National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DECISION-MAKER: Brendon Moore

Application Name: Mandingalbay Yidinji People
Names of Applicants: Vincent Mark Mundraby and Alfred Switson Mundraby

Region: FNQ
NNTT No: QC99/40
Federal Court No: QUD6015/98
Date Application Made: 7 October 1999

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

DECISION
The application is NOT ACCEPTED for registration pursuant to s. 190A of the *Native Title Act 1993* (Cth).

26 August 2005
Brendon Moore Date of Decision

Delegate of the Registrar pursuant to
ss.190, 190A, 190B, 190C and 190D

Brief history of the application

This application is a combination of two applications lodged with the Tribunal on 4 April 1995 (QC95/9) and 4 July 1996 (QC96/88) respectively.

The following Federal Court orders that have been made in relation to this application:

- On 7 October 1999 an amendment (combination) application was filed in the Court. Leave was granted for applications QG6015/98 and QC0194/98 to amend so that these two applications be further amended to combine and continue under application number QG6015/98.
- On 21 January 2000 an amendment application was filed with the Court and leave was granted on 14 February to amend the application (as combined by order dated 18 October 99).
- On 23 February 2001 leave was granted to be amended in accordance with the amendment application filed with the Court on 7 December 2000.
- On 27 July 2001 an amendment application was filed in the Court and leave was granted to amend on the 1 August 2001.
- On 1 October 2001 the delegate accepted the amendment application for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwlth).
- An amendment application was filed with the Court on 24 August 2004 and forwarded to the Tribunal for information only.
- A further amendment application was filed with the Court on 30 September 2004 and forwarded to the Tribunal for information only.
- A re-engrossed application was filed pursuant to the order dated 8 October 2004. Leave was granted to amend on the 8 October 2004 and a re-engrossed amendment application be filed by 13 October 2004.

Information considered when making the Decision

In deciding whether or not to accept this application for registration I have considered and reviewed the application and all of the information and documents from the following files, databases and other sources:

- National Native Title Tribunal's administration files, legal service files and registration testing files for QC99/40 and QC00/08.
- Tenure information acquired by the Tribunal in relation to the areas covered by the application.
- The National Native Title Tribunal's Geospatial Database.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.
- The National Native Title Tribunal's Geospatial Analysis & Mapping Branch prepared a geospatial assessment and overlap analysis dated 27 October 2004;
- The amendment application filed with the Court on 30 September 2004 and the re-engrossed amendment application filed with the Court on 8 October 2004.
- Expert's Report by **[Anthropologist 1 – name deleted]** dated 10 February 2002
- Additional information provided by the applicants - letter of submissions dated 15 May 2005.

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* unless otherwise specified.

The application was filed on 14 October 2004

NOTE TO APPLICANT:
To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in ss. 190B and 190C of the *Native Title Act*.

> Section 190B sets out the merit conditions of the registration test (see pages 4 – 20).
> Section 190C sets out the procedural conditions of the registration test (see pages 21 – 41).

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

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

On 5 May 2005 Christopher Doepel, Native Title Registrar, delegated to certain members of the staff of the Tribunal, including myself. all of the powers given to the Registrar under ss. 190, 190A, 190B, 190C and 190D of the *Native Title Act 1993* (Cth).

This delegation has not been revoked as at this date.

Section 190C: Procedural Conditions

Applications contains details set out in ss. 61 and 62: s. 190C(2)

Section 190C(2) tests whether the Registrar's delegate is satisfied that the application contains all the details and other information required by ss. 61 and 62. If the application contains all the information and other details as required, it passes this condition of the registration test.

Native Title Claim Group: s. 61(1)

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

Reasons relating to this sub-condition

In *Northern Territory of Australia v Doepel* [2003] FCA 1384, his Honour, Mansfield J stated that:

> In my judgment, s. 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s. 61. That is one of the procedural requirements to be satisfied to secure registration: s. 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and the Registrar should not accept the claim for registration—at [36].

His Honour went on to say that:

> My view that s. 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s. 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s. 190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title

> claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration—at [37].

The 'application' I take to mean as including the affidavits filed in support and any accompanying documents filed in the Federal Court. To this end, I have not considered any material outside the application for the purposes of testing the application against this registration test condition imposed by s. 190C(2).

The claim group is described as follows:

> The Mandingalbay Yidinji People are descendants of Jabalum Mandingalpai aka Jimmy.
>
> Jabulum is the known apical ancestor of the Mandingalbay Yidinji People at this time. This description includes all Mandingalbay Yidinji People whether or not known at this time and includes all persons who hold the native title claimed.

I find that there is no information on the face of the application which requires me to conclude that the application does not include all those individuals who, according to their traditional laws and customs hold the common or group rights comprising the particular native title claimed, but see my reasons at s. 190B(3). I am consequently satisfied that the application meets the requirements of s. 61(1).

Result: Requirements met

Name and address of service for applicants: s. 61(3)

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

Reasons relating to this sub-condition
Details of the applicants address for service are provided at Part B of the application.
Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: s. 61(4)

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to

make must name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. For the reasons which led to my conclusion below that the requirements for s. 190B(3) have not been met, I am not 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. See my reasons at s. 190B(3) on p.25ff.

Result: **Requirements not met**

Application complies: s. 61(5)

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

Reasons relating to this sub-condition

The application is in the form prescribed by r. 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. It is accompanied by the documents prescribed by ss. 61 and 62 (an affidavit by each of the persons who make up the applicant).

Section 190C(2) only requires me to consider details, other information and documents required by ss. 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.

Result: **Requirements met**

Application is accompanied by affidavits in prescribed form: s. 62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by ss. 62(1)(a)(i) – (v).

Reasons relating to this sub-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).

There are the appropriate affidavits, dated 23 September 2004, from **[Applicant 1 – name deleted]** who has replaced the late **[Previous Applicant 1 – name deleted]** as one of the two persons comprising the applicant, and from **[Applicant 2 – name deleted].**

Result: Requirements met

Application contains details set out in s. 62(2): s. 62(1)(b)

Section 62(1)(b) asks the Registrar to consider whether 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.

Details of physical connection s. 62)(1)(c)

Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate).
Reasons relating to this sub-condition.
There are very brief assertions found at Schedule M of the application.

Result: Provided

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

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

Reasons relating to this sub-condition
For the reasons which led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

Section 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: s. 62(2)(b)

The application contains a **map showing the external boundaries of the area covered by the application.**

Reasons relating to this sub-condition
For the reasons that led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the map contained in the application show the external boundaries of the claim area.

Result: **Requirements met**

Details and results of searches: s. 62(2)(c)

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

Reasons relating to this sub-condition

The application states at Schedule D that:

> The State of Queensland has carried out and served on the Applicants and the NNTT copies of the tenure histories of these lots.

Leaving aside the question of 'service' of any documents on the NNTT, which is not a party to the proceedings, and of which I have no knowledge, I must consider whether the requirements of the section have been satisfied by the Applicants.

It seems to me that the appropriate way in which to understand the requirements of this section is to see it as necessarily directed to requiring Applicants to disclose what is known by them about their claim and about the details and results of searches which **they have undertaken** (my emphasis). The alternative reading of the section would require the information to be given by the Applicants potentially about searches not carried out by them, or not available to them, or even not within their knowledge. I do not think that can be the intent of the section.

