NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Deanna Cartledge

Application Name: Tableland Yidinji People #1 & #2

Names of Applicant(s): ***[Applicant names deleted]***

Region: Far North Queensland NNTT No.: QC98/35 & QC98/36

Date Application Made: 1 July 1998 Federal Court No.: Q6030/99

DECISION – Tableland Yidinji People #1 & #2

The delegate has considered the application against each of the conditions contained in s190B and 190C of the *Native Title Act* 1993.

DECISION

The application IS ACCEPTED for registration pursuant to s190A of the *Native Title Act* 1993.

…… 24th February 2000

Deanna Cartledge Date of Decision

Delegate of the Registrar pursuant to

sections.190, 190A, 190B, 190C, 190D

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

Information considered when making the Decision

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

- The National Native Title Tribunal's Working/Personnel Files, Legal Services Files, Party Files and Registration Testing Files for QC98/35 QC98/36.
- Tenure information acquired by the Tribunal in relation to the area covered by this application.
- The National Native Title Tribunal's Working files and related materials for Native title applications that overlap the area of this application (if applicable);
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims and Schedule of Native Title Applications;
- The Native Title Register;

I note that any material provided directly to the Tribunal by the applicants for my consideration in application of the registration test was provided to the State, as is required by *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591 – 1594. The State has indicated that it does not intend to provide any comments in response to the contents of this material.

Note: Information and materials provided in the context of mediation have not been considered in making this decision due to the without prejudice nature of those conferences and the public interest in maintaining the inherently confidential nature of such conferences.

All references to legislative sections refer to the Native Title Act 1993 unless otherwise specified.

A. **Procedural Conditions**

s.190C(2)

Information, etc., required by section 61 and section 62:

The Registrar 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.

Details required in section 61

61(3) Name and address for service of applicants

Reasons relating to this sub-condition

The name of the applicants and address for service is detailed at Part A and B of the application.

I note that on page 2 of the application, the first named applicant is described as ***[applicant name deleted]***. The spelling of his surname on page 2 is an obvious typographical error – refer to his affidavits attached to the application in which the spelling of his surname is "***[applicant surname deleted]***". I have adopted the spelling ""***[applicant surname deleted]***" throughout these reasons for this applicant's surname and I direct that the s190A Register also reflect this spelling.

Result: Requirements met

61(4) Name persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. For the reasons which led to my conclusion (below), that the requirements 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

61(5) Application is in the prescribed form, lodged in the Federal Court, contain prescribed information, and accompanied by prescribed documents and fee

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998. The application was filed in the Federal Court as required pursuant to s.61(5)(b) of the Act.

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections. As required by s.61(5)(d) the application is accompanied by an affidavit as prescribed by s.62(1)(a) and a map as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

I note that s.190C2 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

Details required in section 62(1)

62(1)(a) Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

The applicants have provided affidavits, paragraph (e) of which states "see Affidavits in "Attachment R" or, in one case, "see my Affidavit in "Attachment R" as stating the basis on which the applicants are authorised. All four applicants have each sworn a further affidavit (contained in Attachment "R" of the combined amended application) that states the basis of the applicants' authorisation. The applicant's affidavits were sworn on 18 October and 19 October 1999. I am satisfied that the affidavits satisfactorily address the matters required by s.62(1)(a)(i)-(v).

I note that the first affidavit by the applicant named ***[applicant name deleted]*** is expressed to be by "***[text identifying spelling of name deleted]***". However, this appears to be a typographical error, as this applicant is described on page 2 and in the affidavit in attachment "R" as "***[text identifying spelling of name deleted to protect privacy of an individual]***", and his signature on both affidavits show his surname to be "***[text identifying spelling of surname deleted to protect privacy of an individual]***".

Result: Requirements met

62(1)(c) Details of physical connection (information not mandatory)

The application contains some details relating to 'traditional physical connection' at Schedule G and Attachments "F".

Result: Provided

Details required in section 62(2) by section 62(1)(b)

62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps provided by the applicant is sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered

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 and provided by the applicant 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

62(2)(b) A map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition.

For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the maps provided by the applicant sufficiently identify the boundaries of the claim area.

Result: Requirements met

62(2)(c) Details/results of searches carried out to determine the existence of any non-native title rights and interests

Reasons relating to this sub-condition

The requirements of s.62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicants in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect the applicants to have knowledge of, and obtain details about all searches carried out by every other person or body. Schedule D states that "it has not been possible to carry out a tenure history search on these lots."

Result: Requirements met

62(2)(d) Description of native title rights and interests claimed

Reasons relating to this sub-condition

An adequate description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. I have outlined these rights and interests in my reasons for decision in respect of s.190B(4).

Result: Requirements met

62(2)(e)(i) Factual basis – claim group has, and their predecessors had, and association with the area

Reasons relating to this sub-condition

This information is contained at Schedule F of the amended application and in the affidavits of ***[deponent name deleted]*** sworn 19 October 1999, ***[deponent name deleted]*** sworn 18 October 1999 and ***[deponent name deleted]*** sworn 19 October 1999. For the reasons which led to my conclusion that the requirements of s.190B(5)(a) have been met, I am satisfied that there is sufficient factual basis to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

Result: Requirements met

62(2)(e)(ii) Factual basis – traditional laws and customs exist that give rise to the claimed native title

Reasons relating to this sub-condition

This information is contained at Schedule F of the amended application and in the affidavits of ***[deponent name deleted]*** sworn 19 October 1999, ***[deponent name deleted]*** sworn 18 October 1999 and ***[deponent name deleted]*** sworn 19 October 1999. For the reasons which led to my conclusion that the requirements of s.190B(5)(b) have been met, I am satisfied that there is sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed.

