

National Native Title Tribunal

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE:	Graham Miner
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Application Name:	Gugu Badhun People #2
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Names of Applicants:	Ernie Hoolihan, Harry Gertz, Narda Kennedy, Hazel Illin, Elsie Thompson
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Region:	Central Queensland	NNTT No.:	QC05/7
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Date Application Made:	22 March 2005	Federal Court No.:	QUD 85/2005
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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

22 April 2005
Date of Decision

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

Brief History of the Application

This application was lodged with the Federal Court on 22 March 2005. The application was made in response to a section 29 notice issued in relation to the following Exploration Permit Applications: EPM 14555, EPM 14576, and EPM 14610.

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 and legal services files for this application.
- ◆ The National Native Title Tribunal's registration test files and legal services files for related applications made by the Gugu Badhun People: Gugu Badhun People QC04/11, Kutjala and Gugu Badhun People QC02/23, Gunbara Bulara Group QC01/27, Gunbara Bulara Group #2 QC01/36 and Gunbara Bulara Group #3 QC 01/41
- ◆ 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.
- ◆ Geospatial assessment by the Tribunal's Geospatial Analysis and Mapping Branch dated 1 April 2005

No information was considered which was not already before the State of Queensland, so no additional information has been of provided to the State of Queensland.

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' are to the application filed in the Federal Court on 23 March 2005, unless otherwise specified.

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

On 22 November 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 (Cwth).

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 I shall consider the merit conditions.

A. Procedural Conditions

Applications contains details set out in ss. 61 and 62: S. 190C(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: S. 61(1)

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

Reasons relating to this sub-condition

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 Gugu Badhun People. Schedule A of the application contains the following description of the native title claim group:

'The criteria for membership of the Gugu Badhun native title claim group is in accordance with traditional laws acknowledged and customs observed by the Gugu Badhun people who are traditionally connected to the area described in Schedule B ("application area") through:

- 1. physical, spiritual and religious association*
- 2. genealogical descent; and*
- 3. processes of succession;*

and who have communal native title in the application area, from which rights and interests derive.

The Gugu Badhun native title claim group is comprised of all persons descended from the following ancestors:

- [Ancestor 1], father of [Descendant 1]*
- [Ancestor 2], mother of [Applicant 2] and [Descendant 2]*
- [Ancestor 3], father of [Descendants 3, 4, 5 and 6]*
- [Ancestor 4], mother of [Descendants 7, 8 and 9]*
- [Ancestor 5] also known as [Ancestor 5], father of [Descendant 10]*

I have taken descendants to mean biological descendants. I note that there is no mention 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 information provided at Schedule F, Attachment F and the affidavits attached sworn by [Applicant 1] (22 February 2005) and [Applicant 2] (13 March 2005) of the application supports the contention that the Gugu Badhun are a distinct and cohesive group, with local group and family ties to specific areas of land within Gugu Badhun country going back hundreds of years. It indicates that the claimants observe common traditional laws and customs and that they continue to acknowledge these traditional laws and customs and

possess and exercise their traditional rights and interests, in relation to the whole of their traditional country, including the area claimed.

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 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: S. 61(3)

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

Reasons relating to this sub-condition

The applicants' names are provided at Part A of the application. The details of address for service appear at Part B of the application.

Result: Requirements met

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

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must 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

Schedule 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: s. 61(5)

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

Reasons relating to this sub-condition

s. 61(5)(a)

The application is 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).

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

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

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s 62(1)(a)(i) – s 62(1)(a)(v)

Reasons relating to this sub-condition

Affidavits sworn by the each of the persons named as the applicant accompany the application. The affidavits are signed, dated and competently witnessed. The affidavits are virtually identical in content and address the matters required by s. 62(1)(a)(i) to (v). I am satisfied that the affidavits meet the requirements of this condition.

Result: Requirements met

Application contains details set out in s. 61(2): S. 62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information required in s. 61(2). Because of this, the Registrar's decision for this condition is set out under s. 61(2) below.

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

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

Comment on details provided

There are affidavits from [Applicant 2] and [Applicant 1] accompanying the application which contain details of traditional physical connection. In the affidavit of [Applicant 2] he states that he lived and worked in the Valley of Lagoons (which is in the claim area) until the end of 1975 and further says that he moved back to Greenvale, also in the claim area, at the end of 2001.

In his affidavit [Applicant 1] speaks about his traditional connection with country and states that he goes to his traditional country to hunt and fish, and normally set up camp at Reedy Brook in the Valley of Lagoons (para 9).

Attachment F states that Gugu Badhun people have maintained a traditional physical connection with the land and waters covered by the application, and that named Gugu Badhun people reside on Gugu Badhun country. Both [Applicant 1 and Applicant 2] depose to travelling on country, hunting and fishing and learning about it from their forebears.

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

- residing on the land;
- hunting and collecting animals, fish and other food from the land and waters;
- using waters from the land;
- collecting materials including timber, stones, minerals, ochre, grass and shell from the land and waters;
- travelling across the land and waters;

- camping on the land;
- responsibility for caring for the land and waters including sites of significance;
- teaching children on and about the land and waters; and
- maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

Result: Provided

Information about the boundaries of the application area: S. 62(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 maps in the application are sufficient to enable the area covered by the application to be identified.

Result: Requirements met

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

Reasons relating to this sub-condition

For the reason that led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information contained in the application and provided by the applicant is sufficient to enable any areas within the external boundaries of the area covered by the application which are not covered by the application to be identified.

Result: Requirements met

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

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

Reasons relating to this sub-condition

A map of the area claimed accompanies the application. 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 area covered by the application.

Result: Requirements met

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

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

Reasons relating to this sub-condition

At Schedule D of the current application the applicants state that no searches have been conducted as yet.

