National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DECISION-MAKER:	Brendon Moore
Application Name:	Gudjala People #2 Core Country Claim
Names of Applicants:	David Allie, Roe Hero, William Santo, Gavin Allingham, Allan Huen, Gloria Santo.
Region:	Central Queensland
NNTT No:	QC06/8
Federal Court No:	QUD 147/2006
Date Application Made:	21 April 2006

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

DECISION
The application is NOT ACCEPTED for registration pursuant to s190A of the Native Title Act 1993 (Cth).

1 November 2006

Brendon Moore — Date of Decision

Delegate of the Registrar,
Pursuant to s. 99 of the *Native Title Act* 1993 (Cth)
of the powers given under ss. 190, 190A, 190B, 190C, 190D

Brief history of the application

The application was filed in the Federal Court on 21 April 2006.

Information considered when making the decision

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

- The National Native Title Tribunal's Registration Test File for QC06/8 QUD147/06
- The National Native Title Tribunal Geospatial Database
- The Register of Native Title Claims and Schedule of Native Title Applications
- The National Native Title Register
- Other material described in my reasons at s 190B(5)

Information provided for consideration by the Registrar's delegate in the application of the registration test in this application was provided to the State. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

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

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

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

S190C sets out the procedural conditions of the registration test (pages 4– 15)
S190B sets out the merit conditions of the registration test (pages 15 – 38).

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

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

On 31 May 2006, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

This delegation has not been revoked as at this date.

A. PROCEDURAL CONDITIONS

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

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

If the application meets all these conditions, then it passes the registration test at s. 190C(2).

Native Title Claim Group: s. 61(1)

An application may 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.

Reasons relating to this sub-condition
Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act.

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

This consideration does not involve me going beyond the application, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group (*Northern Territory of Australia v Doepel [2003] FCA 1384 at paras 16-17, 37)*.

The application is brought by a group of persons who are described in Schedule A to the application. I reproduce that description here.

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

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

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

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

. [Ancestor 1 – name deleted] of Bluff Downs;
. [Ancestor 2 – name deleted]
. [Ancestor 3 – name deleted]
. [Ancestor 4 – name deleted].

In my view there is nothing in the description in Schedule A to indicate that the group does not include, or may not include, all the persons who hold native title in the area of the application.

Result: Requirements met

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

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

Reasons relating to this sub section
The name and address of the applicant's representative is provided at Part B.

Result: Requirements met

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

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

> **(a) name the persons; or**
>
> **(b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons**

Reasons relating to this sub-condition

I must be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. I am not required to make any assessment of those details and information beyond being satisfied that what is provided is, on its face, responsive to the requirement of the section.

It is my opinion that the application provides a description which may describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons

Result: Requirements met.

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

An Application must

> **(a) be in the prescribed form; and**
> **(b) be filed in the Federal Court; and**
> **(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.**

Reasons relating to this sub-condition

s.61(5)(a)

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

s.61(5)(b)

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

s.61(5)(c)

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to s.62 below.

s.61(5)(d)

The application is accompanied by affidavits in relation to the requirements of s.62(1)(a) from the applicants. I am satisfied that the application has complied with s.61(5)(d) in relation to the requirement for affidavits pursuant to s.62(1)(a).
See also my reasons in respect of s.62(1)(a) below.

s.62 (1)(b)

There has been compliance with the requirement to include a map pursuant to s.62(1)(b). See my reasons for decision under s.62(1)(a) and s.62(2)(b) below.

Result: Requirements met

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

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

Reasons relating to this sub-condition

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

Result:Requirements met

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

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

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

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

Reasons relating to this sub-condition

Section 62(1)(c) of the Native Title Act says:

> A claimant application (see section 253):
>
> (c) **may** contain details of:
>
> (i) if any member of the native title claim group currently has, or previously had, any traditional physical connection with any of the land or waters covered by the application—that traditional physical connection; or
>
> (ii) if any member of the native title claim group has been prevented from gaining access to any of the land or waters covered by the application—the circumstances in which the access was prevented.

There is no requirement for the delegate 'to be satisfied' under this section, as it does not make the provision of details mandatory. At s.190B(7), however, 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...'

Material provided is therefore relevant to the consideration of both s.190B(5) and s.190B(7.) 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 connection is in accordance with the laws and customs of the group and that they have their origins in pre-contact society.

Schedule M asserts such connection and refers to Schedule F and the affidavit of [Claimant 1 – name deleted] dated 25 January 2006.

See my reasons at s.190B (5) and (7).

Result: Provided

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

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

Reasons relating to this sub-condition

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. It does not require me to make any further assessment of those details and that information beyond being satisfied that it is responsive to the requirement of the section.

An assessment by the Tribunal's Geospatial Unit dated 22 May 2006 concludes that 'the description and map are consistent and describe the area with reasonable certainty.'

The requirements of the section are met.

Result: Requirements met

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

Reasons relating to this sub-condition
An assessment by the Tribunal's Geospatial Unit dated 22 May 2006 concludes that 'the description and map are consistent and describe the area with reasonable certainty.'

The requirements of the section are met.

Result: Requirements met

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

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

Reasons relating to this sub-condition
It is my opinion that the map contained in the application shows an external boundary of the claim area.

