National Native Title Tribunal

Registration test decision (EDITED)

Application name:	Gold Coast Native Title Group
Name of applicant:	Mr Ian Levinge, Ms Eileen Williams, Mr Kevin Slabb, Ms Jacqueline McDonald, Mr Bernie Williams, Mr Wesley Aird, Mr Earl Sandy
State/territory/region:	Southern Queensland
NNTT file no.:	QC06/10
Federal Court of Australia file no.:	QUD346/2006
Date application made:	6 September 2006
Date application last amended:	6 July 2007
Name of delegate:	Lisa Jowett

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(1B) (as in force on 31 August 2007), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 18 February 2008

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth)

Reasons for decision

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Introduction

This document sets out my reasons for the decision to not accept the claimant application QC06/10—Gold Coast Native Title Group—QUD346/2006 for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to the claims made in all claimant applications given to him or her under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court), with the exception of certain amended applications specified under s. 190A.

This application was not on the Register of Native Title Claims (the Register) on 15 April 2007 when the relevant provisions of the *Native Title Amendment Act 2007* (the 2007 Amendment Act) commenced because it had not been considered for registration at that time. Therefore, item 89 of the transitional provisions to the 2007 Amendment Act is attracted. As a result, I must ensure there is compliance with the requirements of that sub-item when considering the application pursuant to s. 190A.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth), as in force on 31 August 2007, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 27 September 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

A summary of the result for each condition is provided at Attachment A.

Application overview

The application that is before me for consideration under s. 190A is that filed as an amended application in the Court on 6 July 2007 pursuant to an order made by Dowsett J on 29 June 2007. A

copy of the application was forwarded by the Court to the Registrar under s. 64 on 6 July 2007. The application was originally filed in the Court on 5 September 2006.

Native title determination applications have previously been made in this region by members of the Gold Coast Native Title Group (GCNTG) claim group:

- QC01/2—Eastern Yugambeh People—QUD6002/01 which was filed on 25 January 2001 and later discontinued on 26 July 2002
- QC98/24—Kombumerri People #2—QUD6194/98 which was lodged with the Tribunal on 28 April 1998 and later discontinued on 26 July 2002
- QC96/69—Kombumerri—QUD6082/98 which was lodged with the Tribunal on 25 June 1996 and later discontinued on 26 July 2002.

The history of this application is explained in the affidavit of claim group member, **[Person 1 – name deleted]**, sworn 22 August 2006 (1st affidavit):

> The application of "Eastern Yugambeh People" Q6002/01 (the "Eastern Yugambeh application") was lodged on 25 January 2001. It had been instigated by senior members of the native title group in the context of the Kombumerri applications, which were not inclusive of the entire group. The Eastern Yugambeh application was made on behalf of the descendants of eight known apical ancestors of the native title group—at [3].

[Person 1] also explains in her affidavit the reason for the naming of this current application:

> The current application is similar in substance to the Eastern Yugambeh application. The application is made on behalf of the same native title group, which is defined by a common language. Given the use of various names, and history of claims, within the region the name "Gold Coast Native Title Group" is an attempt to ensure no families feel excluded—at [8].

A preliminary assessment of a draft application was provided to the applicant on 24 July 2006. The application was then filed in the Court on 5 September 2006. The applicant requested an extension of time on the application of the registration test in order to resolve objections to the application. This was granted on 23 January 2007 with the decision to be made by 16 April 2007.

An amended application was filed in the Court on 5 July 2007 addressing certain inconsistencies identified by the Tribunal's Geospatial Services.

A number of objections to the registration of the application have been submitted for my consideration. They are, in the majority, from members of the claim group opposing the making of the application and go primarily to matters of authorisation.

As the transitional provisions of the 2007 Amendment Act affect this application, the applicant was advised by letter dated 15 May 2007 that the Registrar was considering the claim pursuant to item 89 of the transitional provisions. The applicant was offered a reasonable opportunity to provide further information or other things, or to have other things done in relation to the application, before the registration test was applied (pursuant to item 89(4)(c)).

On 25 September 2007 the case manager wrote to the applicant informing them of the recent decision in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*). The applicant was informed that in light of this decision the information and material relating to the factual basis of the claim may not be sufficient to satisfy the conditions set out in s. 190B(5). A member of the applicant group met with the case manager for the application and the Tribunal's Senior Delegate,

Communications on 10 October 2007. The meeting was requested by the applicant in order to clarify issues relating to the material that may be provided in respect of satisfying the requirements of s. 190B(5). Confirmation of the discussion which took place at the meeting was forwarded to the applicant by the case manager and noted other issues of clarification which may assist me in making my decision. These were to do with the decision-making process used for the purposes of authorisation and the application's lack of an express statement that the applicant is a member of the native title claim group (as required by s. 190C(5)).

The applicant provided further information on 31 October 2007—one document relating to the requirements of s. 190B(5) and issues raised in the decision in *Gudjala*; another document making further comment regarding the objections to the application.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

However, given that item 89 of the transitional provisions of the amendments to the Act referred to above applies to the registration testing of this application, I must also abide by item 89(4)(c). This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person *after* the application *was made*.

Attachment B of these reasons lists all of the information and documents that I have specifically considered in reaching my decision.

There exists an enormous amount of material in respect of the previous Kombumerri and Eastern Yugambeh applications. Not all of this has been relevant to my consideration under s. 190A of the GCNTG application. However, I have read this material and consider it to be information within my general knowledge. Much of the material before me that pertains to the registration testing of the Eastern Yugambeh application has been relevant in providing historical context. Those documents I have specifically utilised for the purposes of these reasons are listed at Attachment B.

I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker.

The steps that the Registrar has undertaken to ensure procedural fairness is observed in this matter are listed at Attachment C.

Objections received by the Tribunal

Thirty-six objections to the application have been received, thirty-three of those are from people, who, by their own identification, are descended from one or more of the apical ancestors listed at schedule A of the GCNTG application. They would thus appear to be members of the native title claim group. Two objections are made by persons whose membership or otherwise of the group is difficult to determine. One objection is made by Queensland South Native Services (QSNTS) on behalf of the Quandamooka People. Copies of these objections were received by the Tribunal during the period of 3 April 2006 through to 15 February 2007. Each person's correspondence is listed at Attachment B of these reasons on page 56. These objections were forwarded to the applicant for the GCNTG application in the period 27 November 2006 through to 19 February 2007.

On 23 November 2006 letters seeking clarification of their objection was sought by the then delegate from the following persons: **[Group of persons 1 – names deleted]. [Person 2 – name deleted]** responded by letter with further clarification on 18 December 2006. This letter was forwarded to the applicant on 21 December 2006.

The applicant responded to all this objection material on 20 March 2007. The material provided to the Tribunal is listed at Attachment B of these reasons.

Please note: All references to legislative sections refer to the *Native Title Act 1993* (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition. For ease of reading, sections, sub-sections and paragraphs of the Act are denoted with 's.' in headings and elsewhere.

Procedural and other conditions: s. 190C

Section 190C(2)
Information etc. required by ss. 61 and 62

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

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 14 below.

I note that I am considering this claim against the requirements of s. 62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

In the case of *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) Mansfield J stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss. 61 and 62'—at [16]. His Honour also said in relation to the requirements of s. 190C(2): '...I hold the view that, for the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself'—at [39].

I am of the view that *Doepel* is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not to undertake any qualitative or merit assessment of the prescribed information or documents, except in the sense of ensuring that what is found in or with the application are the details, information or documents prescribed by ss. 61 and 62.

Native title claim group: s. 61(1)

> The application must be 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.

Result

The application **meets** the requirement under s. 61(1).

Reasons

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). If the description of the native title claim group in the application indicates that not all persons in the native title claim group have been included, or that it is in fact

a subgroup of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I should not accept the claim for registration—*Doepel* at [36].

In forming a view on this, I am not required to go beyond the material contained in the application and in particular I am not required to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group as described is in reality the correct native title claim group—*Doepel* at [37].

The description of the persons in the native title claim group is set out in schedule A of the application (set out in full below under s. 190B(3)) and in summary describes the GCNTG as comprising all of the biological descendents of twelve named people. The description also includes the element that adoption of persons by members of the native title claim group, in accordance with traditional law and custom, confers membership of the group upon the adoptee.

There is nothing on the face of the application which leads me to conclude that the description of the native title claim group indicates that not all persons in the native title group have been included, or that it is in fact a subgroup of the native title claim group.

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

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

Result

The application **meets** the requirement under s. 61(3).

Reasons

The name and address for service of the applicant's representative is found on page 18 of the application.

Native title claim group named/described: s. 61(4)

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

The application **meets** the requirement under s. 61(4).

Reasons

The application at schedule A does not name the persons in the native title claim group but contains a description of the persons in the group.

Application in prescribed form: s. 61(5)

> The application must:
> (a) be in the prescribed form,

(b) be filed in the Federal Court,
(c) contain such information in relation to the matters sought to be determined as is prescribed, and
(d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application **meets** the requirement under s. 61(5).

Reasons

The application is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998 and was filed in the Court as required, pursuant to s. 61(5)(a) and (b).

It contains the information prescribed by ss. 61 and 62 and is accompanied by the prescribed documents (that is, an affidavit from each of the persons who comprise the applicant prescribed by s. 62(1)(a)), thereby meeting the requirements of s. 61(5)(c) and (d).

Affidavits in prescribed form: s. 62(1)(a)

The application must be accompanied by an affidavit sworn by the applicant that:
(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
(ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
(iii) the applicant believes all of the statements made in the application are true, and
(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).

Result

The application **meets** the requirement under s. 62(1)(a).

Reasons

This section requires that the application be accompanied by an affidavit sworn/affirmed by the applicant in relation to the matters specified in subparagraphs (i) through to (v). To satisfy the requirements of s. 62(1)(a) the person comprising the applicant may jointly swear/affirm an affidavit or alternatively each of those persons may swear/affirm an individual affidavit.

Separate affidavits by each of the seven persons who jointly comprise the applicant accompany the application. Each affidavit is signed by the deponent and appears to be competently witnessed. I am satisfied that all affidavits sufficiently address the matters required by s. 62(1)(a)(i)—(v).

Application contains details required by s. 62(2): s. 62(1)(b)

The application must contain the details specified in s. 62(2).

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains eight paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 14 below and is one and the same as the result for s. 62(1)(b) here.

Result

The application **meets** the requirement under s. 62(1)(b).

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

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

Result

The application **meets** the requirement under s. 62(2)(a).

Reasons

Schedule B of the application refers to Attachment B which describes the external boundaries of the application area by the use of coordinates within a geographical description. Information about the areas within the external boundary which are not covered by the application area is also provided at Schedule B.

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

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **meets** the requirement under s. 62(2)(b).

Reasons

Schedule C of the application refers to Attachment C, which is a map that shows the external boundaries of the application area.

Searches: s. 62(2)(c)

> The application must contain the 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.

Result

The application **meets** the requirement under s. 62(2)(c).

Reasons

Schedule D states that no searches have been carried out.

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

> The application must contain 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 interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Result

The application **meets** the requirement under s. 62(2)(d).

Reasons

Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application area. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

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

> The application must contain 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.

Result

The application **meets** the requirements under s. 62(2)(e).

Reasons

Schedule F contains information going to the factual basis on which it is asserted that the native title rights and interests claimed exist, and for the particular assertions in the section. Further information in relation to the factual basis is contained in schedules G and M and affidavits provided by members of the claim group.

The general description provided does more than recite the particular assertions and in my view meets the requirements of a general description of the factual basis for the assertions identified in this section—see *Queensland v Hutchison* (2001) 108 FCR 575.

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application **meets** the requirement under s. 62(2)(f).

Reasons

Schedule G contains details of activities carried out by the native title claim group in the application area.

