National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE:	Mia Zlamal

Application Name:	Tableland Yidinji People		
Names of Applicant:	Mr Lloyd Stewart (aka Con Stewart), Mrs Catherine (Nola) Joseph, Ms Evelyn (Dawn) Johnson, Mr Peter Rosas		
Region:	FNQ	NNTT No.:	QC99/36
Date Application Made:	29 October 1999	Federal Court No.:	QUD6030/99

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

DECISION

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

Mia Zlamal

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

Date of Decision:
6 September 2005

Brief History of the Application

The original applications were lodged with the Tribunal on 1 July 1998.

A notice of motion to amend and to combine the two applications, together with amended applications in each application, was filed on behalf of the applicants in the Federal Court on 25 October 1999. On 29 October 1999 Deputy Registrar Robson of the Federal Court in Brisbane:

- granted leave to the applicants to amend both applications;
- ordered that each application be amended so that henceforth it is combined with and includes the other application;
- further ordered that the two applications be combined and continued in and under new application number Q6030/99.

The delegate of the Registrar accepted the amended application for registration under section 190A on 24 February 2000.

On 14 October 2004 an amended application was filed in the Federal Court. A copy was forwarded to the National Native Title Tribunal on 18 October 2004, for information only. On 22 October 2004 leave was granted to the applicants to amend.

A further amended application was lodged in the Federal Court on 29 April 2005 for information only.

The Tribunal provided comments in relation to the amended application by way of a preliminary assessment (letters to the applicant's legal representative dated 1 June 2005 and 8 June 2005).

A further amendment application was filed with the Court on 17 June 2005 and leave was granted for the amendments on 27 June 2005. Therefore the application falling for consideration is that as filed in the Federal Court on 17 June 2005 ('the application' or 'amended application').

Information considered when making the Decision

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

- The National Native Title Tribunal's Registration Testing files and Legal Services files for this application;
- The National Native Title Tribunal's Registration Testing files and Legal Services files for QC04/10;
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims and Schedule of Native Title Applications;
- The Native Title Register;

- The National Native Title Tribunal's Geospatial Unit assessment and overlap analysis dated 14 July 2005;
- Federal Court Order dated 27 June 2005.

Copies of any material provided directly to the Registrar by the applicants in relation to my consideration of the application were provided to the State. I am advised that the State has not provided any comments in relation to this material.

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

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

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

On 5 May 2005, Christopher Doepel, the Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Act.

This delegation has not been revoked as at this date.

NOTE TO APPLICANT:

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

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

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

In the following decision, I test the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions.

A. Procedural Conditions

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

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

Native Title Claim Group: S61(1)

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

Reasons relating to this condition

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

I must consider whether the application sets out the native title claim group in the terms required by s.61(1). That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group *in the application* indicates that not all persons in the native title group are included, or that it is in fact a sub-group of the native title claim group, then the requirements of s.190C(2) would not be met and the claim could not be accepted for registration (*AG of Northern Territory v Doepel* [2003] FCA 1384 (*Doepel*) [at 36].

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group (*Doepel at paras 16 - 17, 37, 39).*

In light of *Doepel*, I have confined my considerations to the information contained in the application and accompanying affidavits.

The description of the persons in the native title claim group is found in Schedule A of the application, which states:

"The Tableland Yidinji Native Title claim group comprises members of five families tracing their descent from apical ancestors known to have occupied, and having the authority to speak for country in the claim area.

(a) **[Family 1 – names deleted]**, being descendants of two individuals variously known as **[Apical Ancestors 1 and 2 – names deleted]**.

(b) **[Family 2 – name deleted]**, being descendants of **[Apical Ancestor 3 – name deleted]** and her husband **[Apical Ancestor 4 – name deleted]**, as well as the daughter of **[Apical Ancestor 5 – name deleted]** and his wife **[Apical Ancestor 6 – name deleted]**.

(c) **[Family 3 – name deleted]**, being descendants of **[Apical Ancestors 7 and 8 – names deleted]**.

(d) **[Family 4 – name deleted]**, being descendants of **[Apical Ancestors 9 and 10 – names deleted]**.

(e) **[Family 5 – name deleted]**, being descendants of **[Apical Ancestor 11 – name deleted]**."

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

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

Result: Requirements met

Article I.
Article II. Applicant in case of applications authorised by claim groups: s61(2)
Article III.
Article IV.
Article V. Section 61(2) simply says who the applicant is in the case of a native title determination application. The applicant is the person or persons jointly (together) who are authorised by the native title claim group to make the application.

Article VI.
Article VII. Name and address of service for applicants: S61(3)
Article VIII.
Article IX. An application must state the name and address for service of the person who is, or persons who are, the applicant.

Reasons relating to this condition

The name and the address for service of the applicant appears at the commencement of the application and in Part B of the application.

Result: Requirements met

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

Article X. A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this condition
Schedule A of the application describes the native title claim group as set out above under s.61(1). For the reasons that lead to my conclusions (below) that the requirements for s. 190B (3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

Article XI.
Article XII. Application is in prescribed form: s61(5)
Article XIII.

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

Reasons relating to this condition

s.61(5)(a)
The application is in the form prescribed by Regulation 5(1)(a) *Native Title (Federal Court) Regulations 1998*.

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

s.61(5)(c)
The application meets the requirements of s. 61(5)(c) as, for the reasons outlined below in relation to s.62, it does contain the information prescribed by s.62.

s.61(5)(d)
As required by s.61(5)(d), the application is accompanied by the prescribed documents, being the applicant affidavit/s prescribed by s.62(1)(a). I refer to my reasons in relation to s.62(1)(a) below.

I note that s.190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

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

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

Reasons relating to this condition

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn by the applicant in relation to the matters specified in sub-paragraphs (i) through to (v).