I have no reason to believe that the applicants have made any searches other than those noted in Schedule B, which do not fit the description of the section.

Result: **Requirements met**

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

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

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

Result: **Requirements met**

General description of factual basis: s. 62(2)(e)

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

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

Reasons relating to this sub-condition

Schedule F states as follows:

> The attached affidavits show that the group, as a matter of fact is exercising native title rights and interests; that they have an association with the areas claimed, as have their predecessors; that traditional customs and laws persist and that the group has continued to practice their native title rights and their traditional laws and customs.
>
> See Affidavits of
> The late [Previous **Applicant 1]**
> Mr [Applicant 2]

> Marked Attachment "F" in which general descriptions of the rights and interests claimed are provided. [There then appears on the copy of the application provided to me a handwritten addendum. Under the word 'Attachment' is an arrow pointing to the handwritten words 'affidavit of **[Previous Applicant 1].**
>
> The connection material filed with the court, being the expert's report of **[Anthropologist 1]** contains all this information and has been previously provided to the NNTT for purposes of registration testing.

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

The information provided in Schedule F does not provide 'a general description of the native title rights and interests claimed', nor does it provide 'the factual basis' for them.

There is some limited information in Schedules G and M of the application, and in the affidavits found in Attachment F (referred to at Schedules F and M) which I now consider.

At Schedule G there is a list of six activities. They do not however answer the requirements of the section. Schedule M refers to the affidavits and asserts that the Mandingalbay Yidinji People continue to live on country. Again, this does not satisfy the requirement of the section.

The two affidavits annexed as Attachment M do not contain any material which answers the requirements of the section. They contain some biographical information, assertions about the activities carried out by the deponents and references to observation of some laws and customs but none of it constitutes 'a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist' and there are no references to the particular matters required by the three subsections.

Result: Requirements not met

Activities carried out in application area: s. 62(2)(f)

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

Reasons relating to this sub-condition
The application provides details of the activities which the native title claim group carries out in relation to the application area at Schedule G.

Result: Requirements met

Details of other applications: s. 62(2)(g)

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

Reasons relating to this sub-condition
Information is provided in Schedule H to the effect that the Applicant is unaware of any such applications or determinations.

Result: Requirements met

Details of s. 29 notices: s. 62(2)(h)

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

Reasons relating to this sub-condition
Details are provided at Schedule I that the Applicants are unaware of any such notices. The assessment by the Tribunal's Geospatial Unit dated 27 October 2004 confirms that there are none.
Result: Requirements met

Combined decision for s. 190C(2)
For the reasons identified above the application does not contain all the details and other information required by ss. 61 & 62. It is accompanied by the documents required by those sections.
Result: Requirements not met

Common claimants in overlapping claims: s. 190C(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 s. 190A.

Reasons relating to this condition
A search of the Geospatial database and Register of Native Title Claims reveal that there are no overlapping applications over the area covered by the application. The requirements of this section are therefore met.

Result: Requirements met

Application is authorised/certified: s. 190C(4)

The Registrar must be satisfied that either of the following is the case:
(a) the application has been certified pursuant to s. 203BE 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 s. 190C(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 subsection (4)(b) has been met; and
(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons relating to this condition

The importance of continuing authorisation
The Federal Court has consistently emphasised the fundamental importance the NTA places on ensuring that claimant applications are properly authorised.[1] Authorisation is defined in s. 251B and provides for two alternative methods of authorisation. Firstly, if

[1] *Ankamuthi People v Queensland* [2002] FCA 897, Drummond J; *Strickland v Native Title Registrar* (1999) 168 ALR 242, French J; *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637; *Quall v Risk* [2001]; FCA 378 *Daniel v State of Western Australia* [2002] FCA 1147, French J.

there is a process of decision making under traditional law and custom for authorising things of this kind that must be complied with then that process must be followed (s. 251B(a)). Alternatively, 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)).

What does s. 190C(4) require?

The application is not certified pursuant to s. 190C(4)(a). I must therefore be satisfied that the requirements in s. 190C(4)(b) are met. In particular, s. 190C(4)(b) requires the Registrar to be satisfied that 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.

Section 190(C)(5) states that I cannot be satisfied that the condition in s. 190C(4)(b) has been satisfied unless the application:

(a) includes a statement that the requirement has been met; and

(b) briefly sets out the grounds on which I should consider that it has been met.

I find that the application does contain the statement required by s. 190C(5)(a) in the affidavits filed pursuant to s. 62. Clause (e) of each affidavit is as follows:

(e) stating the basis on which the applicant is authorised as mentioned in paragraph (d) – see affidavits "Attachment R".

There does not appear to be an Attachment R in the application, although there are two affidavits by the applicants dealing with authorisation, which bear the Court seal, indicating that they have been filed. I think it reasonable to assume that those documents were intended to be Attachment R and that all that is missing is the heading. Even if I am wrong in that assumption, I would accept these two affidavits as being 'in the application' for the purposes of the application of the registration test because they were clearly filed with it and are responsive to the requirements of the Act. They do not, however, 'include a statement to the effect that the requirements set out in paragraph (4)(b) have been met'. They contain identical paragraphs 4 which state:

'4. I take my identity as a Mandingalbay Yidinji man from my father.'

Although the Act requires a statement to the specific effect that each person who is an applicant is a member of the claim group I am prepared to draw the necessary inferences and accept this statement as sufficient to satisfy that particular requirement.

The remaining portions of the requirements of s. 190C(4)(b) are not provided in the affidavits comprising Attachment R, but in fact appear as clause (d) in the two s. 62 affidavits dated 23 September 2004 and filed.

I am satisfied that s. 190C(5)(a) has been complied with. I am also satisfied that brief reasons have been given, satisfying s. 190C(5)(b). I must now consider the provisions of s. 190C(4)(b).

Is the Applicant a member of the native title claim group?

As stated above, I am able to draw the necessary inferences that the persons jointly comprising the applicant are members of the claim group for the purposes of satisfying the requirement of a 'statement' to that effect.

For the wider purpose of this enquiry I am further satisfied by the material in the Expert Report that the persons jointly comprising the applicant are members of the claim group.

Authorisation

The nature of that task, and the material I may take into account, was briefly considered in *Northern Territory of Australia v Doepel* [2003] FCA 1384 in which Mansfield J said:

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

Who must authorise?

Authorisation must be by 'all the other persons in the claim group.'

It is clear as a matter of law that the requirement that the applicant be authorised by 'all the other persons' in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant[2]. There may, for example, 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 incapacitated. It may also be the case that 'all the other persons' do not individually have to authorise the making of the application, where, for example, a traditional process is used which allows only some persons, such as male elders, to make the relevant decisions[3].

In Risk v NNTT 2000 FCA 1589 O'Loughlin J said:

> The importance of the term ("native title claim group") is apparent from its appearance in the table that forms part of subs 61(1) of *the Act*. Subsection 61(1) imposes requirements not only in relation to the question of authorisation, but also in relation to the anterior question of whether the application has been made on behalf of a "native title claim group". An application which is not made on behalf of a "native title claim group" cannot validly proceed. By operation of subs 190C(2) the Registrar must be satisfied in relation to all the requirements contained in s 61. It follows that, when applying the registration test, the Registrar must consider whether (on the basis of the application and other relevant information) the application has been made on behalf of a "native title claim group. —at [30].

