Registration test decision

EDITED

Application name:	Budjiti People
Name of applicant:	Max Sullivan, James Shillingsworth, Jason Thomas, Peter Seckold, Margaret Seckold, Michael McNiven
State/territory/region:	South-west Queensland
NNTT file no.:	QC07/2
Federal Court of Australia file no.:	QUD53/07
Date application made:	20 February 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 am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s.190D(1B), my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 10 July 2007

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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 accept or not accept, as the case may be, the claimant application 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 all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court).

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, on17 May 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 of Native Title Claims, 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 among 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.

Information considered when making the decision

Section 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.

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

I have *not* considered any information 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).

Application overview

The application that is before me for consideration under s.190A is that filed in the Court on 20 February 2007, a copy of which the Court forwarded to the Registrar under s. 63 on 20 February 2007.

This native title determination application by the Budjiti People has had two precursors:

- QC97/56—Budjiti People—QUD6163/98 which was filed on 6 November 1997 and discontinued 7 May 2004
- QC04/7—Budjiti People—QUD112/04 which was filed on 1 July 2004 and dismissed on 30 March 2007.

A combined application (accepted for registration on 3 September 2004), QC99/15—Mardigan People—QUD6034/98 significantly overlapped the QC04/7—Budjiti People application.

In addition to the Mardigan and Budjiti applications, a number of other native title determination applications in the region overlapped each other, a factor which appears to have prevented the progress of any of the applications concerned. A solution to rectify this situation was put in train in 2005 which culminated in the Western Land Summit, the eventual consequence of which was that agreements were reached about the removal of overlaps. The application QC04/7 was dismissed by the Court on 30 March 2007.

The application QC07/2 was filed prior to the dismissal of QC04/7 with the intention to reduce the boundary area to remove the overlap with the Mardigan People (whose application was also dismissed after a new one was filed).

A preliminary assessment (dated 26 April 2007) of the application QC07/2 invited a submission from the applicant to clarify certain aspects of the application. A submission in response to the preliminary assessment was provided on 30 May 2007.

Native title determination application QC07/2—Budjiti People—QUD053/7 is the application I now consider for registration pursuant to s. 190A.

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 as follows:

- A preliminary assessment of the application as filed on 20 February 2007 was provided to Queensland South Native Title Services (QSNTS) as the representative of the applicant on 26 April 2007;

- A submission was provided by QSNTS to the delegate in response to the preliminary assessment on 30 May 2007 (the details of which are provided at attachment A of these reasons);
- This submission was provided to the State of Queensland (after signing a confidentiality undertaking) on 28 June 2007 for comment;
- Material previously provided to the State of Queensland in respect of registration tests applied in 1999 and 2004 was again provided on 5 July 2007;
- The Tribunal case manager for the Budjiti application was notified by email on 9 July 2007 that the State of Queensland had no comment to make in relation to any of the material provided to it.

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.

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 13.

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

Section 61(1) requires the delegate of the Registrar to be satisfied that the native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

In forming a view on this, the delegate is not required to go beyond the material contained in the application and in particular the delegate is not required to undertake some form of merit assessment of the material to determine whether she or he is satisfied that the native title claim group as described is in reality the correct native title claim group—*Northern Territory v Doepel* (2003) 203 ALR 385 (*Doepel*)—at [37].

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

The description of the persons in the native title claim group is set out in schedule A of the application and describes the Budjiti People as the native title claim group on whose behalf the claim is made. The Budjiti People is said to comprise all the biological descendents of 11 named people.

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 sub-group 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 14 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 does not name the persons in the native title claim group but contains, at schedule A, 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) the requirement under s. 61(5).

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

Affidavits by each of the six persons who comprise the applicant accompany the application. Each affidavit is in 'long form' containing information additional to those statements required of s. 62(1)(a).

The statements required of subsections (i), (ii) and (iii) are provided in separate paragraphs in each affidavit. The matters specified in subsections (iv) and (v) are provided in paragraph 3 of each affidavit. It is my view that the statements in paragraph 3 of each affidavit cumulatively say the things required by ss. 62(1)(a)(iv) and (v) and that this is sufficient compliance with the section.

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 8 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 13 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 contains 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 refers to attachment F which contains a general description of 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 provided in schedules G and M.

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 contains details about native title determination applications QC96/17—Kunja People—QUD6032/98 and QC99/15—Mardigan People—QUD6034/98 that have been made in relation to part of the area covered by this application.

The application QC96/17—Kunja People was dismissed on 18 December 2006 and therefore no longer covers part of the application area. The application QC99/15—Mardigan People was dismissed on 30 March 2007 and therefore no longer covers part of the application area.

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 no s. 29 or equivalent notices fall within the external boundary of the application as at 27 November 2006.

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 **does** contain 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 ('the current application') and any overlapping 'previous application'.

For the purposes of subsection (b), the application QC07/2—Budjiti People is the current application and it was 'made' when it was filed in the Court on 20 February 2007—see *Strickland FC*—at [44] to [45]. Therefore, any overlapping application would need to have been on the Register on this date for it to become necessary to consider whether there are any common members.

The Tribunal's geospatial overlap analysis (dated 8 March 2007) confirms two applications were on the Register at the time that the current application was filed:

- QC99/15—Mardigan People—QUD6034/98, registered on 19 April 1999 and
- QC04/7—Budjiti People—QUD112/04, registered on 3 September 2004.

Both these applications were dismissed by order of the Court on 30 March 2007. Therefore neither application currently overlaps with any part of the area of the current application at the time of my consideration for its registration.

A search of the application area against the Register on 12 June 2007 revealed that there were no other applications which currently covered any part of the area of the current application, QC07/2—Budjiti People—QUD053/07.

The requirement to consider whether there are any common members is therefore not triggered as there are no overlapping applications on the Register.

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 s. 190C(4)(b) are the case in this application, including that the condition of s. 190C(5) is met.

Reasons

The application is not certified pursuant to s. 190C(4)(a).

It is therefore necessary to consider if the application meets the condition in s. 190C(4)(b)—that is, that the applicant is a member of the native title claim group and authorised by all other persons in the claim group to make the application and deal with matters arising in relation to it.

There are other requirements for uncertified applications. 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.

A note to s. 190C(4) directs the Registrar to s. 251B of the Act, for the meaning of the word 'authorise':

> **251B Authorising the making of applications**
> For the purposes of this Act, all the persons in a native title claim group or compensation claim group authorise a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
> (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

(b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

I have had regard to the following material in my consideration of the authorisation of the applicant to make this application and to deal with matters arising in relation to it:

- Schedule R of the application
- Attachment R (minutes of the 1 October 2006 authorisation meeting)
- Form 1 application for NTDA QC04/7—Budjiti People—QUD112/04 filed1 July 2004
- Submission by [Person 1 – name deleted], Principal Legal Officer, QSNTS, (dated 30 May 2007) together with:
    - Affidavit of [Person 2 – name deleted], CEO, QSNTS, sworn 28 May 2007
    - Memo from [Person 3 – name deleted] (staff member of the Legal Section of QSNTS) summarising the decision making process [VC1]
    - Public Notice for the purposes of 1 October 2006 authorisation meeting [VC2]
    - Affidavit of [Applicant 1 - name deleted], person jointly comprising the applicant, sworn 25 May 2007
    - Affidavit of [Anthropologist 1 – name deleted], anthropologist, affirmed 30 May 2007.

I have also taken into consideration the fact that the Budjiti People first made an application for determination of native title in 1997 and have therefore been involved in native title meetings and proceedings for virtually 10 years. The implications of 10 years involvement by the claim group have been brought to my attention by the submission by QSNTS and by [Applicant 1] in his affidavit. Additionally, information relating to the Western Land Summit (WLS) convened in October 2005, involving all the native title determination applications in the region has had a bearing on my consideration.

