National Native Title Tribunal

Registration test decision

Application name:	Jinibara People
Name of applicant:	Kenneth Murphy, Noel Blair.
State/territory/region:	Queensland
NNTT file no.:	QC98/45
Federal Court of Australia file no.:	QUD6128 of 1998
Date application made:	29 September 1998
Date application last amended:	13 June 2007
Name of delegate:	Kristy Eulenstein

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: 22 June 2007

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Kristy Eulenstein

Delegate of the Native Title Registrar pursuant to section 99 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 (the 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.

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar. The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims (the Register) under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal (the Tribunal), including myself, on 17 May 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register, 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 A of these reasons lists all of the information and documents that I have considered in reaching my decision.

I have *not* considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is

private as between the parties and is also generally confidential (see also ss. 136E and 136F of the Act).

Application overview

The original Jinibara application was lodged with the Tribunal and entered on the Register on 29, as provided under the original 1993 Act. On 5 October 1999 an amended application was filed in the Federal Court (QG6128/1998), and again on 25 January 2000. The amendment of 25 January 2000 was considered and accepted under s. 190A of the Act and consequently not removed from the Register on 18 February 2000.

On 17 February 2006 a further Jinibara amended application (QUD6128/1998) was filed in the Federal Court, the notice of motion was heard by Justice Spender on 31 May 2006. Orders by Justice Spender on 31 May 2006 granted leave to amend the application in accordance with the draft amended application annexed to the notice of motion filed 17 February 2006 with typographical errors in that amended application corrected. Pursuant to that order the re-engrossed amended application was filed in the Federal Court on 5 July 2006.

On 28 May 2007 a further amendment was filed in the Federal Court, the notice of motion was heard by Deputy District Registrar Fewings on 5 June 2007. On that date, the State of Queensland opposed the motion because filed with the amended application was an affidavit of only one of the two persons comprising the applicant ([Applicant 1 – name deleted]) explaining the changes in the application. A further date was set down for hearing, that being 12 June 2007. On 8 June 2007 an affidavit, affirmed by the other person comprising the applicant ([Applicant 2 – name deleted]) was filed explaining the changes in the application. On 12 June 2007 Deputy District Registrar Fewings re-heard the motion, the State did not oppose the motion to amend the application. Deputy District Registrar Fewings ordered that:

> 1. The applicant has leave to file an amended application in the form of Annexure "CH1: to the affidavit of [Person 1 – name deleted] affirmed 28 May 2007, but with the content of Schedule s to be application to be replaced with the words:
>
> "1.Schedule A – the native title claim group definition provided in Schedule A has been changed by deleting the words "excluding the descendants of [Claimant 1 – name deleted]"

On 13 June 2007 a re-engrossed amended application was filed in the Federal Court. The 2007 amendments filed in the Federal Court (both 28 May 2007 and 13 June 2007) contained only one amendment, namely a change to the Schedule A claim group description. No amendment was made to any other part of the application, including area.

It is the re-engrossed amendment application of 13 June 2007 that is the subject of this registration test decision.

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 an 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.

In this matter no adverse material was received form third parties. I have been informed by the case manager for this application that all the material provided by the applicant and considered in this decision (as listed in Attachment A to these reasons) has been provided to the State of Queensland for its consideration. Copies of all material filed in the Federal Court as part of the amendment applications (both current and previous) has been provided to the State of Queensland. In addition, the case manager has advised me that the 'connection material', which was provided to the Tribunal on 11 October 1999 from the applicant's representative for the purposes of considering the amendment application filed in the Federal Court on 5 October 1999, was forwarded to the State of Queensland on 20 January 2000. No comment or submissions have been received from the State regarding any of the material relied upon in this decision (as listed in Attachment A).

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 14.

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

If the description of the native title claim group indicates that not all persons in the native title group were included, or that the group is in fact a sub-group of a native title group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration: *Northern Territory of Australia v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (Doepel) at [36].

My consideration under this section does not involve me going beyond the information contained in the application: see *Doepel* at [39]. In particular it 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].

Schedule A of the current Jinibara amended application contains the following description of the native title claim group:

> The descendants of the union of [Ancestor 1 – name deleted] whose Aboriginal name was [name deleted], who was born around 1840, and [Ancestor 2 – name deleted], whose Aboriginal name was [name deleted] and who was born around 1826 and died on 23 June 1897.

I am satisfied that this procedural requirement is met.

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 application states the name and address for service of the persons who comprise the applicant. I note Parts A and B of the application.

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

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

Result

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

Reasons

Schedule A of the amended application contains the description of the native title claim group, as being:

> The descendants of the union of [Ancestor 1] whose Aboriginal name was [name deleted], who was born around 1840, and [Ancestor 2], whose Aboriginal name was [name deleted] and who was born around 1826 and died on 23 June 1897.

In my view the procedural requirement set down in s. 61(4) of the Act is met by this description.

Application in prescribed form: s. 61(5)

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

Result

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

Reasons

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*. The amended application I am considering, QUD 6128/1998 was filed in the

Federal Court, as required by s. 61(5)(b) and contains such information as is required by s. 61(5)(c). Section 61(5)(d) states that the application be accompanied by any prescribed documents, these are set out in s. 62(1)(a) of the Act (see comments under s. 62(1)(a) below).

I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

I am therefore satisfied that the application meets s. 61(5) of the Act.

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

Section 62(1)(a) of the Act requires an application be accompanied by an affidavit sworn by the applicant addressing certain matters.

The applicant for the current application is comprised of two persons; [Applicant 1] and [Applicant 2]. Affidavits, affirmed on 17 February 2006 by the two persons comprising the applicant, were filed in the court with the current amendment. The affidavits contain the required statements, therefore I am satisfied that this procedural requirement is met.

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

Under section 62(1)(b) the application must contain the details specified in subsection (2).

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains 8 paragraphs (from (a) to (h)), and I address each of these sub-requirements below. 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 for s. 62(1)(b)

The application **meets** the requirement under s. 62(1)(b), namely the application contains the details specified in subsection (2).

Information and map of boundaries of the area: s. 62(2)(a) and s. 62(2)(b)

Result

The application **meets** the sub-requirements under ss. 62(2)(a) and (b).

Reasons

Schedule B of the application contains a description of those areas within the external boundaries of the application area not covered. Schedule B also refers to Attachment B1 and Attachment B2. Attachment B1 describes the external boundaries of the application area and Attachment B2 describes the tenures included.

Schedule C refers to Attachment C which is a copy of an A3 colour map titled 'QUD6128/98 Jinibara Peoples (QC98/45) Amended Native Title Determination Application', produced by the Tribunal's Geospatial Services on 10 October 2005 and which shows the external boundaries of the application area.

I am satisfied that the sub-requirements at ss. 62(2)(a) and (b) are met.

Searches: s. 62(2)(c)

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

Result

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

Reasons

The section only requires the details and results of any searches undertaken by the applicant, it is not mandatory that the applicant have done searches.

Schedule D of the application provides that:

> No searches have yet been undertaken by the Applicants.

I accept the statement that the applicant has not undertaken any searches having no information to the contrary, I am therefore satisfied that s. 62(2)(c) is met.

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

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

Result

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

Reasons

Schedule E of the application refers to Attachment E which contains a description of the claimed native title rights and interests.