An assessment by the Tribunal's Geospatial Unit dated 22 May 2006 concludes that 'the description and map are consistent and describe the area with reasonable certainty.'

Result: **Requirements met**

Details and results of searches: S62(2)(c)

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

Reasons relating to this sub-condition

This information is found at Schedule D which states that:

> 'CQLC, on behalf of the applicant, has not carried out any searches.'

The section requires 'details and results of all searches carried out' and the requirement is not limited by reference to who carries out those searches, except to say that as a matter of construction the delegate understands the section as meaning 'carried out by or on behalf of the applicant'. The section could not be intended to burden the applicants with a requirement to provide details of searches done by others.

Result: **Requirements met**

Description of native title rights and interests: S62(2)(d)

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

Reasons relating to this sub-condition

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

Result: **Requirements met**

Description of factual basis: S62(2)(e)

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

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

Reasons relating to this sub-condition

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application, and can not be the subject of additional information provided separately to the Registrar or his delegate.

The Court said:

> The information here required by s 62(2)(e) is clearly part of the application filed in Court and changes to it should be notified to the Court and the parties in the manner prescribed, which is to say by a process of amendment: and see *Strickland & Anor v Western Australia & Ors* (1999) 89 FCR 117. Had such an application been made, the State would have been made aware of the new detail, either on or following the application and these proceedings would have been largely unnecessary. Other parties would also be notified after amendment: see s 64(4). (At [21])

The section does not require me to make any assessment of the description provided. The relevant information is to be found in Schedule F which also refers to Attachment F and the affidavit of [Applicant 1 – name deleted] dated 24 January 2006.

Result: **Requirements met**

Activities carried out in application area: S62(2)(f)

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

Reasons relating to this sub-condition

The application provides details of the activities which the native title claim group carries out in relation to the application area at Schedule G.

Result: **Requirements met**

Details of other applications: S62(2)(g)

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

Reasons relating to this sub-condition

Details are provided in Schedule H. There are no such applications.

The assessment of the Tribunal's Geospatial Unit dated 22 May 2006 confirms that no applications as per the Register of Native Title Claims or the Schedule of Applications fall within the external boundary of the application as at that date.

Result: **Requirements met**

Details of s29 notices: S62(2)(h)

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

Reasons relating to this sub-condition

Details are provided at Schedule I. The application states that:

> 'The Applicant has made no inquiries at this point and reserves the right to provide further information at a later stage.'

I understand that as meaning that the Applicant is not presently aware of any such notices.

Result: **Requirements met**

<u>Combined decision for s190C(2)</u>

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

Result: Requirements met

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

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

(a) the previous application covered the whole or part of the area covered by the current application; and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and

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

Reasons relating to this condition

This application was filed in the Federal Court on 21 April 2006. For the purposes of s.190C(3)(b), the application is taken to have been "made" on that date.

As a first step, Section 190C(3) requires identification of previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A. The applicants state at Schedule H of the application that they are not aware of any other applications.

The assessment completed by the Tribunal's Geospatial Unit on 22 May 2006 confirms that there are no other applications that fall within the external boundary of the current application.

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

Result: Requirements met

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

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

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

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

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

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

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

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

Reasons relating to this condition

Section 190C(4), above, sets out what the Act requires. I am only required to be satisfied that one of the two conditions in s.190C(4) is met.

This application is certified by Central Queensland Land Council Aboriginal Corporation ("CQLCAC") pursuant to s.203BE of the Act. I must therefore consider whether the requirements of s.190C(4)(a) in relation to certification are met.

A signed and dated certificate has been provided by the CQLCAC, dated 7 April 2006.

A search of the Tribunal's Geospatial database reveals that CQLCAC is the sole representative body for the region covered by the application and it is therefore the appropriate body to issue a certificate.

The relevant provisions of Part 11 of the Act for the purposes of this condition are found in s.203BE which states:

> (1) The certification functions of a representative body are:
>
> > (a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body;
>
> (2) A representative body must not certify under paragraph(1)(a) an application for a determination of native title unless it is of the opinion that:
>
> > (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

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

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

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

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

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

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

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

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

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

The certificate complies with subsection (2) in that CQLCAC states that it has formed the requisite opinions.

The certificate complies with subsection (4)(a) by including the statement required, that CQLCAC is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met.

The certificate complies with subsection (4)(b) in that it sets out brief reasons for CQLCAC being of that opinion. They are that CQLCAC has acted for the claimant group, providing research and community consultation and in the course of doing so has been able to observe the claim group's practices in relevant areas.

I find that the provisions of s.190C(4)(a) are satisfied.

Result: Requirements met

B. MERITS CONDITIONS

Identification of area subject to native title: S190B(2)

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

Reasons for the Decision

Written Description and Map of External Boundaries

A detailed technical description of the area covered by the application is found in Schedule B and its external boundary is described in Attachment B, in terms of sets of geographical co-ordinates, cadastral boundaries, native title determination application boundaries, and geographical features (eg road reserves). The description includes notes relating to the source and currency of data used to prepare the description.

A map of the claim area is provided at Attachment C. The map was prepared by CQLCAC, is dated 2 March 2006 and clearly depicts the external boundaries of the application area by a bold dashed line and the actual area subject to claim by a bold line and stippled; major towns, rivers and roads are shown. The map includes geographic co-ordinates and major topographic features, scale bar, north point and notes relating to the source and currency of data used to prepare the map.

