

Brief History of the Application

The application was lodged with the National Native Title Tribunal on 2 April 1998. An amended application was filed in the Federal Court on 28 September 1999 and the Court granted leave to amend on 18 October 1999. An amended application was filed in the Federal Court on 24 November 1999 and leave granted to amend the application on 30 November 1999.

An amended application was filed in the Federal Court on 3 August 2001. The Federal Court granted leave to amend the application on 21 August 2001 and directed that the applicant file and serve a re-engrossed completed Form 1 Application by 4 September 2001. On 19 September 2001 a further amended application was filed in the Federal Court, and leave was granted to amend on 20 September 2001.

This application is affected by notices of proposed mining leases (application notice) ML10232 and ML10243 issued pursuant to s652 of the *Mineral Resources Act 1989* (Qld).

Unless otherwise indicated, reference to the 'amended application' in these reasons refers to the amended application filed in the Federal Court on 19 September 2001.

Information considered when making the Decision

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

- ◆ The working files and registration test files for this application;
- ◆ The National Native Title Tribunal's registration test files and applications for native title applications that overlap the area of this application QC98/5 (Wirri People native title application) and QC98/11 (Wirri People #2 native title application)
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;
- ◆ Schedule of Native Title Applications
- ◆ The Native Title Register
- ◆ Register of Indigenous Land Use Agreements

In particular, the following documents are contained in the Registration Test File for QC98/12:

ITEM	DATE	FILE	DESCRIPTION
1	2/4/98	WF QC98/12 Folio 1	Application.
2	26/8/99	RTF QC98/12 Folio 19C	Affidavit of [Applicant 1- name deleted] dated 26/8/99
3	28/9/99	RTF QC98/12 Folio 23	Affidavit of [Applicant 2- name deleted] dated 24/9/99
4	28/9/99	RTF QC98/12 Folio 23	Affidavit of [Applicant 3- name deleted] dated 24/9/99
5	6/10/99	RTF QC98/12 Folio 25	Affidavit of [Applicant 4- name deleted] dated 29/9/99
6	12/10/99	RTF QC98/12 Folio 29	Affidavit of [Applicant 1- name deleted] dated 7/10/99
7	3/8/01	RTF QC98/12 Folio 117	Amended application
8	13/9/01	RTF QC98/12 Folio 133-134	NNTT GIRO Analysis

9	19/9/01	RTF QC98/12 not yet filed	Amended application
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Copies of the documents provided to the Registrar directly for the purposes of registration of this application have been provided to the State. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

The State has not provided any comment in response to the material I have had reference to.

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

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

A. Procedural Conditions

s.190C(2)

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

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

Details required in section 61

s.61(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-condition

Has the application been made on behalf of all 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

The case of *Risk v. National Native Title Tribunal* [2000] FCA 1589 (10 November 2000) ('Risk's case') needs to be considered. In *Risk's* case, O'Loughlin J said the following:

'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' [30]

'The [Native Title] Act now ensures that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held . . . 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 . . .' [30] – [31]

'[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group' [para. 60]

Risk's case is authority for the proposition that to comply with the requirements of s61(1), the application must be made on behalf of a 'properly constituted group', and 'not individuals or small sub-groups', as happened in *Risk*.

The application before me was made originally by 10 applicants, now reduced to 8 following a meeting in Townsville on 12 May 2001. The 8 applicants comprise 4 newly named applicants and 4 of the original applicants. It is stated at Part A of the amended application (item 9) that "The applicants were chosen at a meeting of the Birri People in Townsville on the 12 May 2001, by those persons present at the meeting in a manner consistent with traditional law and custom."

The amended application contains a description of the native title claim group (see Schedule A) that does not name all of the persons in the group. The native title claim group is said to comprise of individuals who can trace their descent from one of the 43 persons listed.

I think that this application can be distinguished from the facts in *Risk's* case. What we have here is a clearly defined and constituted group of people, that are descendant from named ancestors. There is nothing before me to suggest that these are not all the persons who, according to their traditional laws and customs, hold the common or group rights and interests to the claim area.