Attachment R of the application comprises affidavits of each person comprising the applicant group, namely **[Applicant 1 – name deleted]** affirmed on 14 September 2004, **[Applicant 2 – name deleted]** affirmed on 14 September 2004, **[Applicant 3 – name deleted]** affirmed on 14 September 2004 and **[Applicant 4 – name deleted]** affirmed on 13 October 2004. Each of these affidavits are signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently address the matters required by s. 62(1)(a)(i)-(v).

Result: Requirements met

Application contains details set out in s62(2): s62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information required in s. 62(2). Because of this, the Registrar's decision for this condition is set out under s. 62(2) below.

Article XVII.
Article XVIII. Details of physical connection s: 62(1)(c)
Article XIX.
Article XX. Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate)

Comment on details provided

Schedule M states that by residing in the vicinity of the claim area, many members of the native title claim group continue to, amongst other things, visit the claim area, exercise

their native title rights by caring for their country, camping, gathering, hunting, fishing and passing on their traditional knowledge, laws and customs.

Schedule M refers to affidavits of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** at Attachment F of the application.

Result: Details provided

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

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

Section 21.01

Reasons relating to this condition

Schedule B of the application contains a written description of the claim area. For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable the external boundaries of the claim area covered by the application to be identified.
Refer to reasons under s.190B(2) below.

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: Requirements met

Map of the application area: s62(2)(b)

Article XXII.
Article XXIII. The application contains a map showing the external boundaries of the area covered by the application

Reasons relating to this condition

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

Result: Requirements met

Details and results of searches: s62(2)(c)

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

Reasons relating to this condition

Schedule D states that: "To the applicant's knowledge no such searches have been conducted". There is no information in the application or otherwise before me to suggest that searches have been undertaken or, if they have been, that the applicant is aware of them.

Result: Requirements met

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

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

Reasons relating to this condition

A description of the claimed native title rights and interests is contained in Schedule E of the application. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law. Additionally, for the reasons that I find that there has been compliance with s.190B(4) (see below), I am also satisfied that the requirements of this section are met.

Result: Requirements met

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

s.(62(2)(e) *The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*

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

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

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

Reasons relating to this condition

A general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist and for the particular assertions in sub-paragraphs (i) – (v) is found in Schedule F and Attachment F, Schedule G and Schedule M of the application. For the reasons that led to my conclusion that the requirements of s.190B(5) have been met (refer below), I find that the application satisfies the requirements of s.62(2)(e).

Article XXIV. **Result: Requirements met**

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

s.62(2)(f) *If native title claim group currently carry on any activities in relation to the area claimed, details of those activities*

Reasons relating to this condition

At Schedule G of the application, the applicants provide details of activities currently being carried out by the native title claim group in relation to the claim area.

Schedule G states that, "Claim group members continue to exercise a body of traditional laws and customs passed down to them from generation to generation by their forbearers and predecessors.

Such tradition and custom includes:

(a) controlling access to, speaking and caring for country;
(b) the holding of ceremonies on, and use of traditional country;

(c) gathering, hunting and fishing in the claim area;
(d) camping and occupying country, visiting, protecting and preserving special sites and story places; and
(e) Participation in consultation processes and land use decision – making in relation to third parties.

Tableland Yidinji children and young people visit their country to learn about their culture and histories. The claim group live in close vicinity to the lands claimed and continue to access them on a regular basis."

I find that the information provided in Schedule G of the application satisfies the requirements of s.62(2)(f).

Result: Requirements met

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

Article XXV.

s.62(2)(g) *Details of any other application to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)*

Reasons relating to this condition

Schedule H of the application states, "As far as the applicants are aware there are no native title determination applications entered on the Register of native title claims covering any parts of the claim area." In an assessment dated 14 July 2005, the Tribunal's Geospatial Analysis & Mapping Branch confirmed that no other claimant or non-claimant applications fall within the external boundaries of the current application**.**

Result: Requirements met

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

Article XXVI.

s.62(2)(h) *Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of.*

Reasons relating to this condition

Section 26.01 Schedule I of the application states that there are no s.29 notices issued as yet over the area claimed.

I note that the Tribunal's Geospatial Analysis & Mapping Branch assessment dated 14 July 2005 lists one notice issued under s.29 of the Act (or under a corresponding provision of a law of the State or Territory) in relation to the whole or part of the application area as at 14 July 2005. This section requires the applicant to provide details of any s.29 notices *of which they are aware*. The applicant's failure to indicate the s.29 notice as identified in the Geospatial assessment indicates to me that it was a notice of which they were not aware and as such is not fatal to the requirements of this section being satisfied.

I see that the notice listed is no longer current, the notification date being on 22 December 2004. By *no longer current* I mean the four months after the notification day specified in the s 29 notice, in which period the Registrar is required to use best endeavours to consider the claim, has expired.

Even if my conclusion above that the applicant is unaware of the notice is incorrect, I am of the view that Parliament's intention in relation to the requirements of s. 62(2)(h) is relatively clear. Both the note at the end of that paragraph, which states: "*Notices under s29 are relevant to subsection 190A(2)"*, and also s.190A(2) itself, make it reasonably clear that the purpose of the provision was to ensure that the Registrar was aware that the claim was affected by the relevant notice and, therefore, expedited the registration test of the application as required under s.190A(2). The Tribunal is of course aware of the notice and that it is no longer current. I am of the opinion that in this circumstance it would be unduly harsh not accept an application for registration for not including details of a notice of which the Tribunal is aware and which is no longer current.

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

Result: Requirements met

Combined decision for s190C(2)

Reasons relating to this condition

Section 26.02 For the reasons identified above I find that the application contains all details and other information, and is accompanied by the documents, required by ss. 61 & 62.

