

# Registration test decision

Application name: Birri People

Name of applicant: Mr David Miller, Name Withheld for Cultural Reasons, Mr Frank Fisher, Mr Colin McLennan, Mr Allan Fisher, Mrs Heather Tilberoo, Ms Grace Smallwood, Mr Algon Walsh Jnr.

State/territory/region: Queensland

NNTT file no.: QC98/12

Federal Court of Australia file no.: QUD 6244 of 1998

Date application made: 2 April 1998

Date application last amended: 31 August 2006

Name of delegate: Graham Miner

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

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

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

**Date of decision:** 14 August 2007

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Graham Miner

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth)

# Reasons for decision

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# Introduction

This document sets out my reasons for the decision to accept or not accept, as the case may be, the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court).

## Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 30 July 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

## The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

## Information considered when making the decision

Section 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgements in the courts) relevant to the application of the registration test. Amongst issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

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

I have *not* considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

## **Application overview**

Please see Attachment C.

## **Procedural fairness steps**

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that the Registrar has undertaken to ensure procedural fairness is observed in this matter are as follows: See Attachment D.

**Please note:** All references to legislative sections refer to the *Native Title Act 1993* (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition.

# Procedural and other conditions: s. 190C

## *Section 190C(2)*

### *Information etc. required by ss. 61 and 62*

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

#### **Delegate's comment**

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 13.

### *Native title claim group: s. 61(1)*

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

#### **Result**

The application **meets** the requirement under s. 61(1).

#### **Reasons**

The Registrar's task under s. 61(1) was clarified by his Honour Justice Mansfield in the case of *Attorney General of the Northern Territory v Doepel* (2003) 203 ALR 385 (*Doepel*). This case is authority for the proposition:

Section 190(C)(2) is confined to ensuring that the application, and accompanying affidavits or other materials, contains what is required by ss. 61 and 62— at [16].

Bearing in mind that the Registrar's consideration of s. 61(1) is defined by the procedural task set in s.190C(2), I must be satisfied that 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. 190(A)(6)(b) — *Doepel* at [36].

If the description of the native title claim group 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 relevant requirement of s. 190C(2) would not be met and the claim cannot be accepted for registration — *Doepel* at [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—*Doepel* at [37] and [39].



In light of the above I am of the view that I am not required to consider here whether the group described in the application is the native title claim group.

There is nothing on the face of the application which would cause me to conclude that the requirements of this section are not met, bearing in mind that my consideration of it is limited by the task set in s. 190C(2). In relation to the words in the claim group description, 'who identify and are identified by others', I refer to my comments below under s. 190B(3).

### *Name and address for service: s. 61(3)*

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

#### **Result**

The application **meets** the requirement under s. 61(3).

#### **Reasons**

The names of the persons authorised as the applicant is stated, as is the address for service.

### *Native title claim group named/described: s. 61(4)*

The application must:

- (a) name the persons in the native title claim group, or
- (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

#### **Result**

The application **meets** the requirement under s. 61(4).

#### **Reasons**

The application does not name the persons in the native title claim group but does otherwise describe the persons in the native title claim group.

### *Application in prescribed form: s. 61(5)*

The application must:

- (a) be in the prescribed form,
- (b) be filed in the Federal Court,
- (c) contain such information in relation to the matters sought to be determined as is prescribed, and
- (d) be accompanied by any prescribed documents and any prescribed fee.

#### **Result**

The application **meets** the requirement under s. 61(5).

## **Reasons**

I am satisfied the application meets the requirements of this section for the reasons set out under ss. 61(1), 61(3), 61(4), 62(1)(a) and 62(2)(c).

### *Affidavits in prescribed form: s. 62(1)(a)*

The application must be accompanied by an affidavit sworn by the applicant that:

- (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
- (ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
- (iii) the applicant believes all of the statements made in the application are true, and
- (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
- (v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).

## **Result**

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

## **Reasons**

The application is accompanied by affidavits that have been signed by each of the persons named as the applicant. The affidavits are apparently sworn before a competent person. They contain the statements required by subparagraphs (i) to (v) of s. 62(1)(a).

### *Application contains details required by s. 62(2): s. 62(1)(b)*

The application must contain the details specified in s. 62(2).

## **Delegate's comment**

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains eight paragraphs (from (a) to (h)), and I address each of these sub requirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 13 below and is one and the same as the result for s. 62(1)(b) here.

## **Result**

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

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

## **Result**

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

## **Reasons**

Information that enables the boundaries of the area covered by the application to be identified is found in the description at Attachment B and the map depicting the boundary in Attachment C of the application.

Information that enables the boundaries of any areas within the external boundaries not covered by the application to be identified is found in Schedule B and on p. 5 of Attachment B.

## *Map of external boundaries of the area: s. 62(2)(b)*

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

## **Result**

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

## **Reasons**

The application contains a map at Attachment C showing the boundaries of the area mentioned in section 62(2)(a)(i).

## *Searches: s. 62(2)(c)*

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

## **Result**

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

## **Reasons**

Schedule D of the application says that no searches have been undertaken by the applicant. I am unaware of any searches which the applicant may have carried out or of which the applicant may have notice. I am consequently satisfied the application meets this requirement of s. 62(2)(c).

## *Description of native title rights and interests: s. 62(2)(d)*

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

## **Result**

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

## **Reasons**

A description of the claimed native title rights and interests is found in Schedule E of the application. It does not consist merely of a statement to the effect that the native title rights and interests claimed are all native title rights and interests that may exist or have not been extinguished at law and consequently meets the requirements of s. 62(2)(d).

### *Description of factual basis: s. 62(2)(e)*

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

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

## **Result**

The application **meets** the requirements under s. 62(2)(e).

## **Reasons**

I am satisfied that the application contains a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist and for the particular assertions in subparagraphs (i) to (iii). See Schedules F, G, M and Attachments F, F1 and F2 of the application.

### *Activities: s. 62(2)(f)*

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

## **Result**

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

## **Reasons**

Schedule G sets out details of activities currently being carried out by the native title claim group in relation to the area covered by the application. See also Attachment F, F1 and F2 of the application.

### *Other applications: s. 62(2)(g)*

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

## **Result**

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

## Reasons

Schedule H of the application refers to the Kudjala People #2 native title application (QUD6001/01) (QC01/1) which overlapped the current application. That application was dismissed by order of Justice Dowsett of the Federal Court made on 25 September 2006.

### *Section 29 notices: s. 62(2)(h)*

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

## Result

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

## Reasons

Schedule I of the application lists twelve (12) s. 29 notices of which the applicant is said to be aware. I take this to mean these are the only notices of which the applicant is aware.

I note that the Tribunal's Geospatial Service's assessment, dated 3 October 2006, lists 89 notices issued under s. 29 of the Act (or under a corresponding provision of a law of the State or Territory) in relation to the whole or part of the application area as at that date. I see that the notices listed are no longer current, the most recent being 12 July 2006. By no longer current I mean that the four month period after the notification day in the s. 29 notice, in which the Registrar is required to use best endeavours to consider the claim, has expired.

Even if my conclusion that the applicant is unaware of the additional notices is incorrect, I am of the view that Parliament's intention in relation to the requirements of this section is relatively clear. Both the note at the end of that paragraph, which states that notices under s. 29 are relevant to s. 190A(2), and also s. 190A(2) itself, make it reasonably clear that the purpose of the provision was to ensure that the Registrar was aware that the claim was affected by the relevant notice and, therefore, expedited the registration test of the application as required under s.190A(2). The Tribunal is of course aware of the notices and they are no longer current. I am of the opinion that in those circumstances it would be unduly harsh not to accept an application for registration for not including details of notices of which the Tribunal is aware and which are no longer current.

I am satisfied that the application meets the requirements of this condition.

### **Combined result for s. 62(2)**

The application meets the combined requirements of s. 62(2), because it meets each of the requirements of s. 62(2) (a) to (h). See also the result for s. 62(1)(b) above.

### **Combined result for s. 190C(2)**

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

## *Section 190C(3)*

### *No common claimants in previous overlapping applications*

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

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

### **Result**

The application **satisfies** the condition of s. 190C(3).

### **Reasons**

Schedule H of the application refers to the Kudjala People #2 native title claim application (QUD6001/01) (QC01/1) as overlapping the current application. That application was not a previous application, as it was made after the Birri People's application. Thus it was not on the register when the Birri application was made. Moreover, that application was dismissed by order of Justice Dowsett of the Federal Court on 25 September 2006.

