National Native Title Tribunal

Edited registration test decision

Application name:	Glasshouse Mt – Gubbi Gubbi
Name of applicant:	Helena Gulash
State/territory/region:	Queensland
NNTT file no.:	QC96/70
Federal Court of Australia file no.:	QUD6083/98
Date application made:	26 June 1996
Name of delegate:	Hamish MacLeod

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

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

For the purposes of s. 190D, my opinion is that it is not possible to determine whether the claim satisfies all of the conditions in s. 190B because of a failure to satisfy s. 190C.

Date of decision: 28 September 2007

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Hamish MacLeod

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D and 190E 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.

The requirement that the Native Title Registrar (the Registrar) reconsider this application for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth) (the Act) has been triggered by item 90 of the transitional provisions of the *Native Title Amendment Act 2007*(Cwlth).

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, 190D and 190E of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 27 September 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register 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 amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Where the application has not been accepted for registration, a summary of the result for each condition is provided at Attachment A

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.

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 was lodged in the Brisbane Registry of the Tribunal on 26 June 96, and was registered on that day. No amendments have been made, nor additional information supplied since that time.

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:

On 23 April 2007 a letter from the Registrar was sent to the applicant care of **[Claimant 1 - name deleted]** to advise that the Act had recently changed and as a result it was necessary to apply the registration test to the application, and, if it failed this test, the application would come off the Register of Native Title Claims. If the application failed, the Registrar advised that he would have to report this to the Federal Court who may decide to dismiss the application if it is satisfied that the application has not been amended since the registration test was applied, and that it was not likely that it would be amended in a way that would lead to registration. Any changes to the application had to be done by amendment of it by filing a notice of motion in the Federal Court.

On 14 May 2007 the Tribunal case manager for the application wrote to the applicants advising them that the Registrar would apply the registration test in September 2007, and any Federal Court amendments, or any additional material to be submitted, would have to be completed by 17 August 2007.

On 7 August 2007 the case manager wrote further to the applicants to advise that the registration test would be applied by 30 September 2007.

On 17 August 2007 the case manager received electronic mail correspondence from the applicants **[Claimant 1]** and **[Claimant 2 - name deleted]** as follows:

> Dear Ann
>
> At first we thought about withdrawing the above, but now we wish to ask for an extension of time, to prepare the claim in conformity with the new format as it is quite different to that under which we presented the original.
> I might point out that there has never been any cultural heritage work in the national park in the last 15 years and probably never will be. This can be confirmed with National Parks & Wildlife. Our function in this matter is not for cultural heritage (as was stated at the last Directions Hearing), but to protect the mountains - our time and energy have been given freely. Would you mind passing on this request to the Court.
>
> **[Claimant 1] & [Claimant 2]**

On 20 August 2007 the case manager wrote to the applicants advising that the Registrar's delegate had not granted an extension, and that the application would be tested by 30 September 2007.

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 15.

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

My consideration under this section does not involve me going beyond the information contained in the application. See *Attorney General of Northern Territory v Doepel* 203 ALR 385 (*Doepel*):

> My view that s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s 190A(6)(a). Its focus also 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. It, too, 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. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration—at [37].

Item 90(4) of the transitional provisions to the 2007 amendment Act says that I must have regard to any information provided by the applicant after the application was made and must apply s. 190A as if the conditions in ss. 190B and 190C requiring that the application contain or be accompanied by certain information or other things or be certified or have other things done in relation to it, also allowed the information or other things to be provided or to be done by the applicant or another person after the application is made. The applicant has not provided any information or done any other things in relation to the application in accordance with the 2007 amendment Act.

The application has not been amended since the commencement of the new Act on 30 September 1998, nor have the applicants provided any information or done anything in relation to it since that time. The application does not comply with all conditions of ss. 61 and 62, which were substantially amended on 30 September 1998 when the test for registration in s. 190A commenced.

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 **does not meet** the requirement under s. 61(1).