There is no information in the application to indicate that the applicants have carried out any searches. I am satisfied that the requirements of this condition are met.

Result: Requirements met

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

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

Reasons relating to this sub-condition

A description of the claimed native title rights and interests is contained in Schedule E. 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. I have outlined these rights and interests in reasons for decision in respect of s. 190B(4).

Result: Requirements met

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

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

- (i) the native title claim group have, and the predecessors of those persons had, an association with the area; and*
- (ii) there exist traditional laws and customs that give rise to the claimed native title; and*
- (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

Reasons relating to this sub-condition

In *State of Queensland v Hutchison* [2002] FCA 416 Keifel J found that the information required by s.62(2) should form part of the application. This decision is therefore authority for the proposition that only material that is part of the application can be relied upon in support of compliance with the requirements of s.62(2)(e). Refer also to my reasons for decision under s. 190B(5) below.

Information relevant to this subsection is contained in Schedules F, G and M and Attachment F of the application. There are also affidavits from [Applicant 2] and [Applicant 1] accompanying the application.

It is my view that the information in Schedules F, G and M, Attachment F and the evidentiary affidavits from [Applicant 1 and Applicant 2] amount to a general description of the factual basis so as to comply with the requirements of s. 62(2)(e) (i)-(iii). See my reasons under s. 190B(5) for details of this material.

I am satisfied that the information provided by the application amounts to a general description of the factual basis so as to comply with the requirements of s. 62(2)(e).

Result: Requirements met

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

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

Reasons relating to this sub-condition

At Schedule G of the application the applicants provide details of the activities that the native title claim group carries out in the claim area including:

- residing on the land;
- hunting and collecting animals, fish and other food from the land and waters;
- using waters from the land;
- collecting materials including timber, stones, minerals, ochre, grass and shell from the land and waters;

- travelling across the land and waters;
- camping on the land;
- responsibility for caring for the land and waters including sites of significance;
- teaching children on and about the land and waters; and
- maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

Further details are provided in the affidavits of [Applicant 1] and [Applicant 2].

Result: Requirements met

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

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

Reasons relating to this sub-condition

At Schedule H the applicants state that there are three Gugu Badhun polygon claims that *abut* the area covered by the application, namely:

- Djilbalama QUD6007/01
- Christmas Creek Holding Group QUD6041/01; and
- Bintharra QUD6036/01

The assessment of the Tribunal's Geospatial Unit dated 1 April 2005 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 1 April 2005.

Result: Requirements met

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

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

Reasons relating to this sub-condition

At Schedule I refers to Attachment I of the application. A number of section 29 notifications are listed in Attachment I, including EPM 14555, EPM 14576, EPM 14610 which have a notification date of 22 December 2004.

The assessment by the Tribunal's Geospatial Unit dated 1 April 2005 confirms this information. As a result I am satisfied that the conditions relating to this part of the registration test have been met.

Result: Requirements met

Reasons for Decision under s. 190C(2):

For the reasons identified above, the application contains all the details and other information, and is accompanied by the affidavits and other documents, required by ss.61 and 62 of the Act. I am satisfied that the application meets the requirements of this condition.

Aggregate Result: Requirements met

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

The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

Reasons for the Decision

This application was lodged with the Federal Court on 22 March 2005. For the purposes of s. 190C(3)(b), the application is taken to have been "made" on that date.

The assessment of the Tribunal's Geospatial Unit dated 1 April 2005 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 1 April 2005.

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

Result: Requirements met

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

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

- (a) *the application has been certified under paragraph s. 203BE(2) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or*
- (b) *the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.*

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

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

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

Reasons 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.

The application has not been certified by the relevant representative Aboriginal/Torres Strait Islander body. Consequently, I need only consider whether there has been compliance with s.190C(4)(b) in relation to authorisation. Thus the requirements of s.190C(4)(a) relating to certification are not applicable.

There are two limbs to s.190C(4)(b): firstly I must consider whether the applicants are members of the claim group and secondly, whether they have been 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.

The first limb

At paragraph 1 of their s.62 affidavits each of the applicants state that they are an applicant and a member of the native title claim group for this native title determination application.

The second limb.

Each applicant states in their s. 62 affidavit that they are authorised by all the persons in the native title claim group to make this application and to deal with matters arising in relation to it, the basis of which is set out in Schedule R and Attachment R of the application.

Attachment R of the application contains a copy of the public notice containing details of the meeting to be held at Greenvale on 2 and 3 October 2004, including the purpose of the meeting being to authorise applicants in the making of a new native title application. Attachment R also contains a copy of the agenda for that meeting, a copy of the attendance sheet and the minutes of the meeting which includes details of all the resolutions passed. The affidavit of anthropologist [Anthropologist 1] dated 17 March 2005 (at Attachment R of the

application) states that, “in my professional opinion there was sufficient representatives of the Gugu Badhun people in attendance (at the authorisation meeting) and those persons had the necessary authority from the group to authorise the native title claim application on their behalf.”(para. 26)

The decision making process of the group was described in the affidavit of anthropologist [Anthropologist 1] who stated that: “from my experience of the Gugu Badhun claim group decisions are made through a process of consensus and are deemed by the group to be reached when there is sufficient agreement and no group member is publicly willing to maintain their opposition (para 25).....the process of authorisation accorded with the traditional decision making practices of the Gugu Badhun group observed by myself on numerous occasions.”(para 27)

Information concerning the Authorisation meeting was attached to [Anthropologist 1]’s affidavit. Resolution 8 records that:

“The meeting resolves to authorise [Applicant 3], [Applicant 1], [Applicant 5], [Applicant 2], [Applicant 4] as applicants for the claim, to make the application and deal with all matters arising under the Native Title Act in relation to the application.”

The resolution was passed with no objection.