The assessment completed by the Tribunal's Geospatial Unit, dated 22 May 2006 concludes that the map and area description are consistent and identify the application area with reasonable certainty. I accept that assessment.

I am satisfied that the information contained in the application is sufficient to identify the area covered by the application with reasonable certainty. Further, I am satisfied that the description of the claim area by reference to geographic coordinates, meets the requirements of s.62(2)(a)(i).

Internal Boundaries

At Schedule B, the applicants have provided information identifying areas within the external boundaries of the area covered by the application that are **not** covered by the

application. This is done by way of a formula that excludes a variety of tenure classes from the area covered by the application and is set out above. That description is as follows:

1. The area covered by this application ("the application area") includes all the land and waters inside the external boundary of the application area.

   The external boundary of the application area is shown on the map and marked "Attachment C", and is also identified by reference to the external boundary description set out in "Attachment B".

2. Areas that are excluded from the application area:

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

   (a) Category A past acts as defined in *s.228* and *s.229* of the Native Title Act 1993 (Cth) and
   (b) Category A intermediate acts as deemed in s.232A and s.232B of the Native Title Act 1993 (Cth);

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

   iii) Subject to (iv), any areas over which native title has otherwise been extinguished;

   iv) The paragraphs above and below are subject to the provisions of s.47, s.47A and s.47B of the Native Title Ac11993 (Cth) as may apply to any part of the application area. Areas subject to acts referred to in (2)(i), (H) & (Hi), and (3), to which the provisions of s.47, s.47A and s.47B of the Native Title Act (1993) Cth apply, are not excluded from the application area.

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

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

I note that the applicants make exceptions to the particular exclusions cited in the application by claiming the benefit of s.47, s.47A and s.47 B of the Act at Schedule L of the application. The applicants provide further details of any such claim at Schedule L.

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

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

Result: Requirements met

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

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons for the Decision

Section 190B(3) of the Act sets out the two ways in which a claim group may be described for the purposes of registration. It says:

> 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.

If the persons in the claim group are not named then they must be described under subsection (b). Subsection (b) requires a description from which it is possible to identify 'a particular person' as a member. I understand that as requiring there should be in the description some objective way of verifying the identity of members of the native title claim group.

Mansfield J in *Northern Territory v Doepel* [2003] FCA 1384, on considering the application of s.190B(3), held that the following important principles apply:

> "Section 190B . . . has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4)." [16]

> "Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group." [37]
>
> "The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. [51]

The claim group description is at Schedule A and is as follows:

> The criteria for membership of the Gudjala native title claim group is in accordance with traditional laws acknowledged and customs observed by the Gudjala people who are traditionally connected to the area described in Schedule B ("application area") through:
>
> 1. physical, spiritual and religious association; and
> 2. genealogical descent; and
> 3. processes of succession; and
>
> who have communal native title in the application area, from which rights and interests derive.
>
> The Gudjala native title claim group is comprised of all persons descended from the following ancestors:
>
> . [Ancestor 1] of Bluff Downs;
> . [Ancestor 2]
> . [Ancestor 3]
> . [Ancestor 4].

The description is in two parts. The second paragraph sets out a straightforward 'descent from apical ancestors' form of description. I would understand such a form of words to mean that the group is comprised of all the biological descendants of named ancestors. Taken on its own it would be, in my opinion, satisfy the requirements of the section, as an almost identical description was held to do in *State of Western Australia v Native Title Registrar and Bellotti* [1999] FCA 1591.

The first paragraph however modifies the simplicity of the second by apparently introducing 'criteria for membership' which must raise doubts about what is meant by the term 'descendants' in paragraph two. I have considered whether the paragraph is intended to be read as saying that the apical ancestry description in paragraph two is itself in accordance with the criteria in paragraph one but do not think it can be taken that way. The explicit statement in the paragraph concerning membership criteria means that it cannot be regarded as simply some form of general assertion about the connection of the members defined by paragraph two. Although on its face it seems to me to be more a statement about issues of connection, I must take it into account where it appears.

Even were I to take the view that it was intended to be merely descriptive of the group's laws and customs I could not overlook the stated 'criteria' of 'genealogical descent' and 'processes of succession' because such terms relate to 'descent'.

The application of the three criteria in paragraph one would require some definition of or assumptions as to the meanings of 'traditionally connected', 'physical, spiritual and religious association', 'genealogical descent' and 'processes of succession'. These terms are vague, generalised and undefined. Any such elucidation would need to be in the application, which it is not:

> Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so. (*Doepel* at [51])

The application of the criteria does not provide any objective description which 'enables the reliable identification of persons in the native title claim group'.

Result: Requirements not met.