Other applications: s. 62(2)(g)

> The application must contain 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 of compensation in relation to native title.

Result

The application **meets** the requirement under s. 62(2)(g).

Reasons

Schedule H states that the applicant is not aware of any other applications that seek a determination of native title or compensation in relation to native title made in relation to the whole or part of the area the subject of their application.

Section 29 notices: s. 62(2)(h)

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(h).

Reasons

Schedule I states that the applicant is not aware of any s. 29 notices that have been given in relation to any part of the area covered by the application.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it meets each of the subrequirements of ss. 62(2)(a) to (h). See also the result for s. 62(1)(b) above.

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it **contains** all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

Section 190C(3)
No common claimants in previous overlapping applications

The Registrar/delegate 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) 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 the previous application being considered for registration under s. 190A.

Result

The application **satisfies** the condition of s. 190C(3).

Reasons

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration and any overlapping 'previous application'.

The Tribunal's geospatial overlap analysis (dated 12 September 2007) reveals that there are no overlapping applications in relation to the application area on the Register. The requirement that I be satisfied that there are no common members between this application and any other overlapping applications is therefore not triggered.

Section 190C(4)
Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

(a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, 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.

Under s. 203BE(4), certification of a claimant application by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and
(b) briefly set out the body's reasons for being of that opinion, and

(c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

Under s. 190C(5), if the application has not been certified, the application must:
(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am **satisfied** that the circumstances described by either ss. 190C(4)(a) or (b) are the case in this application and therefore the condition of s. 190C(4) as a whole is **met**.

Reasons

The application is not certified pursuant to s. 203BE and I must therefore be satisfied pursuant to s. 190C(4)(b), that 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.

Pursuant to s. 190C(5), the Registrar cannot be satisfied of compliance with s. 190C(4)(b) 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 sets out the grounds on which the Registrar should consider that it has been met.

In *Doepel* at [78], Mansfield J discusses the interaction between ss. 190C(4)(b) and 190C(5) and how the Registrar is to be satisfied as to these conditions of the registration test:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.

Pursuant to s. 190C(4)(b) I am required to be satisfied that it is the case that 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.

The importance of proper authorisation of an application has been considered by the Court on many occasions. For instance, in *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 (*Bolton*), Justice French observed the following:

> As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on

behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title…—at [43].

Information considered

In my consideration of the authorisation of the applicant to make this application and to deal with matters arising in relation to it I have had regard to a large volume of material. This material has included some pertaining to the previous Eastern Yugambeh application which I have found to be relevant to the matters before me. I have considered the following material:

1. Gold Coast Native Title Group application including—
    1.1. Attachment R1—the individual s. 62(1)(a) affidavits
    1.2. Attachment R2—affidavit by **[Person 1]**, sworn 22 August 2006 (1st affidavit) with the following Attachments:
        1.2.1. Motions of the Kombumerri Authorisation Meeting, dated 7 October 2000
        1.2.2. Eastern Yugambeh Mailing List Membership as at 26 May 2006 and Eastern Yugambeh Corresponding Membership as at 29 May 2006
        1.2.3. *Eastern Yugambeh Native Title News*, The newsletter of the traditional owner families of the coast and south-east hinterland—
            - editions dated 3 March 2005, 1 November 2004, 2 July 2004, July 2003
        1.2.4. *Eastern Yugambeh Native Title News*, The newsletter of the traditional owner families of the coast and south-east hinterland, dated 17 February 2006; and the following documents—
            - Mail merge letter, dated 24 February 2006, notifying of Gold Coast Native Title Application information sessions (March 2006)
            - Public Notices for the regional sessions in Beaudesert, Fingal (Tweed), Mt Warren Park (Beenleigh), Ipswich, Southport, One Mile College (Stradbroke)
        1.2.5. *Eastern Yugambeh Native Title News*, The newsletter of the traditional owner families of the coast and south-east hinterland, dated 27 April 2006; and the following documents—
            - Public Notice of Confirmation of Authorisation Meeting for 24 May 2006, placed in *Gold Coast Bulletin* on Friday 5 May 2006
            - Mail Merge letter, dated 9 May 2006, inviting attendance at the 'final community discussion forum' at Broadbeach on 20 May 2006
            - Reminder notice for the confirmation of Authorisation Meeting, dated 19 May 2006
        1.2.6. Correspondence to persons who objected to the previous Eastern Yugambeh application and to persons identified as 'potential new objectors' (affidavit, **[Person 1]** at [26])

1.2.7. Correspondence to persons 'whose relationship to the applicant group was unclear' affidavit, **[Person 1]** at [27])

1.2.8. Gold Coast Native Title Group, Work Update, 9 June 2006, including other documents—

- Information on cultural heritage projects
- Community notices
- *Gold Coast Native Title News*, dated 20 June 2006, providing information about confirmation of authorisation and the filing of the NTDA;

2. Documents provided by the GCNTG in response to the objection material received by the Tribunal on 21 March 2007. The applicant's submission comprised the following documents—

2.1. Affidavit of **[Person 1]**, dated 20 March 2007 (2nd affidavit), including attachments:

A—Video footage (provided on DVD) of the 20 May 2006 Community Forum
B—Attendance List of the Community Forum held 20 May 2006 at Broadbeach
C—Audio recording (provided by CD) of the 24 May 2006 Authorisation Meeting
D—Letter dated 13 March 2007 from **[Applicant 1 – name deleted]** regarding confirmation of her and **[Person 3 – name deleted]** attendance at the 24 May 2006 authorisation meeting
E—Record of attendance at 24 May 2006 authorisation meeting
F—Letters conveying authorisation from **[Person 4 – name deleted]** (29 May 2006); **[Person 5 – name deleted]** (5 June 2006); **[Person 6 – name deleted]** (9 March 2007); **[Person 7 – name deleted]** (9 June 2006); **[Person 8 – name deleted]** (15 June 2006); **[Person 9 – name deleted]** (23 June 2006)
G—Notice of 28 June 2006 meeting, agenda and notes at which additional persons comprising the applicant were authorised
H—An explanation of the family lines with reference to apical ancestors (the views of which were presented at the 24 May 2006 authorisation meeting
I—Kombumerri Aboriginal Corporation for Culture (KACC), Statement by Committee Members, dated September 2006
J—Document of proposed changes to objects and rules of incorporation, KACC
K—Correspondence dated February/March 2006 between **[Person 10 – name deleted]** (for EY Native Title Group) and **[Person 2]** (for KACC)
L—Letter dated 18 May 2006 from **[Person 1]**(for the GCNTG) to **[Person 11 – name deleted]**
M—Information and correspondence dated February 2006 regarding communications between GCNTG and QSNTS regarding the Quandamooka objection
N—Various correspondence between GCNTG and QSNTS between November 2006 and February 2007
O—Letter dated February 2007 from QSNTS to **[Person 1]** (for the GCNTG) regarding terms of instruction by the Quandamooka Family Representatives Steering Committee

3. Provision by the applicant of additional information, dated 31 October 2007—

3.1. Letter from **[Applicant 2 – name deleted]** expressing his own personal views regarding those objections opposing the GCNTG application

3.2. Letter from **[Person 1]** confirming that the persons jointly comprising the applicant are members of the native title claim group and addressing requirements of s. 190B(5)

4. Objections to the making of the GCNTG application submitted by various persons (listed at Attachment B);
5. Correspondence to the President of the Tribunal from **[Applicant 2]**, dated 18 February 2002, including numerous attachments;
6. Letter to **[Lawyer 1 – name deleted]** from **[Applicant 2]**, dated 19 April 2001;
7. Affidavit of **[Applicant 2]**, dated 28 February 2001;
8. Attachment R of the 25 January 2001 Eastern Yugambeh application (comprising of affidavits of **[Group of persons 7 – names deleted])**
9. Correspondence to Tribunal case manager from **[Applicant 2]**, dated 3 November 2000, attaching transcript of Kombumerri authorisation meeting of 7 October 2000.

The requirements of s. 190C(5)

As the application is not certified pursuant to s. 190C(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 sets out the grounds on which the Registrar should consider it has been met.

Pursuant to item 89(4)(b) of the transitional provisions, I am obliged to apply s. 190A to my consideration of the claim in this application as if the conditions in ss. 190B and 190C requiring that the application contain certain information, also allowed the information to be provided by the applicant or another person after the application is made.

I am satisfied that the application includes a statement that the applicant is a member of the native title claim group—this is found in a letter dated 31 October 2007, provided by the applicant after the application was made. I am satisfied that the application includes a statement that the applicant is authorised to make the application and also briefly sets out the grounds on which I should consider that this has been met. This statement and brief setting out of the grounds is found in each of the affidavits accompanying the application by the persons comprising the applicant at paragraphs 4 (i) through (vii) and 5.

The requirement in s. 190C(5) is therefore met. It is my view that the requirement in s. 190C(5) is procedural only and it does not automatically follow that an the application which contains the information prescribed by s. 190C(5) must necessarily comply with the condition in s. 190C(4)(b)—see these comments by Mansfield J in *Doepel*:

> Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

I move now to consider if the condition in s. 190C(4)(b) is met.

What is the process that must be used to authorise the applicant?

Section 251B defines the term 'authorise' and provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways:

(a) in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists (in accordance with s. 251B(a)); or

(b) in any other case, by an agreed or adopted process in relation to authorising things of that kind (in accordance with s. 251B(b)).

In other words, the second of the two processes under s. 251B may only be employed where there is no traditional process mandated for authorising things of that kind: see *Evans v Native Title Registrar* [2004] FCA 1070 at [7] and [52].

Each person comprising the applicant swears in their affidavit that the process of decision-making is in accordance with the native title claim group's traditional law and custom (at paragraph 5). I take this to mean that the decision-making process used for the purposes of authorising the making of the native title determination application is a traditional process and one which must be complied with in relation to authorising things of this kind (as per s. 251B(a)). In other words, the group appears to have not agreed to and adopted a decision-making process in the absence of a mandated traditional decision-making process. This is confirmed in **[Person 1]** 1st affidavit at paragraphs [9] and [10] (I discuss this further below).

Who must authorise the applicant to make and deal with the application?

It is firstly necessary to consider the definition of the term 'native title claim group' from whom authorisation must flow pursuant to s. 190C(4)(b). This definition, by virtue of s. 253, is found in s. 61(1):

> all the persons (the ***native title claim group***) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed

In my view, the decision in *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) indicates that I am required to consider the composition of the native title claim group, as defined in s. 61(1), when assessing authorisation under s. 190C(4)(b). Justice O'Loughlin said in *Risk* at [60] that a native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. He went on to say at [60] that it is incumbent on the delegate to be satisfied that the claimants truly constitute such a group, and the applicant should be seen to be authorised by all persons who relevantly hold the common or group rights.

Composition of the native title claim group and its representation at authorisation

For the reasons set out below under s. 190B(3), I have found that the description of the native title claim group in schedule A of the application does not meet the registration test condition in s. 190B(3) such that the group is described sufficiently clearly. This has not so much to do with the

descent-based description of the group but to do with the lack of information regarding the rules according to traditional law and custom by which adoption takes place.

Without a finding that the group has been sufficiently clearly described so that it can be ascertained whether any particular person is in the group, consideration of the authorisation condition would normally be compromised—identifying the composition of the native title claim group for the purposes of ensuring the proper authorisation of the applicant by all of the group would not be possible. However, I am of the view that in large part (aside from the adoption element), the description of the group is sufficiently clear enough to consider in full whether the applicant has been authorised to make and deal with the application.

