose of cultural resources taken from, and manufactured items derived from the area covered by the application by customary trade, exchange, or gift with other Aboriginal people.

In *Commonwealth v Yarmirr* (1999) 101 FCR 171, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that "[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land" [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

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

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s.190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to *exclusive* possession, occupation, use and enjoyment of lands and waters [my emphasis]. However, with regard to this right at 22, a right to trade, exchange or give resources does not appear to be readily identifiable pursuant to s.190B(4) except where there is a right to exclusive possession. I say this in light of the comments of the majority of the High Court in *Yarmirr*.

I refer to my reasons in respect of 13 – 15 above. I am of the view that it is not readily identifiable pursuant to s.190B(4) in respect of areas where exclusive possession cannot be sustained.

24. Engage in production, customary trade and other customary economic activities on the land as they relate to other aboriginal people with respect to indigenous cultural resources.

This right is akin to that claimed at 22. This claim appears to be in respect of the whole of the area, i.e. *the land*. For the same reasons as appear in respect of 22, it appears that a right to trade is not capable of being readily identifiable pursuant to s.190B(4) except where there is a right to exclusive possession.

However, I am satisfied that the remainder of the rights and interests claimed are readily identifiable for the purposes of s.190B(4).

Conclusion
I am satisfied that the native title rights and interests claimed in Schedule E are readily identifiable, with the exception of those indicated above.

Result: Requirements met

Factual basis for claimed native title: S190B(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 for the Decision

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).

To satisfy the requirements of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to

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

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].

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

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

In considering this condition, I have had regard to:

- information contained in Schedules F, G and M and Attachment G of the application;
- the affidavits sworn by **[Applicant 4]** (13/4/04) and **[Applicant 1]** (24/3/04).

I believe that in respect of this condition I must consider whether the factual basis provided by the applicant 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 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.

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

At Schedule F of the application, the applicants state that:

'The Wangan and Jagalingou peoples have traditional attachments to the areas entered on the Clermont area and extending north to the Suttor River, east to Logan Downs, south to Alpha and approximately fifty kilometers west of the Belyando river. They continue to possess customary rights to land that have existed long before European settlement of the area. Their histories, recollections and identifications all refer to the area around the town of Clermont. The following sections deal with recorded information concerning contact with local Aborigines and settlement by Europeans in the area.'

The Attachment then proceeds to set out historical and anthropological evidence in support of the native title claim group having, and the predecessors of those persons having had, an association with the area.

Schedule G and Attachment G list a number of activities currently carried out by members of the claim group in support of this statement. Details of these activities are outlined under s.190B(5)(b) below.

In their affidavits the members of the native title claim group provide support the native title claim group having, and the predecessors of those persons having had, an association with the area. For instance **[Applicant 4]** says in her affidavit that she identifies as a Jagalingou woman (para 2), she was born and raised in the Clermont area (para 3), and her mother and grandfather used to take her out into her country and show her how to survive off the land (para 6). While on country they instructed her in traditions, myths, rituals and stories for the country (para 7 and 8). She lives and has continued to live on the claim area for the majority of her life and has maintained her knowledge of and connection with the claim area as a means of fulfilling her obligations as a Jangalingou woman (para 25 – 29).

Similarly, **[Applicant 1]** says she identifies as a Wangan woman and was told by her father that it was important to visit the land as a continued affirmation of the Wangan

custodianship of their country (paras 4 – 6). Her grandfather told her where her country was (para 5). She and other members of her family have been returning regularly to the country for the past 37 years, collecting wood and other materials for artefacts (para 8). They also camp on country, fish in the rivers and creeks and hunt on the nearby surrounds (para 11 -15).

I am satisfied that the information that has been provided is a sufficient factual basis to support the assertion that the native title claim group have, and their predecessors had an association with the area.

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

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, and that those laws and customs give rise to the claim to native title rights and interests, is sufficient to support that assertion.

At Schedule F of the application, the applicants state that:
'The members of the claimant groups hold their traditional rights and interests over the area on the basis of inheritance from their forebears according to a system of cognatic descent. Their parents and grandparents taught them that they were responsible to care for the country, and to learn and to practice the ways of their ancestors. This system is itself imbued by the doctrine that rights to an area of land derive from a spiritual connection to it, at the centre of which is the inter-connection between contemporary native title holders and their relationship to ancestors connected to the country.'

Schedule G and Attachment G list a number of activities currently carried out by members of the claim group in support of these statements. I set out both in full. They are:

Schedule G:
'1. A long historical and consistent contemporary collection and use of natural resources.

2. Regular access to, camping upon, and residing on the traditional lands.

3. Continual self-regulation (including dispute resolution within the claimant group) and demarcation of localised family and subgroup and subdivisions and interests within the claim area under the direction of senior people of authority.

4. Speaking for, on behalf of and authoritatively within the regional aboriginal community about the claim area.

5. Engaging in economic life in relation to the claim area, including the collection of resources and the manufacture, sale and trade of artefacts.

