National Native Title Tribunal

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE: Mia Zlamal

Application Name:	Jangga People		
Name of Applicant:	Colin McLennan, Thomas Brown, Dorothy Hustler, Marie McLennan, James Gaston, Tyrone Tyers		
Region:	Central Queensland	NNTT No.:	QC98/10
Date Application Made:	2 April 1998	Federal Court No.:	Q6230/98

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

DECISION

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

Mia Zlamal

19 October 2004
Date of Decision

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

Brief History of the Application

The application was filed in the National Native Title Tribunal on 2 April 1998. Following the commencement of the amendments to the *Native Title Act* on 30 September 1998, the application was taken to have been filed in the Federal Court.

On 9 April 1999 the Federal Court ordered that the applicants file and serve an amendment application containing a precise description of the boundary of the claim. An amendment application was filed in the Federal Court, Brisbane Registry, on 4 October 1999, and the Court granted leave to amend the application on 11 October1999.

A further amendment application was filed in the Federal Court on 17 November 1999, and the Court granted leave to amend the application on 24 November 1999. The application was accepted for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwlth) on 7 July 2000.

On 29 March 2004 the Federal Court ordered that the applicants file and serve an amended application on or before 30 June 2004. A further amendment application was filed in the Federal Court on 19 July 2004. On 4 August 2004 the Federal Court granted leave to amend the application The application must now be reconsidered for registration pursuant to s.190A of the *Native Title Act* 1993.

Information considered when making the Decision

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

- The National Native Title Tribunal's registration test files personnel files and legal services files for this application.
- The National Native Title Tribunal's files for the proposed Jangga #2 application.
- The National Native Title Tribunal's registration test files, personnel files and legal services files for related applications: Wiri People QC98/5, Wiri People #2 QC98/11, Wiri People #3 QC99/34.
- The National Native Title Tribunal Geospatial Database.
- The Register of Native Title Claims.
- Schedule of Native Title Applications.
- The Native Title Register.
- Register of Indigenous Land Use Agreements
- Affidavit of [applicant 1] dated 13 August 1999
- Anthropological report of [anthropologist 1] dated July 1999, provided in support of the Jangga #1 application.

Copies of any additional information provided directly to the Tribunal have been provided to the State of Queensland. The provision of this material to the State, with an opportunity to comment, is 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*. The State has advised the Tribunal that it has no comment to make in relation to the additional material.

Note: Information and materials provided in the mediation of any of native title claims made on behalf of this native title group has not been considered in making this decision. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

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

All references to 'the application' or the 'current application' refer to the amendment application filed on 19 July 2004 unless otherwise specified.

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

On 1 October 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 NTA.

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.

S.190B sets out the merit conditions of the registration test.

S.190C sets out the procedural conditions of the registration test.

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

A. Procedural Conditions

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

S.190C(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 s.190C(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

Section 190C(2) provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61.

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

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

The application before me is made on behalf of a group of people described in the application as the Jangga People. Schedule A of the application contains the following description of the native title claim group:

'*1. The native title claim group is comprised of the Jangga People, who, according to traditional laws acknowledged and customs observed*

(a) are traditionally connected with the area claimed through biological or adoptive descent through ones father or mother; and spiritual, religious, physical and historical associations;

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

2. Jangga people are comprised of all persons descended from the apical Jangga persons more particularly identified as follows:

(a) [apical ancestor 1] was an Aboriginal person whose children include [family group 1];

(b) [apical ancestor 2] was an Aboriginal person whose children include [family group 2];

(c) [apical ancestor 3] was an Aboriginal person whose children include [family group 3];

(d) [apical ancestor 4] was an Aboriginal person whose children include [family group 4];

(e) [apical ancestor 5] was an Aboriginal person whose children include [family group 5];

(f) [apical ancestor 6] was an Aboriginal person whose children include [family group 6];

(g) [apical ancestor 7] was an Aboriginal person whose children include [family group 7]; and

(h) [apical ancestor 8] and [apical ancestor 9] were Aboriginal persons.

I have taken descendants to mean biological descendants or persons adopted into the native title claim group in accordance with traditional laws and customs.

Section 190C(2) provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61.

In the recent decision of Mansfield J in *Northern Territory of Australia v Doepel [2003] FCA 1384* His Honour concludes that for the purposes of the requirements of s.190C(2), the Registrar, (and hence his delegate) may not go beyond the information in the application itself [see in particular paras 37 - 39]. I have consequently confined my considerations to the information contained in the application and accompanying documents.

I note that the description of the native title claim group has been amended from that contained in the previous amendment application filed in the Federal Court on 4 October 1999. The description of the native title claim group in the latter application comprised the members of the Diwah Aboriginal Corporation. The application in its previous form was accepted for registration on 7 July 2000. However, a description of a native title claim group in terms of membership of a Corporation has been held by the Courts to be no longer acceptable for the purposes of the registration test and the description of the native title claim group in the current application has been specifically amended to address this issue.

The description in terms of descent from named apical ancestors results in a more inclusive description of the native title claim group compared to that in the former application.

In the affidavit of [anthropologist 2], staff anthropologist at Central Queensland Land Council Aboriginal Corporation (CQLC) dated 2 July 2004 at Attachment R1 of the application, further information is provided in relation to the description of the native title claim group and the process by which it was amended, at the authorisation meeting held on 22 and 23 November 2003.

At Attachment MD1 of her affidavit [anthropologist 2] provides a report on amendments to the Jangga claim group description. The report states that anthropological evidence shows that there are several families, members of which were present at the meeting, who should be removed from the claim group description. These include apical ancestor [apical ancestor 10] and his descendants, who include [descendant 1 of apical ancestor 10] and some of her family members, and apical ancestor [apical ancestor 11] and his descendants, who include [descendant 2 of apical ancestor 11] and the [family group 1 of apical ancestor 11]. The remaining names removed from the list of apical ancestors were themselves descended from other of the apical ancestors now listed. The amended list of apical ancestors has properly identified the apical, as opposed to nodal ancestors, on the list, so that only the oldest known ancestor of each bloodline is listed.

The report outlines the decision making process by which the claim group description was amended. Several families who were invited to the meeting were subject to the decision to remove them from the claim group description. The former claim group description included a list of apical ancestors and a list of family group surnames. On the first day of the meeting those people whose names the group was proposing to remove from the claim group description, either through removal of their apical ancestor or exclusion of the list of family surnames, accepted that they were not part of the Jangga claim. On the second day of the meeting a number of people with historical connections to Jangga country were invited by the Jangga claim group to participate in the meeting not as native title holders, but as elders with historical connections to Jangga country.

[anthropologist 2] states that she is unable to say that the decisions to remove certain families from the claim group, to delete some names from the list of apical ancestors and to remove [descendant 2 of apical ancestor 11] as an applicant, were made "according to

a process of decision making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relating (sic) to authorising things of this kind (s.251B(a). Rather she is able to say that these decisions were made according to a decision making process commensurate with broad principles of Aboriginal cultural practice that occur across a range of Aboriginal cultural life. These principles include:

- respect for elders of the group and deference to their knowledge and decisions;
- connection to known apical ancestors acknowledged as being connected to the country;
- recognition of the broader social group and the legitimacy of decisions approved by the broader social group;
- understanding of decision making based on family groups.

Discussion about the composition of the Jangga claim group took place in an open forum session. Everyone present had the capacity to contribute to the discussion. Deference was given to the opinion of those who had personal knowledge of the families and individuals to be removed from the Jangga claim group description. However, knowledgeable individuals asked the group as a whole to consider the reasons given for the removal of individuals or families from the claim group description. If the group agreed a decision was made according to the advice of the elder or individual with specific knowledge.

The affidavit of [anthropologist 3], senior anthropologist at CQLC, states that the original claim group description determined at the authorisation meeting held on 18 and 19 July 1999 comprises the members of the Diwah Aboriginal Corporation, and that in her opinion the basis for membership of a native title claim group in this region can generally be described through principles of descent. She outlines the anthropological research undertaken by [anthropologist 2] to finalise genealogical information for use in the identification and description of the claimant group associated with the Jangga claim area, and in particular documentary research into the genealogical connections of those ancestors and families named in the Diwah Aboriginal Corporation Rules. [anthropologist 3] states that the second stage was confirmation of genealogical information compiled by [anthropologist 2] with members of the native title claim group at the authorisation meeting on 22 and 23 November 2003. She confirms the observations of [anthropologist 2] that those present at the meeting deferred to those Jangga individuals who had intimate knowledge of claim area and of the particular family associations with it, those Jangga acknowledge as elders, and those Jangga people who are particularly active in the native title process.

The affidavits sworn by each of the applicants in regard to the matters required by s.62 also describe the process by which the description of the native title claim group was amended in some detail, at paras 29 to 47. They outline the apical ancestors listed in the definition of 'traditional owner' in the rules of the Diwah Aboriginal Corporation and

the decision made at the meeting to amend the description of the claim group in terms of descent from certain apical Jangga persons.

In Schedule F of the application the applicants state that the native title claim group as described in Schedule A comprises Aboriginal people who are descended from ancestors who comprised an identifiable community, and who:

(i) had an affiliation with Jangga country , including a spiritual affiliation, which included the application area described in Schedule B and maintained this connection with the application area;

(ii) held and exercised native title rights and interests in the application area in accordance with acknowledged laws and observed customs and maintained this holding and exercise of native title rights and interests in the application area; and

(iii) passed on their language, their spiritual affiliation with the application area their laws and customs and their native title rights and interests, in accordance with those laws and customs, to their descendants.