The overlap analysis dated 3 October 2006 prepared by the Tribunal's Geospatial Service reveals that there are no overlapping applications that cover the area of this application.

For the above reasons I need not consider this matter further.

## *Section 190C(4)*

### *Authorisation/certification*

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

- (a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Under s. 203BE(4), certification of a claimant application by a representative body must:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and
- (b) briefly set out the body's reasons for being of that opinion, and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

Under s. 190C(5), if the application has not been certified, the application must:

- (a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
- (b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

## **Result**

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am satisfied that the circumstances described by s. 190C(4)(b) are the case in this application. I am also satisfied that the conditions in s. 190C(5) are met.

## **Reasons**

The application is not certified pursuant to s. 190C(4)(a). Consequently I must be satisfied that the requirements of s. 190C(4)(b) are met.

Firstly, I must consider if the applicants are members of the native title claim group.

Attachment R states that each of the persons named as the applicant are members of the native title claim group. Also each of those people has sworn affidavits that are attached to the application stating that they are members of the native title claim group. I am satisfied on the basis of this information that the persons named as the applicant are members of the native title claim group.

Secondly, I must consider if the applicants are 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.

The current application was filed on 31 August 2006. Part A states:

The Applicant was authorised to make this Amended Native Title Determination Application by members of the Birri Native Title Group at an Authorisation Meeting held at the Plaza Hotel in Townsville on 20 May 2006.

Also refer to Schedule R of this Application.

Schedule R refers to Attachment R which states:

1. All of the people comprising the applicant are members of the native title claim group as defined in this application.
2. The applicant is authorised by all other people in the native tide claim group to make this application and to deal with matters arising in relation to the application.

The attachment then outlines the background to the meeting held on 20 May 2006. It is said to have been convened as a direct result of the Kudjala People #2 (QUD 6001/2001) filing an application for determination of native title. This resulted in an overlap being created over part of the area of the application as filed by the Birri people in QUD 6244/1998. At a case management conference held on 14 December 2005 in the Federal Court agreement was reached as to a means by which each of the Birri and Kudjala # 2 people would amend their boundaries in order to resolve the overlap. At a subsequent meeting in Townsville on 24 January 2006, all of the persons constituting the applicant met and unanimously ratified the agreement as executed by Applicant Name Withheld for Cultural Reasons and Mr Algon Walsh Jnr at the case management conference. The applicant also unanimously agreed to call a meeting of the native title claim group in order to

seek their agreement to an amendment of the boundaries of the Birri Claim so that the Birri People could comply with the above agreement (see Attachment R [3] to [6]).

The attachment then outlines how the meeting was convened, to whom notice was given, who attended and the decisions made— at [7] to [18]. I am satisfied on the information provided that adequate notice of the meeting was given to members of the native title claim group and that the meeting was well attended by about 158 people. Attachment R3 is a typed list of the people who attended the meeting (see [12]).

Michael John Owens, who is the Principal of the firm Michael Owens & Associates, Solicitors, which represents the applicant in this application, states the following in his affidavit sworn on 29 June 2007 about the attendance at the meeting and the information in Attachment R3:

2. I was present throughout the authorization meeting that was held at the Plaza Hotel in Townsville on 20 May 2006
3. I have perused the minutes of the meeting of 20 May 2006. I have also perused the list of names of people whom appear in Attachment R 3 and the Attendance sheets that were signed by each of the persons in attendance at the meeting of 20 May 2006 and whose names appear in Attachment R 3.
4. The Attachment R 3 is identical with the Attendance sheets that were signed by those in attendance at the meeting. All of those persons whose names appear in the Attachment R 3 signed the Attendance Sheets kept at the meeting.
5. As a result of all of the foregoing, I have no hesitation in stating that
  - (a) All of those Birri People in attendance at the meeting (other than children whom cannot make decisions) on 20 May 2006 were those people whose names appear in Attachment R 3,
  - (b) All of the Birri People in attendance at the meeting and whose names appear in Attachment R 3 signed an Attendance Sheet kept on the day,
  - (c) All of those in attendance at the meeting (other than some spouses and partners and some children whom were not Birri People) were Birri People,
  - (d) All of the Birri People in attendance at the meeting took part in the decision-making and made decisions on that day,
  - (e) As a result of various resolutions unanimously carried on the day, I am aware that of the Birri People in attendance believed they were authorized by their families to make those decisions,
  - (f) All the Birri People in attendance at the meeting (who all signed the Attendance sheets and whose names appear in Attachment R3) were all descendants of those various ancestors as are described in the Form 1 Native Title Determination Application QUO 6244 of 1998 as filed in the Federal Court (the "Birri Claim"), and
  - (g) All of the family groups in the contemporary Birri community were represented at the meeting.

Further, Mr Algon Walsh Jnr., an elder of the Birri People and one of the persons named as the applicant, states in his affidavit sworn on 29 June 2007 that he has perused the minutes of the meeting of 20 May 2006 and the list of those who attended at R3. He says that R3 is identical to the attendance sheet signed by those at the meeting. At [14] Mr Walsh also outlines some of the resolutions passed unanimously at the meeting. He then says:

15. As a result of all of the foregoing, I have no hesitation in stating in the most emphatic of terms that:



- (a) All of those Birri People in attendance at the meeting (other than children whom cannot make decisions) on 20 May 2006 were those people whose names appear in Attachment R 3,
- (b) All of the Birri People in attendance at the meeting and whose names appear in Attachment R 3 signed an Attendance Sheet kept on the day,
- (c) All of those in attendance at the meeting (other than some spouses and partners and some children whom were not Birri People) were Birri People,
- (d) All of the Birri People in attendance at the meeting took part in the decision-making and made decisions on that day,
- (e) All of the Birri People in attendance were authorized by their families to make those decisions, and
- (f) All the Birri People in attendance at the meeting were all descendants of those various ancestors of ours as are described in the Form 1 Native Title Determination Application QUD 6244 of 1998 as filed in the Federal Court (the "Birri Claim").

I am satisfied that at the meeting held on 20 May 2006 the members of the native title claim group agreed to and adopted a decision-making process that involved the claim group making decisions by majority vote in relation to written resolutions — at Attachment R [14], [15] and [16].

I see in particular that at [17] it is said:

Using this agreed and adopted decision-making process, the Birri People unanimously passed resolutions authorising the applicant to make this application.

The decision-making process confirmed at the Authorisation Meeting on 20 May 2006, is consistent with that as has been used for a number of years by the Birri People.

Also at [18 (c)] and [18(d)] the attachment states:

The Birri Applicant is authorised to instruct Michael Owens & Associates Solicitors to take whatever steps were usual and necessary to amend the existing Birri Claim (QUD 6244 of 1998) and to thereafter file an amended application for Native Title in the Federal Court so as to fully reflect the agreement reached at the Federal Court Case Management Conference.

The Birri Applicant is authorised to instruct Michael Owens & Associates Solicitors to take whatever steps were usual and necessary to have the amended Birri Claim (QUD 6244 of 1998) registered in the NNTT so as to fully protect their right to negotiate in Future Act matters.

The authorisation of the applicant is further supported by the affidavits of the persons named as the applicant that are required by s. 62(2)(a) of the Act. The affidavits are attached to the application. They all state in part:

- 5. Pursuant to s. 251B of the Native Title Act 1993, I was (together with all of the other named applicants) authorised by all of the persons in the native title claim group to make this application and to deal with matters arising in relation to it,
- 6. The basis upon which I was authorised to make this application is as follows:
  - (a) At a meeting of the Birri Claim Group held in Townsville on 20 May 2006, the Birri Claim Group confirmed their decision-making process for matters pertaining to their Native Title Claim.
  - (b) The decision-making process which was unanimously confirmed, adopted and agreed upon by the Birri Claim Group was that all decisions pertaining to their Native Title Claim would be made by way of a majority of the group evidenced by a show of hands.
- 7. At the authorisation meeting of the Birri Claim Group held in Townsville on 20 May 2006 the Birri Claim Group unanimously: -

- (a) Agreed to amend their native title claim in order to resolve the overlap with the Kudjala # 2 People by adopting the agreement reached as between representatives of the Birri and Kudjala # 2 Peoples at the Federal Court Case Management conference convened by Deputy District Registrar Robson and held in Charters Towers on 14 December 2005, and
- (b) Agreed to authorise both myself and the other authorised applicants to take such steps as were necessary to file an amended claim in the Federal Court, which incorporated the agreement reached at the Case Management Conference.

