NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

Reasons for Decision

DELEGATE: Brendon Moore

Application Name: Djabugay People

Names of Applicant(s): Mr Barry Lawrence Hunter, Mr Ivan Cecil Brim, Mr Lloyd Lindsay Levers, Mr Gerald Stan Hobbler Mr Melvyn Hunter, Mr Patrick John Hastie, Ms Rhonda Dell Brim

Region: Far North Queensland NNTT No.: QC94/4

Date Application Made: 13/05/1994
Application Amended: 08/12/2004

Federal Court No.: QG6002/98

The application is **ACCEPTED** for registration pursuant to s.190A of the *Native Title Act* 1993 (C'th).

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

18th April 2005
Date of Decision

Brief History of the Application

This application was originally lodged with the National Native Title Tribunal on 13 May 1994.

The first amendment of the application was made on 23 March 2001 and accepted for registration by a delegate of the Registrar on 16 January 2002.

The application has again amended by leave of the Federal Court. On 20 August 2003 the Court granted the applicants leave to amend the application in the form of the amendment application filed on 12 August 2003. The Court further ordered that the amendment application stand as the amended application.

The application was again amended in accordance with Form 1 amended application annexed to an affidavit from [**Lawyer – name deleted]** and filed with the Federal Court on 23 April 2004.

An amended application was filed with the Federal Court on 8 December 2004 with final amendments and a version 14(b) of the draft determination annexed to the amended application.

It is this latest amended application that I am considering for registration pursuant to s. 190A.

Information considered when making the Decision

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

- the National Native Title Tribunal's Registration Testing files and Legal Services files for this application
- the National Native Title Tribunal Geospatial Database
- the Register of Native Title Claims and Schedule of Native Title Applications
- the Native Title Register
- geospatial assessment and overlap analysis 22 December 2005
- additional information provided directly to the Registrar in relation to the conditions of the registration test consisting of
- **[Lawyer - name deleted]** letters dated 01/10/2003, 28/11/2003, 10/02/2004

Copies of the applicants' additional information have been provided to the State of Qld in the interests of procedural fairness, in line with the decision by Carr J in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

Note: I have not considered any information and materials provided in the context of mediation of the native title claim group's native title applications. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

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

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

On 22 November 2004, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth).

This delegation has not been revoked as at this date.

NOTE TO APPLICANT:

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

S190B sets out the merit conditions of the registration test (see pages 3 – 12).

S190C sets out the procedural conditions of the registration test (see pages 13 – 31).

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

S190C: Procedural Conditions

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

S190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

Native Title Claim Group: S61(1)

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

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

I must consider whether the application sets out the native title claim group in the terms required by s.61(1). That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group found in the application indicates that not all persons in the native title group are included, or that it is, in fact, a sub-group of a wider group with native title rights and interests in the area claimed, then the requirements of s.190C(2) may not be met, and the claim cannot be accepted for

registration (*Northern Territory of Australia v Doepel* [2003] FCA 1384 [at 36] – hereafter *Doepel*).

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group- refer *Doepel* [2003], at paras 16-17, 37.

Because of this, I confine my consideration to information contained in the application and any documents that accompany it under s.62.

Schedule A of the application identifies that the application is made by the Djabugay people and that

> "*Djabugay people comprise those men, women and children who can demonstrate descent…"*

from at least one of the 29 individuals named in Schedule A as Djabugay ancestors.

I find that there is nothing on the face of the description of the persons in the native title claim group or elsewhere in the application and accompanying s.62(1)(a) affidavits to indicate that all the persons in the native title claim group for the area of the application are not included in the description or that the persons described are in fact a sub-group of the native title claim group for the area of the application.

For these reasons, I am satisfied that this description of the persons in the native title claim group meets the requirement in s. 61(1), as imposed by s. 190C(2).

Result: Requirements met

Name and address of service for applicants: S61(3)

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

Reasons relating to this sub-condition

The applicant names are detailed at Part A. The details of address for service appear at Part B of the application.

Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: S61(4)

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

name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this sub-condition

Schedule A of the application describes the persons in the native title claim group. For the reasons which led to my findings that the requirements for s. 190B(3) have been met I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

Application is in prescribed form: s61(5)

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

Reasons relating to this sub-condition

s.61(5)(a)
This is a claimant application which has been filed as a Form 1 as prescribed by Regulation 5(1)(a) of *Native Title (Federal Court) Regulations 1998.*

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

s.61(5)(c)
The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62, including a map as required by s.62(2)(b). I refer to my reasons in relation to s.62 below.

s.61(5)(d)
The application is accompanied by an affidavit as required by s.62(1)(a) from each of the seven persons named as applicant.

I note that s.190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

Application is accompanied by affidavits in prescribed form: S62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

The application is accompanied by an affidavit from each of the seven persons named as applicant. Each affidavit appears competently witnessed. Each affidavit contains the statements required by sub-paragraphs (i), (ii), (iii), (iv). Each of the deponents states the basis on which the applicant is authorised, as required by sub-paragraph (v).