Below I consider the key issues relating to proper authorisation of the applicant and the making of the application.

The convening of the authorisation meeting

[Person 2], in her affidavit dated 28 May 2007, provides information about the circumstances and details particular to the Budjiti group's participation in the events leading up to their 1 October 2006 authorisation meeting:

> 4. The Land Summit was attended by approximately 200 people. Of that number I would estimate that approximately 20 Budjiti people attended including the Applicants.
>
> 9. QSNTS put a lot of effort into organising the authorisation meeting which was held 1 October 2006. Again I was put in charge of making sure that the Budjiti People knew about the authorisation meeting.

10. Applicants were advised of the date of the meeting through letters sent to their current addresses and provided with flyers to distribute throughout the claim group.

11. In addition, flyers were distributed via mail, fax and email by QSNTS to various organisations including the Community Development Employment Program, Neighbourhood Centres, Legal Services, Centrelink Offices and other Indigenous service providers throughout the South Queensland region. The flyers, radio announcements and Newspaper advertisements all gave the same information as provided to the Applicants. Toowoomba, Dalby, Chinchilla, Roma, Cunnamulla, St George, Enngonia and Burke were among the communities where flyers were distributed.

12. QSNTS advertised the meeting between 9 September and 30 September 2006, through the Public Notices section of various newspapers with advertisements measuring 14x3 CCM and community announcements on radio stations. Advertisements were made in the following publications and radio stations:

- Courier Mail
- Toowoomba Chronicle
- Western Star
- Western Sun
- Western Times
- 4RR Radio
- Triple A
- 4UM Radio

The purpose of placing advertisements in the 5 newspapers was to ensure that coverage in South West Queensland was saturated. The newspapers are published in the major western towns of Toowoomba, Roma, Cunnamulla, Mitchell, St George and Eulo, as well as other towns throughout the region.

The radio announcements read out the information contained on the flyers.

Copies of the radio announcement [VC2] and the public notice [VC3] are attached to [Person 2]'s affidavit. The public notice is comprehensive in its detail by including the list of Budjiti apical ancestors, a map of the proposed claim area and the purpose of and agenda for the meeting.

I am satisfied that 'every reasonable opportunity'[1] was provided for members of the Budjiti native title claim group to participate in the 1 October 2006 authorisation meeting and also that a significant proportion of the Budjiti native title claim group would have been aware of the course of action which would authorise the applicant to make the new application and to deal with matters arising in relation to it.

Representative nature of the group

Schedule R and the affidavits which accompany the application have this to say about the representative nature of the claim group for the purposes of authorisation:

- The meeting of 1 October 2006 was "attended by members of the claim group who had authority to make decisions on their own behalf and for the members of their respective family groups and were representative of the group" (Schedule R—at (b));

[1] as per *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 (*Lawson)*—at [25]

- The meeting was "made up of persons who are acknowledged and respected by all members of the claim group to make decisions on their behalf. I say from my knowledge of the claim group those in attendance were broadly representative of the claim group" (contained in identical paragraphs 4 of all affidavits).

These statements are supported by more detailed information provided in the submission made by QSNTS and its accompanying affidavits.

In his affidavit, [Anthropologist 1] deposes to have been 'working, and maintaining contact with Budjiti families over the last seven years' (at [6]) and he provides, amongst other things, information about the constitution of the Budjiti claim group:

> From my research I am able to say that the Budjiti Claim group is composed of approximately 150 members of the generation of the Applicants. There are six main family groups. They are: [Family 1 – name deleted], [Family 2 – name deleted], [Family 3 – name deleted], [Family 4 – name deleted], [Family 5 – name deleted] and [Family 6 – name deleted], in addition to a large number of smaller family groups which are linked to the main families. Most of the members of the claim group are located throughout Southern Queensland—at [7].

Attendance at meetings by 'core' representatives of the claim group appears to be somewhere between 20 and 35 persons—[Person 2] states that approximately 20 people attended the WLS in October 2005 (at [4]); [Person 3] states in her memo that 35 Budjiti People attended the original authorisation meeting of October 2002 for the application QC04/7. Attendance numbers at the key meetings is also discussed by [Applicant 1] in his affidavit, sworn 25 May 2007:

> 2. I first became involved in lodging a native title determination application for the Budjiti People in 1997. A meeting was held to kick off the claim at the Church of England Hall in Cunnamulla. Approximately 40 people attended.
>
> 3. On 25 to 26 October 2002, I attended a meeting in Toowoomba (off country) to discuss the authorisation of a new claim for the purpose of overcoming technical defects identified in the original claim. Approximately 35 people attended this meeting.
>
> 5. A meeting to authorise the current claim was held on country at the Eulo Town Hall on 1 October 2006. It was also attended by a small proportion of the claim group, about the same number that had attended the Toowoomba Meeting.

Further, the context of the 1 October 2006 meeting is provided in the QSNTS Submission:

> 2. …While the meeting did not have the same level of attendance as the meeting in October 2002, it was attended by substantially the same persons who had express authority to speak on behalf of the claim group for the purpose of lodging a new claim to implement the boundary agreements.
>
> 3. The group has been meeting for the purpose of advancing the Native Title Claim for at least 10 years. The only substantial variation with respect to the current claim relates to the boundaries of the area claimed (matters that have also been well thrashed out by the group over the last 12 months). As a consequence it is not surprising that many members of the claim group did not see the need to personally attend the authorisation meeting.
>
> 5. The efforts of QSNTS to hold an authorisation meeting that was widely advertised in the area where the majority of the claim group reside was an attempt to supplement rather than supplant this established process—at [p. 3].

It would therefore appear that a core number of persons (approximately 35) in the group have in the past 10 years or so taken and now continue to take an active role in the processes involving the Budjiti People's native title claim.

There is authority that the requirement that the applicant be authorised by 'all the persons' in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant, as explained in *Moran v Minister for Land and Water Conservation for NSW* [1999] FCA 1637 (*Moran*) and also in this passage by O'Loughlin J in *Quall v Risk* [2001] FCA 378 (*Quall*):

> I have some difficulty with the use of the word **all** [in s. 61(1)]. It cannot mean every person in the group for there may be members of the group who are infants or mental defectives and, as such, incapable of giving their authorisation. The whereabouts of other members of the group may not be known. I cannot see how the failure to obtain authorisation from members whose whereabouts are unknown could prevent an otherwise legitimate claim for native title from proceeding—at [33].

This view is similarly expressed by Stone J in *Lawson*, and is one I have taken into consideration in contemplating how representative of the group those persons were who authorised the applicant and the making of the application. I am of the view that any evaluation of the representative nature of the group attending the 1 October 2006 meeting should be considered in the context of the claim group's previous and accepted decision-making processes.

Decision-making process

French J in *Bolton v Western Australia* [2004] FCA 760 (*Bolton*) provides a view about the two decision-making processes provided in s. 251B, albeit one in relation to the requirements of s. 251B as they apply to the requirements of s. 66B when seeking to remove and replace an applicant previously authorised. It is my view that his comments as to the operation of the section are equally applicable to the task of the Registrar under s. 190C(4)(b):

> Provided that the decision is made by a representative or other collective body exercising authority on behalf of the group under customary law or, absent applicable and mandatory customary law, by an agreed process, that will suffice to prove the decision-making process required by s. 66B—at [42]
>
> If, as may well be the case, there is no relevant and mandatory traditional decision-making process applicable to the making and conduct of a native title determination application then a process 'agreed to and adopted by the persons in the native title claim group' will suffice as the source of authority for applicants representing members of the group. <u>That is no light requirement. It means that the authorisation process must be able to be traced to a decision of the native title claim group who adopt that process</u>. The conferring and withdrawal of authority for the purposes of a s 66B application must be shown as flowing from the relevant native title claim group—at [44] (emphasis added).