Risk appears to me to have been concerned with a family of 8 people, it being quite clear that this family were part of a larger community of people who potentially held the claimed rights and interests in the area covered by the application. It was clear from the information available to the delegate that this small family could not, on their own (and independently of the larger group to whom they traditionally belonged), hold rights and interests in the claimed native title. As such it was not a properly constituted native title claim group, as required by s61(1).

Prima facie, I am satisfied that the applicants are authorised by a properly constituted native title claim group which I refer to in my reasons under s190C(4)(b) below. There is no evidence before me that suggests that the Birri People native title claim group is part only of a larger community of people who hold the common or group rights in the claim area. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule A of the amended application (item 9) describes the native title claim group. I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is a member of the claim group. I have reached this view for the reasons contained in my decision at s.190B(3) below.

Result: Requirements met

s.61(5) Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents

Reasons relating to this sub-condition

s.61(5)(a)

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

s.61(5)(b)

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

s.61(5)(c)

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to s.62 below.

s.61(5)(d)

As required by s.61(5)(d) the application is accompanied by the prescribed documents, being, an affidavit as prescribed by s.62(1)(a) and a map as prescribed by s.62(1)(b).

I refer to my reasons for decision in relation to s.62(1)(a) and (b) below. I note that s190C(2) only requires me to consider details, other information and documents required by s.61 and s.62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

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

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-condition

The applicants have each provided an affidavit in relation to this condition. All the affidavits are competently witnessed.

The four original applicants each provided affidavits.

I am satisfied that the affidavit of [Applicant 3] addresses the matters required by s.62(1)(a)(i)-(v) at paragraphs 2, 3, 4, 5, and 6-7 of the affidavit respectively (Item 4).

The affidavits of [Applicant 4] and [Applicant 1] are virtually identical in content and I am satisfied that they address the matters required by s.62(1)(a) (i)-(v) at paragraphs 14, 15, 13, 2 and 3-11 of the affidavits respectively (Items 5 and 6).

The affidavit of [Applicant 2] addresses the matters required by s.62(1)(a)(i)-(v) at paragraphs 13, 14, 12, 2 and 3-11 of the affidavit respectively (Item 3).

The four new applicants have provided affidavits in identical terms with the amended application filed 3 August 2001 (item 7). I am satisfied that the affidavits satisfactorily addresses the matters required by s.62(1)(a) (i)-(v). Paragraph 5 of the affidavits state the basis on which the applicant is authorised and consequently the requirement of s.62(1)(a)(v) is satisfied.

For reasons outlined above, I have formed the view that the application complies with the requirements of this subsection.

Result: Requirements met

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

Comment on details provided

The applicants state at Schedule M of the amended application dated 19 September 2001 (item 9) that members of the native title claim group maintain a traditional connection with the claim area and carry out activities consistent with the rights and interests referred to in Schedule E. Further details of traditional physical connection are provided in the affidavit of [Applicant 2] dated 17 September 2001 attached to the amended application.

Result: Provided

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

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

Reasons relating to this sub-condition

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

Result: Requirements met

s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application

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 amended application (item 9) and provided by the applicant is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified. It also describes exclusions by way of a formula that excludes a variety of tenure classes from the claim area.

Result: Requirements met

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

Reasons relating to this sub-condition

A map showing the external boundaries of the area covered by the application is at attachment C to the amended application (item 9). For the reasons that led to my conclusion that the

requirements of s.190B(2) have been met, I am satisfied that the map provided by the applicants sufficiently identify the boundaries of the claim area.

Result: Requirements met

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

Reasons relating to this sub-condition

The requirements of s.62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect the applicant to have knowledge of, and obtain details about all searches carried out by every other person or body. Schedule D of the amended application (item 9) states that the applicants have not carried out any searches and have not been provided with any additional information in relation to the existence of any non-native title rights and interests in relation to land in the area covered by the application. I am satisfied that the applicants have complied with this condition.