Reasons

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

Item 90(4) of the transitional provisions to the 2007 amendment Act says that I must have regard to any information provided by the applicant after the application was made and must apply s. 190A as if the conditions in ss. 190B and 190C requiring that the application contain or be accompanied by certain information or other things or be certified or have other things done in relation to it, also allowed the information or other things to be provided or to be done by the applicant or another person after the application is made. Apart from an amendment requested by the applicant to the identity of the persons who make the application on 31 October 1996, the applicant has not provided any information or done any other things in relation to the application.

As the application has not been amended since the commencement of the new Act on 30 September 1998 and the applicant has not provided any information or done any things in relation to it since that time, the application does not comply with all of the conditions in ss. 61 and 62, which were substantially amended on 30 September 1998 when the test for registration in s. 190A commenced.

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 Form 1 native title application, (the application), states the name of the persons who are to be registered native title claimant as **[Claimant 3 – name deleted] [Claimant 1]** and **[Claimant 2]** and supplies an address for service of the claimants.

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

At A1 of the application the applicants are named as **[Claimant 2], [Claimant 1]** and **[Claimant 3]**. Under section A5 of the application entitled 'any other claimants' a description of the native title claim group has been provided. It is 'On behalf of all those Aboriginal people who identify as and are recognised as Gubbi Gubbi peoples, and their descendants'. A qualitative assessment of the sufficiency of the description provided is found in my reasons under s. 190B(3), but for the purposes of this section, the requirement is met.

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 **does not meet** the requirement under s. 61(5).

Reasons

The application was filed in 1996 and is not in the Form 1 as it is currently prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998, however I am satisfied that the application meets the form as prescribed at the relevant time and thus satisfies s. 61(5)(a).

The application is a 'pre-commencement application' under the 1998 amendments to the Act. It was lodged with the Registrar on 26 June 1996 but is taken as having been made to the Federal Court and thus meets s. 61(5)(b): see item 6 of the transitional provisions to the 1998 Act.

The application does not contain all the information prescribed in ss. 61 and 62 and does not therefore satisfy the condition in s. 61(5)(c). I refer to my reasons elsewhere under ss. 61 and 62.

The application is not accompanied by an affidavit as prescribed by s. 62(1)(a) and does not satisfy s. 61(5)(d).

I am not required under s. 190C(2) to consider whether the prescribed fee has been paid to the Federal Court.

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 **does not meet** the requirement under s. 62(1)(a).

Reasons

To satisfy the requirements of s. 62(1)(a) the persons comprising the applicant may jointly swear/affirm an affidavit; alternatively each of those persons may swear/affirm an individual affidavit.

There are three affidavits attached to the original application which are deposed by applicants **[Claimant 2], [Claimant 1]** and **[Claimant 3]** competently witnessed and dated 26 June 1996. The affidavits address the requirements of s. 62(1)(a)(i), (ii), (iii) but do not address the statements in relation to authorisation that are required by subsections (iv) and (v); thus it does not satisfy s. 62(1)(a).

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 sub-requirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 14 below and is one and the same as the result for s. 62(1)(b) here.

Result

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

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

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

Result

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

Reasons

At A6 of the application, the area covered is described.

An assessment by the Tribunal's Geospatial Services dated 24 September 2007 concludes that 'the description and map are consistent and describe the area with reasonable certainty'.

The requirements of the section are met.

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

A map is supplied at Attachment A6.

An assessment by the Tribunal's Geospatial Services dated 24 September 2007 concludes that 'the description and map are consistent and describe the area with reasonable certainty'.

The requirements of the section are met.

Searches: s. 62(2)(c)

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

Result

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

Reasons

At A7 the applicants state 'The applicants are not aware of any current interests in relation to the area subject of the application other than native title interests claimed in this application'. In A8 the applicants further state: 'The applicants have not conducted any searches or received any documents recording existing or expired interests over the area subject of the claim'. In lieu of any other information I am satisfied that this is the extent of searches carried out by the applicants, and the requirements of the section are met.