[2] *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].

[3] Strickland v Native Title Registrar [1999] FCA 1530

This case and those referred to above in *Doepel* all emphasise the fact that if a claim group is not adequately described it is difficult or even impossible to be satisfied that authorisation has been by 'all the other persons' of the claim group for the simple reason that it may not be possible to know who those persons are.

I refer to my reasons under s. 190B(3), in which I concluded that the description of the claim group in the application (paraphrased as 'the descendants of Jabalum Mandingalpai aka Jimmy [but not necessarily all descendants]) was not such that I could identify its members. In examining whether the application meets the requirements of the Act for authorisation I am able to consider a wider range of material.

I have therefore also considered the lengthy expert's report by **[Anthropologist 1]** dated 10 July 2002 , forwarded to the Registrar for the purposes of the test (hereafter occasionally referred to as **[Anthropologist 1]**). Although it bears that date, there are intra-textual references to it being a draft, so that I am unable to be certain whether the copy forwarded to the Tribunal is the same one served on the parties. I refer in particular to pages 2, 3, 7 – 10, and 171-193 (but principally at 179 – 188) where there is material concerning the claim group.

My understanding of the claim group description is fortified by the material which I am able to consider here, particularly that at pages 179 to 187. Even without the need to accept all **[Anthropologist 1's]** conclusions it is clear that there is considerable debate about who are in fact the descendants of the apical ancestor (and even the identity of that person) and thus the composition of the claim group. Indeed, at p. 184 there is reference to an alternative claim group description (incorporating 'all descendants of..') with which members of the group are said to have agreed, but which has apparently not been adopted. At p. 186 of the report **[Anthropologist 1]** says that 'It seems that they confound the historical **[Person 1 – name deleted]** (the father of **[Person 2 – name deleted]**) with another man of the same name who appears in their family's oral tradition of the distant past' and later '[t]hus, **[Person 2]** and **[Person 3 – name deleted]** were indeed brothers, sharing the same father **[Person 1]**.

My reading of the description is further confirmed by the regular references to cognatic descent amongst the claim group throughout **[Anthropologist 1's]** report (see, for example, paras 1 and 2 on p. 184, and the discussion of the **[Family1 – name deleted]** and **[Family 2 – name deleted]** families on pp. 184 to187). No such principle appears in the description.

These difficulties were raised with the applicants' representative by way of preliminary assessment dated 2 February 2005. By letter of 11 April an extension of time was sought by him to allow time for a response, which was ultimately received on 2 May 2005. There was some material in that response which was irrelevant and ought not to have been put before me. I have not taken those portions into account. That letter also sought advice, which the Registrar is not empowered to give. Where the material in that response is able to be taken into account I have adverted to it and done so.

The applicant's response of 15 May 2005 confirmed that, to some extent, membership of the claim group is cognatic, allowing persons to choose whether or not to identify as Mandingalbay Yidinji. ('the **[Family 3 – name deleted]** are accepted as Mandingalbay Yidinji People – though nearly all of them choose not to so identify and claim other identity' - at page 2; 'Certainly the Mandingalbay Yidinji point of view is that a large number [of] the **[Family 2]** family can choose to be and in fact are Mandingalbay Yidinji….a number of **[Family 2]** families and their members do identify as Mandingalbay Yidinji' – at p. 4). There are references to the same principles to be found in **[Anthropologist 1]**. If that is so, then it is clear that the description cannot be read as 'all the descendants of…'.

The response also, like the anthropological report, concedes that there may have been adoptions into the group; none are mentioned in the description ('It is apparent that there is some adoption into the group' – at p. 2 of the response).

As a result, firstly, I am not satisfied that I am able to determine who is in the native title claim group as defined by s. 61 and secondly, I am not able to sufficiently identify who 'all the other members' might be to be satisfied that they have authorised the applicant to make the application etc..

Putting to one side the claim group issue—was the applicant authorised to make the application

Even if the full membership of the claim group were able to be identified, I still must be satisfied that the applicant was authorised under s. 190C(4)(b).

As noted above, there are circumstances where the lack of participation by all the members will not necessarily be fatal, such as where a traditional process which restricts decision making to a few persons has been relied upon. In the present case I must consider whether I can be satisfied that authorisation has occurred when a traditional process has been utilised.

In *Moran v Minister for Land & Water Conservation for the State of New South Wales [1999] FCA 1637* Wilcox J observed, of a factual situation similar to that of the present application:

> The Moran Clan was identified as "all those directly descended from the Kooradgie `Bobby' Murruin….no list of Murruin's descendants has yet been filed….. After six or seven generations, there may be hundreds of living descendants. Many of these people may be out of contact with any of the participants in these proceedings. Whether or not for that reason, the people within the group have not yet been comprehensively identified. This affects Mr Allen's ability to demonstrate he is "authorised by the claim group" to do anything. Although he apparently enjoys substantial support amongst identified family members, it is impossible to know whether this amounts to majority or consensus support within the group as a whole.….However, a person who wishes to rely on a decision by 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 binding the members of the group and that the body has authorised the making of the application.
> ….. [N]o evidence has been put before the Court regarding the meeting. There is no evidence of the existence of a Council of Elders, its membership or its powers. There is no evidence as to the composition of any group of people represented by any such Council. Given the number of people likely to be descended from Murruin, and their apparent geographical spread, it seems unlikely there is an ongoing Council of Elders exercising general authority over, or on behalf of, all of them"—at [34] and [35].

What does the application say about the authorisation process?

At Part A the application states:

> "There is a process of decision making that must be complied with when members of the Mandingalbay Yidinji People want to speak up for country. This process is a traditional and customary way of dealing with Mandingalbay Yidinji land business. In this traditional decision making process the Elders and heads of family amongst the Mandingalbay Yidinji People, who live in and around the Mandingalbay Yidinji region and maintain close physical ties to country, make decisions that bind the entire Mandingalbay Yidinji People in a traditional and customary manner."

From that passage the operative principle able to be extracted is that ; 'the Elders and heads of family…who live in and around the …..region and maintain close physical ties to country, make decisions…'.

It is not clear to me whether 'living in and around' country and 'maintaining close physical ties' is intended as a qualification for being able to make decisions, or whether it is a descriptor of the persons.

There are contradictions between the statement at Part A and the affidavits, as well as internally inconsistent statements about the process within the affidavits of the applicants. The affidavits filed pursuant to s. 62 are identical from paragraphs 4 to 12. The propositions set out there are:

- 'The Elders and heads of families discuss the issue amongst themselves and their relatives and the Elders reach a consensus among themselves after considering the views of others'.
- '…land is men's business and only male Elders may speak for land'.
- '..the Elders decide land business. A decision of the Elders is final and…people who are not male Elders cannot disagree publicly'.
- 'During early March 2005 the Elders…met and consulted. We agreed …that this application had the support of all Mandingalbay Yidinji people'.
- 'At a series of meetings and community discussions'.
- 'These meetings affirmed the Elders decision to authorise…the applicants'.