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

The procedural requirement at s. 62(2)(d) of the Act is met by Attachment E. For further discussion of these rights and interests in respect of the merit requirements, see below in regard to sections 190B(4) and (6) of the Act.

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 sub-requirement under s. 62(2)(e).

Reasons

Section 62(2)(e) of the Act does not require me to assess the material provided any further than ensuring a general description is provided, which is more than a mere formulaic re-statement of s. 62(2)(e).

Schedule F of the application refers to Attachment F. Attachment F is 13 pages in length, the information provided is not a mere formulaic re-statement of s. 62(2)(e) of the Act. Therefore I am satisfied that the procedural sub-requirement at s. 62(2)(e) is met.

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 sub-requirement under s. 62(2)(f).

Reasons

Schedule G of the application contains a general description of the activities that are currently carried out by the native title claim group in relation to the application land and waters. The information at Schedule G is sufficient to meet this procedural requirement.

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 sub-requirement under s. 62(2)(g).

Reasons

Schedule H of the application provides:

> The area claimed is also covered by:
> 1. Turrbal people (QG6196/98) (QC98/26); and
> 2. Glasshouse Mountains – Gubbi Gubbi (QG6063/98) (QC96/70).

I note the result of the overlap analysis undertaken by the Tribunal's Geospatial Services (Reference: GeoTrack 2006/0332) which confirms that those two claims are applications as per the Register which fall within the external boundary of the Jinibara application.

Section 62(2)(g) requires that the application must contain the details of any other applications of which the applicant is aware when they file the application. Schedule H meets this procedural requirement.

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 sub-requirement under s. 62(2)(h).

Reasons

Schedule I of the application states:

> Geospatial data held by the National Native Title Tribunal indicates that there are two future act notices that fall within the external boundaries of the application, namely:
> 1.EPC746 – notification date: 4 June 2001.
> 2.EPM14563 – notification date: 27 October 2004.

An assessment by the Tribunal's Geospatial Services (reference: GeoTrack 2006/0332) identified the two s. 29 notices cited above, which fall within the external boundary of the application. The information contained in the application meets the s. 62(2)(h) requirement.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it meets each of the sub-requirements of ss. 62(2)(a) to (h), as set out above. 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

Under section 190C(3) of the Act I must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

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

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

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

It is my understanding that this section seeks to ensure that a later application is not registered in respect of the same area covered by an earlier registered application where the claim groups of the two applications have common members. The underlying policy being that if there are claim group members in common between two claims, priority is given to the claim which is registered first in time and has been considered under s. 190A. Only a previously registered claim still on the Register when the s. 190A decision on the current application is made will keep the second off the Register where there are common claim group members.

As stated above there are two registered claims which overlap the Jinibara claim area, namely:

- Turrbal (QC98/26); and
- Glasshouse Mountains - Gubbi Gubbi (QC96/70).

Gubbi Gubbi has been on the Register since 26 June 1996, however that application has not been considered under section 190A, therefore it is not a previous application under s. 190C(3).

Turrbal has been on the Register since 13 May 1998, and has been considered under s. 190A of the Act. Its claim group description reads:

> The native title claim group is comprised of all the biological descendants of Turrbal ancestor known as the [Turrbal Ancestor 1 – name deleted] (who died circa 1855). His children included [Turrbal Ancestor 2 – name deleted] (aboriginal name being [name deleted]) and [Turrbal Ancestor 3 – name deleted] Aboriginal name [name deleted]. [Turrbal Ancestor 2] born circa 1820 and [Turrbal Ancestor 3] circa 1825.
> The surviving descendants of the [Turrbal Ancestor 1] include -
> [Turrbal Claimant 1 – name deleted], [Turrbal Claimant 2 – name deleted], [Turrbal Claimant 3 – name deleted], [Turrbal Claimant 4 – name deleted], [Turrbal Claimant 5 – name deleted], [Turrbal Claimant 6 – name deleted], [Turrbal Claimant 7 – name deleted], [Turrbal Claimant 8 – name deleted], [Turrbal Claimant 9 – name deleted], [Turrbal Claimant 10 – name deleted], [Turrbal Claimant 11 – name deleted], [Turrbal Claimant 12 – name deleted], [Turrbal Claimant 13 – name deleted], [Turrbal Claimant 14 – name deleted], [Turrbal Claimant 15 – name deleted], [Turrbal Claimant 16 – name deleted], [Turrbal Claimant 17 – name deleted], [Turrbal Claimant 18 – name deleted], [Turrbal Claimant 19 – name deleted], [Turrbal Claimant 20 – name deleted], [Turrbal Claimant 21 – name deleted], [Turrbal Claimant 22 – name deleted], [Turrbal Claimant 23 – name deleted] and future descendants.

The Jinibara application was originally made on 29 September 1998, so it was made when the entry for Turrbal was already on the Register. Therefore, in this case, Turrbal is a previous application for the purpose of s. 190C(3).

I note Schedule H of the Jinibara amended application, which expressly refers to both the Turrbal and Gubbi Gubbi applications, and Schedule O which states:

> No member of this native title claim group is a member of another native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.
> No member of the native title claim group is a member of an overlapping claim by another native title claim group.

Reading Schedules H and O together, I am satisfied that that no person included in the native title claim group for the Jinibara application (the current application) was a member of the native title claim group for any previous application.

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 s. 190C(4)(b) is met, and that information as required by s. 190C(5) was provided.

Reasons

Authorisation or certification

The current amended application is not certified, therefore I must be satisfied that the applicant is authorised to make the application and to deal with matters arising in relation to it, by all the other persons in the native title claim group (s. 190C(4)(b)). Authorisation is defined in s. 251B of the Act:

> For the purposes of this Act, all the persons in a native title claim group or compensation claim group authorise a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind – the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
> (b) where there is no such process- the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

The importance of authorisation

The Federal Court has consistently emphasised the fundamental importance the Act places on ensuring that claimant applications are properly authorised (see: *Moran v Minister for Land and Water Conservation (NSW)* [1999] FCA 1637 (*Moran*); *Quall v Risk* [2001] FCA 378; *Daniel v State of Western Australia* (2002) 194 ALR 278; [2002] FCA 1147 (*Daniel*)).

Justice French said about authorisation in *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 (*Strickland*) that:

> …this is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications—at [57].

The Registrar's task under s. 190C(4)

The nature of the Registrar's task was set out in *Doepel*:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given. The nature of the enquiry is discussed by French J in *Strickland v NTR* at 259 - 260, and approved by the Full Court in *WA v Strickland* at 51 - 52. Both *Martin* at [13] - [18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b)—at [78].

Who must authorise?

Authorisation must be by 'all other persons in the claim group'. It is clear as a matter of law that this requirement does not necessarily mean that each and every member of the claim group must authorise the applicant (see *Moran* at [48]). There may be individual members of the claim group who for one reason or another are incapable of authorising an applicant. It may also be the case that 'all the other persons' do not individually have to authorise the making of the application, where for example, a traditional process is used which allows only some persons, such as senior Elders, to make the relevant decisions (see *Strickland*). In *Moran* Justice Wilcox observed that:

> a person who wishes to rely on a decision by a representative of other collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body's authority to make decisions binding the members of the group and that the body has authorised the making of the application—at [34].

Authorisation of the current application

As previously stated, the current amended application is not certified, therefore I must be satisfied under s. 190C(4)(b) of the Act. Under s. 190C(5) I cannot be satisfied that s. 190C(4)(b) is met unless there is a statement to the effect that the application is authorised and reasons are provided as to why I should be satisfied under s. 190C(4)(b).