Result: Requirements met

62(2)(e)(iii) Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs

Reasons relating to this sub-condition

This information is contained at Schedule F of the amended application and in the affidavits of ***[deponent name deleted]*** sworn 19 October 1999, ***[deponent name deleted]*** sworn 18 October 1999 and ***[deponent name deleted]*** sworn 19 October 1999. For the reasons which led to my conclusion that the requirements of s.190B(5)(c) have been met, I am satisfied that there is sufficient factual basis to support the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

Result: Requirements met

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 sub-condition

The combined amended application provides general details of the activities which the native title claim group carries out in relation to the area claimed at schedule G of the application. It is my view that this description of activities is sufficient to comply with the requirements of s.62(2)(f).

Result: Requirements met

62(2)(g) Details of any other applications 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 sub-condition

Schedule H of the application states "there is an overlap with QC96/18, QG6033/98. This will be resolved soon". A search of the Tribunal's geospatial data confirms that there is an overlap with QC96/18 and another overlap with application QC94/11.

The requirements of s.62(2)(g) only require the applicant to provide details of any other applications *the applicant is aware of* (my emphasis). From my perusal of the NNTT records for this application there is nothing to suggest that the applicant is aware of the overlap with QC94/11. I am therefore satisfied that the application complies with the requirements of s 62(2)(g).

Result: Requirements met

62(2)(h) Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, and the applicant is aware of

Reasons relating to this sub-condition

The application at Schedule I states that "there are no s29 notices issued as yet over the area claimed".

Result: Requirements met

Reasons for the Decision

For the reasons identified above the application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61&62.

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

Aggregate Result: Requirements met

Common claimants in overlapping claims:
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

190C(3) requires identification of those claims that were on the Register of Native Title Claims after consideration under s190A at the time the current application was made, that have not subsequently been removed.

In *Strickland v Native Title Registrar* [1999] FCA 1530, His Honour Justice French found that the earliest date upon which an application could be made or be taken to have been made to the Federal Court was 30 September 1998. His Honour concluded that the Native Title Registrar in considering 190C (3)(b) will therefore be dealing with applications made under the new Act after 30 September 1998 or taken to have been made on that date.

In the case of pre-combined applications 'made' on 30 September, 1998, but combined subsequently – His Honour found that the combined application was not a new application and should be taken as having been made on 30 September 1998. Therefore, in accordance with His Honour's findings, for the purpose of this section the date that the Tableland Yidinji application was made is 30 September 1998, as both pre-combined applications were lodged with the Tribunal on 1st July, 1998.

A search of the Schedule of Native Title Applications and Register of Native Title Claims on 24th February, 2000 revealed that two overlapping applications covering part of the area covered by the application have been filed in the Federal Court, namely QC94/11, Yirrganydji People #1 and QC96/18 Malanbarra Clan.

The Malanbarra Clan application was found not to comply with the requirements of s190A on 26/10/99, was removed from the Register of Native Title Claims on 04/11/99 and then discontinued in the Federal Court on 7th February 2000. The Yirrganydji People #1 has yet to be considered under s190A.

In summary, neither of the two overlapping applications (QC94/11, Yirrganydji People #1 and QC96/18 Malanbarra Clan) were entered on the Register of Native Title Claims under s190A when this application was 'made' on 30th September 1998.

Accordingly, the application does not offend the provisions of s.190C(3).

Result: Requirements met

Certification and authorisation:

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 applicants rely on the second limb of s190C4. Under s190C4(b) I must be satisfied that the applicants are members of the native title claim group and authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

The Act, at s251B, recognises that applicants may be authorised using a decision making process that is either:

(a) under traditional laws and customs of the group; or

(b) agreed to and adopted by the native title claim group.

In affidavits attached to the application as 'Attachment R' the applicants depose that the decision making process used to authorise them was a traditional one. As a consequence I am treating the authorisation as having been carried out under s251B(a).

A prerequisite to compliance with this sub-section is provision by the applicants, under s190C5, of:

- a statement to the effect that the requirement in s190C(4)(b) is met; and
- a brief statement setting out the grounds on which I should consider that the requirements of s.190C4(b) are met.

At Part A(2) of the amended application it is stated that the Tableland Yidinji people have authorised the application according to Tableland Yidinji custom and tradition; and in the affidavits by the applicants at Attachment R it is deposed that:

- the Tableland Yidinji people have complied with their own customary and traditional decision-making process that must be complied with and have authorised the applications QC98/35 and QC98/36 (now combined by order of the Federal Court into one application), and
- the applicants are authorised to pursue the applications and seek as outcomes of the applications, determinations of native title for the Tableland Yidinji people.

I am satisfied that the requirements of 190C5 have been met.

Under 190C4(b) I must be satisfied that each of the applicants is:

(a) a member of the native title claim group; and

(b) is duly authorised to make the application and to deal with matters arising in relation to it.

In affidavits attached at both 'F' and 'R' of the application, each applicant self-identifies as 'Tableland Yidinji' and provides basic details about their lineage. Based on this and their sworn

evidence with respect to authorisation I am satisfied that each applicant is a member of this native title claim group.