Aggregate Result: Requirements met

Common claimants in overlapping claims: S190C(3)

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

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

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

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

Reasons for the Decision

A search of the Geospatial database and Register of Native Title Claims reveals that there are no overlapping applications that cover the area of this application which are on the Register of Native Title Claims, as a result of a consideration pursuant to s. 190A. This was confirmed in the overlap analysis dated 14 July 2005 prepared by the Tribunal's Geospatial Analysis and Mapping Branch, which found that there were no applications overlapping the area of the current application. Consequently, I need not consider this matter further.

I am satisfied that this application does not infringe the provisions of s.190C(3).

Result: Requirements met

Application is authorised/certified: s190C(4)

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

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

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
***Note:** s.190C(5) – Evidence of authorisation:*
If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:
(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons for the Decision

The application is not certified pursuant to s.190C(4)(a). Therefore I must be satisfied that the application meets the requirements of s.190C(4)(b). Authorisation is defined in s. 251B and provides that where there is a process of decision making under traditional law and custom for authorising things of this kind then that process must be complied with (s. 251B(a)). Where there is no such process, the native title claim group may authorise the applicant in accordance with a process of decision making agreed to and adopted by the group (s. 251B(b)).

It is clear as a matter of law that the requirement that the applicant be authorised by all the persons in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant[1]. The Act simply requires all those persons who need to authorise an applicant according to traditional law and custom do so. There may well be individual members of the claim group who for one reason or another are incapable of authorising an applicant - for example because they are of unsound mind, ill, or unable to be located- or are disinclined to do so for whatever reason.

There are two limbs to s.190C(4)(b) compliance. Firstly, the Registrar must be satisfied that the applicant is a member of the native title claim group. Under the second limb the Registrar must be satisfied that the applicant is authorised by all the other persons in the native title claim group to make the application and deal with matters arising in relation to it. In accordance with s.190C(5) the Registrar cannot be satisfied of compliance with s.190C (4)(b) unless the application:

(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
(b) briefly sets out the grounds on which the Registrar should consider that it has been met.

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

Each of the four people named as the applicant (**[Applicants 1 to 4 – names deleted]**) has provided affidavit evidence that they are a member of the native title claim group (see para 1 of each s.62(1)(a) affidavit accompanying the application). For these reasons I am satisfied that the first limb of the authorisation condition is met.

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

Part A, 2 of the Form 1 states:

> *"The applicants are holders of native title rights and interests in the claim area and are authorised by the Tableland Yidinji People under their traditional laws and customs to make the application on behalf of the native title claim group."*
>
> *"The applicants were so authorised as a result of a meeting of Tableland Yidinji People in Atherton on 4-5 October 2003 and 14 September 2004. At this meeting individual applicants were authorised in a manner consistent with the traditional laws and customs of the members of the native title claim group to bring this application on behalf of the claim group. The applicants are also authorised by the native title claim group to deal with matters arising in relation to the application. The grounds for this assertion are set out in the Affidavits of the Applicants named above. The Affidavits are provided and labelled as "Attachment R"."*

[1] *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J. Refer also O'Loughlin J, *Quall v Risk* [2001] FCA 378 at paras [33-34].

Schedule R(2) states, "Affidavits of **[Applicants 1 to 4 – names deleted]** are provided and labelled as "Attachment R"."

In their respective s. 62 affidavits at paragraphs (v) and (vi) **[Applicants 1 to 4 – names deleted]** state:

> *(v) I have been authorised by all the persons in the native title claimant group to make this application and to deal with matters arising in relation to it.*
>
> *(vi) The basis on which I am authorised, as mentioned in paragraph (v) is:*
>
> *a) North Queensland Land Council, an agent of the claim group contacted members of the claim group. A meeting was held in Atherton on 4 October 2003 and 14 September 2004 to discuss and authorise the lodgement of a further Tableland Yidinji native title claim application.*
>
> *b) In accordance with Tableland Yidinji traditional laws and customs, the members attending the meeting authorised me and the other applicants and to act as one of the applicants for the Tableland Yidinji People's further native title claim and to make decisions about the claim, including this application.*
>
> *c) The authorisation was in a manner consistent with traditional laws and customs of the Tableland Yidinji People, which provide that decisions on behalf of the Tableland Yidinji People are made by the Tableland Yidinji Elders and that such decisions bind the group of Tableland Yidinji People as a whole.*

The application as filed on 14 October 2004 includes at Attachment R affidavits of **[Applicant 3 – name deleted]** (sworn 18 October 1999), **[Applicant 1 – name deleted]** (sworn 18 October 1999), **[Applicant 2 – name deleted]** (sworn 18 October 1999) and [**Deponent 1 – name deleted]** (sworn 19 October 1999) in which they each depose:

> *"The Tableland Yidinji people have a traditional decision-making process that must be complied with when land issues are involved. The Elders and heads of families discuss the issue amongst themselves and their relatives and then the Elders and heads of families reach a consensus among themselves after considering the views of others."* Paragraph [4]
>
> *"Under Tableland Yidinji customary law and tradition the Elders decide land business for all Tableland Yidinji people. A decision of the Elders and heads of families is final and Tableland Yidinji people who are not Elders and heads of families cannot disagree publically* [sic] *with the Elders about such a decision"* Paragraph [5]
>
> *"During 1998 and 1999 the Tableland Yidinji People discussed amongst ourselves the need to lodge native title applications over our country."* Paragraph [6]
>
> "A series of meetings, facilitated by the North Queensland Land Council Aboriginal Corporation affirmed the Elders and heads of families decision to authorise **[Applicants 1 to 3 – names deleted]** and **[Deponent 1 – name deleted]** to pursue these applications, known as QC98/35, QC98/36 and seek as outcomes of those applications, determinations of native title for the Tableland Yidinji people" Paragraph [7]

> *"The Tableland Yidinji people have complied with our own customary and traditional decision-making process that must be complied with and have authorised the applications QC98/35 and QC98/36. (QG6205/98 and QG6206/98)."*Paragraph [8]
>
> *"At a further meeting of the Tableland Yidinji people in October 1999 at Atherton the decisions of the Elders and heads of families to pursue these applications were supported by all the Tableland Yidinji people present."* Paragraph [9]
>
> *"All the facts and circumstances deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on this the face of my affidavit."* Paragraph [10]

In my opinion this material indicates that the native title claim group has authorised the applicants pursuant to a traditional decision-making process that must be complied with when making decisions of this kind (see s.251B(a)). In my opinion this information demonstrates that Tableland Yidinji traditional law and custom requires that Tableland Yidinji Elders and their families make this decisions that bind the group of Tableland Yidinji People as a whole and that the applicants were so authorised in accordance with this process. I am not provided with any information that would suggest that the Tableland Yidinji People did not follow their traditional law and custom when authorising the four people named as applicants.