Schedule R of the application refers to Attachment R, which in summary states:

- The authorisation of this amendment occurred under section 251B(a) of the Native Title Act 1993.
- [Applicant 1] and {Applicant 2] have been applicants of the Jinibara claim since 1998. Even before this application was made, they were Spokespersons for the claimant group. Throughout this time, they have always acted according to the ways [Ancestor 3 – name deleted] taught them, informing their Elders and asking for instructions. When authorising this claim, the same system of "asking"

prevailed. [Applicant 1] went to each of his Elders and explained why the claim had to be re-authorised.

- All members of the claimant group are aware of who their Elders are, and continue to consult with them for guidance and advice and ultimately accept their authority on matters of traditional law.
- All Elders in the claimant group have authorised this claim application. Each of the Elders told [Applicant 1] to keep on with his work of representing the family group. Copies of authorisation letters signed by all Elders of the claimant group are provided.
- Since the authorisation of the first claim, a number of Elders have passed away. In some cases, the oldest of these Elder's children are not considered senior enough to warrant being thought of as Elders, but may still be spokespersons for their family lines. In such scenarios, people turn to the senior Elders of the claimant group. In particular, these are [Claimant 2 – name deleted], [Claimant 3 – name deleted], [Claimant 4 – name deleted], [Claimant 5 – name deleted], and [Applicant 1].
- The following breakdown of the Jinibara claimant group shows each family line and the Elder, Elders, or spokesperson who are recognised.
    - Oldest Elder of claimant group: [Claimant 2].
    - Elder for descendants of [Ancestor 4 – name deleted]: [Claimant 2]; [Applicant 1].
    - Descendants of [Ancestor 5 – name deleted]: While [Claimant 2] is the Elder for the family group, [Claimant 6 – name deleted] is considered the spokesperson for her family line. She gave her authority for the claim, but recognises [Claimant 2] as her Elder.
    - Descendants of [Ancestor 6 – name deleted]: [Claimant 7 – name deleted] (who authorised the first claim in 1998) has passed away recently. Her eldest daughter, [Claimant 8 – name deleted], is now the spokesperson of the family line, but also welcomed the fact that the senior Elders of the claimant group authorised the claim.
    - Descendants of [Ancestor 7 – name deleted]: [Claimant 9 – name deleted](who authorised the first claim in 1998) has passed away. This family line has a high mortality rate, and the eldest person is [Claimant 10 – name deleted], who is still regarded as a "young person". The descendants of [Ancestor 7] look to the senior Elders of the family for guidance and accept the authority of the Elders.
    - Descendants of [Ancestor 8 – name deleted]: Three senior Elders of the claimant group belong to this family line, namely [Claimant 3], [Claimant 4] and [Claimant 5]. Each have authorised the claim.

Attachment R meets s. 190C(5) by being a statement to the effect that the applicant is authorised and briefly setting out the grounds and providing reasons why I should be satisfied under s. 190C(4)(b) of the Act.

Attachment R of the application provides that s. 251B(a) is the relevant decision-making process, namely a mandated traditional process. Attachment R also provides how the traditional process operates, namely that Elders make the decisions for the claim group and that this process was always used by the group in that predecessors such as [Ancestor 3] acted in this way and taught that this was the process of decision-making. The names of the Jinibara Elders are provided along with signed statements by each Elder and each spokesperson to support the fact that the Elders authorise the applicant to make this application and to deal with matters arising in relation to it.

Having considered all the information provided, I am satisfied that the applicant is authorised as required by s. 190C(4)(b) of the Act.

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.

Result

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

Reasons

Subsection 190B(2) requires that the information in the application, describing the area covered by the application, is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The information required to be contained in the application is that described in ss. 62(2)(a) and (b), namely:

> (a) information, whether by physical description or otherwise, that enables the boundaries of:
> (i) the area covered by the application; and
> (ii) any areas within those boundaries that are not covered by the application to be identified
> (b) a map showing the external boundary of the application area

Attachment B1 of the application is a detailed written description of the external boundaries of the application area. Attachment B2 describes the tenures included in the area. Schedule B provides a number of general exclusions — identifying areas within the external boundaries of the area that are not covered by the application. I am of the view that the stated exclusions enable areas not covered by the application to be identified with reasonable certainty.

The boundaries of the area are shown on a map at Attachment C of the application, which is a copy of an A3 colour map titled 'QUD6128/98 Jinibara Peoples (QC98/45) Amended Native Title Determination Application' produced by the Tribunal's Geospatial Services on 10 October 2005.

An assessment provided by the Tribunal's Geospatial Services of 3 May 2006 (Reference: Geotrack 2006/0332) concluded that the description and map are consistent and identify the application area with reasonable certainty. Since that time the description and map have not been changed, therefore that assessment remains up-to-date.

Considering the comprehensive identification of the external boundary in Attachment B1 and the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described comprehensively, so that the area can be identified with reasonable certainty. To conclude and for these reasons above, I am satisfied that the application complies with s. 190B(2) as the information and map in the application required by ss. 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.

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

Reasons

Under this section, I am only required to be satisfied that one of the requirements in s. 190B(3) is met. That is, either the persons in the native title claim group must be named in the application (s. 190B(3)(a)) or the persons in that group must be described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s. 190B(3)(b)).

The description at Schedule A of the application is not a complete list of names of the claim group members which means that it does not satisfy s. 190B(3)(a). The claim group description must therefore satisfy s. 190B(3)(b). The Schedule A claim group description reads:

> The descendants of the union of [Ancestor 1] whose Aboriginal name was [name deleted], who was born around 1840, and [Ancestor 2], whose Aboriginal name was [name deleted] and who was born around 1826 and died on 23 June 1897.

In State of *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 Justice Carr said:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently—at [67].

I am of the opinion that some factual inquiry may be required to identify members of the native title claim group in this matter, that is, to identify who are the descendants of the named ancestors. However, I am of the view that this description by reference to descendants of named ancestors is capable of satisfying the requirements of s. 190B(3). I am satisfied that the description as provided at Schedule A of the application is sufficiently clear to satisfy the requirement of s. 190B(3)(b).

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 **meets** the condition of s. 190B(4).

Reasons

Section 190B(4) requires me to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified.

I am of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified it must describe what is claimed in a clear and easily understood manner. Any assessment of whether the rights can be prima facie established as native title rights and interests will be discussed in relation to the requirement under s. 190B(6) of the Act. At this stage the delegate is focussing only on whether the rights and interests as claimed are identifiable.

Schedule E of the application refers to Attachment E which contains a description of the claimed native title rights and interests, in summary;

- Paragraph 1 claims exclusive possession in relation to unallocated State land not previously subject to any extinguishing tenure.
- Paragraph 2 claims the right to assert and be acknowledged as the Aboriginal owners of the land and the right to speak for the determination area.
- Paragraph 3 claims ownership of Aboriginal cultural heritage within the meaning of s. 20 of the *Aboriginal Cultural Heritage Act* 2003 within the determination area.
- Paragraph 4 claims, in relation to all other areas the right to use and enjoy those areas for the purpose of the 7 individually listed rights (numbered (a) to (g)).
- Paragraph 5 claims the right to control disclosure of spiritual beliefs or practices which relate to any part of or place on the land or waters.
- Paragraph 6 claims the right to determine and regulate the membership of and recruitment to the Jinibara people.