6. On-country instruction of the younger generations of the claim group about traditional law and customs of the Wangan and Jagalingou pertaining to the land.,

Attachment G states that details of the activities include, but are not limited to the following:

1. A long historical and constant contemporary collection and use of natural resources.
2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands.
3. Substantial and widespread exercise of management responsibilities for the traditional lands, and exercise of cultural property rights in them.
4. Continual self-regulation and demarcation of localised family and sub-group and subdivisions and interests within the claim area under the direction of senior people of authority.
5. Asserting valid propriety and possessory claim over the claim area.
6. Speaking for, on behalf of and authoritatively about the claim area.
7. Inheriting and transmitting native title rights and interests.
8. Conferring certain rights on others.
9. Asserting the right to control access, occupation, use and enjoyment of the claim area and its resources by others
10. Resolving disputes about who is and who is not a Wangan or Jagalingu person.
11. Resolving disputes between Aboriginal people concerning the claim area, with the assistance of native title holders of adjoining areas where such assistance is necessary.
12. Determining as between native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the claim area.
13. Engaging in a way of life consistent with traditional connection of the native title claim group to the claim area.
14. Upholding, regulating, monitoring and enforcing the customary laws of the native title claim group in relation to the area.
15. Excluding particular members of the native title claim group from the exercise of particular native title rights and interests in relation to particular parts of the claim group.
16. Being buried on, and burying members of the native title claim group on the claim area.
17. Physically occupying the claim area.
18. Physically enjoying and using the clam area.
19. Living on and erecting residences and other infrastructure on the claim area.
20. Protecting, managing, and using the claim area.
21. Manufacturing materials, artefacts, objects and other products from the claim area.
22. Disposing of Natural Resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift.
23. Engaging in economic life in relation to the claim area.

24. Learning, determining, maintaining, communicating and expanding cultural, social, natural, environmental, spiritual and cosmological knowledge, traditions, beliefs, customs, relationships, practices and institutions in relation to the claim area, to ensure the continued vitality of the culture and well being of the native title claim group.
25. Exercising all those rights, duties and responsibilities which are derived from and are necessary for, or ancillary to full exercise an enjoyment of the native title rights and interests referred to above.'

Further evidence of the existence of a range of traditional laws and customs acknowledged and observed by the members of the claim group is provided in the affidavits of the members of the native title claim group. **[Applicant 4]** deposes to the following:

6. My grandfather and my mother were concerned that I keep my culture. They used to take me and my five brothers out to country and show us how to survive off the land. Later a sister was born to my parents.
7. They taught us about family life, traditions, the myths and rituals, which we live by. Our religion is made up of myths and rituals and these were also imparted to me by my grandfather. We lived by that religion and I and my family still do so to this day.
8. By Family Life I mean family structure; the role of elders; our obligations to parents and other clan members and elders; that there were separate rules for men and separate rules for women in our society recognising and acknowledging the history of the family and its culture.
9. Traditions includes history (how the past influences our presence); Culture (how our culture impacts on our lives); structural (how society is organised and shapes our lives); and critical (how we can improve our current existence).
10. Myths were always imparted around the campfire. We were inculcated into our spiritual lives and this continues to this day. Other spiritual aspects included earth, air and water.
11. They told us about *Mundagadda* [the water serpent] at Sandy creek; we couldn't swim in that water hole after dark. Wipe out our footprints in the sand before dark. We listened to the old people who told us yarns, mostly ghost stories.
12. My grandfather spoke about ceremonies and Rituals in relation to marriage; the passing on of family members; in the preparation of feed; and other aspects in life. I still prepare food in a ritual way and this is all instilled into my children.
13. They told us about a lot of places. We couldn't do nothing because we were only kids then but it always stuck in our brains.
14. There's a few caves around here, with paintings ~ there's a lot of ringers around here that have seen these places.
15. We learned about how to survive and to adapt to mainstream living.
16. When the local authority put the dam in, Sandy creek dried up and the weeds just took over, and just wiped out the gum sapplings that we obtained our grubs from.'

[Applicant 4] also speaks of her totem (emu), of hunting and gathering and describes which foods are traditionally forbidden (17 – 22). She also deposes to passing on her knowledge and observance of traditional laws and customs to her children (23 – 26).

[Applicant 1] deposes to being told by her father that it was important to visit the land as a continued affirmation of the Wangan custodianship of their country. She and other members of her family have been returning regularly to the country for the past 37 years,

collecting wood and other materials for artefacts. They also camp on country, fish in the rivers and creeks and hunt on the nearby surrounds. She also says that she received knowledge of the existence of sacred sites in her father's country.

The information outlined above supports the contention that these traditional laws and customs form the normative system which gives rise to the native title rights and interests of the Wangan and Jagalingou people in the land and waters of the application area.

Having regard to the above, I am satisfied that there is a sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed.

I am therefore satisfied that the requirements of s.190B(5)(b) have been met.

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

At Schedule F, the applicants state:

> 'The members of the claim group verified that they continue to hold native title on the basis of either their continuing occupation, including systematic periodic returns to the land by those who are resident outside the claim area.
>
> They view themselves as a distinct community of native title holders who can trace connection back to those indigenous groups in possession and occupation of the area of the claim at the time of first settlement by Europeans. Evidence of who those groups were is available through historical and anthropological literature cited above. The connection of claimants is further supported by their genealogies which can trace back to apical ancestors identified as members of these groups.
>
> Claimants acknowledge their continuity of connection and ongoing acknowledgement and observance of traditional laws and customs relating to the land, by ensuring that are transmitted to the next generation. For example, **[Applicant 4]** and **[Applicant 1]** fulfil this obligation by teaching their children about the lore and law which was passed down to them by their parents and grandparents.'

As outlined above, I am satisfied that traditional laws and customs exist which give rise to the claim to native title rights and interests by the native title claim group. Section 190B(5)(c) requires that the claim group have continued to hold native title in accordance with those traditional laws and customs.