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

At A9 the applicants state:

> The applicants claim the native title rights and interests possessed under the laws of the Gubbi Gubbi Peoples which include the right to possession, occupation, use, enjoyment and management of the land, waters and resources, the subject of the application, to maintain and sustain cultural and economic viability to the exclusion of all others.

This goes beyond 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 by law.

Following the decision in *Doepel*, I am not required to make a merit assessment of those details beyond that, prima facie, it is responsive to the requirements of the section.

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 **does not meet** the requirements under s. 62(2)(e).

Reasons

At A9 of the application, in addition to the description of the rights and interests described in subsection 62(2)(d), the applicants state:

> The Gubbi Gubbi Peoples have at all times recognised traditional laws and customs relating to the possession, occupation, management, use and enjoyment of all lands, waters, resources within their territory, including that land waters and resources which is the subject of this application.

Again, following *Doepel* a qualitative or merit assessment is not applied at this juncture beyond being satisfied that the description is responsive to this section. The description provided is, however, too brief, vague and formulaic to satisfy the requirements of s. 62(2)(e).

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

No mention is made of activities currently carried out in the area claimed. I assume from this that they do not carry out any such activities.

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

This subsection refers to details 'of which the applicant is aware'. No such details are provided, indeed at A8 of the application the applicants state:

> The applicants have not conducted any searches or received any documents recording existing or expired interests of the areas subject of the claim.

I therefore conclude that the applicant is not aware of any such details as I have no information before me to suggest that the applicant is otherwise aware.

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

As above, this subsection refers to details 'of which the applicant is aware'. No such details are provided, indeed at A8 of the application the applicants state:

> The applicants have not conducted any searches or received any documents recording existing or expired interests of the areas subject of the claim.

I therefore conclude that the applicant is not aware of any such details as I have no information before me to suggest that the applicant is otherwise aware.

Combined result for s. 62(2)

The application does not meet the combined requirements of s. 62(2), because it does not meet each of the sub-requirements 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 **does not satisfy** the condition of s. 190C(2), because it **does not** 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

A Geospatial assessment of overlap information on 24 September 2007 concludes that one application falls within the external boundary of this application. This application is Jinibarra People, QUD6128/98. A search of the Register of Native Title Claims (RNTC) carried out on 27 September 2007 discloses that the Jinibarra claim was lodged on 29 September 1998, while this application was lodged on the RNTC on 26 June 1996. The Jinibarra People application was therefore subsequent, and not prior to the current application. I am therefore satisfied that the application satisfies the condition of s. 190C(3).

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 not satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case in this application and therefore the condition of s. 190C(4) as a whole is not met.

The application **does not satisfy** the conditions of s. 190C(4).

Reasons

There is nothing before me to show that the application has been certified and I therefore find that the requirement of s. 190C(4)(a) is not met.

Similarly, there is no information either in the application or provided subsequently by the applicant evidencing that the application is made by a person or persons who 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. As the application does not contain (and has not since been supplemented with) a statement and brief setting out of the grounds on which it is made by a properly authorised applicant, I cannot therefore be satisfied that the requirement in s. 190C(4)(b) has been met—see s. 190C(5).

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 18 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

At A6 of the application, area covered is described as:

> The area covered by the application is:
> Glass House Mountains National Park (Lot 127, Plan NPW509).
> For the sake of convenience, the area claimed comprises those areas listed below, and shown in attachment A6:
> Blue Gum Creek
> Coochin Hills
> Mount Beerwah
> Mount Coonowrin
> Mount Ngungun
> Mount Tibrogargan
> Mount Miketeebumugrai
> Mount Elimbah

It is a discrete area contained with one lot plan which is apparently registered with the Queensland Land Department.

An assessment by the Tribunal's Geospatial Services dated 24 September 2007 concludes that 'the description and map are consistent and describe the area with reasonable certainty'.