There is no explicit statement in either the application or the submission and accompanying affidavits which states whether the group's decision-making process is in accordance with s. 251B(a) or s. 251B(b). The minutes of the meeting (attachment R) describes the 'decision-making processes for the Authorisation meeting' as that 'of the original claim – as a contemporary decision-making process' (at [p.2]).

[Anthropologist 1]'s affidavit is clear about the decision-making process adopted by the group for this meeting and others in the past:

> The decision making process followed by the Budjiti People is based on Budjiti traditional laws and customs. However, it does not constitute a mandatory traditional decision making process because it has evolved from rather than mirrors the decision making process of the Budjiti society that existed before European contact. Families who are descendants of known Budjiti apical ancestors have representatives who liaise directly with the Budjiti applicants. In this system it is all family groups which participate in the decision making process. The Budjiti applicants have received the authority from those family representatives to make day-to-day decisions about country. For more serious matters, these applicants contact the same family representatives for advice before decisions are made; in turn, these representatives contact their own family members including their own Elders to discuss the matters of concern and then report back on their decisions to the applicants. The applicants have means of contacting directly and immediately all families if and when serious matters arise. Special attention is paid to ensure that more senior members such as [Claimant 1 – name deleted] (born 1924) and [Claimant 2 – name deleted] (born 1934) are consulted in this process—at [8] (emphasis added).

[Anthropologist 1] also affirms his confidence in the authorisation process—at [10] to [11]:

> I have been a witness to a large part of the formal discussions and the decision making process (as described above) leading to amendments of the claim area into its present form. Having regard to the size and location of group members and the extent of consultation that has occurred within the group, I have no doubt that the decision to authorise the new claim and to reduce the boundaries can be taken to be authorised by the whole group.
>
> I have observed that the Budjiti decision making process goes through a consultation process that at least involves the following individuals and their respective family connections:
>
> - [Applicant 1] (Charleville) is the contact point for the [Family 1] families;
> - [Applicant 2 – name deleted] (Enngonia) and [Applicant 3 – name deleted] (Enngonia) are the contacts for the large [Family 3], [Family 4] and [Family 5] families;
> - [Applicant 4 – name deleted] and [Applicant 5 – name deleted] (Cunnamulla) are the contacts for the large [Family 2], [Family 7 – name deleted] and [Family 6] families;
> - [Applicant 6 – name deleted] (Cunnamulla) is the contact point for the [Family 8 – name deleted], [Family 9 – name deleted] and [Family 7] families;
> - [Claimant 3 – name deleted] (Eulo) is the contact point for a large segment of the [Family 2] families.
>
> From my researches and from interviews with these people, I am confident that all these people and through them the major Budjiti family groups were consulted in the process to authorise the new claim boundaries.

The QSNTS submission also provides comment on Budjiti decision-making processes:

> While, the evidence is that there is no mandatory traditional decision making process for the group, there is an established contemporary process with traditional elements. This process involves consultation and agreement from the 6 main Budjiti family groups. Both the affidavits of [Anthropologist 1] and [Applicant 1] establish that this process was followed in the instance of authorising the new claim—at [p.4].

In *Lawson* the Court said at [25]:

> As indicated above, s 251B specifies what is required to establish that "all the persons in a native title claim ... ***authorise*** a person or persons to make a native title determination application"

> (original emphasis). The effect of the section is to give the word "all" a more limited meaning than it might otherwise have. If there is no traditional process of decision-making "in relation to authorising things of that kind" then, in accordance with s 251B(b), authorisation in accordance with a process of decision-making "agreed to and adopted, by the persons in the native title claim group" is sufficient. In s 251B(b) there is no mention of "all" and, in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process.

Based on the information provided and having regard to the above-mentioned authorities, I am satisfied that there is not a traditional method of decision making that must be complied with in the circumstances. Considering that information in conjunction with my conclusions about the representative nature of the group attending the 1 October 2006 meeting, I accept that the Budjiti claim group have implicitly agreed to and adopted a decision-making process (pursuant to s. 251B(b)) to authorise the applicant to make the application and to deal with matters arising in relation to it.

I accept that not 'all' the members of the claim group were physically present at the 1 October 2006 meeting, but that wide consultation amongst the native title claim group had occurred during the WLS process in 2005, at the follow-up meetings later in 2006 and within the community itself. I am of the view that the information before me reveals that by the time the new applicant was to be formally authorised, the native title claim group had exercised an agreed and adopted decision-making process, the results of which were expressed by those who attended the 1 October 2006 meeting.

The requirements of 190C(5)

The following statements are included in schedule R:

a. The Applicants are members of the Native Title Claim Group and are authorised to make this application and deal with matters in relation to it by all the other persons in the Native Title Claim Group.

b. The Applicants were appointed at a meeting specially convened for the purpose on 1 October 2006 at the Eulo Community Hall, Eulo that was attended by members of the claim group who had authority to make decisions on their own behalf and for the members of their respective family groups and were representative of the claim group…

This satisfies the conditions imposed by s. 190C(5)(a) and (b) on applications which have not been certified by the representative body for the area.

Consideration

In accordance with the requirements of s. 190C(4)(b), the application contains information that the applicant is part of the native title claim group and has been authorised to make the application to deal with matters arising in relation to it.

Resolution 5 of the Minutes of the Meeting (attachment R) names the persons who jointly comprise the applicant:

> The following persons will comprise the applicant for the new NTDA:
>
> Max Sullivan
> James Shillingsworth
> Jason Thomas
> Peter Seckold
> Margaret Seckold and
> Michael McNiven

The affidavits of each of the persons who comprise the applicant include the following statements:

> 3. I have been authorised to make the Application and to deal with the matters arising from the Application. I was appointed at a meeting specially convened for the purpose on 1 October 2006 at the Eulo Community Hall, Eulo that was attended by members of the claim group who had authority to make decisions on their own behalf and for the members of their respective family groups. MC1 is a true copy of the minutes of the meeting, which I confirm accurately record the events and resolutions passed at the meeting.
>
> 4. The meeting to which I refer in paragraph 3 was made up of persons who are acknowledged and respected by all members of the claim group to make decisions on their behalf. I say that from my knowledge of the claim group those in attendance were broadly representative of the claim group.

I must be satisfied that the information in the application addresses the authorisation of the applicant by the other persons in the group and its making of the application. This is a consideration made in conjunction with my comments above in respect of the conduct of the authorisation meeting, the representative nature of the group attending and its decision-making process.

Section 190C(4)(b) requires consideration of two questions:

(i) Is the applicant a member of the native title claim group?

(ii) Do all the current persons in the native title claim group authorise the applicant to make the application and to deal with matters arising in relation to it?[2]

In respect of the first question, there is no information before me that contradicts the assertion in the application at schedule R, that the individuals who comprise the applicant are members of the native title claim group.

In respect of the second question, I believe that some overall comments can be made in addition to those made above about how the meeting was convened, how representative of the claim group were the persons who attended the authorisation meeting and what defined their decision-making process.