With regard to the authorisation decision I have had regard to decisions relevant to this section, in particular *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 ["Moran'] and *Strickland v Native Title Registrar* [1999] FCA 1530 ["Strickland"] when considering the material provided.

The applicants' affidavits at Attachment R state that:

(a) the Tableland Yidinji people have a traditional decision-making process that must be complied with when land issues are involved (refer para.4 of all applicant affidavits);

(b) the Tableland Yidinji traditional decision making process entails:

- the Elders and heads of families discussing the issue amongst themselves and their relatives;
- the Elders and heads of families alone then reaching a consensus about the issue among themselves, after considering the views of others;
- the consensus decision of the Elders and heads of families is then final. Those who are not Elders and heads of families cannot disagree publicly about such a decision (refer paras. 4 & 5 of all applicant affidavits).

(c) The following is deposed to in relation to this process:

- during 1998 and 1999 the Tableland Yidinji people discussed amongst themselves the need to lodge native title applications over their country (refer para. 6 of all applicant affidavits);

- a series of meetings, facilitated by the regional land council, affirmed the decision of the Elders and heads of families to authorise the four applicants to pursue the applications and to seek as outcomes, determinations of native title for the Tableland Yidinji people (refer para. 7 of all applicant affidavits);

- at a further meeting in October 1999, the authorisation decision of the Elders was again supported by all the Tableland Yidinji people present.

A letter dated 2nd February, 2000 from ***[person's identity deleted to protect privacy of an individual]***, instructed by the applicants' legal representative, provides some additional information about the authorisation decision ("the letter"). Generally the letter indicates that professional anthropological information has been gathered on behalf of the group, but that this will not be provided to the Tribunal once completed.

Specifically, the letter confirms the decision making process deposed to by the applicants and submits that this process does not involve a "formalised or institutionalized body" such as that considered in Moran. I am of the view that the Elders/family heads decision-making group does constitute such a body, as discussed in my conclusion.

In addition, the letter indicates that the decision making process engaged in by the Elders/family heads does not involve a formal meeting (and associated formalities such as written Minutes). Instead, the process is "a customary community based matter"; where the relevant people engage in discussions from time to time either at other group gatherings (eg. funerals) or as a result of ordinary social interaction – "their daily lives". It is indicated that the relevant people live within reasonable proximity of each other.

The decision reached by the Elder/family heads is then affirmed at a more formal gathering of group members. These are the meetings deposed to by the applicants.

Conclusion

In my view the Moran decision provides some general guidance about authorisation notwithstanding that some areas of the judgement relate to the specific circumstances of that case.

Having found the group used a traditional form of decision making [as defined in s251B(a)] when authorising the applicants, I consider paragraph 34 pertinent to this application, in particular:
"*I accept it may be possible to satisfy the requirements of s66B(1)(b) of authorisation by the claim group other than by proving the making of individual decisions by all or most of the members or the group; it would be enough if there was a decision by a representative or other collective body, that exercises authority on behalf of the group under customary law. …. However, a person who wishes to rely on a decision of a representative or 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 being the members of the group and that the body has authorised the making of the application*".
The matters to be considered under s66B with respect to authorisation are, in my view, analogous to those considered under this subsection.

The Strickland decision is, in my view, also relevant to this application. In that matter His Honour Justice French found that the Registrar was not shown to be informed by any error in principle when satisfied as to authorisation. The authorisation had been evidenced by a brief assertion within an affidavit as to the authority of elders within the relevant native title claim group, and in addition the Registrar had reference to other anthropological material. In reaching this conclusion, His Honour noted that authorisation was:
"*a matter of considerable importance and fundamental to the legitimacy of native title determinations. 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*".

In this application the authorisation was clearly based on the decision of a collective body as referred to by Judge Wilcox in Moran, being a 'body' of Elders and heads of families.

The evidence provided that such a body exists under the Tableland Yidinji customary law recognised by group members is each applicant's sworn affidavit to that effect. (It is not clear whether any of the applicants are currently Elders or heads of families.) This evidence is also corroborated in the letter. The nature and extent of the Elders/heads of families authority to make decisions in relation to native title/land; and that the authorisation was made in this context, is evidenced from the same sources.

It is not clear how large the group is, and more specifically how many Elders/family heads are involved in the making of native title/land related decisions. The letter does state that "The Tableland Yidinji are not a huge group" and later that "over 600 people attended ***[person's name deleted to protect the privacy of an individual]*** funeral, including most Tableland Yidinji persons who could do so". (A group of 600 people in my view is reasonably large.)

The size and locality of in particular the Elders and family heads of the group is relevant to my consideration of whether the stated process used to authorise the applicants was in fact carried out. The letter states the "people live in a close community based around Atherton, but extending as far as Mount Garnet and Ravenshoe and Cairns and Mareeba and Gordonvale" and I note that there were a number of affirmation meetings held after the decision was made. Given this I am satisfied that the body of Elders/heads of families were able to discuss authorisation within the context of daily life interaction (as is their tradition) and that the native title claim group members have accepted the Elders authorisation decision. Based on the above and the applicants' sworn authorisation statements, I am satisfied that the applicants are authorised as required by this section.

The information provided in particular in the letter and also other affidavits is more than a formulaic statement and in the circumstances of this particular application is just adequate given the considerable importance of authorisation.

Result: **Requirements met**

B. Merit Conditions

s.190B(2)

Description of the areas claimed:

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 and waters.