Particular evidence in support of this condition is provided in the affidavits of **[Applicant 4]** and **[Applicant 1]** to which I have referred above. For instance **[Applicant 4]** speaks of taking her children out to teach them the ways of the land, and where to pick the food

(para 23). She says that "they feel it too" (para 23). **[Applicant 4]** also says that she has taught her children what her mother's taught her and that they have "got a very strong belief and they respect it" (para 23). **[Applicant 4]** says she has three children and four grandchildren (para 24), that she has lived on the claim area for the majority of her life, continues to live on the claim area and has maintained her knowledge of and connection with the claim area as a means of fulfilling her obligations as a Jagalingou woman (para 25). Her continued acknowledgement and observance of traditional laws and customs in relation to the claim area has been passed down to her children (para 26). **[Applicant 4]** reiterates that she has lived in Clermont on the claim area for the majority of her life and only left Sandy Creek as a child when the Local Authority bulldozed the family house. They them moved into her grandfather's property which was at Hood's Lagoon, Clermont (para 27).

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

Conclusion

I am satisfied that the information included in the current application filed by the Wangan and Jagalingou people, and otherwise provided, is sufficient to support the assertion that the claimed native title rights and interests exist, and also supports the following assertions:

- that the native title claim group have, and the predecessors of those persons had, an association with the area;
- 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;
- that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Result: Requirements met

Native title rights and interests claimed established prima facie: S190B(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 for the Decision

'Native title rights and interests' are defined in s.223 of the *Native Title Act 1993*. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

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

The definition is closely aligned with all the issues I have already considered under s.190B(5). I will draw on the conclusions I made under that section in my consideration of s.190B(6).

Under s.190B(6), I must consider that, *prima facie*, at least some of the rights and interests claimed can be established. The term '*prima facie*' was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

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

This meaning was recently considered in 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 considering this application, in deciding which native title rights and interests claimed can be established on a *prima facie* basis.

The claimed native title rights and interests are found at 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 Schedules B, E, L, P and Q and Attachment Schedule E. Refer to my reasons under s.190B(4) above for details of these statements.

I have noted in my reasons under s.190B(4) above that a claim to exclusive possession, occupation, use and enjoyment of lands and waters may only be able to be established *prima facie* in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicants claim the benefit of ss.47, 47A or 47B). 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]. Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was 'inappropriate': at [919].

In light of the comments of the majority of the High Court in *Ward* and of O'Loughlin J in *De Rose*, it does not appear that a non-exclusive right to possession, occupation, use and enjoyment can, on the face of it, be established pursuant to s.190B(6).

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

- information contained in Schedules F, G and M and Attachment F of the application;
- the affidavit sworn by **[Applicant 4]** and **[Applicant 1]**

These documents provide sufficient material and information to satisfy me on a *prima facie* basis that at least some of the native title rights and interests claimed by the applicants can be established. I will now consider in turn each of the native title rights and interests claimed in Schedule E and whether these can be established *prima facie* as required by s.190B(6) of the Act.

1. Speak for, on behalf of and authoritatively amongst Aboriginal people about the area covered by the application.

Not established

I understand the applicant is here seeking the right to:

- speak *for* the area covered by the application;
- speak on *behalf* of the area covered by the application, and
- speak authoritatively *about* the area covered by the application,

amongst Aboriginal people

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: 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 to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained.

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

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

> identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing."

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

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

It seems from this, that although the right to speak for the application area may be seen as a right which amounts to a right to control access to and use of the land in some circumstances, it does not always amount to such a claim. To assume that the right is necessarily a right to control access or use of the land would be not only to 'oversimplify' the nature of the connection Aboriginal people have with their land but to fail to apply the Act beneficially as is encouraged by the preamble to the Act. I note that in *Commonwealth v Yarmirr* (2001) 184 ALR 113 at [124] to [125], after noting the warning given by the High Court in *North Ganalanja* about construing the Act, McHugh J went on to say that:

> 'It is also necessary to keep in mind that, in the second reading speech on the Native Title Bill 1993, the then Prime Minister, Mr. Keating, saw *Mabo (No 2)* as giving Australians the opportunity to rectify the consequences of past injustices. The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the "national legacy of unutterable shame" that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.
>
> [After identifying the purpose of the Act,] the duty of the courts would be to ensure that that purpose was achieved. That would be so even if it meant giving a strained construction to or reading words into the Act. In an extrajudicial speech, Lord Diplock once said that "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed."

The right claimed at 1 is limited to a right "amongst Aboriginal people". I do not understand the right at para. 1 to be a claim to control access to, or the use or enjoyment of the application area by other than Aboriginal people. It follows that I am satisfied that the right is capable of being established *prima facie* on a non-exclusive basis.

On the basis of the above I am satisfied that this right is capable of being *prima facie* established over the claim area.

Turning now to consider whether the claimed right and interest can be *prima facie* established.

At Schedule G of the application included among the activities said to be currently carried on by the native title claim group in relation to the area is "speaking for, on behalf of and authoritatively about the claim area" (para 4). Whilst this statement is verified by the applicant's s 62(1)(a) affidavits, I am unable to locate any sufficient supporting information.

Having considered the application, attachments and affidavits I am unable to find sufficient information to support the *prima facie* establishment of this claim the right and interest.

I add that by letter dated 15 June 2004 the applicant was invited to direct my attention to any information in the application or elsewhere which supported the *prima facie* establishment of the rights and interests claimed. The applicant's representative did not avail itself of this invitation.

In relation to this right and interest, and other claimed rights and interests which are not established, I direct the applicant's attention to the provisions of s 190(3A). Briefly, that section provides that

- if an application is accepted for registration; and
- afterwards the applicant provides further information relating to any native title rights and interests that were claimed in the application but were not accepted for registration, and
- it is considered that had information been provided earlier the claim would have been accepted for registration,

the rights and interests can be included in the Register.

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

Established.

Schedule F says that:
The Wangan and Jagalingou peoples have traditional attachments to the area centered on the Clermont area and extending north to the Suttor River, east to Logan Downs, south to Alpha and approximately fifty kilometers west of the Belyando river. They continue to possess customary rights to land that have existed long before European settlement of the area. Their histories, recollections and identifications all refer to the area around the town of Clermont. This statement is supported by historical and anthropological information in the Schedule.

