National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

Delegate:	Graham Miner

Application Name:	Byron Bay Bundjalung People
Names of Applicants:	Ms Lorna Kelly Ms Linda Vidler Ms Dulcie Nicholls Ms Yvonne Stewart Ms Stan Kay Mr Norman Graham Mr Brian Kelly

Region:	NSW	NNTT No.:	NC01/8
Date Application Made:	5 December 2001	Federal Court No.:	N6020/2001

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

DECISION

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

Graham Miner

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

April 2003
Date of Decision

Brief History of the Application

The application was filed in the Federal Court on 5 December 2001. An amended application was filed on 4 March 2003

The application is linked to a first application by the same claimant group, namely the Byron Bay Bundjalung People's application NC95/1 (NG6010/98) which was lodged with the NNTT on 22 December 1994.

The two applications appear intended to cover areas of the traditional country of the Byron Bay Bundjalung People.

Information considered when making the Decision

In determining this application I have reviewed and considered all of the relevant information and documents from the following files, databases and other sources, including information supplied by the applicant and the Minister for Land & Water Conservation in relation to the application filed on 5 December 2001:

- NC01/8 - Registration Testing File;
- NC95/1 - Registration Testing File
- Submission from the Department of Land & Water Conservation Crown dated 17 January 2002;
- Submission from legal representative on behalf of applicants dated 18 March 2002;
- Submission from legal representative on behalf of applicants dated May 2002;
- Submission from NSW Native Title Services dated 20 December 2002;

- Confidential material: **(Report name and Author deleted)**
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The Schedule of Native Title Applications;
- The Native Title Register;
- The Register of Indigenous Land Use Agreements.

Note: Information and materials provided in the context of mediation on any related native title determination application has not been considered in making this decision. 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 legislation 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.

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below.

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

I must consider here whether the application has 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 s.61(1), the application must be made on behalf of a 'properly constituted group', and 'not individuals or small sub-groups', as happened in Risk. His Honour held that, when it is apparent that the group bringing the application is only part of a larger group who hold common or group rights, the application does not meet the section's requirements.

The native title claim group is described at Attachment A of the application.

The present application is made on behalf of a group of people who refer to themselves as the Byron Bay Bundjalung People. Attachment A of the application states that the claim is brought on behalf of the descendants of named apical ancestors and includes details of further criteria and a process by which it can be ascertained whether a particular person is a member of the native title claim group.

The Tribunal sought additional information from the applicants concerning potential issues arising out of the decision in *Risk v Registrar, NNTT* [2000] FCA 1589.
In responses made on or about 22 May 2002 and on 20 December 2002, the applicants provided the following:

> "The native title claim group, as supported by **(name deleted)** in the report, constitutes the entire community that hold the common or group rights and interests for the land included in application NG 6020/01 and not part of it."[para 22 of May 2002 submission]
>
> Further, as there is no overlapping application for any larger grouping, and no evidence before the Registrar that it is a larger grouping that hold the common or group rights, it is the submission of the applicants that the Registrar must be satisfied that the native title claim group as described in the application NG 6020/01 compromise a properly constituted native title claim group for the purposes of sections 190B, 190C and 61 of the NTA." [para 35 of May 2002 submission]
>
> "…the present claim group comprises all the potential native title holders of the area claimed. It is made up of descendants of named apical ancestors who occupied the claim area at first contact and had custodial obligations towards it. Custodianship of the country being claimed has passed to the claim group under its traditional laws and customs. The claimants do not comprise a small part of the native title holding group – they comprise the *whole group*. The fact that they may form part of a broader Bundjalung polity or cultural grouping does not derogate from the fact that the members of the present claim group are the traditional custodians or "owners" of the area claimed and hold the group rights and interests in it." [para 3 of 20/12/02 submission]

Also, in response to the Tribunal's enquiry regarding the relationship between the Byron Bay Bundjalung and the wider Bundjalung polity, the applicants have responded that:

> "The Byron Bay Bundjalung is one of a number of local descent groups which together form a part of a wider cultural bloc described as "Bundjalung". The relevant point is that it is the local group which is the land holding group, with the right to speak for country and observing laws specifically related to that country, as well as more generic "Bundjalung" law and custom.
>
> There is no competing "Bundjalung" claim asserting that the broader polity holds native title rights and interests over the Byron Bay area." [para 5 of 20/12/02 submission]

The report referred to in the above submissions is a report entitled: ***(Name, Author and date of report deleted),.*** The report was submitted to the Tribunal in support of this application.
In my view, reading **(name deleted)** report as a whole, it is relatively clear that the claimant group as described in the application constitutes a distinct group or community that can be identified as culturally Bundjalung people of Byron Bay who, according to their traditional laws and customs, hold the common or group native title rights and interests for the land included in application.