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

Result: Requirements met

Merit Conditions: s190B

Identification of area subject to native title: s.190B(2)

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

Reasons relating to this condition

External Boundaries

The written description of the external boundary of the claim area is at Schedule B of the application. Schedule C refers to a map of the claim area labelled as Attachment C.

Schedule B of the application states:

"A. The above information is provided and labeled "Attachment B" as set out in the Map at "Attachment C".

B. The area covered by the application ***excludes*** any land or waters covered by:

a) a scheduled interest
b) a valid non-Aboriginal freehold estate
c) a commercial lease that is neither an agricultural lease nor a pastoral lease
d) an exclusive agricultural lease or an exclusive pastoral lease
e) a residential lease
f) a community purpose lease
g) a lease dissected from a mining lease and referred to in s.23B(2)(vii)
h) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters
i) a public road

which was validly granted or vested on or before 23 December 1996.

C. Subject to the following paragraph, (E), the area covered by the application excludes any land or waters covered by the valid construction or establishment of any public work, where the construction or establishment of the public work commenced on or before 23 December 1996.

D. The area covered by the application excludes land or waters where the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2) pursuant to section 190(9)(c).

E. Where the act specified in paragraphs B & C falls within the provisions of:

1) s.23B(9) - Exclusion of acts benefiting Aboriginal Peoples or Torres Strait Islanders;
2) s.23B(9A) - Establishment of a national or state park;
3) s.23B(9B) - Acts where legislation provides for non-extinguishment;
4) s.23B(9C) - Exclusion of Crown to Crown grants; and
5) s.23B(10) - Exclusion by regulation

the area covered by the act is not excluded from the application."

Attachment C is a monochrome copy of a map prepared by the Tribunal's Geospatial Unit dated 10 June 2005.

The Geospatial Unit assessed the map and written description and concluded in its assessment dated 14 July 2005 that, "The description and map are consistent and identify the application area with reasonable certainty."

Article XXVII.
For these reasons, I am satisfied that the information contained in the application describes the external boundaries of the area covered by the application with reasonable certainty.

I am of the view that this stated exclusion by class amounts to information that enables areas not covered by the application to be identified with reasonable certainty. In some cases, research of tenure data held by the State of Queensland may be required, but nevertheless it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

For these reasons, I am satisfied that the description in the application of areas not covered by the application complies with s. 190B(2) and s. 62(2)(a)(ii).

To conclude, I am satisfied that the information and the maps required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters. In my opinion the requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: Requirements met

Identification of the native title claim group: s.190B(3)

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

Reasons for the Decision

Schedule A of the application describes the native title claim group as follows:

> *"The Tableland Yidinji Native Title claim group comprises members of five families tracing their descent from apical ancestors known to have occupied, and having the authority to speak for country in the claim area.*

(a) [Family 1 – name deleted] , *being descendants of two individuals variously known as* **[Apical Ancestors 1 and 2 – names deleted]**.
(b) [Family 2 – name deleted], *being descendants of* **[Apical Ancestor 3 – name deleted]** *and her* **[Apical Ancestor 4 – name deleted]**, *as well as the daughter of* **[Apical Ancestor 5 – name deleted]** *and his wife* **[Apical Ancestor 6 – name deleted]**.
(c) [Family 3 – name deleted], *being descendants of* **[Apical Ancestors 7 and 8 – names deleted]**.

(d) [Family 4 – name deleted], *being descendants of* **[Apical Ancestors 9 and 10 – names deleted]**.
(e) [Family 5 – name deleted], *being descendants of* **[Apical Ancestor 11 – name deleted]**.*"*

Each of the five named family groups is described with the name by which the group is known *(eg.* ***[Family 1 – name deleted]****)* and is said to be the descendants of apical ancestors named or otherwise identified for that family.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that "[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially."

I am of the view that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b). By referencing the identification of members of the native title claim group to named apical ancestors, it is possible to objectively verify the identity of members of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group.

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

Result: Requirements met

Native title rights and interests are readily identifiable: s.190B(4)

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

Reasons for the Decision

Schedule E of the application states:

"1. The Native Title rights and interests claimed in relation to the claim area are not to the exclusion of all others and are the rights to have access to and use the claim area and its natural resources namely to:

(i) maintain and use the claim area;
(ii) conserve the natural resources of the claim area;
(iii) protect the claim area and the natural resources of the claim area for the benefit of the Native Title holders;
(iv) care for the claim area for the benefit of the Native Title holders;

(iv) use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes;

and more particularly to:

A. reside on, camp on and travel across the land;
B. exercise rights of use and disposal over the natural resources;
C. exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the Native Title rights and interests;
D. discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare;
E. preserve sights [sic] of significance to the Native Title holders and other Aboriginal people on the claim area;
F. conduct secular, ritual and cultural activities on the claim area;
G. conduct burials on the claim area;
H. maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the Native Title holders;
I. inherit or dispose of Native Title rights and interests in relation to the claim area in accordance with custom and tradition;
J. resolve disputes between the Native Title holders and other Aboriginal persons in relation to the claim area; and
K. construct and maintain structures for the purpose of exercising the Native Title.