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

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

Reasons for the Decision

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

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

The courts have not explicitly considered what the legislature intended by 'readily identifiable', although Mansfield J in *Doepel* briefly noted that at s 190B(4) the Registrar must be satisfied that:

> '… the claimed native title rights and interests [did] meet the requirements of being understandable as native title rights and interests and of having meaning.' (at [123])

I understand this as indicating that the rights must be native title rights; they must be 'understandable' as such. Because they are so described they must meet the definition of native title rights in s 223. On this basis it may be argued that rights and interests that have been found by the Courts to fall outside the scope of s 223 can not be 'readily identified' for the purposes of s 190B(4). Section s.223(1) provides as follows:

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

Rights which are <u>not</u> readily identifiable or have been held not to be native title rights include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[1] rights to minerals and petroleum under relevant Queensland legislation,[2] an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.[3]

To meet the requirements of s. 190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

<u>Native title rights and interests claimed</u>

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

> The rights and interests claimed in relation to
>
> I) Land and waters where there has been no prior extinguishment of Native Title or where section 238 (the non-extinguishment principle) applies:
>
>> The native title rights and interests claimed are the right to possession,

[1] *Western Australia v Ward* (2002) 191 ALR 1, para [59].
[2] *Western Australia v Ward*, para [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[3] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

occupation, use and enjoyment of the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group but subject to the valid laws of the Commonwealth of Australia and the State of Queensland.

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

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

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

Many of these rights offend, as they are presently drafted, against the considerations of the High Court to be found in *Western Australia v Ward.* That is a matter for s190B(6).

<u>Conclusion</u>

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

Result: **Requirements met**

Factual basis for claimed native title: S190B(5)

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

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

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

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

Reasons for the Decision

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

To satisfy the requirements of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s.190A(3), regard will also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function 'substantially uninterrupted' [89] from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system.

Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim;

rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

These statements in the *Yorta Yorta* decision define how the terms 'traditional laws' 'traditional customs' and 'native title rights and interests', as found in s.190B(5) and (7) must be interpreted.

I have also considered the Second Reading Speech of the Attorney-General, Hansard, House of Representatives, 9 March 1998 at p 784 when he explained the purpose of the introduction of the proposed amendments to Part 7 of the Act so as to introduce a more stringent test (the registration test) to be applied by the Registrar when considering applications for registration and entry onto the Register of Native Title Claims, thereby allowing the registered native title claimant to participate in the right to negotiate process:

> . . . it is essential to the continuing acceptance of the right to negotiate process that only those people with a credible native title claim should participate. Application of an improved test will go a long way to removing the ambit and unprepared claims which are now clogging the National Native Title Tribunal.

It is my view that the factual basis condition found in s 190B(5) is critical to Parliament's intent, namely that the Registrar deny registration to 'ambit and unprepared claims'.

The Registrar's task under this section was described thus in *Doepel*:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The 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 which may ultimately be adduced to establish the asserted facts. (at [17])

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[4]

2. Information before me and taken into account

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

I am provided by the applicants with the material in the Application (including Attachment F, which is a document entitled "A brief examination of matters pertaining to schedule F of the Gudjala Core Country Native Title Claim" by [Anthropologist 1 – name deleted], anthropologist, dated March 2005 – hereafter '[Anthropologist 1]'), and with affidavits by:

- [Applicant 1] dated 24 January 2006
- [Applicant 1] dated 11 September 2006
- [Claimant 1] dated 25 January 2006

I also have available the following affidavits and documents which were filed with or provided in relation to associated claims; as it transpired they were of little direct relevance, as the anthropological reports were written in 1999, prior to the major decisions in *Ward* and *Yorta Yorta* , and thus some sections are not responsive to the issues raised by the later development of native title law (see, for example, [Anthropologist 2 – name deleted]'s definition of 'Aboriginal tradition') The affidavits suffered similarly. The additional affidavits and documents from the associated claims are:

- Affidavit of [Applicant 1 of Santo Clan of Kudjala People – name deleted] dated 15 October 1999; Santo Clan of Kudjala People Claim QUD 6229/98 (QC98/2).
- Affidavit of [Applicant 1 of Kudjala, Jirandali & Mitjumba People – name deleted] dated 27 March 1999; Kudjala, Jirandali & Mitjumba People Claim QUD6253/98 (QC97/57).
- Anthropological Report by [Anthropologist 2] dated 11 October 1999; Great Basalt Wall National Park; Santo Clan of Kudjala People Claim QUD 6229/98 (QC98/2).
- Anthropological Report by [Anthropologist 2] dated March 1999; Porcupine Gorge National Park; Kudjala, Jirandali & Mitjumba People Claim QUD6253/98 (QC97/57).
- Anthropological Report by [Anthropologist 2] dated May 1999; White Mountain National Park; Kudjala and Jirandali Peoples Claim QUD6243/98 (QC98/1).
- Constitution and membership documents of the Inland Land Council Aboriginal Corporation. I do not consider these documents further as they are not relevant.
- Two letters adverse to the registration of the Kudjala Core Country Claim by [Claimant 1 of Kudjala People 1 – name deleted], dated 12 April 2005 and 19 April 2005, which I do not consider further as they are of no assistance here.
- Affidavit of [Claimant 1 of Kudjala & Jirandali People #2 – name deleted] dated 25 March 2002; Kudjala & Jirandali People #2 Claim QUD6016/02 (QC02/24).
- Affidavit of [Applicant 1 of Inland Land Council Claim – name deleted] dated 27 January 2000; Inland Land Council Claim QUD6001/00.
- Affidavit of [Applicant 1 of Kudjala Yarramundu Claim – name deleted] filed 2 January 2001; Kudjala Yarramundu Claim.
- Affidavit of [Applicant 1 of Yarramundu Claim – name deleted] dated 19 July 2001; Yarramundu claim

3. Consideration

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

I am unable to determine the basis for membership of the group and thus who its members might be. In my reasons at s 190B(3) I came to the conclusion that the description did not allow the reliable identification of members. In doing so I observed that the description seemed to have wider reach than simply the 'descendants of (named) apical ancestors'. I am not required at s 61(1) to make any assessment of whether the group named in the application is or is not correct.