Result: Requirements met

Application contains details set out in s61(2): S62(1)(b)

S62(1)(b) asks the Registrar to make sure that the application contains the information required in s61(2). Because of this, the Registrar's decision for this condition is set out under s61(2) below.

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

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

Reasons relating to this sub-condition

The application contains some details relating to traditional physical connection at Schedules F, G and M.

Result: Provided

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

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information and map in the application are sufficient to enable the area covered by the application to be identified.

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

For the reasons that led to my conclusion that the requirements of s.190B (2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the application area.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

Schedule D, (a) – (k) contains a list of searches carried out that describe the assertion of a number of non-native title interests in relation to the area covered by the application. In addition Attachment D contains a four page tenure history report undertaken by the Department of Lands (Qld) (as it was then) on the 20 September 1993.

Result: **Requirements met**

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

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

Reasons relating to this sub-condition

Schedule E of the application contains a description of the claimed native title rights and interests. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

Result: Requirements met

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

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

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

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

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Reasons relating to this sub-condition

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application, and can not be the subject of additional information provided separately to the Registrar or his delegate. I am satisfied that this information is found in Schedules F, G and M of the application – see my reasons under s.190B(5) for details of this information.

Result: Requirements met

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

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

Reasons relating to this sub-condition

The application provides details of activities carried out by the native title claim group at Schedule G.

Result: Requirements met

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

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

Reasons relating to this sub-condition

In relation to this sub-condition Schedule H states "Not applicable".

This sub-condition is applicable and relevant for the purposes of the registration test. It is applicable in the sense that applicants are either aware or unaware any other applications that overlap with the area subject to their claim. Within this context, presumably the statement "Not applicable" means that the applicants are unaware of any overlapping applications. The Tribunal's overlap analysis dated 22 December 2004 confirms that there are no other overlapping applications.

Result: Requirements met

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

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

Reasons relating to this sub-condition

Schedule I states that the applicants are not aware of any Section 29 notices. The Tribunal's overlaps analysis dated 22 December 2004 confirms that there are no such notices.

Result: Requirements met

Combined decision for s190C(2)

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

Result: Requirements met

Common claimants in overlapping claims: S190C(3)

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

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

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

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

Reasons relating to this condition

A search of the Geospatial Database and Register of Native Title Claims identifies that there are no applications that overlap the whole or part of the area covered by this application.

Result: Requirements met

Application is authorised/certified: s190C(4)

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

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

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

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

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

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

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

Reasons relating to this condition

The application has not been certified pursuant to s.190C(4)(a). Consequently, I need to consider whether there has been compliance with s.190C(4)(b) – authorisation by the native title claim group.

1st limb – the applicant is a member of the native title claim group

There are seven people named as applicants and each has provided affidavit evidence that they are a member of the native title claim group (see para 1 of each s.62(1)(a) affidavit accompanying the application). Two of the seven applicants have provided affidavit evidence directly to the Registrar identifying that they are Djabugay (see affidavits by [**Applicant and Applicant – names deleted]**). Each of the applicants share surnames with the family names identified as forming part of the Djabugay native title claim group in schedule A. For these reasons I am satisfied that the first limb of the authorisation condition are met.

2nd limb – the applicant is authorised to make the application and to deal with matters arising in relation to it

Authorisation is defined in s. 251B and provides that where there is a process of decision making under traditional law and custom for authorising things of this kind then that process must be complied with (s. 251B(a)). Where there is no such process, the native title claim group may authorise the applicant in accordance with a process of decision making agreed to and adopted by the group (s. 251B(b)). It is clear as a matter of law 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[1]. The Act simply requires all those persons who need to authorise an Applicant according to traditional law and custom do so. There may well be individual members of the claim group who for one reason or another are incapable of authorising an applicant - for example because they are of unsound mind, ill, or unable to be located- or are disinclined to do so for whatever reason.

The Federal Court has consistently emphasised the fundamental importance the NTA places on ensuring that claimant applications are properly authorised.[2]

It is stated at Schedule R of the application that:

> *"The applicants are all members of the group and have been authorised to make this application, and to deal with matters arising in relation to it, by all of the persons in the native title claim group in accordance with their traditions and customs governing decision making for decisions of this kind."*

In relation to the authorisation process itself the applicants state that:

> *"Meetings of the group were held in 1994 before the original application…was lodged. Those meetings were held in accordance with traditional laws and customs of the native title claim group and those meetings authorised the original applicant to*

[1] *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J. Refer also O'Loughlin J, *Quall v Risk* [2001] FCA 378 at paras [33-34].
[2] *Ankamuthi People v Queensland* [2002] FCA 897, Drummond J; *Strickland v Native Title Registrar* (1999) 168 ALR 242, French J; *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637; *Quall v Risk* [2001]; FCA 378 *Daniel v State of Western Australia* [2002] FCA 1147, French J.

make the application and deal with matters arising in relation to it. Meetings of the group have been held on a regular basis since 1994."