Result: Requirements met

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

Reasons relating to this sub-condition

The native title rights and interests claimed by the applicant are described at Schedule E of the amended application (item 9). In accordance with s.62(2)(d), the rights and interests claimed do 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 common law. I have outlined these rights and interests claimed in my reasons for decision in relation to s.190B(4).

Result: Requirements met

s. 62(2)(e) The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:
(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and
(ii) there exist traditional laws and customs that give rise to the claimed native title; and
(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application includes a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. Specifically, the description addresses each of the three particular requirements in (i), (ii) and (iii).

Under this section I must have regard to information contained in the application **only** in order to be satisfied that the requirements of this condition are met.

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that only material that is part of the application can be relied in support of this requirement. I am therefore able to consider any other information that the applicants have supplied as part of their application in determining whether this requirement has been satisfied.

Information relevant to this subsection is contained at Schedule F of the amended application (item 9) and in the affidavit of [Applicant 2] dated 17 September 2001 attached to the application. It is my view that this information amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e)(i), (ii) and (iii).

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

At Schedule F of the amended application the applicants assert that they have and the predecessors of those person had an association with the claim area. [Applicant 2], in his affidavit of 17 September 2001 provides details relating to ancestral and current association stating that:

- his father was born at Palm Island and was a Birri Elder (paras 2, 11)
- his father's mother and her brother were born on Strathmore Station near Collinsville (para 3-4)
- he and other Birri families lived on Palm Island and other aboriginal mission towns and cities in Queensland (para 8)
- he has worked and camped on many places within the claim area (para 10)
- his father maintained connection with his country (para 11)
- since he was a small child, he remembers visiting parts of our traditional country with his father and of his father telling him stories of other places he visited (para 11)
- he has worked on country undertaking environmental protection and management of parts of our traditional country and cultural heritage surveys and recognisance's (para 17)

I am satisfied that the information included in the application is sufficient to satisfy the requirements of this provision.

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

At Schedule F of the amended application the applicants assert that there exist traditional laws and customs that give rise to the native title rights and interests claimed as detailed in Schedule E.

[Applicant 2] affidavit provides a general description of the factual basis for this assertion, stating that:

- he has the right to speak and act for and on behalf of his family through his birthright, as this is Birri traditional law (para 7)
- he can speak some Birri language and speaks his language when he is with his elders for family meetings or when he attends traditional ceremonies (para 9)
- his father told him stories which were told to him by his great uncle (para 11)
- the Birri traditional way of passing on their history, culture and custom is by story telling (para 11,13)
- he has practiced traditional Birri ceremony on country in that he has hunted, gathered, prepared, cooked and consumed food taken from traditional country in accordance with Birri culture 19)

I am satisfied that the information included in the application is sufficient to satisfy the requirements of this provision.

(iii) *the claim group has continued to hold native title in accordance with traditional laws and customs*

At Schedule F of the amended application the applicants assert that the claim group has continued to hold native title in accordance with traditional laws and customs. A general description of the continued holding of native title in accordance therewith is contained in the affidavit of [Applicant 2], attached to the amended application, dated 17 September 2001. He provides examples of traditional laws and customs which are still observed, including:

- the passing down of Birri law, custom, an language from one generation to the next (para 13)
- hunting, gathering, preparing, cooking and consuming food taken form traditional country (para 19)
- it is taboo for him to discuss certain traditions, rights and ceremonies that have been passed onto him by his grandparents, other than with peers from his traditional clan (para 28)
- not going onto someone else's country without being invited, or letting them know. This is done by lighting a 'Boori' (or fire) (para 29)

I am satisfied that the information at Schedule G and the affidavit of [Applicant 2] attached to the amended application meet the requirements of s62(2)(e) and is the requisite general description of the factual basis that is required by that section.

Result: Requirements met

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

Reasons relating to this sub-condition

The applicants state, at Schedule M of the application, that members of the native title claim group have continued to carry on activities consistent with the rights and interests claimed at Schedule E. Further information is provided in the affidavit of [Applicant 2] dated 17 September 2001. Activities referred to include:

- Story telling
- Knowledge and use of language
- Worked and camped on many places within claim area
- Lived on country
- Hunted, gathered, prepared, cooked and consumed food from traditional country
- Observance of traditional ceremonies
- Use of resources

It is my view that this description of activities is sufficient to comply with the requirements if s.62(s)(f).