The facts in this matter are so similar that the Court's reasoning on how the law should be applied to them must guide my own enquiry. *Moran's* case sets out three propositions which require proving:

1. that such a body exists under customary law recognised by the members of the group;
2. that the body has the authority under traditional law and custom to make decisions of this kind which are binding on the members of the native title group; and
3. that the body had given its authority as required under the Act .

In *Martin v Native Title Registrar* [2001] FCA 16 French J also considered what might need to be demonstrated ;

> .....Including the applicant, a total of twenty three members of the claim group had either directly or through a representative authorised the applicant. In addition, the delegate was satisfied that the biological descendants of those people had, through their parents/grandparents, also authorised the applicant.
>
> Nevertheless there remained a total of eight named members of the claim group who had not provided information regarding their authorisation of the applicant. Seven of these were children of **[Person 4 – name deleted].** There was no information provided from any of them or any one else that directly indicated that they had authorised the applicant. There was therefore no evidence of authorisation from that branch of the family. In addition, there was no other direct information provided to the delegate which supported the authorisation of the applicant by those members of the claim group. Beyond the applicant's assertion of a traditional authorisation process, **there was no further evidence supplied that the asserted customs exist and how they would apply in the particular situation**. He also made reference to a claim by the applicant that:
> *"…following a number of family meetings and personal communications, by which such agreement was reached, I am authorised by my siblings, my cousins, their descendants and my descendants, who comprise the native title claim group to make this application and deal with the matters arising in relation to it."*
> **No further detail was provided as to the nature and content of those meetings and personal communications or whether they specifically involved the eight members of the claim group who had not directly authorised the applicant.**
> ... As I have previously observed, 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. There was no error on the part of the delegate in relation to this condition. [my emphases] — at paras [14] to [18]

Does the application satisfy these tests?
There is no evidence at all as to who 'the Elders' may be: this is not to say that the people do not have such Elders or that the persons named are not Elders, but rather that for the purposes of this test there is no information as to the number of such Elders, the laws and customs by which they are so regarded or their powers under such laws.

It is not possible to know whether, as Part A says, that 'heads of families...make decisions' or whether, as the affidavits say, they are merely part of a 'discussion'. As with the Elders, there is no information as to who the 'heads of families' are or what their role is or its basis in traditional law and custom. The affidavits contradict the assertions in Part A.

Insofar as there appears to be a role for the community, it is not possible to know whether that role is a necessary one in 'affirming the Elder's decision' or whether it is something less than that. If it is an affirmatory role, then no details are given about the laws and customs on which it is based or what kind of community affirmation is required.

Sometime 'in early March 2005 the Elders met and consulted' and then apparently 'agreed that [they] had the support of all Mandingalbay Yidinji people'. If this took place at a public meeting there is no indication how, by whom or where it was convened, who might have attended, or what its role was. If it were just a meeting of the Elders (noting that there is no mention of 'heads of families), there is no evidence of their power to conclude that they had the support of the group, even were the group able to be identified. Nothing is said about the place of that meeting in the traditional system of decision making pleaded.

Whilst in this matter there is no assertion that there is a particular 'body' formed by the Elders, in my view the questions in Moran are still meaningful and must all be answered 'no'. There is no evidence other than what appears in Part A and the two short s. 62 affidavits to establish the existence or content of the 'traditional' decision-making process' or the rights of Elders and 'heads of families' to make decisions on such matters alone. There is no definition or description of the 'heads of families.' Nor is there anything to establish that the 'traditional' system can be understood in the light of the Court's consideration of that word in *Yorta Yorta*. The expert report does not consider the question at all. Overall, what is supplied is both contradictory and confusing. I am not satisfied that the existence or content of the asserted traditional process has been demonstrated as regards the role of Elders and 'heads of families'..

Insofar as the applicant also ascribes a role in the process to 'meetings' and 'communal discussion', and considering what was said in Martin, I am not satisfied that authorisation occurred at those meetings or was , perhaps, ratified at them. There is insufficient supporting evidence of the existence of the customs or how they might apply, and there is no evidence of the 'nature and content of those meetings and personal communications' (per Martin) or of the role played by such meetings and discussions.

I find that the various statements in the application and the extra information in **[Anthropologist 1]** are such that I am unable to identify or be satisfied exactly what the process was which was used, although I do find that the same process was not used on each occasion. If I am to be satisfied that there has been proper authorisation then a clearer or fuller account of the laws and customs giving rise to the process is required.

As French J said about authorisation in *Strickland v Native Title Registrar [1999] FCA 1530:*

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

Conclusion

I find that there is sufficient uncertainty about the actual composition of the claim group, both as a result of the inadequacy of the description as well as of the information provided and problems adverted to by **[Anthropologist 1]**, that I cannot be satisfied as to who are the members of the claim group and thus I am unable to conclude that there has been authorisation by 'all the other members'. Further, I am unable to find that the traditional process asserted has been sufficiently described or explained that I am able to find authorisation according to tradition and custom by a smaller group comprised of Elders and heads of families..

I find that I cannot be satisfied as required under s. 190C(4)(b).

Result: Requirements not met

Merits Conditions: s. 190B

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
The Tribunal's Geospatial Unit has considered the map and description on 27 October 2004 and concluded that the description and map are consistent and identify the application area with certainty. I accept that analysis.

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 relating to this condition

The members of the native title claim group are not named, so I must consider whether the provisions of s. 190B(3)(b) are satisfied.

The test imposed by s. 190B(3) and s. 61(4) for the 'identifiability' of members of the claim group requires a level of objectivity and specificity which is apparently higher than that applying to determinations by the Court. For a determination pursuant to s. 225 the Court is required to decide only who are 'the persons, or each group of persons …. holding the common or group rights…' but there is no requirement equivalent to that in s. 190B(3) that those persons be 'individually identifiable'. A claim group described in terms which do not satisfy the section is not necessarily 'wrong': although it may not allow the application to be registered because of it.

In *Ridgeway on behalf of the Worimi People, in the matter of Russell v Bissett-Ridgeway* [2001] FCA 848, Tamberlin J. said of a claim group description in these terms:

> Those members of the Worimi people who are affiliated with the area which includes the land which is the subject of this application. Full genealogical material will be provided at a later date. that
>
> …I am not satisfied that the members of the claim group have been sufficiently identified to determine whether there has been a proper decision taken to authorise the Motion."(at paragraph 34)...

In *Ford v NSW Minister for Land & Water Conservation* [2000] FCA 1913 Lindgren J. said:

> In the application as lodged with the Tribunal, Mrs Ford identified the other claimants as "The Elouera people". The Land Council has on many occasions before the Court, contended that this is an inadequate identification of the other claimants, that is, that it does not comply with the requirement of subs 61(2) of the old Act. I agree. Identification in those terms without more is not meaningful to the Court. Identification in those terms alone does not make it clear whether a particular person is a person on whose behalf Mrs Ford is making the claim. I accept that no matter what description is used, there can be debate about whether a particular individual is or is not such a person, but the mere words "The Elouera People", without any elaboration, does not convey meaning to the Court, or to individuals who may be contemplating applying to be joined as a party."
> 21 I note that a similar approach was taken by Madgwick J to the expression, "the Korewal Aboriginal People", in *Korewal People - Longbottom v NSW Minister for Land & Water Conservation (No 2)* [2000] FCA 1237, at pars 10-12."