At paragraph 7 of Schedule G the applicant states that one of the activities currently carried on by the native title claim group is "inheriting and transmitting native title rights and interests".

[Applicant 1] speaks in her affidavit of her families association with the area and the exercise of traditional rights and interests:

"5. It's here in Clermont where our land was. And I also remember that our family went all the way up to Mt. Coolum and all the waterways around Moranbah and down to Anakie and the ranges this side of Emerald (Denham ranges) round the Nebo area.- This information was imparted to me by my grandfather around the camp fires.
6. We've got records to show that some of our people are buried up around Mt. Coolum. The scarred trees where the burial grounds are, we haven't found them. I went up and had a look around the river there where they camped.
7. My maiden name was Dunrobin. I am aware of our aboriginal name but my culture prevent me from stating it in an affidavit. We got our name from Dunrobin station because all our ancestors worked on Dunrobin station from its early days. There's one unmarked grave out there which I think would be my great great grandmother. I you can trace back to **[Ancestor 9 – name deleted]**, daughter of **[Ancestor 1];** that was my father's mother; she was known as **[Ancestor 9]**.
8. The last 37 years we've explored everywhere out there gathering timber for our artefacts. Because this is where out family comes from - dad showed us how to make boomerangs when we were really young. In our minds we believed that this was our country so that we should be able to do our artefacts, in accordance with our beliefs and customs; roam the country and collect the timber as we needed it. We went everywhere, including Nebo, and walked all the rivers and creeks.
9. Sometime I collected stones and I was firmly instructed by the elders to "put them back" as it was contrary to our law.
10. Spiritually we were drawn there ... we've always said that this was our land. It was always Clermont, this was our area.
11. My father used to talk about him and his father going fishing and hunting, following the rivers around, up to Mt Coolum, down to Moranbah, all those rivers, that's where they all camped and fished - in that area there are a lot of scarred trees. I have been to the places where these scared trees grow.
12. Both myself and other members of the claim group, including Elders, continue and have continued for as long as I can remember, to walk on country the subject of this claim.
13. I was told by her father that it was important to visit the land as a continued affirmation of the Wangan custodianship of their country.
14. I and other members of my family have been regularly walking on the country for the past 37 years. I have eleven brothers and sisters who also regularly walk on the country in the claim group area.
15. I and other Claimants acknowledge our continuity of connection and ongoing acknowledgement and observance of traditional laws and customs relating to the land, by ensuring that are transmitted to the next generation.
16. For example, I fulfill this obligation by teaching my children about the law and custom which was passed down to me by my parents and grandparents. This includes teaching our culture to younger ones. This information was given to me by my Elders."

In her affidavit **[Applicant 4]** deposes that her mother and grandfather were concerned that she keep her culture and taught her and her five brothers about family life, traditions and rituals and took them out to country to show them how to live off the land (paras 6, 7). She continues to pass her knowledge of traditions and customs down to her children (paras 23, 26, 29).

I am satisfied that the above information supports the continued existence of a close association with the claim area and the inheritance and transmission of native title rights and interests from generation to generation within the native title claim group.

3. Speak for, on behalf of and authoritatively amongst Aboriginal people about the use and access under traditional law and custom of the area covered by the application.

Not established

Activities carried out by Wangan and Jangalingou people on their traditional country are said in Schedule G to include, but not be limited to, "speaking for, on behalf of and authoritatively within the regional aboriginal community about the claim area" (para 4).
At Schedule G (attached to the application) contains the following provision:
"6. Speaking for, on behalf of and authoritatively about the claim area".

This right is similar to the right claimed at 1 above. For the same reasons as appear there I am of the view that this right is capable of being *prima facie* established. However, I am not satisfied that there is sufficient information to support such establishment.

Please see my comments in respect of s 190(3A) under 1. above.

4. Confer customary use and access rights to other Aboriginal people who seek to use and access the area covered by the application under the traditional law and custom of the native title claim group.

Established.

I understand the reference here to "other Aboriginal people" to be to Aboriginal people other than those who comprise the native title claim group.

At Schedule G (attached to the application) it is said that the activities of the native title claim group includes;

8. Conferring certain rights on others.
9. Asserting the right to control access, occupation, use and enjoyment of the claim area and its resources by others.
11. Resolving disputes between Aboriginal people concerning the claim area, with the assistance of native title holders of adjoining areas where such assistance is necessary.

The above activities would be consistent with the native title claim group occupying the area the subject of this claim. There is in my view sufficient evidence in the application and affidavits of **[Applicant 4]** and **[Applicant 1]** to support the proposition that the native title claim group has, and continues to, occupy the area the subject of this claim. In my view the right which is claimed here would flow from that fact and hence can be *prima facie* established. Refer to the affidavit of **[Applicant 4]** at paras 3, 4, 25 and 27, and the affidavit of **[Applicant 1]** at paras 8, 9, 13, 15 and 16.

5. *Determine between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application.*

Established

In Schedule G (attached to the application) it is said that the group engages in "continual self regulation and demarcation of localised family and subgroup subdivisions and interests within the claim area under the direction of senior people of authority" (para 4). Also, it is said that the claim group engages in "determining as between native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the claim area" (para 12).

I am of the opinion that the right claimed here is one which flows from the traditional attachment of the native title claim group to the claim area and its occupation of the area. As I have indicated above I am of the view that there is adequate evidence to support the proposition that the native title claim group has, and continues to, occupy the area the subject of the claim (see the affidavits and Schedule M).