2. The Native Title rights are subject to:
a) the valid laws of the State of Queensland and the Commonwealth of Australia
b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Queensland

3. In relation to the Native Title rights and interests asserted:
- They do not include a claim to ownership of any minerals, petroleum or gas wholly owned by the Crown in a manner which is inconsistent with the continuing Native Title rights residing in those substances;
- They are not exclusive rights or interests if they relate to waters in an offshore place; and
- They will not apply if they have been extinguished in accordance with valid State and Commonwealth laws."

I also note the statement in Schedule Q of the application: "The Applicants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown."

The Requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to

allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.[2]

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

Furthermore, the phrases 'native title' and 'native title rights and interests' are used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s.223.

Section 223(1) reads as follows:

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

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

- the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[3]
- rights to minerals and petroleum under relevant Queensland legislation,[4]
- an exclusive right to fish offshore or in tidal waters, and
- any native title right to exclusive possession offshore or in tidal waters.[5]

I have considered the description of native title rights and interests in the present application in light of previous judicial findings. As a result, I am satisfied that the rights and interests claimed by the applicants in Schedule E are native title rights and interests and that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

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[2] *Queensland v Hutchinson* (2001) 108 FCR 575.
[3] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[4] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[5] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

Result: Requirements Met

Factual basis for claimed native title: s. 190B(5)

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

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

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

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

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

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it." For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[6]

In essence, I must be satisfied, pursuant to s.190B(5), that a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided is sufficient to support the assertions that:

- the native title claim group have, and their predecessors had, an association with the area claimed;
- the traditional laws and customs, acknowledged and observed by the native title group exist, and

[6] See *Western Australia v Ward* (2002) 191 ALR (*Ward)* at [382].

- the native title claim group continue to hold native title in accordance with those traditional laws and customs.

Material which addresses the requirements of s.190B(5) is contained in Schedules F, G and M of the application and in the affidavits of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** attached to the application as "Attachment F."

A general description of the factual basis on which it asserted that the three criteria identified at s.190B(5)(a) - (c) are met is provided in Schedule F of the application, which in turn refers to the three affidavits at Attachment F.

Schedule G provides details of activities currently carried out within the claim area. Schedule M briefly outlines the traditional physical connection of members of the claim group to the area claimed and refers again to the affidavits at Attachment F.

I turn now to the particular assertions of this section:

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

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

- have a close association, including a spiritual connection, with the claim area according to their traditional law and custom; (para (i))
- pass on to their descendants traditional laws and customs, stories and beliefs concerning their traditional country including the claim area; (para (ii))
- use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials; (para (iii))
- care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors; (para (iv))
- exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country. (para (v))

In Schedule G it is stated that members of the claim group continue to exercise traditional laws and customs which has been passed down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs which deal with speaking and caring for country, controlling access to country, the holding of ceremonies on and the use of traditional country, gathering, hunting and fishing in the claim area, camping and occupying country, visitation to and protection and preservation of special sites and story places and participation in consultation processes and land use decision making in relation to third parties.

Schedule M refers to the affidavits of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** (Attachment F), who reside in the vicinity of the claim area and states that many members of the native title claim group continue to, amongst other things, visit the claimed area, many members of the native title claim group continue to, amongst other things, visit the claim area, exercise their native title rights by caring for their country, camping, gathering, hunting, fishing and passing on their traditional knowledge, law and customs.

In the affidavits at Attachment F, **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** tell of their Tableland Yidinji identity and the association that they, other Yidinji families and their Yidinji predecessors have with their Tableland Yidinji country. Such association includes being born and growing up on Yidinji country, living and working on country, camping, fishing, using its resources and being given the knowledge of language and identifying particular places on country by their elders.

- **[Applicant 1 – name deleted]** says (in summary) in his affidavit (sworn on 18 October 1999) that he identifies as a Tableland Yidinji man through his great grandfather and grandfather (para's 2, 3 and 4). He was raised on Tableland Yidinji country, lived, worked, visited other Yidinji families, camped, fished and worked most of his life in the area (paras 5, 6, 7, 8, 9, 11, 13, 16, 19). He was taught the knowledge of the Yidinji language, dreamtime stories and significant Tableland Yidinji places, traditional medicines and traditional ways and laws (paras 10, 11, 14, 15, 18, 19, 20, 21).
- **[Deponent 1 – name deleted]** says (in summary) in his affidavit (sworn on 19 October 1999) that he identifies as a Tableland Yidinji man through his great great grandfather (paras 2 and 3). His family would take him to visit other Yidinji families and places (paras 4, 5, 6, 9, 14). He has lived, worked, hunted and gathered for bush tucker on Tableland Yidinji country (paras 4, 7, 8, 10, 12, 13, 15). He has had passed onto him the knowledge of the Yidinji language, traditional medicines, artifacts and traditional ways (paras 11, 16, 17, 18, 19, 20, 21).
- **[Deponent 2 – name deleted]** says (in summary) in her affidavit (sworn on 19 October 1999) that she identifies as a Tableland Yidinji woman through her grandfather and grandmother (paras 2 and 3). She has lived with her family and worked on Yidinji country and visited other Yidinji families (paras 4, 5, 6 & 11). She gathered bush tucker for food and medicines (paras 8, 9, 10 & 12). She was taught a bit of Yidinji language and can understand it and has passes it and the traditions and culture onto her family (paras 7, 13, 14 & 15).