The applicant has listed the claimed rights and interests which, in my view, are sufficiently clear to be understood. I am satisfied that the requirement of this section is met.

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

Under s. 190B(5) of the Act I must be satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist, is sufficient to support that assertion. I am not limited to consideration of information contained in the application but may refer to additional material supplied. The provision of material demonstrating a sufficient factual basis for the claimed rights and interests is ultimately the responsibility of the applicant. There is no requirement that I undertake a search for this material (see Justice French's comments in *Martin v Native Title Registrar* [2001] FCA 16).

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

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

The factual basis provided must support the particular assertions set out in paras (a), (b) and (c) of s. 190B(5). These paragraphs express the important aspects of this requirement for a sufficient factual basis under the section, namely an association with the area, 'traditional' laws and customs and the continuity of the society who held those laws and customs.

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 25 below.

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

This subsection requires me to be satisfied that the factual basis on which it is asserted that the native title claim group and the predecessors of those persons had an association with the application area, is sufficient to support that assertion.

Attachment F of the application asserts in respect of s. 190B(5)(a):

> European settlement of the claim area commenced in the 1840s—at [p.1].
>
> [I]n 1842, Schmidt's observations of his journey to 'the Bunya Bunya Tree Country' was that his 'nine natives were rather undecided whether they would accompany us any further being very much afraid the strange mountain natives' (the Jinibara)'would attack and kill us'—at [p.1]
>
> Simpson recorded that the bunya scrubs started on the distant mountains around Kina Booma (which were the mountains that correspond with the Jinibara boundary at the west and south of Kentworth)…Placed in this context, Schmidt's observations of the 'mountain men', who were viewed by other Aboriginal people in the party as 'strange' or different, and the additional fact that they were associated with the bunya bunya scrubs is evidence of the placement of the

> Jinibara in their country and the acceptance by neighbouring groups of their difference—at [p.1] to [p.2].
>
> There is an association between the bunya scrubs and the name 'Jinibara'. Jini is the local dialect term for the lawyer vine thickets which were found in the vicinity of the bunya trees…[Ancestor 3] expressly claims that his own birthplace was a twelve hectare area of lawyer cane scrub at the head of Kilcoy creek—at [p.2].
>
> Within Dala and Nalbo territory, members of the family were able to take employment that gave an on-going opportunity to live in Jinibara country and continue traditional customs and law. [Claimant 11 – name deleted] and her husband, [Claimant 12 – name deleted], [Claimant 13 – name deleted], [Claimant 7], [Claimant 4] and [Claimant 14 – name deleted], [Claimant 15 – name deleted] and [Claimant 1] were all living in Jinibara country near the Glass House Mountains by the 1950s. Later, [Claimant 15] lived at Linville near the Brisbane River, in Dungidau territory—at [p.4].

I note Schedule M of the application which contains relevant statements about current claim group members and their association with the claim area:

> [Applicant 1] is a 60 year old member of the Jinibara native title claim group whose rights are inherited from his great grandmother, [Ancestor 9 – name deleted], and his great great grandparents, [Ancestor 1] and [Ancestor 2]. He has continued to maintain connection to the country that he inherited from his forebears, representing the interests of the Jinibara throughout Jinibara country. So far as is practicable, he continues to use the resources of the land in a manner that accords with the traditional laws and customs that he learned form great uncle, [Ancestor 3} (whom he called grandfather)…

I am satisfied on the basis of this information that the factual basis provided is sufficient to support the assertion that members of the claim group have and their predecessors had an association with the area, whether physical or spiritual, which survived from sovereignty until the present time.

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

This subsection requires me to be satisfied that there is a sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the group that give rise to the claim to native title rights and interests. The word 'traditional', as used here, must be understood in light of the High Court's reasoning in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*). The court in that case held that only laws and customs that have their origins before the assertion of British sovereignty are capable of being considered 'traditional' and that those laws and customs must remain 'substantially unchanged' since that time. The recent Federal Court decision in *Risk v Northern Territory* [2006] FCA 404 supported the *Yorta Yorta* view. The Court in *Northern Territory v Alyawarr* Kaytetye, Warumungu, Wakay Claim Group (2005) ALR 431; [2005] FCAFC 135 (*Alyawarr*) referred to *Yorta Yorta* and said:

> The laws and customs, from which the native title rights and interests derive their existence, must necessarily be those of a society or group… laws and customs and the society which acknowledges and observes them are inextricably interlinked.

Therefore the factual material should indicate that the laws and customs are 'traditional' and that they were possessed by the 'normative society'.

Attachment F of the application states:

> In pointing out the variations in the customary totem classifications, Kelly suggests that the Jinibara had their own separate and distinctive character and were entitled to be regarded as a discrete group with their own specific dialect territory—at [p.2].

A document marked JT2 and titled '[Ancestor 3]'s Story of the Jinibara Tribe of South-East Queensland (and its neighbours)' was provided by the applicant's representative on 11 October 1999 for the purposes of considering the amended application as filed in the Federal Court on 5 October 1999 . The information contained therein is of particular relevance to s. 190B(5)(b) as it sets out the factual basis for the assertions made in the application. From that document I note in particular the following extracts:

> [Ancestor 3]…was one of the songmakers of his tribe, and well versed in their coroboris and in many of their tribal customs—at [p.2].
>
> [Ancestor 3]'s one brother and his six sisters, were all born to the same mother, and were therefore full blood kin to him. All members of his totem (which was matrilineal, that is, the totem was inherited form the mothers side) were his tribal brothers or sisters, no matter to what tribe they belonged. Marriage with a person of the same totem was forbidden, as was marriage with a member of one of the associated totems—at [p.10].
>
> There were certain birds and animals that were Daran [forbidden] to the whole tribe – these included bush rats, snakes of any kind except the Carpet, any kind of hawk, crows, magpies, platypus and swans, pelicans and shags—at [p.52].
>
> The funeral customs of other tribes did not all conform to those of the Jinibara tribe—at [pg 69].
>
> This tribe used neither musical tapping sticks nor the hollow stick trumpet, elsewhere called the didjeridu—at [p.75].
>
> …there was recognised a superior Being, or Spirit, called Ben:ewa which means High-up or Over-all. Children were taught the spiritual aspect of the native beliefs by any of the old men, who would call them to desist from any wrong action by saying Ben:ewa waru (Ben:ewa sees you). [Ancestor 3] states definitely that all such actions dated back to old customs and beliefs and were in existence long before the white men came, and in his time were practised by people that could not speak or understand English—at [p.70].
>
> The Jinibara tell tales, some called 'ninangura', old traditional stories about the beginning of things—at [p.99].

'[Ancestor 3]'s Story of the Jinibara Tribe of South-East Queensland (and its neighbours)' also contains many of the traditional Jinibara stories relating to animals of the Jinibara tribal land as well as relating to geographical locations in the claim area. I note as one particular example, the story of 'the hunter and the opossums' which tells of 2 waterholes found in the vicinity of Mt. Archer and the rock quartz standing between the two water holes (see p.103).

Having considered the amended application as a whole as well as all the information provided in '[Ancestor 3]'s Story of the Jinibara Tribe of South-East Queensland (and its neighbours)' I am satisfied that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests. The material consistently indicates that the laws

acknowledged and customs observed by the persons in the native title claim group are those of the Jinibara society.