I am satisfied on the basis of information before me that the persons named as the applicant are members of the native title claim group and they have been 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.

***Issue concerning the present composition of the applicant***

The persons named as the applicant include Applicant Name Withheld for Cultural Reasons. In his affidavit sworn 29 June 2007 Applicant Name Withheld for Cultural Reasons's brother, Mr Algon Walsh, deposes that Applicant Name Withheld for Cultural Reasons died on 8 October 2006. I accept his evidence of his brother's death. Applicant Name Withheld for Cultural Reasons's death makes it necessary to consider who the persons are who are the applicant authorised to make the application.

One view is that the applicant is the eight (8) people collectively who were so authorised. Such an interpretation means that if one of the persons comprising the applicant dies, the remaining persons are not authorised to make the application, at least in the absence of a qualification in the authorisation to the effect that all of the named persons either constitute the applicant or as many of them as remain in the event of the death or incapacity of one or more of those named. I cannot see such qualification in this application.

A second view is that the authorisation of a number of persons as an applicant is an appointment of each of them jointly and severally to deal with the matters arising in relation to an application.

Yet another view is that the applicant is constituted by the group of persons authorised by the meeting or as many of them as are able and willing to continue to constitute the applicant.

I am guided in my consideration of this issue by the decision of Justice Spender in *Doolan v Native Title Registrar* [2007] FCA 192 (23 February 2007). His Honour says:

56 For my part, I do not see the authorisation of a number of persons as an 'applicant' as being an appointment of each of them 'jointly and severally' to deal with the matters arising with the matters in relation to an application. I accept that s 61(2) contemplates an authorisation of persons to act collectively, rather than each of them personally.

57 However, I think that an appointment of a group of persons jointly to be an 'applicant' by a meeting of a native title claim group is an authorisation for the named persons to act, or so many of them as remain willing and able to act. It is these persons who constitute the 'applicant'. There is, in my opinion, an implication in an authorisation of a group to act collectively in a representative capacity that that authorisation has to be understood as recognising the vicissitudes that accompany joint action, particularly where (as is frequently the case) the persons authorised to make an application for a native title determination are elderly, and subject to the possible incidents of old age.

58 No differentiation, it seem to me, is to be made as to the capacity of a person in a group to act, and that person's willingness to continue to act as a member of the group.

59 In the view I take of the matter, there is no requirement for there to be an express qualification to that effect, as the submissions of the Attorney-General suggest. Rather, the position is that an authorisation of a group of people to act has to be understood as meaning the authorisation of so many of them as continue to be willing and able to discharge their representative function.

60 It is important to remember that the persons who are authorised by a native title claim group to make an application are not authorised merely to make the application, but also to 'deal with matters arising in relation to' the application. If one person comprising an 'applicant' were to die, it would be contrary to the purpose of the Native Title Act to require there to be a further authorisation meeting to authorise another group of persons (perhaps constituted by the remaining members of the 'originally specified persons') to be the 'applicant'. Such a frustration of proceedings, perhaps proceedings well advanced, would be antithetical to the purpose of the Native Title Act. That is the paramount consideration, but the gross waste of time and resources also serves to indicate that an interpretation of 'applicant' which avoids all of these consequences is clearly to be preferred.

Having had regard to the above decision I am of the opinion that the applicant is presently constituted by the remaining group of seven persons authorised by the above meeting.

I direct that a note be included on the Register of Native title Claims as follows:

Note: Applicant Name Withheld for Cultural Reasons died on 8 October 2006.

# Merit conditions: s. 190B

## *Section 190B(2)*

### *Identification of area subject to native title*

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

#### **Delegate's comment**

I consider whether the condition of s. 190B(2) is met firstly with respect to what is required by s. 62(2)(a) and then with respect to what is required by s. 62(2)(b). I come to a combined result for whether or not s. 190B(2) as a whole is met at page 20 below.

### *Information regarding external and internal boundaries: s. 62(2)(a)*

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

#### **Result**

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

#### **Reasons**

##### *The area covered by the application*

Attachment B provides a written description of the external boundary of the claim area. This is supplemented by a map at Attachment C showing the external boundaries.

##### *The areas within the area covered by the application that are not covered by the application*

Attachment B on p. 5 specifically excludes certain land and waters the subject of three native title determination applications.

Schedule B identifies, by use of a formula, areas that are excluded from the claim.

I am of the opinion that at this stage of the proceedings, describing areas not covered by the application by use of a formula is acceptable—see *Daniels & Ors v State of Western Australia* [1999] FCA 686 (*Daniels*).

In Schedule D the persons named as the applicant say that to their knowledge no searches have been conducted. I have no information that the applicant has conducted any searches. I thus find that the applicant has a limited state of knowledge about any particular areas that would fall within the description provided. In the circumstances the written description provided is acceptable.

The description provided offers an objective mechanism to identify which areas fall within the categories described. 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 in the application.

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

### *Map of external boundaries: s. 62(2)(b)*

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

#### **Result**

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

#### **Reasons**

A map that shows the external boundary of the claim area is attached to the application at Attachment C.

The map is an A4 copy of an A3 colour map prepared by the Tribunal's Geospatial Service entitled 'QUD 6244/98 (QC98/12) Birri People as amended, dated 5/7/2006'. The map includes the application area depicted by bold dark outline.

I have a report from the Tribunal's Geospatial Service dated 3 October 2006 informing me that the description and map are consistent and identify application area with reasonable certainty. I accept that assessment.

#### **Combined result for s. 190B(2)**

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

### *Section 190B(3)*

#### *Identification of the native title claim group*

The Registrar must be satisfied that:

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

#### **Result**

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

#### **Reasons**

The application does not name all the persons in the native title claim group. As a result, it is necessary for the application to meet the requirements of s. 190B(3)(b). In order to meet this condition of the registration test, the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

The description of the persons in the group is found at Schedule A of the application. The Birri People are described as the descendants of named ancestors who identify and are identified by others as belonging to the Birri people according to traditional law and custom. The names of 33 people follow.

The description in Schedule A seems capable of two interpretations.

1. The Birri people are the descendants of the listed apical ancestors. They also identify as, and are identified by others as Birri People.
2. The listed apical ancestors identified, and are identified by others, as belonging to the Birri people and the claim group comprises their descendants.

On balance I favour the second interpretation. I see these listed apical ancestors as Birri People acknowledged by others to be Birri People and known to be Birri People by the contemporary community of native title holders according to traditional law and custom.

I am satisfied that there is information in the application that supports the existence of traditional law and custom. Applicant Name Withheld for Cultural Reasons, one of the persons named as the applicant, provides information in his affidavit sworn 31 August 2006 about traditional law and custom – Attachment F2. As said above, Applicant Name Withheld for Cultural Reasons has passed away. However, I believe I can still have regard to the contents of his affidavit. Applicant Name Withheld for Cultural Reasons was an elder of the native title claim group. Applicant Name Withheld for Cultural Reasons states that he is one of the persons named as the applicant and supplies information about the existence of, and observance of, the customary law of the Birri people. He outlines his family background and his family's involvement with traditional law and custom. He also describes some traditional laws and customs but declines to discuss others for cultural reasons – at [40].

Applicant Name Withheld for Cultural Reasons's affidavit is supported by that of his brother Mr Algon Walsh Jnr. sworn on 29 June 2007. He speaks of the origin of the native title claim group's laws and customs and of these being passed down from generation to generation – [16] to [22]. Mr Walsh says that:

The rights to country originally held by Moonduga at the time of creation (and in succession thereafter passed onto us by our ancestors) is the very essence of whom we are and of what we stand for both as Birri People and as aboriginal people. It identifies us and sets us apart. It forms the basis of how we identify and interact with each other as Birri People and how we identify and react with the rest of the world – at [28].

He says that the laws and customs have basically remained unchanged since before European contact and gives examples of the same – at [30] and [31]. He also gives examples of the contemporary observance of traditional laws and customs and of the manner in which he observes the same – at [32] and [33].

I am satisfied that traditional laws and customs existed and exist. I am of the view that it is reasonable to accept for the purposes of the registration test that they would have resulted in the named persons being Birri people and being identified by others as Biri people.

I also refer to Schedule A of the amended application filed on 19 September 2001. While this schedule does not form part of the current application, I have had regard to it for the purpose of interpreting the description in Schedule A of the current application. Schedule A (19 September 2001) described the native title claim group as 'constituted by individuals who can trace their descent from one of the following people', i.e. in other words 'descendants' of the named people. There is no further process of identification of the descendants. The second interpretation seems consistent with that approach.