Given the relatively large apical ancestor group and according to information contained in the material before me, I am of the view that the group is likely to be comprised of a large number of persons. The authorisation of the applicant to make and deal with the GCNTG application is said to have been made by representatives of the family groups who comprise the native title claim group. The following is my understanding of how the group has been represented for the purposes of authorisation and is based on information contained in the 9 June Work Update attached to **[Person 1]** 1st affidavit and Attachment H of **[Person 1]** 2nd affidavit, titled 'Document of Authorisation'.

- seventeen children of the ten apical ancestors have known living descendents;
- each of these seventeen children represent 'family lines';
- these are the families who comprise the native title claim group;
- these family lines have received information about the GCNTG application and had the opportunity to participate in the authorisation process;
- authorisation is 'through family lines'; and
- families represented at the 24 May 2006 Confirmation of Authorisation meeting were descendants of these seventeen children.

It is stated in the group's newsletter of 17 February 2006 (Attachment 4 to **[Person 1]** 1st affidavit) that it is 'now sent directly to 336 families'. There are also 87 corresponding members who 'receive all the information that is prepared for committee members'.

Additionally, references made to the size of the claim group in the previous Eastern Yugambeh application, in particular in an affidavit sworn by **[Applicant 2]** in 2001, indicate that the claim group may be in excess of 1000 persons. The Eastern Yugambeh application described its claim group as those descended from eight apical ancestors. The GCNTG is described as being descended from those same eight apical ancestors as well as another two—ten in total. Judging by the numbers contained in the Eastern Yugambeh mailing lists, (used in the GCNTG application for authorisation and other purposes) I consider that it is likely that the GCNTG claim group is made up of 1000 or more persons.

How was the authorisation process conducted?

A management committee exists, 'formed to support the traditional process of decision-making' and whose 'primary purpose is ensuring decisions made according to this traditional process are

fully informed, and that the process of decision-making is formally reflected and documented' (**[Person 1]** 1st affidavit at [14]).

The committee consists of sixteen representatives from the family groups comprising the native title group—**[Person 1]** 1st affidavit at [14] to [16]. The committee produces a newsletter, *Eastern Yugambeh Native Title News*, The newsletter of the traditional owner families of the coast and south-east hinterland[1]. A newsletter of 2 July 2004 explains in detail the operation of the Eastern Yugambeh Native Title Group Management Committee and two other related entities, Eastern Yugambeh Limited, the Eastern Yugambeh Trust and how all operate for the benefit of the Eastern Yugambeh People. The management committee is 'responsible to the whole Eastern Yugambeh Community' and that community is defined as 'the descendents of **[Group of ancestors 1 – names deleted]** '(page 3).

As I understand it, the management committee has facilitated the process of the discussion, consultation and authorisation of the GCNTG application. Dissemination of information to the native title claim group occurs via the newsletters the committee produces.

I have a considerable amount of information before me that documents in various forms the process leading up to the 'formal' authorisation of the application. The broad overview is provided by **[Person 1]** in her 1st affidavit and supported by eight attachments. Greater detail was later provided by **[Person 1]** in her 2nd affidavit and attachments. All these documents are listed above.

Information about the proposed making of the native title determination application was communicated via newsletters distributed in accordance with Eastern Yugambeh mailing lists. The most recent lists I have are dated 5 April 2006 and show the mailing list consists of 336 names and the corresponding membership list consists of 90 names. **[Person 1]** 1st affidavit provides at Attachment 4 information about the notification given to the claim group:

> A "Community Forum" and "Confirmation of Authorisation Meeting" were advertised in a number of ways:
>
> a. Newsletter 27 April 2006;
> b. Public Notice of meetings for 'Gold Coast Traditional Owners' Proposed Native Title Claim' in "The Gold Coast Bulletin" 5 May 2006;
> c. 'Invitation to Community Forum' 9 May 2006 and 'Reminder Notice of Confirmation of Authorisation Meeting' 19 May 2006, sent to corresponding members;
> d. Notices in community newspapers and local radio announcements between 10 May and 20 May 2006.

Copies of all these documents are provided. Additionally, the newsletters produced as far back as 2003 on behalf of the Eastern Yugambeh Group contain information about the filing of a new native title determination application. The community was actively encouraged to participate in discussions about the form and content of the application and I am of the view that the proposed application was well known amongst members of the native title claim group. In other words, the group had been afforded a reasonable opportunity to be involved in discussions and to participate in the process of authorising the making of an application in the Gold Coast region.

[1] As of 27 April 2006, the newsletter's name appears to have been changed to *Gold Coast Native Title News*

What follows below is my understanding of the lengthy process of consultation and discussion leading up to the final authorisation meetings of the applicant and the making of and dealing with the application.

Regional information sessions were held throughout March 2006 in Stradbroke Island, Southport, Ipswich, Tweed, Beenleigh, Beaudesert and Brisbane. **[Person 1]** states in her 1st affidavit at [22] that the meetings were organised by committee members and/or local community members. Discussions took place about the history of applications in the area, apical ancestors, boundaries, rights and interests, potential objections and the proposed authorisation process.

A Community Forum was held on 20 May 2006 at Broadbeach. Attendance records provided to me as Attachment B to **[Person 1]** 2nd affidavit show 47 people attended. Families represented were **[Group of family names 1 – names deleted]** Attendees have also noted their descent and the ancestors listed include **[Group of ancestors 2 – names deleted]**.

The Confirmation of Authorisation meeting was held on 24 May 2006 at Southport Community Centre. The attendance record provided as Attachment E of **[Person 1]** 2nd affidavit shows 18 people in attendance noted to be of the following families: **[Group of family names 2 – names deleted]**. Four of the persons comprising the applicant were authorised at this meeting—**[Group of persons 8 – names deleted]** Three additional persons to comprise the applicant were requested by various representatives of family groups, and it was 'agreed that these would need to be discussed within family groups and a further meeting would be convened to confirm a decision (**[Person 1]** 2nd affidavit at [33]).

The Work Update states in its final paragraphs that those present at the 24 May 2006 authorisation meeting confirmed who they were representing and that those families were aware of the GCTNG application and its content including the name of the application, its boundaries, ancestors and applicants. Discussion by those families regarding the application had taken place, with consideration of the 'known objections', and families had authorised the application to be made.

A further authorisation meeting was then held at Robina Community Centre on 28 June 2006. The attendance record shows **[Group of persons 2 – names deleted]** present.

The meeting notes provide for the following:

> It was confirmed that families had authorised **[Group of persons 3 – names deleted]** as applicants. The opinions passed on by representatives of those families who were not able to be present outlined [sic]. No families indicated any concerns with having additional applicants, nor with those who had stepped forward.

Three of the persons comprising the applicant were authorised at this meeting—**[Group of persons 3]**

Traditional decision-making process used to authorise

It is my view that the application states that the decision-making process to authorise the applicant to make and deal with the application is a traditionally mandated process. This is a process in accordance with s. 251B(a):

> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind--the persons in the native title

> claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

[Person 1] makes the following statement in her 1st affidavit:

> There exists in accordance with the laws and customs of the Gold Coast Native Title Group ("the native title group") a traditional decision-making process ("traditional process") for things of this kind. The traditional process is known, and *adhered* to, by the native title group. *The authorisation process has complied with this traditional process*—emphasis added—at [9] and [10].

I believe that the intention of this statement is to say that the native title claim group possesses an applicable decision-making process that is mandated by its traditional law and custom. My view is supported by the collective tenor of the affidavits, correspondence and supporting documentation attached to the application and later provided for the purposes of clarification and response to objections to the application.

The following features were affirmed at the final Community Forum and are those I understand to be the group's mandated traditional decision-making process:

- Decision-making is inclusive of all members of the community
- Decisions take place in family groups comprising the descendants of the apical ancestors
- All family groups must be informed of, and have an opportunity to participate in, the decision-making process
- Representatives are selected, or authorised, from within each family group to speak for that family group
- Representatives are usually particular 'elders' or 'heads of families'. Selection can, however, depend on the level of knowledge of, or involvement in, an issue that a person is recognised by their family to have
- The views of elders are always considered and taken into account
- A consensus, as arrived at by a meeting of the family representatives, marks the binding decision of the native title group
- Consensus is defined as the general agreement of the representatives. Put another way, consensus can be achieved over objections.[2]

I am also referred by **[Person 1]** in her 1st affidavit at [12] to documents considered by the delegate for the Eastern Yugambeh application. **[Applicant 2]** stresses in numerous correspondence in late 2001 to the Tribunal and the delegate for the registration testing of the Eastern Yugambeh application, that consultation amongst members of family groups comprising the native title claim group occurred on a wide and informal basis over a long period of time. Decisions and conclusions reached within this informal process were then conveyed to representatives or 'elders' who reached a general consensus in accordance with traditional law and custom about the applicant to make and deal with the application.

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[2] Work Update of 9 June 2006 reflecting the agreement of those present at the Broadbeach community forum as an accurate description of the 'community' process—Attachment 8 of **[Person 1]** 1st affidavit,

This same process of consultation and discussion amongst families and community members is noted to have occurred in respect of the GCNTG application. This is evidenced by the eight community forums, various management committee produced newsletters, statements in both **[Person 1]** affidavits and the affidavits of each of the persons comprising the applicant.

In the absence of a more explicit statement than has been provided for in the application about the decision-making process of the group, there is further material to support the conclusion that the group believes there exists a traditionally mandated process which must be complied with. At [13] in her 1st affidavit, **[Person 1]** refers to a motion passed at a 'Kombumerri Authorisation Meeting':

> A "Kombumerri Authorisation Meeting" held on 7 October 2004 was attended by members of the broader native title group in addition to the descendants of **[Person 12 – name deleted]**. A motion (Motion 1) was passed which purported to choose a decision-making process. In the meeting it was clear, however, that the intention was to confirm an existing traditional process, and that motion does generally reflect the features of the traditional process.

The document detailing Motion 1 is provided as Attachment 1 to the affidavit:

> That the decision making process of the Kombumerri People is based on the following principles:
>
> (a) Each Family group shall have their own method of internal discussion and decision making processes;
> (b) Each Family shall be represented by two members chosen by the processes in paragraph (a) above and both representatives shall have an equal vote;
> (c) All decisions after (b) by a 75% majority;
> (d) Each Family has the right to full information, and access to full information, and no Family shall be disadvantaged by size of membership;
> (e) The Elders are to be called upon for advice.

This document is headed 'Motions passed at Kombumerri authorisation meeting held at Seaworld Nara Resort Saturday, 7 October 2000'. In referring to the motion, **[Person 1]** dates the meeting as being held 7 October 2004. I take this to be a typographical error.

On the face of it, the above description would appear to be a decision-making process more in line with that outlined in s. 251B(b) rather than a traditionally mandated process. However, I accept that the applicant refers to this motion as a description that 'does generally reflect the features of the traditional process'. My understanding is that the applicant is providing an historical context that confirms a pre-existing traditional process.

[Applicant 2] in a letter to **[Lawyer 1]**, dated 19 April 2001, states that 'Eastern Yugambeh people assert that they have not lost their tradition and custom and therefore do not need to develop and agree on a replacement decision-making process'. This correspondence was before the delegate in the previous Eastern Yugambeh application, and in my view, serves to further confirm the intention of the native title claim group to follow an existing traditionally mandated decision-making process.

Finally, at my request for some further clarification about the group's traditional decision-making process, **[Person 1]** provided the following information in a letter of 31 October 2007:

> In relation to individual authority and decision making **[Person 13 – name deleted]** (1894) writes: I confidently say that the aboriginals of Australia do not acknowledge any individual authority in anyone blackfellow such as kingship. I know there are many so-called kings who

> have been so created by the bestowal upon them of a brass plate by the whites; but I question much of this royal coat of arms had reached as far as Morton Bay on the year 1835. One blackfellow, buy [sic] reason of his greater strength, prowess, or even bullying power, may have greater influence in the councils of the tribe; but in no case would that influence confer kingly authority...
> **[Person 14 – name and description deleted]** (1847), writing about peoples to the immediate north of the claim area gives a consistent account.
> The process of decision-making detailed in the application is not inconsistent with these historical observations—at page 7.