I accept that for the reasons set out above, that the applicants are authorised in accordance with s. 251B to make the claim and deal with matters arising in relation to it. I am also satisfied that the requirements of s.190C(5) are met.

Result: Requirements met

B. Merits Conditions

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

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

Reasons 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.

A map of the claim area is provided at Attachment C.

The assessment completed by the Tribunal's Geospatial Analysis and Mapping Branch, dated 1 April 2005, concluded that the map and area description were consistent and identified 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:

Attachment B provides:

The area covered by this application excludes any land or waters that is or has been covered by the following native title determination applications:

- 1. Djilbalarna Q6007/01;*
- 2. Christmas Creek Holding Group Q6041/01; and*
- 3. Bintharra Q6036/01.*

Schedule B states:

2. Areas that are excluded from the application area:

(i) Subject to (iv), valid acts that occurred on or before 23 December 1996 comprising such of the following that are considered extinguishing acts within the meaning of the Native Title Act 1993 as amended namely:

(a) Category A past acts as defined in s.228 and s.229 of the Native Title Act 1993, and

(b) Category A intermediate acts as defined in s.232A and s.233B of the Native Title Act 1993.

(ii) subject to (iv), any valid previous exclusive possession act(s) as set out in Division 2B of Part 2 of the Native Title Act 1993 Cth done in relation to the area and the act(s) were attributable to the Commonwealth or State;

(iii) subject to (iv) any areas over which native title has otherwise been extinguished.

(iv) The paragraphs above and below are subject to the provisions of s.47, s.47A and s.47B of the Act as may apply to any part of the application area. Areas subject to acts referred to in (2)(i), (ii) and (iii), and (3), to which the provisions of s47, s.47A and s.47B of the Native Title Act 1993 Cth apply, are not excluded from the application area.

3. Save that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession act(s), done by the Commonwealth or the State, as set out in Division 2B or Part 2 of the Act.

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 part of 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. The applicants do not identify specific parcels of land where any of s.47, s.47A or s.47B apply, but rather rely on reference to class tenures. 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 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: S. 190B(3)

The Registrar must be satisfied that:

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

Reasons 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 (the claimants) is comprised by the Gugu Badhun People who, according to traditional laws and customs observed are traditionally connected with the area described in Schedule B (the area claimed) through:

- *physical, spiritual, and religious association*
- *genealogical descent, and*
- *processes of succession*

and have a communal native title in the application area, from which rights and interests derive.

The Gugu Badhun native title claim group are comprised of all persons descended from the following ancestors:

- *[Ancestor 1], father of [Descendant 1]*
- *[Ancestor 2], mother of [Applicant 2] and [Descendant 2]*
- *[Ancestor 3], father of [Descendants 3, 4, 5 and 6]*
- *[Ancestor 4], mother of [Descendants 7, 8 and 9]*
- *[Ancestor 5] also known as [Ancestor 5], father of [Descendant 10]*

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that: “[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently....The Act is clearly remedial in character and should be construed beneficially.”

I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s. 190B(3)(b), even though these descendants are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group.

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, 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: S. 190B(4)

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

Reasons for the Decision

Schedule E describes the native title rights and interests claimed as follows.

The rights and interest claimed in relation to:

1) Land and waters where there has been no prior extinguishment of Native Title of where section 238 (the non-extinguishment principle) applies:

The native title rights and interests claimed are the rights to possession, occupation, use and enjoyment of the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group but subject to the valid laws of the Commonwealth of Australia and the State of Queensland.

2) All remaining land and waters within the claim area the Native Title rights and interests claimed are not to the exclusion of all other and are the rights to use and enjoy the claim area in accordance with the traditional laws acknowledged and customs observed by the Gugu Badhun for the purposes of:

- accessing land and waters;*
- entering and remaining on the land being claimed;*
- hunting;*
- fishing;*
- gathering and using the products of the claim area such food, medicinal plants, timber, bark, ochres and earths, stone and resin, minerals, and using natural water resources of the area;*
- camping and erecting shelters;*
- engaging in cultural activities;*
- conducting ceremonies and holding meetings;*
- teaching the physical and spiritual attributes of locations and sites;*
- participating in cultural practices relating to birth, marriages and deaths on the claim area; and*
- making decisions, pursuant to Aboriginal law and custom about the use and enjoyment of the land by Aboriginal people; and*
- transmitting of tradition knowledge.*

The application does not include a claim for exclusive possession over previous non-exclusive possession act areas as defined under section 23F of the Native Title Act 1993 save where the Native Title Act 1993 and/or the common law allows such a claim to be part of the Native Title Determination application.

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 It is sufficient that at least some of the native title rights and interests claimed be readily identifiable.

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

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

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 Act.

s.223(1) reads as follows:

'The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia'.

Some interests which may be claimed in an application may not be native title rights and interests 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 am satisfied in the light of the High Court's decision in *Ward* that the composite right claimed at para 1 of Schedule E is readily identifiable. Briefly, a claim to exclusive possession, occupation, use and enjoyment of lands and waters may 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).

In relation to the rights claimed at para 2, I have considered the decision of the Full Federal Court in *Attorney General for the Northern Territory v Ward* [2003] FCAFC 283 at [16] – [23]. In summary, in that case a determination was sought 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 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]).

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.

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”. In para 2. of Schedule E the applicant sets out the “purposes of” the claimed use and enjoyment. I am of the view that this clearly indicates the incident of the claimed right to use and enjoy the remainder of the claim area, i.e. where the area where exclusive possession cannot be sustained. I am satisfied that the applicant has exhaustively indicated the incident of the right.

It is accordingly my view that this right and interest claimed at para. 2 is readily identifiable.