I also see that at Attachment R 2 there is a database which is said to be held by the applicant's legal representative that contains the contact details of all members of the Birri Claim Group whom are known to assert Birri identity or whom have previously attended authorisation meetings or whom had previously been accepted as being part of the Birri Claim Group—at [11].

In *State of Western Australia v Native Title Registrar* [1999] FCA, 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—at [1591]–[1594].

I accept that a description of the native title claim group in terms of named ancestors and their descendants is acceptable under s. 190B(3)(b), even though these descendants are not named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group. In my opinion, whilst the database referred to above is not said to name all members of the native title claim group, its existence indicates that such enquiries are capable of being carried out and have been carried out to assist in this identification process.

I am satisfied that a description of the group as descendants from the identified ancestors is a sufficiently clear description so that it can be objectively verified whether any particular person is in the native title claim group.

## *Section 190B(4)*

### *Native title rights and interests identifiable*

The Registrar must be satisfied that the description contained in the application as required by s. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

#### **Result**

The application **satisfies** the condition of s. 190B(4).

#### **Reasons**

It is my view that to be satisfied under s. 190B(4) the description of the claimed native title rights and interests must have a meaning that is clear and understandable. In other words: do they make sense?

Schedule E contains the description of the native title rights and interests claimed in this application. I am satisfied that the description provided of the claimed native title rights and interest is clear and understandable and that, hence, they are readily identifiable.

## *Section 190B(5)*

### *Factual basis for claimed native title*

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

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

### **Delegate's comments**

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 29 below.

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

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

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

The following material addresses the described assertion. Schedule F refers to Attachment F. Schedule G is a list of 17 activities that members of the native title claim group currently carry out on the application area. Schedule M refers to Schedule G, Attachment F and the affidavit of Applicant Name Withheld for Cultural Reasons at F2 as evidencing the traditional physical connection of the claim group with the application area.

Attachment F asserts that the native title claim group have, and the predecessors of those persons had, an association with the area.

Attachment F includes the following information in support of this assertion:

1. The native title claim group is a contemporary community who are descended from, and identify as, the Birri People.
2. The association of the Birri predecessors with the area subject to this application (the "claim area") is well documented in historical ethnographic literature. From early ethnographic accounts (especially Tindale and Kerr), it can be inferred that at the time of early colonial contact the Birri people were a distinctive tribal and language group who occupied an area bounded roughly by the Burdekin River near the town of Charters Towers to the east, north to the Haughton River and Haughton Valley, across to or near the Clark Ranges at Mt Aberdeen, along the Clark Ranges to the headwaters of the Bowen River south to the Leichhardt Ranges along the Leichhardt Ranges to an area near the junction of the Cape and Burdekin Rivers.
3. During the contact period, the Birri People maintained fierce resistance. There were sporadic outbreaks of violence and resistance to intrusion over a period of 10 to 20 years. Organised acts of resistance were mounted throughout the claim area, but principally these exchanges were with pastoralists.  
The Native Police were brought in to put down the uprising. Native Police barracks were established at several locations within the claim area.  
There were many European settlers killed in these early exchanges. Several massacres of Birri People are known to have occurred. Sites and other evidence of such massacres are still known to exist.
4. In the period following contact and resistance, the Birri People who remained in or near their homelands were largely gathered on pastoral stations. These stations included Strathmore, Urana, Pretty Bend and a number of other smaller pastoral stations in the area.



There is recorded evidence on Strathmore station of the Birri men being used as stockman and the Birri women for domestic purposes. That practice continued for a number of years and provided the basis upon which the owners of Strathmore and other pastoral holdings were able to establish themselves.

After the government of the day commenced to enforce its removal and dispersal policies, women, children and old men were removed to reserves at Yarrabah, Palm Island, Baku Creek, Woorabindah, Cherborg and Purga.

The men whom were still capable of working as stockman were allowed to remain on the various pastoral stations situated with the claim area. There are recorded instances of some Birri women being granted an exemption and being allowed to return to their country to work as cooks and other domestic help.

5. The contemporary native title claim group are descended from the original Birri People. Amongst the members of the group there is a high degree of mutual recognition as being part of the one Birri community. There is an identifiable Birri society.
6. The native title claim group maintains an association with the claim area through, amongst other things the following.
  - a. Many members of the group were born within the claim area and many are resident in Bowen, Collinsville, Proserpine and surrounding areas,
  - b. Members of the group use the area, including for hunting, fishing and gathering, and other activities listed in Schedule G of this application.
  - c. There is within the group knowledge of a repertoire of sites of significance in the claim area and of sacred stories associated with some sites.
  - d. The group as a whole has actively asserted traditional ownership rights to claim area, including by asserting the right to negotiate in relation to significant developments on their country, and by actively participating in the protection of Birri cultural heritage in the face of such developments.
  - e. A strong awareness of, and assertion of, connectedness to one's country in the claim, area together with one's people, is an integral aspect of Birri cultural identity. This relationship with land in the claim area gives rise to the Birri people's identity as well as the foundation for ownership of land and resources. As well as land ownership, ancillary rights and interests also arise through this relationship with land.
7. Some examples of the associations with the claim area maintained by members of the native title claim group are contained in the affidavit of Applicant Name Withheld for Cultural Reasons which forms Attachments F2 to this application.

The affidavit of [Applicant 1 – name deleted] sworn 31 August 2006 (Attachment F2) refers to family members being born on or near the application area. He also speaks of his 'Bullo', [Claimant 1 – name deleted], and his family and others having a connection to the claim area. He says that he hunted, gathered, prepared and consumed food from Birri traditional country in accordance with Birri culture. He speaks of his father and Bullo going to Birri country and visiting sacred places—at [3] to [5], [9] and [10] to [41].

In his affidavit sworn 29 June 2007, [Applicant 2 – name deleted] speaks of the origin of the Birri People's law and custom, of his family's links with the country and that of other Birri people. He asserts that according to the stories that have been handed down to him the 'Berri people' 'have been here since creation' [22]. He says that the rights to country is the very essence of whom the Birri people are and what they stand for both as Birri People and as aboriginal people [28]. He says that 'we are inextricably connected with our country' —at [29]. See also [16] to [29].

[Applicant 3 – name deleted] says in his affidavit sworn 26 August 1999 that his grandmother, mother and he were was born in the area and that 'we've never left that country. We've always stayed in that country'.

He also speaks of activities carried out in the application area. He says that he and his brothers worked there. He also speaks of the connection of his people with the country – at [1] to [24].

I also see that on or about 14 December 2005 the Birri People and Kudjala #2 People reached agreement resolving their overlapping claims. This indicates to me that the Kudjala #2 People recognise that the Birri People have, and the predecessors of those persons had, an association with the area.

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

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

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

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

Schedule F refers to Attachment F where the applicant states that there exist traditional laws and customs that give rise to the claimed native title. Schedule E describes those rights and interests which are said to derive from and be exercisable by reason of the existence of native title.

Attachment F states that:

8. Amongst members of the group there is knowledge and observance of traditional laws and customs. Examples of contemporary observance of traditional laws and customs include the following.
  - a. Ritual initiation of male members of the group. Male initiation ceremonies are practiced at Urana which is situated within the claim area.
  - b. Initiated men keep ceremonial knowledge secret.
  - c. Initiated men have knowledge of how to rid people and places of unwanted spirits.
  - d. Members of the group retain and recount knowledge of sacred stories and sacred places and dreaming tracks. These include dreaming stories, which come onto Birri country. One such story concerns Mundeguddah a water serpent whom formed all of the mountains and rivers as he came through Birri country. He gave the Birri People all of their natural resources and still lives in the rivers and water system.
  - e. Some members of the group have personal totems and beliefs associated with them including food taboos.
  - f. There is belief in rules about how to interpret environmental signs and behave accordingly to avoid breaking the law and suffering consequences.
  - g. Members of the group consume bush foods and use bush medicines.
  - h. Members of the group have personal encounters with spiritual or supernatural beings.
  - i. The members of the group have detailed knowledge of their ancestry and familial relations.
  - j. Connectedness to one's people as well as one's country, which has its origins deep within the traditional laws and customs of the group, remains an integral aspect of contemporary Birri cultural identity.
  - k. Members of the group still partake in traditional ceremonies. For example a smoking ceremony is performed upon a persons death. Corobbee's [sic] are still performed some of which are secret and are only known to the Birri people.