Result: Requirements met

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

Reasons relating to this sub-condition

At Schedule H of the amended application (item 9) the applicants provide details of the following applications:

- Birri-Gubba #2 QC97/31
- Yuibera QC98/37
- Wirri/Yuiburra QC98/46

The Birri-Gubba #2 application (QC97/31) has been withdrawn (19 July 1999).

The applicants further state at Schedule H that any overlap boundary issues with Wirri/Yuiburra QC98/11 and Jangga QC98/10, to the extent that such issues ever existed, have been resolved. They also state that any overlap boundary issues with Yuibera QC98/37 and Wiri/Yuiburra QC98/11 have been removed.

A search of the Tribunal's spatial data as at 13 September 2001 (item 9) indicates overlaps exist between the current application and:

- Wiri People QC98/5
- Wiri People #2 QC98/11
- Gia People QC99/24
- Wiri People # QC99/34
- Kudjala People QC00/1
- Kudjala People #2 QC01/01

The overlaps with QC98/11 and QC99/24 are technical in nature. On that basis, I am prepared to accept that the applicants believe that the "boundary issue" between their application and QC98/11 has been resolved. I can further accept that the applicants may not be aware of the other overlapping applications, as there is nothing before me to suggest otherwise.

I am satisfied that the application complies with the requirements of s.62(2)(g).

Result: Requirements met

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

Reasons relating to this sub-condition

At Schedule I of the amended application dated (item 9) the applicants states that "*The applicants are aware of notices received in respect of ML 10232 and ML 10243*".

Result: Requirements met

For the reasons outlined above, I consider that the application **passes** the conditions contained in s.190C(2).

s.190C(3)

Common claimants in overlapping claims:

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

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

Reasons for the Decision

This Birri People application was lodged on 2 April 1998 (item 1). Following the decision made by French J in *Strickland v Native Title Registrar* on 4 November 1999, “old Act” applications are said to have been “made” on 30 September 1998. Therefore, for the purposes of s190C(3)(b) this application was “made” on 30 September 1998.

Section 190C(3) requires me to be satisfied that any person who is a member of the Birri People native title claim group is not also a member of the native title claim group for any previous native title determination application (“the previous application”), where:

- (a) the previous application overlaps in whole or part the claim area covered by the Birri People application (cf. s190C(3)(a)); and
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the Birri People application was made (cf. s190C(3)(b)); and
- (c) the entry in the Register was made, or not removed, as a result of consideration of the previous application under s190A (cf. s190C(3)(c)).

A search of the Tribunal’s geospatial data (item 8), as at 13 September 2001, reveals six applications as per the Register of Native Title Claims, fall within the external boundary of this application namely:

NNTT No	Name	Federal Court No.	Overlap area
QC98/5	Wiri People	QG6242/98	1.551 sq.km
QC98/11	Wiri People #2	QG6251/98	0.445 sq.km
QC99/24	Gia People	Q6023/99	0.496 sq.km
QC99/34	Wiri People #3	Q6033/99	1017.752 sq.km
QC00/1	Kudjala People	Q6001/00	69.439 sq.km
QC01/01	Kudjala People #2	Q6001/01	6668.801 sq.km

190C3 requires identification of previous application entered on the Register as a result of a consideration of any such previous applications under s190A. None of the above-mentioned applications were on the Register as a result of consideration under s190A at the time this application was made. Therefore this application does not offend the provisions of s190C(3).

Result: Requirements met

s.190C(4)(a) or s.190C(4)(b)

Certification and authorisation:

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

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

Note: s.190C(5) – Evidence of authorisation:

If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

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

Reasons for the Decision

The application has not been certified by the relevant representative Aboriginal/Torres Strait Islander body. Therefore the conditions of s.190C4(a) are not relevant.