I am satisfied that the native title rights and interests claimed in Schedule E are readily identifiable,

Result: Requirements met

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

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

- (a) *that the native title claim group have, and the predecessors of those persons had, an association with the area;*
- (b) *that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;*
- (c) *that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs*

Reasons 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. Regard can also be had to relevant information that is not contained in the application: subject to s. 190A(3).. 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]. I have not been supplied with any such material. However, in this instance I have found sufficient information in the application.

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that “[s]ection 190B(5) may require more than [s.62(2)(e)], for the Registrar is required to be satisfied that the factual basis

asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.”

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.⁵

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word ‘traditional’ refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that ‘traditional’ laws and customs are those normative rules which existed or were “rooted in pre-sovereignty traditional laws and customs”: at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being ‘possessed’ under traditional laws and customs, and this assumes a continued “vitality” of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was ‘traditional’ or whether it could “no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified” - at [82] and [83].

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.

In considering this condition, I have had regard to:

- the information in Schedules F, G and M of the application;
- the information in Attachment F of the application;
- the affidavit sworn by [Applicant 1] (22 February 2005), and
- the affidavit sworn by [Applicant 2] (13 March 2005).

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.

⁵ See *Ward* at [382].

The applicants make the specific assertions referred to in s. 190B(5)(a) – (c) in Schedule F.

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

Schedule F of the application states that:

“The claim group asserts that:-

- (a) the native title claim group has, and predecessors of those persons had, an association with the claim area; and
- (b) there exist traditional laws and customs that give rise to native title rights and interests claimed;
- (c) the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

The native title rights and interests claimed are those possessed under the traditional laws and customs of the Gugu Badhun People which together form part of a body of customary law that is part of a broader system of Aboriginal culture. The broader system is a comprehensive body of law covering cultural values, norms of social behaviour and principles that comprise the land law component of that body of law that govern the landed interests of the claim group. The acquisition of land interests is by descent from ancestors and derived from fundamental rights of possession and ownership of land.

Examples of facts giving rise to the assertion of native title include:-

- (i) members of the claim group continue to have a close association, including a spiritual connection with the claim area according to their traditional laws and customs;
- (ii) members of the claim group continue to pass on to their descendants the body of traditional laws and customs rights to conduct activities under those traditional laws and customs stories and beliefs concerning their traditional country including the claim area;
- (iii) members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials;
- (iv) members of the claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors;
- (v) members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forebears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country by members of the native title claim group, the holding of ceremonies on traditional country and the use of traditional country.

SEE ATTACHMENT F and the affidavits of [Applicant 1] sworn on 22 February 2005 and of [Applicant 2] sworn on 13th March 2005.”

Attachment F contains archaeological, historical and linguistic information about the presence of Aboriginal people in the area and about their occupation of the area for centuries prior to the Crown's acquisition of radical title. Attachment F also says in part:

"The principal scholarly evidence for Gugu Badhun occupation of the area is linguistic. In 1886, Curr in his *The Australian Race* published several word lists from the region. Contemporary linguists such as Sutton and Dixon have been able to identify the language used as Gugu Badhun. [Anthropologist 2] master's thesis of 1973, *Gugu Badhun and Its Neighbours*, provides an extensive survey of the language. [Anthropologist 2]'s principal sources of information, [Descendant 11] and [Descendant 7], were ancestors of the present claimants who spoke in language. [Anthropologist 2]'s informants described the boundaries of Gugu Badhun territory in some depth (at pp 14-15). The area claimed falls within the boundaries thus described. According to Sutton at p. 14 R. L Sharp in 1939 and Norman Tindale in 1940 produced the earliest maps of Gugu Badhun territory. These are not entirely accurate.

In the affidavit of [Applicant 1] annexed at Attachment F at paragraph 3 he deposes that his father [Descendant 7] was born in a cave at Lamonds Lagoon on the Burdekin River in Gugu Badhun country on 7 February 1907. He further deposes in paragraph 4 that his grandmother, [Ancestor 4], was born in the same cave as his father at Lamonds Lagoon.

In the affidavit of [Applicant 2] annexed at Attachment F he deposes that his grandfather [name removed] was working out at the Valley of Lagoons when he [Applicant 2] moved there in 1971 and continues, "That's where he was from. Apart from the youngest child, all of my grandfather's children were born on the Valley of Lagoons". Atkinson, op. cit., at p. 117 records that "[Name removed] was born on Kangaroo Station [on Gugu Badhun country] in 1887 and spent 71 years working there. Genealogical and archival material consulted by the CQLCAC's senior anthropologist confirms that [name removed] mother [Ancestor 2], who is an apical ancestor for the claim group, lived on and was buried in the Valley of Lagoons. [Applicant 2] also deposes at paragraph 27 that he knows where his grandfather's grandmother, the mother of [Ancestor 2], is buried and that [name removed] "...took me there and showed me, its on the Valley of Lagoons"."

Also Schedule G lists a number of activities currently carried out by members of the claim group as follows:

"The traditional usage of Gugu Badhun people, including in some cases the area claimed, includes:

- (a) residing on the land;
- (b) hunting and collecting animals, fish and other food from the lands and waters;
- (c) using waters from the land;
- (d) collecting materials including timber, stones, minerals, ochre, grass and shell from the land and waters;
- (e) travelling across the land and waters;
- (f) camping on the land;
- (g) responsibility for caring for the land and waters including sites of significance;

- (h) teaching children on and about the land and waters; and
- (i) maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.”

These activities in my view support the assertion that the group has an association with the area the subject of the application.

Further evidence of the association of members of the claim group with the claim area is provided in the affidavit of [Applicant 1] (22 February 2005), and [Applicant 2] (13 March 2005) which are referred to above and have been provided in support of this application.