In that case cited with approval by Lindgren J, *Korewal People - Longbottom v NSW Minister for Land & Water Conservation* (No. 2) [2000] FCA 1237, Madgwick J said:

> *"11 Notwithstanding that an applicant would not be assisted by that marginal note, it is nevertheless clear that there must be some actual description or means of identification of who the other people are. This ought, among other things, to enable potential parties to consider whether they will seek to become actual parties. The information given by the applicants was:*
> *"The Korewal Aboriginal People"*
> *12 There is no means at all, apart from resort to a self-bestowed and unverifiable description, to enable that to be done. It may be that the applicants are justified in using that description, however its use alone does not comply with the then requirements of the Act. For this reason too, it seems to me that the objection to the application is well founded"*

These cases all have the same feature; that although a class of persons is named, there are no means to objectively identify who any individual member of that group may be. Although they were considered under the 'old' Act, the relevant provisions of that Act parallel those on the 1988 Act.

The nature of the Registrar's task and the material to which he may turn was considered in

Northern Territory of Australia v Doepel [2003] FCA 1384 where Mansfield J said (the emphasis being mine)

> Section 190B . . . **has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4**). [at 16]
>
> The attack upon the Registrar's conclusion under s 190B(3)(b), in my judgment, must also fail. I consider the Registrar addressed the issue which he was required to address, and reached a conclusion available to him**. The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group.** Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). **Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so.** [at 51] [my emphasis]

I understand this as requiring that the description be 'in the application', and that I must confine my considerations to the application itself.

The description given at Schedule A is this:

> The Mandingalbay Yidinji People are descendants of Jabalum Mandingalpai aka Jimmy.
> Jabulum is the known apical ancestor of the Mandingalbay Yidinji People at this time. This description includes all Mandingalbay Yidinji People whether or not known at this time and includes all persons who hold the native title claimed.

I do not think that the first sentence can be read other than as meaning—'**all** of the Mandingalbay Yidinji People are descended from Jabalum'. To interpret it as meaning that 'the Mandingalbay Yidinji are **all** the descendants of Jabalum' is to add words which are not there. I find that the sentence bears its plain meaning. I do not think the second part of the description assists: it too is ambiguous. If it is intended to convey a meaning that 'all the claim group are descended from [this apical ancestor]', then I do not think it does so with sufficient clarity. My reading of the second paragraph is that it simply repeats the assertion in the first paragraph but does not answer the fundamental problem that it does not help define a closed group of people.

The difficulty with such a description is that it no more allows the identification of any one person as a member of the claim group than it would it if it were to read, for example: 'the claim group are residents of Queensland'.

That this might be the delegate's reading was conveyed to the applicants' representative by way of preliminary assessment. Because of the confirmation in *Doepel* that the 'focus of s190B(3) is whether the application enables the reliable identification [of any one person] any relevant response would have had to be 'in the application.' Although the submissions noted at the commencement of these reasons contained some responses to the preliminary assessment, I am not able to take them into account in this context.

I find that the description simply identifies a class of persons amongst whom the claim group may be found ('descendants of Jabulum') but not such that it can be ascertained whether any particular person is in the group.

Result: **Requirements not 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 relating to this condition

What rights and interests are claimed?

The claimed rights and interests are set out in Schedule E as follows:

> In the USL land claimed, subject to s47B revival, the applicants claim the native title is a right in accordance with traditional laws and customs to possession, occupation, use and enjoyment.
>
> In the remaining lots claimed the native title rights consist of non-exclusive rights to use and enjoy the land and waters, being:
>
> > a. the right to access and be physically present on the Native Title Area in accordance with traditional laws and customs;
> >
> > b. the right to camp on the Native Title Area- in accordance with traditional laws and customs which does not include the right to permanently reside or build permanent structures or fixtures;
> >
> > c. the right to hunt, fish and gather on the Native Title Area for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs in accordance with traditional laws and customs;
> >
> > d. the right to take, use and enjoy the natural resources of the Native Title Area for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual ceremonial and non-commercial communal needs in accordance with traditional laws and customs;

e. the right to maintain and protect from physical harm, by lawfu1 means, places within the Native Title Area of importance to the Native Title Holders in accordance with traditional laws and customs; and

f. the right to perform social, cultural, religious, spiritual or ceremonial activities on the Native Title Area and invite others to participate in those activities in accordance with traditional laws and customs.

In relation to the land and waters that are not USL lands, non exclusive rights to:

(i) pass on native title rights and interests in relation to the Native Title Area in accordance with traditional laws and customs;

(ii) make decisions in accordance with traditional law and custom about the access, use and enjoyment of the Native Title Area by Aboriginal People who are governed by the traditional laws acknowledged and traditional customs observed by the Native Title Holders; and

(iii) determine membership of and filiation to the native title holding group in accordance with traditional laws and customs.

The native title rights and interests in relation to lots where non-exclusive possession is claimed do not confer possession, occupation, use and enjoyment of those land and waters on the Native Title Holders to the exclusion of others.

I understand this table to mean that the rights listed as a. to f. are claimed over land where exclusive possession cannot be found and that they are intended to be the incidents of 'use and enjoy'. The second set of rights numbered (i) to (iii) are also expressed as non-exclusive rights.

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. To meet the requirements of s. 190B(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.

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 which describe native title rights and interests in a manner which is vague, or unclear.

In *Doepel*, the Court saw the task in this way:

> The Registrar referred to s 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard. at [99].

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. They fall into three broad types:

- Rights which are not readily identifiable because they are not native title rights. Examples are the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters[4], the right to determine membership of the landholding group; the right to determine and regulate the membership of and recruitment to a landholding group; the right to be acknowledged as the traditional Aboriginal owners of the land and waters of their respective estates within the determination area (' incapable of precise definition and incapable of enforcement'); the right to make decisions about the use and enjoyment of the determination area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders.[5]

- Rights which, whilst identifiable, may not recognizable under s. 223(1)(c) because they are either inconsistent with statute or the common law or have been extinguished, such as rights to minerals and petroleum under relevant Queensland legislation, an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.6

[4] *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28
[5] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135*

[6] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

- Rights which have been held to be either so unclear or legally imprecise that they are not able to be identified, such as a claim for non-exclusive 'possession, occupation, use and enjoyment' made over land[7].

It will be obvious that there are some rights which may fit into more than one of these categories. Others might be so vague that they would also not be able to be recognized at s. 190B(6), in the alternative.

The majority of the High Court in *Ward* commented that while the exclusive right to 'possess, occupy, use and enjoy' the claim area was acceptable as a description of the native title rights and interests claimed, this composite right was not acceptable where rights other than exclusive rights were being claimed. Therefore possession, occupation, use and enjoyment of the claim area may be claimed only in relation to those areas where exclusive possession can be made out. Indeed, the phrase is regarded as the fullest expression of the complete 'bundle of rights' which make up exclusive possession.

In *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 the majority indicated that non-exclusive rights should be expressed as 'activities':

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters—at [51].