Under this section, I am only required to be satisfied that one of these conditions is met. I have therefore limited my consideration to compliance with s.190C4(b) – authorisation by the native title claim group.

There are two limbs to s190C(4)(b):

1. the applicant must be a member of the native title claim group;
2. the applicant must be authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

The first limb

[Applicant 1] has sworn an affidavit dated 26 August 1999, that he is a member of the Birri native title claim group. [para 1]

[Applicant 4] has sworn an affidavit dated 29 September 1999, that he is a traditional owner of the Birri people [para 12].

[Applicant 2] has sworn an affidavit dated 17 September 2001 that he is a Birri traditional owner [para 1].

[Applicant 3] has sworn an affidavit dated 24 September 1999 that he is a member of the Birri native title claim group [para 1].

[Applicant 5 – name deleted] states in a letter dated 20 April 1999 that she is a Birri person, and that her ancestors are [person 1 – name deleted] and [Person 2 – name deleted].

The remaining three applicants were also present at the authorisation meeting which was a meeting for Birri native title claimants. Further, the remaining three applicants' surnames strongly suggest family connection to the native title claim group.

I am therefore satisfied that all applicants are members of the native title claim group.

The second limb

A prerequisite to compliance with s190C(5) is provision by the applicant of a :

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

Statements of the kind required by s190C(5) are found in the applicant's s62(1)(a) affidavits and in the legal representatives affidavit accompanying the amended application of 3/8/01.

The s62(1)(a) affidavits by each of the applicants state that they are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it. The applicants state in Part A of the application that: "The applicants were chosen at a meeting of the Birri People in Townsville on 12 May 2001, by those persons present at the meeting in a manner consistent with traditional law and custom".

The affidavit of [Applicant 2] sworn 18 September 2001 details the authorisation process as follows:

- Notices of the 12 May meeting which advertised the discussion of "Birri Native Title Claim Matters" on the agenda and invited members of the Birri native title claim group to attend, appeared in the Townsville and Charters Towers newspapers on 25, 27 and 28 April 2001.
- The original group of applicants also distributed the notice to family members
- All attendees were handed a copy of the agenda upon entering the meeting. Item 7 of the agenda was "amendment to native title applicants".
- Attendance sheets were signed by 143 people. [Applicant 2] deposes that not all of the persons in attendance signed the attendance sheets. Many different family names are represented on the attendance sheets.
- The meeting resolved to have a group of 8 applicants. The meeting then elected the eight named applicants. All resolutions passed at the meeting (including the resolution relating to the election of the applicants) were approved by a majority greater than 75% of the attendees.

The information before me supports the following conclusions:

- the applicants are members of the Birri native title claim group
- the group has been involved in meetings and a process of decision making from which the applicants' authority stems
- the applicants were authorised to make the application and to deal with matters arising in relation to it.

I am satisfied that the applicant is a member of the native title claim group and is authorised to make the application, deal with matters arising in relation to it, by all other persons in the native title group.

For these reasons I am satisfied that the requirements of s.190C4(b) are met.

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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

Reasons for the Decision

External Boundaries

The external boundaries of the claim area are described at Attachment B2 of the amended application (item 9). Email from the NNTT's geospatial unit dated 22 November 1999 and 23 November 1999 confirm that the external boundary description as filed by the applicants complies with the requirements of this section.

I am satisfied that the list of co-ordinates is consistent with the map of the claim area and clearly identify the external boundary of the application.

Map

A map of the claim area is provided at attachment C to Schedule C of the amended application (item 9). The map shows the boundaries of the area covered by the application. The map does not show a scale, which allows distances and areas to be ascertained but includes co-ordinates. These co-ordinates, combined with the detailed list of 535 geographic co-ordinates defining the claim boundary at attachment B2 are sufficient to identify with reasonable certainty the specific area being claimed. The map is based upon Central Queensland Land Council data and data from the Department of Lands.

I am satisfied that the map submitted with the amended application is sufficient to meet the requirements of s.62(2) and s.190B2 as the boundaries of the area covered by the application can be identified.