I am satisfied that this right can be *prima facie* established.

6. Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the area covered by the application against other Aboriginal people.

Established.

This right relates to the right claimed at 4 above. It refers to customary laws in relation to use and access of the area by other Aboriginal people. I see the customary law as the basis for the claim group conferring use and access rights to other Aboriginal people who seek to use and access the area. In my view there is sufficient connection with the subject area for this right to be seen as a right and interest in relation to land and water. Consequently I am of the view that this right is capable of being *prima facie* established.

In Schedule G (attached to the application) it is said that the group engages in, amongst other activities, the following:

8. Conferring certain rights on others.

9. Asserting the right to control access, occupation, use and enjoyment of the claim area and its resources by others.
11. Resolving disputes between Aboriginal people concerning the claim area, with the assistance of native title holders of adjoining areas where such assistance is necessary.
13. Holding, regulating, monitoring and enforcing the customary laws of the native title claim group in relation to the area.

I refer to my reasons in respect of 4 above. For the same reasons based on the same information as appears there I am satisfied that this right can be prima facie established.

7. *Resolve disputes about who is and who is not a Jagalingou or Wangan person.*

Not established.

This right is not in my opinion readily identifiable (see under s190B(4) above) and hence it follows that it cannot be prima facie established.

8. Be buried on, and to bury members of the native title claim group on, the area covered by the application.

Not established.

Included in the activities listed in Schedule G are the following:
"16. Being buried on, and burying members of the native title claim group on the claim area."

[Applicant 1] in her affidavit speaks of having records to show that some of "our people" are buried up around Mount Coolum (para 6). She also refers to an unmarked grave which she thinks would be that of her great great grandmother (para 7). However the burials referred to are far in the past and do not provide sufficient evidence of the continuity of this practice into the present.

I am not satisfied that there is sufficient information to *prima facie* establish this right.

9. Occupy non exclusively the area covered by the application.

Not established.

I refer to my reasons concerning this right under s.190B(4) above. As I am of the opinion the right is not readily identifiable it cannot be *prima facie* established.

10. Use and enjoy in non exclusive manner the area covered by the application.

Not established.

I refer to my reasons concerning this right under s.190B(4) above. As I am of the opinion the right is not readily identifiable it follows that it cannot be *prima facie* established.

11. Live on the area covered by the application.

Established

The applicants claim the right to live on the application area. A question which arises here is whether the right to live on the land *necessarily* amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession could not be sustained.

There is nothing in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of areas for which a claim to exclusive possession cannot be sustained.

It follows that I am satisfied that the right is capable of being established *prima facie*.

There is evidence to support this right in Schedules G, M and in the affidavits of **[Applicant 4]** and **[Applicant 1]**.

At Schedule G (attached to the application) it is said that the activities of the native title claim group include:

2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands
17. Physically occupying the claim area.
18. Physically enjoying and using the clam area.
19. Living on and erecting residences and other infrastructure on the claim area.
20. Protecting, managing, and using the claim area.
21. Manufacturing materials, artefacts, objects and other products from the claim area.
22. Disposing of Natural Resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift.
23. Engaging in economic life in relation to the claim area.

At Schedule M the applicant states that members of the claim group can demonstrate an ongoing physical connection to the area, both through continuity of residence and through ongoing episodes of visitation and cultural practice. At Schedule M, and in their respective affidavits, **[Applicant 4]** and **[Applicant 1]**.
speak of their, and their families, living in the area. For instance **[Applicant 4]** says that she was born and raised in the Clermont area and grew up on the banks of the Sandy Creek (page 18). **[Applicant 1]** speaks returning to the claim area from which her father had been removed nearly 40 years ago and of continuing to do so. **[Applicant 1]** speaks of being spiritually drawn to her land and of her father talking about him and his father going fishing, hunting and camping in the area (page 19).

Refer to the affidavit of **[Applicant 4]** at paras 3, 4, 25 and 27 and the affidavit of **[Applicant 1]** at paras 7, 8, and 11.

I am satisfied that this right can be *prima facie* established.

12. Establish residences on the area covered by the application, subject to the rights and interests of other parties.

Established

A question which arises here is whether the right to establish residences on the land amounts to a right to control access to and use of the claim area. If so it can only be established on areas where exclusive possession can be established. The right is claimed here in respect of *the area covered by the application*, i.e. the whole area. That would include areas where exclusive possession cannot be sustained. To the extent that it would amount to a right to control access to and use of those areas of the claim, such a right would be not be readily identifiable and hence not capable of being established over the area covered by the application where exclusive possession cannot be sustained.

The claim is said to be *subject to the rights and interests of other parties*. There is no indication of the nature of the residences sought to be established. However, the erection of structures of some kind would be involved. However, having regard to the qualification that the right claimed is *subject to the rights and interests of other parties* the description does not convey to me an intention or capacity on the part of the members of the native title claim group to establish residences which would involve the control access to or use of areas that would be contrary to the rights and interests of others. In my view it follows that the right is capable of being prima facie established in respect of areas where exclusive possession can and cannot be sustained.

I refer to my reasons in respect of 11 above. Based on the same information, and for the same reasons as appear there, I am satisfied that this right can be *prima facie* established in respect of the area covered by the application.

13. Establish outstations on the area covered by the application.

*Established **but only** in respect of areas where exclusive possession can be sustained.*

In my opinion this right flows from the right to live on the area and is similar to that claimed at 12. However, it is not *subject to the rights and interests of other parties as is the right claimed at para 12.* I refer to my reasons concerning this right under s.190B(4) above. As I am of the opinion the right is not readily identifiable in respect of areas where exclusive possession cannot be established it follows that it can only be *prima facie* established in respect of areas where exclusive possession can be established.