Subsequently, in the determination hearing in *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 the Court commented on the use of 'composite' expressions such as 'occupy, use and enjoy' in relation to non-exclusive rights. Omitting some material for clarity, the Court said:

> The opening words of clause 5 of the proposed determination identify the native title holders' rights as being 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement' certain identified rights. Counsel for the Commonwealth and the State of Western Australia argue for two changes to these words: the omission of the word 'occupy' and the substitution of 'being' for the words 'including, as incidents of that entitlement'. These changes are resisted by counsel for the claimants, Mr J Basten QC.

[7] *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28

As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s 225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression.

The argument for an exhaustive, rather than inclusive, list of the incidents of the entitlement is based on para (b) of s 225 of the Act. That paragraph requires 'a determination of ... the nature and extent of the native title rights and interests in relation to the determination area'.

In their High Court joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ said (at [51]):

> 'A determination of native title must comply with the requirements of s 225. In particular, it must state the **nature** and **extent** of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.' (Original emphasis)

…… A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy—at [16] to [19] and [21].

This was followed in *Neowarra v State of Western Australia* [2003] FCA 1402 thus:

> As a result of the injunction in *Ward* at [52] that in certain situations it will be preferable to express rights by reference to activities that may be conducted as of right on or in relation to land and waters, the applicants also claim the right to engage in particular activities. They say the activities are "particular incidents of, but do not comprise or define the legal content of the rights previously considered". But for extinguishment considerations, there would be no need to examine the various things that could be done in the exercise of the applicants' general ownership right. But where, as here, pastoral leases are involved, it is useful to

consider the activities relied on to illustrate aspects of inconsistency of rights—at [501].

The most recent authoritative consideration of rights and interest is that in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135,* by the Full Federal Court. I have relied on that decision.

Which of the rights claimed are readily identifiable?

On the basis of the principles set out above, I find that the following rights are readily identifiable:

a. the right to access and be physically present on the Native Title Area in accordance with traditional laws and customs;

b. the right to camp on the Native Title Area- in accordance with traditional laws and customs which does not include the right to permanently reside or build permanent structures or fixtures;

c. the right to hunt, fish and gather on the Native Title Area for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs in accordance with traditional laws and customs;

e. the right to maintain and protect from physical harm, by lawfu1 means, places within the Native Title Area of importance to the Native Title Holders in accordance with traditional laws and customs; and

f. the right to perform social, cultural, religious, spiritual or ceremonial activities on the Native Title Area and invite others to participate in those activities in accordance with traditional laws and customs.

I note that *in Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135, the Full Federal Court redrafted a right similar to f. above. For the purposes of the test here I find that it is readily identifiable.

Whether these remaining rights are capable of being prima facie established at s.190B(6) will depend on the evidence.

I find that the following rights are not readily identifiable:

d. the right to take, use and enjoy the natural resources of the Native Title Area for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual ceremonial and non-commercial communal needs in accordance with traditional laws and customs;

(i) pass on native title rights and interests in relation to the Native Title Area in accordance with traditional laws and customs;

(ii) make decisions in accordance with traditional law and custom about the access, use and enjoyment of the Native Title Area by Aboriginal People who are governed by the traditional laws acknowledged and traditional customs observed by the Native Title Holders; and

(iii) determine membership of and filiation to the native title holding group in accordance with traditional laws and customs.

I find that d.; and (ii) both offend against the principles expressed in *Neowarra* above, in that the use of the composite expression 'use and enjoy' does not set out the nature and extent of the asserted right such that it can be recognised as a right capable of being readily identified. The rights at (i) (ii) and (iii) were also expressly rejected in *Alyawarr*.

For the same reasons, it is my view that if I am wrong in this analysis, these rights would, in any event, be incapable of being prima facie established at s. 190B(6).

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

Reasons relating to this condition

In order to pass this section of the test there must be demonstrated a factual basis sufficient to satisfy the Registrar that each of the three subsections can be supported.

In *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58, the majority set out, inter alia, the following propositions:

.. the laws or customs in which those rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of

> norms or normative system - the body of norms or normative system that existed before sovereignty' (at [38] per Gleeson CJ, Gummow and Hayne JJ), and;
>
> 'To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality' (at [50]), and:
>
> 'Yet again, however, it is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty'—at [86].

These observations must inform any consideration of this section, and in particular, the interpretation of 'traditional.'

The preliminary assessment forwarded to the applicant's representative raised the question of how it could be said that a single ancestor – Jabalum – could constitute a 'particular society which exists as a group…acknowledg[ing] and observ[ing] those laws and customs' of the type discussed by the High Court in *Yorta Yorta* as set out above. Can one person be found to constitute a 'normative system that existed before sovereignty'? This enquiry is necessary because clearly, if the normative society has ceased to exist at any point, then so will have the factual basis underpinning native title

In his submissions dated 15 May 2005 the applicant's representative supplied the following further information, commencing on the third page below the header 'Note 5 – normative society':

> Jabalum (and it is now proposed his sister Lydia) are the two persons the group descents [sic] through.
> At the time of their residence in the area of the application and the mission at Yarrabah, they were part of a larger group exercising social norms in the area.

[Then follows three paragraphs chiefly concerning whether the **[Family 2]** are or could be part of the claim group and which is not strictly relevant here]. The response continues:

> The position on the **[Family 2]** connection is not definitively closed and as stated a number of **[Family2]** identify as Mandingalbay Yidinji -this opens a "second front" as it were of Jabalum descendants.

> The **[Family 3's]** probable descent through Lydia further enlarges the Mandingalby Yidinji society of the early 20th century late 19th century. A man with a number of wives, which was certainly the case with Jabalum, could well make a good start on repopulating and re-shaping a normative society. After all the society consisted of more than simply Jabalum and his sisters, they also had relatives who were members of other Yidinji groups and tended to intermarry with their relatives the **[Family 4 – name deleted]** who were the neighbouring Yidinji group on the Cairns side of the Trinity inlet - but also had removed themselves and/or been removed to the Yarrabah mission.
>
> Just as a religious order, a normative society, can be increased by a single person "proselytizing" or in the case Jabalum and his sisters propagating many children - the Bible maintains that the human race are descended from two persons only and this is a widely held belief in many parts of the world! Jabalum and his sisters were active in maintaining a normative social group, the Mandingalbay Yidinji People, and the traditional rules and social norms that kept the group distinct from its neighbours, in the face of immense social and economic and viral (such as smallpox and influenza) disruption in the region where they dwelt and on their relatives and social relations living nearby. It was hence not simply Jabalum and his sisters, but the society of other Aborigines they lived with both before they were brought into the mission and after, who made possible the maintenance and growth of the Mandingalbay Yidinji society to this day."

These submissions, in my view, present three different and inconsistent positions;

1. That there was no relevant society obeying normative rules and customs: "A man with a number of wives, which was certainly the case with Jabalum, could well make a good start on repopulating and re-shaping a normative society."
2. That they were part of a larger society: 'They were part of a larger group exercising social norms in the area' and 'After all the society consisted of more than simply Jabalum and his sisters, they also had relatives who were members of other Yidinji groups and tended to intermarry' and 'not simply Jabalum and his sisters, but the society of other Aborigines they lived with both before they were brought into the mission and after'.
3. That there was a distinct society of Mandingalbay Yidinji persons: 'Jabalum and his sisters were active in maintaining a normative social group, the Mandingalbay Yidinji People, and the traditional rules and social norms that kept the group distinct from its neighbours.