In my view this information does not clarify the process of decision-making used by the GCNTG to authorise an applicant to make and deal with the application. However, I think this information does confirm that it has been the intent of the group to use a mandated traditional decision-making process they believe to be in existence rather than to agree to and adopt a process constructed for the purposes of authorisation.

Objections to the making of the application

Thirty-five letters have been submitted to the Tribunal objecting to the making and registration of the GCNTG application. They take the form primarily of individual correspondence, some in identical format and expression, and some appear to be a show of support for other individuals who detail a more substantive opposition. Two have also been submitted in affidavit form.

QSNTS acting for the applicant in Quandamooka #1 (QUD6010/98) and Quandamooka #2 (QUD6024/99) also submitted an objection based on the inclusion of South Stradbroke Island in the GCNTG's claim. They later withdrew their objection to the registration of the GCNTG claim on 9 May 2007. I have considered the material provided for the purposes of the objection but in the absence of an ongoing objection, do not find such consideration relevant.

Objections are made separately by **[Person 15 – name deleted]** and **[Person 16 – name deleted]** who identify themselves to be of the 'Ngarakwal Nganduwal moiety'. **[Person 15]** in his eight page affidavit claims to be a direct descendent of Kombumerri grandfathers **[Group of ancestors 3 – names deleted]**, and descendent of **[Ancestor 1 – name deleted]** (who may be **[Ancestor 2 – name deleted]** a named apical ancestor in schedule A). The basis upon which they oppose the GCNTG claim appears to be that they do not recognise the group's claim to the area as they can 'claim no Traditional Owner ancestral descent associations'.

It is not my task, in considering the GCNTG application for registration, to be satisfied that the native title claim group as described is in reality the correct native title claim group or to examine whether all the named or described persons do in fact qualify as members of the native title claim group—*Doepel* at [37].

[Persons 15 & 16] assert descent from ancestors listed at Schedule A of the GCNTG application. I agree with **[Person 1]** assertion in her 2nd affidavit that they would therefore be included as members of the group—at [21]. The **[Persons 15 & 16]** contention that they have at no time been consulted about the GCNTG application and that they have not authorised the applicant or the making of the application is consistent with the other objections discussed below. However, **[Person 1]** states in her affidavit that the **[Persons 15 & 16]** were 'individually notified of the application in an effort to ensure that no person with a possible interest was excluded'—at [20].

The other thirty-three objections all have common ancestry to an apical ancestor named in schedule A of the GCNTG application. Each objector clearly states his or her descent. It has been submitted by the applicant that the objectors are restricted to certain persons from one of the family lines of descent from **[Person 12]** – daughter of **[Person 17 – name deleted]** (also known as **[Person 18 – name deleted]**). The bases for their objections have in common the following elements:

- Lack of satisfaction as to the participation by elders in the GCNTG's decision-making process—that is, there has been no acceptance of advice and guidance by elders and consensus and approval of elders has not been sought or gained as is the traditional process;
- This is not in keeping with law and custom, there has been a change in the process that was defined in the previous Eastern Yugambeh application and disregard for Yugambeh traditions and elders;
- Certain of the named ancestors come from outside the boundary of the claim;
- The boundary of the GCNTG claim has not been defined correctly;
- Questions about attendance at authorisation meetings;
- Refusal to support or authorise the applicant and the making of and the dealing with the application.

Contained within some of this opposition are objections to the actions or standing of particular persons about issues that do not relate to the making of this application (for example, actions to do with ILUA negotiations and registration) and are not in my view relevant to my consideration under s. 190A.

The applicant submits, and this is evidenced throughout the material before me, that the views of objectors had been anticipated, canvassed, considered and attempts made to resolve points of contention. I accept that those persons objecting to the application were also well informed as to the authorisation process being conducted, and aware of all meetings that were convened for the purposes of authorising the applicant to make the claim.

'Consensus' has been agreed by the community (9 June Work Update) to be 'defined as the general agreement of the representatives' … 'consensus can be achieved over objections'. Thirty-three objections to the GCNTG application may appear on the face of it to be a large amount of opposition. But seen in proportion to the likely overall numbers of the claim group (1000 or more or 336 families) and given that the opposition originates in families from one line of descent (four of the eight families descended from **[Person 12]** I am not of the view that the objections in themselves provide evidence of a lack of authorisation by a significant proportion of the native title claim group.

Consideration

Based on the evidence detailed above, I am of the view that there have been significant efforts made to ensure wide consultation with and discussion amongst the family groups who comprise the native title claim group. Based on the information provided to me by the applicant in response to the letters of objection, I do not doubt that there is support for the application.

The question for me, however, is whether or not I can be satisfied the applicant has been authorised to make and deal with the application by all the persons in the native title claim group. The applicant asserts that the group practices a traditionally mandated decision-making process for the purposes of authorising the applicant to make and deal with the application. The applicant has provided material in support of its belief that this kind of process exists and that it must be complied with and has detailed the steps of this process.

My assessment is made in accordance with the process as defined and affirmed at the Broadbeach Community Forum on 20 May 2006 and outlined in the 9 June 2006 Work Update.

Community involvement, access to information and family group decision-making

I am satisfied that members of the community, that is the native title claim group, have had the opportunity to be involved in the process of the applicant being authorised and the GCNTG application being made. The applicant is clear in its assertions about the notification and convening of community information meetings and the general dissemination of information. I am of the view that every effort was made by the organising members of the claim group to ensure that the family groups were informed of, and had an opportunity to participate in, the decision-making process.

That it is sufficient for a decision to be made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process is supported in *Lawson on behalf of the `Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517—at [24]. I am also satisfied that those opposing the application were given the opportunity to be informed of the proposed application (it is clear that a number of the objectors had seen copies of the application). They were also invited to participate at the community forums and the later authorisation meetings.

Representation of the native title claim group at authorisation

Representatives are usually particular 'elders' or 'heads of families' and it said that they qualify to represent family groups by their knowledge and involvement in 'issues' (stated in the Work Update). Each of the seventeen children of the apical ancestors is said to 'represent family lines' and those attending the authorisation meetings are noted to be descendents of those seventeen children. I have also had regard to the seven letters in Attachments D and F to **[Person 1]** 2nd affidavit stating or listing each writer's representation of certain families.

The 9 June 2006 Work Update states that 'those present confirmed who they were representing and that those families' were aware of the proposed application, its content and boundaries, the applicants, had discussed the application and considered the known objections and authorised the application—page 4. The attendance list of the 24 May 2006 meeting indicates that those persons attending are descended from five of the ten apical ancestors.

I am satisfied that the people who attended the authorisation meetings were representative of their families and were authorised to make the decision to authorise the applicant to make and deal with the GCNTG application. I am satisfied that this smaller group was representative of a reasonable cross-section of the wider native title claim group and its family groups.

Views of elders

A key component of the opposition to the GCNTG application has to do with lack of consultation with and agreement by the group's elders. The alleged break in the traditional process is highlighted by **[Person 19 – name deleted]** in her letter of objection where she states the following:

> The Gold Coast Native Title Group have negated the authority of Elders in the authorisation process by creating 'new' traditional laws and customs for this application … I grew up in the household of my grandmother, an Aboriginal woman born in the 1850s. I observed the customary process through which Elders made decisions about matters which could impact forever on the lives of families. Head of families were called on to contribute to discussion but final decisions were made by Elders ….

I do not find any information in the applicant's response to the objections that directly refutes **[Person 19]** contention that 'final decisions were made by Elders'. However, in **[Person 1]** 2nd affidavit she refers to the 'descriptive difficulties of the words *consensus* and *elder*'—paragraphs [12] to [19]. She states:

> A description of the process was confirmed as correct at the Community Forum and further agreed to have been followed at the Confirmation of Authorisation meeting. That description does not devalue the role of 'elders', nor represent a change in the process of decision-making, as is contended by some objectors. That description ensures that the primary locus of decision-making, the families together comprising the applicant [sic] group, is noted, and simply substitutes the terms 'representatives', or 'heads of families' for the less precise 'elder'—at [16] and [17].

It would appear that certain representatives of families comprising the native title claim group may also be elders because the definition of representatives as affirmed at the Community Forum is that 'representatives are usually particular elders, or heads of families'—Work Update, 9 June 2006.

The views of those who oppose the making of the GCNTG application are said to have been considered—'the application was authorised by a community cognisant of those concerns, and despite them'—**[Person 1]** 2nd affidavit at [39] and similar is asserted by the applicant throughout the material before me. Some of those persons who object to the making of the application may be considered to be elders. Whether or not the views of elders can potentially change the course of any actions does not appear to be a feature of the decision-making process.

I find that this feature of the traditionally mandated decision-making process is more likely to be a 'rider' to the general conduct of the process rather than a particular stage of the process and that it is likely that the group took account of those opinions of elders.

Consensus by general agreement and the binding decision of the native title claim group

I accept the group's definition of consensus and that consensus can be achieved over objections. I do not believe that the persons opposing the making of the GCNTG application make up a significant proportion of the native title claim group such that their objections would block the general consensus of the group. None of those opposing the application attended the final two authorisation meetings and a decision was reached by those in attendance.

It is stated on page 4 of the Work Update that 'those present confirmed who they were representing and that those families' are aware, have discussed and considered various things about the application; have authorised the application and are ready for the application to be lodged'.

I am satisfied that the consensus reached at the two authorisation meetings 'marks the binding decision of the native title group'—that is, the group is bound by the decision-making process and the agreement of those persons who attended the two meetings.

Conclusion

The applicant asserts a traditional decision-making process described as being one where representatives of groups authorise on the basis of the opinions and authority of the families they represent. The system as described allows for dissent and it is clear to me that the dissent was addressed and in some way, attempts were made to resolve it.

I am of the view that the native title claim group was given every reasonable opportunity to be informed of and be represented at those meetings where the proposed application was discussed and also at the later authorisation meetings. Consensus as defined by the applicant was reached whereby the applicant was authorised to make and deal with the application.

Merit conditions: s. 190B

Section 190B(2)

Identification of area subject to native title

The Registrar must be satisfied that the information and map contained in the application as required by ss. 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.

Information regarding external and internal boundaries: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

Map of external boundaries: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **satisfies** the condition of s. 190B(2).

Reasons

The description of the area covered by the application is found in schedule B which refers to Attachment B, a description which has been prepared by the Tribunal's Geospatial Services on 12 September 2007.

Attachment B describes the application area by metes and bounds description referencing state borders, topographic features including rivers, creeks and islands. The written description of the external boundary uses geographic coordinates commencing at the southern most point of the application area on the Queensland—New South Wales state border. It also provides sources and reference data.

A written description of the areas within the external boundary that are not covered by the application is found also in schedule B at paragraph 3. This is a generic description using the wording of the relevant section of s. 23B to specifically exclude certain previous exclusion possession acts (clause A) and public works (clause B). Clause C excludes from the application any areas which are the subject of any other act whereby native title has 'otherwise been extinguished'.

Paragraph 2 states that if the excluded areas so described fall within certain provisions of s. 23B or ss. 47, 47A or 47B (such that they are either not previous exclusive possession acts or extinguishment must otherwise be disregarded) then the areas so described are not excluded from the application.

Schedule C refers to Attachment C which is a monochromatic copy of a colour map titled 'Gold Coast Native Title Group' prepared by Geospatial Services dated 19 March 2007 and includes:

- The amended application area depicted by a bold line;
- Topographic image background;
- Significant localities and places of interest, towns and roads;
- Scale bar, north point, coordinate grid based on the Geocentric Datum of Australia (GDA94); and
- Notes relating to the source, currency and datum of data used to prepare the map.
- I am satisfied that the map is sufficient enough to locate the boundary of the application area on the earth's surface.