The authorisation process in relation to the amendment of the application is described as follows:

> *"At meetings of the group held at Kowrowa on 8 September and at Kuranda in 9 October 2000, the native title claim group decided, in a manner consistent with our traditional laws and customs, to amend the applicants and to amend the application in accordance with this amended application.".*
>
> *"At meetings of the group held at Kuranda on 26 March 2003, the native title claim group decided, in a manner consistent with our traditional laws and customs, to further amend the application to take into account changes in the law since the last amendment was made, and in the applicants view, will facilitate negotiations with other parties towards a determination of native title by consent of all the parties."*

The applicants' s62 affidavits depose that each 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. The basis for these statements is described in terms identical to the information that is provided at Schedule R.

This material leads me to believe that this native title claim group has authorised the applicants pursuant to a traditional decision-making process that must be complied with when making decisions of this kind (see s. 251B(a)). I am not provided with any information that would suggest that the Djabugay did not follow their traditional law and custom when authorising the seven people named as applicants.

Although the applicants have supplied relatively few details of their processes, I consider that the fact that the claim has been in progress for more than ten years and has undergone a large number of amendments, including changes of applicants, is evidence of the solidarity of the claim group and clearly demonstrates that the group has confidence that its own laws and customs are operating satisfactorily. The claim group has been able to negotiate an Indigenous Land Use Agreement which will come into effect on the registration of this application and again I feel that it is reasonable for me to draw the conclusion and accept that this could not have occurred without the applicants having been vested with proper authority by the group.

For these reasons I find that the condition in s. 190C(4)(b) is met. I am also satisfied that the application contains the statements required by s. 190C(5).

Result: Requirements met

Merits Conditions: s190B

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

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

Reasons relating to this condition

Schedule B states that:

"The area covered by this application ("the claim area") comprises the land and waters of the Barron Gorge National Park being Lot 880 on Plan NPW 459 but does not include:

1. Land subject to former Lot on K40115 and former Lots 12, 13 and 14 on Plan NR 7579 (being former Allotments 1, 2, 3, and 4 of Suburban Section 1, town of Kuranda).
2. Land subject to former Lots 21 and 22 on Plan NR 7579.
3. Land subject to part of Term Lease 0/213315 being Lot D on CP 894159, Lot E in strata on CP 891025, Lot F in strata on CP 891027, Lot G in strata CP 894159 and Lot H in strata on CP 894157.
4. Airspace subject to part of Term Lease 0/213315 (being Lot E in strata on CP891025 and Lot F in strata on CP891027, Lot G in strata on CP894159 and Lot H in strata on CP894157).
5. Land subject to part of former Special Lease 53088 being Lot D in strata on CP866960, Lot E in strata on CP 866963 and Lot F in strata on CP 866965.
6. Airspace subject to part of former special Lease 53088 (being Lot D in strata on CP866960, Lot E in strata on CP 866963 and Lot F in strata on CP866965).
7. Land subject to former portion 164 Parish of Cairns on NR 1735.
8. Land subject to former portion 194 Parish of Cairns on NR 1735.
9. Land subject to former Portion 383 Parish of Cairns on NR 3594.
10. Former Lengthmens Camp Reserves 85, 169 and 171.
11. Land the subject to a public work, being the boardwalk that links the Barron Gorge train station with the Barron Gorge National Park car park off Barron Falls Road.
12. Land subject to public work being part of Lot 111 on SP 129892, Lot 91 on SP 129891 and part of Lot 81 on SP 219890 being that part of the Cairns Kuranda Railway corridor that traverses the Barron Gorge National Park.
13. Land or waters on which any other public work is constructed, established or situated.
14. Land 20 metres either side of the centre line of the penstock between the intake structure at the Kuranda Weir on Lot 150 on NR 4991 and the underground machine hall on Lot 752 on NR 5189 ("the penstock corridor") for the Barron gorge Hydro-Electric Power Station.
15. Any land or waters that are subject to previous exclusive possession act, as that term is defined in s.23B of the Native Title Act 1993 (Cwth)
16. Minerals or petroleum.

Djabugay People do not claim native title rights and interests that have been extinguished by operation of law.

Schedule C refers to "…….the Department of Natural Resources map dated 5 September 2002".

An A4 monochrome copy of that map is attached, including:

- The "National Park subject to claimant application QC94/4" depicted by the shading;
- Reference cadastral boundaries;
- "Land the subject of Term Lease 0/213315…"(Exclusion item 3 of the description); being those areas where the Kuranda Skyrail route traverses the above national park, depicted by additional diagonal hachuring;
- The Cairns to Kuranda Railway corridor depicted by darker shading;
- Scale bar, north, locality map, source and datum and notes.

Assessment:

The "penstock corridor" listed as an exclusion in Schedule B is not depicted in the map. The map and description are therefore inconsistent.