The description used is:

> The criteria for membership of the Gudjala native title claim group is in accordance with traditional laws acknowledged and customs observed by the Gudjala people who are traditionally connected to the area described in Schedule B ("application area") through:
>
> 1. physical, spiritual and religious association; and
> 2. genealogical descent; and
> 3. processes of succession; and
>
> who have communal native title in the application area, from which rights and interests derive.
>
> The Gudjala native title claim group is comprised of all persons descended from the following ancestors:
>
> . [Ancestor 1] of Bluff Downs;
> . [Ancestor 2]
> . [Ancestor 3]
> . [Ancestor 4].

This second part of the description draws no distinction between male and female descendants and is clear that all descendants are members. Some of the material considered below does not seem to support that.

The first part of the description however could have the effect of describing either a wider or narrower membership, as does much of the affidavit and anthropological material provided which is considered below.

The relevance of this is that here I must be satisfied that the factual basis provided in support of the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area is sufficient to support that assertion.[5] A

[5] The delegate is not obliged to accept general assertions nor to seek for material: *Martin v Native Title Registrar* [2001] FCA 16 at [28]

significant component of that factual basis is, therefore, who comprises the group for the purposes of the section.

In his lengthy affidavit [Applicant 1] says, amongst other things

- He belongs to the Gurrdjal language group (at 1.1)
- That his mother was a Wammji (at 1.8)
- His father was a Gurrdjal (at 1.9)
- His sister's language is Birri Gubba but her language identity is Gurrdjal. (at 1.10)
- 'Boys go to the mother's line and girls go to the father's line. Boys would be Wammji language group.' (at 1.10)
- His grandmother (his father's mother) was Bindal and his grandfather Gurrdjal. (at 1.11)
- 'the Gurrdjal generally have close relations with, especially, the Yirandali and Gugu Badhun due mainly to permitted intermarriage.' (at 2.4)
- 'My family has the closest contact on Country with other clan groups known as the [Family name 1 – name deleted], [Family name 2 – name deleted] and the [Family name 3 – name deleted] families. In the Hughenden clan groups with the [Family name 4 – name deleted], [Family name 5 – name deleted], [Family name 6 – name deleted] and [Family name 7 – name deleted] families. In the Mount Garnet area I was in contact with the [Family name 8 – name deleted], [Family name 9 – name deleted] and the [Family name 10 – name deleted] families in Townsville' (at 2.10)
- '...except that women in a certain clan may not in addition eat pigeon. That prohibition only applies to one clan.' (at 3.5)
- 'Country is not derived by every one born on the land in the same way. The Law is that it must come and be traceable through the full blood line.' (at 4.2)
- 'It is possible under traditional law to acquire birth rights to Country. However one must have lived there and be accepted a part of the clan group.' (at 4.6)
- 'Persons who are lawfully married into a claim group have the same rights and interests as other members of the claim group.' (at 4.11)

These statements seem to me to be consistent with the claim group description being more than a purely descent defined one. At the very least they make it clear that membership of the group is more complex and mediated than the simple 'all the descendants of' model used. They also appear to suggest that the claim group and/or the laws and customs relied upon may be wider than those of the descendants of four persons. In my opinion they support the construction or understanding of the claim group description made by me at s 190B(3) where I came to the view there that the 'descent from ancestors' portion did not exhaustively describe the group.

This conclusion is reinforced by the two [Anthropologist 2] Reports. Both describe at some length a process of acceptance/non-acceptance of aspirant members by other members; March 1999 Report at 9.7, 9.10 and the May 1999 Report at 11.1.0. The [Anthropologist 1] report also says of the same question that ancestry is only 'the primary overtly expressed rule', implying that other factors are at play.

The four persons named in the 'descent from ancestors' portion as 'the predecessors' are

[Ancestor 1] of Bluff Downs, [Ancestor 2], [Ancestor 3] and [Ancestor 4].

I accept that the material provided supports an assertion that [Ancestor 1], [Ancestor 3] and [Ancestor 4] were associated with the claim area. They are described in the oral histories of the claimants as being on country. There seems to be a factual basis for claiming that all were within the claim area when first recorded by settlers, although few details are provided. Because of the findings which will follow there is no purpose in my considering whether there is a factual basis demonstrated for ongoing association with the area from that time until the present.

[Ancestor 2] (or ['Ancestor 2' in [Anthropologist 1]), however, was born at Saint Pauls in about 1880[6]. That station is about 80 kilometres east-south-east of Charters Towers, on the west bank of the Burdekin River, and perhaps 25 kilometres south of Ravenswood. It does not appear to be in the claim area. There is no further reliable information from which I could reasonably draw inferences concerning [Ancestor 2] such as where she lived, nor who her descendants may be, nor where they lived. I cannot find any sufficient factual basis to support an assertion that she had an association with this particular area claimed, nor am I able to speculate where her descendants may have lived.