I have in my knowledge information provided to me for the purposes of the registration test for the application QC07/1—Mardigan People—QUD6034/98. The native title claim group for that matter was involved in the same process as the Budjiti group, involved in many of the same group meetings with the same intent to resolve the impasse of their application due to overlaps with other applications in the region. In particular, I am aware of the process of meetings to do with the

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[2] as per *Martin v Native Title Registrar* [2001] FCA 16—at [14]

Western Land Summit (WLS) and the Court hearings and orders to do with this progression towards resolution.

I am of the view that the authorisation of the applicant for the making of the new application should not be taken out of the context of the circumstances and events leading up to the actual authorisation meeting. The Budjiti group has been involved in the prosecution of their native title determination application for some 10 years. A long process of meetings and consultation in the last two to three years has culminated in the filing of an application reduced in area that does not overlap with the area of any other application.

I accept this argument that has been put forth in the submissions and its accompanying affidavits provided by QSNTS for my consideration in respect of the authorisation condition.

The greatest contention for the Budjiti group appears to have been the resolution of overlaps with other native title determination applications and this was settled prior to the 1 October 2006 meeting. Additionally, nowhere in the material before me do I have information that attests to any 'disturbance' between members of the Budjiti native title claim group that would lead me to question the proper authorisation of the applicant and its making of this application.

Importantly, [Applicant 1] in his affidavit sworn 25 May 2007, attests to the level of consultation in which he participated:

> 7. …As a member of the Indigenous Community in South West Queensland, I can say that these meetings (and the outcomes) generated a great deal of interest anq discussions amongst the Murri Community and amongst the Budjiti claim group members in particular.
>
> 8. As a result of this interest I can say that the new claim implementing the agreements to remove overlaps with neighboring claims had been fully discussed and agreed to by the Budjiti Claim group well before the Eulo meeting in October 2006.
>
> 9. In addition, from my attendance and my many years of representing the Budjiti People as a person constituting the Applicant on their native title claims, I can say that senior persons from all the major Budjiti families were , present at the Eulo meeting. There were senior representatives of the [Family 7],[Family 2],[Family 1], [Family 6], [Family 3] and [Family 4]families at the meeting.
>
> 10. Before the Eulo meeting, I spoke to senior Budjiti people about the need for a new claim to reduce our boundaries and the implementation of the agreements reached with our neighbours. I talked to[Claimant 4], [Applicant 4], [Claimant 5], [Claimant 6] and[Claimant 7]. Each of these people confirmed that they had spoken to their family members and that they also spoke to [Applicant 2], [Applicant 3], [Applicant 4 & 5], [Applicant 6], [Claimant 8] and [Claimant 3] who told me that they had spoken to the Elders of their families and they agreed with the new claim and boundaries.
>
> 12. [Applicant 5] told me that he had also spoken to the Enngonia mob ([Family 4, 3,5) and they told him that they would go with the claim to get rid of the overlaps.
>
> 13. As a result, I am able to say that the claim group has approved the new claim and its boundaries.

I am not of the view that I should be strictly prescriptive in my consideration of a single meeting termed an 'authorisation meeting'. I accept that much of the active discussion about the making of a new Budjiti application occurred outside this single meeting held on 1 October 2006 in Eulo. Based on the information contained in the QSNTS submission and accompanying affidavits I

accept that approximately 35 persons attended this meeting and they were essentially the same persons who have attended meetings during the past 10 years and included 'the main Budjiti family groups'.

I believe it is a fair conclusion that these persons properly had the authority at the 1 October 2006 meeting to make decisions for a greater number of persons in a manner that had been adopted for the past 10 years. It is also fair to conclude that all these persons had actively participated in a consultation and discussion process prior to the authorisation meeting and were given every reasonable opportunity to participate in that final meeting.

For these reasons I am satisfied that those persons who jointly comprise the applicant are members of the Budjiti native title claim group and have been authorised by all the other persons in the group to make this application and to deal with matters arising in relation to it.

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.

Delegate's comment

I consider whether the condition of s. 190B(2) is met firstly with respect to what is required by s. 62(2)(a) and then with respect to what is required by s. 62(2)(b). I come to a combined result for whether or not s. 190B(2) as a whole is met at page 26 below.

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.

Result

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(a).

Reasons

The description of the area covered by the application is found in schedule B which refers to attachment B, prepared by the Tribunal's Geospatial Services on 20 November 2006.

Attachment B describes the application area by metes and bounds description referencing coordinate points and topographic features including rivers and creeks. The written description of the external boundary uses geographic coordinates commencing at a south eastern point of the application area on the Queensland – New South Wales border. It also provides sources and reference data.

Schedule B also lists general exclusions to describe those areas within the boundaries of the claim area which are either not covered by the application or over which exclusive possession is not claimed.

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) with respect to what is required by s. 62(2)(b).

Reasons

Schedule C refers to attachment C.

Attachment C is a monochromatic copy of a colour map titled 'Budjiti People' prepared by Geospatial Services dated 20 November 2006 and includes:

- The application area depicted by a bold outline;
- Background topographic image;
- Significant features referenced in the description labelled;
- Scalebar, northpoint, coordinate grid and locality map; and
- Notes relating to the source, currency and datum of data used to prepare the map.

Combined result for s. 190B(2)

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 8 March 2007: GeoTrack 2007/0341). The assessment was that the description and map are consistent and identify the application area with reasonable certainty.

A written description of the areas within the external boundary that are not covered by the application is found in schedule B at paragraphs 1—6. This is a generic description that excludes from the application area any land covered by the tenures described in s. 23B of the NTA. It is then stated that if the areas so described fall within the other parts 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 in fact covered by the application.

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 **satisfies** the condition of s. 190B(3).

Reasons

In *Doepel*, Mansfield J stated at [51] 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).

Mansfield J said also at [37] 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.

Further, Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) found at [67], 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.

Information in the application

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

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Budjiti People.
>
> The Budjiti People are the biological descendants of the following people:
>
> Jessie Brooks
> Jimmy Eulo
> Jasper Podmore

Margaret Gordon
Gypsey Brooks
Tom Coleman
Dick and Katie Widgell
Rosie Hennessey
Lizzie Brooks
Janie Podmore
Ethel Brooks

As the application does not name the persons in the native title claim group, I must consider if, pursuant to s. 190B(3)(b), this description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group. It may be that some factual inquiry may be required to ascertain how members of the claim group are descended from the named apical ancestors, but it does not mean that the group has not been sufficiently described.

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. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Result

The application **satisfies** 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].

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.

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

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the Budjiti People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

2. Over areas where a claim to exclusive possession cannot be recognised, the Budjiti People claim the following rights and interests:
(a) the right to access the application area;
(b) the right to camp on the application area;
(c) the right to erect shelters on the application area;
(d) the right to exist on the application area;
(e) the right to move about the application area;
(f) the right to hold meetings on the application area;
(g) the right to hunt on the application area;
(h) the right to fish on the application area;
(i) the right to use the natural waters resources of the application area including the beds and banks of watercourses;
(j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
(k) the right to conduct ceremony on the application area;
(l) the right to participate in cultural activities on the application area;
(m) the right maintain places of importance under the traditional laws, customs and practices in the application are;
(n) the right to protect places of importance under traditional laws, customs and practices in the application area;
(o) the right to conduct burials on the application area;
(p) the right to speak for and make non-exclusive decisions about the application area;
(q) the right to cultivate and harvest native flora according to traditional laws and customs.

3. The native title rights and interests are subject to
(a) The valid laws of the State of Queensland and the Commonwealth of Australia; and
(b) The rights conferred under those laws.

I am satisfied that this description is sufficient to allow the native title rights and interests claimed to be readily identified.

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 combined result for s. 190B(5) at page 35 below.

For the application to meet this merit condition, the delegate 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 subs (a) to (c) of s. 190B(5). In *Doepel*, Mansfield J stated at [17] that:

> 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.