Reasons for the Decision

Map and External Boundary Description

Maps

The applicant claims a number of reserves, national parks, USL and State land in the vicinity of Atherton on the Atherton Tablelands. All of the claimed parcels (except for 2) are described according to the legal parcel description allocated by the State's land tenure identification system. The two that are not so described, are described as being part of a legally defined land parcel, with a further description of the external boundary by reference to geographic features, supplemented with maps that plot the external boundary lines, supplemented with latitude and longitude markings.

The applicants have provided a number of maps with the original application and the combined amended application that depict the parcels of land claimed in the application.

The maps (except for two, discussed below) are all BLINMAPs, produced by DNR and based upon an extraction from the Digital Cadastral Data Base.

The remaining two maps are:

- a map prepared by C&B Consulting Group of the part of the lot described in the application as "194 FTY 1695 (north of northern bank of Scrubby Creek only as per map then following a direct line between plotted geo-spatial points as per new map 10)";
- an old DNR "working map" of the land parcels claimed in the Tolga area. This map was attached to the original application for QC98/36. In the combined amended application new map numbered "12 is provided to depict the land parcels claimed in the Tolga area. (This is one of the BLINMAPS referred to above). I therefore do not need to consider this map.

The boundary lines for the parcels of land depicted on the BLINMAPS are drawn in fine black ink. Each parcel of land depicted on the BLINMAPs contains a reference to the written description allocated by the State to the relevant parcel of land. The maps have a scale, and, in most cases, a series of latitude and longitude co-ordinate points. In the bottom left hand corner of each BLINMAP is a "map window position" and a limited set of geographic coordinates.

In some cases on the BLINMAPS the applicant has drawn or marked in ink the area within the external boundaries that makes up the claimed land parcel. In some cases the drawing or marking has gone outside the drawn external boundary line. However, I am satisfied that it is still possible to make out the external boundary line, particularly as each claimed land parcel is referred to on the map by the legal land parcel description allocated to it pursuant to the State's land identification system. In this regard I note that the applicants have stated in schedule B that: "*that any duplication of lot numbers on more than one map is for the purposes of contextualisation, not to repeat the claim. Hence if a lot is marked on a map and not listed in the map descriptions below it is there on the map for contextualisation only. Likewise marker lines*

are to indicate the locations of named lots not to define them. Where there is and "out" or "no" written over a lot description or next to one with arrows this is to indicate that the lot is not included in the application, even if it is coloured in".

Some of the claimed land parcels are not depicted on the BLINMAPs supplied with the application, or if depicted, the boundary lines are incomplete. However, the land parcels in respect of which this has occurred:

- are in any event described according to the legal parcel description allocated by the State's land tenure identification system;
- have been depicted in additional maps supplied by the applicant to clarify their location.

The three additional maps supplied by the applicant have been prepared by the Tribunal's Geospatial Analysis & Mapping Branch, sourced from data obtained from the State's Department of Natural Resources. These three maps clearly depict the external boundaries of all of the claimed parcels with reference to the legal description allocated to the parcel. The boundary lines are finely drawn. The maps are drawn to a scale, and there is a series of latitude and longitude co-ordinate points. I have therefore accepted this information as clarifying mapping of the external boundary of each of the claimed parcels.

In reaching this decision I have had particular regard to the obligations imposed on the Tribunal by s109 to "pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way" (s109(1)) and the provisions of s109(3) which state that the Tribunal, in carrying out its functions, is not bound by technicalities, legal forms or rules of evidence.

However, I recommend that the three further maps be marked "additional information" and included as an attachment to the Register extract for this claim, and that the applicant attach these to the application when it is next amended.

I am satisfied that the maps meet the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.

External boundary description

The combined amended application lists each land parcel claimed in the application at schedule B according to lot numbers, plan numbers and/or other unique reference codes to identify the claimed parcels, allocated in accordance with the Queensland State Government's land tenure record system.

In respect of one of the claimed parcels, the applicant has described it in schedule B as *"803 NR 7480"*, and this is the descriptor allocated to the parcel in the maps attached to the application (refer to map 6 attached to original application QC98/36). It would appear from one of the maps provided as additional information (map A) that this parcel has been allocated a new description, namely, *"803 SP 101838"*. This is confirmed in a facsimile letter from the applicant's legal representative dated 31/01/00, and a DNR printout that shows that this parcel is described as *"Lot 803 on SP101838"*. I accept this information as clarifying the written description for this parcel of land. I recommend that this information be included (together with the old description) on the Register.

In two cases, the applicant has defined the external boundary as being part of a legally defined parcel. In the first case the parcel is described as *"194 FTY 1695 (north of northern bank of Scrubby Creek only as per map then following a direct line between plotted geo-spatial points as per new map 10)"*. The map 10 referred to clearly shows the section of Scrubby Creek that corresponds with the external boundary for that portion of the parcel and also a line from the co-ordinates 145o 25'23" E, 17o16'58"S which then travels in a northerly direction with a series of

plotted co-ordinate points to gauge its location. The remainder of the external boundary then corresponds with that of lot 194 FTY1695.

In the second case the parcel is described as *"191 FTY 1520 (on the western side of the western bank of the Barron River only)"*. The map that depicts this parcel clearly shows the western line of the bank of the Barron River (map 11 from the original application for QC98/36). This map is also referenced to co-ordinate points that assist in the location of this boundary line. Further information as to this section of the external boundary is found in the additional maps provided by the applicant as further information clarifying the external boundary line. This section of the external boundary is clearly depicted on the first of the three additional maps. It is drawn in fine ink and there are plotted co-ordinate points to gauge its location. The remainder of the external boundary then corresponds with that of lot 191 FTY 1520.