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

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests

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

I note the statements outlined above in Schedule F at para's (i) through to (iv). I also note the information at Schedule G (outlined above)

In addition, **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** provide factual information in support of this assertion in their affidavits to which I have referred above. They describe a variety of traditional laws and customs which have been passed down to them by their forebears and which they continue to observe and pass on to their own children. These traditional laws and customs include:

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

In particular I refer to:

- Affidavit of **[Applicant 1 – name deleted]** (paras 4 – 21)
- Affidavit of **[Deponent 1 – name deleted]** (paras 4 - 21)
- Affidavit of **[Deponent 2 – name deleted]** (paras 3 – 15)

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

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

The evidence reviewed above in relation to ss.190B(5)(a) and (b) is relevant to whether the application meets the requirements of s.190B(5)(c). On the basis of my findings under s.190B(5)(a) and (b), I am satisfied that there is a factual basis which supports the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

A factual basis for this assertion is provided in the affidavits from **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]**, the three claim group members identified above. Each of the deponents describe their lives as a Tableland Yidinji person and member of the native title claim group. They tell of the observance of Tableland Yidinji traditional laws and customs by which they are connected to their country by continuing to have a close association to the claim area according to their traditional law and custom. They live, or regularly visit their country by camping and fishing on country, knowing its special places and stories, engaging in activities so as to honour its stories and laws. Each deponent tells of the acquisition of knowledge about Tableland Yidinji traditional laws and customs from their predecessors and the observance throughout their lives of those laws and customs. They also tell of the passing of these laws and customs to younger members of the claim group.

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

I am satisfied that that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion.

Result: Requirements met

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

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

Reasons for the Decision

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

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

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

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

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

I have noted already the description of native title rights and interests claimed by the applicants in Schedule E of the application under my reasons for decision for s.190B(4) above.

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

1. The Native Title rights and interests claimed in relation to the claim area are not to the exclusion of all others and are the rights to have access to and use the claim area and its natural resources namely to:

I note in relation to the opening paragraph of Schedule E that all the rights and interests claimed are on a non-exclusive basis (i.e. 'not the exclusion of all others').

(i) maintain and use the claim area

Established prima facie

I am satisfied that there is sufficient evidence in the application and affidavits to prima facie establish a right to 'maintain and use the claim area', subject to the qualifications below. I refer in particular to the information in Schedules F, G and M and in the affidavits of **[Applicant 1 – name deleted]** (paras 9, 11, 13, 14, 15, 19), **[Deponent 1 – name deleted]** (paras 7, 8, 10, 12, 13, 14, 16, 17) and **[Deponent 2 – name deleted]** (paras 8, 9, 10, 12).

In regard to the right to 'use' the claim area, I note that, in accordance with the comments of the majority of the High Court in *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward*), this right should be construed as comprising those activities that do not amount to controlling access to the area by others and making binding decisions on how the land will be used. Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* questioned whether it would be appropriate to claim rights to control access to and use of the land: "…Without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - at [52].

There are statements in Schedules F and G of the application that indicate that members of the claim group 'control access' to the claim area and 'speak for' country. There is nothing in the affidavits at Attachment F that refer to controlling access or making binding decisions in relation to the claim area.

In *Ward* the court recognised "a clear distinction between a right to control access, generally and as a matter of law, and a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs." The court was of the view that while the former right is incompatible with a claim to non-exclusive possession, the latter right is not (at [27]).

Taking into account the application as a whole, I have interpreted the references in Schedules F and G to 'control of access' as being intended to apply only in relation to other Aboriginal people. As such I do not find these statements to be inconsistent with a non-exclusive right to use the claim area.

In light of these comments I direct that a note be included on the Register qualifying the extent of this particular right as being limited to use of the claim area that does not amount to controlling access to the claim area and making binding decisions as to how the land will be used (except in relation to other Aboriginal persons).

(ii) conserve the cultural resources of the claim area

Established prima facie

Schedule F refers to members of the claim group passing on their traditional laws and customs and stories and beliefs in relation to the claim area (para). (ii)) and the holding of ceremonies on traditional country (para. (v)). Schedule G refers to members of the claim group holding ceremonies on the claim area, "protecting and preserving special sites and story places" and participating in consultation processes and land-use decision-making in relation to third parties in relation to the claim area. **[Deponent 1 – name deleted]** states in his affidavit (Attachment F) that he visited with his father significant Tableland Yidinji places and story places and passed those stories on to his sons and grandchildren (para. 5) and refers to the holding of traditional ceremonies (para.14). Similarly **[Applicant 1 – name deleted]** states in his affidavit (Attachment F) that he visited with his uncle significant Tableland Yidinji places and story places and has passed on those stories to his sons and grandchildren (para. 6).

I am satisfied that there is sufficient evidence in the application and affidavits to prima facie establish a right to conserve the cultural resources of the claim area.

(iii) protect the claim area and its cultural resources for the benefit of native title holders

Established prima facie

For the reasons referred to above in relation to right 1(ii) I am satisfied that there is sufficient evidence in the application and affidavits to prima facie establish a right to protect the claim area and its cultural resources for the benefit of native title holders.

(iv) care for the claim area for the benefit of the native title holders

Established prima facie

Schedule F refers to members of the claim group continuing to care for their traditional country including the claim area in accordance with traditional laws and customs (paras (iv) and (v)) and Schedules G and M refer to members of the claim group caring for country and preserving special sites and story places. While the affidavits of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** do not specifically refer to caring for the claim area the information contained in them implies support for such a right, for example in the course of hunting and gathering resources on the claim area and visiting culturally significant places within the claim area and passing on traditional knowledge to the younger generation.

(v) use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes:

Established prima facie

I am satisfied that there is sufficient information in the application to prima facie establish a right to 'use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes'. There is material that demonstrates that the claim group use the claim area and its natural resources for camping, visiting, knowing and observing its stories and laws relating to special places, fishing, collecting bush-tucker and the passing of traditional knowledge between the generations.