In considering this condition, I must bear in mind the s. 223 definition of the terms 'native title' and 'native title rights and interests'. This then requires me to take account of the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) as to what is meant in s. 223(1)(a) by the word 'traditional' in the context of the phrase 'traditional laws and customs'. In considering the traditional laws and customs referred to in s. 223, I must look at whether or not those laws and customs derive from a body of norms or a normative system that existed before sovereignty was asserted. I refer 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 not limited to considering information contained in the application but may refer to additional material. 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 affidavit affirmed by [Anthropologist 1] accompanies the QSNTS submission of 30 May 2007, in which he comments on Budjiti past and contemporary connection and society. In addition to the

information contained in the application, I have taken into consideration some material provided in respect of the previous Budjiti applications. This material is referenced at attachment A of these reasons—*Documents and information considered*.

The application states at attachment F that the evidence provided 'is primarily based on the preliminary research conducted by [Anthropologist 1] in 2001'—at [p.1]. Attachments G and M provide information to support the assertions. Limited information to do with the factual basis is also found in the affidavit material of the five persons who jointly comprise the applicant.

I have quoted only those passages from all the material before me which are pointedly relevant to each of the assertions.

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.

The affidavits of those persons who jointly comprise the applicant all contain the following paragraph:

> I have accessed the land and waters claimed and collected bush tucker, hunted game and fished the waters in accordance with the customs and traditions of the Budjiti People. I have done this in conjunction with other members of the Budjiti People. I have seen my children and other members of the Budjiti People exercise traditional skills of making artifacts, which are made from resources found on our traditional lands—at [6].[3]

[Anthropologist 1]'s affidavit of 30 May 2007, contains the following information about the group's current and past association with the application area:

> I wish to comment on the point that the Budjiti People have had a continuous physical connection with the area. Today, a number of Budjiti individuals live in the area and the majority of families live in towns adjacent to the area. These towns include Quilpie, Charleville, Cunnamulla, Enngonia and Thargomindah. From these home bases, access to the area by these Budjiti families is easy and is frequent. Connection with country by the Budjiti People as a group is continuous—at [12].
>
> It is my strong opinion that the current claim group is descendant from the original traditional society. The apical ancestors listed in the claim are Budjiti individuals who were members of a traditional group that functioned under strict traditional laws and customs. These ancestors had ample opportunities to teach their descendants Budjiti protocol as well as laws and customs. These families were living on various stations in country and because of this Budjiti families had access to their important spiritual places. These places, and many others, are still visited and inspected by Budjiti families today. The last corroboree was held as late as the 1930s. Applicants to the Budjiti claim and all the families involved in the claim are the direct

[3] In [Applicant 1]'s affidavit attached to the application, this paragraph appears at [8].

> descendants of those apical ancestors. There is no break at all in the genealogical connection. Finally, it is important to note that some of these apical individuals were still alive well into the 20th century, including:[Ancestor 1 – name deleted], died about 1920 at Tinnenburra; [Ancestor 2 – name deleted], died 1910 at Eulo; [Ancestor 3 – name deleted], died 1933 at Tinnenburra; [Ancestor 4 – name deleted], died 1943 at Belalie Station; [Ancestor 5 – name deleted], died 1956 at Cunnamulla—at [15].
>
> (b) Hunting, fishing and foraging in the claim area is still widely practiced. There has been limited restrictions on members of Budjiti People accessing their land and waters for these purposes. Traditional methods and customs in relation to carrying out these practices are still observed and widely known by members of the claim group—at [17].

Attachment M also provides relevant material:

> [Ancestor 2] is the great-grandmother of [Applicant 1]. She is a Budjiti from the Caiwarro area, and was born in 1878…—at [p.2]
>
> …I remember seeing my great- grandmother [Ancestor 6 – name deleted] at Eulo. She could not speak English. She never lived in a house but always lived in a humpy…—at [p.3]

Additionally, I have considered for the purposes of this condition information provided in attachment F and schedule G.

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

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by 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.

Material can be found in the affidavit of [Applicant 1], sworn 12 February 2007:

> I am a Budjiti man. My mother, [Claimant 4] told me when I was a child that I was a Budjiti person through my great grandmother [Ancestor 2] [sic]. She told me of the location of Budjiti land and waters, some of which are claimed in this application. My mother, explained to me the laws and traditions of the Budjiti People which she told me [sic] had learnt from her mother and my great Aunties and Uncles. I learnt from her and also from my Aunties and Uncles, the stories and places importance of the Budjiti people [sic]. I also learnt that I must respect and obey the decisions of the Budjiti elders and that if I did not I may be punished by them—at [6]
>
> Under Budjiti law, I have a responsibility to care and speak for the traditional lands of our people. Under our law, I also have right to inhabit and live off the traditional lands of our people—at [7]

[Anthropologist 1]'s affidavit of 30 May 2007, contains information about traditional laws and customs acknowledged and observed by the native title claim group:

> In my opinion the known Budjiti apical ancestors constituted a viable and vibrant traditional indigenous society with rights in the land. There is documented evidence that they were senior members of important corroborees in the region, and they discussed tribal issues with other Elders including arranged marriages. A powerful indicator of a group of individuals being a

society, is the process of traditional arranged marriage. There are many documented examples of these among the descendants of apical ancestors listed in Schedule A. It should be noted that arranged marriages were made to ensure that individuals belong to the proper moiety and to the proper totem. Traditionally, these arranged marriages were within the same tribal group or between members of adjacent groups. It is the Elders of the time who were arranging these marriages and this was conducted according to very strict protocol and it followed strict laws and customs. The society must be large enough and traditional in its practices for these tribal marriages to occur. A number of these are documented for the Budjiti people, the earliest being in about 1870 and the latest being as late as in the 1930s—at [13]

…(a) Members of the Budjiti claim group value and appreciate their identity and revere where they have come from and what unites them as a people. They have a clear understanding of the boundaries and where there traditional lands lie and they uniformly understand how a particular person is entitled to assert Budjiti identity.

(c) Within Budjiti Society there is widespread knowledge of the location and importance of significant sites within the claim area. There is widespread observance of rules about avoiding and caring for sites, or of following rituals before entering specific sites. Some sites are subject to regular maintenance (and repair if needed) by senior members of the Budjiti community—at [17]

Attachment M provides relevant material:

During time off from station commitments, Budjiti and other stockmen were doing things the 'old way by going 'walkabout', collecting food (kangaroo, emu, goanna, bukalis, mulga apples, and quandongs), crafting traditional objects and conducting ceremonial activities. Budjiti people also continued conducting burials on the application area during the establishment of the pastoral industry and still conduct burials on country today—at [p.1-2]

… She taught Budjiti language, customs and traditions to her three children, including [Ancestor 7 – name deleted], the grandmother of [Applicant 1]. [Ancestor 2] dies in 1910 at Eulo and was buried the traditional way on a sandhill near the One Mile Waterhole—at [p.2]

[Ancestor 10 – name deleted] said you had to chuck a match in and feed the fire, if you go across (the waterhole) in a boat. [Ancestor 11 – name deleted} never goes close to the waterhole, and myself I do not like to go close. The Munungarra, bunyip, when he came out of the waterhole he did not know where to go, and he stopped around the swampy country, and then he went down the Wirai, a little creek. And into the Paroo up from Womba lake. He made that swampy country .He went back to the main water hole where he is now. [Ancestor 12 – name deleted] told me that story. That's what they told him when he was a boy. He and his parents had lived on Caiwarro. They reckon a man and a woman in the waterhole [Ancestor 12] told me. That was his water hole. He used to dive in there—at [p.4]

[Claimant 10 – name deleted]has extensive knowledge of Budjiti traditional and culture, and these excerpts should not be taken as exhaustive in any way:

"I remembers the terms or 'meats', they were "Barnba" = pademelon and "Bowera" = red roo; they were used all the time during my youth…"—at [p.5]

Cods are called Yamal, fish are called Guyu. Little tiny fish are called Kurduba. They are caught in the swamps and cane grass. Native bee's honey is called Kudju—at [p.6]

Attachment F provides relevant material:

The available anthropological and historic documents, such as Meston (1897) and Howitt (1904), show that there was a traditional Aboriginal system in operation in Western Queensland,

> including this area. This system included a tribal organisation and a social organisation with regulations involving country, marriage, totems, rights and rituals ('traditional law and customs')—at [p.3]

The material I have considered provides references to the stories of places, customs relating to access to land, traditions and laws concerning burials and food and respect for country as well as the transmission of language and culture. In addition to these, there is explanation about the relationship of members of the claim group to some of the apical ancestors listed in schedule A.