Once this corridor is depicted on the map (as it is in the Determination Schedule 1 – NTD Plan AP9685), the description and map will be consistent and identify the application area with reasonable certainty.

Carr J in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1594* considered 'exclusion clause' drafting, saying at [56]

> *" It can be seen from those portions of s 62(2) which I have set out above that while there must be a map showing the boundaries of the area covered by the application, there is no need for a map showing any areas within those boundaries that are not covered by the application. The reference to boundaries of the area must be a reference to the outer boundaries and the case was conducted on that basis. In relation to the areas within those boundaries that are not covered by the application, the requirement in s 62(2) is simply for information, whether by physical description or otherwise that enables the boundaries of areas not covered by the application to be identified".*

Whilst the corridor is not shown on the map I am of the view that it is not necessary that it do so when the written description clearly identifies that the 'penstock corridor' is not subject to the claim, and is excluded. The description is as given above, being:

> '14. Land 20 metres either side of the centre line of the penstock between the intake structure at the Kuranda Weir on Lot 150 on NR 4991 and the underground machine hall on Lot 752 on NR 5189 ("the penstock corridor") for the Barron gorge Hydro-Electric Power Station.'

This is a clear and precise description. Although the map and description may not be 'consistent', the requirement of the section is as follows

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

I find that there is such reasonable certainty

Result: Requirements met

Identification of the native title claim group: S190B(3)

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

Reasons relating to this condition
To meet this condition, I must be satisfied that the requirements of either s.190B(3)(a) or (b) have been met. A list of names of all persons in the claim group is not provided in the application and as a result the requirements of s.190B (3)(a) of the Act are not met. Alternatively, s. 190B (3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Schedule A describes the native title claim group as follows:

> "*The native title claim group is Djabugay People.*
>
> *For the purposes of this Application, Djabugay People comprise those related families who have descended from the indigenous inhabitants of the coastal, rainforest and Tablelands areas to the north and the west of the present city of Cairns, and south and to the west of the Mowbray Valley to the south of Port Douglas. Those ancestors were known to others members of the Djabugay language group, and comprise*:"

Schedule A then goes on to name twenty nine individuals and concludes with the statement;

> "*Djabugay People comprise those men, women and children who can demonstrate descent from at least one of the above ancestors*."

I note the comments by Mansfield J in *Northern Territory v Doepel* [2003] FCA 1384 that where an application clearly falls, as this one does, within s.190B(3)(b), the focus of the Registrar is "whether the application enables the reliable identification of persons in the native title claim group – at [51]. Mansfield J added:

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

> *"Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group*." [37]

I am of the view that a description of the native title claim group in terms of named apical ancestors is acceptable under s. 190B(3)(b), even though the descendants are unnamed, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group. By referencing the identification of members of the native title claim group to named apical ancestors, it is possible to objectively verify the identity of members of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group.

For these reasons I find that the requirements of this section are met.

Result: Requirements met

Native title rights and interests are readily identifiable: S190B(4)

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

Reasons relating to this condition

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.[3]

Section 62(2)(d) requires that the application contain "*a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law."*

The terminology in these sections indicates that the legislative intent is to screen out applications that describe native title rights and interests in a manner which is vague, unclear or otherwise do not make sense.

Furthermore, as the phrase 'native title rights and interests' in s.190B4 has a statutory meaning under s. 223, it seems that any native title right and interest claimed in an application which is not a native title right and interest as a result of Court findings about what is a native title

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

rights and interests under s.223, can not be readily identified under s. 190B(4).

Section 223(1) provides:

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

Rights and interests which the Courts have found to fall outside the scope of s.223 include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[4] rights to minerals and petroleum under relevant Queensland legislation,[5] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[6]

Schedule E of the application states

> *"Djabugay People are entitled as against the whole world to:*
>
> *(a) occupy the claim area*
> *(b) be physically present on the claim area;*
> *(c) camp on the claim area;*
> *(d) access, use and enjoy the claim area;*
> *(e) hunt, fish and gather on the claim area;*
> *(f) take, use and enjoy the natural resources of the claim area;*
> *(g) maintain and protect places of importance within the claim area;*
> *(h) perform social, cultural, religious, spiritual or ceremonial activities on the claim area and invite other to participate in those activities;*
> *(i) inherit, dispose of or confer native title rights and interests in relation to the claim area on others, and*
> *(j) make decisions about the use and enjoyment of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by Djabugay Peoples in accordance with valid State and Commonwealth laws.*

A number of qualifications to the claimed native title rights and interests are found in the application:

Paragraphs 3 and 4 of Schedule E of the application states that

[4] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
http://www.austlii.edu.au/au/cases/cth/high_ct/2002/28.html
[5] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[6] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.
http://www.austlii.edu.au/au/cases/cth/high_ct/2002/28.html

- *Djabugay People do not claim native title rights and interests that have been extinguished by operation of law.*