Details of the land parcels are available on the public record and are sufficient to identify the location of the areas claimed on the surface of the earth. Combined with the additional descriptions included for the two specific parcels just discussed, this is sufficient information to enable any person to ascertain with reasonable certainty the area covered by the application.

I am satisfied that the written description of the external boundaries meet the requirements of s62 (2)(a)(i) as the boundaries of the areas covered by the application can be identified.

Internal Boundaries

At Schedule B, the applicants have provided information identifying the internal boundaries of the claimed area. This is presented by way of a formula that excludes a variety of tenure classes from the claim area. This reflects an amendment to the original exclusions detailed at A6 of the two original applications.

The class exclusion in the application is in the following terms:

"The application excludes:

- *Dedicated roads*
- *Dedicated road reserves*
- *Creeks or rivers dedicated to the State of Queensland*
- *Valid grants of freehold land or water*
- *other scheduled interests*
- *a commercial lease that is neither an agricultural lease nor a pastoral lease*
- *An exclusive agricultural lease or exclusive pastoral lease*
- *A residential lease*
- *A community purpose lease*
- *any lease other than a mining lease that confers exclusive possession over particular land or waters*
- *What is taken by subsection 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to "1 January 1994" were instead a reference to "24 December 1996"*
- *Any area covered by a valid construction or establishment of any public works where the establishment or construction of the public work commenced on or before 23 December 1996."*

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

basis of the information provided by the applicants. I consider that the description of the internal boundaries of the claim area in the application provide a reasonable level of certainty.

Conclusion

For the reasons given above, I am satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b), supplemented by the additional information; 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.

Result: Requirements met

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.

Reasons for the Decision

To meet this condition, the description of the claim group must be sufficiently clear so that it can be said with reasonable certainty whether any particular person is a member of the native title claim group.

An exhaustive list of the persons in the native title claim group has not been provided. Accordingly, the requirements of s190B(3)(a) have not been met.

In the alternative, s190B(3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Schedule A of the application states that the native title claim group is:
"The Tableland Yidinji People being the descendants of

[The text that then follows is a list of the names of the group's apical ancestors – this text is deleted to protect the privacy of individuals].

Being the five sets of known Tableland Yidinji apical ancestors."

It is my opinion that the biological descendants of the persons named could be readily identified with appropriate inquiry. I note that a letter dated 2nd February, 2000 from ***[person's identity deleted to protect privacy of an individual]***, states that the group has had an anthropological report with supporting genealogies prepared by ***[person's identity deleted to protect privacy of an individual]***. As a consequence, I have concluded that the descendant named "***[person's name deleted to protect the privacy of an individual]***" could be readily identified with reference to the genealogies prepared, and if not by further inquiry based on ***[name of person conducting research deleted to protect privacy of an individual]*** research to date.

I am satisfied that the above-stated descriptor constitutes an objective means of verifying 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.

Result: Requirements met

Identification of claimed native title:

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

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'. To meet the requirements of s190B (4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

At Schedule E of the amended application the applicants generally state that:

"It is duly noted that 'the native title rights and interests claimed are subject to the valid laws of the state and commonwealth generally and to any other valid acts of adverse dominion.'

The Tableland Yidinji People are entitled to use, enjoyment and occupation of their lands and waters, in the case of some of the parcels in this application, their rights co-exist with the holders of other rights and interests in the land. That is to say they do not claim exclusive possession."

I also note at this point that at Schedule Q the applicants state **"**The Applicants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown**"***.*

Schedule E describes the claimed native title rights and interests by listing five categories of rights and interests (or specific activities in exercise of the core right to use, enjoyment and occupation of the land and waters) in the following terms:

"1. Discharge cultural, spiritual traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the native title land including to:

(a) preserve sights of significance to the native title holders and other Aboriginal people on the native title land;
(b) determine, give effect to, pass on, and expand the knowledge and appreciation of their culture and tradition;
(c) regard the native title land as part of the inalienable attachment of the native title holders to the native title land and ensure that the use of the native title land is consistent with that attachment;
(d) maintain the cosmological relationship, beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the native title land and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders;
(e) inherit, dispose of or confer native title rights and interests in relation to the native title land on other in accordance with custom and tradition;
(f) determine who are the native title holders;
(g) resolve disputes in relation to the native title land.

2. Establish residences on the native title land

3. Determine use rights in relation to activities which may be carried out by others on the native title land including the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title land.

4. (3.1) Exercise and carry out economic life (including by way of barter) on the native title lands including to hunt, fish and carry out activities on the native title land, including the creation, growing production or harvesting of natural resources.

5. (4) Have access to and use the natural resources of the native title land including the right to :-

(i) maintain and use the native title land;
(ii) conserve the natural resources of the native title land;
(iii) safeguard the natural resources of the native title land for the benefit of the native title holders;
(iv) manage the native title land for the benefit of native title holders;
(v) use the natural resources of the native title land for social, cultural, economic, religious, spiritual, customary and traditional purposes.

The application identifies the right to use enjoyment and occupation of lands and waters as the principal native title right and interest claimed. The application then list five rights that are, in my view, subordinate to the principal right and interest sought.

On this basis, in my view the native title rights and interests described at schedule E are readily identifiable. The description is more than a statement that native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'.