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

This subsection requires me to be satisfied that the factual basis on which it is asserted that the claim group continues to hold native title in accordance with their traditional laws and customs, is sufficient to support that assertion.

Attachment F of the current application contains the following information relevant to s. 190B(5)(c):

> The tradition of keeping and teaching stories has continued, with both male and female members of the claimant group keeping stories alive, and handing them on, where appropriate, to the next generation…The chain of responsibility to maintain and teach these stories is taken very seriously by the Jinibara Elders—at [p.8].
>
> [Ancestor 3] and his sister [Ancestor 9] disseminated the knowledge of Jinibara culture to the following generations…It is significant, for example, that the matrilineal focus of totemic convention was taught and followed. Jinibara Elder, [Applicant 1], still follows his totemic obligations, which he inherited from his mother, grandmother and great grandmother—at [p.8].
>
> The responsibility for communicating this knowledge and keeping alive the traditions and customs is carried out and supervised by the Jinibara Elders. This accords with the social organisation and hierarchy that existed in pre-contact times where such responsibility was the function of the Jinibara Elders and members of the Bora Council—at [p.8].
>
> Hunting and Fishing of traditional foods occurs, and…relevant totemic and other sanctions stemming from stories are observed. The Jinibara Elders are careful to maintain their own relationship with the land, and ensure that the younger members of the group are adequately trained in these traditions—at [p.10].

In addition, the affidavit of [Applicant 1], affirmed 3 August 1999 states:

> Because of my close association with [Ancestor 3] and my great-grandmother [Ancestor 9] my connection with my country has not been broken and I have inherited the traditions of my people—at [18].

I am satisfied that the material provided contains sufficient factual basis to support the assertion that the claim group continues to hold native title in accordance with Jinibara 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 prima facie established are identified in my reasons below.

Reasons

My consideration under this section of the Act is constrained by the words 'prima facie'. In my view, this terminology directs that I do not delve into or attempt to resolve disputed questions of fact or law in my consideration of what rights and interests can be established. I rely on the consideration by the High Court in *North Ganalanja Aboriginal Corporation v QLD* (1996) 185 CLR 595 (*North Ganalanja*) of the term 'prima facie' as it appeared in the registration sections of the Act, prior to the 1998 amendment, which seem to me still relevant. In that case, the majority of the High Court said:

> The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase 'Prima Facie' is: 'At first sight; on the face of it; as it appears at first sight without investigation.' [citing the Oxford English Dictionary (2nd ed) 1989]—at [615] to [616].

The court also said:

> However, the notion of a good prima facie claim which, in effect, is the concern of s. 63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the [old Native Title] Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success—at [620].

The test in *North Ganalanja* was considered and approved in *Doepel*:

> Although [*North Ganalanja*] was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate—at [134].

Justice Mansfield in *Doepel* also approved of comments by Justice McHugh in *North Ganalanja* as informing what prima facie means under s. 190B(6):

> …if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis—at [135].

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

It seems to me to follow, having regard to the above authorities on what is meant by prima facie, that it is not my role to resolve whether the facts claimed in the application as supporting a determination of native title will be made out at trial. The task under this section is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed, having regard to settled law about:

- what is a 'native title right and interest' (as that term is defined in s. 223); and
- whether or not the right has been extinguished.

In making my decision under this section I pay particular regard to the definition of the phrase 'native title rights and interests' in s. 223 of the Act:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

Considering the Rights Claimed in the Application

In my consideration of the rights claimed in the application, I have read the rights in Attachment E as being claimed on a non-exclusive basis, save for paragraph (1) which is the only claimed right which expressly asserts exclusive possession and is stated to be over areas where there has been no extinguishment. It therefore follows that if any of the rights and interests claimed in the remainder of Attachment E can not be sustained over areas where exclusive possession has been extinguished, such as rights seeking to control access to or use of the area or rights seeking to speak for the area, then they are not prima facie established, following the authority in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*) that:

> without the right, as against the whole world, to possession of land, it is doubtful that there is any right to control access to land or make binding decisions about the use to which it is put—at [52].

I elaborate upon this below when considering those rights which in my view seek to control access and therefore can not be prima facie established.

In my consideration of each right below I have had regard to three main sources of information provided by the applicant, namely:

- '[Ancestor 3]'s Story of the Jinibara Tribe of South-East Queensland (and its neighbours)' ([Ancestor 3]'s Story)
- Attachment F to the application (Attachment F)
- Schedule M of the application describing the traditional physical connection of members of the group, particularly [Applicant 1] (Schedule M)
- Affidavit of [Applicant 1], affirmed 3 August 1999 (Affidavit).

1. The right to possession, occupation, use and enjoyment of the claimed areas of unallocated State land not previously subject to any extinguishing tenure to the exclusion of all others;

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

The phrasing of this right in Attachment E (as extracted above) appears to take account of the authority in *Ward HC*.

Statements relevant to this claimed right provided in the material are extracted below:

> The principal element of social etiquette observed by the Indigenous groups of Southeast Queensland was the injunction against trespass. In a social order that was geocentric, boundaries were much more than a simple political device. The economic assets were defined by the location of tribal boundaries and the ecology that they circumscribed. It was assumed that any man who intruded upon the estate of another group without permission was doing so to steal part of that asset…As part of their normative social mores, and the dictates of relevant 'stories', the Jinibara people still do not 'trespass' on other people's country (the converse is also generally similarly observed). As [Applicant 1] says, "We don't talk for other people's country, and we don't expect them to presume to talk for ours". He has mutual agreements with the Kabi Kabi, the Wakka Wakka and the Jagera that the shared boundaries of Jinibara with these groups are correct, and that each group will respect the boundary of the other. In another person's country, the Jinibara will not take part in discussions or contribute to decisions about country—at [p.9] of Attachment F.
>
> I remember as a small child [Claimant 16 – name deleted] telling me stories of our tribal lands. He told me that other tribes always had to get permission from the elders of our tribes before they could come onto our lands—at [6] of Affidavit.
>
> Before anything could be done to or on the land the permission of the elders had to be obtained. Permission was always sought so that elders would know what was happening to the land and waters within their tribal lands—at [14] of Affidavit.

In addition, Schedule G of the application provides that 'observance of the traditional rules concerning permission and consent to use and access the area' is currently being carried out by the claim group. The material provided is sufficient to prima facie establish that there is control of use and access under traditional laws and customs and as such I am satisfied that the right of exclusive possession occupation, use and enjoyment of the claimed areas of unallocated State land not previously subject to any extinguishing tenure can be prima facie established.

2. The right to assert and to be acknowledged as the Aboriginal owners of the land and waters vis a vis other Aboriginal people who are not the native title holders in accordance with traditional laws and customs and the right speak for the determination area.

In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* (2005) 220 ALR 431 (*Alyawarr*) the Full Federal Court found that a right to be acknowledged as the traditional owners is incapable of precise definition and incapable of enforcement and therefore is not a native

title right that can be properly the subject of a determination under the NTA. It is my view that the right in 2 is worded similarly to that considered in *Alyawarr* and as such I find that it can not be prima facie established.