As a result I am satisfied that the information satisfies the condition of s. 190B(2)

The requirements of the section are met.

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

A map is supplied at Attachment A6, and is entitled 'Glass House Mountains National Park Locality Map'. It is an A4 size monochrome map that shows eight separate shaded areas identified on the map with major roads, and a scalebar and northpoint.

An assessment by the Tribunal's Geospatial Services dated 24 September 2007 concludes that 'the description and map are consistent and describe the area with reasonable certainty'.

The requirements of the section are met.

Combined result for s. 190B(2)

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

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

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

Result

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

Reasons

At A1 of the application the applicants are named as **[Claimant 2], [Claimant 1]** and **[Claimant 3]**. Under section A5 of the application entitled 'any other claimants' a description of the native title claim group has been provided. It is 'On behalf of all those Aboriginal people who identify as and are recognised as Gubbi Gubbi peoples, and their descendants'. The application does therefore not purport to name the persons in the native title claim group, and subsection 190B(3)(a) is not satisfied.

In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so – at [51].

And at [37], his Honour states 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.'

The Gubbi Gubbi claimant application was made in June 1996, the concept of a 'native title claim group' was not in existence. The concept was introduced in the new Act of 1998 and so it is difficult to accept that the description provided at section A5 of the application can meet the requirements of s. 190B(3) for that reason. However, if I am wrong about this, I have applied the current law to the information contained in the application and my assessment of that information is set out below.

The description used in the Gubbi Gubbi application is of the kind discussed in *Colbung v The State of Western Australia* [2003] FCA 774 . Finn J stated:

> The description of the persons on whose behalf the application is made is clearly inadequate. The description "the Isaacs family" is itself difficult enough in the absence of explanation. The word "family" as applied to people can be used in a variety of senses. The Oxford English Dictionary (2nd ed), for example, includes the following amongst possible meanings of "family":
> *"3.a. The group of persons consisting of the parents and their children, whether actually living together or not; in wider sense, the unity formed by those who are nearly connected by blood or affinity.*
> *4.a. Those descended or claiming descent from a common ancestor: a house, kindred, lineage."*
>
> Alternatively the term as used in the application may have its own dictionary or conventional meaning. There is no evidence to suggest this is the case, but the additional description of the claim group "and other related people etc" suggests this might be so—[38] to [39].

These are some of the difficulties posed by the claim group description and as such, I am not satisfied that the description is sufficiently clear to enable it to be ascertained who are the Gubbi Gubbi peoples and who are all the descendants are of those peoples that collectively make up the native title claim group.

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

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

Result

The application **does not satisfy** the condition of s. 190B(4).

Reasons

At A9 the applicant states:

> The applicants claim the native title rights and interests possessed under the laws of the Gubbi Gubbi Peoples which include the right to possession, occupation, use, enjoyment and management of the land, waters and resources, the subject of the application, to maintain and sustain cultural and economic viability to the exclusion of all others.

The conclusion of that description imports a claim to exclusive possession.
The judgment of French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242 at [60], and upheld in the Full Court of the Federal Court in *Western Australia v Strickland* [2000] FCA 652 at [30] states that:

> Again, the sufficiency of the native title rights and interests is a matter of which the Registrar must be satisfied. There is scope for evaluative judgment in an expeditious administrative process carried out by people with relevant specialist experience. It is not for the Court, in reviewing the Registrar's decision, to substitute its own view of the sufficiency of the native title rights and interests for those of the Registrar unless it can be shown that the Registrar's state of satisfaction is based upon some error of principle.

For a description to be sufficient to allow the claimed native title rights and interests to be readily identified under this section, it must be a native title right and describe what is claimed in a clear and easily understood manner.

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

In Doepel Mansfield J suggests a dual test:

> In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning at [123].

In their High Court joint judgment in *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283, Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

> 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) - at [16] – [19], and:

> 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' - at [21].