I am satisfied that the description in Schedule E allows the native title rights and interests claimed to be readily identified in compliance with s.190B(4).

Result: Requirements met

Sufficient factual basis:

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

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

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

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

Reasons for the Decision

This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests described at schedule E of the application is sufficient to support that assertion. In reaching this decision I must be satisfied that the factual basis supports the 3 criteria identified at s.190B5 (a) – (c).

The applicants have sought only to claim defined tenure within a specific area. It could be contended that I could not be satisfied under this condition if the applicants sought to rely on information relating to land not covered by the application but which fell within a broader area of the groups' recognised 'traditional' country (including the areas covered in the application).

I am of the view, given the comments of Mr Justice Lee in *Ward v WA 159 ALR 4*83 at 499 to 510 and the beneficial nature of the Act, that so long as there is a sufficient factual basis drawn from either the broader traditional area or the defined areas that supports the relevant conditions, this is adequate.

The information, in addition to that within the amended application, which I considered in relation to this section was the:

- Affidavit of ***[deponent's name deleted]*** sworn on 19/10/99
- Affidavit by ***[deponent's name deleted]*** sworn 18/10/99
- Affidavit of ***[deponent's name deleted]*** sworn 19/10/99.

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

To be satisfied under this criterion, it must be evident that the association with the area is and was communal, that is, shared by a number of members of the native title claim group.

All the deponents refer to obtaining Tableland Yidinji identity from one or more of the apical ancestors referred to in the native title claim group description. Consequently, I am satisfied that the deponents are members of this native title claim group.

The deponents also refer to interaction with either younger and/or older generations such that traditional laws and customs are passed on. ***[Deponent's name deleted]*** talks of:

- Still living in Tableland Yidinji country with his family, and sometimes camping there;
- Being taught Yidinji language by his parents and passing some of it to his children;
- Passing on stories and customs to his children whilst on country;

- Being asked sometimes by younger Yidinji if they are ***[text describing a traditional Tableland Yidinji law and custom deleted to protect the confidentiality of the information]*** (a Yidinji law and custom that he learnt from his relatives);
- Being taught about dreaming stories on country by his father and relatives; being taught where the ochres are on country by his father for use in Yidinji ceremony; being taught how to use plant products in traditional healing ways.

[Deponent's name deleted] talks of building a traditional Yidinji grass covered house on country for he and his sons to live in while mining the ochres and hunting on country and passing on stories about significant places on country to his sons and grandchildren, being stories he was told by his grandfather on country as a youth.

[Deponent's name deleted] talks of learning language and other Yidinji traditions and customs from her relatives and of teaching her son Yidinji words and how to talk the language.

The various deponents refer to their past and current association with the country, including:
- birth in towns/regions in which the land parcels claimed in the application are located;
- growing up in such towns/regions;
- residence in towns in the vicinity of the claim area;
- traditional activities (including hunting, eating bush tucker, camping out on the country, using resources for traditional purposes and living in traditionally built shelters/homes) carried out by families on traditional country;
- working all over Yidinji country as younger persons so that they could maintain their connection;
- being taught about Yidinji laws and customs when they were growing up.

The affidavits suggest a history of a community having connection and association with the country in which the claim area is located, which is easily recalled at least back to the times of the grandparents of ***[Deponent's name deleted]*** (born 1918) and the grandparents of the other deponents.

Result: Requirements met

<u>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</u>**.**

This subsection requires me to be satisfied that:
(a) traditional laws and customs exist;
(b) those laws and customs are respectively acknowledged and observed by the native title claim group; and
(c) those laws and customs give rise to the claim to native title rights and interests.

The various deponents refer to traditional laws and customs and provide examples of how these continue to be exercised by the group; such as:
- a traditional decision making process for issues relating to land;
- taking of identity;
- learning Tableland Yidinji words, place names and laws regarding ***[text describing an example of traditional Tableland Yidinji law is deleted to protect the confidentiality of the information]***;
- being taught about bush medicine and using various tree and plant products to care for sores and other ailments;
- hunting and gathering traditional food sources;
- visiting and travelling on country and building traditional houses.

These affidavits establish that the deponents have acquired from their forbears, Tableland Yidinji traditional knowledge and customs relating to:

- language;
- customs and laws relating to marriage and traditional decision making;
- hunting and gathering;
- traditional food and medicinal uses of plants;
- generally carrying out activities and living on the country in traditional ways.

The requirements of s190B5(b) are therefore met.

Result: Requirements met

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

This subsection requires that the native title claim group continue to hold native title in accordance with their traditional laws and customs. I have already referred to information relevant to this subsection in the two earlier subsections. I will not repeat that information here.

I also note that Schedule G of the application provides information about specific activities that are undertaken by members of the claim group, relating those to the claimed rights and interests. At schedule G of the amended application, it is stated:

"Applicants and members of the claimant group regularly collect wood products and foodstuffs in the claim area and bush medicine. Claimants care for country in claim area and remain custodians of the significant sites in this country. Tableland Yidinji children and young people visit to this country to learn about their culture and history. The claimants access this land to maintain their livelihood. The claimants live in close vicinity to the lands claimed and continue to access them on a regular basis."

The authorisation process undertaken to lodge this application also illustrates the current practice of a traditional decision making process.

In my view the applicants have provided sufficient evidence to demonstrate that the native title claim group continues to hold native title in accordance with their traditional laws and customs I am satisfied this condition is met.