There is evidence to support this right in Schedules G, M and in the affidavits of **[Applicant 4]** and **[Applicant 1]**.

At Schedule G (attached to the application) it is said that the activities of the native title claim group include:

2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands
17. Physically occupying the claim area.
18. Physically enjoying and using the clam area.
19. Living on and erecting residences and other infrastructure on the claim area.
20. Protecting, managing, and using the claim area.
23. Engaging in economic life in relation to the claim area.

At Schedule M the applicant states that members of the claim group can demonstrate an ongoing physical connection to the area, both through continuity of residence and through ongoing episodes of visitation and cultural practice. At Schedule M, and in their respective affidavits, **[Applicant 4]** and **[Applicant 1]** speak of their, and their families, living in the area. For instance **[Applicant 4]** says that she was born and raised in the Clermont area and grew up on the banks of the Sandy Creek (page 18). **[Applicant 1]** speaks returning to the claim area from which her father had been removed nearly 40 years ago and of continuing to do so. **[Applicant 1]** speaks of being spiritually drawn to her land and of her father talking about him and his father going fishing, hunting and camping in the area (page 19).
Refer to the affidavit of **[Applicant 4]** at paras 3, 4, 25 and 27 and the affidavit of **[Applicant 1]** at paras 7, 8, and 11.

I am satisfied that this right can be *prima facie* established but only in respect of those areas covered by the application where exclusive possession can be sustained.

14. Establish and maintain seasonal camps on the area covered by the application.

Established.

There is evidence to support this right in Schedules G and M and in the affidavits of **[Applicant 4]** and **[Applicant 1].**

Schedule G refers to the activities of the native title claim group involving "regular access to, camping upon, and residing on the traditional lands" (para 2).

At Schedule G (attached to the application) it is said that the activities of the native title claim group include:

2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands.
17. Physically occupying the claim area.

18. Physically enjoying and using the clam area.
19. Living on and erecting residences and other infrastructure on the claim area.
20. Protecting, managing, and using the claim area.
21. Manufacturing materials, artefacts, objects and other products from the claim area.
22. Disposing of Natural Resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift.
23. Engaging in economic life in relation to the claim area.

These activities are in my opinion consistent with members of the native title claim group establishing and maintaining seasonal camps on the application area as part of those activities.

[Applicant 4] speaks in her affidavit of her grandfather and mother taking her and her five brothers out to country to show them how to survive off the land (para 6). She also speaks of taking her children out to teach them the ways of the land, and where to obtain food as her mother taught her (para 25). In para 10 of her affidavit she tells how myths and legends were always imparted around the campfire. Such activities would be consistent with the establishment and maintenance of seasonal camps on the area covered by the application. **[Applicant 1]** says in her affidavit as follows:

> "8. The last 37 years we've explored everywhere out there gathering timber four-hour artefacts. Because this is where our family comes from - bed showed us how to make boomerangs when we were really young. In our minds we believe that this was our country so that we should be able to do our artefacts, in accordance with our beliefs and customs; roam the country and collect timber as we need it. We went everywhere, including Nebo, and walked all the rivers and creeks.
> 11. My father used to talk about him and his father going fishing and hunting, following the rivers around, up to Mt Coolum, down to Moranbah, all those rivers, that's where they all camped and fished – in that area there are a lot of scarred trees. I have been to the places where these scarred trees grow.
> 12. Both myself and other members of the claim group, including Elders, continue and have continued for as long as I can remember, to walk on country is subject of this claim.

Again such activities are in my view consistent with the establishment and maintenance of seasonal camps on the area covered by the application.

I am satisfied that this right can be *prima facie* established in respect of the area covered by the application.

15. Construct other infrastructure on the area covered by the application.

Not established.

I refer to my reasons concerning this right under s.190B(4) above. As I am of the opinion the right is not readily identifiable it follows that it cannot be *prima facie* established.

16. Protect and care for the natural and cultural resources of the area covered by the application.

Not established.

At Schedule G (attached to the application) it is said that the current activities of the native title claim group include;

3. Substantial and widespread exercise of management responsibilities for the traditional lands, and exercise of cultural property rights in them.
20. Protecting, managing and using the claim area.

However, I am unable to find sufficient information in the application or affidavits to support the *prima facie* establishment of this right.

I refer the applicant to the provisions of s.190(3A) of the Act to which I have referred above.

17. Maintain and protect sites in the areas within the area covered by the application which are of significance to the Native Title Holders under traditional law and customs.

Not established.

This right is similar to that claimed at 16 above. Again, I am unable to find sufficient information in the application or affidavits to satisfy me that this right and interest can be *prima facie* established.

I again refer the applicant to the provisions of s.190(3A) of the Act to which I have referred above.

18. Hold ceremonies on the land.

Not established

I am unable to find sufficient information in the application or affidavits to satisfy me that this right and interest can be *prima facie* established. In her affidavit **[Applicant 4]** tells how her grandfather spoke about ceremonies and rituals in relation to marriage, the passing on of family members and other aspects of life (para 12). However it is my view that these references relate to activities well in the past and do not provide sufficient evidence of the continuity of ceremonial activities into the present.

I refer to the provisions of s190B(3A) which I have outlined above.

19. Hold ceremonies concerning the land.

Not established.

As with the right at 18 I am unable to find sufficient information in the application or affidavits to satisfy me that this right and interest can be *prima facie* established.

Again I refer the applicant to the provisions of s190(3A).

20. Take natural resources from the area covered by the application.

Established.

At Schedule G (attached to the application) it is said that the current activities of the native title claim group include:
21. Manufacturing materials, artefacts, objects and other products from the claim area.
22. Disposing of Natural Resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift.
23. Engaging in economic life in relation to the claim area.