- I. There is a system of traditional dispute resolution involving a council of elders.
- m. There is a traditional system governing rules of marriage, which amongst other things, sets rules whereby a Birri person can only marry within the right skin group.
- n. There is a traditional set of laws and customs governing a person's behaviour and imposing traditional forms of punishment for breach of those rules. Such punishment may (depending upon the nature of the breach) include temporary or permanent banishment from the community and may also extend to other forms of physical punishment.

I am satisfied that the affidavits of [Applicant 1] and [Applicant 2] referred to above, adequately support the information in Attachment F. For instance, [Applicant 2] outlines the origin of the group's laws and customs. He also gives examples of the contemporary observance of traditional laws and customs and examples of how he observes the same—at [16] to [33].

I also refer to the affidavit of [Applicant 3] sworn 26 August 1999 in which he speaks of the existence of traditional laws and customs and their observance. For instance at [3] he speaks of learning the 'ways of the old people' and being taught to respect elders. He speaks of being taught to hunt, fish, about bush medicine and about country by the old people—at [4] to [6].

Schedule G lists details of activities currently carried on in relation to the land and waters the subject of the application to support these traditional laws and customs. Seventeen (17) activities are listed. These activities include, visiting the area, hunting and gathering, travelling to significant sites on the area, camping on the area, the use of the area for customary and cultural activities and the protection and management of cultural or traditional sites.

Having regard to the information contained in the application, and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that traditional laws and customs exist; 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.

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

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

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

Attachment F asserts that the native title claim group has continued to hold native title in accordance with its traditional laws and customs and includes the following information in support of this assertion:

- 9. The Birri communities in and near to the claim area in the early twentieth century formed a link between the Birri People encountered by early pastoralists and ethnographers, and the contemporary group resident principally in Bowen, Collinsville, Proserpine, Mackay, Townsville and other towns in the region. These communities maintained a physical connection with Birri country, an identifiable Birri society and a body of traditional knowledge and practice, which has been transmitted to members of the present group.
- 10. Members of the contemporary native title claim group retain a body of cultural knowledge and continue to acknowledge and practice traditional laws and customs. They continue to assert their connectedness to the claim area and to take steps to have that relationship recognised through negotiations and legal processes.

11. Birri native title rights and interests in country have been affected by the grant of tenures, including pastoral leases, mining leases and mineral exploration permits. There has, however, been no wholesale extinguishment of native title in relation to significant tracts of land in the claim area.

The affidavits referred to above also provide support for the assertion that the native title claim group has continued to hold native title in accordance with their traditional laws and customs.

For instance, in his affidavit referred to above [Applicant 2] gives examples of the contemporary observance of traditional laws and customs as follows:

32. Some examples of the contemporary observance of traditional laws and customs are as follows:
  - (a) Ritual initiation of male members of the group. Male initiation ceremonies are practiced at Urana which is situated within the claim area.
  - (b) Initiated men keep ceremonial knowledge secret.
  - (c) Initiated men have knowledge of how to rid people and places of unwanted spirits.
  - (d) Members of the group retain and recount knowledge of sacred stories about Moonduga and sacred places and dreaming tracks. These include dreaming stories, which come onto Birri country.
  - (e) Some members of the group have personal totems and beliefs associated with them including food taboos.
  - (f) There is belief in rules about how to interpret environmental signs and behave accordingly to avoid breaking the law and suffering consequences.
  - (g) Members of the group consume bush foods and use bush medicines.
  - (h) Members of the group have personal encounters with spiritual or supernatural beings.
  - (i) The members of the group have detailed knowledge of their ancestry and familial relations.
  - (j) Connectedness to one's people as well as one's country, which has its origins deep within the traditional laws and customs of the group, remains an integral aspect of contemporary Birri cultural identity.
  - (k) Members of the group still partake in traditional ceremonies. For example a smoking ceremony is performed upon a person's death. Corobbee's [sic] are still performed some of which are secret and are only known to the Birri people.
  - (l) There is a system of traditional dispute resolution involving a council of elders.
  - (m) There is a traditional system governing rules of marriage, which amongst other things, sets rules whereby a Birri person can only marry within the right blood line.
  - (n) There is a traditional set of laws and customs governing a person's behaviour and imposing traditional forms of punishment for breach of those rules. Such punishment may (depending upon the nature of the breach) including shaming, temporary or permanent banishment from the community and may also extend to other forms of physical punishment.
  - (o) Rules about access to country are still observed. Birri People will not go onto another clans country without first asking permission.
  - (p) Birri people still actively manage and protect their country and secret sites. Birri People still respect rules governing access to sites.
  - (q) Birri People still sing out when on country to respect country and so as not to upset the spirits.
  - (r) Lawmen still practise, teach and enforce our laws and customs.

He also deposes that he has attended and participated in a number of corroborees over the years on Birri country and that he was taught by family members and 'old Berri people' about marriage customs and other social rules about kinship and how Birri people must behave. His Bullo, father, other close relatives and elders taught him about bush medicine which he has used. He also says he has been involved in environmental management of Birri country and cultural heritage protection on that country. Mr Walsh also says that he makes decisions about, and speaks for, 'our country' because of rights that were given to them by Moonduga at the time of creation—at [33].

While it is likely that there has been some adaptation in the group's traditional laws and customs due to the impact of colonization, as stated by the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 (*Yorta Yorta*):

The key question is whether the law and custom can still be seen to be a traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples...

Based on the information before me, I am satisfied for the purposes of the registration test that, despite some change or adaptation of the laws and customs of the claim group from the time of British sovereignty, they may still be seen to be traditional laws and customs, as that term is used in *Yorta Yorta*.

I am of the view that the asserted facts are sufficient to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

### **Combined result for s. 190B(5)**

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

## *Section 190B(6)*

### *Prima facie case*

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

### **Result**

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

### **Reasons**

Under s. 190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered.

In *Doepel*, Mansfield J noted that s. 190B(6), together with ss. 190B(5) and (7), clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s. 190A(3) may be relevant— at [16].

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

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

I have adopted the ordinary meaning referred to by their Honours in considering this application.

I note that the meaning of ‘prima facie’ was considered in and approved in *Doepel* at [134] to [135]. Briefly, the Court concluded that although the above case was decided before the 1998 amendments to the Act, there is no reason to consider the ordinary usage of ‘prima facie’ there adopted is no longer appropriate.

I am of the view that my task under s. 190B(6) is to consider whether there is any probative factual material before me evidencing the existence of the particular native title rights and interests claimed, having regard to relevant law about what is a native title right and interest (as that term is defined in s.223).

Under this condition I believe I must consider whether the claimed rights and interests have been found by the courts to be native title rights and interests within s. 223. If a claimed right and interest has been found by the courts to fall outside the scope of s. 223, then it will not be capable of being established prima facie for the purposes of s. 190B(6).

The native title rights and interests claimed by the applicants are set out in Schedule E of the application. I have retained the numbering of the paragraphs as in Schedule E of the application.

I turn now to a consideration of whether the native title rights and interests claimed in Attachment E can be established prima facie:

7. Over areas where a claim to exclusive possession can be recognized (such as areas where there has been no prior extinguishment of native title or where s. 238, ss. 47, 47A or 47B apply), the Birri People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

### ***Established***

In *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*), the majority of the High Court found that a right of possession, occupation, use and enjoyment is the fullest expression of native title there is and where ‘native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms’ – at [51].

The Court said:

The expression ‘possession, occupation, use and enjoyment ... to the exclusion of all others’ is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of ‘possession’ of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms – at [89].

Therefore a claim to possession, occupation, use and enjoyment is only capable of being established prima facie in relation to those areas where a claim to exclusive possession can be recognised. In light of the comments in *Ward*, I am of the view that in order to prima facie establish this claimed right, there must be sufficient information available to establish, prima facie, the right of the claim group to control access to and use of those parts of the claim area in relation to which a right to exclusive possession can be recognized.

Schedule G says that the group currently protects and manages the claim area and in particular cultural or traditional sites—at [9].

There is some supporting affidavit evidence of a right of the claim group, under traditional law and custom, to control access of people to the claim area.