In my view there is nothing in the application to indicate that the group described in Schedule A does not include, or may not include, all the persons who hold native title in the area of the application. Further there is no information in the application to indicate that the native title claim group has been assembled for administrative convenience, and is not a group as required by s.61(1). Rather, the information provided indicates that the Jangga people represent a cohesive and identifiable community. It also indicates that the description of the native title claim group is based on current anthropological research and has been considered and accepted by the members of the group in an agreed decision making process.

See my reasons under s.190C(4) in relation to whether the applicants have been authorised by all the persons in the group to make, and to deal with matters arising in relation to, the application.

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 names of the persons who are the applicant are provided at Part A of the application. The details of the 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 native title claim group. For the reasons which led to my conclusion (below) that the requirements of 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)

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

s.61(5)(b)

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

s.61(5)(c)

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

s.61(5)(d)

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

s.62 (1)(b)

There has been compliance with the requirement to include a map pursuant to s.62(1)(b).

See my reasons for decision under s.62(1)(a) and s.62(2)(b) below.

Result: Requirements met

Details required in section 62(1)

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

Affidavits sworn by each of the persons named as the applicant accompany the application. The affidavits are signed, dated and competently witnessed. The affidavits are virtually identical in content and address the matters required by s.62(1(a)(i) to (iv) at paras 2 to 5. The matters required by s.62(1)(a)(v) are addressed in detail at paras 6 to 27 and to 42 to 44.

I am satisfied that the affidavits meet the requirements of this condition.

I note that [descendant 2 of apical ancestor 11] was removed as an applicant at the meeting of the native title claim group held at Nairana Park on 22 and 23 November 2003, as a consequence of the removal of the [family group 1 of apical ancestor 11] from the description of the native title claim group. In an affidavit dated 5 May 2004 [descendant 2 of apical ancestor 11] deposes to the circumstances under which he was removed as an applicant and states:

"Since the claim group meeting I have been advised by [anthropologist 2], staff anthropologist of the CQLC that my family, [family group 1 of apical ancestor 11] and I, do not have traditional

connection to the Jangga claim territory. I now acknowledge that I should not be an applicant to the Jangga claim and that I should not be a claimant on the Jangga claim. This is because my traditional connection to country through my mother's family is to the Gia native title claim 6023/99 and the Birri native title claim QG 6244/98, and my traditional connection to country through my fathers family is to the Wiri, who are a traditional tribe which was located to the south of the Jangga claim around Nebo."

Refer also to my reasons for decision under s.190C(4) below in relation to this issue.

Result: **Requirements met**

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 details relating to traditional physical connection at Schedule M.

Comment on details provided:

Schedule M states that the native title claim group and in particular [applicant 1] continue to have a traditional physical connection with the land and waters covered by the application. The applicants refer to Schedule G, where it is stated that [applicant 1] regularly goes to the claim area. He was born in Collinsville and grew up in the area around Mt Coolon and in particular, Glen Eva which is also in the claim area, and was once owned by his grandmother. As he child he spent much time with her and learned from her. Glen Eva is a 'special place' to him.

Examples of activities through which the Jangga People have maintained traditional physical connection are provided at Schedule G of the application, including:

- residing on the land;
- hunting and collecting animals, fish, and other food from the land and waters;
- using waters from the land;
- collecting materials including timber, stones, grass and medicines from the land and waters;
- travelling across the land and waters;

- camping on the land;
- responsibility for caring for the land and waters including sites of significance;
- teaching children and relatives on and about the land and waters;
- maintaining traditional knowledge of the land and waters and passing that knowledge onto younger generations;

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 contained in the application are sufficient to enable the area covered by the application to be identified with reasonable certainty.

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 external boundaries of the claim 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 claim 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

The application states at Schedule D that on 22 July 1999 searches were conducted with the Department of Natural Resources, copies of which are attached at Attachments D1 to D5. In addition 322 current tenure searches concerning Lots within the current external application boundary have been carried out; details of these lots are provided at Attachment D6. A listing of 'non-freehold land tenure' within the claim area as at 16 December 2003 is provided at Attachment D7.

It is stated that as a result of these searches certain Lots have been excluded from the application area as described in Schedule B. These Lots, identified by Lot on Plan number, are set out in Attachment B3.

I am satisfied that the application contains details and results of all searches carried out to determine the existence of non native title rights and interests in relation to the area covered by the application.

Result: Requirements met

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

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

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

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

Reasons relating to this sub-condition

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

A general description of the factual basis on which it is asserted that the native title claimed exists and for the particular assertions in s.62(2)(e) is found at Schedules F, G and M of the application and the affidavit of [applicant 1]. See my reasons under s.190B(5) below 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 the activities which the native title claim group currently carries out in relation to the application area at Schedule G. Refer to my reasons for decision under s.62(1)(c) above.

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

At Schedule H of the application the applicants state that they are not aware of any other applications seeking a determination of native title or a determination of compensation, that have been made in relation to the whole or a part of the area covered by this application..

The assessment of the Tribunal's Geospatial Unit dated 30 July 2004 confirms that no applications as per the Register of Native Title Claims or the Schedule of applications fall within the external boundary of the application as at 30 July 2004.

Result: Requirements met

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

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

Reasons relating to this sub-condition

The applicant is only obliged to give details of notices of which the applicant is aware. At Attachment I of the application the applicants provide details of 42 notices under Section 29 of the NTA (or under a corresponding provision of a law of a State or Territory) that have been given and relate to the whole or a part of the claim area. I note that two notices have been issued in relation to three of the tenements listed, EPM13499, EPC708 and EPC836.

The assessment by the Tribunal's Geospatial Unit dated 30 July 2004 confirms the details of these s.29 or equivalent notices, as notified to the Tribunal, with the exception of the two notices in relation to EPC708.

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

Result: Requirements met

Combined decision for s190C(2)

For the reasons outlined above the application contains all details and other information, and is accompanied by the documents, required by ss.61 and 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 for the Decision

This application was filed in the Federal Court on 2 April 1998. For the purposes of s.190C(3)(b), the application is taken to have been "made" on that date.

As a first step, s.190C(3) requires identification of previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A. The applicants state at Schedule H of the application that they are not aware of any other applications seeking a determination of native title or a determination of compensation that overlap the whole or part of the area covered by the current application. The assessment completed by the Tribunal's Geospatial Unit on 30 July 2004 confirms this information.

I therefore do not need to consider the requirements of this condition any further.

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

Result: Requirements met

Application is certified or authorised: 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 for the Decision

Under this condition the Registrar or his delegate must be satisfied that either the conditions of s.190C(4)(a) or s.190C(4)(b) are met. The application is not certified by the relevant representative body pursuant to s.190C(4)(a). Consequently I must be satisfied that the requirements of s.190C(4)(b) are met. There are two limbs to this condition.

First Limb – the applicants are members of the native title claim group

The application contains the following information relevant to this limb of s.190C(4)(b):

- Attachment R – affidavits by each of the six applicants stating that they are an applicant and a member of the native title claim group for this native title determination application (at para 1).

I am satisfied on the basis of this information in the application that the applicants are members of the Jangga native title claim group. The information set out above amounts to the statement required by s.190C(5)(a) and the brief setting out of the grounds required by s.190C(5)(b), in relation to this first limb of s.190C4(b).

Second Limb - applicants 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.

Information about authorisation is found in the application at Schedule R – this, in turn, refers to the affidavits of the applicants at Attachment R1.

The applicants' s.62 affidavits at Attachment R state that they are authorised by all persons in the native title claim group to make the application and to deal with matters arising in relation to it (at paras 5 or 6). They set out the basis upon which they are authorised at paras 6 to 24 of their affidavits as follows. The affidavits of the applicants are virtually identical and I will quote from the affidavit of [applicant 2].