I note the concluding words claiming also the 'right to speak for the determination area'. Assuming that this is a separate right to that described in the first part of 2, I will consider whether it can be prima facie established separately from the first part. As I understand the description of the claimed rights and interests in this application (my reasoning in relation to this is found above), the right at (2) is to be distinguished from that claimed in (1) and is claimed over areas where exclusivity has been extinguished. *Neowarra v State of Western Australia* [2003] FCA 1402 (*Neowarra*) is authority that 'the right to speak for country involves a claim to ownership' and can only be recognised in relation to areas where there has been no extinguishment of exclusive native title rights and interests. I note also the decision in *Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*) and the view of Justice French:

> 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 to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [1072].

It follows from the authorities of *Neowarra* and *Sampi* that any right to 'speak for the area' cannot be prima facie established in areas where exclusive possession can not be recognised.

For these reasons, the right claimed at (2) cannot be prima facie established as it either:

- offends the authority in *Alyawarr*; or
- if the offending part is able to be severed, thus leaving it as a 'right to speak for the area', this right can not, on the authority of *Neowarra* or *Sampi,* be prima facie established as it is claimed over areas where there is no right to possess, occupy, use and enjoy the application area to the exclusion of all others.

3. Ownership within the meaning of s. 20 of the Aboriginal Cultural Heritage Act 2003 of Aboriginal cultural heritage within the determination area;

Ownership of cultural heritage is not possessed under traditional laws and customs of the native title holders, as required by subsection 223(a). Rather it apparently flows from the relevant state legislation and as such is not a 'native title right and interest' having regard to the definition of that term under s. 223 of the Act. It follows that the right at (3) can not be prima facie established.

4. In relation to all other areas claimed, the right to use and enjoy those areas, and to access and move about those areas in order to so use and enjoy those areas for the purpose of:

a. Living on the land, camp, erecting shelters and other structures, travelling over and visiting any part of the area;

b. Hunting and fishing together and using the resources of the land such as food, fauna, flora, medicinal plants and trees, timber, charcoal, ochre, stone, resin and wax and minerals not wholly owned by the Crown, and to have access to and use of water on or in the land;

c. Engaging in activities on the land for cultural, ceremonial and religious purposes, conducting ceremonies and holding meetings, teaching the physical and spiritual attributes of places and areas of importance on or in the land and waters and participating in cultural practices relating to birth and death, including burial rights

These rights are all within the definition of native title rights and interests in s. 223 and have not been found by the courts to fall outside the scope of that section in relation to non-exclusive areas.

Statements relevant to these claimed rights provided in the material are extracted below:

> For making their huts or humpies, they used the bark of the Blackbutt or Stringy Bark or Tallowwood trees, cut into six or eight feet lengths…when a camp was shifted, these pieces of bark were stored on logs and so raised off the ground, ready for use again the tribes return at a future date—at [p.44] of [Ancestor 3]'s Story.
>
> If there were a death in the camp, they moved away for perhaps a mile and carefully burnt that humpy, and smoked all members of the family before they moved, so that the We:jar (spirit) could not follow them to their new camp—at [p.47] of [Ancestor 3]'s Story.
>
> [Claimant 16] told me stories of how they constantly moved from place to place around the tribal lands to establish the boundaries. When they would meet with another tribe on the other side of the boundary they would establish the connection there—at [11] of Affidavit.
>
> [Claimant 16] also told me stories of his growing up on the tribal lands and how he and other men used to go fishing and hunting. The men used to make rock walls in the creeks and dam up the creeks and create a deep pool for the fish. This made the fishing much easier for them—at [7] of Affidavit.
>
> Hunting was well organised, in that one band of men would light fires to drive the kangaroos towards a narrow track where the other men would be hiding ready to maim the animals as they passed by—at [p.57] of [Ancestor 3]'s Story.
>
> The natives had several methods by which they caught fish…moss lined log trap...in this trap they would catch freshwater jewfish, eels and turtles…fishing line…for a hook they used the thigh bone of a wallaby…fish in a pond or very still water were poisoned…hand nets were used for mullet…a four pronged spear…In order to catch fresh water turtles, the hunter dived for them—at [p.59] to [p.60] of [Ancestor 3]'s Story.
>
> Bunya nuts were consumed in great quantities also yams, water lilies, turtles, snakes, kangaroos, bandicoot, porcupine, blueberries, lillipillies, and miggiums—at [12] of Affidavit.
>
> Some plants were used medicinally, for example wattle gum for diarrhoea. There was a creepy vine with a very dark leaf…its leaves were crushed in the hands and inhaled for colds and headaches…another plant was used for asthma…the plant was dried and an infusion made, strained, and drunk, and its green leaves were chewed for a sore throat. Lambs tongue was infused in hot water, and the resulting fluid was applied to sores—at [p.34] to [p.35] of [Ancestor 3]'s Story.
>
> The white pipe clay used in this treatment of wound, could only be obtained from special deposits…the best clay was secured from cliffs near the sea—at [p.36] of [Ancestor 3]'s Story.
>
> [T]he gum of the Bloodwood tree, which makes a very permanent stain, the gum of the Yellow Jacket or Munburi:r when soaked in water with its own bark makes a very lasting yellow stain, and the bark of the Iron Bark Tree if powdered after being burnt, makes a very permanent black paint. It is used for colouring babies as soon as they were born, and also for colouring the mother before she went back to her own camp—at [p.45] of [Ancestor 3]'s Story.

> Bracken fern roots or Bwongbi (all ferns were called Bwongbi) were dug up with a stick called Gowarair…The same type of stick was used for yams. Pencil Orchid (Ngungarm) roots that looked like tiny pine apples, were ground up after being dried—at [p.53] of [Ancestor 3]'s Story.
>
> Cabbage Tree Palm…the top of young palms was eaten with honey. It was called Burun. There was another palm tree…both were eaten raw. The tops of grass trees…were also chewed to quench thirst—at [p.54] of [Ancestor 3]'s Story.
>
> Quandong fruit…grows on tall trees at the head of the Stanley River at Durundur (Dundur)…it was picked green and buried in sand for four days, and by then it was quite soft and had turned blue; it was very sweet and nice to eat—at [p.54] of [Ancestor 3]'s Story.
>
> As soon as a Jinibara man died, his body was moved to a different part of the camp—at [p.63] of [Ancestor 3]'s Story.
>
> Coroboris were held perhaps once a fortnight in a small camp, and all joined in. Ordinary coroboris were held near the camp, but sacred ones were held away from it, always in the same place—at [p.76] of [Ancestor 3]'s Story.
>
> [M]eetings occurred between neighbouring tribes for a range of reasons, including initiations, settlement of tribal quarrels, viewing other tribe's new corroboris, for the playing of organised games…and for the bunya feasts—at [p.9] of Attachment F.
>
> [Claimant 16] also told me about the great bunya corroborres which took place in and around the areas of Stanley and the Brisbane River—at [12] of Affidavit.
>
> I still to this day carry with me at all times my medicine stuff which comes from the land of my ancestors—at [10] of Affidavit.

I am satisfied that the material evidences these rights such that they are prima facie established.

d. Accessing, maintaining and protecting from damage, disturbance, interference or desecration places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;

I note the relatively recent Federal Court cases of *Gawirrin Gumana v Northern Territory (No 2)* [2005] FCA 1425 (*Gawirrin*) and *Alyawarr*, both containing a similar claimed right, where the court discussed whether the term 'protect' necessarily involved an intention to exclude or control access. I consider these two authorities because of my finding that this right is claimed over areas where exclusivity has been extinguished. It follows that if the claimed right seeks to control access, it can not be prima facie established in this application, being claimed as it is over areas where there is no exclusivity.