Subsection 190B(4) requires that the rights and interests claimed must be able to be identified without reference to material outside the application, they must be identifiable in and of themselves. The description provided in this application does not do this, and fails to satisfy this requirement.

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Delegate's comments

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to a combined result for s. 190B(5) at page 23 below.

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

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts. - at [17].

As I have stated in my reasons in s. 62(2)(e), the rights and interests have not been sufficiently described for a test of factual basis to be applied.

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

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

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

In my reasons at s. 190B(3) I was not satisfied that the description was sufficiently clear to enable me to ascertain who are the Gubbi Gubbi peoples and who are all the descendants of those persons that collectively make up the native title claim group. The assertion in A9 that 'The Gubbi Gubbi Peoples have at all times recognised traditional laws and customs relating to the possession, occupation, management use and enjoyment of all lands, waters, and resources within the territory, including that land, waters and resources which is subject of this application' is insufficient factual basis from which reasonable inferences could be drawn as to association.

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

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

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

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

Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

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

In this application the mere assertion that 'The Gubbi Gubbi Peoples have at all times recognised traditional laws and custom' does not contain a general description of the asserted factual basis

either in the body of the application, or through the subsequent provision of information, and is insufficient to satisfy the requirements of this section.

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

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

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

For the reasons set out in respect of s.190B(5)(a) and (b) above, I am not satisfied that traditional laws and customs exist which gave rise to the claim to native title rights and interests by the applicants. I cannot find sufficient factual basis for the assertion that the claim group has continued to hold native title in accordance with its traditional laws and customs.

Combined result for s. 190B(5)

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

Section 190B(6)
Prima facie case

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

Result

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

Reasons

As there has been no or insufficient factual basis provided to support the assertion that the claimed native title rights and interests exist or the particular assertions in s. 190B(5)(a) to (c), I cannot be satisfied as to whether there are any of the claimed native title rights and interests that can be established prima facie.

Section 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or
(ii) a statutory authority of the Crown in any capacity, or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Result

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

Reasons

The applicant does not provide any information in relation to previous or current traditional physical connection of a member or members of the native title claim group with any of the claimed area, and therefore I cannot be satisfied that the conditions of s.190B(7) are met.

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 26.

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

An assessment by the Tribunal's Geospatial Services dated 24 September 2007 concludes that 'No determinations as per the National Native Title Register fall within the external boundary of this application as at 24 September 2007'.

The requirements of the section are met.

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 **does not meet** the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

This condition is to ensure that native title determination applications are not made over areas covered by prohibited grants or tenures, (e.g. freehold and certain leases) called 'previous exclusive possession acts', the definition of which is contained in s. 23B – see s.61A(2). The description of the area does not identify excluded areas within the external boundary not covered by the application and there is no express statement that the application does not cover land or waters that are covered by previous exclusive possession acts.

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 **does not meet** the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

The claimed native title rights and interests do include a claim to possession and a claim to occupation, use and enjoyment to the exclusion of all others and there is no statement in the application that no such claim is made over areas subject to any 'previous non-exclusive possession acts' as defined in s. 23F. It follows that I can not be satisfied that the requirements of this section are met.

Combined result for s. 190B(8)

The application **does not satisfy** the condition of s. 190B(8), because it **does not meet** 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 27.

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

The application **does not satisfy** the sub-condition of s. 190B(9)(a).

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

There is no information supplied in the application regarding this requirement, therefore I am unable to identify if this requirement is met.

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

The application **does not satisfy** the sub-condition of s. 190B(9)(b).

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

There is no information supplied in the application regarding this requirement, therefore I am unable to identify if this requirement is met.

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

The application **does not satisfy** the sub-condition of s. 190B(9)(c).

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

There is no information supplied in the application regarding this requirement, therefore I am unable to identify if this requirement is met.

Combined result for s. 190B(9)

The application **does not satisfy** the condition of s. 190B(9), because it **does not meet** all of the three sub-conditions, as set out in the reasons above.

[End of reasons]