- *The basis on which I say that I am so authorised is that on 22 and 23 November 2003 at a meeting at Nairana Park in the State of Queensland ('the Nairana Park meeting') the claim group re-authorised me together with five other applicants to make the application and to deal with matters arising in relation to it. The other applicants who were authorised at the Nairana Park meeting were [applicant 1], [applicant 3], [applicant 4], [applicant 5] and [applicant 6].(para 6)*
- *The Nairana Park meeting was attended by about 40 members of the Jangga claim group and about 10 to 15 members of other claim groups in respect of native title determination*

applications for neighbouring country to that subject to the application, including the Wiri and Wiri #3 applications.(para 9)

- *At the Nairana Park meeting the claim group decided to:*

  (a) amend the description of the native title claim group in the application;

  (b) revoke the authorisation of [descendant 2 of apical ancestor 11] as an applicant for the application;

  (c) reauthorise [applicant 1], [applicant 3], [applicant 4], [applicant 5] and [applicant 6] and myself to make the application and to deal with matters arising in relation to it. (para 13)

- *In my opinion there were enough key senior Jangga representatives or elders and other Jangga family members present at the Nairana Park meeting and involved in the decision making process to make these decisions for the Jangga people. (para 14)*

- *There is a way the Jangga people make decisions about the description of our group (the Jangga people) and who is nominated to represent the group. This is done according to aboriginal cultural practice. (para 17)*

- *According to aboriginal cultural practice, decisions about the description of our people and who to represent them are made by senior elders, down family lines. To become a senior elder, it is not based on age, but on respect and on knowledge of country and how things work. The elders are the senior family representatives; they have to be actively involved in decisions such as the composition of the claim group and the authority of individuals to act on behalf of the Jangga claim group. They have to be present when these types of decisions are made. (para 19)*

- *The people at the meeting recognised that the necessary senior Jangga people were present, who had been authorised by those not present to represent them. This was how these family groups had participated in Jangga decisions throughout the course of the making of the application. (para 20)*

- *Even if families do not have representatives present when a decision is discussed, they respect the decision if there are enough key senior Jangga representatives or elders present to make the decision for the people. For a decision like this, the key people are the senior elders of the families, especially those who have grown up in Jangga country. (para 21)*

- *At the Nairana Park meeting, and attending by telephone, there were proper and appropriate representatives of the claim group present so that decisions could be made. (para 23).*

- *Each of the decisions made at the Nairana Park meeting was made in accordance with processes of decision making in accordance with aboriginal cultural practice, as described above. (para 28)*

- *At the 22 November meeting as described above, the members of the claim group had decided that the [family group 1 of apical ancestor 11], among others, should not be included in the claim group description. As a result of that discussion, it was resolved by the*

claim group to remove [descendant 2 of apical ancestor 11] as an applicant, as he is not a member of the claim group, as proposed to be amended. (para 48)

- *Accordingly the claim group revoked the authorisation of [descendant 2 of apical ancestor 11] to make the application and to deal with the matters arising in relation to it. I believe that [descendant 2 of apical ancestor 11] is not a member of the claim group, as proposed to be amended. It was for this reason that his authorisation to make the application and deal with matters arising under it was revoked. (para 49)*

In their affidavits the applicants also describe how the decision was made at the Nairana Park meeting to remove [descendant 2 of apical ancestor 11] as an applicant, as a consequence of the decision to remove the [family group 1 of apical ancestor 11] from the description of the native title claim group. They describe how [applicant 5], who was not in attendance at the meeting, was consulted by telephone in relation to the decisions being made, including the removal of [descendant 2 of apical ancestor 11] as an applicant.

In an affidavit dated 5 May 2004 [descendant 2 of apical ancestor 11] deposes to the circumstances under which he was removed as an applicant and acknowledges that he should not be an applicant to the Jangga claim and that he should not be a claimant on the Jangga claim. Refer to my reasons for decision under s.62(1)(a) above.

Further information in relation to the authorisation meeting is contained in the letter from [applicant 1], dated 15 July 2004, at Attachment R1 of the application. The letter confirms the information provided in the affidavits sworn by each of the applicants and quoted above, and states:

"The authorisation meeting was convened by the Central Queensland Land Council Aboriginal Corporation (CQLC) and an agenda for the meeting was included in a letter posted to all members of the Jangga native title claim group. The members of the Jangga claim group were included on the mailing list, which was compiled by the CQLC.

The meeting was attended by about 40 members of the Jangga claim group and about 10 to 15 members of neighbouring claim groups, including the Wiri and Wiri #3. On the afternoon of 22 November a meeting of only Jangga claimants was held in the machinery shed at Nairana Park.

The decision to authorise the applicants and all other decisions made at the authorisation meting at Nairana Park were made in accordance with processes of decision making of the Jangga people that had been agreed to and adopted over a period of time.

Each decision was recorded by way of minute which was signed by members of the claim group. The decision to reauthorise the applicants, less [descendant 2 of apical ancestor 11], was made on the morning of 23 November 2003 under a marquee at Nairana Park."

In the affidavit of [anthropologist 2], staff anthropologist at CQLC, dated 2 July 2004 at Attachment R1 of the application, further information is provided in relation to family representation and decision making processes at the Nairana Park meeting. Attached to the affidavit and marked MD1 is a detailed report on the family representation at the meeting and the affiliation of the persons who attended with the apical ancestors listed

at Schedule A of the application. The report also outlines the decision making processes adopted by the Jangga group at the meeting, based on respect for elders, and decisions made by elders and down family lines.

This outline accords with the process described in the affidavits of the applicants and quoted above. [anthropologist 2] concludes that the claim group as a whole and the family groupings within it were well represented by the people in attendance, and the applicants were selected as broadly representing the major families involved. In her opinion the decision making process followed at the authorisation meeting was in accordance with Aboriginal cultural practice generally.

The affidavit of [anthropologist 3], senior anthropologist employed by CQLC, dated 13 July 2004, describes the research carried out by [anthropologist 2] into the composition of the Jangga native title claim group, and the decision making processes adopted by the group. She concludes that in her opinion the decisions of the Jangga group at the meeting at Nairana Park on 22 and 23 November 2003 were consistent with aboriginal cultural practices, particularly in the wider region. She states that she is also of the view that there were sufficient members of the Jangga native title claim group present at the meeting to make decisions with authority, and that the applicants then authorised by the Jangga group have the right to speak with authority, and to make the native title determination application and to deal with matters arising in relation to it.

The affidavit of [field officer 1], field officer employed by CQLC, dated 16 July 2004, describes how the meeting at Nairana Park was organised and participants notified. Copies of the letter mailed to approximately 120 people notifying them of the meeting and the proposed agenda, the invitation list, a list of people who registered with CQLC to attend the meeting and a list of the people who actually attended on each day of the meeting are attached to the affidavit. Also attached to the affidavit and marked PSG5 is a copy of the resolutions made at the meeting, signed by members of the native title claim group. In her affidavit [field officer 1] also describes the circumstances under which [descendant 2 of apical ancestor 11] and his father, [descendant 1 of apical ancestor 11], did not attend the Nairana Park meeting.

In *Strickland v Native Title Registrar (1999) 168 ALR 242*, French J held that the insertion of the word 'briefly' in s.190C (5)(b) suggested that the legislature was not concerned to require any detailed explanation of the process by which authorisation was obtained but the sufficiency of the statement is primarily a matter for the Registrar. In determining whether or not the evidence of authorisation is sufficient, the Registrar is not confined to considering the information in the application and any accompanying affidavit. His Honour emphasised that the authorisation question is a matter of considerable importance and mere formulaic statements are insufficient. This aspect of the decision by French J was upheld by the Full Federal Court in *Western Australia v Strickland (2000) 99 FCR 33*.

I am satisfied that the information that is in the application relating to the grounds upon which I should be satisfied about authorisation is sufficient for the purposes of s.190C(5)(a) and (b).

The information in the application supports a finding that the authorisation decision was made by the native title claim group in accordance with a decision making process that must be complied with by the group when authorising things of this kind. I am satisfied that the applicants are members of the native title claim group and are authorised to make this application and to deal with matters arising in relation to it by the native title claim group.

I find that the requirements of this section are met.

Result: Requirements met

B. Merits Conditions

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

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

Reasons for the Decision

Written Description and Map of External Boundaries

The written description of the external boundaries is found in Schedule B of the application, which refers to Attachment B2 of the application. At Schedule B the applicants state that the area covered by the application includes:

"All unallocated state land;

All stock routes wider than 300 metres;

All national parks;

All waterways, natural lakes, creeks and rivers;

All pastoral holdings;

All non-exclusive pastoral leases as defined by section 248B;

All state forest and timber reserves;

All camping reserves;

All recreational sites;

All reserves for aboriginal purposes

To the extent that they are within the external boundary of the application area but not so as to include any area of land or waters that was not covered previously by the application."

The external boundary description at Attachment B2 describes the external boundary by reference to:

- land parcels identified by Lot on Plan number;
- geographic co-ordinates referenced to AGD 84 datum;
- the boundaries of adjoining native title determination applications Q6033/99 Wiri People #3 (QC99/34)

The description includes notes relating to the source and currency of data used to prepare the description.

I note that the area of the application has been reduced by removing areas also subject to the Wiri People application QG6242/98 (QC98/5), the Wiri People #2 application QG6251/98 (QC98/11) and the Wiri People #3 application Q6033/99 (QC99/34). (I refer to Schedule S and para 51 of the s.62 affidavit of [applicant 2]).

A map of the claim area is provided at Attachment C1. The map was prepared by the Tribunal's Geospatial Unit on 9 July 2004 and clearly depicts the boundaries of the application area by a bold dark outline with stippling. Land parcels are labelled with Lot and Plan identifiers and pastoral holding names. Surrounding native title determination boundaries are also depicted and referenced to a legend. The map includes geographic co-ordinates, scale bar, north point, locality map and notes relating to the source and currency of the data used to prepare the map.

The assessment completed by the Tribunal's Geospatial Unit, dated 30 July 2004, concludes that the map and area description are consistent and identify the application area with reasonable certainty.

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

Internal Boundaries

At Schedule B, the applicants have provided information identifying areas within the external boundaries of the area covered by the application that are **not** covered by the application. This is done by way of a formula that excludes a variety of tenure classes from the area covered by the application, and by listing specific land parcels that are excluded from the application area. The information is as follows:

(b) Areas that are excluded from the application

(i) land parcels identified by Lot on Plan numbers, as described in Attachment B3. Attachment B3 sets out those land parcels identified by lot on plan numbers that are excluded from the application area.