In *Gawirrin* the court said that the right to protect sites encompassed a right to exclude others from those sites and it follows that it can not be sustained over areas where exclusive possession is not available. The Full Court in *Alyawarr* (at [140]) found that the notion of protection of sites may involve physical activities on the site to prevent its destruction, but need not be read as implying a general right to control access.

These two cases appear to be at odds with each other. It is noted that the court in *Gawirrin* were happy to delete the word 'protect' allowing the right to be determined as a right to 'maintain' the sites in question.

Statements relevant to this claimed right provided in the material are extracted below:

> [Ancestor 3] provided quantities of information to Winterbotham about places of spiritual significance to the Jinibara. These sites, places and landscapes are still known to the Jinibara Elders. The Jinibara Elders, and especially the applicants, are regularly involved in attending these places. Attendance can be through visiting, and by practicing ceremony that keeps the place 'in good condition'—at [p.10] of Attachment F.
>
> Women too had their own Bora Council and a Bora ground which was well away from the camp. The trees around were nicked to mark it so as to keep uninitiated women away. Men would not go near it…—at [p.27] of [Ancestor 3]'s Story.
>
> Bora Rings…were always orientated towards points of the compass, the larger one to the north, the smallest to the south—at [p.28] of [Ancestor 3]'s Story.
> There were four Bora Rings in the Jinibara tribal area…They were always well looked after—at [p.28] of [Ancestor 3]'s Story.
> There were four special places along the Stanley River where youths were thus tested by this trial of 'still waters'…Buran – this was a bend in the Brisbane River at Caboonbah where [Ancestor 3] himself was tested and failed…Burarum – this was a lagoon on the Stanley River at Durundur. Here too, sick men were taken for healing, being made to stand in water up to their waists…Buruja - …a native name for Mt Archer. It is a swamp near Villeneuve at the foot of the mountains, below present railway stateion and between it and the Stanley River…Burgalba – …name means 'box tree'…it is a lagoon…—at [p.30] to [p.31] of [Ancestor 3]'s Story.

I am persuaded by the judgement in *Alyawarr* and am satisfied that such rights may exist in areas where exclusive possession cannot be supported. I also note that the above material does not indicate that a control of access is necessary in order to maintain and protect the sites. Therefore, having considered the relevant material, there is sufficient material to prima facie establish the claimed right.

e. Making decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of Queensland or the Commonwealth in relation to the use of the land and waters;

f. Making decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of Queensland or the Commonwealth in relation to the use of the land and waters;

The essence of these rights is to control the use an access of the area, and as stated in the High Court in *Ward HC*:

> …without a right…[against the whole world],…it may greatly be doubted that there is any right to control access to land or <u>make binding decisions</u> about the use to which it is put—at [52] (my emphasis added).

Therefore, as these rights are claimed as a non-exclusive right, they cannot be prima facie established.

g. Sharing, exchanging or trading subsistence and other traditional resources obtained on or from the land and waters;

The question which arises in respect of this claimed right to share, exchange or trade subsistence and other traditional resources of the area, is whether it is a right in relation to land or waters, as required under s.223 of the Act. The Full Court in *Alyawarr* considered the right to trade and said:

> The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land—at [153].

The *Alyawarr* court also considered the case of *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 (*Yarmirr*) which at first instance referred to evidence related to trade by way of exchange, between indigenous groups of items including spearheads, stone axes, bailer shells, cabbage palm baskets and turtle shells. The *Alyawarr* Full Court said of the *Yarmirr* decision:

> Olney J's observation does not involve the proposition that trade in the resources of the land can never be a 'right' in relation to the land. There the evidence was of an activity. It did not amount to evidence of the exercise of a right…*Yarmirr* cannot be taken as authority for the proposition that there cannot be a right to trade in the resources of the land as a right in relation to the land—at [155].

Having come to that conclusion however, the Full Court in *Alyawarr* was of the opinion that in the matter before them, there had been insufficient evidence at first instance for the right to survive on appeal.

The court has implicitly accepted that the right to trade is capable of being established (where satisfactorily evidenced) over land where exclusive possession is not available.

Statements relevant to this claimed right provided in the material are extracted below:

> The white pipe clay used in this treatment of wound, could only be obtained from special deposits, and was an article of trade—at [p.36] of [Ancestor 3]'s Story.
>
> Eaglehawk feathers…were also traded out to other tribes—at [p.36] of [Ancestor 3]'s Story.
>
> Other things traded included scrub opossum skins (thick and warm), red ochre…bunya nuts…white cockatoo head feathers with their yellow crest, Razor back shells…hardwood for boomerangs or spears or nullas. In exchange they would receive Rosewood for nulla clubs, special stone suitable for axes. Brigalow for boomerangs, and any other wood or material that might be useful—at [p.90] of [Ancestor 3]'s Story.

The material evidences this right such that this right is prima facie established.

5. The right to control the disclosure (otherwise than in accordance with traditional law and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters;

The Courts have generally allowed rights in relation to cultural knowledge provided they can be characterised as rights 'in relation to land and waters' pursuant to s. 223(1)(b) and are not in the nature of incorporeal rights not recognised by the common law pursuant to s. 223(1)(c) (see *Ward HC* at [59]).

It was held in *Alyawarr* (at [135]) that the 'right to teach the physical and spiritual attributes of places and areas of importance' if specified as a right to teach on the land, requires access to and use of the land for that purpose. So defined, it is a right in relation to the land.

However, the court in *Neowarra* (at [488]) held that the mere use of such words in the formulation of a right does not ensure that the right is in fact 'in relation to land or waters'. The true character of the right must be ascertained. In that case the court decided that the character of the right to 'uphold and enforce the traditional laws and customs' was a right in relation to people and not in relation to land or waters, even if the applicant further qualified the right by saying that it exists 'in relation to the land and waters of the claim area'.

The right claimed in the current application is the right to control the disclosure of spiritual beliefs or practices or of the paraphernalia associated with them which relate to any part of or place on the land or waters. In my view the terminology of 'seeking to control disclosure' indicates that this right's true character is in relation to people not land, and as in *Neowarra* the mere use of 'land or waters' does not mean it is in fact in relation to land or waters. This right goes beyond the content of the definition in s. 223(1) and therefore the right can not be prima facie established.

6. The right to determine and regulate membership of and recruitment to the group comprising the Jinibara People;

The Courts have consistently disallowed rights seeking to determine such things as membership, identity and recruitment within the group. In *Alyawarr* at [165], the court said of the right to determine and regulate the membership of the native title group that it is part of the claim group's laws and customs rather a right or interest in relation to land or waters.

In *Daniel* it was said that the right to identify members of the native title group:

> is not a right that gives rise to a connection to land or waters. Additionally in the light of the provisions in Pt 2 Div 6 of the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 this is a matter to be determined by application of that law and is not therefore to be approached as a native title right and interest—at [303].

Therefore the right claimed at (6) cannot be prima facie established.