For example, [Applicant 2] states in his affidavit when speaking of the origins of law and custom that:

21. That spiritual origin that we as Birri People have is the thing that gives all of us Birri People our identity, our laws, our rights and obligations to country. Our identity is inextricably linked with the country and our dreamings.
22. Those laws meant that we as the Birri People hold separate rights and interests (as opposed to other aboriginal people) in respect to our country. In accordance with the stories that have been handed down to me - we (the Birri People) have been here since creation. That can never be taken away from us.
23. Some of those rights and interests differ for different parts of our country. For example the descendants of [Ancestor 1 – name deleted] speak for the area around Ravenswood whilst at the same time enjoying common rights along with all of the other Birri People in other areas of Birri country. The descendants of Maggie Callaghan (the [Family name 1 – name deleted] and [Family name 2 – name deleted] families) speak for the area around Strathmore and Collinsville. But we are all still Birri People and are all bound by those laws and customs that were handed to us by Moonduga.
24. Those laws and customs did, in addition to creating our rights and interests to country also imposed obligations upon us as Birri People to manage and protect our country, to defend our country, to protect and keep secret important sites, our stories, our secret and sacred places and our traditional rituals and beliefs.

He also says:

31. Some examples of our laws and customs that were in existence at the time of European contact were:
  - (a) The Birri People have no right (without permission) to enter other adjoining clans country. Equally the Birri People had a right to exclude others from their country. If people from other groups tried to enter Birri country or entered Birri country without permission - there would be a big fight as our ancestors had an obligation to defend and protect their country. If such an event occurred it was interpreted as them challenging us and challenging our sovereignty. These fights were often violent and in some cases people could be speared and killed.

It was Birri law that if any Birri People wanted to enter another clans country they must ask first permission to do so. Before European contact (and for a long time thereafter) if we wanted to enter the country of another clan - we would tell those people (whose country we wanted to enter) where we were and warn them of our presence by lighting a fire ("Boori").
  - (b) As a Birri person you had an exclusive right along with all other Birri people within the boundaries of their country to live off the land and to share, use and exploit the natural resources offered by the land in order to exist and flourish.

- (c) As part of the right to use and exploit Birri country (that was inherited from Moonduga) the Birri People were also charged with the responsibility to maintain, manage and protect their country. As a result, there were laws and customs that governed the management and use of the country. The Birri People were only able to use the natural resources provided by the land to the extent that they needed to survive and trade. It was a sign of disrespect to waste any of those resources.
- (d) All major decision-making was undertaken by the elders. They met and decided issues of importance to our community.

[Applicant 2] also says that rules about access and protection of country are still observed – at [33]:

- (o) Rules about access to country are still observed. Birri People will not go onto another clans country without first asking permission.
- (p) Birri people still actively manage and protect their country and secret sites. Birri People still respect rules governing access to sites.
- (q) Birri People still sing out when on country to respect country and so as not to upset the spirits.
- (r) Lawmen still practice, teach and enforce our laws and customs.

Similar statements are made in [Applicant 1]'s affidavit. He said that because of the authority vested in him as an elder he had authority to maintain and protect places of importance under traditional law and custom and that he had authority to speak about and make exclusive decisions about the application area. He also said that he was entitled to speak authoritatively about the area amongst other Aboriginal people and control access and use by other Aboriginal people in accordance with traditional law and custom – at [44 (h) (j) (k) and (l)].

I am of the view that there is sufficient information available to prima facie establish a right of possession, occupation, use and enjoyment in relation to certain parts of the application area. I am satisfied that, on the basis of the information available to me, this claimed right can be established prima facie in relation to those areas where a claim to exclusive possession can be sustained.

I turn now to consider the rights and interests claimed in [8].

- 8. Over land and waters where a claim to exclusive possession cannot be recognised, the Birri People claim the following rights and interests:

***(a) the right to access the application area – established***

Schedule G contains information about several activities which involve accessing the application area, such as using the area for customary, cultural and ceremonial purposes and hunting, gathering and fishing within the area.

The affidavit evidence referred to above also supports this claimed right, for example, there is evidence that the deponents travel around the area and access the area for the purposes of hunting, fishing and gathering of bush foods and other products.

I am satisfied that there is sufficient information available to prima facie establish this claimed right.

***(b) the right to camp on the application area – established***

Schedule G includes camping on the application area as one of the listed activities of the claim group – at [6]. This is adequately supported by the affidavits to which I have referred above. For instance, [Applicant 1] says that he accessed and camped on the application area – at [42(b)]. Also [Applicant 2] speaks of activities relating to the observance of traditional laws and customs which are consistent with camping on the area of



the application. He says that members of the group still consume bush foods, use bush medicines engage in ritual initiation of male members of the group and in other traditional ceremonies— at [32]. I am of the opinion that it is reasonable to accept that these activities would involve camping on the application area.

I am satisfied that there is sufficient information available to prima facie establish this claimed right.

***(c) the right to erect shelters on the application area— established***

I take this right to relate to the erection of temporary shelters as opposed to permanent structures or residences. I am of the view that the erection of such shelters would be incidental to and consistent with members of the native title claim group accessing the area, hunting, fishing and gathering and camping on the application area.

There is some affidavit evidence in support of this claimed right, for example, the affidavit of [Applicant 1] refers to the existence of ‘old Murri camps’ — at [20].

I am satisfied that there is sufficient information to prima facie establish this claimed right.

***(d) the right to live on the application area— established***

Attachment F states at [6 a.] that the native title claim group maintains an association with the area and that many members of the group were born in the area and that many are resident within the area or in surrounding areas. Members of the group are also said to use the area for hunting fishing and other activities listed in Schedule G.

I am also satisfied that there is affidavit evidence in support of this claimed right. [Applicant 3] in his affidavit sworn 26 August 1999 tells of him and his family living and working in the application area.

***(e) the right to move about the application area— established***

I refer to my reasons above in relation to (a). For the same reasons I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

***(f) the right to hold meetings on the application area— established***

Schedule G states that members of the native title claim group actively conduct negotiations with various interest groups and stakeholders in relation to activities on the area covered by the application. These statements are supported by the affidavit evidence of [Applicant 1]. He speaks of having led negotiations in respect of future act matters and of arranging meetings of the applicant and claim group. He also says that he negotiated, arranged and attended numerous cultural heritage surveys and salvages. I am of the view that these statements support a claimed right to hold meetings on the application area. I say this because in my opinion the activities outlined would involve having meetings on the application area.

I also refer to the information in respect of (k) and (l) below. Those activities would involve meeting on the application area.

I am of the view that there is sufficient information before me to prima facie establish this claimed right.

***(g) the right to hunt on the application area— established***

The applicant says in Schedule G of the application that members of the claim group currently hunt within the application area. This assertion is supported by affidavits of [Applicant 1], [Applicant 2] and [Applicant 3]. For instance, [Applicant 1] states he has the right to hunt in the area— at [42(f)].

[Applicant 3] also speaks of hunting in the area— at [3] and [4].

I find that there is sufficient information before me to prima facie establish this claimed right.

***(h) the right to fish on the application area—established***

In Schedule G the applicant states that members of the claim group currently engage in fishing within the application area. This assertion is supported by affidavit evidence. [Applicant 1] refers to his right to hunt, fish, gather and use the natural resources of the application area in [42] of his affidavit. Similarly in his affidavit [Applicant 3] speaks of hunting, fishing and gathering—at [3].

I find that there is sufficient information available to establish prima facie this claimed right.

***(i) the right to have access to and use the natural water resources of the application area—established***

I refer to my reasons under (h) above and to the information outlined there. I also refer to the affidavit of [Applicant 3]. At [3] of his affidavit he says that he hunted and walked the watercourses to catch freshwater crays, mussels and fish of various types. He also refers to using different types of plants for stunning fish. I am satisfied that the implication is that the watercourses were within the application area.

Further, I am of the opinion that it is reasonable to accept that water resources would be used while members of the native title claim group moved about and camped on the application area.

I am satisfied that there is sufficient information to support the establishment prima facie of a claimed right to use the natural water resources of the application area.

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

Schedule G at [12] to [14] states that members of the claim group collect resources for food and for cultural purposes and collect flora, fauna and mineral resources for medicinal and cultural purposes. Also in Schedule F at [8(g)] the applicant says that members of the group consume bush foods and use bush medicines. This clearly involves gathering the same. These assertions are supported by [Applicant 2] who at [32(g)] of his affidavit speaks of members of group consuming bush foods and using bush medicine. Similarly, at [3] and [4] of his affidavit [Applicant 3] speaks of gathering and use of a variety of bush foods and bush medicine.

I am of the view that there is sufficient information before me to establish prima facie this claimed right.