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

(a) Category A past acts as defined in s.228 and s.229 of the Native Title Act (1993) Cth.

(b) Category A intermediate acts as defined in s.232A and s.232B of the Native Title Act (1993) Cth.

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

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

(v) The paragraphs above and below are subject to the provisions of s.47, s.47A and s.47B of the Native Title Act (1993) Cth as may apply to any part of the application area. Areas subject to acts referred to in (b)(ii), (iii) and (iv),and (c) to which the provisions of s.47, s.47A and s.47B of the Native Title Act (1993) Cth apply, are not excluded from the application area.

(c). Subject to (b)(v), exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts as defined by section 23F Native Title Act (1993).

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

I note that the applicants make exceptions to the particular exclusions cited in the application by claiming the benefit of s.47, s.47A and s.47 of the Act at Schedules B and L of the application. Consistent with the reasoning set out above in respect of identifying areas excluded from the claim, I am of the view that identifying the areas so excepted from the exclusions in the manner done by the applicant does allow specific geographic location to be identified subject to tenure research.

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

I find that the requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: **Requirements met**

Identification of the native title claim group: 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 for the Decision

Under this section, I am required to be satisfied that the requirements of either sub-section 190B(3)(a) or (b) is met. The application does not name all of the persons in the native title claim group and consequently the requirements of s.190B(3)(a) are not applicable.

Turning to s.190B(3)(b), this sub-section requires that the Registrar 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.

The native title claim group is described in Schedule A of the application as follows:

'*1. The native title claim group is comprised of the Jangga People, who, according to traditional laws acknowledged and customs observed*

(a) are traditionally connected with the area claimed through biological or adoptive descent through ones father or mother; and spiritual, religious, physical and historical associations;

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

2. Jangga people are comprised of all persons descended from the apical Jangga persons more particularly identified as follows:

(a) [apical ancestor 1] was an Aboriginal person whose children include [family group 1];

(b) [apical ancestor 2] was an Aboriginal person whose children include [family group 2];

(c) [apical ancestor 3] was an Aboriginal person whose children include [family group 3];

(d) [apical ancestor 4] was an Aboriginal person whose children include [family group 4];

(e) [apical ancestor 5] was an Aboriginal person whose children include [family group 5];

(f) [apical ancestor 6] was an Aboriginal person whose children include [family group 6];

(g) [apical ancestor 7] was an Aboriginal person whose children include [family group 7]; and

(h)[apical ancestor 8] and [apical ancestor 9] were Aboriginal persons.

I have taken descendants to mean biological descendants or persons adopted into the native title claim group in accordance with traditional laws and customs.

Further information regarding the traditional laws and customs of the Jangga People in relation to adoption was requested from the applicant's legal representatives. In a letter dated 16 September 2004 the applicants' legal representative provided the following information.

"The processes by which a person is adopted in accordance with the traditional laws and customs of the Jangga people are as follows:

(i) When a child is 'grown up' by a parent who is not the biological parent and the child is regarded as having acquired the descent identity that would be appropriate for a biological child of the adoptive parent. The child would often be a close relative of the adoptive parent, such as the child of a deceased sibling;

(ii) when the Aboriginal husband of an Aboriginal woman accepts the children that woman has had with a non-Aboriginal man as his own; and

(iii) the adopted child is recognised by others in the wider group or community as a member of the cognatic descent group of his or her adoptive mother or father but will not take on the rights and responsibilities with regard to country until her [sic] or she reaches adulthood, as with the children who are members of the descent group by birth."

I am satisfied that this information provides an objective means by which persons who have been adopted into the native title claim group can be identified.

The description in this form is sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that:

> *"[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially."*

I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry would be necessary in these instances to determine if any one person is a member of the group.

I am satisfied that the descendants of the named ancestors can be identified with minimal inquiry and as such, ascertained as part of the native title claim group. By identifying members of the native title claim group as descendants of named 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.

I find that the requirements of s.190B(3)(b) are satisfied.

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 for the Decision

Native title rights and interests claimed

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

"1. The claimants are entitled, under traditional laws acknowledged and customs observed, to exercise native title rights and interests in relation to the application area which include the following rights and interests:

(a) to possess, occupy, use and enjoy the application area to the exclusion of all others, those parts of the area claimed where there has been no extinguishment of native title or where s.238 of the *Native Title Act* applies;

(b) to speak for and to make decisions about the use and enjoyment of the application area;

(c) to reside upon and otherwise have access to and within the application area;

(d) to control the access of others to the application area;

(e) to use and enjoy the resources of the application area;

(f) to control the use and enjoyment of others of the resources of the application area;

(g) to share, exchange and/or trade resources derived on and from the application area;

(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;

(i) to maintain, protect, prevent the misuse of their cultural knowledge, customs and practices associated with the application area, where the traditional laws and customs observed have a connection with the application area;

(j) to transmit to others their cultural knowledge, customs and practices associated with the application area, where the traditional laws and customs observed have a connection with the application area;

(k) to determine and regulate membership of and inclusion in the native title claim group.

(l) non-exclusive rights to use and enjoy those parts of the application area, where native title rights and interests have been partially extinguished, in accordance with their traditional laws and customs, being:

(i) the right of access to the land and waters

(ii) the right to take fauna from the land and waters

(iii) the right to take fish from the waters

(iv) the right to take flora from the land and waters

(v) the right to take other natural resources of the land such as ochre, stones, soils, wood and resin;

(vi) the right to enter and remain on the land and waters;

(vii) the right to take water;

(viii) the right to engage in cultural activities on the land and waters, including to conduct ceremonies;

(ix) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area; and

(x) the right to transmit to others their cultural knowledge, customs and practices associated with the application area, where the traditional laws and customs observed have a connection with the application area

These native title rights and interests do not confer possession, occupation use and enjoyment of those lands and waters to the exclusion of all others."

The particularised description of these rights and interests is qualified in Schedule E of the application as follows:

"2. The claimants acknowledge that:

(a) their native title rights and interests are subject to all valid and current laws of the Commonwealth and the State of Queensland;

(b) the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws;

(c) their native title rights and interests are subject to rights conferred by or arising under laws of the Commonwealth or the State of Queensland in relation to the use of the land and waters in the application area; and

(d) their native title rights and interests might have been partially extinguished by relevant valid laws of the Commonwealth and the State of Queensland.

3. Subject to Schedule L, this application does not claim that the native title rights and interests confer:

(a) possession, occupation, use and enjoyment to the exclusion of all others;

(b) the right to control the access of others to the application area

in relation to any area regarding which a valid previous non-exclusive possession act under s.23F of the *Native Title Act* 1993 has been done.

4. Each and every right and interest listed in paragraph 1 above exists (and existed) throughout the whole of the application area.

5. All rights and interests are held communally by all of the claimants, albeit that:

(a) the capacity of individuals to exercise these rights and interests will vary according to a variety of circumstances, for example age, gender, and physical and mental capacity;

(b) some sub-groups or families are closely associated with specific areas of the area claimed;

(c) by traditional laws and customs, responsibility for the area claimed is exercised by different individuals in different ways.

6. The activities referred to in Schedule G are enjoyed and undertaken by the claimants as a result of the observance of their traditional laws and customs. It is by those traditional laws and customs that the claimants derive their rights and interests in respect of the land and waters in the application area, and their authority to enjoy and undertake the said activities."

The rights and interests at Schedule E are further qualified as follows.

- The applicants claim the benefit of ss.47, 47A and 47B of the *Native Title Act* in relation to the whole of the claim area (Schedules B, L).

- The applicant does not claim any minerals, petroleum or gas wholly owned by the Crown (Schedule Q).
- The applicant does not claim exclusive possession over any offshore place (Schedule P);
- Exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State (Schedules B, E)

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.[1]

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

Furthermore, the use of the phrases 'native title' and 'native title rights and interests' excludes any rights and interests that are claimed but are not native title rights and interests as defined by s.223.

s.223(1) reads as follows:

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

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural

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

knowledge that goes beyond the right to control access to lands and waters,[2] rights to minerals and petroleum under relevant Queensland legislation,[3] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[4]

I will now consider the description of native title rights and interests in the present application in light of previous judicial findings.

1(c) to reside upon and otherwise have access to and within the application area

The applicants do not state that they claim this right only over areas where a claim to exclusive possession can be sustained. This implies that they claim this right over the whole of the claim area. (I refer to the statement at para (4) of Schedule E outlined above).

A question which arises here is whether the right to establish residences on the land amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not readily identifiable and hence not capable of being established over areas for which a claim to exclusive possession cannot be sustained.

However, the formulation used by the applicants here does not necessarily amount to a right to control access to and use of the claim area. The term 'reside' can have a range of meanings which connote different degrees of control in relation to the land. While one sense of the term may be 'permanently reside', the term may mean something less than that, something more akin to occupation or transient residence which does not suppose a right to control access to the land. I note that there is no reference in this formulation to the building of structures or the establishment of residences. The description of this right does not convey to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas where residences are established.

That right 1(c) of Schedule E is not a right which necessarily claims 'control' of access or use of the land is clear from other statements in Schedule E which expressly claim a right to control (eg at 1(d) and 1(f)). Taken in the context of the application as a whole, I am satisfied that the right at 1(c) is not a claim to control access to or use of the land.