- *The native title claim group do not assert that they possess exclusive possession to any land or waters within the claim area."*

The last paragraph of Schedule B also states that

- *Djabugay People do not claim native title rights and interests that have been extinguished by operation of law.*

Schedule P states that

- *This application does not cover any offshore places*

Schedule Q states that

- *Djabugay People do not claim ownership of minerals, petroleum or gas.*

At the beginning of Schedule E, Djabugay People claim rights and interests "*as against the whole world*." This raises the question whether this description of claimed native title rights and interests indicates that exclusive rights and interests are being claimed in a manner that is internally inconsistent within the description of rights and interests claimed? In other words does the phrase "*as against the whole world*" suggest that the claimed rights and interests are to be exclusive of or superior to, the rights of other, non-native title rights and interests.

It is noted that neither the specific rights and interests listed in Schedule E when read in isolation from this phrase, nor the provisions of the draft consent determination attached to the application in Schedule J extend the rights and interests to a right to control access to or a right to control use of the proposed determination area.

The claim group's legal representative, by email correspondence of 9/10/2003, submits that the words are used to indicate that the nature of a determination is a declaration in rem and that the words do not by themselves create or expand the rights set out. Whilst there is no doubt that a declaration in rem can be so described, in my view it is confusing to do so in this context. I am unable to find any examples of a Native Title determination in which the phrase is used in conjunction with non-exclusive rights, whereas it is commonly used in conjunction with the 'possess, occupy, use and enjoy' formulation of absolute title. Nonetheless, I accept that the intention is not to seek exclusive rights.
Considered as a whole, the rights and interests claimed are not exclusive, but non-exclusive. The claim by the Djabugay People is an action *in rem* and consequently against the property the subject of the claim. If successful the rights and interests claimed would be recognised as against the whole world, and the exercise of those rights would be subject to valid State and Commonwealth laws. I note that it is not used in the draft determination (provided as Schedule J) between the parties.

Schedule E also includes the express statement that the native title claim group to not assert that they possess exclusive possession to any land or waters within the claim area.

In Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory [2002] HCA 28 the majority indicated that non-exclusive rights should be expressed as 'activities':

51 *It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.*

Subsequently, in the determination hearing in Attorney-General of the Northern Territory v Ward [2003] FCAFC 283 the Court commented on the use of 'composite'expressions such as 'use and enjoy' in relation to non-exclusive rights. Omitting some material for clarity, the Court said:

> *'16 The opening words of clause 5 of the proposed determination identify the native title holders' rights as being 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement' certain identified rights. Counsel for the Commonwealth and the State of Western Australia argue for two changes to these words: the omission of the word 'occupy' and the substitution of 'being' for the words 'including, as incidents of that entitlement'. These changes are resisted by counsel for the claimants, Mr J Basten QC.*
>
> *17 As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s 225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression.*
>
> *18 The argument for an exhaustive, rather than inclusive, list of the incidents of the entitlement is based on para (b) of s 225 of the Act. That paragraph requires 'a determination of ... the nature and extent of the native title rights and interests in relation to the determination area'.*
>
> *19 In their High Court joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ said (at [51]):*
>
> > *'A determination of native title must comply with the requirements of s 225. In particular, it must state the **nature** and **extent** of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.' (Original emphasis)*
>
> *21 A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be*

a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy'.

This was followed in *Neowarra v State of Western Australia [2003] FCA 1402* thus

'501 As a result of the injunction in Ward at [52] that in certain situations it will be preferable to express rights by reference to activities that may be conducted as of right on or in relation to land and waters, the applicants also claim the right to engage in particular activities. They say the activities are "particular incidents of, but do not comprise or define the legal content of the rights previously considered". But for extinguishment considerations, there would be no need to examine the various things that could be done in the exercise of the applicants' general ownership right. But where, as here, pastoral leases are involved, it is useful to consider the activities relied on to illustrate aspects of inconsistency of rights'.

There are a number of the rights sought which fall foul of these injunctions. They are the rights to:

(d) access, use and enjoy the claim area
(f) take, use and enjoy the natural resources of the claim area, and, possibly
(h) perform social cultural religious spiritual or ceremonial activities on the claim area and invite others to participate in thise activities.

I do not think, in the light of what the High Court has said, that rights (d) and(f) can be readily identified as non-exclusive rights as they do not come within the requirements of s225. I note that these two rights are not in the draft determination which will, presumably, supercede these findings in due course.

The right at (h), it could be argued, goes no further than the rights at (a) to occupy the area and (b) to be physically present on the claim area in its intent. To the extent that the claimed right (albeit phrased as a 'composite' right) does give some indication of its 'nature and extent' it may be considered, at a prima facie level, to fall outside these strictures and be able to be readily identified.

Whether such composite rights can be established at s190B(6) is another question.

Save for the two rights considered above I am satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests to be readily identified.