In particular, I refer to:

- Schedule F paras (ii) and (iii)
- Schedule G paras (b), (c) and (d)
- Affidavit from **[Applicant 1 – name deleted]** (paras 6, 9, 11 - 20)
- Affidavit from **[Deponent 1 – name deleted]** (paras 5, 7, 8, 9, 10 – 21)
- Affidavit from **[Deponent 2 – name deleted]** (paras 5 – 18)

and more particularly to:

It is not entirely clear in my view whether the words "*and more particularly to"* are intended to indicate that the rights that follow at (A) to (K) are a particularisation of those outlined at para's 1(i) to (v) or are intended to relate only to (v). Taking into account the overall wording of Schedule E I have interpreted that rights (A) to (K) are intended to be considered as additional separate rights to those specified at (i) to (v) and as such I consider each of them separately.

A. reside, camp on and travel across the land

Established prima facie

I am satisfied that there is sufficient evidence in the application and affidavits to prima facie establish a right to 'reside, camp on and travel across the land.' Schedule F refers to members of the claim group using the claim area for traditional hunting, fishing and gathering (para iii), Schedule G refers to the current activities of members of the native title claim group in relation to the claim area including hunting and fishing, camping and occupying country and visiting special sites and story places.

There is evidence in the affidavits of members of the claim group in support of this right. For example:

- **[Applicant 1 – name deleted]** refers to visiting and camping on the claim area, hunting fishing and gathering on the claim area and building mia-mias (Yidinji grass covered houses);
- **[Deponent 1 – name deleted]** refers to visiting, living and camping on the claim area, hunting, fishing and gathering on the claim area and building gunyas (Yidinji grass covered houses) on the claim area;
- **[Deponent 2 – name deleted]** refers to living, visiting, gathering foods and bush medicines on the claim area and building Yidinji grass huts on the claim area.

B. exercise rights of use and disposal over the natural resources

Established prima facie

I am satisfied that there is sufficient information in the application and affidavits to prima facie establish a right to 'exercise rights of use and disposal over the natural resources.'

In support of this right I note the following information:

Schedule F indicates that the group continues to use the claim area for traditional hunting, fishing and gathering of traditional bush medicines and other materials (para iii.).

Schedule G states that members of the claim group currently engage in hunting and fishing activities in relation to the claim area.

The affidavits of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** provide evidence that members of the claim group engage in hunting, fishing and gathering of bush tucker and medicines and ochre in relation to the claim area.

- **[Applicant 1 – name deleted]** refers to setting bush turkey, fish and wallaby traps and hunting for bush tucker including goannas, turtles, bandicoot and possums (para 9), fishing for eels (para 11), collecting honey from the earth (para 14), collecting and using ochre (para 15), collecting and using bush medicine plants (para 18) and building grass covered houses (para 19).
- **[Deponent 1 – name deleted]** refers to setting bush turkey, wallaby and fish traps to feed the family and catching goannas, turtles, bandicoot, possums and other

bush tucker and collecting turkey and cassowary eggs on the claim area (para 8), catching eels (para 10), collecting wild figs, lawyer vine berries and wild ginger (para 13), collecting and using bush medicines (para 16), building grass covered houses (para 17) and making spears and shields using vine and sap (para 21).

- **[Deponent 2 – name deleted]** refers to collecting grass to build grass huts (para 5), collecting and using pandanus (para 8), collecting berries and wild honey (para 9), catching and eating eels, fish and turtles (para 10) and collecting and using bush medicines (para 12).

C. exercise & carry out economic life on the claim area, including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the native title rights and interests.

Not established prima facie

I note that as this right is expressed as a composite right I must be satisfied that there is sufficient information in relation to each part of the right in order to prima facie establish the overall composite right.

Despite information in the material relating to the collection and personal use by members of the claim group and their families of traditional foods, I find that there is insufficient information in the application to establish *prima facie* the existence of a traditional economic system relating to production, husbanding, harvesting and exchange of natural resources.

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

D. discharge cultural, spiritual, traditional & customary rights, duties, obligations & responsibilities on, in relation to and concerning the claim area and its welfare

Established prima facie

I refer to the information set out in respect of the rights and interests claimed at E and F below. Based on the information outlined there I am satisfied that this right claimed here can be prima facie established.

E. preserve sights [sic] of significance to the native title holders and other Aboriginal people on the claim area.

Established prima facie

It would appear that the use of the word 'sights' rather than 'sites' in this claimed right is a typographical error. I assume that the applicants are referring to 'sites of significance' (as is correctly reflected in Schedule G para (d)).

I am satisfied that there is sufficient information in the application and affidavits to prima facie establish a right to 'preserve sites of significance to the native title holders and other Aboriginal people on the claim area.' Schedule G states that members of the native title claim group currently engage in "visiting, protecting and preserving special sites and story places and participation in consultation processes and land use decision-making in relation to third parties".

I also note the evidence in the affidavits of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** in support of this right. There is evidence in support of the claim group observing traditional law and custom relating to special sites on country and related stories and evidence of preservation of these sites according to Tableland Yidinji law and custom. I refer to:

- Affidavit from **[Applicant 1 – name deleted]** (paras 6, 7, 10, 13, 14, 15, 19)
- Affidavit from **[Deponent 1 – name deleted]** (paras 4, 5, 6, 7, 9, 12, 14, 21)
- Affidavit from **[Deponent 2 – name deleted]** (paras 5, 15)

F. conduct secular, ritual and cultural activities on the claim area.

Established prima facie

I am satisfied that there is sufficient information in the application and affidavits to prima facie establish a right to 'conduct secular, ritual and cultural activities on the claim area.' Schedule F refers to the claim group maintaining a close spiritual connection to the area, passing on traditional laws and customs and stories and beliefs in relation to the claim area to their descendants and using the claim area for traditional hunting, fishing, gathering. Schedule G outlines activities of the above nature being carried out by members of the claim group, e.g. hunting, fishing, gathering, conducting ceremonies and visiting and protecting special sites and story places. This is supported by the affidavits of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** referred to above.