Internal Boundaries

The internal boundaries are described at Attachment B1 to the application (item 9) as follows:

The land claimed covers that part of all land within the co-ordinate points listed at Attachment B2 to this application that was designated as one of the following at the time the Application was made:

Unallocated State Land
Stock Routes of a Width of Greater than 300 metres
State Forest
Timber Reserves

Camping Reserves

Reserves for Aboriginal purposes

National Park

All watercourses and lakes as defined by the Water Resources Act (Qld) 1989

Non-exclusive pastoral leases as defined by section 248B of the Native Title Act 1993 (Cth).

The statement in Attachment B1 further provides information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the claim area.

Areas excluded from the claim area are as follows:

- (i) Subject to (iv) valid acts that occurred on or before 23 December 1996 comprising such of the following that are considered extinguishing acts within the meaning of the Native Title Act 1993 (Cth) as amended, namely:
 - (a) Category A past acts as defined in s.228 and s.229 of the Native Title Act 1993 (Cth) and
 - (b) Category A intermediate acts as defined in s.232A and s.232B of the Native Title Act 1993 (Cth);
- (ii) Subject to (iv), any valid previous exclusive possession act(s), as set out in Division 2B of Part 2 of the Native Title Act 1993 (Cth) done in relation to the claim area; and the act(s) were attributable to the Commonwealth or State;
- (iii) Subject to (iv) any areas over which native title has otherwise been extinguished.
- (iv) The paragraphs above are subject to the provisions of s.47, s.47A and s.47B of the Native Title Act 1993 (Cth) as may apply to any part of the claim area.

Save that, exclusive possession is not claimed over areas that have been subject to valid previous non-exclusive possession act(s), done by the Commonwealth or the State, as set out in Division 2B of Part 2 of the Act.

I have taken into account Nicholson J's order on 21 May 1999 in matter of Daniels and Ors, et al v The State of Western Australia (WAG6017 of 1996), being the only authority available to date on what may satisfy the requirements of s. 62 (2)(a) (i) and (ii) of the Native Title Act 1993. I refer specifically to para 32 of Nicholson J's order in which he states:

“These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be satisfactory compliance with the statutory requirement.”

It is my view that the description of areas excluded by class can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants. Accordingly, I consider that the description provides a reasonable level of certainty in regard to whether native title rights and interests claimed in relation to particular areas of land and waters within the external boundaries of the area the subject of the application.

For the reasons given above, I am satisfied that the information and map contained in the amended application (item 9) as required by paragraphs 62(2)(a) and (b) is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:

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

Reasons for the Decision

A list of names of persons in the claim group is not provided in the amended application. The requirements of s.190B(3)(a) of the Act are therefore not relevant.

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

The native title claim group is described in Schedule A of the amended application (item 9) as follows:

The native title claim group is constituted by individuals who can trace their descent from one of the following people: Schedule A then lists the names of 43 people.

I am satisfied that the descendants of the named ancestor could be identified with minimal inquiry, and as such, ascertained as part of the native title claim group. By referencing the identification of members of the native title claim group as descendants of a named ancestors, it is possible to objectively verify the identity of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are

'all native title interests that may exist, or that have not been extinguished, at law'. To meet the requirements of s190B(4), I need to be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

At Schedule E of the amended application (item 9) the applicants describe the native title rights and interests claimed as follows:

The native title rights and interests claimed are those of and flowing from:

- (a) The right to possession, occupation, use and enjoyment of the land within the claim area and designated as U.S.L., as against the whole world, pursuant to the traditional laws and customs of the claim group; and*
- (b) The right to possession, occupation, use and enjoyment of the land within the claim area, excluding areas designated as U.S.L. pursuant to the traditional laws and customs of the claimant group.'*

I am satisfied that the claimed rights and interests described, as required by s.62(2)(d), is sufficient to allow the native title rights and interests claimed to be readily identifiable.