Result: Requirements met

Factual basis for claimed native title: S190B(5)

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

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

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

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

Reasons relating to this condition

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

The Registrar (or his delegate) is not limited to consideration of statements contained in the application (as is the case for s.62(2)(e)) but may refer to additional material supplied to the Registrar in order to be satisfied that the requirements of s.190B(5) have been met: *Martin v Native Title Registrar* [2001] FCA 16.

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s.62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it." For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[7]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 558 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of their native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

I find these statements in the *Yorta Yorta* decision of assistance in interpreting the term "traditional" laws and customs found in s. 190B(5). However, I am also mindful that the

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

"test" in section 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and it is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing.

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that there is a sufficient factual basis to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided to support the following assertions is sufficient to support those assertions: that the native title claim group have, and their predecessors had, an association with the area claimed, that the traditional laws and customs, acknowledged and observed by the native title group exist, and that the native title claim group continue to hold native title in accordance with those traditional laws and customs.

I am satisfied that a general description of the factual basis on which it asserted that native title rights and interests exist and for the three criteria identified at s.190B(5)(a)-(c) is provided in Schedules F, G and M of the application.

Pursuant to s.190A(3) of the Act, regard is also to be had to certain categories of information that may not be contained in the application.

Doepel has confirmed that the Registrar may also take into account the assertions made in the application:

> *125 One of those contentions can be briefly dealt with. There is nothing in s 190B(5) or in s 190B generally which indicates that the assertions in the application itself may not be considered by the Registrar in addressing the condition imposed by s 190B(5). In both WA v Strickland at 54-55 [88 - 89] citing with approval Strickland v NTR at 261, and Martin at [23] - [26], the Court was prepared to consider the material included in the application as material relevant to the satisfaction of the condition imposed by s 190B(5). The Registrar then, in fact, looked at the extensive material available beyond the application to address the condition*

Consequently, I have had regard to the following additional information provided by the applicant to the Registrar for the purposes of this condition and the conditions in ss.190B6 and 190B7:

- Affidavit of [**Applicant - name deleted]**, 17/08/2000
- Affidavit of [**Applicant – name deleted]**, 31/08/2000.
- I have also had regard to the schedules of the application

I turn now to the particular assertions in s.190B(5), as my findings about the factual basis which is provided to support the particular assertions will assist me as to whether or not a sufficient factual basis is provided to support the general assertion that the claimed native title rights and interests exist.

190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area.

In Schedule F it is stated that Djabugay people continue to:

- have a close association, including a spiritual connection, with the claim area according to their traditional law and custom;
- pass on to their descendants traditional laws and customs, stories and beliefs concerning their traditional country including the claim area;

- use the claim area for traditional hunting and fishing and for the gathering of traditional materials;
- care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their ancestors;

In Schedule G it is stated that members of the claim group continue to:

- regularly visit the claim area including sights of significance;
- hunt, fish and gather in the claim area;
- manage the land in accordance with their traditional laws and customs and
- transmit information about such laws and customs relating to the claim area in accordance with such laws and customs.

Schedule M states that many Djabugay people continue to use and occupy the claim area regularly to

- hunt, fish and gather;
- visit significant sites and
- manage the claim area

[Applicant and Applicant - names deleted] have deposed to the extent of Djabugay country (within which the claim area is located, as shown on the map in attachment C). They also tell of their Djabugay identity and the association that they, other Djabugay people and their Djabugay predecessors have with their Djabugay country. Such association includes being born and growing up on Djabugay country, living and working on country, camping on country and using its resources.

Having regard to the information contained in the application, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

190B(5)(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.

Schedule F provides the following assertions relevant to this sub-paragraph:

- Members of the Djabugay people continue to have a close association, including a spiritual connection with the claim area according to their traditional law and custom.

- Members of the Djabugay people continue to pass on to their descendants, traditional laws and customs, stories and beliefs concerning their traditional country including the claim area.

- Members of the Djabugay people continue to use the claim area for traditional hunting and fishing and for the gathering of traditional materials.

- Members of the Djabugay people continue to care for their traditional country including the claim area, in accordance with traditional laws and customs passed down to them by their ancestors.

- Members of the Djabugay people continue to exercise a body of traditional laws and customs which has been passed down to them from generation to generation

by their forebears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country.

Two members of the group provide a factual basis for this assertion in their affidavits. They describe a variety of traditional laws and customs which have been passed down to them by their forebears and which they continue to observe and pass on to their own children. These traditional laws and customs include:

- inheritance of their Djabugay heritage and consequent traditional rights in Djabugay country from their forebears;
- bestowing of language names according to special interests held by particular group members or families to particular places on country;
- customary marriage rules;
- knowledge of bush tucker and special places in Djabugay country;
- stories relating to special places in Djabugay country;
- camping and fishing on country;
- prohibitions on visiting certain places;
- correct behaviour when visiting another family's area;
- maintenance of Djabugay language;
- responsibilities for caring for Djabugay country.