In my view these activities involve the taking of natural resources from the area covered by the application. I note that the applicant does not claim ownership of any minerals, petroleum or gas wholly owned by the Crown.

The taking of natural resources from the area covered by the application is supported by **[Applicant 4]** in her affidavit when she speaks of hunting and gathering and of teaching her children the ways of the land as she was taught by her mother (para 16, 17,18, 20 and 23).
Also **[Applicant 1]** speaks about being shown how to make boomerangs when she was young and of collecting timber as was needed from her country (para 8). She also speaks of her father and his father going fishing and hunting (para 11).

I am satisfied there is sufficient information available to *prima facie* establish this claimed right and interest in respect of the area covered by the application.

21. Manufacture materials, artefacts, objects and other products taken from the area covered by the application.

Not established.

Such information as there is in Schedule G to support the *prima facie* establishment of this right is outlined in respect of 20 above.
The only other evidence I have been able to find to support the establishment of this right is in the affidavit of **[Applicant 1]** where she speaks being shown how to make boomerangs when she was young (para 8). This is very limited information and relates to tuition well in the past.

I am of the view that there is insufficient information in the application or affidavits to satisfy me that this right and interest can be *prima facie* established.

22. Dispose of cultural resources taken from, and manufactured items derived from the area covered by the application by customary trade, exchange, or gift with other Aboriginal people.

Not established

I refer to my reasons concerning this right under s.190B(4) above where I conclude that this claimed right is not readily identifiable in respect of areas where exclusive possession cannot be sustained. As I am of the opinion the right is not readily identifiable it follows that it cannot be *prima facie* established in respect of such areas.

In respect of areas where exclusive possession can be sustained I am not satisfied that there is sufficient information to support the *prima facie* establishment of this right.

23. Engage in subsistence activities on the land.

Established.

There is evidence to support this right in Schedules G, and in the affidavits of **[Applicant 4]** and **[Applicant 1]** and their statements set out in Schedule M.

At Schedule G (attached to the application) it is said that the activities of the native title claim group includes;

2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands.
17. Physically occupying the claim area.
18. Physically enjoying and using the clam area.
19. Living on and erecting residences and other infrastructure on the claim area.
20. Protecting, managing, and using the claim area.
21. Manufacturing materials, artefacts, objects and other products from the claim area.
22. Disposing of Natural Resources taken from the claim area and manufactured items derived from the claim area, by trade, exchange or gift.
23. Engaging in economic life in relation to the claim area.

These activities are in my opinion consistent with members of the native title claim group engaging in subsistence activities on the application area as part of those activities.

This is supported by the affidavits of **[Applicant 4]** and **[Applicant 1]**. **[Applicant 4]** speaks in her affidavit of her grandfather and mother taking her and her five brothers out to country to show them how to survive off the land (para 6). **[Applicant 4]** describes how they obtained grubs from gum saplings (para 16), and hunted possums, kangaroos, goannas and porcupines and fished in the creek for yellow bellies, catfish, jewfish, eels

and turtles (paras 17 and 18). She also speaks of taking her children out to teach them the ways of the land, and where to obtain food as her mother taught her (para 25).
[Applicant 1] speaks of her father having told her of he and his father fishing, hunting and following the rivers around (para 11). She also speaks of gathering timber to make artefacts (para 8).

Again such activities are in my view consistent with subsistence activities being carried out by the native title claim group on the area covered by the application.

I am satisfied that this right can be *prima facie* established in respect of the area covered by the application.

24. Engage in production, customary trade and other customary economic activities on the land as they relate to other aboriginal people with respect to indigenous cultural resources.

Not established

I refer to my reasons concerning this right under s.190B(4) above where I conclude that this claimed right is not readily identifiable in respect of areas where exclusive possession cannot be sustained. As I am of the opinion the right is not readily identifiable it follows that it cannot be *prima facie* established in respect of such areas.

In respect of areas where exclusive possession can be sustained I am not satisfied that there is sufficient information to support the *prima facie* establishment of this right.

Please see s.190(3A).

25. Care for the area for the benefit of the native title holders.

Not established.

At Schedule G (attached to the application) it is said that the activities of the native title claim group includes;
3. Substantial and widespread exercise of management responsibilities for the traditional lands, and exercise of cultural property rights in them.
20. Protecting, managing, and using the claim area.

However, there is little other information in the application or accompanying documents to support the existence of this native title right among the claim group. I am of the view that the available information is insufficient to *prima facie* establish this right and interest in respect of the application area.

26. Hunt and fish in the area covered by the application.

Established.

Schedule G sets out details of activities in relation to the land and water currently being carried out by the native title claim group. Included in those activities are:

2. Continual access to, camping upon and residing outstations with residences on the traditional lands.
13. Engaging in a way of life consistent with the traditional connection of the native title claim group to the claim area.
17. Physically occupying the claim area.
18. Physically enjoying and using the claim area.
23. Engaging in economic life in relation to the claim area.
25. Exercising all those rights, duties and responsibilities which are derived from and unnecessary for, or ancillary to, the full exercise and enjoyment of the native title rights and interest referred to above.

Although Schedule G does not specifically refer to be native title claim group engaging in hunting and fishing such activities would in my opinion be ancillary to members of the native title claim group engaging the above activities.

This is supported by the affidavits of **[Applicant 4]** and **[Applicant 1]**. **[Applicant 4]** speaks in her affidavit of her grandfather and mother taking her and her five brothers out to country to show them how to survive off the land (para 6). She describes how they obtained grubs from gum saplings (para 16), and hunted possums, kangaroos, goannas and porcupines and fished in the creek for yellow bellies, catfish, jewfish, eels and turtles (paras 17 and 18). She also speaks of taking her children out to teach them the ways of the land, and where to obtain food as her mother taught her (para 25).