G. conduct burials on the claim area.

Not established prima facie

Based upon the information available to me, I am unable to be satisfied that this right can be prima facie established. There is no information in the application or the affidavits to support a specific right to conduct burials on the claim area. Schedules F and G refer to the holding of ceremonies on traditional country but there is no information specifically provided in support of the conducting of burials.

I note s.190(3A) of the Act – refer above.

D. maintain the cosmological relationship, beliefs, practices & institutions through ceremony and proper & appropriate custodianship of the claim area and special and sacred sites to ensure the continued vitality of culture, and the well-being of the native title holders;

Established prima facie

I am satisfied that this right does not amount to a right 'approaching an incorporeal right akin to a new species of intellectual property' and can be distinguished from the right to protect and prevent the misuse of cultural knowledge disallowed by the High Court in *Ward* (at [19] and [57] to [60]). Rather, this right appears to relate to the conduct of ceremony on country and proper custodianship of the native title land, activities which clearly connect the native title claim group to their land and waters pursuant to s.223. As such I find that it is readily identifiable for the purposes of s.190B(4) and capable of being prima facie established.

I am satisfied that there is sufficient information in the application and affidavits to prima facie establish this right. In Schedule G the applicant provides information relating to people visiting and travelling over their country for the protection and preservation of sacred sites and story places. There is evidence of the transmission of cultural knowledge between generations relating to Tableland Yidinji country. The evidence of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** in their affidavits paints a clear picture of lifelong associations with the Tableland Yidinji country, including camping, residing and travelling over it and the acquisition of knowledge from their elders about its sites and stories and the use of its resources via fishing and collection of bush tucker. The evidence shows that members of the group continue to access their land and its resources to camp, fish and visit special places. They continue to pass on knowledge of these customs and practices to younger generations. **[Deponent 1 – name deleted]** says that he still lives on country with his family (para 12).

I. inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition;

Not established

There is no information that I can find that supports the existence of this is claimed native title right and interest under Tableland Yidinji traditional law and custom.

I refer the applicant to s. 190(3A) of the Act – see above.

J. resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area;

Not established prima facie

I am not satisfied that this right can be prima facie established.

Schedules F and G refer to members of the claim group exercising traditional laws and customs including 'controlling access to, speaking and caring for country' and 'protecting and preserving special sites and story places.' As noted above in relation to right (i) I have interpreted, in the context of the application as a whole, the references to controlling access to apply only in relation to other Aboriginal people. However, aside from these general statements there is no information available to me to support the existence of a right to resolve disputes between the Tableland Yidinji people and other Aboriginal persons in relation to the claim area. The affidavits at Attachment F do not specifically refer to information that would support this right.

I refer the applicant to s.190(3A) – see above.

K. construct & maintain structures for the purpose of exercising native title.

Established prima facie

I am satisfied that there is sufficient information in the application and affidavits to prima facie establish this right. Schedule G refers to members of the claim group camping and occupying country. The affidavits provided at Attachment F provide evidence that members of the claim group live, and have lived, raised their families and visit Tableland Yidinji areas. I also note that the affidavits refer to members of the claim group building 'mia-mias' or 'gunyas' (Yidinji grass covered houses) in the claim area.

I refer to:

- Affidavit from **[Applicant 1 – name deleted]** (paras 6, 7, 13, 17 and 19)
- Affidavit from **[Applicant 1 – name deleted]** (paras 4, 6, 12 and 17)
- Affidavit from **[Deponent 2 – name deleted]** (paras 5, 6)

Conclusion: I have found that at least some of the claimed rights and interests at Schedule E of the application can be prima facie established. Consequently I am satisfied that the requirements of this section are met.

i. Result: Requirements met

Traditional physical connection: s. 190B(7)

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

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

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

(i) the Crown in any capacity; or

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

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

Reasons for the Decision

Under s.190B(7) 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.

In statements at Schedules F and G, the applicant claims a continuous association with the claim area, both by means of physical occupation and otherwise.

Also, Schedule M states:

> "Details of any traditional physical connection with any of the land or waters covered by the application by any member of the native title claim group:
>
> Residing in the vicinity of the up claimed area, many members of the native title claim group continue to, amongst other things, visit the claim area, exercise their native title rights by caring for their country, camping, gathering, hunting, fishing and passing on their traditional knowledge, laws & customs.
>
> Further details are contained in attached affidavits of claim group members."

I refer also to the affidavits at Attachment F of **[Applicant 1 – name deleted]** and **[Deponents 1 and 2 – names deleted]** (as discussed above) which provide evidence in support of the assertions that they are members of the native title claim group and that they have a current traditional physical association and connection with the claim area. I am satisfied the requirements of the section are met.

Result: Requirements met

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

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

Reasons for this condition

Section 61A contains four sub-conditions. Because s.190B(8) asks the Registrar to test the application against s. 61A, the decision below considers the application against each of these four sub-conditions.

(ii) S. 61A(1) Native Title Determination

A search of the Native Title Register has revealed that there is no determination of native title in relation to the area claimed in this application.

(iii) S. 61A(2) Previous Exclusive Possession Acts

In Schedule B of the application, any area that is covered by the categories of previous exclusive possession acts defined in s.23B, is excluded from the claim area. I am therefore satisfied that the claim is not made over any such areas.

(iv) S. 61A(3) Previous Non-Exclusive Possession Acts

The applicants state in Schedule B that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts (s. 23F).

Article XXVIII. Conclusion

For the reasons as set out above I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s. 61A the application should not have been made.

Result: Requirements met

s.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

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

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

Reasons for this condition

The applicants state at Schedule Q of the application that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons relating to this sub-condition

The applicants state at Schedule P of the application that this is not applicable. The application area does not include an offshore place.

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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

Reasons for this condition

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the claim area have been extinguished.

Result: Requirements met

End of Document

Errata created on 12 October 2005 – At page 25 the reference to Warrungu is incorrect and should be referring to Tableland Yidinji.