Section 190B(2) requires that the information in the application describing the areas covered by the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar to be satisfied that this can be said, the written description and the map are required to be sufficiently consistent with each other.

Having regard to the comprehensive identification of the external boundary in Attachment B and then the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

Geospatial Services has also provided an assessment of the map and written description (Memorandum dated 12 September 2007: GeoTrack 2007/1114). The assessment was that the description and map are consistent and identify the application area with reasonable certainty. I agree with that assessment.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would so fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686—at [32]. There is nothing in the information before me to the effect that the applicant is in possession of a tenure history or other information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In fact the applicant expressly states in schedule D that no searches have been undertaken to identify non-native title rights and interests in the application area. In these circumstances, I find the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

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

The application **satisfies** the condition of s. 190B(2) as a whole.

Section 190B(3)
Identification of the native title claim group

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

Result

The application **does not satisfy** the condition of s. 190B(3).

Reasons

In *Doepel*, Mansfield J stated that:

> The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b)—at [51].

Mansfield J also said that the focus of s. 190B(3) is:

> not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained—at [37].

Further, Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) found, in the way native title claim groups were described, that:

> It 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—at [67].

Carr J accepted as sufficient for the purposes of s. 190B(3)(b) a claim group description which provided that there were 'three rules' of claim group membership, namely:

1. The biological descendants of the unions between certain named people;
2. Persons adopted by the named people and by the biological descendants of the named people; and
3. The biological descendants of the adopted people referred to in paragraph 2 above—at [64].

In the later case of *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732, Carr J said the following:

> The delegate clearly understood that the test was whether the group was described sufficiently clearly so that it could be ascertained whether any particular person was in the group i.e. by a set of rules or principles … In my view, it was clearly open to the delegate to find that she was not satisfied that the persons in the claim group were described sufficiently clearly within the

> requirements of s 190B(3)(b). The matter is largely one of degree with a substantial factual element—at [25] to [27] (my emphasis).

I understand these authorities to mean that the description needs to contain some objective means of identifying or ascertaining the members of the group.

Schedule A of the application contains this description of the group:

> The Gold Coast Native Title Group comprises all of the biological descendants of the following people:
>
> **[Group of ancestors 4 – names deleted]**
>
> It is accepted that adoption takes place according to traditional laws and customs. Where a child has been adopted by a member/s of the native title group it confers upon the adoptee membership of the group.

By way of explanation, information provided at Attachment G of **[Person 1]** 2nd affidavit, Document of Authorisation, notes that **[Ancestor 3 – name deleted]** and **[Ancestor 4 – name deleted]** were brothers of **[Ancestor 5 – name deleted]**. They are not known to have living descendents but have been included in the claim group description at the request of families with close connection to them.

It is my view that the first part of the description allows for an objective means to readily identify any particular person in the native title claim group. However, the element of the description to do with adoption and membership of the group is problematic as the application does not provide information about the traditional laws and customs under which adoption into the group may occur.

Ascertaining membership of persons adopted according to traditional laws and customs may not be a matter of a simple factual inquiry. What happens if this is disputed by others in the group because they do not recognise the adoption as having taken place pursuant to traditional law and custom? How does one then pursue the factual inquiry if the content of the traditional law and custom in relation to adoption is not set out in the application?

I am of the view that the native title claim group is in part described sufficiently clearly to enable identification of any particular person in that group. However, in the absence of any content of the traditional laws and customs relating to adoption and the conferal of claim group membership to adoptees there is no objective means by which the reliable identification of certain persons within the native title claim group could be made.

Section 190B(4)
Native title rights and interests identifiable

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

Result

The application **satsifies** the condition of s. 190B(4).

Reasons

Section 190B(4) requires the Registrar 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 identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

I am of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner.

Native title rights and interests are defined in the Act at s. 223(1), which states:

> 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.

With this definition in mind it may be argued that rights and interests that have been found by the courts to fall outside the scope of s. 223 cannot be 'readily identified' for the purposes of s. 190B(4).

On another view, s. 190B(4) is only intended to cover those rights and interests that are not readily identified in the sense of being unintelligible or not understandable. On this view, any rights that fall outside the scope of s. 223 should be considered under s. 190B(6) as not able to be prima facie established. I have adopted this view and do not consider those rights that fall outside the scope of s. 223 under this condition at s. 190B(4).

The description of the native title rights and interests claimed in relation to particular land or waters is found at Attachment E:

> 1. The following non-exclusive rights and interests are claimed, jointly and severally:
>
> a. The right to be present on, use and enjoy the application area.
>
> b. The right to inherit and succeed to the native title rights and interests.
>
> c. The right to make use of the application area by:
>
> i. hunting, fishing and gathering on, in or from the application area for non-commercial purposes;
>
> ii. conducting ceremonies and meetings on the application area;
>
> iii. being buried on, and burying native title holders on, the application area;

iv. maintaining springs and wells in the application area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;

v. taking, using and enjoying the natural resources (footnote 1) found on or within the application area, for non-commercial purposes;

vi. maintaining and protecting by lawful means places of importance and areas of significance to the native title holders;

vii. protecting the land, waters and natural resources of the application area by taking steps to prevent acts which are not carried out in the exercise of statutory rights or any common law rights and which may cause damage, spoliation or destruction of the land, waters and/or natural resources of the application area;

viii. using and enjoying the application area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the native title holders.

d. An interest in the management and use of the application area and its natural resources.

The exercise of these rights and interests is in accordance with the traditional laws acknowledged and traditional customs observed by the applicants.

[footnote1—Other than minerals wholly owned by the Crown, and petroleum. "Minerals" has the meaning attributed to it in the Minerals Resources Act 1989(Qld) as in force at the date of this application. "Petroleum" has the meaning attributed to it in the Petroleum Act 1923 (Qld) as in force at the date of this application.]

Attachment E includes further paragraphs [2] a. b. and c. which I understand to be provisos in relation to the rights and interests claimed. The paragraphs provide that the non-exclusive rights and interests are claimed only to the extent that they are not inconsistent with other non-native title rights granted in the area.

The description of the claimed rights and interests in Attachment E does not include a claim for exclusive possession. This fact is confirmed by information contained in schedule J:

> The native title rights and interests do not confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders to the exclusion of all others—at [9].

I note that the rights at [c(vii)] and [d] are not written in terms that I find easily understood or identifiable. However, I find that overall the description of the claimed native title rights and interests is clear, understandable and makes sense.

Section 190B(5)
Factual basis for claimed native title

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

Delegate's comments

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to a combined result for s. 190B(5) at page 47 below.

For the application to meet this merit condition, I must be satisfied that a factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particular assertions in subsections (a) to (c) of s. 190B(5).

My consideration of this condition is guided by Court decisions in:

- *Gudjala*
- *Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422;* (2002) 194 ALR 538; [2002] HCA 58
- *Doepel*

Gudjala supports the relevance of the decision in *Yorta Yorta* to this condition of the registration test. Justice Dowsett sets out at [26] the main propositions which have emerged from *Yorta Yorta* which includes:

- what is meant in s. 223(1)(a) by the word 'traditional' in the context of the phrase 'traditional laws and customs';
- that laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- that traditional laws or customs are derived from a body of norms or normative system that existed before sovereignty;
- that rights and interests are rooted in pre-sovereignty traditional laws and customs;
- that it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

In my consideration of the condition at s. 190B(5), my role is not to test whether the asserted facts will or may be proved at the hearing or to assess the strength of the evidence, but to determine whether the asserted facts, assuming they are true, are sufficient to support the claimed assertions—*Doepel* at [17].

Information considered

I have considered the following material in respect of this condition:

- Schedule F of the application
- Schedule G of the application
- Affidavits provided with the application of **[Person 20 – name deleted]**—sworn 27 June 2006, **[Person 21 – name deleted]**—sworn 18 August 2006, **[Person 22 – name deleted]** —sworn 28 August 2006, **[Person 23 – name deleted]**—sworn 29 June 2006, **[Applicant 1]** —not dated but filed in the Court 5 September 2006, and **[Person 24 – name deleted]**—sworn 23 August 2006.
- Additional material provided by the applicant on 31 October 2007, which includes information on:
    - apical ancestors and links to the current application
    - information relating to the claim group's normative system—language, descent, decision-making
    - continuity of connection
    - a brief timeline (since 1850s)
- Material in the form of affidavits and documentation which relates to the previous Eastern Yugambeh applications of 25 January 2001 and later amended application of 23 November 2001
    - affidavit of **[Person 19]**, dated 8 January 2001, filed with the Eastern Yugambeh application
    - Eastern Yugambeh Ancestors, attached to an email from **[Applicant 2]** to the Tribunal, dated 23 January 2001
    - affidavits from **[Person 25 – name deleted]**, dated 28 September 2001, **[Person 21]** dated 27 September 2001, and **[Person 26 – name deleted]**, dated 25 August 2001.

I have found some of the extensive material in relation to the past Eastern Yugambeh applications to be of some relevance to the consideration of this condition. I have found relevant evidentiary material in documents that relate to members of the claim group who do not support the registration of this current GCNTG application.

Some of the information that I have considered in relation to this condition was provided in 2001 in support of the Eastern Yugambeh applications, but those persons to whom they are connected now oppose the making of the GCNTG application. The position of **[Person 19]** is an example of this. I note that the information she provides in her 2001 affidavit is the kind that is often most relevant when considering the sufficiency of material provided by an applicant for the purposes of s. 190B(5). I have chosen to rely on material in these affidavits as it is information before me by virtue of its inclusion in the Eastern Yugambeh application and is on the public record. I have not been directed or referred to this information by the applicant.

I am not limited to considering information contained in the application but may refer to additional material. However, 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* [2001] FCA 16 at [23]). The applicant was invited to provide further information to address the

requirements of s. 190B(5) and this was provided on 31 October 2007 in the form of the above mentioned document.

Whether or not a sufficient factual basis has been provided to support the assertions laid out in s. 190B(5) has always involved a wider consideration than simply an acceptance of generalised statements or mere assertions—*State of Queensland v Hutchison* [2001] FCA 416—at [25]. This is even more clearly the case since the decision in *Gudjala*, which outlines the requirements of what is sufficient information:

- Formulaic statements regarding the factual basis are insufficient to meet the condition in s. 190B(5). Formulaic statements which could apply to any group in any part of the country are not helpful—at [46].
- Material such as anthropological reports and statements made in support of the factual basis need to contain more than mere opinions and conclusions – an alleged factual basis should be provided for any opinions and conclusions. It is insufficient for anthropological reports to merely contain views and opinions concerning Indigenous culture and norms generally—at [46], [68] and [81].
- It may not suffice for a few individuals to talk about their particular association or that of their particular predecessors or of their personal connections—at [52].

Sovereignty

In the case of the relevant part of Queensland covered by this application, the British Crown's acquisition of sovereignty occurred in 1788 by virtue of the area's inclusion in the proclamation of New South Wales. However, it is my understanding that first contact by Europeans in the region around what is now known as the 'Gold Coast' occurred somewhere between 1835 and 1850. It is reasonable to infer that the structures of any indigenous societies present in the area at the time of European settlement were the same as those in existence in 1788. Therefore, I am of the view that the 'position' of the indigenous society at 1788 in the area of this application need only be demonstrated by evidence that reflects the position of that society at the time of first European settlement of the area—in this case somewhere between 1835 and 1850.[3]

Result re s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

Reasons re s. 190B(5)(a)

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the native title claim group have and the predecessors of those persons had an association with the application area.