In his affidavit sworn on 22 February 2005 [Applicant 1] deposes that:

- He is a Gugu Badhun elder.
- His father always said that he was from the Valley of Lagoons and a traditional owner and member of the Gugu Badhun tribe.
- His father was born on the Valley of Lagoons.
- His grandmother was born in a cave at Lamonds lagoon on the Burdekin River, and his father was born in the same cave.
- His grandmother was also a member of the Gugu Badhun tribe, and at one stage, was tribally married to one of the ancestors named in Schedule A.
- He identifies one of the other applicants as a descendant of this shared ancestor.
- His father gave information to the Gugu Badhun language study conducted by [Anthropologist 2] [I take this to be a reference to the anthropologist].
- His father advised people in the 1950s that he was a traditional owner. When his father was working at the Valley of Lagoons, when he was a kid, his mother wanted to take his father away. The station owners would not let him go. The deponent’s Grandad then raised his father at Valley of Lagoons.
- The station owners of Valley of Lagoons knew them and recognised his family and the [name removed] family, amongst others, as traditional owners.
- The claim area is in Gugu Badhun country.
- They have been to their traditional country and hunted and fished there.
- [name removed] lived on the Valley of Lagoons and they often went back and camped and fished there.
- He has continued to go back to the area from time to time and his children go up to that area around Valley of Lagoons as often as they can.

[Applicant 2] also provides information in his affidavit that supports the native title claim group’s association with the area. His affidavit is referred to in Attachment F.

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.

I refer to Schedule F of the application which I have quoted above.

Attachment F says in part that:

“The law and custom of the Gugu Badhun descends from the stories or dreamtime actions of creative beings that in their travels formed and populated the landscape and laid down rules which governed traditional life. One important story also recorded in the ethnographic literature is that of the rainbow serpents "Yamani" as told in [Applicant 2]'s affidavit at paragraphs 9 to 12. In addition to these stories concerning the waterways of the region there are others including that of "the three maidens" and "how lava came to be" which recount the creation of geological features in the area such as the lava flows in the Burdekin. The lava flow story is deposited to in paragraph 8 of [Applicant 2]'s affidavit.”

These and other stories which give form to the social organization, cultural customs and laws of the claim group are not only known by senior members of the group, but are actively passed down as a responsibility to country.”

I have had regard to [Applicant 2]'s affidavit (13 March 2005). I am satisfied that it supports the above statements in Attachment F.

Schedule G lists a number of activities currently carried out by members of the claim group that are consistent with the existence of traditional laws and customs that give rise to the claimed native title. They are said to include:

- camping on the land;
- hunting and collecting animals, fish and other food from the land and waters;
- using waters from the land;
- collecting materials including timber, stones, minerals, ochre, grass and shell from the land and waters;
- travelling across the land and waters;
- responsibility for caring for the land and waters including sites of significance;
- teaching children on and about the land and waters;
- maintaining traditional knowledge of the land and waters and passing that knowledge on to younger generations.

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 affidavit of [Applicant 1] (22 February 2005). He refers to the following traditional laws and customs:

- his being a Gugu Badhun elder;
- association with particular parts of traditional Gugu Badhun country by virtue of birthplace (para 3 and 4);
- traditional usage of the claim area for camping, hunting and fishing and usage of other resources of the claim area (para 9);
- the transmission of traditional laws and customs from one generation to the next (para 11).

The information outlined above supports the assertion that traditional laws and customs exist which gives rise to the native title rights and interests of the Gugu Badhun people in the land and waters of the application area. It also supports the existence of an identifiable community of people called the Gugu Badhun who are associated with and recognised by neighbouring

traditional owners and pastoral holders as traditional owners of an area of traditional country that is either the area claimed in the current application or near it.

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 Attachment F it is said that:

“Members of the group continue to transmit to the younger generation stories and knowledge which preserve the traditional law and customs of the Gugu Badhun. [Applicant 1] deposes that [Applicant 2] and [name removed] hold cultural camps on Gugu Badhun country for aboriginal children who are mainly of Gugu Badhun descent. Descendants of the [Family 1] and [Family 2] families attended the last camp in October 2004 and the children were taught about bush tucker and fishing.

In paragraphs 8, 9, 12, 13 and 14 of [Applicant 2]'s affidavit he deposes to the transmission of knowledge and practices about country from older to younger generations within the group. At paragraph 7 he describes making a mural depicting the carpet snake and other totem animals. In his mural he is passing on the stories told to him by [name removed] and [name removed]. This passing on of the stories is the paramount obligation, which goes with land ownership. Laws and customs come from the ancestors and the creative beings in the stories, and are passed on from generation to generation. The ancestors in their mythic travels not only form the landscape but also impart the knowledge of physical resources and serve as exemplars of the behaviours needed to sustain the society.

Members of the claim group continue to maintain physical connections with their country. Gugu Badhun such as [Applicant 2] and [name removed] still live on traditional Gugu Badhun country at Greenvale. Both [Applicant 2 and Applicant 1] depose to travelling on country and learning about it from their forebears. Connection to country has physical and spiritual modalities, which cannot be readily disentangled. Under traditional law and custom people's spirits come from the land and return to the land when they die. If one is buried on country one is able to join the spirits of the ancestors more readily. The continuing importance of this physical dimension of connection to land and ancestors through time and burial on country is demonstrated in [Applicant 2]'s affidavit at paragraph 27.

The line of connection between deceased ancestors and living claimants is referred to by aboriginal persons as coming from their parents and grandparents and for the Gugu Badhun it is this principle of descent governing membership of the group. Descent groups form alliances by ongoing patterns of intermarriage. The genealogies of the claimant group reveal interrelations by marriage amongst the claim group families. At paragraph 14, [Applicant 2] deposes that “my grandfather taught us from a very young age who we were and who we were related to.”

Members of the claim group continue to use the claim area for traditional hunting and fishing as is deposed to in paragraph 9 of the affidavit of [Applicant 1] and paragraphs 17 to 22 of the affidavit of [Applicant 2].