Result: Requirements met

s.190B(5)

Sufficient factual basis:

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

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

Reasons for the Decision

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the applicant's assertion about the existence of the native title rights and interests listed at Schedule E of the amended application. In considering this condition I have had regard to information contained at Schedule F of the application, the affidavit of [Applicant 2] attached to the amended application (item 9), and the affidavit, provided direct to the Registrar, of [Applicant 1], sworn on 26 August 1999 (item 2).

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

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

The applicants assert at Schedule F of the amended application that the native title claim group have and the predecessors of those persons had, and association with the claim area.

On the basis of the affidavits of [Applicant 1] (item 2) and [Applicant 2] (item 9) there is evidence that the native title claim group are biological descendants of the native title claim ancestor group and that there is a factual basis for their, and their predecessors', association with the area that is the subject of this application, being within Birri traditional country.

(Affidavit [Applicant 1] dated 26 August 1999, paras 2, 7 – 10, 12, 18)

(Affidavit [Applicant 2] dated 17 September 2001, paras 1-4, 14-16, 23-26)

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

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

The applicants assert in Schedule F of the amended application that there exist traditional laws and customs that give rise to the native title rights and interests claimed as detailed in Schedule E.

On the basis of the affidavits of [Applicant 1] and [Applicant 2] it is clear that there exist traditional laws and customs observed by the native title claim group that give rise to the claim to native title rights and interests. A range of continuing traditional culture and laws are described in the affidavit of [Applicant 1]. These include: fishing; hunting; tracking, gathering bush foods such as waterlily bulbs and wild honey; visiting culturally significant sites, observing appropriate behaviour when visiting such sites, stories associated with particular sites, and transmission of knowledge, for example of appropriate behaviour towards elders, how to track and what to eat and not to eat in the bush.

(Affidavit [Applicant 1] dated 26 August 1999, paras 3, 4, 12, 13, 14, 17, 18)

The affidavit of [Applicant 2], dated 17 September 2001, describes traditional practices of his ancestors including the use of spears, plants to cure sickness and the use of sap from trees to fish (paras 23-26). Continuing traditional culture and laws are also described in the affidavit of [Applicant 2], including:

- passing moiety/skin group down from generation to generation (para 6)
- speaking language (para 9)
- telling stories of history, culture and custom (paras 11, 13)
- undertaking Environmental Protection and Management work and Cultural Heritage Surveys on country (para 17)
- hunting, gathering preparing food in accordance with Birri culture (para 20)

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

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

The affidavit of [Applicant 1] referred to above provides evidence of an extant and continuing system of rules and beliefs adhered to by members of the native title claim group. The system specifies some of the rights and responsibilities of members of that group and processes by which those rights and responsibilities are recognised and exercised. These rights and responsibilities include the transmission of traditional knowledge, the protection of places of significance; caring

for the land; paying respects to elders buried on country and customs and skills relating to the utilisation of resources.

(Affidavit [Applicant 1] dated 26 August 1999, paras.3, 6, 10, 12, 13, 14, 17, 20, 21, 23)

The affidavit of [Applicant 2] referred to above provides evidence of existing and continuing system of rules and beliefs adhered to by members of the native title claim group. He states that permission is obtained to access a country that is not their own, passing down of Birri custom, law and language from generation to generation through stories, belief in and awareness of the presence of spiritual ancestors present in traditional country.

(Affidavit of [Applicant 2] dated 17 September 2001, paras 13, 28-29, 27-28)

Result: Requirements Met

s.190B(6)

Prima facie case:

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

Reasons for the Decision

Under s.190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

‘Native title rights and interests’ are defined at s.223 of the *Native Title Act*. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

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

The definition is closely aligned with all the issues I have already considered under s190B(5). I will draw on the conclusions I made under that section in my consideration of s190B(6).

Under s190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term ‘prima facie’ was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

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

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

I note that the claimed rights and interests are subject to the following qualifications:

- that exclusive possession is not claimed over areas that have been subject to valid previous non-exclusive possession act(s) done by the Commonwealth or the State, as set out in Division 2B of part 2 of the Act. (Attachment B1 to application 6/10/99)
- The applicants make no claim to ownership of minerals, petroleum or gas wholly owned by the Crown (Schedule Q)

The native title rights and interests claimed are those of and flowing from:

a. The right to possession, occupation, use and enjoyment of the land within the claim area and designated as USL, as against the whole world, pursuant to the traditional laws and customs of the claim group.