Dowsett J found in *Gudjala* that it may be that some members of the claim group are, and their predecessors have been, associated with the claim area, but that does not necessarily mean that

[3] *Gudjala* at [64], [66] and [82]

'the claim group as a whole, and their predecessors, were similarly associated'—at [51]. This does not mean that all members must have association at all times, but that there must be evidence that there is an association between the whole group and the area. Similarly, there must be evidence that there was an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

I take this to mean in this case that the GCNTG must provide for the purposes of the registration test a factual basis sufficient enough to support an assertion that the claim group as a whole has had an association with the area claimed since the assertion of sovereignty. It may not suffice for a few individuals to talk about their particular association or that of their particular predecessors or apical ancestors.

Application and affidavit material

Firstly, I consider the affidavit material contained in both the GCNTG application and previous Eastern Yugambeh applications. I am of the view that **[Person 19]** affidavit filed with the Eastern Yugambeh application on 25 January 2001 and others filed with the amended application on 28 November 2001 remain relevant to the GCNTG application as they are all made by members of the native title claim group**.**

[Person 20] in his affidavit of 27 June 2006, states 'our families have always been here, always—[18]—he talks of being 'a close knit mob', of families and uncles—**[Group of persons 5 - names deleted]**

> Years ago people used to walk. They would walk long ways visiting people. Families would travel, follow the seasons, always going to where the good food was. Everyone was taught how to survive in the bush, we knew the country … the track people follow starts down in the northern rivers region. At the Clarence River, that is a beautiful river. They came up over Mt Lindsay, then followed the Logan down. They took their families on these long walks—at [7] and [8].

[Person 21] in his 2006 affidavit talks of activities with his older cousin **[Group of persons 4 – names deleted]**. He also talks of visiting special sites 'such as the Jarraparilla' and knowing of 'the Bora ring at Burleigh' (at 17).

[Person 1] was born in Beaudesert in 1931 and he takes his identity from his mother, whose grandmother was **[Person 18]** (GCNTG apical ancestor). He attests in his 2001 affidavit to have been taught hunting and fishing by his father, mother, uncles and aunties; sharing stories with people about **[Person 18]** and visiting sites such as Bridle Track, Jaraparilla, Jumpinpin and Currigee.

[Person 25] was born in 1945 in Beaudesert and takes his identity as an Eastern Yugambeh man from his father, his grandmother being the granddaughter of **[Ancestor 6 – name deleted]** (GCNTG apical ancestor). He attests in his 2001 affidavit in detail to hunting and fishing in Eastern Yugambeh country and being taught these skills by his father, uncles and aunties and grandparents. He attests also to visiting and caring for sites in the claim area with uncles and grandparents, being taught stories, ceremony, songs, language and history.

[Person 26] was born in 1948 and is the great great granddaughter of **[Ancestor 5]** (GCNTG apical ancestor). She attests in her 2001 affidavit to interaction between the families of the Eastern Yugambeh region.

[Person 19] was born in 1928 in Beaudesert and takes her Yugambeh identity through her mother **[Person 27 – name deleted]**, the grandchild of **[Person 18]** who was an Eastern Yugambeh woman (GCNTG apical ancestor). She attests in her affidavit of 8 January 2001 to having lived in the Southport/Nerang River region, Yugambeh country, most of her life—[1] to [4]. The information she provides in this previous affidavit supporting the Eastern Yugambeh application goes to showing current and previous association of the claim group with the area: Cultivation of yam gardens by her grandmother and other Yugambeh women—[7]; her grandmother walking with her father from Gilston to Southport—[8]; the conduct of ceremonies and large gatherings of Eastern Yugambeh and other Aboriginal peoples on South Stradbroke Island and on other traditional Eastern Yugambeh country – her aunties told her before they passed away about gatherings at Jarriparilla—[15].

Further material

I have a document before me titled Eastern Yugambeh Ancestors, provided to the Tribunal early in 2001. I have read this in conjunction with the timeline in the additional material provided to me in October 2007 and observe a chronology of births, deaths, unions and lines of descent. Approximate birth dates of GCNTG ancestors can be ascertained or inferred by reference to other dates:

[Ancestor 7 – name deleted]—b.1880s; **[Person 18]**—b.1840 (married to **[Ancestor 8 – name deleted]**); children of **[Ancestor 5]** and **[Ancestor 9 – name deleted] -** b.1850s and 1860s; children of **[Ancestor 10 – name deleted]** - 1880s; children of **[Ancestor 11 – name deleted]**—b.1860s; **[Ancestor 12 – name deleted]**—d.1900s aged 73.

Throughout all the material before me individuals and families and ancestors are aligned with geographical locations in and around the claim area boundary: Beaudesert, Tweed, Ipswich, Dunwich, Southport, the Logan River, the Nerang River, Macintosh Island, Gardiners Island, Shark's Bay, Crab Island, Currigee, Lake Moogerah, Tallebudgera, Currumbin, Fingal, Pimpama, Chinderah, Cobaki Broadwater, Currumbin, Beenleigh, Nerang, Coomera, South Stradbroke Island.

It is possible from this information to place those persons named as the apical ancestors in the region at the time of European settlement, and hence by implication sovereignty.

I have before me a map, titled Yugambeh Language Region which is provided as an Attachment to the letter of objection by **[Person 19]** to the making of the GCNTG application. The map was published in 1994 by the Kombumerri Aboriginal Corporation for Culture and is based on 'oral history, historical research, and the personal input of the Elders who had lived and interacted with ancestors born in the region in the earliest days of white settlement'[4]. The map contains the following information:

> Yugambeh is the name of the language spoken by Aboriginal family groups within the area roughly bordered by the Logan and Tweed rivers. This map shows the location of the family groups and includes places names which continue to hold great significance for the Yugambeh people.

The map also notes the following:

---

[4], Correspondence from **[Person 19]** addressed to the Registrar, dated 4 December 2006, page 2.

> In 1866 when Surveyor Roberts ran the boundary line between Queensland and New South Wales, he was accompanied by Yugambeh people. His recording of towns in the region reflects the policy at the time to retain traditional names.

Included in the applicant's submission of 31 October 2007, under the heading of 'Language', is historical reference to the Yugambeh region and composition of groups from that region:

> The territory of the.. .Yugumbir was the basins of the Logan and Albert Rivers. ...The tribes were subdivided into locality groups, each as its peculiar right. Each group had a distinctive name, which, in many cases, was derived from some outstanding feature of the group's territory, either of its geography, geology, flora or fauna. ...The suffixes -bul and -burra may be interpreted as meaning a group or subdivision of a tribe.. ..The language and customs of the locality groups were common to the whole tribe to which they belonged, although there were dialectical difference which, however, were not so great as to cause any great difficulty in lingual intercourse between members of the different groups... —at page 5.
>
> *Watson, F.J. 1946. Vocabularies of Four Representative Tribes of South Eastern Queensland. Journal of the Royal Geographical Society of Australia: Supplement 34.*

Schedule F of the application does not provide anything further than to summarise affidavit material and to make general statements about the assertions in subsections (a) to (c) of s. 190B(5).

Conclusions

After reading through all of the material before me, I am led to conclude that the native title claim group is comprised of numerous family groups who identify with the overall Yugambeh region which is roughly the area delineated by the boundaries of the GCNTG application. Families appear to have been united in the past by interfamily relationships (p. 3, applicant's submission of 31 October 2007). Much of the commentary in the affidavits and other material connected to the GCNTG and Eastern Yugambeh applications focuses upon the maintenance of family relationships and thereby 'the traditions of the group' and that relationships and connections extend across the claim area.

I am of the view that I am able to find references within all of this material to families, localities, and the predecessors of the group to a sufficiently wide and varied extent. The evidentiary material I have before me sufficiently supports the assertion that the GCNTG as a whole currently has an association with the whole of the area. Lines of descent are sufficiently demonstrated such that I believe that there is evidence to support the fact that the predecessors of the claim group had an association with the whole of the claim area.

Result re s. 190B(5)(b)

I am **not satisfied** that the factual basis provided is sufficient to support the assertion set out in s. 190B(5)(b).

Reasons re s. 190B(5)(b)

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

For the laws and customs to be traditional, they must have their source in a pre-sovereignty society and must have been acknowledged and observed since that time by a continuing and vital society. I refer particularly to the following passages from *Yorta Yorta*:

> [46] A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> [47] Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.

I am satisfied that the material pertaining to this application, as well as that which pertains to the Eastern Yugambeh applications, supports an assertion that the ancestors as listed at Schedule A were associated with the claim area. It would appear that there is a factual basis for claiming that these people (and probably more) were present in and around the claim area at the time of European settelement. It would be a natural conclusion then that there existed at that time a society united in and by its acknowledgement and observance of a body of law of custom. Section 190B5(b) requires a sufficient factual basis to support such a conclusion.

The information that is before me must support the proposition that the rights and interests as currently expressed by the claim group are 'rooted in pre-sovereignty laws and customs'[5]. That is, is there evidence of the content of the law and custom and can it be seen to originate from the rules of a normative society that existed before the assertion of sovereignty?

The decision in *Gudjala* is particularly concerned with the basis upon which it may be inferred that a society existed at sovereignty from which the claim group has derived its law and custom:

> One is inclined to infer that, in 1850-1860, there were groups of indigenous people in the area, but there is no evidence concerning them. There is certainly no factual basis for inferring that there was a society defined by its acknowledgement and observation of laws and customs. Mr Hagan says that there is documentary evidence of Gudjala interest in the claim area, but the factual basis of that information is not given—at [68].
>
> Unfortunately he offers no real basis for this inference. Whilst Mr Hagan may describe a society having apparently traditional laws and customs, there is no basis for inferring that they originated in any pre-sovereignty society … no basis is shown for inferring that there was, at and prior to 1850-1860, a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group—at [81].
>
> The difficulty is the inability to demonstrate the existence, at that time, of a society observing laws and customs from which current traditional laws and customs were derived—at [82].

[5] *Yorta Yorta*—at [79].

Consideration of the material before me

The evidentiary basis which I have before me is essentially a broad overview made in generalised statements, of some rules, obligations and patterns of behaviour currently practiced by some members of the claim group. Examples are:

- visiting and maintaining sites of significance
- speaking language
- rights of access and observing rules of access
- telling of stories
- customs relating to fishing, hunting and collecting bush tucker
- knowledge of the seasons and the changes in the land and the resources according to the seasons
- connection to country
- passing on of knowledge between family members and generations.

The timeline and information linking the apical ancestors to the current group as provided in the 31 October 2007 submission reveals a possible large occupation by Aboriginal people in the area of the GCNTG claim prior to European settlement. However, I am provided with little evidentiary material as to the form of a society at that time, or how any particular society was governed by its own laws and customs or how it was that rights and interests in the land and waters arise from those laws and customs.The submission provides some historical references to Yugambeh people and to their activities as recorded by observers in the past: records of gatherings and ceremony and family and social interactions (Gresty 1946 and 1947); observations of corroborees at which some persons named as apical ancestors attended (Hinchcliffe 1931, Gresty 1946); recordings of language and dialects spoken by of Yug-ara-bul (local observation), Yug-um-bir (Hardcastle 1947) and Yuggum (Lane and Allen 1914). The records and observations are specific to locations within the application area—the Tweed, Nerang, Coomera and Albert Rivers, the Pimpama, Coomera and Tambourine districts and some other surrounding regions.

[Person 28 – name deleted] is both Bundjalung and Yugambeh, born in 1974. In his affidavit, dated 28 August 2006, he retells the *Joonggara Ngarian* story about the pelican and the crow—its message is that 'you always respect people even if they are different'—[7]. There is the Pelican's Bora Ring, a place of past and present significance. **[Person 28]** refers in language to things, to hunting the traditional way (with spears and nets); of signs that indicate the seasons for fishing and hunting; and the relationship of people to their country—one of intimacy and a different world-view—at [24]—and though the physical features of the land may change, the land as an entity is always the same – *Jagoun* being the word for that—at [25].