Because of the vagueness of the first paragraph of the description in schedule A, and the subjective aspects of membership revealed, it is not possible to know how large the membership of the group is nor who they are and thus I am not able to be satisfied that there is a factual basis for the assertion that such members have and their predecessors had an association with the area claimed.

In considering this I must take into account the history of dispossession cited. Nothing is said about where the bulk of the claim group lived at sovereignty and not a great deal more thereafter. I am not told when effective sovereignty occurred, but I note that sovereignty, in legal terms, was 1788. If effective sovereignty were shown to be much later, and thus closer to the lives of the ancestors, inferences may be available.

The [Anthropologist 1] Report, for example, says of [Ancestor 3] that 'the available documentary and oral historical information clearly identifies [Ancestor 3] with the claim area; most closely with 'Bluff Downs' and the nearby 'Great Basalt Walls'. [Ancestor 4] is identified with the Maryvale/Bluff Downs/Sandy Creek area. Mention is made of [Claimant 2] who "also appears to have come from the Bluff Downs/Maryvale area:" [Ancestor 1] also came from Bluff Downs. I have already noted that [Ancestor 2] does not seem to be mentioned within the claim area at all. The claim area is a large one – around 1000 square kilometres – and Bluff Downs is close to the eastern boundary. Maryvale Station, about 30 kilometres north of Bluff Downs was the home of [Claimant 1]'s forebears and there is some mention of Toomba Station, but only in relatively recent times.

This analysis is not to say that some members of the claim group have not maintained an association, only that a sufficient factual base from which reasonable inferences could be drawn as to the whole group is not provided. It must also be said that the courts have

[6] [Anthropologist 1] at p.3 under '[Family name 1-Family name 2]'.

recognised that association or connection is not necessarily tied to physical presence on country, but if it is not physical then more information is required.

I am unable to find a factual base for the assertion that all the predecessors of the present claim group can be said to have an association with all of the claim area, nor of what might be described as the 'intermediate' members from, say 1870 on.

I am not satisfied that the factual basis provided by the applicant is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

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

This subsection requires me to be satisfied that there is a sufficient factual basis on which it is asserted that there exist traditional laws and customs; that those laws and customs are respectively acknowledged and observed by the native title claim group; and that those laws and customs give rise to the claim to native title rights and interests.

The application is, so far as I can tell, one of a series of Gudjala applications in the area broadly surrounding Charters Towers. It makes a specific claim to certain lands and waters by a particular group which does not appear to comprise all those persons who might claim Gudjala ancestry or all the country which might be claimed by Gudjala people. That, of itself, is not my concern; native title is defined as 'communal, group or individual rights and interests' at s 223, but I am not able to discern whether the laws and customs asserted are those of a particular group of Gudjala people or all Gudjala people..

What I must consider is whether a sufficient factual basis is provided for the assertion that traditional laws and customs exist and that they give rise to the claimed native title rights and interests. In doing so I am guided and bound by the reasoning of the High Court in *Yorta Yorta* (op cit) at paragraphs 42 - 56 and 79 - 89 concerning the interpretation of the word 'traditional.'

The High Court stressed that the laws and customs observed and acknowledged must have their roots in pre-sovereignty laws and customs, and be laws and customs having normative content (42), and having their origin in a normative system (43). That system must have had a continuous existence and vitality since sovereignty (47). The laws and customs and the society which acknowledges and observes them are inextricably interlinked (55) and in this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs (49). "Traditional" must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty (86) and acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty (87).

The High Court noted the consequences of European sovereignty:

> It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end 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 that period as a body united by its acknowledgment and observance of the laws and customs. (89)

The fact that there is some current practice or observation of laws and customs does not of itself demonstrate that they are 'traditional'.

If the laws and customs do not have that normative content there may be observable patterns of behaviour but not rights or interests in relation to land or waters (42). 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. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title (47). And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality (50).

If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, *that later society*, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society (53).

The Court acknowledged the possibility of adaptation or change:

> What is clear, however, is that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not necessarily be fatal to a native title claim. (83) and
>
> Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom. (44)

Bearing these strictures in mind I am unable to find a sufficient factual base for the assertion that there exist traditional laws and customs and I will now consider why.

The fact of widespread and often brutal dispossession of Aboriginal peoples, particularly, but not exclusively in the 19th century, is a matter of public record and knowledge. It is a matter to which I must turn my mind as there is evidence of it having occurred here.

There were apparently massacres in the early years at Quippenburra cave, Policeman Hole and at the Lolworth Range (although the references to them are scanty and it may be that these place names all refer to the same incident). The large pastoral stations seem to have been commenced in the 1860s or so as there are oral histories of ancestors being on those stations at that time, or soon thereafter, and often of them remaining there. I am not told when effective sovereignty occurred but infer that it was about 1850-60. There are other more general references to massacres and dispossession. It is clear (from the affidavits and anthropological material) that the Gudjala Peoples were subject to at least dislocation in, or dispossession of, parts of their country.

There is virtually no factual base provided from which could be established the existence of a normative society at that time, nor, subject to the next paragraph, what the content of the laws and customs now asserted were prior to or even after sovereignty. Nor is there any material from which I could safely draw inferences about their content or the society that existed at sovereignty.