Result: Requirements met

Conclusion

There is evidence to support the factual basis in each of the 3 criteria identified at s.190B5 (a) – (c). This evidence in turn is sufficient for me to be satisfied that the factual basis on which the assertion of the existence of the native title rights and interests claimed is sufficient to support the assertion.

Aggregate Result: Requirements met

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.

Reasons for the Decision

Under s190B6 I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

"Native Title Rights and Interests" are defined at s.233 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- the rights and interests to be linked to traditional laws and customs;
- those claiming rights and interests to have a connection with the relevant land and waters; and
- those rights and interests to be recognised under the common law of Australia.

The definition is closely aligned with all the issues I have already considered under s190B5. I will draw on the conclusions I made under that section in my consideration of s190B6.

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

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

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

The information, in addition to that within the amended application, that I considered in relation to this section was the:

- Affidavit of ***[Deponent's name deleted]*** sworn 19/10/99
- Affidavit of ***[Deponent's name deleted]*** sworn 18/10/99
- Affidavit of ***[Deponent's name deleted]*** sworn 19/10/99

In some instances, I will only refer to one of the relevant paragraph or page number of the document containing information that I considered pertinent to establishing the prima facie claim. I will not detail information in these reasons or detail every document containing information with information about the specific condition.

The rights and interests claimed by the native title claim group are set forth in schedule E of the amended application. There is a principal native title right and interest expressed, being:

"The Tableland Yidinji people are entitled to use, enjoyment and occupation of their land and waters, in the case of some of the parcels in this application, their rights co-exist with the holders of other rights and interests in the land. This is to say they do not claim exclusive possession.

The five other rights and interests sought flow from this principal right. As a consequence, the information provided to establish the secondary rights of itself also supports the principal right and interest.

The five subordinate rights and interests sought, together with my reasons, follow:

1. Discharge cultural, spiritual tradition and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the native title land including to:

a) preserve sites of significance to the native title holders and other Aboriginal people on the native title land;

The application and the affidavits refer to taking children out on country and recounting stories and telling of stories regarding significant sites, and of caring for country and being involved in the custodianship of country.
Schedule G; ***[Deponent's name deleted]****, para. 12;* ***[Deponent's name deleted]****, para. 19*

b) determine, give effect to, pass on, and expand the knowledge and appreciation of their culture and tradition**;**

The application and the affidavits refer to the passing on of traditional knowledge from the old people, to taking children out on country and recounting stories and telling of significant sites
Schedule G; ***[Deponent's name deleted]****, para. 12;* ***[Deponent's name deleted]****, para. 19;* ***[Deponent's name deleted]****, para. 15*

c) regard the native title land as part of the inalienable attachment of the native title holders to the native title land and ensure that the use of the native title land is consistent with that attachment;

I find that this is a right or interest which relies upon or is parasitic to the native title right to land or waters established by the native title claim group and that it is therefore established on a prima facie basis.

d) maintain the cosmological relationship, beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the native title land and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders;

The application and the affidavits refer to the passing on of traditional customs from generation to generation and to the current practice of taking young people on country to teach them about their culture and history.
Schedule G; ***[Deponent's name deleted]****, para. 12;* ***[Deponent's name deleted]****, para. 15,* ***[Deponent's name deleted]****, para. 6*

e) inherit, dispose of or confer native title rights and interests in relation to the native title land on other in accordance with custom and tradition;

The application and the affidavits describe how the native titleholders inherit their identity as Tableland Yidinji. This is in my opinion prima facie evidence of this right.

f) determine who are the native title holders;

I have interpreted 'native title holders' here to mean the persons who hold particular rights within the claim group.

The various deponents assert that they inherit Tableland Yidinji heritage rights through their parents or other forebears. The affidavits at Attachment R regarding authorisation suggest that membership of the group is determined through traditional law and custom. There appears to be no discretion to deviate from these rules thus the native title claim group is only able to determine who are the native title holders within their group in accordance with traditional law and custom. This is in my opinion prima facie evidence of the above right.

g) resolve disputes in relation to the native title land.

The affidavits on authorisation at Attachment R refer to how the Tableland Yidinji make decisions in relation to Tableland Yidinji land business, in accordance with their custom and tradition. This is prima facie evidence of this right.

2. Establish residences on the native title land

The application and affidavits refer to members of the claim group living on Tableland Yidinji country in their lifetime, building traditional homes and camping out on country.
***[Deponent's name deleted]**, paras. 12, 17; **[Deponent's name deleted]**, para. 19*

3. Determine use rights in relation to activities which may be carried out by others on the native title land including the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title land.

I find that this is a right or interest which relies upon or is parasitic to the native title right to land or waters established by the native title claim group and that it is therefore established on a prima facie basis. Refer to my reasons in respect of the right at 1(c) above.

4.(3.1)Exercise and carry out economic life (including by way of barter) on the native title lands including to hunt, fish and carry out activities on the native title land, including the creation, growing production or harvesting of natural resources.

The application and the affidavits refer to members of the claim group, in their lifetime, hunting, foraging for foodstuffs, fishing, using plant stuffs for medicinal purposes, using ochres, building houses from traditional resources.
***[Deponent's name deleted]**, para. 11*

5. (referenced as 4.) Have access to and use the natural resources of the native title land including the right to :-

a) maintain and use the native title land;
b) conserve the natural resources of the native title land;
c) safeguard the natural resources of the native title land for the benefit of the native title holders;
d) manage the native title land for the benefit of native title holders;
e) use the natural resources of the native title land for social, cultural, economic, religious, spiritual, customary and traditional purposes.