The other affidavits in the application also speak of similar things—family relationships, fishing and hunting activities, preparing, cooking and sharing of food, collecting bush tucker, the importance of connection to country, the passing on of information down the generations.

[Person 19] in her 2001 affidavit talks of communal sharing of the catch from a hunt as part of Yugambeh custom and tradition—[9] and [10]; her mother teaching her about bush medicine—[11]; the teaching of custom and tradition by older women in the family, particularly about

relationships, marriage laws, punishment laws – rules taught through the telling of stories—[13] and [14].

The 2001 affidavits filed with the Eastern Yugambeh amended application speak of stories relating to Yugambeh tradition and custom; of the passing on of dances, ceremonies and songs, hunting and fishing in the application area and this being taught by older relatives, speaking in and teaching of language, visiting and caring for special sites; rules in accordance with law and custom relating to totems.

Schedule F of the application contains largely generalised statements without reference to specific laws and customs acknowledged and observed by the native title claim group. The schedule summarises and highlights the most important information held in the affidavits and states that the affidavits contain information about rules imposed in accordance with traditional law and custom, in relation to such things as:

> a. the sharing and conservation of resources;
> b. the maintenance of spiritual life;
> c. traditional structures of authority; and
> d. sites and areas of significance—at page 8.

Conclusions

It is not clear to me from this material that what the deponents are describing is their adherance to law and custom or simply a knowledge of traditional law and custom. The finding in *Yorta Yorta* is clear—the relevant laws and customs under which the rights and interests are possessed must be rules having normative content. Without that quality there may be observable patterns of behaviour but not rights or interests in relation to land or waters (at [42]). 'Normative' in this sense can be understood to be those normal or everyday customs, rules, systems and practices that go to make up a group's social organisation. The information in this application must give evidence about the existence of a society 'united in and by its acknoweldgement and observance of a body of law and custom'—*Yorta Yorta* at [49].

Gudjala is plain about what the delegate must consider:

> Broadly speaking, the task is to identify the existence in 1850-1860 of a society of people, living according to identifiable laws and customs, having a normative content. I take that to mean that such laws and customs must establish normal standards of conduct or, perhaps, be prescriptive of such standards—at [65].

I have before me information which goes some way to demonstrating the existence of a continuing normative society, the sum of which is identified in summary form above. However, the evidence provided in the affidavits and other material does not identify sufficiently 'traditional laws and customs derived from a pre-sovereignty society, which support or justify the claim group's claims'—*Gudjala* at [78].

I am of the view that the application and other documents do not provide sufficient factual material about such things as:

- Belief systems—matters that go to spiritual observance
- Spiritual customs and practices
- Rules and obligations relating to access to country

- Kinship rules and obligations
- Customary law and tradition
- Sites of significance and ancestoral beings

At the risk of being prescriptive I have provided the above by way of example because evidence of such matters may demonstrate a society and its 'normative content'. Such evidence is not provided sufficiently enough in either the application or the additional material provided for the purposes of demonstrating a society currently acknowledging and observing traditional laws and customs in relation to the claim area. Similarly, I have not material before me that sufficiently evidences the existence of the Yugambeh society at the time of European settlement – that is around 1835 to 1850. This is not to say that no society existed when sovereignty was asserted by the British Crown. There is simply no information before me which provides a basis for inferring that there was, at or prior to settlement, 'a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group'— *Gudjala* at [81].

Without sufficient information from which to draw inferences or conclusions about the particular or specific content of Yugambeh or Gold Coast traditonal law and custom, there is no basis from which I may conclude that the people of this area live in a society governed by its own laws and customs, and that it is a society substantially unchanged since sovereignty.

This being the case, I am not satisfied that there is sufficient factual basis provided to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

Result re s. 190B(5)(c)

I am **not satsified** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Reasons re s. 190B(5)(c)

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the claim group continues to hold native title in accordance with their traditional laws and customs.

As discussed above, I have found that the material before me does not sufficiently support the assertion that traditional laws and customs exist now which give rise to the rights and interests claimed by the native title claim group. It therefore follows that I cannot be satisfied of the factual basis provided to support the assertion that the claim group continues to hold native title in accordance with their traditional law and custom.

The decision in *Gudjala* confirms this conclusion, stating that the assertion at s. 190B(5)(c):

> . . . implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty. The difficulty is the inability to demonstrate the existence, at that time, of a society observing laws and customs from which current traditional laws and customs were derived. This difficulty led the Delegate to conclude that this requirement has not been satisfied. I agree—at [82].

I am therefore not satisfied that a sufficient factual basis is provided to support the assertion that the group continues to hold native title in accordance with traditional law and custom.

Combined result for s. 190B(5)

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

Section 190B(6)
Prima facie case

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

Result

The application **does not satisfy** the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can be prima facie established.

Reasons

In the absence of a sufficient factual basis being provided by the applicant to support the assertion of traditional laws and custom, it follows that I cannot be satisfied that there are rights and interests possessed under them. Therefore, under this section, I cannot be satisfied that, prima facie, the native title rights and interests claimed in the application can be established.

That an application which fails the merit condition at s. 190B(5) must then fail the condition at s. 190B(6) is supported by the decision in *Gudjala* at [87].

I would like to note that it may be the case that some of the claimed rights in this application have been found by the courts to fall outside the scope of s. 223(1) and may, on that basis, not be prima facie established for the purposes of s. 190B(6).

Finally, based on the material currently before me the information provided about activities in exercise of the rights and interests claimed (as listed at Schedule E) is neither precise nor sufficient to satisfy me that many of the rights and interests could be established prima facie.

Section 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently 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.

Result

The application **does not satisfy** the condition of s. 190B(7).

Reasons

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.

The word 'traditional' as it is used here must be understood as it was defined in *Yorta Yorta*. That is, it is necessary to show that the traditional connection is in accordance with the laws and customs of a group or society which has its origins in the society that existed at sovereignty.

I was unable to find that the material currently before me is sufficient to support an assertion as to the existence of traditional laws acknowledged and customs observed by the claim group that give rise to the claim to have native title rights and interests. It therefore follows that I am unable to be satisfied that the requirements of this condition to do with traditional physical connection are met—see *Gudjala*:

> As I can see no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7)—at [89].

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

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

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 50 below.

No approved determination of native title: s. 61A(1)

> A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

Result

The application **meets** the requirement under s. 61A(1).

Reasons

The geospatial report dated 12 September 2007 and a search more recently undertaken by myself of the Tribunal's geospatial databases reveals that there are no approved determinations of native title over the application area.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which
(a) a previous exclusive possession act (see s. 23B)) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:
(a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

Schedule B at paragraph 3 excludes from the application area any area covered by previous exclusive possession acts as defined in s. 23B.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:
(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:
(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

The claimed rights and interests listed in Attachment E to Schedule E do not include a claim to exclusive possession. Paragraph 1 clearly states that the rights and interests claimed are all non-exclusive. Paragraph 2 of schedule E also makes it clear that those non-exclusive rights and interests are claimed only to the extent that they are consistent with other non- native title rights granted in the area.

Paragraphs 3 and 9 of schedule J of the application also make it clear that non-exclusive rights and interests are claimed—that they 'do not confer possession, occupation, use and enjoyment … to the exclusion of all others.'

It is clear that rights and interests that confer exclusive possession, occupation, use and enjoyment are not claimed in any part of the application area and therefore not claimed over PNEPAs.

Combined result for s. 190B(8)

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Section 190B(9)
No extinguishment etc. of claimed native title

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(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 ss. 47, 47A or 47B.

Delegate's comments

I consider each sub condition under s. 190B(9) in turn and I come to a combined result at page 51 below.

Result re s. 190B(9)(a)

The application **satisfies** the sub-condition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

The application at schedule Q states that 'The applicants do not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown'.

Result re s. 190B(9)(b)

The application **satisfies** the sub-condition of s. 190B(9)(b).

Reasons re s. 190B(9)(b)

The application at schedule P states that 'The applicants do not claim exclusive possession of any offshore place.'

Result re s. 190B(9)(c)

The application **satisfies** the sub-condition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Combined result for s. 190B(9)

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three sub-conditions, as set out in the reasons above.

[End of reasons]

Attachment A
Summary of registration test result

Application name:	Gold Coast Native Title Group
NNTT file no.:	QC06/10
Federal Court of Australia file no.:	QUD346/06
Date of registration test decision:	December 2007

Test condition (see ss.190B and C of the Native Title Act 1993)	Sub-condition/requirement	Result
s. 190C(2)		Combined result: met
	re s. 61(1)	met
	re s. 61(2)	met
	re s. 61(3)	met
	re s. 61(4)	met
	re s. 61(5)	met
	re s. 62(1)(a)	met
	re s. 62(1)(b)	met
	re s. 62(2)(a)	met
	re s. 62(2)(b)	met
	re s. 62(2)(c)	met
	re s. 62(2)(d)	met
	re s. 62(2)(e)	met

	re s. 62(2)(f)	met
	re s. 62(2)(g)	met
	re s. 62(2)(h)	met
s. 190C(3)		met
s. 190C(4)		met
s. 190B(2)		met
s. 190B(3)		not met
s. 190B(4)		met
s. 190B(5)		Combined result: not met
	re s. 190B(5)(a)	not met
	re s. 190B(5)(b)	not met
	re s. 190B(5)(c)	not met
s. 190B(6)		not met
s. 190B(7)		not met
s. 190B(8)		Combined result: met
	re s. 61A(1)	met
	re ss. 61A(2) and (4)	met
	re ss. 61A(3) and (4)	met
s. 190B(9)		Combined result: met
	re s. 190B(9)(a)	met
	re s. 190B(9)(b)	met
	re s. 190B(9)(c)	met

Attachment B
Documents and information considered

The following lists all documents and other information that were considered by the delegate in coming to her decision about whether or not to accept the application for registration.

Please note: the delegate had a vast amount of material before her which included the two previous Kombumerri applications, the previous Eastern Yugambeh application and much of the material associated with the registration testing of these previous applications. In addition, the Eastern Yugambeh application was the subject of numerous objections and correspondence between the then delegate and the applicant. Not all of this information has been listed below, only that which has been either specifically referred to in the reasons or has been particularly relevant to the delegate's consideration. It should be noted, that though some of the material has not been listed, the information contained in that material was within the delegate's general knowledge whilst applying the test.

Material prior to filing of application

1. Copies of letters forwarded (March 2006) by **[Applicant 2]** to State Manager, Tribunal, Brisbane Registry—
    1.1. **[Person 1]**to President, Tribunal, 28 March 2006
    1.2. **[Person 1]**to President, Tribunal, 29 March 2006
    1.3. **[Person 1]**to **[Person 29 – name deleted]** 27 March 2006
    1.4. **[Person 1]**to **[Ancestor 4]**, 29 March 2006
    1.5. Map of proposed claim boundary.
2. Materials pertaining to the authorisation of the Gold Coast Native Title Application, received by the Tribunal 6 April 2006—
    2.1. Fact Sheets; authorisation plan, draft public notice for the proposed application;
    2.2. Eastern Yugambeh Mailing List Membership, dated 5 April 2006
    2.3. Eastern Yugambeh Corresponding Membership, dated 5 April 2006
    2.4. Invitations, notices and discussions points for information sessions, February 2006
    2.5. *Eastern Yugambeh Native Title News*: 17 February 2006 to May 2004.
3. The draft application as received in the Brisbane Registry of the Tribunal 5 July 2006.
4. Preliminary assessment prepared in respect of the draft application, forwarded to the applicant 24 July 2006.
5. Correspondence from **[Barrister 1 – name deleted]**, dated 11 August 2006.