The information outlined above provides a sufficient factual basis to support the assertion that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

A factual basis for this assertion is provided in the affidavits from the two group members identified above. Each deponent describes their lives as a Djabugay person and member of the native title claim group. They tell of the observance of Djabugay traditional laws and customs by which they are strongly connected to their country, including through visiting country and camping on country, knowing its special places and stories, engaging in activities so as to honour its stories and laws and to protect and care for their country. Each deponent tells of the acquisition of knowledge about Djabugay traditional laws and customs from their predecessors and the observance throughout their lives of those laws and customs. They also tell of the passing of these laws and customs to their youngsters.

For these reasons, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

It follows then that I am also satisfied that the factual basis provided sufficiently supports the assertion that the native title rights and interests claimed exist.

Result: Requirements met

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

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

Reasons relating to this condition

The Registrar is of the view that it is only necessary for one right to be recognised for the application to satisfy this section.

The term '*prima facie*' was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) noted:

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

And at 35:

> *However, the notion of a good prima facie claim which, in effect, is the concern of s.63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success.*

This test was explicitly considered and approved in *Northern Territory v Doepel* 2003 FCA 1384 at paras 134-5 :

> *'134. Although North Ganalanja Aboriginal Corporation v The State of Queensland (1996) 185 CLR 595 (Waanyi) 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: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided*
>
> *135. ……see e.g. the discussion by McHugh J in Waanyi at 638 - 641. To adopt his Honour's words, 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.'*

I have adopted the ordinary meaning referred to by their Honours and the expressions of it in the concepts of 'material which, if accepted, will result in the claims success' and 'a claim which is arguable, whether involving disputed questions of fact or disputed questions of law should be accepted on a prima facie basis' .in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

I have noted already the description of the native title rights and interests claimed by the applicants under my reasons for decision for s.190B(4) above. I determined that all but two of the native title rights claimed at Schedule E are readily identifiable for the purposes of the *NTA.*

I note that the rights claimed under Schedule E are non-exclusive and that the qualifications to these rights and interests are discussed under my reasons in relation to s.190B(4) above.

I will now consider in turn each of the rights and interests claimed in the application and whether these can be established *prima facie* as required by s.190B(6).

The following rights **can be established *prima facie***:

(a) occupy the claim area;

On the 17/08/2000 **[Applicant - name deleted]** deposed in an affidavit *inter alia*

- *"I was born in Mareeba Hospital on the* **[date deleted]**.
- *From immediately after my birth I lived at the old Mona Mona mission, which is located in Djabugay traditional country. My family moved from Mona Mona in the early 1960's to Kuranda, which is also in Djabugay country. The town of Kuranda is next to the Barron Falls National Park. I have lived in Kuranda since then. I have always lived in Djabugay country.*
- *I have always known that I am a Djabugay man, from as long as I can remember. My father's mother, who was also Djabugay, told me I am Djabugay.*
- *. I worked on the railways in the 1970's. I worked out of Kuranda, on the concreting gang. We worked mainly between Kuranda and Redlynch, which includes a large part of the railway that runs through the Barron Gorge National Park.*
- *I had special feelings when I worked on the railway near an old Djabugay camp on a hill within the national park.*
- *The Barron Gorge, as it is known in the English language, is a sacred place for Djabugay People.*
- *Old Djabugay People told me stories about it. I pass on those stories to my children. I was told about dangerous story places in the Barron Gorge to stay away from.*
- *I used to walk in the national park when I was on a break at work on the railway. I continue to visit the Barron Gorge National Park."*

On the 31/08/2000 **[Applicant – name deleted]** deposed in deposed in an affidavit *inter alia*

- *"I was born in Mareeba Hospital in 1952.*
- *From immediately after my birth until about 1960, I lived at the old Mona Mona mission, which is located in Djabugay traditional country. My family moved to Oak Forest, which is also in Djabugay country in about 1960. We stayed there until the mid 1960's after which we moved to Mantaka, which is also in Djabugay traditional country. I have lived at Mantaka ever since then.*
- *I trace my Djabugay identity back to my great grand father* **[name deleted].** *I identify as a Djabugay woman.*
- *My father, who was also a Djabugay person, taught me a lot about Djabugay People and Djabugay culture and traditions. He also took me to many Djabugay places including places within the Barron Gorge National Park, which is the area under claim.*
- *My father taught me about bush tucker and knowledge of timbers in the Djabugay rain forest. He walked throughout the land, and taught me a lot about its importance to Djabugay People.*

- *My father and other old people taught me that there are many important story places in and around the Barron Gorge National Park.*
- *I travelled through the Barron Gorge National Park each time I went to high school at Cairns High School. I travelled by train through the national park five days a week in school times from years one to five.*
- *I continue to visit the Barron Gorge National Park, which is a small part of Djabugay People's traditional country."*

I am therefore satisfied that the applicants have supplied sufficient information to establish this right on a *prima facie* basis.