In my view it follows that this right is readily identifiable, over the whole of the claim area. Refer to my reasons for decision under s.190B(6) below for further discussion of this issue.

(d) to control the access of others to the application area; and

(f) to control the use and enjoyment of others of the resources of the application area

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

The recent decision of the Full Federal Court in *Attorney General for the Northern Territory v Ward* [2003] FCAFC 283 and the 'Wandjina' decision suggest that rights that involve *control* of the use of or access to land and waters are only readily identifiable as native title rights and interests over areas where a claim to exclusive possession can be sustained (except among other Aboriginal people and Torres Strait Islanders who seek to access or use the land in accordance with traditional law and custom) (*Western Australia v Ward* (2002) 191 ALR 1).

The majority in *Ward* (2002) (Gleeson CJ, Gaudron, Gummow and Hayne JJ) similarly questioned the appropriateness of claims to control access to and use of the land: at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land, or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained. This is because the existence of rights to control access to and use of land are central to establishing whether or not a claim to exclusive possession can be made out.

Considering the above decisions, I am of the view that these rights and interests are only readily identifiable over areas where a claim to exclusive possession can be sustained.

(g) to share, exchange and/or trade resources derived on and from the application area

In *Commonwealth v Yarmirr* (1999) 101 FCR 171, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that "[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land" [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223.

On appeal, the Full Federal Court spoke of this right in these terms: "It may well be right, as the argument runs, and as seems logical, to view the right to trade as 'an integral part,' or integral aspect of a right to exclusive possession." The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 but made no finding on the issue. The issue was not raised before the High Court.

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s.190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to *exclusive* possession, occupation, use and enjoyment of lands and waters [my emphasis].

In light of these comments I am of the view that this right and interest is readily identifiable only over areas where a claim to exclusive possession can be sustained.

(i) to maintain, protect, prevent the misuse of their cultural knowledge, customs and practices associated with the application area, where the traditional laws and customs observed have a connection with the application area

In *Ward*, as noted above, the majority of the High Court confirmed that the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters is not a readily identifiable native title right and interest: [19], [57] to [60]. Their Honours stated: "However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property… the recognition of this right would extend beyond denial of right of access to land held under native title… it is here that the second and fatal difficulty appears…." at [59].

It is my view that this right goes beyond a right to control access to land and waters, and is therefore equivalent to the right referred to in *Ward*. I find that it is therefore not readily identifiable for the purposes of s.190C(4).

(k) to determine and regulate membership of and inclusion in the native title claim group

In *Daniel v State of Western Australia* [2003] FCA 666 Nicholson J held that the following rights were not capable of recognition as native title rights and interests:

- the right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area. This was because a determination of native title must include a determination of who holds the common or group rights. Therefore, his Honour found that this right 'cannot of itself be a native title right and interest'; and
- the right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area. His Honour rejected this right because he found that it is not a right that 'gives rise to a connection to land and waters' and, in any case, was a matter to be determined by reference to the Native Title (Prescribed Body Corporate) Regulations 1999 – at [302] to [303].

The wording of the right at 1(k) is similar to that of the rights considered in *Daniel*. In view of the decision in *Daniel*, I find that this right is not readily identifiable for the purposes of s.190C(4), because it is not a right that gives rise to a connection to land and waters.

(l) non-exclusive rights to use and enjoy those parts of the application area, where native title rights and interests have been partially extinguished, in accordance with their traditional laws and customs

In *Attorney General for the Northern Territory v Ward*, the Court disapproved the use of a non-exhaustive list of rights and interests said to be 'included' in the right to 'occupation, use and enjoyment of the lands and waters'. The Court substituted the word 'being' for 'including, as incidents of that entitlement' (see [16] and [23]).

At [21] the Court said, speaking of 'use and enjoy', that there must be a specification of the contents of the relevant rights and interests to which the reader may look in considering the effect of the determination. Of the specified contents of the right the Court said: "They must exhaustively indicate the determined incident of the right to use and enjoy".

The wording of the right at 1(l) specifies the incidents of the right to use and enjoy at subparagraphs (i) to (x), prefaced by the word 'being'. I am satisfied that this right is readily identifiable over those parts of the claim area where native title rights and interests have been partially extinguished, i.e. where a claim to exclusive possession cannot be sustained.

I am satisfied that the remainder of the rights and interests claimed at Schedule E are readily identifiable for the purposes of s.190B(4).

Conclusion

I am satisfied that the native title rights and interests claimed in Schedule E are readily identifiable, with the exception of the rights at paras 1(i) and 1(k).

Result: Requirements met

Factual basis for claimed native title: S190B(5)

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

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

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

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

Reasons for the Decision

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

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

In *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.[5]

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 uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system.

Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the

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

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 terms 'traditional laws' 'traditional customs' and 'native title rights and interests', as found in s.190B(5). However, I am also mindful that the '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.

In considering this condition, I have had regard to:

- information contained in Schedules F, G and M of the application;
- the affidavit of [applicant 1] dated 13 August 1999 at Attachment G of the application;
- the anthropological report of [anthropologist 1] dated July 1999, provided in support of the Jangga #1 application.

I believe that in respect of this condition I must consider whether the factual basis provided by the applicant is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5)(a), (b) and (c). I have formed the view that the information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

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

At Schedule F of the application, the applicants state that:

- The native title claim group as described in Schedule A comprises Aboriginal people who are descended from ancestors who comprised an identifiable community and who:
  - (i) had an affiliation with Jangga country, including a spiritual affiliation, which included the application area described in Schedule B, and maintained this connection with the application area.
  - (ii) held and exercised native title rights and interests in the application area in accordance with acknowledged laws and observed customs and maintained this holding and exercise of native title rights and interests in the application area;

(iii) passed on their language, their spiritual affiliation with the application area, their laws and customs and their native title rights and interests, in accordance with those laws and customs, to their descendants.

Schedule G lists a number of activities currently carried out by members of the claim group in support of this statement. Details of these activities are outlined under s.190B(5)(b) below.

In his affidavit dated 13 August 1999 [applicant 1] provides information to support the native title claim group having, and the predecessors of those persons having had, an association with the area.

He deposes that:

- He was born in Collinsville and he grew up around Mt Coolon, in the claim area, but the main place for him is Glen Eva, a cattle property his grandmother used to own.. (para 1)
- He travelled across the country with his grandmother, hunting and fishing and gathering bush foods such as wild honey and waterlily bulbs (para 2)
- He and his family maintain ongoing contact with the land, returning all the time to work, to pay their respects to their ancestors who are buried there, to fish, to camp, to visit their relations and to look after their country and their heritage. (paras 5, 7, 13)
- There are some places you're not supposed to go, such as burials or ceremonial grounds, where you have to let them know you're coming by 'talking a bit of lingo' (paras 9, 11,12)

In the anthropological report prepared by [anthropologist 1] the author outlines the history of the association of the claim group with the claim area, drawing on archaeological, historical and anthropological evidence and the oral testimony of members of the native title claim group (pp. 6 – 9). She states that the oral history surrounding the claim group's traditional physical connection with the claim area is supported by archival evidence. She also describes the activities carried out by members of the claim group within the claim area (pp. 15 – 19) and the principles of descent connecting them to their country through their parents and grandparents and through them to their forbears (see my reasons for decision under s.190B(5)(b) below).

I am satisfied that the information that has been provided is a sufficient factual basis to support the assertion that the native title claim group have, and their predecessors had an association with the area.

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

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

laws and customs give rise to the claim to native title rights and interests, is sufficient to support that assertion.

At Schedule F of the application, the applicants state that:

- The native title claim group:

  (i) have an affiliation with Jangga country, including a spiritual affiliation, which included the application area described in Schedule B, and maintain this connection with the application area.

  (iv) have inherited, hold and exercise the native title rights and interests described in Schedule E in the application area in accordance with traditionally acknowledged laws and traditionally observed customs and maintain this holding and exercise of those native title rights and interests in the application area;

  (v) pass on their spiritual affiliation with the application area, their traditional laws and customs and their native title rights and interests, in accordance with those laws and customs, to their descendants.

In Schedule G the applicants state, amongst other matters, that the traditional usage of the Jangga people of the area claimed includes:

- hunting and collecting animals, fish, and other food from the lands and waters;
- responsibility for caring for the land and waters including areas of significance;
- teaching children and relatives on and about the land and waters;
- maintaining traditional knowledge of the land and waters and passing that knowledge on to younger generations.

The above information is supported by the affidavit of [applicant 1] who describes a variety of traditional laws and customs that he, his family and other members of the native title claim group continue to observe. These include:

- respect for the elders (para 2)
- traditional hunting and gathering techniques and knowledge of bush medicines (paras 2, 3)
- respect for significant sites including the burial places of the ancestors and ceremonial grounds, and observing proper behaviour at such sites (paras 5, 8, 9, 11)
- hearing stories from his grandmother about the message bird, about spirits and special places, and passing them on to his children and nephews and nieces (paras 4, 7, 8 – 12)
- observing rules about not eating another's totem (para 14)
- responsibility for caring for the land and the significant places on it (paras 5, 14)

In the anthropological report prepared by [anthropologist 1] the author provides an overview of the principles and protocols forming the basis of Aboriginal law as observed by the Jangga claimant group (pp. 9 – 13). These laws and customs include:

- principles of descent connecting them to their country through their parents and grandparents and through them to their forbears;
- connection to country expressed through these principles of descent and also in terms of more localised family or clan based interests within the claim area;
- protocols for appropriate behaviour, particularly described as showing respect for the land, for ancestors, for elders and those with knowledge of country;
- respect for elders;
- respect for culturally significant areas, and the ancestors, through observing appropriate behaviour at these sites;
- restriction of transmission of knowledge, showing deference to the knowledge of elders and those with knowledge of country;
- structured relationships between kin, for example avoidance relationships and Aboriginal use of English kin terms according to the classificatory kinship system;
- respect for traditional natural resources and responsibility to preserve them for future generations;
- knowledge of the skills necessary to survive in the bush.