An account of what may have been the laws and customs is given in the [Anthropologist 2] Reports of March and October 1999 at section G, where the author describes their 'classical form.' These statements lack some specificity but it is clear that the author is describing laws and customs very different from the 'serial filiation' now relied upon.

That the laws being described are not those at sovereignty seems to be acknowledged in the [Anthropologist 1] Report. In the section of Schedule F entitled 'Traditional laws and customs of the Predecessors' he firstly draws on writings by [Author 1 – name deleted] concerning connection to land in north west Queensland and then from an article by [Author 2 – name deleted] dated 1905 titled 'Notes on Government, Morals and Crime''in the North Queensland Ethnography Bulletin. He then describes four 'underlying principles of law'. Those principles do not go to matters which I must consider. Neither piece of writing is about the particular claim group.

The [Anthropologist 1] Report then considers the laws and customs of what he refers to as the 'contemporary community' under the heading of 'Laws and Customs underpinning interest in land today.' The report says that 'members of the families mentioned above demonstrate the existence of a number of contemporary laws. These are clearly important and generally held, both amongst the applicants and amongst the indigenous population generally.' The Report seems to be at pains to stress the 'contemporary' nature of what it describes. I understand the word to be used to distinguish what occurs today from what may have occurred at other times. I must then look for some factual basis for any assertion

that the 'contemporary' laws are 'traditional' laws subject to 'developments at least of a kind contemplated by that traditional law and custom.' (44)

What follows is a set of 'rules' which appear to concern how particular members or families establish rights to particular parts of the claim area rather than the laws and customs of the group which give rise to communal rights in land.

The [Anthropologist 1] report says that

> 'ancestry provides the primary overtly expressed rule for recognition of membership. There is clearly a view, held by all, that by establishing that one's ancestors were part of the community associated with the area in the early days of occupation to the satisfaction of the contemporary community, one possesses contemporary rights'.

He notes of the 'satisfaction' that 'it is recognition by the contemporary indigenous community which is critical'. Again, these statements seem to be concerned with allocation of rights within a group, whereas I must consider the group as a whole and not the rights of 'families.' They do not seem to me to have the quality of being 'traditional' laws as explained by *Yorta Yorta;* indeed the report does not assert that they are, and they are almost entirely phrased in the present. The High Court said:

> 'Further, for the same reasons, it would be wrong to confine the inquiry for connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown now to be acknowledged and observed by the peoples concerned' (at 56)

I am also not persuaded that a sufficient factual basis has been established that, whatever form they take, the laws and customs relied upon are those of a 'society', of which *Yorta Yorta* said:

> '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. (at [47]), and
> 'acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty' (at[87]), and
> Law and custom arise out of and, in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs (at [49]).

There is no material before me which would constitute a sufficient factual basis to suggest that the four apical ancestors named in schedule A could be said to have constituted a 'society'.

Firstly, [Ancestor 3] is 'identified with Bluff Downs and the Great Basalt Walls area' and 'the evidence suggests a birth date around 1860.' [Ancestor 4] is 'identified with the Maryvale/ Bluff Downs/ Sandy Creek area to the north of the Great Basalt Walls' and 'the evidence suggests a birth date ... around 1855 to 1860'. [Ancestor 1] is 'also of Bluff Downs' and 'the evidence suggests a birth date ... in the 1860s or 1870s.' I have already noted that

[Ancestor 2] does not come from the claim area but from about 80 kilometres south. She 'was born ... in about 1880.'

I am not able to find that these three women, of whom it may possibly be said that they met or knew each other and, noting that there are no men, could be seen as a society governed by laws and customs of normative effect. There is just no material to provide a sufficient factual basis for such an assertion that the current laws and customs are 'traditional.'

It should be stressed that this is not to say that further evidence at trial might not establish otherwise or that all traces of Gudjala culture has been lost, as that is plainly not the case. What I must find is those matters to which the High Court directs me.

I note what the Full Court said in *De Rose v State of South Australia* [2003] FCAFC 286 at 200-201 to the effect that a biological link to the native title holders at sovereignty is not a necessity, but nor is descent alone sufficient[7]. That is not however the position put by the applicants. I also note that it might be argued that my conclusion above could be an artefact of the way in which the group has been described, by the convention of descendants from apical ancestors. That is a matter for the applicants to decide but I must consider what is before me. A description of descent from a limited number of people, even one that has been qualified in the way found in the first paragraph of schedule A, does not provide any assistance to enable understanding of the size of the group at any one time, nor its whereabouts.

Having regard to the above, I am not satisfied that a sufficient factual basis is provided to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed and thus I conclude that the requirements of s.190B(5)(b) have not been met.

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

As outlined above, I am not satisfied that traditional laws and customs exist which give rise to the claim to native title rights and interests by the native title claim group. Section 190B(5)(c) requires that the claim group have continued to hold native title in accordance with those traditional laws and customs.

For the reasons set out in respect of s.190B(5)(a) and (b) above I am unable to find a sufficient factual basis for the assertion that the claim group has continued to hold native title in accordance with traditional laws and customs.