The first proposition would, if accepted, be fatal to the claim in the light of the High Court's statements. The third proposition cannot stand as neither of Jabalum's sisters are described as members of the claim group. It seems to me that the second proposition is the one which I should accept and consider, because there is some support for it in the expert's report (see for example p.172 where they are described as a clan of the Yidinji, as they were in a previously filed application). More conclusive is his introduction to Chapter 10 (p.200) in which he says, inter alia:

> I do not consider it necessary or even ethnographically correct to describe separate Gunggandji, Mandingalbay and Lower Coastal Yidinji models of aboriginal

> title….the several groups share much traditional law and custom, their members generally know how they and their group differ from other groups ….There is a single regional Aboriginal jural public and several beneficial titles to particular lands and waters are not constituted in isolation from that wider jural public.

The legislation, being beneficial, should be interpreted beneficially when such a construction is available.

That a group may have connections to or rights in land through observance of a wider set of normative rules was established in *De Rose v State of South Australia* [2003] FCAFC 286, in which the claim group was comprised of a small group of Nguraritja ('land-holders') who asserted that they held rights over a limited area as a result of acknowledging and observing the laws and customs of the much wider Western Desert Bloc. Because it is apposite here it is worth quoting at length:

> To satisfy s. 223(1)(a) of the NTA the appellants had to show that under the traditional laws and customs of the Western Desert Bloc they possessed rights and interests in relation to the claim area. It was not enough for them to show that they had purported to acknowledge or observe the traditional laws or customs of the Western Desert Bloc. If, for example, the appellants had been "usurpers" of the claim area, who were not recognised under the laws and customs of the Western Desert Bloc as capable of possessing native title rights and interests, their claim could not succeed. This would be so even though they might have genuinely been attempting to act in conformity with their understanding of the traditional laws and customs of the Western Desert Bloc. Just as the Yorta Yorta claimants failed notwithstanding that they had genuinely attempted "to revive the lost culture of their ancestors" (Yorta Yorta (HC) at 558 [69]), the appellants' claim would fail unless they could show that any rights or interests asserted by them were derived from the traditional laws and customs of the Western Desert Bloc and that the Western Desert society had continued since sovereignty.
>
> Similarly, the appellants would fail if their claim to be Nguraritja for the claim area was founded on rules or norms that never formed part of the traditional laws and customs of the Western Desert Bloc. If, for example, the appellants' forebears had formulated new and expanded Nguraritja rules in the 1920s or later specifically in order to accommodate unprecedented population shifts, and this form of accommodation did not form part of, or was not recognised by, the traditional laws and customs of the Western Desert Bloc, the appellants would be unable to satisfy the requirements of s. 223(1)(a) of the NTA. This would be so even if the appellants were regarded by other members of the Western Desert Bloc as part of that society, although in practice the two issues (membership of the society, and recognition by the traditional laws and customs of that society of the broader Nguraritja rules) are likely to be closely related.
>
> Nor would it be enough for the appellants simply to show that they were descended in some way from Western Desert people who followed traditional laws and customs at sovereignty. That of itself would not demonstrate that they had interests

> in the claim area possessed under the traditional laws and customs acknowledged and observed by the people of the Western Desert Bloc. The primary Judge was therefore correct to reject a submission to that effect made by the appellants—at [223] to [235].

No further information was provided as to the traditional laws and customs of the wider Yidinji society referred to or of how the Mandingalbay Yidinji related to it. The two 'long form' affidavits filed with the application do not mention any society other than Mandingalbay Yidinji, although both deponents indicate that they speak some Yidinji. Whilst I accept the material in those affidavits, they are of little weight. Apart from a few paragraphs which are particular to the deponent in each, the vast majority of the paragraphs in the two affidavits are otherwise identical, right down to spelling errors, giving them a formulaic quality.

Bearing in mind the Court's guidance in *De Rose*, and giving the benefit of the doubt to the applicants by accepting that they are in fact observant of Yidinji norms (as set out below), I now turn to a consideration of the three subsections individually.

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

I accept that the claim group is, and has been since Jabalum's time, associated with the area. I am also able to accept, and where necessary, draw inferences, that the Yidinji people (of which the claimants are a part) have been associated with the area since sovereignty and that the Yidinji people were also the predecessors of the claim group.

The evidence is throughout **[Anthropologist 1's]** report, but particularly in Chapter 4: 'Languages, groups and tribes in the Yarrabah region"; Chapter 5: Maps, places and groups in the claim region'; and portions of Chapter 9: "Mandingalbay Yidinji people and places.' I accept the material in the expert report.

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

The Application, at Schedule F refers to the affidavits of the late **[Previous Applicant 1]**, **[Applicant 2]** and refers also to Attachment F 'in which general descriptions of the rights and interests claimed are provided'. They are not. Attachment F is comprised of the two affidavits referred to. Schedule F also says:

> The attached affidavits show that the group, as a matter of fact is exercising native title rights and interest; that they have an association with the areas claimed, as have their predecessors; that traditional customs and laws persist and that the group has continued to practice their native title rights and their traditional laws and customs.

Schedule F also refers to the connection report of **[Anthropologist 1]** which 'contains all this information and has been previously provided to the NNTT for purposes of registration testing.'

Both affidavits attest (identically) to the catching and eating of bush tucker and other activities, of being taught sites and stories, of the use of Yidinji, and of customs relating to their use of country, but neither affidavit gives any indication of the 'traditional' nature of these activities (in the sense identified in *Yorta Yorta*), nor how these activities as described provide a factual basis for the existence of rules concerning them. I note however that **[Anthropologist 1]** is of the view that the language is now 'moribund' (p.137). I must then turn to **[Anthropologist 1's]**report.

[Anthropologist 1] positions the claim group as a 'clan of the Yidinji' and consistently writes of them in those terms. In fact the claim group once described itself that way. I accept **[Anthropologist 1's]** conclusions. Although there is little before me in the application to show that the claim group sees itself as being part of the wider Yidinji and drawing its rights in land from that context, it is not for me to decide complex issues of anthropology of that kind, and there is sufficient detail in the report for me to be satisfied, factually, that they were and are a part of the wider Yidinji peoples and that the laws and customs are those of the Yidinji.

That being the case, I accept the considerable material in the Report of a system of Yidinji law and culture , the observation of which gives rise to rights in land. I accept also, at this prima facie level, that the claim group's activities are pursuant to those normative rules.

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

Again, the application and accompanying affidavits are silent on this question but I am prepared to accept the Report as prima facie evidence that the group holds its claim in accordance with those Yidinji laws and customs. I do not think there is much point in detailing page references and the like in this regard: the Report is of some 200 pages (although the Gunggandji portion of it has properly not been made available) and examines the contending interpretations at length but I am satisfied there is ample prima facie evidence throughout it.

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.

Subject to other requirements being met, a claim to exclusive possession may be established prima facie over areas where:

- there has been no previous extinguishment of native title; or
- the non-extinguishment principle in s. 238 of the *Native Title Act* applies; for example where s. 47, s. 47A or s. 47B applies and in relation to areas affected by Category C and D past and intermediate period acts.