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

I am **satisfied** 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.

The affidavit of [Applicant 1], sworn 12 February 2007, contains details that support this assertion:

> I know that Budjiti People (particularly the elders) keep safe the stories and maintain and create sites of significance to the Budjiti People on the land and waters claimed. I have been told from other Budjiti People that I must speak for our lands and keep our sacred places. With other Budjiti elders I tell the Budjiti stories to our children as they were told to me when I was a child—at [9]

[Anthropologist]'s affidavit of 30 May 2007, provides extensive detail regarding the group and how it continues to hold native title in accordance with its traditional laws and customs:

> … Even though arranged marriages are not practiced today, from a young age their parents and elders have instilled in them as part of their traditional teachings who they should and should not marry. Therefore, a Budjiti person when he or she marries is acutely aware whether they have married the 'right' or 'wrong' way. To the latter, attaches personal shame within the Budjiti community—at [14].
>
> 15. It is my strong opinion that the current claim group is descendant from the original traditional society. The apical ancestors listed in the claim are Budjiti individuals who were members of a traditional group that functioned under strict traditional laws and customs. These ancestors had ample opportunities to teach their descendants Budjiti protocol as well as laws and customs. These families were living on various stations in country and because of this Budjiti families had access to their important spiritual places. These places, and many others, are still visited and inspected by Budjiti families today. The last corroboree was held as late as the 1930s. Applicants to the Budjiti claim and all the families involved in the claim are the direct descendants of those apical ancestors. There is no break at all in the genealogical connection. Finally, it is important to note that some of these apical individuals were still alive well into the 20th century, including:
>
> - [Ancestor 1], died about 1920 at Tinnenburra;
> - [Ancestor 2], died 1910 at Eulo;
> - [Ancestor 3], died 1933 at Tinnenburra;
> - [Ancestor 4], died 1943 at Belalie Station;

- [Ancestor 5], died 1956 at Cunnamulla—at [15].

In my opinion, the current claim group constitutes a society that observes and acknowledges substantially the same laws and traditions as those observed by the society of apical ancestors. Budjiti society has not been destroyed by the European invasion of its country .Budjiti families lived on these new pastoral properties, they worked with and for these pastoralists. As a group, the Budjiti People never left their country and maintained continuously physical and spiritual contact with country, right up to the present—at [16].

The Budjiti community of today is an active society, which embraces its history and traditions. The Budjiti Society has survived European settlement with its laws and customs substantially intact. This is evidenced by:

(d) Cultural knowledge has been passed down orally from one generation to the next without intemlption since sovereignty .Cultural heritage management is an important activity carried out in the area by members of all the families descendants from known Budjiti apical ancestors.

(e) There is a clear correspondence between the knowledge of culture and significant sites and the seniority of individuals within Budjiti society. For instance individuals such as [Claimant 1] (born 1924, living at Enngonia), [Claimant 4](born 1927, living at Cunnamulla), [Claimant 11 – name deleted] (born 1933, living at Toowoomba), [Claimant 12-name deleted] (born 1934, living at Enngonia), [Claimant 10] (born 1934, living at Eulo) and [Claimant 13] (born 1935, living at Toowoomba) represent a group of Elders with traditional knowledge which is highly respected and consulted in Budjiti affairs. They represent the all important link between generations of the past and generations of the present.

(f) There are clear indications of a process of inheritance of knowledge and awareness of significant sites. Elders mentioned in the previous paragraph are also renowned teachers, and they have passed on their knowledge of Budjiti culture, of Budjiti laws and customs to members of their respective extended families—at [17].

The information provided in attachment M extensively covers information about a vital Budjiti society that continues to hold native title in accordance with their traditional laws and customs. Attachment F of the application particularises each of the rights and interests claimed and refers to documentary evidence and interviews with members of the Budjiti claimant group in support of each right and interest claimed. Together with those activities listed in schedule G, this information provides a factual basis for the assertion that the native title claim group continue to hold native title in accordance with their traditional laws and customs.

Combined result for s. 190B(5)

The test in s. 190A involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests exist. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country, as that is a judicial enquiry.

What I must do is consider whether the factual basis provided by the applicant supports the assertion that claimed native title rights and interests exist. In particular this material must support

the assertions described in s. 190B(5)(a), (b) and (c). Relying on the information before me, summarised in this section of my reasons, I am satisfied that a sufficient factual basis is provided for the general assertion that the native title rights and interests claimed exist and for the following particular 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.

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **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 **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Reasons

Under s. 190B(6) I must be satisfied that, prima facie, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered. In *Doepel*, Mansfield J noted at [16] the following:

> Section 190B(5), (6) and (7) however clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s. 190A(3) may be relevant. Even so, it is noteworthy that s. 190B(6) requires the Registrar to consider whether `prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle.

The consideration by the High Court in *North Ganalanja Aboriginal Corporation v QLD* (1996) 185 CLR 595 (*North Ganalanja*) of the term 'prima facie' as it appeared in the registration sections of the NTA, prior to the 1998 amendments, are still relevant. In that case, the majority of the High Court said:

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

The test in *North Ganalanja* was considered and approved in *Doepel*—at [134]:

> Although [*North Ganalanja*] was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of "prima facie" there adopted is no longer appropriate…

Mansfield J in *Doepel* also approved of comments by McHugh J in *North Ganalanja* at—[638] to [641] as informing what prima facie means under s. 190B(6):

> …if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.

Doepel is authority that this pronouncement of the meaning of prima facie supports the view that it is not for the Registrar to resolve disputed questions of law (such as those about extinguishment and the applicability or otherwise of s. 47B) in considering whether a claimed right or interest is prima facie established under s. 190B(6).

Having regard to the above authorities on what is meant by prima facie, it follows that the task under this section is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed. In performing this task, I should have regard to settled law about:

- what is a 'native title right and interest' (as that term is defined in s. 223);
- whether or not the right has been extinguished; and
- whether or not the right is precisely expressed such that it sets out the nature and extent of the right.[4]

If a described right and interest in this application has been found by the courts to fall outside the scope of s. 223(1) then it will not be prima facie established for the purposes of s. 190B(6).

Consideration

As mentioned above in relation to the requirements of s. 190B(5), the registration test involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are prima facie capable of being established.

In my consideration of the rights claimed in the application, I have grouped together rights which appear to be of a similar character and therefore rely on the same evidentiary material or rights which require consideration of the same law as to whether they can be established.