***(k) the right to conduct ceremony on the application area—established***

Schedule G states at [2] that members of the claim group use the application area for customary, cultural and ceremonial purposes. Similarly, Attachment F says at [8 a] that ritual initiation of male members of the group is carried out. In particular, male initiation ceremonies are practiced at Urana which is located in the claim area. [Applicant 2] confirms this in his affidavit. He states at [32 (a)] that male initiation ceremonies are practised at Urana which is situated within the claim area. He also speaks at [32 (k)] of members of the claim group still participating in traditional ceremonies, for example, smoking ceremonies when a person dies. He also deposes that corroborees are performed, some of which are secret and are only known to Birri people.

I am of the view that there is sufficient information before me to prima facie establish this claimed right.

***(l) the right to participate in cultural activities on the application area—established***

The applicant states at [2] in Schedule G that members of the claim group use the application area for customary, cultural and ceremonial purposes and visit and maintain cultural or traditional sites. Affidavit evidence supports these assertions. For instance, [Applicant 2] states in [32 p] of his affidavit that Birri people still actively manage and protect their country and sacred sites. He also says at [33 (e) and (f)] that he has undertaken cultural heritage protection on Birri Country and has been involved in many cultural heritage projects. [Applicant 2] also says that he has been employed to facilitate cultural heritage investigations, surveys and clearances in all areas throughout Birri country – at [33].

I am of the view that there is sufficient information before me to prima facie establish this claimed right.

***(m) the right to maintain places of importance under traditional laws, customs and practices in the application area – established***

Schedule G states at [9] and [10] that members of the claim group are engaged in the protection and management of the claim area and in particular cultural or traditional sites and that they visit and maintain cultural or traditional sites.

There is affidavit evidence in support of these statements. I refer to the affidavit of [Applicant 2] including the information I have outlined in respect of (l) above.

I find that there is sufficient information available to establish prima facie this claimed right.

***(n) the right to protect places of importance under traditional laws, customs and practices in the application area – established***

In relation to the use of the word ‘protect’ in this claimed right, I am satisfied that it does not involve an assertion of a right to control access and to exclude others from the claim area. In this regard, I note the comments of the Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*) in relation to a claimed right to ‘have access to, maintain and protect places and areas of importance on or in the land and waters ...’ where it was found that such a right did not necessarily imply a general control of access – at [136] to [140].

In light of the above, I find that this right is capable of being established prima facie in relation to those areas where a claim to exclusive possession cannot be recognized.

***(o) the right to conduct burials on the application area – not established***

Schedule G refers generally to members of the claim group using the application area for ‘customary, cultural and ceremonial purposes’. There is some information that indicates that Birri people are buried within the application area. However, in my view there is insufficient information to support the establishment prima facie of the right to conduct of burials within the application area.

I refer to s. 190(3A) of the Act. This section 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.

***(p) the right to speak for and make non-exclusive decisions about the application area – not established***

In the decision of *Neowarra v State of Western Australia* [2003] FCA 1402 at [494] Sundberg J was of the view that the right to speak for country involves a claim to ownership and could only be recognised in relation to areas where exclusive possession could be established. I note also the decision of French J in *Sampi v State of Western Australia* [2005] FCA 777 where his Honour stated:

The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [1072].

I am of the view that the right to speak for the application area cannot be established prima facie in relation to those areas where exclusive possession cannot be recognised. I note that this right is expressed as a composite right, namely the right to speak for and make non-exclusive decisions about the application area. I am therefore of the view that if one part of the right cannot be established, the overall right cannot be established. I add that I am unable to find that part of the claimed right has been established as that would involve amending the right claimed. Further, I am of the view that the claimed right to make non-exclusive decisions about the application area is not sufficiently clear in its scope and meaning.

I find that this right is not capable of being established prima facie in relation to those parts of the application area where a claim to exclusive possession cannot be recognised.

***(q) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs—not established***

In my view it is doubtful whether this claimed right can be characterised as a right in relation to land and waters as required by s. 223.

I also refer to my comments above in relation to the right claimed at (p) as also being relevant in relation to this right.

I am of the view that this claimed right implies a claim to control access and as such can only be recognised in relation to those areas where exclusive possession can be sustained. In my view, the restriction of this right to other Aboriginal people does not assist.

I am not able to find that this claimed right is capable of being established prima facie for the purposes of s. 190B(6).

***(r) the right to control access to the application area by other Aboriginal People in accordance with traditional laws and customs—not established***

Without a right to exclusive possession it is doubtful that there is any right to control access to land—see *Ward* at [52].

The right claimed here to control access to the area implies a degree of ownership that is inconsistent with a claim to non-exclusive possession. Although this right is phrased only in relation to other Aboriginal people I am of the view that it still implies a claim to exclusive possession of the area and a right to make decisions about the use of and access to the land by others that is not able to be sustained in relation to areas where exclusive possession cannot be established.

For the above reasons I find that this right is not capable of being established prima facie in relation to those areas where a claim to exclusive possession cannot be sustained.

***(s) the right to control use of the application area by other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional laws and customs—not established***

For the same reasons as outlined above in relation to right claimed at (r) I am of the view that this right cannot be established prima facie in relation to those areas where a claim to exclusive possession cannot be sustained.

***(t) the right to determine and regulate membership of and recruitment to the native title claim group—not established***

In *Daniel v Western Australia* [2003] FCA 666 the court held that a similarly phrased right, being a right to identify and acknowledge members of the native title claim group, was not a right that gives rise to a connection to land or waters as required by s. 223—at [303].

By reason of the above I am of the view that this right is not capable of being established prima facie for the purpose of s. 190B(6).

***(u) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites—not established***

In my view it is doubtful that this claimed right is a native title right and interest within the meaning of section 223 on the basis that it is not a right in relation to land or waters. It would seem to be a right in relation to people in that it involves the transmission of cultural heritage and knowledge between claim group members and perhaps others. As such I am unable to be satisfied that this right is capable of being established prima facie for the purposes of s. 190B(6).

I see that Schedule E also states:

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

### ***Conclusion***

I have found that at least some of the claimed rights and interests at Schedule E of the application can be established prima facie, namely; (a) to (n) inclusive. Consequently, I am satisfied that the requirements of s. 190B(6) are met.

## ***Section 190B(7)***

### ***Traditional physical connection***

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

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
  - (i) the Crown in any capacity, or
  - (ii) a statutory authority of the Crown in any capacity, or
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

## **Result**

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

## **Reasons**

I refer to Schedules G, M and Attachment F, extracts from which are set out above, and the affidavits to which I have referred. I find that they contains sufficient information for me to be satisfied that that at least one member of the native title claim group has, or had, a traditional physical connection with the land or waters covered by the claim.

## *Section 190B(8)*

### *No failure to comply with s. 61A*

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

## **Delegate's comments**

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61A(4). Therefore, I consider s 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 39.

### *No approved determination of native title: s. 61A(1)*

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

## **Result**

The application **meets** the requirement under s. 61A(1).

## **Reasons**

A search of the Tribunal's geospatial database by the Tribunal's Geospatial Services reveals that there are no approved determinations of native title over the application area.

### *No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)*

Under s. 61A(2), the application must not cover any area in relation to which

- (a) a previous exclusive possession act (see s. 23B)) was done, and
- (b) either:
  - (i) the act was an act attributable to the Commonwealth, or
  - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:

- (a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

## **Result**

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

## **Reasons**

Schedule B of the application excludes from the claim area any land covered by previous valid exclusive possession acts as defined in s. 23B. I am therefore satisfied that the application is not made over any such areas.

## *No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)*

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

- (a) a previous non-exclusive possession act (see s. 23F) was done, and
- (b) either:
  - (i) the act was an act attributable to the Commonwealth, or
  - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

- (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

## **Result**

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

## **Reasons**

Schedule B of the application states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State of Queensland. I am satisfied that the requirements of s. 61A(3) are met.

## **Combined result for s. 190B(8)**

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

## *Section 190B(9)*

## *No extinguishment etc. of claimed native title*

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

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

### **Delegate's comments**

I consider each subcondition under s. 190B(9) in turn and I come to a combined result at page 40 below.

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

The application **satisfies** the subcondition of s. 190B(9)(a).

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

Schedule Q states that no claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown.

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

The application **satisfies** the subcondition of s. 190B(9)(b).

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

Schedule P of the application states that the applicant does not claim exclusive possession of all or part of any offshore place.

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

The application **satisfies** the subcondition of s. 190B(9)(c).