The affidavits provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Applicant 1] affidavit [paras 2, 10, 11]
- [Applicant 2] affidavit [paras 10, 19 and 29]

Subject to the qualifications outlined above,

This right is accepted for registration.

b. The right to possession, occupation, use and enjoyment of the land within the claim area, excluding areas designated as USL pursuant to the traditional laws and customs of the claimant group.

The affidavits provide sufficient evidence of the members of the native title claim group exercising and/or having these rights, some of which is detailed below:

- [Applicant 1] affidavit [paras 2, 10, 11]
- [Applicant 2] affidavit [paras 10, 19, 21 and 29]

This right is accepted for registration.

Result: Requirements met

s.190B(7)

Traditional physical connection:

The Registrar 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; or***
- 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:***
 - the Crown in any capacity; or***

- (ii) *a statutory authority of the Crown in any capacity; or*
- (iii) *any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.*

Reasons for the Decision

This section requires me to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

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

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

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application. The affidavit of [Applicant 1] dated 26 August 1999 (item 2) provides evidence of traditional physical connection to the claim area. He states that:

- his grandmother was born at Byerwen Station
- his mother was born at Rockhampton and grew up at Glen Eva
- he was born at Collinsville (in the claim area) in 1950 and deposes that “We’ve never left that country. We’ve always stayed in the country” (para 2).

The affidavit of [Applicant 2], attached to the amended application (item 9) refers to historical and linguistic evidence for the continuity of occupation of the claim area by the Birri People (paras 14-15), as well as his ancestors being born in the claim area, and he has worked, lived and camped on country.

Based on this information, I am satisfied that [Applicant 1] and [Applicant 2] are members of the Birri People native title claim group and have the requisite traditional physical connection.

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

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

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s61A.

S61A(1) – Native Title Determination

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

S61A(2) – Previous Exclusive Possession Acts

Attachment B1 to the application states that any areas subject to valid previous exclusive possession act as set out in Division 2B of Part 2 of the Native Title Act 1993 (Cth) done in relation to the claim area are excluded from the claim area.

For the reasons provided above at s.190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and include all previous exclusive possession acts.

S61A(3) – Previous Non-Exclusive Possession Acts

Attachment B1 to the application states that exclusive possession is not claimed over areas that have been subject to valid previous non-exclusive possession act(s) done by the Commonwealth or the State, as set out in Division 2B of part 2 of the Act.

I am satisfied that the applicants do not claim exclusive possession of areas covered by previous non-exclusive possession acts.

S61A(4) – s47, 47A, 47B

The application states at Schedule L that *“The applicants reserve the right to provide further information with regard to this schedule”*. At attachment B1 the applicants state that the areas excluded from the claim area are *“subject to the provisions of s47, s47A and s47B of the Native Title Act 1993 (Cth) as may apply to any part of the claim area”*. I have inferred from this that the applicants do claim the benefits of s.47B.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In my opinion, the applicant’s express statements in respect to the provisions of that section are sufficient to meet the requirements of s190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants have provided sufficient information to bring an area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum.

Conclusion

For the reasons identified above the application and the accompanying documents do not disclose and it is not otherwise apparent that because of Section 61A the application should not have been made.

Result: Requirements met

s.190B(9)(a)

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

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

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

Reasons for the Decision

At Schedule Q of the amended application (item 9) the applicant states that they make no claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

The claim area does not include offshore places. Schedule P of the amended application (item 9) states ‘there are no claims made by the Native Title Claim group to exclusive possession of all or part of an offshore place’.

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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

Reasons for the Decision

The amended application (item 9) does not disclose, and I am not otherwise aware that the native title rights and interests in the area claimed have otherwise been extinguished. I am satisfied that the requirements of this section have been met.

Result: Requirements met

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