However there is a further matter which goes to the satisfaction of each of subsections (a), (b) and (c), which is the whereabouts and composition of the claim group in recent times. There is considerable material which suggests that the current claim group is, in part at

[7] *Rubibi Community v State of Western Australia (No 5)* [2005] FCA 1025 at [175]

least, one of recent creation, and thus more likely to fall into the category described in *Yorta Yorta* at [53] as a 'later society' and at [54] thus

> It is not some later created rule of recognition rooted in the social structures of a society, even an indigenous society, if those structures were structures newly created after, or even because of, the change in sovereignty.

In coming to this conclusion I rely principally on the discussion in the [Anthropologist 1] Report of the 'Laws and customs underpinning interest in land today.' The whole tenor of that material suggests that what is being described is a process whereby people currently alive are seeking to find 'contemporary' ways in which to assert claims to land. That would not be a problem were there some evidence of adaptation or change consistent with traditional law, but there is not.

This assessment is supported by the [Anthropologist 2] reports, each of which discusses processes of locating and identifying previously 'unknown' members of the claim group according to the 'serial filiation' rule also described by [Anthropologist 1]. Such a rule, of itself, does not of itself pose any requirement that members of the group know each other or be part of a society having laws and customs of normative effect. It is obvious that in fact many did not. It is a process of locating an ancestor by each member. That members of the group have become so in recent time (and thus never members of a normative society) is demonstrated by the need for processes to locate and 'induct' them: see for example the [Anthropologist 2] Report of October 1999 at Section G, particularly at 7.16, the [Anthropologist 2] Report of May 1999 at Section G.10, and the [Anthropologist 2] Report of March 1999 at Section G.8 and 9. All are similar in effect.

The [Anthropologist 1] Report, under "Laws and customs underpinning interest in land today" confirms processes for considering the potential rights of persons apparently not previously acknowledged. Statements such as 'any descendant of a community recognised ancestor are seen as possessing rights' at (c) seem to deny what *Yorta Yorta* calls for in its failure to identify a need to be linked by mutual observation of traditional laws and customs.

It is also apparent that many members do not live on or even near the country: see the [Anthropologist 2] Report of October 1999 at G 7.16 where she speaks of 'the vast distances between members.' The [Anthropologist 1] report does not provide much information on where the claim group members live; mostly it is said that members of families continue to live 'in the Charters Towers area'. The application provides none. Because of the apparent savagery with which they were treated it would be reasonable to expect a considerable diaspora over the last century. The courts have confirmed that distance from country may not be fatal, but some explanation of how association or connection has been maintained in such circumstances is necessary.

Conclusion

I am not satisfied that the information included in the current application filed by the native title claim group is sufficient to support the assertion that the claimed native title rights and interests exist, and also to support the following assertions:

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

Result: **Requirements not met**

Native title rights and interests claimed established prima facie: S190B(6)

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

Reasons for the Decision

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

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

The definition is closely aligned with all the issues I have already considered under s.190B(5). I will draw on the conclusions I made under that section in my consideration of s.190B(6). My conclusion that the application does not establish a sufficient factual base for the assertion of traditional laws and customs, it follows that I cannot be satisfied under s 190B(6) that there are rights and interest linked to them.

Requirements not met.

Traditional physical connection: S190B(7)

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity; or

(ii) a statutory authority of the Crown in any capacity; or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Reasons for the Decision

Under s.190B(7)(a), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

'Connection' with the land, as it is used in the definition of Native title at s.223, is a fundamental concept and this information is taken into account at s.190B(5). It is also relevant at s. 62(c)(i) and (ii).

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

Because of my conclusion at s 190B(5) that I could not reach the requisite satisfaction, I am also unable to be satisfied here.

Accordingly, I am not satisfied that at least one member of the native title claim group currently has and previously had a traditional physical connection with any part of the land or waters covered by the application.

Result: **Requirements not met**

No failure to comply with s61A: S190B(8)

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

Reasons for the Decision

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

S61A(1)- Native Title Determination

A search of the National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area. This has been confirmed by the Tribunal's Geospatial Unit in its assessment dated 22 May 2006.

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

The exclusion clause at Schedule B effectively excludes any lands subject to a previous exclusive possession act as defined under s.23B of the Act save where the Act allows those lands to be part of a native title determination application.

The exclusion clause meets the requirement of this subsection.

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

Paragraph 3 of Schedule B confirms that the application does not include a claim for exclusive possession over areas that are subject to valid previous non-exclusive possession acts done by the Commonwealth or to a State or Territory, as set out in Division 2B of Part 2 of the *Native Title Act*.

S.61A(4) – ss.47, 47A, 47B

At Schedule L the applicants make a claim to the benefits of s47, 47A and 47B.

Conclusion

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

Result: **Requirements met**

No claim to ownership of Crown minerals, gas or petroleum: S190B(9)(a)

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

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

Reasons for the Decision

Schedule Q of the application states that the applicant does not claim any minerals, petroleum or gas wholly owned by the Crown.

Result: Requirements met

No exclusive claim to offshore places: S190B(9)(b)

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

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

Reasons for the Decision

The claim area does not include any offshore places: see description and map of the external boundaries, where it is apparent that the claim area is located inland from the coast. At Schedule P the applicants confirm that there is no such claim.

Result: Requirements met

Native title not otherwise extinguished: S190B(9)(c)

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

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

Reasons for the Decision

The applicants state at paragraph 2 (iii) of Schedule B that all areas where native title has otherwise been extinguished are excluded from the application.

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

Result: Requirements met

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