In the circumstances where I have found that a particular claimed right cannot be prima facie established, I refer the applicant to the provisions of s. 190(3A) of the Act. I note that the provisions of s. 190(3A) are available to the applicant if there is further information which would support a decision under that section to include a right on the Register.

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the Budjiti

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[4] *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*)—at [51]

People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

The majority decision of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*) is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can prima facie be established. However, *Ward* is also authority for the proposition that such a claim may only be able to be prima facie established in relation to some areas, such as those where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicant claims the benefit of ss.47, 47A or 47B).

The two rights which make up exclusive possession are (1) a right to control access and (2) a right to make binding decisions about the use of the country. Whilst there is some material about the rules of permission relating to access by other Aboriginal people to Budjiti country in general, there is no material currently before me on the two rights as mentioned which make up exclusive possession.

Therefore, on the basis of the material and information currently before me I am unable to find that a prima facie right of possession, occupation, use and enjoyment as against the whole world could be established.

2. Over areas where a claim to exclusive possession cannot be recognised, the Budjiti People claim the following rights and interests:

Rights/interests (a)—the right to access the application area

Rights/interests (d)—the right to exist on the application area

Rights/interests (e)—the right to move about the application area

Throughout the affidavits I have before me and the information in the application at schedules F, G and M, evidence is provided as to activities which occur on the application area which necessarily require access to, existing on and moving about the application area. These activities include (as listed in schedule G):

> Visiting the application area; use of the application area for customary, cultural and ceremonial purposes; hunting, gathering and fishing; travelling to significant places and sites; camping; protection and management of the claim area and in particular cultural or traditional sites; visitation and maintenance of cultural or traditional sites; collection of flora, fauna and mineral resources, collection of resources for food, for cultural purposes.

Schedule F contains the following:

- Members of the Budjiti People continue to have a close association with lands and waters of the application area according to traditional laws and customs handed down by their elders, and continue to use the application area for hunting, fishing and traditional ceremonies. Personal histories of Budjiti claimants demonstrate a continued physical presence in 'the area' in addition to this spiritual/traditional presence. For example, many members of the [Family 5], Eulo and other Budjiti families residing at Enngonia exercise their right to access the application area through regular visitations. Members of Budjiti families living near 'the area' in towns such as Cunnamulla and Charleville also exercise regularly their right to access the application area— at [p.3].

- Other Budjiti people have continued to 'move across' the application area for the sole purpose of visiting country and sites in accordance traditional laws and customs. [Applicant 1], for example, still travels across the application area as an integral part of his work for the South West Natural Resource Management, as well as to visit the burial sites of his ancestors. In the [Anthropologist 1] report (2002) there are numerous accounts of Budjiti People moving across 'the area' to conduct activities such as to visit relatives, maintain sites of significance, hunting and gathering. For example, it is recorded that [Ancestor 8 – name deleted], an antecedent of {Ancestor 9 – name deleted], travelled to stone arrangements and was initiated at one such arrangement. [Ancestor 8] travelled across the area to hunt and is recorded as showing Budjiti People how many young lizards were needed to be caught prior to ceremonies and how they were specially cooked by the old Budjiti—at [p.6].

This material provides support to prima facie establish the rights to access, exist on and move about the application area.

Rights/interests (b)—the right to camp on the application area

Rights/interests (c)—the rights to erect shelters on the application area

A small proportion of the material which supports these two claimed rights is extracted below.

Attachment F:

- When time permits, she organises family gatherings while camping along the Paroo River or at Caiwarro where there is a good source of yellow belly. Invariably these locations are the same as those camped at by her ancestors. [Applicant 2] and his extended family and [Applicant 3] with his extended family, camp for long periods in areas within the claim boundary such as Currawina National Park. [Applicant 1] states that he returns to camp on country, especially on waterholes because it makes him feel at peace—at [p.4].
- Budjiti people thus secured 'sanctioned' campsites on or adjacent to their traditional country—at [p.4].
- Another example of erecting shelters on country is from [Claimant 10], talking about a Budjiti Elder "[H]e camped in a mud humpy made of sticks and leaves and bags." … they would erect shelters in the form of grass huts and tents on Tilbooroo, "we lived in an old cane grass shed on the bank of Cookara Creek. We lived by a little rock hole in a big bough shed and tents"—at [p.5].

This material provides support to prima facie establish the right to camp on the application area and the right to erect shelters on the application area.

Rights/interests (f)—the right to hold meetings on the application area

Schedule F provides information regarding meetings held on the application area:

- Budjiti Traditional Owners conduct meetings in the application area for the purpose of instructing young people on traditional cultural practice and for discussion and observance of significant places … Budjiti People also conduct meetings on country to make decisions regarding developments on their country. Meetings are continuously held on the application area and in a recent interview with [Applicant 1], it was recorded that there was a death in the Budjiti community, and after the burial, a large number of Budjiti People went back to the reserve at Eulo to commemorate the life of that individual. Budjiti People held a meeting on country as recently as October 2006—at [p.6].

This material provides support to prima facie establish the rights to hold meetings on the application area.

Rights/interests (g)—the right to hunt on the application area

Rights/interests (h)—the right to fish on the application area

A small proportion of the material which supports these two claimed rights is extracted below.

Attachment F:

- …"[W]hen mum, [Ancestor 2] and [Claimant 3] go to the fish hole, they would throw dirt in and talk to each other in language. Go fishing anywhere."—at [p.7].
- Budjiti people have continued to practice their right to hunt on the application area up to present day. Antecedent of applicant [Applicant 4], [Claimant 12], for example, was taught traditional methods of hunting by his parents and other Aboriginal elders and continues to hunt the area today…—at [p.7].
- …They used to take us to a big billabong over on the creek fishing. And to mud springs. Bamboo used to grow there, and we would go and get them for fishing rods. We would fish mainly for bream and yellow belly. Kuju means fish. We used to go for porcupine, we call it bardbilda, goanna, emu - kulburri, and kangaroo - bourda. Used to get - quandong, mulga apple. We used to make little bags out of bark for carrying eggs, and fish…—at [p.8].

Attachment M:

- We would go down to Caiwarro, with [Claimant 13 – name deleted] and [Claimant 14 – name deleted]. We would go down to Womba Lake on Caiwarro to get swan eggs. [Claimant 14] had a big mud hut beside the lake. Down the creek at Caiwarro, big water hole, Korni Paroo water hole. After cod, yellow belly, bream. I call fish Guyu. I remember fishing at Caiwarro with [Ancestor 2]. I remember places at Caiwarro that [Claimant 14] took me. [Ancestor 2], [Claimant 3], mum, they talk in lingo. Talking to the fish. And throw the dirt. Before they sit down at waterhole they always did that. They would talk to the bait. When they chuck in they stop talking. I did that at Caiwarro. I am able to show you the places—at [p.4].

This material provides support to prima facie establish the rights to hunt and to fish on the application area.

Rights/interests (i)—the right to use the natural water resources of the application area including the beds and banks of watercourses

I am of the view that there is not sufficient material that particularises the use of the natural water resources and the beds and banks of watercourses.

Therefore, as currently expressed I cannot find that this claimed right can be prima facie established.

Rights/interests (j)—the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs

Attachment F refers generally to gathering of the natural products of the application area.

- While they are there they eat and cook traditional foods such as emu and gather other bush tucker foods—at [p.4].

- `We would collect Gidgee gum. We ate witchetty grubs over at Gurumarra, they were nicer than eggs (to eat)." And "Pit juri, which we call Pitjudi, was used by [Ancestor 13 – name deleted]. She used to get Gidgee leaves from Tilbooroo [Applicant 1], stated in a recent interview that swan eggs have always been gathered by Budjiti People, as they are quite a delicacy—at [p.10].