Reasons relating to this condition

Under s. 190B(6) I must consider that, *prima facie*, at least some of the native rights and interests claimed, as defined at s. 223 of the Act, 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].
>
> However, the notion of a good prima facie claim which, in effect, is the concern of s.63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success—at para 35

This test was explicitly considered and approved in *Northern Territory v Doepel* 2003 FCA 1384:

> Although *North Ganalanja Aboriginal Corporation v The State of Queensland* (1996) 185 CLR 595 (*Waanyi)* was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided
>
> …… see e.g. the discussion by McHugh J in *Waanyi* at 638 - 641. To adopt his Honour's words, if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis—at [134] to [135].

I have adopted the ordinary meaning referred to by their Honours and the expressions of it in the concepts of 'material which, if accepted, will result in the claims success' and 'a claim which is arguable, whether involving disputed questions of fact or disputed questions of law should be accepted on a prima facie basis' .in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

The rights and interests asserted are set out under s. 190B(4).

The first right is that of exclusive possession, claimed as:

> In the USL land claimed, subject to s47B revival, the applicants claim the native title is a right in accordance with traditional laws and customs to possession, occupation, use and enjoyment.

There is nothing in the application or its accompanying affidavits to evidence or support the existence of this right. I must rely on **[Anthropologist 1]**.

At Chapter 9 of the expert report **[Anthropologist 1]**examines 'Mandingalbay Yidinji people and places'. Although that chapter is principally concerned with tracing the family of the applicants, it also considers some questions about occupation of country. It is worth noting that the report appears to have been commissioned to consider a wider area and other groups such as the Gunggandji , so that it can be difficult at times to be sure whether the report is referring to all the groups, all the country or just to specific groups. **[Anthropologist 1]** notes at p.191 that '**[Previous Applicant 1]** and **[Applicant 2]** know their country, sites and associated law and custom very well'. In that chapter, however, there is no mention of rights amounting to exclusive possession.

At p.8 **[Anthropologist 1]**says that

> I worked through a great amount of material (written and unwritten, published and unpublished), trying to discover any clear and compelling evidence that one or the other of the claimant groups had in the past and have in the present exclusive traditional ownership and native title rights in the jointly claimed areas. The answer that I arrived at in the end was no. I am satisfied that there is good evidence which connects all three claimant groups and their families with the jointly claimed area, and that they are all its joint exclusive traditional owners and native title holders.

At p. 9 **[Anthropologist 1]**makes some comments about Mandingalbay Yidinji exclusive possession of the 'northern portion of the jointly claimed area'. I am not able from his geographical description to locate that area with sufficient precision to be satisfied whether it is the same land and waters claimed by the applicant.

Chapter 10 of **[Anthopologist 1]**, entitled 'Conclusions', contains this:

> I do not consider it necessary or even ethnographically correct to describe separate Gunggandji, Mandingalbay and Lower Coastal Yidinji models of aboriginal title….the several groups share much traditional law and custom, their members generally know how they and their group differ from other groups ….There is a single regional Aboriginal jural public and several beneficial titles to particular lands and waters are not constituted in isolation from that wider jural public.

He goes on:

> The rights and interests…which the claimant groups assert (sometimes in severalty, sometimes jointly) are to the exclusion of all other persons and groups.

I do not think I can go beyond those statements in assessing the question of exclusive possession. Because there are many other statements about shared or alternating occupations of country (in Chapter 9, for example), because the report is one into the several groups in the area, and because I have not had the advantage of being directed to any portion of it specific to this question, I must conclude that I cannot be satisfied that the Mandingalbay Yidinji can establish exclusive possession over the claim area.

The non-exclusive rights sought are set out in Schedule E and are reproduced at s. 190(B)4. I have found that three of those rights claimed are not 'readily identifiable' but, if I am, wrong in that understanding, I confirm my view that because of the use of the phrase 'use and enjoy' in rights (d) and (ii), without some an exhaustive list of activities attached, they are not capable of being established, because, in short, it is not possible to know the nature and extent of the claimed right. Even had *Alyawarr* not found a right similar to (iii) to be not a native title right, I am also of the view that there is insufficient material to establish it here.

The remaining rights, set out below, are able to be established . There is extensive evidence in **[Anthopologist 1]** to support these rights at a prima facie level. Chapters 9 and 10 alone would suffice.

> a. the right to access and be physically present on the Native Title Area in accordance with traditional laws and customs;
>
> b. the right to camp on the Native Title Area- in accordance with traditional laws and customs which does not include the right to permanently reside or build permanent structures or fixtures;
>
> c. the right to hunt, fish and gather on the Native Title Area for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs in accordance with traditional laws and customs;
>
> e. the right to maintain and protect from physical harm, by lawfu1 means, places within the Native Title Area of importance to the Native Title Holders in accordance with traditional laws and customs; and
>
> f. the right to perform social, cultural, religious, spiritual or ceremonial activities on the Native Title Area and invite others to participate in those activities in accordance with traditional laws and customs.

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 relating to this condition

The requirements of this section are such that 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.

'Traditional physical connection' is not defined in the Act although there is no doubt that the view of the High Court as expressed in *Yorta Yorta*, in relation to the meaning of 'traditional' as it appears in s. 223(1)(a), is relevant. The court said the following:

> For the reasons given earlier, 'traditional' in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty— at [86].

I interpret this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. The explanatory memorandum to the *Native Title Amendment Act 1998* explains that this 'connection must amount to more than a transitory access or intermittent non-native title access' —at [29.19].

On the basis of the material in Chapters 9 and 10, I am satisfied that the applicants, amongst others, have and previously had a traditional physical connection to the claim area.

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.

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.

Section 61A(1)- Native Title Determination

A search of the National Native Title Register and the Geospatial database reveals that there are no determinations of native title falling within the external boundary of the application.

Section 61A(2) - Previous exclusive possession acts

It is stated in Schedule B that areas affected by previous exclusive possession acts (as described in s.23B) have been excluded from the area of the application.

Section 61A(3) - Previous non-exclusive possession acts

Schedule B states that the applicants do not claim exclusive possession over areas subject to a previous non-exclusive possession act.

Section 61A(4) - ss. 47, 47A 47B

It is stated in schedule L that the claim group occupies all USL in the area.

Section 61(4)(b) requires a statement in the application that the provision of s. 47 apply. Schedule E says 'In the USL land claimed, subject to s. 47B revival, the applicants claim…possession, occupation, use and enjoyment.' I accept this to be a statement to the necessary effect even though it is not in Schedule L ..

Result: **Requirements met**

No claim to ownership of Crown minerals, gas or petroleum: s. 190B(9)(a)

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

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

Reasons relating to this sub-condition

The application expressly excludes any such claim at Schedule Q.

Result: **Requirements met**

No exclusive claim to offshore places: s. 190B(9)(b)

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

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

Reasons relating to this sub-condition
The application at Schedule P says that there is no claim to waters in an offshore place.

Result: Requirements met

Native title not otherwise extinguished: s. 190B(9)(c)

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

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

Reasons relating to this sub-condition
Any land over which native title rights have been otherwise extinguished is specifically excluded by Schedule E.

Result: Requirements met

[End of document]