[Applicant 1] speaks of her father having told her of he and his father fishing, hunting and following the rivers around (para 11).

I am satisfied that the available information is sufficient to *prima facie* establish this right and interest.

27. Use the area covered by the application for social, Customary, religious and traditional purposes.

Not established.

The activities said to be currently carried out by the native title claim group in relation to the land and water do not refer to the area covered by the application being used for the above purposes. Whilst it may be argued that such use would be incidental to the other activities outlined in Schedule G, I cannot find sufficient information in the application or affidavits to support the *prima facie* establishment of this claimed the right.

Again please see my comments above concerning s190B(3A)

Conclusion
Taking into account:
- the express qualifications to the claimed native title rights and interests;
- the above material and
- the decisions to which I have referred,

I am satisfied that at least some of the claimed native title right and interests can *prima facie* be established in respect of the area covered by the application.

To sum up:
I find that the rights described at the following paras can be *prima facie* established: 2, 4, 5, 6, 11, 12, 14, 20, 23 and 26.

I find that the rights described at the following paragraph can be *prima facie* established but only in respect of areas covered by the application where exclusive possession can be sustained: 13

The rights and interests are subject to the qualifications in Schedule E and Attachment Schedule E.

Requirements met.

Traditional physical connection: S190B(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 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.

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application. This is found in the affidavits of **[Applicant 4]** and **[Applicant 1]** to which I have referred above.

In her affidavit **[Applicant 4]** deposes that she was born and raised in the Clermont area (para 3), and that her mother and grandfather used to take her out into her country and show her how to survive off the land (para 6). She says that she has lived on the claim area for the majority of her life and continues to do so (para 25). Based on this evidence, I am satisfied that **[Applicant 4]** is a member of the claim group and has the requisite traditional physical connection.

At Schedule M, the applicants state that:

> "Members of the claimant group can demonstrate an ongoing physical connection to the area, both through continuity of residence and through ongoing episodes of visitation and cultural practice.
>
> Prior to the establishment of Woorabinda mission in 1927, large numbers of aboriginal families lived on the banks of Sandy Creek, which is located a few kilometres outside of Clermont. Families continued to live there until the 1950s. Several families remained in Clermont after this time, some through until the present time. Most had members working out on the many stations in the surrounding area."

Accordingly, I am satisfied that at least one member of the native title claim group currently has and previously had a traditional physical connection with any part of the land or waters covered by the application. I find that the application passes this condition.

Result: Requirements met

No failure to comply with s61A: S190B(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.

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 National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area. This has been confirmed by the Tribunal's Geospatial Branch in its assessment dated 15 June 2004.

S61A(2)- Previous Exclusive Possession Acts ("PEPAs")

The exclusion clauses at paragraphs (i) and (ii) of Schedule B effectively exclude any lands subject to a previous exclusive possession act as defined under s.23B of the Act save where the Act allows those lands to be part of a native title determination application.

The exclusion clauses meet the requirement of this subsection.

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

Paragraph (d) of Attachment E confirms that the application does not include a claim for exclusive possession over areas that are subject to valid previous non-exclusive possession acts done by the Commonwealth or to a State or Territory, as set out in Division 2B of Part 2 of the *Native Title Act*.

The applicants further state at para (c) of 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.

S.61A(4) – ss.47, 47A, 47B

At Schedule L the applicants refer to a lease for 99 years granted to the Sandy Creek Aboriginal Co-op. However, they claim the benefit of ss.47, 47A and 47B in relation to the whole of the claim area.
They state:
The applicants are not aware of any (other than the above mentioned lease) at the time of lodging but reserve the right to the protections afforded in ss. 47, 47A and 47B of the Act for the whole of the claim area.

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

No claim to ownership of Crown minerals, gas or petroleum: S190B(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 for the Decision

Schedule Q of the application states 'none', indicating that the applicant does not claim any minerals, petroleum or gas wholly owned by the Crown.

Result: Requirements met

No exclusive claim to offshore places: S190B(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 for the Decision

The claim area does not include any offshore places: see description and map of the external boundaries, where it is apparent that the claim area is located inland from the coast. At Schedule P the applicants state 'none'.

Result: Requirements met

Native title not otherwise extinguished: S190B(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 for the Decision

The applicants state at para (a) of Schedule B that all areas where native title has otherwise been extinguished are excluded from the application.

The applicants further state at para (f) of Attachment E that the native title rights and interests claimed do not include rights and interests that are subject to extinguishment by application of the common law.

A search of the Register of Indigenous Land Use Agreements reveals that there is one indigenous land use agreement (ILUA) entered on the Register that affect part of the claim area. This is the agreement between the Kangoulu people and Ausquest Ltd, QIA2001/01, registered on 29 June 2001. There are two other ILUAs in notification that affect part of the claim area: the Kangoulu People ILUA Exploration Permit Backlog Project QIA 2004/03 and the Kangoulu People No 2 ILUA Exploration Permit Backlog project, QIA 2004/04. This information was confirmed in the assessment prepared by the Tribunal's Geospatial Unit dated 15 June 2004.

For the purposes of this condition the only relevant ILUA I need to consider is that entered on the Register of Indigenous Land Use Agreements, QIA2001/01. This ILUA does not provide for any extinguishment of native title, and in any case the claimants in the current application are not parties to this ILUA.

The application does not disclose, and I am not otherwise aware that the native title rights and interests have otherwise been extinguished.

I am satisfied that the requirements of this condition are met.

Result: Requirements met

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