Members of the claim group continue to care for their traditional country albeit in a contemporary context by consulting and negotiating with explorers and developers to protect cultural heritage. Extensive cultural heritage protection work has been done in the area. Members of the group have formed a corporation which has as one of its goals the protection of Gugu Badhun heritage.”

I accept the above statements which are verified by the persons named as the applicant and supported by the affidavits of [Applicants 1 and 2] referred to in the statement.

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 affidavit of [Applicant 1] dated 22 February 2005. He states:

The station owners of Valley of Lagoons station knew us and recognised the [Family 1 and family 2] families, among others, as the right people of that country.

My father and [name removed] would ring the station owners to let them know that we were going to camp. They never knock us back. (para 11)

This information indicates to me that these members of the native title claim group are recognised as traditional owners for the area and are accepted by others as having continuing entitlements in relation to the land and waters.

Having regard to the above, and also the information and reasons set out in respect of s.190B(5)(a) and (b) above, 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 Gugu Badhun people 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: S. 190B(6)

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

Reasons 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).

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

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

The claimed native title rights and interests are 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.

As said in the reasons under s. 190B(4) above, 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].

Thus, 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). This is recognised by the applicant in that the composite native title right and interest to *possession, occupation, use and enjoyment* claimed in paragraph 1) is limited to areas where exclusive possession can be sustained.

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

- the information contained in Schedules F, G and M of the application;
- the information in Attachment F of the application;
- the affidavit sworn by [Applicant 1] (22 February 2005);
- the affidavit sworn by [Applicant 2] (13 March 2005),
- the affidavit sworn by [Anthropologist 1] (17 March 2005).

These documents provide sufficient material and information to satisfy me on a *prima facie* basis that the at least some of the native title rights and interests claimed by the applicants can be established. I will now consider 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 *Native Title Act*.

The rights and interest claimed in relation to:

1) Land and waters where there has been no prior extinguishment of Native Title of where section 238 (the non-extinguishment principle) applies:

The native title rights and interests claimed are the rights to possession, occupation, use and enjoyment of the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group but subject to the valid laws of the Commonwealth of Australia and the State of Queensland.

Established

Possession

At Schedule F the applicants provide information about the past and continuing presence of Aboriginal people in the area – (see first 5 paras. on first page)

In his affidavit dated 22 February 2005 [Applicant 1] deposes that his father was born on the Valley of Lagoons (para 3) and always said he was a traditional owner and member of the Gugu Badhun tribe (para 8). He further deposes that the station owners of Valley of Lagoons station knew his father and recognised the [Family 1 and Family 2] families, amongst others, as the *right people of that country* (para 11).

[Applicant 2] deposes in his affidavit that:

- His grandfather [name removed] was working out at the Valley of Lagoons when he [Applicant 2] moved there in 1971. He continues, "That's where he was from." (para 4)
- Apart from the youngest child, all of my grandfather's children were born on the Valley of Lagoons". (para 4)
- His father was born there.(para 4)
- He knows where his grandfather, grandmother, the mother of [Ancestor 2], is buried and that [name removed] "...took me there and showed me, its on the Valley of Lagoons". (para 27)

In Attachment F it is said on page 2 that Atkinson in, *Northern Pioneers*, at p. 117 records that:

"[name removed] was born on Kangaroo Station [on Gugu Badhun country] in 1887 and spent 71 years working there. Genealogical and archival material consulted by the CQLCAC's senior anthropologist confirms that [name removed] mother [Ancestor 2], who is an apical ancestor for the claim group, lived on and was buried in the Valley of Lagoons."

I am satisfied that there is sufficient information available to me to conclude that possession of the relevant area can be prima facie established.

Occupation

In his affidavit [Applicant 1] deposes that he is a Gugu Badhun elder, that his father was born on the Valley of Lagoons, that his father was a member of the Gugu Badhun tribe and lived and worked in the area. He also tells of his grandmother's place of birth, marriage and presence in the area. (para 3 – 5). [Applicant 1] also refers to other families included in the claim and of activities on traditional country consistent with occupation (paras 6 – 9). [Applicant 1] deposes that [name removed] was born in, and lived in, the Valley of Lagoons and that he and other members of the claim group, [Applicant 2] and [name removed] live in Greenvale near the Valley of Lagoons (para 10).

[Applicant 2] deposes that he has lived and worked in the area, that he moved back to the area permanently in 2001. Prior to that he had been coming back to the area when working elsewhere, and that his son and daughter live there. (para 3 - 7) He also deposes at some length about the use of the resources of the area, camping, hunting and gathering (para 17 – 26). I note that he says people are buried in the area (para 27). He also says at para 28 that people from the north and south normally let them know if they come through the area. I see this as indicating that those people recognise that rights of the group to the area, including the right to occupation.

At Attachment F it is said that:

"The archaeological record and remaining sites and artefacts indicate that indigenous persons occupied the claimed area for centuries prior to the Crown's acquisition of radical title and subsequent contact between explorers, then settlers with indigenous persons in the area.

There is ample archaeological evidence of important burial and ceremonial sites

comprising considerable cultural resources. In addition numerous small campsites with background scatter have been discovered:

John Richter, “*Review of Cultural Heritage Issues in the Upper Burdekin Catchment*”, Report for EPA, 1999.”

In my opinion all the above information is indicative of the occupation of area claimed by the native title claim group.

Use and Enjoyment

In his affidavit [Applicant 1] deposes that he has been to their traditional country to hunt and fish and often camped and fished at the Valley of Lagoons (para 9).

Similarly, [Applicant 2] deposes to the use and enjoyment of the area and its resources at paras. 17 - 26 of his affidavit.