The information outlined above supports the contention that these traditional laws and customs form the normative system which gives rise to the native title rights and interests of the Jangga people in the land and waters of the application area.

Having regard to the above, I am satisfied that there is a sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed.

I am therefore satisfied that the requirement s of s.190B(5)(b) have been met.

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

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

For the reasons set out in respect of s.190B(5)(a) and (b) above and having regard to the same material, I am satisfied that there is a factual basis to support the claim group having continued to hold native title in accordance with those traditional laws and customs.

Conclusion

I am satisfied that the information included in the current application filed by the Jangga people, and otherwise provided, is sufficient to support the assertion that the claimed native title rights and interests exist, and also supports the following assertions:

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

Result: **Requirements met**

Native title rights and interests claimed established prima facie: S.190B(6)

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

Reasons for the Decision

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

A. the rights and interests to be linked to traditional laws and customs;

B. those claiming the rights and interests to have a connection with the relevant land and waters; and

C. those rights and interests to be recognised under the common law of Australia.

The definition is closely aligned with all the issues I have already considered under s.190B(5). I will therefore draw on the conclusions I made under that section in my consideration of s.190B(6).

Under s.190B(6), I must consider that, *prima facie*, at least some of the rights and interests claimed can be established. The term '*prima facie*' was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who 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]."

This meaning was recently considered in and approved in *Northern Territory v Doepel* [2003] FCA 1384, at paras 134 -135. Briefly, the Court concluded that although the above case was decided before the 1998 amendments of the Act, there is no reason to consider that the ordinary usage of '*prima facie*' there adopted is no longer appropriate.

I have adopted the ordinary meaning referred to by their Honours in considering this application, in deciding which native title rights and interests claimed can be established on a *prima facie* basis.

The claimed native title rights and interests are found at Schedule E of the application. I have outlined these rights and interests under s.190C(4) above. The rights and interests claimed are qualified by statements in Schedules B, E, L, P and Q. I refer to my reasons under s.190B(4) above for details of these statements.

In considering this condition against the native title rights and interests listed at Schedule E, I have had regard to the following information:

- information contained in Schedules F, G and M of the application;
- the affidavit of [applicant 1] 13 August 1999 at Attachment G of the application;
- the anthropological report of [anthropologist 1] dated July 1999, provided in support of the Jangga #1 application.

These documents provide sufficient material and information to satisfy me on a *prima facie* basis that at least some of the native title rights and interests claimed by the applicants can be established. I will now consider in turn each of the native title rights and interests claimed in Schedule E and whether these can be established *prima facie* as required by s.190B(6).

(a) to possess, occupy, use and enjoy the application area to the exclusion of all others, those parts of the area claimed where there has been no extinguishment of native title or where section 238 Native Title Act applies;

Established – but <u>only</u> in relation to those parts of the area claimed where there has been no extinguishment of native title or where section 238 of the Native Title Act applies.

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, *prima facie*, be established in relation to some parts of a claim area [see 51]. A claim to exclusive possession may be able to be established over areas where there has been no previous extinguishment of native title or where the non-extinguishment principle in s.238 of the *NTA* applies (such as areas for which the benefit of ss.47, 47A or 47B is claimed, and in relation to areas affected by category C and D past and intermediate period acts).

This is recognised in the wording of the claim to this right, which limits it to those areas where there has been no extinguishment of native title or where s.238 of the *Native Title*

Act applies. At Schedule L, the applicants claim the benefit of ss.47A and s.47B in relation to lands within the application area.

Over areas where a claim to exclusive possession cannot be sustained (i.e. where the claim is *non-exclusive* in nature), the Court has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "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": at [51] Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [919].

In applying the registration test, I must look to the language of the relevant provisions of the Act. These provisions must be read in context, having regard to relevant court decisions and other principles of statutory interpretation. If, as in *Ward* and *De Rose*, the courts cast serious doubt on whether or not a particular description of a right and interest falls within the definition of 'native title right or interest' in s.223, then those doubts affect the standard applied for the purposes of the test. It would seem, then, that without further investigation, a non-exclusive right to possession, occupation, use and enjoyment is not capable of being established *prima facie* pursuant to s.190B(6).

I will now consider the *prima facie* basis for the right to exclusive possession, occupation, use and enjoyment of the application area.

Possession

At Schedule F of the current application the applicants state that:

The native title claim group as described in Schedule A comprises Aboriginal people who are descended from ancestors who comprised an identifiable community and who:

(i) had an affiliation with Jangga country, including a spiritual affiliation, which included the application area described in Schedule B, and maintained this connection with the application area.

At Schedule M the applicants state that the native title claim group and in particular [applicant 1] have maintained a traditional physical connection with the land and waters covered by this application.

In his affidavit at Attachment G, [applicant 1] deposes that:

- He comes from around Glen Eva, a cattle property his grandmother used to own. Glen Eva is a sacred place to him, all this country is his home. (para 1)
- He travelled across the country with his grandmother, hunting and fishing and gathering bush foods such as wild honey and waterlily bulbs. They also collected and used bush medicines (paras 2, 3)
- He and his family maintain ongoing contact with the land, returning all the time to work, to pay their respects to their ancestors who are buried there, to fish, to camp,

to visit their relations and to look after their country and their heritage. (paras 5, 7, 13)

- His country is significant; it's where his ancestors come from and is their 'yumba', their home. They have been born and bred on it. He goes there all the time, he is always going back and forwards working on country and his people are buried there. (paras 5, 6)

In the anthropological report prepared by [anthropologist 1] the author states that the right to possession, occupation use and enjoyment of the claim area is asserted by the claim group on the basis of the transmission of this right from antecedents who held this right.

Occupation

I note that the notion of occupation in this context should be understood in the sense that indigenous people have traditionally occupied land rather than according to common law principles and judicial authority relating to freehold and leasehold estates and other statutory rights (Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32 at [162]).

I refer to the contents of the affidavit of [applicant 1] referred to above in respect of possession.

In the anthropological report prepared by [anthropologist 1] the author outlines the history of the association of the claim group with the claim area, drawing on archaeological, historical and anthropological evidence and the oral testimony of members of the native title claim group (pp. 6 – 9). She states that the oral history surrounding the claim group's traditional physical connection with the claim area is supported by archival evidence. She also describes the activities carried out by members of the claim group within the claim area (pp. 15 – 19).

At Schedule G of the application the applicants state that the current activities of Jangga people, including in the application area, include residing on and camping on the land and travelling across the land.

Use and Enjoyment

In his affidavit at Attachment G, [applicant 1] deposes to activities that evidence the use and enjoyment of the claim area by himself, members of his family and other members of the claim group. I refer to the contents of this affidavit as outlined above in respect of possession.

At Schedule G of the application the applicants state that the current activities of Jangga people, including in the application area, include residing on the land, hunting and collecting animals, fish and other food, using waters from the land, collecting materials such as timber, stones, grass and medicines, and caring for the land and waters, including sites of significance.

To conclude, I am satisfied that the right to possess, occupy, use and enjoy to the exclusion of all others, is *prima facie* established over those parts of the area claimed where there has been no extinguishment of native title or where section 238 *Native Title Act* applies.

(b) to speak for and to make decisions about the use and enjoyment of the application area

Established

In *Ward*, the majority of the High Court considered the right to 'speak for country' in the following terms [88]:

> "It may be accepted that…'a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'". It is the rights under traditional law and custom to be asked permission and to "speak for country" that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others. The expression of these rights and interests in these terms reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing."

Paragraph [88] of the *Ward* decision, however, should be read in conjunction with para. [14] of the majority opinion which, in my view, qualifies, or rather ameliorates what is said in [88]. In [14], their Honours have this to say of the right:

> "Speaking for country' is bound up with the idea that, at least in some circumstances, others should ask permission to enter upon country or use it or enjoy resources, *but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture*." [my emphasis]

It seems from this, that although the right to speak for the application area may be seen as a right which amounts to a right to control access to and use of the land in some circumstances, it does not always amount to such a claim. To assume that the right is necessarily a right to control access or use of the land would be not only to 'oversimplify' the nature of the connection Aboriginal people have with their land but to fail to apply the Act beneficially as is encouraged by the preamble to the Act. I note that in *Commonwealth v Yarmirr* (2001) 184 ALR 113 at [124] to [125], after noting the warning given by the High Court in *North Ganalanja* about construing the Act, McHugh J went on to say that:

> 'It is also necessary to keep in mind that, in the second reading speech on the Native Title Bill 1993, the then Prime Minister, Mr. Keating, saw *Mabo (No 2)* as giving Australians the opportunity to rectify the consequences of past injustices. The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the "national legacy of unutterable shame" that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that

> would ameliorate any of those injustices or redeem that legacy, it should be given that construction.
>
> [After identifying the purpose of the Act,] the duty of the courts would be to ensure that that purpose was achieved. That would be so even if it meant giving a strained construction to or reading words into the Act. In an extrajudicial speech, Lord Diplock once said that "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed."