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

The application does not disclose that the claimed native title rights and interest have been extinguished. I am not aware of the claimed native title rights and interests claimed being otherwise extinguished. The area covered by the application excludes any land or waters where native title rights and interests have been otherwise extinguished—at Schedule B [6].

#### **Combined result for s. 190B(9)**

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]



# Attachment A

## Information to be included on the Register of Native Title Claims

Application name:	Birri People
NNTT file no.:	QC98/12
Federal Court of Australia file no.:	QUD 6244 of 1998
Date of registration test decision:	14 August 2007

In accordance with ss. 190(1) and 186 of the *Native Title Act 1993* (Cwlth), the following is to be entered on the Register of Native Title Claims for the above application.

### *Section 186(1): Mandatory information*

**Application filed/lodged with:**

National Native Title Tribunal

**Date application filed/lodged:**

2 April 1998

**Date application entered on Register**

The date of the decision

**Applicant**

Mr David Miller, Name Withheld for Cultural Reasons, Mr Frank Fisher, Mr Colin McLennan, Mr Allan Fisher, Mrs Heather Tilberoo, Ms Grace Smallwood, Mr Algon Walsh Jnr.

Note: Name Withheld for Cultural Reasons died on 8 October 2006.

**Applicant's address for service:**

Suit 3B, 41 Stuart Street (PO Box 1013)  
Townsville Qld

**Area covered by application:**

As per Schedule B and Attachment B

**Persons claiming to hold native title:**

As per Schedule A of the application

**Registered native title rights and interests:**

Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply) the Birri People claim the right to possess, occupy, use and enjoy the land and waters within the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

Over land and waters where a claim to exclusive possession cannot be recognised, the Birri People claim the following rights and interests:

- (a) the right to access the application area;
- (b) the right to camp on the application area;
- (c) the right to erect shelters on the application area;
- (d) the right to live on the application area;
- (e) the right to move about the application area;
- (f) the right to hold meetings on the application area;
- (g) the right to hunt on the application area;
- (h) the right to fish on the application area;
- (i) the right to have access to and use the natural water resources of the application area,.
- (j) the right to gather and use the natural products; of the application area (including food, medicinal plants, timber, stone, earths, ochre and resin) according to traditional laws and customs;
- (k) the right to conduct ceremony on the application area;
- (l) the right to participate in cultural activities on the application area;
- (m) the right to maintain places of importance under tradition allows, customs and practices in the application area;
- (n) the right to protect places of importance under traditional laws, customs and practices in the application area.

The native title rights and interests are subject to:

- (a) The valid laws of the State of Queensland and the Commonwealth of Australia; and
- (b) The rights conferred under those laws.

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Graham Miner

Delegate of the Native Title Registrar pursuant to  
sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993 (Cwlth)*

# Attachment B

## Documents and information considered

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

Application Claiming Native Title (Form 1) lodged with the National Native Title Tribunal on 2 April 1998.

Letter from Heather Tilberoo dated 20 April 1999.

Letter from [Claimant 2 – name deleted] dated 20 April 1999.

Affidavit of Colin McLennan dated 26 August 1999.

Report to the Registrar of the National Native Title Tribunal prepared for Central Queensland Land Council (CQLC) by [Person 1 – name deleted] dated September 1999.

Affidavits of David Miller and Name Withdrawn for Cultural Reasons dated 24 September 1999.

Affidavits of Frank Fisher, [Claimant 3 – name deleted] and [Claimant 4 – name deleted] dated September 1999.

Affidavits of [Claimant 5 – name deleted], [Claimant 6 – name deleted] and [Claimant 7 – name deleted] dated 30 September 1999.

Affidavit of [Claimant 8 – name deleted] dated 4 October 1999.

Affidavit of Colin McLennan dated 7 October 1999.

Amendment Application filed in the FCA on 06 October 1999.

Letter from [Person 2 – name deleted] (CQLC) dated 13 October 1999.

Affidavit of [Claimant 9 – name deleted] dated 20 October 1999.

Facsimile from National Native Title Tribunal to CQLC dated 19 November 1999 re: letter from [Claimant 2]

Email from P Bowen to J Boileau dated 19 November 1999 re: Overlap analysis.

Facsimile from CQLC to National Native Title Tribunal dated 24 November 1999 re: Notice of Motion and affidavit of [Person 2].

Amendment application filed in the Federal Court on 24 November 1999.

Facsimile from CQLC to National Native Title Tribunal dated 29 November 1999 re: Letter from [Claimant 2] in response.

Letter from National Native Title Tribunal to CQLC dated 23 December 1999 re: Letter from H Tilberoo.

Facsimile from CQLC to National Native Title Tribunal dated 24 January 2000 re: Letter from H Tilberoo in response.

Letter from National Native Title Tribunal to State of Queensland dated 3 February 2000 re: Additional material. Material enclosed.

Reasons for registration test decision dated 7 February 2000.

Amended Claimant Application filed in the Federal Court on 3 August 2001.

Email from Michael Owens and Associates to National Native Title Tribunal dated 17 September 2001 attaching draft affidavit of Applicant Name Withheld for Cultural Reasons.

Letter from Michael Owens and Associates, Solicitors, to State of Queensland dated 18 September 2001 enclosing annexures to the above draft affidavit of Applicant Name Withheld for Cultural Reasons.

Amended Claimant Application filed in the Federal Court on 19 September 2001.

Affidavit of Applicant Name Withheld for Cultural Reasons and annexure dated 17 September 2001.

Reasons for registration test decision dated 21 September 2001.

GIRO II overlap analysis dated 25 September 2006.

Claimant Application Summary and Register Extract for QUD6001/01 Kudjala People 2

Indigenous Land Use Agreement (ILUA) Register Extracts for the following:

QI2002/049 - The North Queensland Gas Pipeline Southern ILUA.

QI2003/019 - The North Queensland Gas Pipeline Central ILUA.

QI2003/032 - Birri Indigenous Land Use Agreement for Backlog Exploration Permit.

QI2003/039 - Birri and Kudjala People Joint ILUA Exploration Permit Backlog Project.

QI2005/013 - Burdekin Pipeline ILUA.

Federal Court Orders dated 6 October 2005, 31 March 2006, and 19 June 2006.

The Amended Native Title Claimant Application filed in the Federal Court 31 August 2006 and all attachments.

Order of the Federal Court made by Justice Dowsett on 25 September 2006 in Kudjala People #2 (QUD 6001/2001).

Geospatial Assessment and Overlap Analysis dated 3 October 2006 prepared by the National Native Tribunal's Geospatial Services.

Letter dated 1 July 2007 from Michael Owen and Associates, Solicitors, to Louise Casson, The Case Manager, National Native Title Tribunal, enclosed affidavits of Algon Walsh Jnr. sworn 29 June 2007 and Michael John Owens sworn 29 June 2007.

# Attachment C

## Application overview

The original claimant application (Form 1) was lodged with the National Native Title Tribunal on 2 April 1998.

A notice of motion to amend the application was filed in the Federal Court on 6 October 1999. The Court granted leave to amend the application on 18 October 1999. A further amendment of the application was sought in the Federal Court on 24 November 1999. Leave was granted to amend the application on 30 November 1999.

An amended application was filed in the Federal Court on 3 August 2001. The Federal Court granted leave to amend the application on 21 August 2001 and directed that the applicant file and serve a completed re-engrossed Form 1 application by 4 September 2001. On 19 September 2001 an amended application was filed in the Federal Court and leave was granted to amend on 20 September 2001. On 21 September 2001 the application was accepted for registration pursuant to s. 190B and s. 190C of the Act.

On 6 October 2005 the Federal Court ordered that the applicant file and serve any further amended application no later than 28 February 2006 and that, in default thereof, the applicant show cause on 31 March 2006 why the application should not be dismissed. By further order made on 31 March 2006 the Federal Court varied the time from 28 February to 31 March 2006. Again on 19 June 2006 the Federal Court extended the time until 31 August 2006. On 31 August 2006 an amended application was filed in the Federal Court. That is the current application.

# Attachment D

## Procedural fairness steps

Copies of the following material provided directly to the Registrar by the applicant in relation to my consideration of the application were provided to the State of Queensland: Letter dated 1 July 2007 from Michael Owen and Associates, Solicitors, to Louise Casson, Case Manager, National Native Title Tribunal and enclosed affidavits of Algon Walsh Jnr. sworn 29 June 2007 and Michael John Owens sworn 29 June 2007.

The State did not provide any comments in relation to this or any other material.

[End of document]