The applicants state at Schedule G of the application that the native title claim group currently carry out certain activities consistent with the rights and interests claimed in Schedule E. These include:

- residing on the land;
- hunting and collecting animals, fish and other food stuffs from the land and waters;
- using waters from the land;
- collecting materials including timber, stones, minerals, ochre, grass and shell from the land and waters;
- using waters from the land;
- travelling across the land and waters;
- camping on the land;
- caring for the land and waters, including sites of significance;
- teaching children on and about the land and waters.

Having regard to the above information I am satisfied that the native title rights and interests claimed in para 1) of Schedule E can be *prima facie* established in relation to the relevant area referred to in that paragraph.

I now propose considering the rights and interests claimed under para 2) of Schedule E

Para 2 lists 12 incidents of, or components of, the claimed non-exclusive right to use and enjoy *all remaining land and waters within the claim area* claimed. That area is the area where exclusive possession cannot be sustained.

Para 2 of Schedule E is constructed in such a way that each incident or component of the claimed right is expressed separately and must, I believe, be considered separately

In considering whether the rights claimed by the applicants at para 2) of Schedule E can be established *prima facie*, I have had regard to Schedules F, G and M and Attachment F of the application and the affidavits of [Applicant 1], [Applicant 2] and [Anthropologist 1] to which I have referred above.

2) All remaining land and waters within the claim area the Native Title rights and interests claimed are not to the exclusion of all other and are the rights to use and enjoy the claim area in accordance with the traditional laws acknowledged and customs observed by the Gugu Badhun for the purposes of:

I refer to my reasons in respect of *use and enjoyment* under para 1) above and to the information which follows. I am satisfied that this native title rights and interests claimed can be prima facie established.

I will now consider each of the listed *purposes*.

- *accessing land and waters;*

I am satisfied for the reasons follow that this incident of the native title rights and interests claimed can be prima facie established.

I refer to the activities outlined in Schedule G above. These include residing on the land; hunting and collecting animals, fish and other food from the lands and waters; using waters from the land; collecting materials including timber, stones, minerals, ochre, grass and shell from the land and waters; travelling across the land and waters, and camping on the land.

All these activities are consistent with members of the group accessing land and waters.

[Applicant 1] refers in his affidavit to going to “our traditional country and hunting and fishing there” (para 9)

Similarly, in his affidavit [Applicant 2] speaks of camping, hunting, fishing and gathering in the area. (paras 17 – 26). All these activities are consistent with accessing land and waters.

- *entering and remaining on the land being claimed;*

For the same reasons and based on the same information as set out above in respect of *accessing land and waters*, I am satisfied that this aspect of the native title rights and interests claimed can be prima facie established.

- *hunting;*

- *fishing;*

- *gathering and using the products of the claim area such food, medicinal plants, timber, bark, ochres and earths, stone and resin, minerals, and using natural water resources of the area;*

- *camping and erecting shelters;*

For the same reasons and based on the same information as set out above in respect of *accessing land and waters*, I am satisfied that the above four aspects of the native title rights and interests claimed can be prima facie established.

- *engaging in cultural activities;*

I am satisfied for the following reasons that this aspect of the native title rights and interests claimed can be prima facie established.

I refer to the activities outlined in Schedule G above. Those activities include: responsibility for caring for the land and waters including sites of significance; teaching children on and about the land and waters; and maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

[Applicant 2]'s affidavit at paragraphs 9 to 12 tells the story of the rainbow serpents "Yamani.

[Applicant 1] at para 12 of his affidavit tells of [Applicant 2] and [name removed] holding cultural camps on Gugu Badhun country for aboriginal children who are mainly Gugu Badhun descent.

- conducting ceremonies and holding meetings;

I am satisfied for the following reasons that this aspect of the native title rights and interests claimed can be prima facie established.

Schedule F states at par (v) that:

“ members of the claim group continue to exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country by members of the native title claim group, *the holding of ceremonies on traditional country* and the use of traditional country.” (emphasis added)

I also refer to the information in [Applicant 1]'s affidavit concerning the holding of cultural camps.

[Anthropologist 1] provides information in her affidavit, sworn 17 March 2005, of meetings held at Greenvale.

- teaching the physical and spiritual attributes of locations and sites;

I am satisfied that this aspect of the native title rights and interests claimed can be prima facie established.

In Schedule G the traditional usage of Gugu Badhun people is said to include:

(h) teaching children on and about the land and waters; and

(i) maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

[Applicant 1] at para 12 of his affidavit tells of [Applicant 2] and [name removed] holding cultural camps on Gugu Badhun country for aboriginal children who are mainly Gugu Badhun descent. I believe it is reasonable to infer that this would involve teaching the physical and spiritual attributes of locations and sites

- participating in cultural practices relating to birth, marriages and deaths on the claim area;

I am **not satisfied** that this aspect of the native title rights and interests claimed can be prima facie established. There are references to people being buried on Gugu Badhun country ([Applicant 2] – para 27). However, I cannot find sufficient information relating to births and marriages to find that this has been prima facie established.

I refer to s.190(3A) of the Act. This section permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested and accepted for registration. In brief, provided that additional information satisfies the Registrar (or his delegate) that, had it been before him at

the time of testing, the right would have been accepted for registration, then, subject to meeting the other conditions of the test, the right in question will be entered in the Register of Native Title Claims.

- making decisions, pursuant to Aboriginal law and custom about the use and enjoyment of the land by Aboriginal people; and

Making decisions about use and enjoyment would appear to be problematic as it involves controlling access to the land. However, I note the judgement of Justice O'Loughlin in *De Rose Hill*, where his Honour rejected the argument by the State that the grant of the lease extinguished all native title rights to control access to and use of the area. At [553] His Honour concludes that the grants do not extinguish residual rights of control of access and use as between the holders of native title themselves and any other Aboriginal people who seek access to or use of the claim area in accordance with the traditional laws and customs. See also [917].