Material pertaining to the application as filed

6. The application as filed in the Federal Court on 6 September 2006, including attachments and affidavits.

7. The amended application as filed in the Federal Court on 6 July 2007, including attachments and affidavits.

8. The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis'—GeoTrack 2007/1114, dated 12 September 2007 (the geospatial report), being an expert analysis of the external and internal boundary descriptions and mapping of the application area.

9. Reports of searches made of the Register of Native Title Claims, Federal Court Schedule of Applications, National Native Title Register and other databases to determine the existence of interests in the application area, namely, overlapping native title determination applications, s. 29 future act notices and the intersection between the Gold Coast Native Title Group (GCNTG) application area and any gazetted representative body regions. These reports are against the Tribunal's databases and documented in the geospatial report.

10. Claimant Application Summary generated by the Tribunal's Case Management System for the following applications:

    10.1. QC01/2—Eastern Yugambeh People—QUD6002/01

    10.2. QC96/69—Kombumerri—QUD6082/98

    10.3. QC98/24—Kombumerri People #2—QUD6194/98.

11. The following persons who oppose registration of the GCNTG application sent information to the Tribunal:

    11.1. **[Person 30 – name deleted]**—letter dated 3 April 2006

    11.2. **[Person 2]**—letters dated 3 April 06; 11 December, 2006, 18 December 2006

    11.3. **[Person 31 – name deleted]**—letter dated 08 April 2006

    11.4. **[Person 32 – name deleted]**—letter dated 17 April 2006

    11.5. **[Person 33 – name deleted]**—copy of letter to **[Person 1]** dated 15 May 2006, letter of objection from Ngarang-Wal Gold Coast Aboriginal Association Inc. under the signature of **[Person 33]**, dated 16 December 2006, letter from Ngarang-Wal Gold Coast Aboriginal Association Inc. under the signature of **[Person 33]** dated 21 December 2006

    11.6. Members of the Ngarang-Wal Gold Coast Aboriginal Association Inc.—letters dated 16 December 2006 from -**[Group of persons 6 – names deleted].**

    11.7. **[Person 19]**—letter dated 4 December 2006, including a map of the Yugambeh Language Region, and 7 other attachments of various correspondence between herself and the GCNTG

    11.8. **[Person 34 – name deleted]**—letter dated 25 September 2006

    11.9. **[Person 35 – name deleted]**—letter dated 26 November 2006

11.10. **[Person 36 – name deleted]**—letter dated 30 November 2006

11.11. **[Person 37 – name deleted]**—letter dated 04 December 2006

11.12. **[Person 38 – name deleted]**—letter dated 13 December 2006

11.13. **[Person 39 – name deleted]**—letter dated 16 December 2006

11.14. **[Person 15 – name deleted]**—Statutory Declaration dated 27 September 2006

11.15. **[Person 16 – name deleted]**—letter dated 15 February 2007

11.16. **[Person 40 – name deleted]**—letter dated 28 September 2006

11.17. **[Person 41 – name deleted]**—letter dated 25 November 2006

11.18. **[Person 42 – name deleted]**—letter dated 25 November 2006

11.19. **[Person 43 – name deleted]**—letter dated 11 December 2006

11.20. **[Person 44 – name deleted]**—letter dated 05 December 2006

11.21. **[Person 45 – name deleted]**—letter dated 08 January 2007.

12. Letter from QSNTS on behalf of **[Person 46 – name deleted]** and Quandamooka Family Representatives to the delegate of the Registrar, dated 22 December 2006, including 3 attachments—

    12.1. Extract from Memmott P (1998), Anthropological and Historical Report on the Quandamooka Native Title Claim

    12.2. Copy of letter from QSNTS to **[Applicant 2]**, dated 12 December 2006

    12.3. Copy of letter from **[Applicant 2]** to QSNTS dated 21 December 2006

    12.4. Letter from **[Person 1]** to Quandamooka Family Representatives Steering Committee, C/- QSNTS, dated 5 February 2007

    12.5. Letter from QSNTS to **[Person 1]**, dated 9 February 2007

    12.6. Letter from QSNTS to the Delegate of the Registrar, dated 4 May 2007, withdrawing the objection of the Quandamooka People to the registration of the GCNTG application.

13. Documents received by the Tribunal on 21 March 2007provided by the GCNTG in response to the objection material. The applicant's submission comprised the following documents—

    13.1. Brief submissions relating to authorisation and aspects of objections to the application

    13.2. Affidavit of **[Person 1]**, dated 20 March 2007, including attachments—

    A—Video footage (provided on DVD) of the 20 May 2006 Community Forum held at Broadbeach
    B—Attendance List of the 20 May 2006 Community Forum held at Broadbeach
    C—Audio recording (provided on CD) of the 24 May 2006 Authorisation Meeting
    D—Letter dated 13 March 2007 from **[Applicant 1]** regarding confirmation of her and **[Person 3]** attendance at the 24 May 2006 authorisation meeting
    E—Record of attendance at 24 May 2006 authorisation meeting

F—Letters conveying authorisation from **[Person 4]** (29 May 2006); **[Person 5]** (5 June 2006); **[Person 6]** (9 March 2007); **[Person 7]** (9 June 2006); **[Person 8]** (15 June 2006); **[Person 9]** (23 June 2006)
G—Notice dated 13 June 2006 of 28 June 2006 meeting, agenda for the meeting and meeting notes at which additional persons comprising the applicant were authorised
H—Documentation of Authorisation—explanation of the family lines with reference to apical ancestors
I—Kombumerri Aboriginal Corporation for Culture (KACC), Statement by Committee Members, dated September 2006,— as proof that eight objectors to the application are committee members of KACC
J—Document of proposed changes to objects and rules of incorporation, KACC
K—Correspondence dated February/March 2006 between **[Person 47]** (for EY Native Title Group) and **[Person 2]** (for KACC)
L—Letter dated 18 May 2006 from **[Person 1]** (for the GCNTG) to **[Person 11]**
M—Information and correspondence dated February 2006 regarding communications between GCNTG and QSNTS regarding the Quandamooka objection
N—various correspondence between GCNTG and QSNTS between November 2006 and February 2007
O—Letter dated February 2007 from QSNTS to **[Person 1]** (for the GCNTG) regarding terms of instruction by the Quandamooka Family Representatives Steering Committee.

14. Provision by the GCNTG applicant of additional information, dated 31 October 2007:

    14.1. Letter from **[Applicant 2]** expressing his own views regarding those objections opposing the GCNTG application

    14.2. Letter from **[Person 1]**confirming that the persons jointly comprising the applicant are members of the native title claim group and addressing requirements of s. 190B(5).

Information relating to previous applications

15. Native Title Determination Application for QC01/2—Eastern Yugambeh People—QUD6002/01, in particular—

    15.1. Attachment R of the 25 January 2001 Eastern Yugambeh application—comprising of affidavits of **[Applicant 3 – name deleted]** (10 January 2001), **[Person 25]** (14 December 2000), **[Person 5]** (8 January 2001) and **[Applicant 2]** (6 December 2000)

    15.2. Affidavits of **[Person 19]**,(8 January 2001); **[Person 25]**, (28 September 2001); **[Person 21]** (27 September 2001); and **[Person 26]** (25 August 2001).

16. Registration test Reasons for Decision in QC01/2—Eastern Yugambeh People—QUD6002/01, dated 16 April 2002, and the following documents which were considered by the then delegate for the purposes of authorisation—

    16.1. Letter to the President of the Tribunal from **[Applicant 2]**, dated 18 February 2002, including numerous attachments

    16.2. Letter to Tribunal case manager from **[Applicant 2]**, dated 6 December 2001

    16.3. Letter to Tribunal case manager from **[Lawyer 1]**, dated 6 December 2001

16.4. Letter to **[Lawyer 1]** from **[Applicant 2]**, dated 19 April 2001

16.5. Affidavit of **[Applicant 2]**, dated 28 February 2001

16.6. Letter to Tribunal case manager from **[Applicant 2]**, dated 3 November 2000, attaching transcript of Kombumerri authorisation meeting of 7 October 2000.

Attachment C
Procedural fairness steps

Letters from persons opposing the making of the GCNTG application were received over a number of months. Listed below are the dates when their correspondence was forwarded to the applicant.

Correspondence by the following people opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **27 November 2006**:

- Letter from **[Person 30]** dated 3 April 2006
- Letter from **[Person 2]** dated 3 April 2006
- Letter from **[Person 31]** dated 08 April 2006
- Letter from **[Person 32]** dated 17 April 2006
- Statutory Declaration from **[Person 15]** dated 27 September 2006
- Letter to **[Person 1]**from **[Person 33]** dated 15 May 2006

The case manager forwarded to the applicant correspondence by **[Person 40]** opposing the registration of the GCNTG application on **7 December 2006**.

The case manager forwarded to the applicant correspondence by **[Person 42]** opposing the registration of the GCNTG application on **14 December 2006**.

Correspondence by the following people opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **12 December 2006**:

- Letter from **[Person 41]** dated 25 November 2006
- Letter from **[Person 36]** dated 30 November 2006
- Letter from **[Person 37]** dated 04 December 2006
- Letter from **[Person 19]** dated 04 December 2006
- Letter from **[Person 44]** dated 05 December 2006
- Clarification letter from **[Person 2]** 11 December 2006
- Letter from **[Person 43]** dated 11 December 2006
- Letter from **[Person 38]** dated 13 December 2006.

Correspondence by the following people opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **19 December 2006**:

- Submission from Ngarang-Wal Gold Coast Aboriginal Association Inc. under the signature of **[Person 33]**, dated 16 December 2006
- Letter from **[Person 48 – name deleted]** dated 16 December 2006
- Letter from **[Person 49 – name deleted]** dated16 December 2006

- Letter from **[Person 50 – name deleted]** dated 16 December 2006
- Letter from **[Person 51 – name deleted]** dated16 December 2006
- Letter from **[Person 52 – name deleted]** dated 16 December 2006
- Letter from **[Person 53- name deleted]** dated 16 December 2006
- Letter from **[Person 54 – name deleted]** dated 16 December 2006
- Letter from **[Person 55 – name deleted]** dated 16 December 2006
- Letter from **[Person 56 – name deleted]** dated 16 December 2006
- Letter from **[Person 57 – name deleted]** dated 16 December 2006
- Letter from **[Person 58 – name deleted]** dated 16 December 2006
- Letter from **[Person 59 – name deleted]** dated 16 December 2006
- Letter from **[Person 60 – name deleted]** dated 16 December 2006
- Letter from **[Person 29]** dated 16 December 2006
- Letter from **[Person 61 – name deleted]** dated 16 December 2006
- Letter from **[Person 33]** dated 16 December 2006.

Revised letter of clarification from **[Person 2]**, dated 18 December 2006, opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **21 December 2006**.

Correspondence by the following people opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **22 December 2006**:

- Letter from **[Person 39]** dated 16 December 2006
- Letter from QSNTS on behalf of **[Person 46]** and Quandamooka Family Representatives dated 22 December 2006.

Correspondence by the following people opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **2 January 2007**:

- Letter from **[Person 35]** dated 26 November 2006
- Letter from Ngarang-Wal Gold Coast Aboriginal Association Inc. under the signature of **[Person 33]** dated 21 December 2006.

Correspondence by the following people opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **8 January 2007**:

- Letter from **[Person 34]** dated 25 September 2006
- Letter from **[Person 45]** dated 08 January 2007.

Correspondence by the following people opposing the registration of the GCNTG application was forwarded by the Tribunal to the applicant on **19 February 2007**:

- Letter from **[Person 16]** dated 15 February 2007.

The applicant provided a response to these objections on 21 March 2007 and again later on 31 October 2007. These documents are listed above at Attachment B.