The right to 'make decisions' about the claim area (which is also part of the right claimed at para. 1(b)) is similarly problematic, and perhaps more than the right to 'speak for' an area. It suggests that the applicants are claiming a right that amounts to a right to control access to or use of the land of the application area.

I note that the applicants do make explicit claims to control the access of others to the application area (at para. (d)) and to control the use and enjoyment of others of the resources of the application area (at para. (f)). In both cases this is limited to areas where there has been no extinguishment of native title or where s 238 applies. This suggests to me that the applicants do not intend that the right to 'speak for and make decisions about the use and enjoyment of the application area' implies a right to control access to or use of the land.

I understand the right at para. 1(b) to be a non-exclusive right which does not seek to control the use or enjoyment of others of the application area. Nevertheless, pursuant to s.186(2), I direct that a note be placed on the register noting that the right claimed at para. 1(b) is non-exclusive in nature.

I will now consider whether the right to speak for and make decisions about the use and enjoyment of the application area is capable of being established *prima facie*. Material is found within Schedules F and Attachment F supporting this right.

There is information to support this right in Schedule G of the application. The applicants there state that the current activities of the Jangga people, including in the application area, include:

- residing on the land;
- hunting and collecting animals, fish and other food from the lands and waters;
- using waters from the land;
- collecting materials including timber, stones, grass and medicine from the land and waters;
- travelling across the land and waters;
- camping on the land;
- responsibility for caring for the land and waters including sites of significance;
- teaching children on and about the land and waters,

- maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

In his affidavit at Attachment G, [applicant 1] deposes to living in the area and to activities that evidence the use and enjoyment of the claim area by himself, members of his family and other members of the claim group (see above).

In the anthropological report prepared by [anthropologist 1] the author states that knowledge of country is expressed by members of the claim group in terms of holding authority and the responsibility to 'speak for' and 'look after' country (p. 12). She also refers to efforts to protect culturally significant areas through cultural heritage survey work, and the monitoring of mining and development activities in the claim area, based on the oral testimony and affidavit of [applicant 1] (p. 16). Elsewhere she states that since his family moved to Proserpine in 1970, [applicant 1] has returned periodically to Glen Eva to carry out cultural heritage survey work in the claim area, and in 1997 he negotiated the resurvey of mining areas on Glen Eva, engaging the mining company in consultations with traditional owners over cultural heritage protection (p. 9).

On the basis of the above I am satisfied that this right can be *prima facie* established over the whole of the claim area.

(c) to reside upon and otherwise have access to and within the application area;

Established

I refer to my reasons for decision under s.190B(4) above, where I found that this right is readily identifiable as a native title right and interest over the whole of the claim area.

I note again here that, despite the absence of exclusive possession in that case, the majority decision in *Ward* did not preclude the recognition of native title rights to reside upon the claim area; nor is there is anything in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. Rather, rights to control access to or use and enjoyment of the claim area are claimed separately at paras. 1(d) and 1(f).

It follows in my view that the right to reside upon and otherwise have access to and within the application area is capable of being established *prima facie*.

There is information to support this right in Schedule G, which states that the current activities of the Jangga people include residing and camping on the land. The other activities described in Schedule G necessarily involve having access to the claim area.

In his affidavit at Attachment G, [applicant 1] deposes that he and his family maintain ongoing contact with the land, returning all the time to work, to pay their respects to their ancestors who are buried there, to fish, to camp, to visit their relations and to look after their country and their heritage. (paras 5, 7, 13)

In the anthropological report prepared by [anthropologist1] the author states that the activities of the members of the claim group within the claim area include continuous residence of members of the claim group in the claim area, in particular residence at

Glen Eva station until 1970 (p. 16). She describes a range of other activities carried out by the members of the claim group within the claim area, such as visits to significant sites, and work on pastoral properties (p. 16).

I am satisfied that this right can be *prima facie* established over areas where exclusive possession cannot be made out.

d) to control the access of others to the application area

Not established

I refer to my reasons for decision under s.190B(4) above, where I found that this right is readily identifiable as a native title right and interest only over areas where a claim to exclusive possession can be sustained. Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained.

In the present matter the applicants claim a right (at para 1(a)) to possess, occupy, use and enjoy the land to the exclusion of all others in relation to those parts of the area claimed where there has been no extinguishment of native title or where section 238 applies and I am satisfied that the information provided by the applicants is sufficient to establish this right on a *prima facie* basis (see above). The right to possession, occupation, use and enjoyment of the land to the exclusion of all others is a broad right which the courts have indicated amounts to the fullest expression of that bundle of rights which comprises native title.

The right to control the access of others to the application area, on the other hand, while an integral part of the right to exclusive possession, is claimed as a separate right at para 1(d), and as such must be considered separately pursuant to the requirements of s.190B(6). I have noted above that this claim is limited to areas where there has been no extinguishment of native title or where section 238 applies.

I have considered the information I have before me. I note that in his affidavit [applicant 1] deposes that among his people there is a strong tradition that there are some places you are not supposed to go, and that other people are frightened when they come up to ceremonial ground, and they stay away, because they know its not their country (para 8).

In the anthropological report prepared by [anthropologists 1] the author cites Howitt (1996) in relation to rules among the Wakelburra (a subgroup or clan of the Jangga) governing attendance at ceremonies by other groups, illustrating the imposition of restrictions on access to country and participation in cultural exchange based on existing social and political alliances (p. 20).

No further evidence going to this right has been provided. Nor has attention been directed to any other information before me or otherwise, which may support the

establishment of this right. In my view there is insufficient material which would go to establishing, *prima facie*, the right to control the access of others to the application area. Accordingly, I am not satisfied that the requirements of s.190B(6) have been met for this right.

I draw attention to s.190(3A) which permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested and accepted for registration. In brief, provided that additional information satisfies the Registrar (or his delegate) that, had it been before him at the time of testing, the right would have been accepted for registration, then, subject to meeting the other conditions of the test, the right in question will be entered in the Register of Native Title Claims.

(e) to use and enjoy the resources of the application area

Established

The right claimed at para.1(e) is a right to use and enjoy the resources of the application area. At Schedule Q, the applicants state that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown (in compliance with the requirements of s.190B(9)(a)). Given this qualification, I am satisfied that this right can be established *prima facie* (subject to the satisfaction of other requirements) whether or not a claim to exclusive possession can be sustained over the lands and waters of the claim area.

At Schedule G the applicants state that the current activities of Jangga people, including in the application area, includes hunting and fishing and the collection and use of resources (see provisions outlined above). I also refer to the affidavit of [applicant 1] outlined above under the right at 1(a). In his affidavits he refers to utilising a variety of resources in the claim area including freshwater crays, mussels, fish, eels, turtles, goanna, bluetongue, wild honey, and medicinal plants.

In the anthropological report prepared by [anthropologist 1] the author refers to the intimate knowledge of the bush resources available in the claim area held by the members of the claim group, and their skills in surviving in the bush. (pp.13, 16). In this regard, she refers to the oral testimony of [applicant 1], [applicant 6] and [person 1 of family group 3].

I am satisfied on the basis of the above information that this right can be *prima facie* established over the whole of the claim area.

(f) to control the use and enjoyment of others of the resources of the application area

Not established

I refer to my reasons for decision under s.190B(4) above, where I found that this right is readily identifiable as a native title right and interest only over areas where a claim to exclusive possession can be sustained.

In the present matter the applicants claim a right to possess, occupy, use and enjoy the land to the exclusion of all others in relation to those parts of the area claimed where there has been no extinguishment of native title or where section 238 *Native Title Act* applies and I am satisfied that the information provided by the applicants is sufficient to establish this right on a *prima facie* basis (see above). The right to possession, occupation, use and enjoyment of the land to the exclusion of all others is a broad right which the courts have indicated amounts to the fullest expression of that bundle of rights which comprises native title.

The right to control the use and enjoyment of others of the resources of the application area, on the other hand, while an integral part of the right to exclusive possession, is claimed as a separate right at para 1(f), and as such must be considered separately pursuant to the requirements of s.190B(6). I have noted above that this claim is limited to areas where there has been no extinguishment of native title or where section 238 applies.

I have considered the information before me. No direct evidence going to this right has been provided. Nor has attention been directed to any other information before me or otherwise, which may support the establishment of this right. In my view there is insufficient material which would go to establishing, *prima facie*, the right to control the use and enjoyment of others of the resources of the application area. Accordingly, I am not satisfied that the requirements of s.190B(6) have been met for this right.

I again note that s.190(3A) permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested and accepted for registration.

(g) to share, exchange and/or trade resources derived on and from the application area

Not Established

I refer to my reasons for decision under s.190B(4) above, where I found that this right is readily identifiable as a native title right and interest only over areas where a claim to exclusive possession can be sustained.