However, as currently expressed, I am of the view that there is not sufficient evidentiary material to prima facie establish a right to gather the all of natural products of the application area as listed. Evidence is not provided about the gathering of products such as stone, ochre and resin. Additionally, the list is not exhaustive due to the use of the word 'including'.

As noted above, the provisions of s. 190(3A) are available to the applicant if there is further or more specific information which would support a decision under that section to include this right on the Register.

Rights/interests (k)—the right to conduct ceremony on the application area

Both attachments F and M refer to the last corroborree occurring in Caiwarro sometime in the 1930s. Schedule G refers to 'use of the application area for customary, cultural and ceremonial purposes'—at [2.]. However, I am of the view that there is not sufficient material before me that is specific or particular to the geographical area or the group to prima facie support the right to conduct ceremony on the application area.

As noted above, the provisions of s. 190(3A) are available to the applicant if there is further information which would support a decision under that section to include this right on the Register.

Rights/interests (l)—the right to participate in cultural activities on the application area

Attachments F and M refer to unspecified cultural activities occurring 'pre-contact' and in the past. Schedule G lists a number of activities from which it can be inferred that the group participates in 'cultural activities'. Whilst there is not material before me which specifies or particularises 'cultural activities', I am of the view that overall, there is sufficient prima facie support for the right to participate in cultural activities on the application area.

Rights/interests (m)—the right maintain places of importance under the traditional laws, customs and practices in the application are

Rights/interests (n)—the right to protect places of importance under traditional laws, customs and practices in the application area

Material in attachments F and M provide information about the protection and maintenance of places of importance, including:

- Post- contact camp sites for instance, have been imbued or saturated with cultural significance for the :Budjiti people. Burial sites constitute another example of post- contact sites that have developed cultural significance, becoming places of importance … Budjiti people continue to visit and maintain places of importance up to present day. [Applicant 1], for example, asserts that according to traditional Aboriginal law and custom he is responsible for looking after the traditional country of the Budjiti people. As such he continues to visit and maintain sites of importance including for example, Currawinya National Park which is a highly significant area for the Budjiti People.…—at [p.12].

This material provides support to prima facie establish the rights to maintain and protect places of importance under traditional laws, customs and practices in the application area.

Rights/interests (o)—the right to conduct burials on the application area

There is not sufficient material to prima facie establish the right to conduct burials on the application area. Though the material before me refers to claimant's visiting burial sites, there is no direct reference to burials conducted on the application area.

Rights/interests (p)—the right to speak for and make non-exclusive decisions about the application area

Material in attachment F provides information about the protection and maintenance of places of importance, including:

- Budjiti People established the Budjiti Aboriginal Corporation so collective decisions could be made regarding issues affecting their country … members of the group continue to enjoy their right to contribute to some of the decisions made about prospective activity within the claim area … Budjiti People also make decisions regarding sites of significance and how they can protect them -for example whether to fence off particular sites so that cattle can not disturb them. [Applicant 1] states that these kinds of decisions are made all the time— at [p.14].

This material provides support to prima facie establish the right to speak for and make non-exclusive decisions about the application area.

Rights/interests (q)—the right to cultivate and harvest native flora according to traditional laws and customs

Whilst there is some material regarding the harvesting of native flora contained in the material I have considered, there is not sufficient evidentiary material to prima facie establish a right to cultivate. Therefore, as currently expressed, I cannot find that this claimed right can be prima facie established.

Conclusion

I am satisfied, having considered all the information before me, that the rights as claimed listed below can be prima facie established under s. 190B(6) and should be registered. These rights seem to sit within the definition of native title rights and interests in s. 223 and I note also have not been found by the courts to fall outside the scope of that section.

> 2. Over areas where a claim to exclusive possession cannot be recognised, the Budjiti People claim the following rights and interests:
> (a) the right to access the application area;
> (b) the right to camp on the application area;
> (c) the rights to erect shelters on the application area;
> (d) the right to exist on the application area;
> (e) the right to move about the application area;
> (f) the right to hold meetings on the application area;
> (g) the right to hunt on the application area;
> (h) the right to fish on the application area;
> (l) the right to participate in cultural activities on the application area

(m) the right maintain places of importance under the traditional laws, customs and practices in the application are;
(n) the right to protect places of importance under traditional laws, customs and practices in the application area;
(p) the right to speak for and make non-exclusive decisions about the application area

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 **satisfies** the condition of s. 190B(7).

Reasons

Under s. 190B(7), 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.

Sufficient material is provided at attachment F, at schedule M and in [Applicant 1]'s affidavit regarding the traditional physical connection of members of the native title claim group. The material has been quoted at length in my consideration for both s. 190B(5) and s. 190B(6).

I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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 45 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 analysis dated 8 March 2007 and a search more recently 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 1 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

Schedule B at paragraph 3 states that exclusive possession is not claimed over areas covered by a previous non-exclusive possession act.

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 46 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 Native Title Claim Group does 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 application does not include a claim by the Native Title Claim Group to exclusive possession of all or part of an 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
Documents and information considered

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

- The application as filed in the Federal Court on 20 February 2007, including attachments and affidavits;
- 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 Budjiti People application area and any gazetted representative body regions. These reports are found in a Geospatial Assessment and Overlap Analysis against the Tribunal's databases dated 8 March 2007;
- Tribunal's Geospatial Services geospatial assessment and overlap analysis of the external and internal boundary descriptions and mapping of the application area, GeoTrack 2007/0341, dated 8 March 2007;
- Affidavit sworn by [Claimant 1] (15 April 1999) in support of NTDA QC97/56.
- Affidavit sworn by [Claimant 11] (15 April 1999) in support of NTDA QC97/56
- Information prepared by [Anthropologist 2 – name deleted](Attachments A, F and M) provided directly to the Tribunal in on 22 March 1999 for the purposes of the registration test of NTDA QC97/56;
- Assoc. Prof. (Adjunct) [Person 4 – name deleted], Griffith University, Nathan QLD, 5 December 2002, Anthropological Research in the "Kullilli Cluster", *Report on progress of [Anthropologist 1] research for Queensland South Representative Body Aboriginal Corporation*;
- Schedule R, Form 1 of application QC04/7—Budjiti People—QUD112/04, filed 1 July 2004;
- Letter dated 3 June 2004 from Queensland South Representative Body Aboriginal Corporation (QSRBAC) addressing preliminary comments made by the then delegate in respect of registration test conditions to be applied to the then proposed Budjiti People application;
- Letter dated 30 June 2004 from QSRBAC addressing further preliminary comments made by the then delegate in respect of registration test conditions to be applied to the then proposed Budjiti People application;
- Registration Test Reasons for Decision, application QC04/7—Budjiti People—QUD112/04;
- Additional information provided by Queensland South Native Title Services (QSNTS) on 30 May 2007 which contained the following in response to a preliminary assessment of the application made by the delegate on 26 April 2007:

- Submission in respect of s. 190C(4), s. 190C(5) and s. 190B(5)
- Affidavit of [Person 2], CEO, QSNTS, sworn 28 May 2007
- Memo from [Person 3] (staff member of the Legal Section of QSNTS) summarising the decision making process [VC1]
- Public Notice for the purposes of 1 October 2006 authorisation meeting [VC2]
- Affidavit of [Applicant 1], person jointly comprising the applicant, sworn 25 May 2007
- Copy of extracts of a draft pamphlet produced by the NSW National Parks and Wildlife Service—'Living and Working on the Paroo River' [NM1]
- Affidavit of [Anthropologist 1], Anthropologist, affirmed 30 May 2007.

[End of document}