(b) be physically present on the claim area;

In my opinion Schedules M, F and G and paragraphs 2, 5 – 10 of **[Applicant - name deleted]** affidavit and paragraphs 2, 4 - 8 of **[Applicant - name deleted]** affidavit demonstrate sufficient evidence to establish this right on a *prima facie* basis.

(c) camp on the claim area;

In Schedules M, F and G and at paragraphs 2, 6 and 10 of **[Applicant - name deleted]** affidavit and in paragraphs 2, 4 and 8 of **[Applicant - name deleted]** affidavit I am satisfied that the applicants have supplied sufficient evidence to establish this right on a *prima facie* basis.

(d) access, use and enjoy the claim area;

I have found this right not to be readily identifiable

(e) hunt, fish and gather on the claim area;

In Schedules M, F and G and at paragraph 5 of **[Applicant - name deleted]** affidavit there is sufficient evidence to establish this right on a *prima facie* basis.

(f) take, use and enjoy the natural resources of the claim area;

I have found this right not to be readily identifiable

(g**) maintain and protect places of importance within the claim area;**

This right was accepted in the consent determination in *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia [2004] FCA 472* in which Mansfield J said:

> *322 In my view, it is appropriate to include the expression of the right set out in par (d). I do not regard the use of the word 'protect' as inappropriate. It contemplates conduct in relation to places and areas of importance which may fall well short of controlling access to those places in a way which is inconsistent with previously granted rights, and the exercise of the right to be recognised is subject to the prevailing activities under the exercise of other rights: s 44H of the NT Act. It is a right which I consider exists independently of the Northern Territory Aboriginal Sacred Sites Act (NT).*

Although an appeal has been heard in that case there has been no judgement. As there is evidence at Schedules M, F and G this right is able to be established prima facie

(h) perform social, cultural, religious, spiritual or ceremonial activities on the claim area and invite other to participate in those activities;

Although I have found at s190B(4) that this right may be identified I cannot find it prima facie established. The Registrar takes the view that a right of this composite nature will require evidence of each and every component if it is to be established. That is because the Registrar is not able to 'unbundle' such rights into their component parts, for to do so would be to effectively amend the application. I am unable to find any evidence of any of these activities.

(i) inherit, dispose of or confer native title rights and interests in relation to the claim area on others,

Again, I can find no evidence of these activities in the application or affidavits.

(j) make decisions about the use and enjoyment of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by Djabugay Peoples
in accordance with valid State and Commonwealth laws.

There is no evidence of any such activities.

Whether the provisions of s190(3A) are available to the applicants when a consent determination may be made, I leave to the applicants' representative.

I find that the rights at (a), (b), (c), (e) and (g) may be established over land where non-exclusive possession may be found.

Result: **Requirements met**

Traditional physical connection: S190B(7)

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

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

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

(i) the Crown in any capacity; or

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

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

Reasons relating to this condition

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

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

I am satisfied that **[Applicant and Applicant - names deleted]** are members of the native title claim group who currently have and previously had a traditional physical connection with the area of this application. Both **[Applicant and Applicant – names deleted]** depose that from immediately after their respective births, they lived in Djabugay country and have continued to do so. **[Applicant - name deleted]** deposes that her father took her to places throughout Djabugay country, instructed her about Djabugay culture and tradition, bush tucker and Djabugay rainforest timbers and the importance of such knowledge to Djabugay people. Evidence along a similar vein is provided by **[Applicant - name deleted]**.

Result: Requirements met

No failure to comply with s61A: S190B(8)

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

S61A contains four sub-conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four sub-conditions.

S61A(1) - Native Title Determination

Reasons relating to this sub-condition

There are no determinations of native title over the area of this application, recently confirmed by search of the Tribunal's Geospatial database.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule B of the application excludes from the claim areas covered by any previous exclusive possession act, as defined in s.23B of the Act.

Result: **Requirements met**

S61A(3) – Previous Non-Exclusive Possession Acts (PNEPAs)

Reasons relating to this sub-condition

This is not a claim to exclusive possession – see my reasons under s. 190B4 and s. 190B6.

Result: **Requirements met**

S61A(4) – Areas to which sections 47, 47A or 47B may apply

Reasons relating to this sub-condition

At Schedule L of the application makes it clear that sections 47, 47A or 47B do not apply.

Result: **Requirements met**

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

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

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

Reasons relating to this sub-condition

At Schedule Q of the application, the applicants state that they do not claim ownership of any minerals, petroleum or gas.

Result: **Requirements met**

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

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

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

Reasons relating to this sub-condition

It is clear that this is a claim situated inland of the coast and does not include any offshore places.

Result: **Requirements met**

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

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

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

Reasons relating to this sub-condition

The application and accompanying documents do not disclose, and I am not otherwise aware of, any area where the native title right and interest have otherwise been extinguished.

Result: **Requirements met**

[End of document]