In the anthropological report prepared by [anthropologist 1] the author refers to archaeological evidence for trade in fine quality stone (p. 6) and stone knives (p. 7) within the claim area, and also cites a reference by the explorer Leichardt in 1847 to a dillybag made from materials obtained from the coast, in his notes on the Aboriginal people he encountered living along Suttor Creek (p. 7). She also cites reports from early pastoralists of substantial movement throughout the region for the purposes of trade, exchange and ceremony. For example seashells were traded from the coast (p. 20). I note that these references pertain to activities carried out by the forbears of the claim group. There is little or no evidence before me that the members of the claim group currently carry out exchange or trade in the resources of the claim area.

I have considered information I have before me and note that no further evidence in support of this right as currently practised by the Jangga people has been provided. Nor

has my attention been directed to any information which may support the establishment of this right. Given the lack of material which would go to establishing, *prima facie*, the right to share, exchange or trade resources derived from the application area, I am not satisfied that the requirements of s.190B(6) have been met for this right.

(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area

Established

The right "to maintain and protect places of importance under traditional laws, customs and practices" appears to amount to a claim to control access to and use of the area which could only be capable of being established *prima facie* over areas where a claim to exclusive possession can be made out. However, in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. For this reason, these rights appear to be capable of being established *prima facie* over such areas.

At Schedule G the applicants state that the current activities of the Jangga people, including in the application area, include responsibility for caring for the land and waters including sites of significance (at para 1(g)).

This is supported by [applicant 1] who deposes in his affidavit to the protection of significant and sacred sites in the claim area, appropriate behaviour when visiting such sites and respect for country (see paras 5, 8, 9, 13).

In the anthropological report prepared by [anthropologist 1] the author states that the responsibility and authority of the claim group to protect and control access to culturally significant areas within the claim area, derives from the right to possession, occupation, use and enjoyment (p.13). She includes in the list of activities of members of the claim group within the claim area, efforts to protect culturally significant areas through cultural heritage survey work, and negotiations with developers regarding cultural heritage protection (p.16). Elsewhere she states that since his family moved to Proserpine in 1970, [applicant 1] has returned periodically to Glen Eva to carry out cultural heritage survey work in the claim area, and in 1997 he negotiated the resurvey of mining areas on Glen Eva, engaging the mining company in consultations with traditional owners over cultural heritage protection (p. 9).

I am satisfied on the basis of the above information that this right can be *prima facie* established over the whole claim area.

(i) to maintain, protect and prevent the misuse of their cultural knowledge, customs and practices associated with the application area, where the traditional laws acknowledged and customs observed have a connection with the application area

Not established

For reasons stated above in relation to s.190B(4), this claimed right is not readily identifiable and is therefore not a right capable of being established *prima facie*.

(j) to transmit to others their cultural knowledge, customs and practices associated with the application area, where the traditional laws acknowledged and customs observed have a connection with the application area

Established

In his affidavit [applicant 1] deposes that he learned the ways of the old people and the law from his grandmother. From her he learned the stories about the spirits and other things, about significant sites and the correct behaviour at those sites. He also learned to respect the elders, to hunt and fish and collect bush medicines, and he has passed this knowledge on to his children and nephews and nieces (paras 2, 7, 9, 11, 12, 14 – 17).

At Schedule G the applicants state that the current activities of Jangga people, including in the application area, include teaching children and relatives on and about the land and waters, and maintaining traditional knowledge of the land and waters and passing this knowledge on to younger generations (at paras (h) and (i)).

In the anthropological report prepared by [anthropologist 1] the author states that the activities carried out by members of the claim group within the claim area include the transmission of cultural practice to younger members of the claim group. These practices include traditional craft practices, site avoidance, spiritual beliefs, classificatory kin relationships and appropriate behaviour toward such kin, respect for elders, traditional conflict resolution practice, and knowledge and use of bush resources (pp. 15 – 16).

I am satisfied on the basis of the above information that this right can be *prima facie* established over the whole of the claim area.

(k) to determine and regulate membership of, and inclusion in the native title claim group.

Not Established

For reasons stated above in relation to s.190B(4), this claimed right is not readily identifiable and is therefore not a right capable of being established *prima facie*.

(l) Non-exclusive rights to use and enjoy those parts of the application area, where native title rights and interests have been partially extinguished, in accordance with their traditional laws and customs

Established only over those parts of the claim area where a claim to exclusive possession cannot be sustained

An exhaustive list of the incidents of this right and interest is set out at paras 1(l)(i) to (x). I refer to my reasons for decision under s.190B(4) above where I found that this right can be readily identified only over those parts of the application area, where native title rights and interests have been partially extinguished.

I am satisfied that this right can be *prima facie* established, only over those parts of the claim area where a claim to exclusive possession cannot be sustained. I refer to the

material outlined in my reasons for decision under the rights at 1(a), 1(c), 1(e), 1(h) and 1(j) above.

Conclusion

Taking into account:

- the express qualifications to the claimed native title rights and interests;
- the above material and
- the decisions to which I have referred,

I am satisfied that at least some of the claimed native title right and interests can *prima facie* be established in respect of the area covered by the application.

I find that the rights and interests described at para 1(a) of Schedule E can be *prima facie* established only over areas where a claim to exclusive possession can be made out: (i.e. over those parts of the area where there has been no extinguishment of native title or where s.238 Native Title Act applies).

I find that the rights and interests described at paras 1(b), (c), (e), (h) and (j) can be prima facie established over the whole of the claim area.

I find that the rights and interests described at para 1(l)(i) to (x) can be prima facie established only over those parts of the application area where native title rights and interests have been partially extinguished.

The rights and interests are subject to the qualifications set out in Schedules B, E, P. Q and L.

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 for the Decision

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

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application. This is found in the affidavit of [applicant 1] deposed on 13 August 1999, at Attachment G of the application.

In his affidavit [applicant 1] deposes that

- He was born in Collinsville and he grew up around Mt Coolon, in the claim area, but the main place for him is Glen Eva, a cattle property his grandmother used to own.. (para 1)
- He travelled across the country with his grandmother, hunting and fishing and gathering bush foods such as wild honey and waterlily bulbs (para 2)
- He and his family maintain ongoing contact with the land, returning all the time to work, to pay their respects to their ancestors who are buried there, to fish, to camp, to visit their relations and to look after their country and their heritage. (paras 5, 7, 13)
- There are some places you're not supposed to go, such as burials or ceremonial grounds, where you have to let them know you're coming by 'talking a bit of lingo' (paras 9, 11,12)

Schedule M states that the native title claim group and in particular [applicant 1] continue to have a traditional physical connection with the land and waters covered by the application. The applicants refer to Schedule G, where it is stated that [applicant 1] regularly goes to the claim area. He was born in Collinsville and grew up in the area around Mt Coolon and in particular, Glen Eva which is also in the claim area, and was once owned by his grandmother. As he child he spent much time with her and learned from her. Glen Eva is a 'special place' to him.

Accordingly, I am satisfied that at least one member of the native title claim group currently has and previously had a traditional physical connection with any part of the land or waters covered by the application. I find that the application satisfies this condition.

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.

Reasons for the Decision

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

S61A(1)- Native Title Determination

A search of the National Native Title Register has revealed that there is no determination of native title in relation to any part of the claim area. This was confirmed by the Tribunal's Geospatial Unit in its assessment dated 30 July 2004.

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

The exclusion clauses at paragraphs (b)(ii) and (b)(iii) of Schedule B effectively exclude any lands subject to a previous exclusive possession act as defined under s.23B of the Act save where the Act allows those lands to be part of a native title determination application.

The exclusion clauses meet the requirement of this subsection.

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

Paragraph (3) of Attachment E confirms that the application does not include a claim for exclusive possession over areas that are subject to valid previous non-exclusive possession acts under s.23F of the *Native Title Act 1993*.

The applicants further state at para (c) of Schedule B that exclusive possession is not claimed over areas that have been subject to valid previous non-exclusive possession acts done by the Commonwealth or State as set out in Division 2B of Part 2.

S.61A(4) – ss.47, 47A, 47B

At Schedule L and para (b)(v) of Schedule B the applicants claim the benefit of s. 47, 47A and s.47B in relation to the whole of the claim area.

Conclusion

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

Result: **Requirements met**

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

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

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

Reasons for the Decision

Schedule Q of the application states that the native title claim group does not make any claim to the ownership of minerals, petroleum or gas wholly owned by the Crown.

Result: **Requirements met**

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

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

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

Reasons for the Decision

The claim area does not include any offshore places: see description and map of the external boundaries, where it is apparent that the claim area is located inland from the coast. At Schedule P the applicants state that the native title claim group does not claim exclusive possession of all or part of an offshore place.

Result: **Requirements met**

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

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

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

Reasons for the Decision

The applicants state at para (b)(iv) of Schedule B that any areas where native title has otherwise been extinguished are excluded from the application.

A search of the Register of Indigenous Land Use Agreements reveals that there are two indigenous land use agreements ('ILUAs') entered on the Register that affect all or part of the claim area. This information was confirmed in the assessment prepared by the Tribunal's Geospatial Unit dated 30 July 2004.

The ILUAs are QI2002/42 (Twin Hills) and QI2002/49 (The North Queensland Gas Pipeline Southern ILUA). Neither agreement provides for surrender of native title or provides that any surrender of native title to government is intended to extinguish native title rights and interests.

The application does not disclose, and I am not otherwise aware that the native title rights and interests have otherwise been extinguished.

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

Result: Requirements met

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