The application and the affidavits refer to members of the claim group, in their lifetime, hunting for eel and goanna, using plant stuffs for medicinal purposes and using plants and bees as traditional food sources. The application and affidavits refer to members of the claim group collecting wood products and foodstuffs in the claim area. The affidavits referred to above show

that members of the native title claim group and their families continue to access the claim area, and use natural resources for traditional purposes.
***[Deponent's name deleted]**, paras 11, 13, 19; **[Deponent's name deleted]**, paras. 12, 13, 7*
In summary, In establishing that the secondary rights on the material before me can be established, the principal right and interest " use, enjoyment and occupation of their land and waters …" is also prima facie established.

The applicants have stated in the application that members of the native title claim group currently visit the claim area, collect wood and foodstuffs, care for country and remain custodians of the significant sites in this country. There is evidence that members of the claim group in their lifetimes have resided on country and used, occupied and enjoyed it in traditional ways. There is evidence of the carrying out of traditional activities such as telling of stories, and the taking of children to country so that they learn about their culture and history.

All of this evidence illustrates that members of the native title claim group have and continue to use, enjoy and occupy the claim area.

Each native title right and interest claimed in the application can be, prima facie, established for the reasons indicated.

Result:Requirements met.

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 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

This section requires me to 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.

As discussed more fully in my reasons for 190B5 above, I am of the view that so long as there is a sufficient factual basis drawn from either the broader traditional area or the defined areas that supports the relevant condition, this is adequate.

In addition to the amended application, I also considered the affidavits of ***[names of the deponents of the affidavits (3) deleted]*** (detailed in 190B5 & 6 above).

Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group

For the reasons given at s.190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

I am further satisfied based on the information supplied and identified previously that the three deponents referred to above are all members of the native title claim group and currently have a traditional physical connection with the land or waters covered by the application.

Each deponent talks about their connection to Tableland Yidinji country, including being born on the claim area, growing up on the claim area, or visiting the claim area throughout their lives. They talk also of living on and using the claim area for hunting and collection of resources, and being taught language, place names stories and other traditional Tableland Yidinji customs. ***[Deponent's name deleted]*** talks of still living on country with his family and passing on stories and customs to his children at one particular special site on country. ***[Deponent's name deleted]*** talks of recently building a traditional home (a grass covered hut) on country for he and his sons to live on while mining ochre and hunting on country. There is evidence of the observance of traditional laws relating to decision making for land business and the recognition of Tableland Yidinji laws relating to ***[text describing a traditional Tableland Yidinji law is deleted to protect the confidentiality of the information]***.

Result: Requirements met

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.

Reasons for the Decision

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 24th February, 2000 reveals that there is no approved determination of native title in relation to the area claimed in this application

S61A(2) – Previous Exclusive Possession Acts

In Schedule B of the application, certain tenures are excluded from the claim area. For reasons provided above at s190B2 these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and include all previous exclusive possession acts.

S61A(3) – Previous Non-Exclusive Possession Acts

At Schedule E of the amended application the applicants generally state that:

"It is duly noted that 'the native title rights and interests claimed are subject to the valid laws of the state and commonwealth generally and to any other valid acts of adverse dominion.'

The Tableland Yidinji People are entitled to use, enjoyment and occupation of their lands and waters, in the case of some of the parcels in this application, their rights co-exist with the holders of other rights and interests in the land. That is to say they do not claim exclusive possession."

Read in conjunction with the draft determination orders sought by the applicants (refer schedule J of the application), being that "the Tableland Yidinji People have the right to occupy, enjoy, and use the determination areas in accordance with and subject to their traditional laws and customs, and subject to the co-existing rights and interests of the statutory title holders"; I am satisfied that the applicants' intention in the above paragraph was to state that there was no claim for exclusive possession over any part of the claim area covered by a previous non-exclusive possession act.

S61A(4) – s47, 47A, 47B

The application does not state that any of these sections apply to it.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In the absence of a statement specified in s61A(4)(b), it is not necessary to consider this section further.

Conclusion

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of Section 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 the Decision

Schedule Q in the application makes the statement that:

The applicants do not claim ownership of minerals, petroleum or gas within wholly owned by the Crown.

I am satisfied that this statement ensures that the application complies with the requirements of s.190B(9)(a).

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 for the Decision

Schedule P of the application asserts that the claim area does not include any offshore place by stating it is "not applicable". It is apparent from the material that the claim area is located inland of the coast.

I am satisfied that this statement ensures that the application complies with the requirements of s.190B(9)(b).

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 the Decision

I note that in a letter dated 14th July, 1998 the Department of Natural Resources indicated that Lot 421 on NR3770 was held on leasehold tenure. In a response dated 20th July, 1998 the applicants' Counsel indicated that "Lot 421 is a reserve and has a recently granted term lease over it. If the term lease is part of the schedule of deemed extinguishments, to that extent it is excluded from the application". This Lot remains in the description of land covered by the application – however,

all s23B acts have also been excluded from the application. In my view the applicants' intention has not changed to that stated in July, 1998 and it may be that a Court will need to determine the appropriate tenure status of the Lot involved.

Consequently, the application does not disclose, and I am not otherwise aware of, any area where an extinguishing act has occurred and yet the application seeks native title rights and interests over such an area. I am satisfied that the requirements of this section have been met.

Result: Requirements met

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