As such I find the non-exclusive right to make decisions about the use and enjoyment of the application area, in so far as it relates to Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders, can be established in relation to the relevant claim area. I propose inserting a note to this effect on the Register.

I am satisfied for the following reasons that this aspect of the native title rights and interests claimed can be prima facie established.

[Anthropologist 1] provides information in her affidavit, sworn 17 March 2005, of the existence of traditional decision making processes. I am of the view that it is reasonable to infer that such decision making processes would relate to decisions about the use and enjoyment of the land by Aboriginal people pursuant to acknowledged and observed traditional laws and customs.

[Applicant 2] in his affidavit says:

“29. When people from the north and south come through, they normally let me know. For example, people from the south always call in when they come this way and if I speak to people from the north. they will let me know when they're coming down this way to camp.”

This indicates to me the existence, recognition of, and observance of traditional decision making rights and interest about the use and enjoyment of the land by Aboriginal people.

- transmitting of tradition knowledge.

I am satisfied for the following reasons that this aspect of the native title rights and interests claimed can be prima facie established.

In Schedule G the traditional usage of Gugu Badhun people is said to include:

- (h) teaching children on and about the land and waters; and
- (i) maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

[Applicant 2] at para 12 of his affidavit tells of [Applicant 2] and [name removed] holding cultural camps on Gugu Badhun country for aboriginal children who are mainly of Gugu Badhun descent. I believe it is reasonable to infer that this would involve the transmission of traditional knowledge, particularly in the light of other information in the application. For instance, [Applicant 2] tells in his affidavit of his grandfather passing on traditional knowledge to him – see paras 9 – 14. He also speaks of teaching his children (para 15).

To sum up I am satisfied that:

- the rights and interest claimed at para 1) can be prima facie established, and
- the rights claimed at para 2) can, with the one exception, be prima facie established. That exception is: “*participating in cultural practices relating to birth, marriages and deaths on the claim area.*”

It follows that the requirements of s. 190B(6) are met.

Result: Requirements met

Traditional physical connection: S. 190B(7)

The Registrar must be satisfied that at least one member of the native title claim group:

- (a) *currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or*
- (b) *previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:*
 - (i) *the Crown in any capacity; or*
 - (ii) *a statutory authority of the Crown in any capacity; or*
 - (iii) *any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.*

Reasons 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.

Schedule M states that:

“Members of the Native Title Claim Group currently have a traditional physical connection with the claim area. For example, members have used the land and water covered by the application to reside, to hunt and to enter and travel across.

See ATTACHMENT F - the affidavits of [Applicant 1] sworn on 22nd February 2005 and of [Applicant 2] sworn on 13th March 2005.”

That members of the claim group continue to use the claim area for traditional hunting and fishing is deposed in paragraph 9 of the affidavit of [Applicant 1]. Both [Applicant 1 and 2] depose to travelling on country and learning about it from their forebears.

There is adequate evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application. This is found in the affidavit of [Applicant 1] dated 22 February 2005.

In his affidavit, [Applicant 1] deposes:

- he is a Gugu Badhun man and an elder;
- his predecessors (his father and grandmother) were from country that is in the claim area – the Valley of Lagoons and Lamond’s Lagoon on the Burdekin River;
- there is a history of his people’s traditional ownership of this country;
- he has been to his traditional country and hunted and fished there and he and his family often went back and camped and fished there;
- he continues to go back to the area from time to time;
- members of the claim group hold cultural camps on Gugu Badhun country for aboriginal kids who are mainly of Gugu Badhun descent.

Based on this evidence, I am satisfied that [Applicant 1] is a member of the claim group and has the requisite traditional physical connection.

[Applicant 2]’s affidavit also demonstrates that he has the required connection.

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 s. 61A: 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.

Section 61A contains four sub-conditions. Because s. 190B(8) asks the Registrar to test the application against s. 61A, the decision below considers the application against each of these four sub-conditions.

Reasons for the Decision

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

S. 61A(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 1 April 2005.

S. 61A(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 (v) of Schedule B confirms that the application does not include a claim for exclusive possession over areas that are or were subject to a valid previous non-exclusive possession act attributable to the Commonwealth or to a State or Territory, as set out in Division 2B of Part 2 of the *Native Title Act*.

S. 61A(4) – s. 47, s. 47A, s. 47B

At Schedule L the applicants claim the benefit of ss.47B in relation to vacant Crown land occupied by the members of the native claim group.

The Schedule states:

Pursuant to paragraph (c) above and section 47B of the Native Title Act 1993, all land included in this application that is determined not to be land covered by a freehold estate or lease or a reservation, proclamation, dedication, condition, permission or authority made or conferred by the Crown in any capacity or by the making, amendment, or repeal of legislation of the Commonwealth, a State or Territory, under which the whole or part of the land or waters in the area is to be used for public purposes or a particular purpose as set out in Section 47B of the *Native Title Act 1993* at the time the application is made is occupied by one or more members of the native title claim group.

The applicants further state at Schedule B that the paragraphs above and below in that Schedule are subject to the provisions of s. 47, s. 47A and s.47B of the Act as may apply to any part 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: S. 190B(9)(a)

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

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

Reasons for the Decision

Schedule Q of the application states that the applicant does claim any minerals, petroleum or gas wholly owned by the Crown.

Result: **Requirements met**

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

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

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

Reasons 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. Also at Schedule P the applicants state that they do not claim such possession.

Result: **Requirements met**

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

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

- (c) *in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).*

Reasons for the Decision

The application states at Schedule B that subject to the provisions of ss. 47, 47A and 47B, any areas over which native title has otherwise been extinguished are excluded from the area covered by the application.

Result: **Requirements met**

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