Conclusion for s. 190B(6)

Resulting from my above reasons I find the following rights are prima facie established and should be entered on the Register:

1. *The right to possession, occupation, use and enjoyment of the claimed areas of unallocated State land not previously subject to any extinguishing tenure to the exclusion of all others;*
4. *In relation to all other areas claimed, the right to use and enjoy those areas, and to access and move about those areas in order to so use and enjoy those areas for the purpose of:*
    a. *Living on the land, camp, erecting shelters and other structures, travelling over and visiting any part of the area;*
    b. *Hunting and fishing together and using the resources of the land such as food, fauna, medicinal plants and trees, timber, charcoal, ochre, stone, resin and wax and minerals not wholly owned by the Crown, and to have access to and use of water on or in the land;*
    c. *Engaging in activities on the land for cultural, ceremonial and religious purposes, conducting ceremonies and holding meetings, teaching the physical and spiritual attributes of places and*

areas of importance on or in the land and waters and participating in cultural practices relating to birth and death, including burial rights;

d. Accessing, maintaining and protecting from damage, disturbance, interference or desecration places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;

g. Sharing, exchanging or trading subsistence and other traditional resources obtained on or from the land and waters;

Section 190B(7)
Traditional physical connection

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

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

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

(i) the Crown in any capacity, or

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

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

Result

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

Reasons

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

I am of the view that 'traditional' as it is used here must be understood as it was defined in *Yorta Yorta*. That is, it is necessary to show that the connection is in accordance with the laws and customs of the group that have their origins in pre-contact society.

In my view, the material provided, and cited throughout these reasons is indicative of the traditional physical connection that claim group members have or had with the application area. There is information in the application, at Schedule M and Attachment F as well as in the previously filed affidavit of [Applicant 1] regarding members of the group having an ongoing physical connection to the land which appears to be consistent with and which follows the traditional laws and customs of the Jinibara People, as explained in the application and examined by me extensively in my reasons under s. 190B(5).

I am satisfied having considered all the information before me that at least one member of the claim group currently has or previously had a traditional physical connection with any part of the land of the application.

Section 190B(8)
No failure to comply with s. 61A

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

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 37.

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 native title determination application must not be made in relation to an area for which there is an approved determination of native title. The Tribunal's Geospatial Services has conducted an overlap analysis of the claim area. The analysis, dated 3 May 2006 (Reference: GeoTrack 2006/0332) confirmed that no approved determinations of native title fall within the external boundary of the amended application.

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 47B, 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

If a previous exclusive possession act was done in relation to an area, a claimant application must not be made that covers any of the area. Schedule B excludes from the application any area covered by a previous exclusive possession act.

There is no claim to the benefit of ss. 47, 47A or 47B in the application (see schedule L) and accordingly s. 61A(4) does not apply.

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:

(d) the act was an act attributable to the Commonwealth, or

(e) 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 47B, 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

If a previous non-exclusive possession act was done in relation to an area, a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others. Attachment E provides that no exclusive native title rights and interests are claimed over areas affected by previous non-exclusive possession acts.

There is no claim to the benefit of ss. 47, 47A or 47B in the application (see schedule L) and accordingly s. 61A(4) does not apply.

Combined result for s. 190B(8)

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

Section 190B(9)
No extinguishment etc. of claimed native title

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

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

Delegate's comments

I consider each sub-condition under s. 190B(9) in turn and I come to a combined result at page 39 below.

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

The application **meets** the sub-condition of s. 190B(9)(a).

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

Schedule Q of the application states that there is no claim for ownership of minerals, petroleum or gas wholly owned by the Crown.

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

The application **meets** the sub-condition of s. 190B(9)(b).

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

Schedule P of the application states that there is no claim of exclusive possession of offshore places.

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

The application **meets** the sub-condition of s. 190B(9)(c).

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

The application and accompanying documents do not disclose, and it is not readily apparent, that the native title rights and interests claimed have otherwise been extinguished.

In addition, Schedule B to the application excludes from the application area any areas over which native title has otherwise been extinguished.

I am satisfied that the application meets this condition.

Combined result for s. 190B(9)

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

[End of reasons]

Attachment A
Documents and information considered

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

Material on file for Jinibara (Federal Court No: QUD6128/1998, NNTT No: QC98/45);

- Affidavit of [Applicant 1], affirmed 3 August 1999.
- Letter from Carne and Herd, dated 11 October 1999, enclosing:
    - 'Connection Report Index'
    - Affidavit of [Applicant 2], affirmed 4 October 1999;
    - Affidavit of [Applicant 1], affirmed 4 October 1999;
    - 'JT1 History of Jinibara Claimants'
    - 'JT2 [Ancestor 3]'s Story of the Jinibara tribe of South East Queensland (and its neighbours) collected by LP Winterbotham'
- Amended Claimant Application filed in Federal Court on 25 January 2000, including;
    - Affidavit of [Applicant 1], affirmed 5 October 1999.
    - Affidavit of [Applicant 1], affirmed 25 January 2000.
    - Affidavit of [Applicant 2], affirmed 25 January 2000.
    - Affidavit of [Applicant 2], affirmed 5 October 1999.
- Draft Amended Claimant Application, received by the NNTT on 3 August 2005.
- Geospatial Assessment & Overlap Analysis (Reference: GeoTrack 2006/0332), produced by NNTT, dated 3 May 2006.
- Re-engrossed Amended Claimant Application filed in Federal Court on 5 June 2006, including;
    - Affidavit of [Applicant 1], affirmed 17 February 2006.
    - Affidavit of [Applicant 2], affirmed 17 February 2006.
    - Statements giving authority to [Applicant 1] and [Applicant 2] to be jointly the applicant, from:
        - [Claimant 6].
        - [Claimant 5].
        - [Claimant 4].
        - [Claimant 3].
        - [Claimant 2].
        - [Claimant 8].
        - [Claimant 17 – name deleted].
- Re-engrossed Amended Claimant Application filed in Federal Court on 13 June 2007, including;
    - Affidavit of [Applicant 1], affirmed 17 February 2006.
    - Affidavit of [Applicant 2], affirmed 17 February 2006.

Attachment B
Application overview

Chronology of key steps:

5 July 2006	- Re-engrossed amended application filed in the Federal Court and a copy provided to the National Native Title Registrar.
30 August 2006	- Registrar's delegate provided preliminary comments to applicant, via email, on the re-engrossed amended application.
8 November 2006	- Tribunal emailed applicant's adviser.
20 November 2006	- Tribunal emailed applicant's adviser.
24 November 2006	- Tribunal wrote to applicant and sought any further information from applicant be provided by 1 December 2006.
1 December 2006	- Applicant requested clarification of delegate's comments, via email.
	- Delegate provided further information to applicant, via email.
	- Applicant sought further clarification of delegate's comments, via telephone.
4 December 2006	- Delegate provided further clarification, via email.
21 December 2006	- Tribunal requested written confirmation of applicant's intent to amend application.
7 February 2006	- Tribunal notified the applicant in writing, that the delegate will be making decision on the application on 23 February 2007 and provided the applicant with a deadline of 14 February 2007 to provide further information.
13 February 2007	- Applicant requested extension of time as they have engaged anthropologist and awaiting Easter Land Summit.
16 February 2007	- Tribunal's Queensland Regional Manager granted extension of time until 20 April 2007.
29 May 2007	- Amended Application Filed in Federal Court.
5 June 2007	- Amended Application Heard by Federal Court, State of Queensland opposed proposed amendment.
8 June 2007	- Additional material Filed in Federal Court.
12 June 2007	- Federal Court granted leave to amend, seeks amended application to be filed within 14 days.
13 June 2007	- Re-engrossed Amended Application filed in Federal Court and provided to the Native Title Tribunal Registrar.