I am satisfied in light of Attachment A, the above submissions and **(name deleted)** report that there is not a broader or common Bundjalung group right to 'ownership' or 'custodianship' of the land comprising the application area. That is, that the group making the claim is the appropriate land-holding group and not a broader group (thereby satisfying any concerns that may be raised in the *Risk* decision at [60]).

I am also influenced by the fact that there are no submissions, suggestions or competing claims over the application area to suggest that the claim group is not the properly constituted claim group, or that the group is merely a part of a different or wider group that should claim native title for this area Further, there is nothing to indicate that the native title claim group has been assembled for administrative convenience and is hence not a properly constituted group as required by s.61(1).

For these reasons, I am satisfied that the native title claim group described in the application includes all the persons who, according to their traditional laws and customs, hold the native title claimed over the area covered by the application. See my reasons under s190C(4) concerning whether the applicants have been authorised by all the persons in the group to make the application and to deal with matters arising in relation to the application.

Result: Requirements met

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

The applicants' names are detailed at Part A of the application. The details of address for service appear 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 application describes the native title claim group. For the reasons which led to my conclusion (below), that the requirements for s190B(3) have been met I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

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

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations* 1998. The application was filed in the Federal Court as required pursuant to s61(5)(b) of the Act.

The application meets the requirements of s61(5)(c) and contains all information prescribed in s.62. I refer my reasons in relation to those sections. As required by s.61(5)(d) the application is accompanied by affidavits as prescribed by s.62(1)(a) and a map as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

I note that s.190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

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 application is accompanied by affidavits sworn by each of the named applicants The applicants depose in paragraphs (i) – (v) of the affidavits to the matters contained in section 62(1)(a)(i)-(v).

I am satisfied that the affidavits of the applicants are sworn, dated and competently witnessed.

For the reasons set out 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 have provided details of traditional physical connection at Attachments F and M of the 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 s190B(2) have been met, I am satisfied that the information and map provided by the applicants are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Schedule B provides a written description of the external boundaries of the application.

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 lead to my conclusion that the requirements of section 190B(2) have been met, I am satisfied that the information provided by the applicant is sufficient to enable the area not covered by the application to be identified with reasonable certainty and meets the procedural requirements of section 62(2)(a)(ii).

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

The applicants have provided a map at Attachment C. For the reasons which lead to my conclusion that the requirements of section 190B(2) have been met, I am satisfied that the map provided by the applicants sufficiently identifies 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 s62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that under this condition I need only be informed of searches conducted by the applicants in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect applicants to have knowledge of, and obtain details about all searches carried out by every other person or body.

The current application states that the Department of Land and Water Conservation is undertaking a search of non-native title rights and interests in the application area. The current application does not reveal that the applicants have conducted any searches of this nature. I am consequently satisfied that the probability is that the applicants have not conducted any searches, the details/results of which should have been disclosed. I find that this requirement is met.

Result: Requirements met

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

Reasons relating to this sub-condition

A description of the native title rights and interests claimed by the applicants is set out in Schedule E.

In accordance with section 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 that may exist or that have not been extinguished at common law. The description is a list of individually identified rights and interests. I have outlined these rights and interests claimed in my reasons for decision in relation to s190B(4).

The application meets the requirements of this condition.

Result: Requirements met

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.

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 upon in satisfaction of this requirement.

Information relevant to this subsection is contained in Attachment F, Attachment G and Attachment M to the application.

I am satisfied that the information provided by the application amounts to a sufficient general description of the factual basis on which it is asserted that native title rights and interest exist so as to comply with the requirements of s.62(2)(e).

Further, in my view, this information amounts to a general description of the factual basis so as to comply with the requirements of s62(2)(e) (i)-(iii).

s.62(2)(e)(i) - ***the native title claim group have, and the predecessors of those persons had, an association with the area;***

At Attachment F, the applicants state that the native title claim group and their ancestors have continually occupied, lived, travelled and been present on, used and enjoyed the area and hunted and fished there (para 3(a) & (b)).

At Attachment G of the application the applicants describe activities carried out by the Byron Bay Bundjalung People and state that those people use and occupy and carry out various activities on their country.

At Attachment F and M the applicants state that two of the applicants, Lorna Kelly and Linda Vidler, hunt, fish and gather, walk and camp on the area of the claim and adjacent areas in the Byron Bay Bundjalung country.

s.62(2)(e)(ii) - ***there exist traditional laws and customs that give rise to the claimed native title;***

At Attachment F of the application the applicants state that the claimant group are the descendants in accordance with Bundjalung law and custom of the pre-sovereignty community that had rights and interests in the area of the application which were possessed under laws and customs acknowledged and observed by them (paras 1 & 2).

At Attachment G of the application the applicants describe activities carried out by the claimant group on their country, including visiting and maintenance of cultural sites, camping, hunting, fishing, gathering food, carrying out cultural and heritage protection and teaching their children about Bundjalung culture. Activities such as visiting and maintaining cultural sites, the conduct of traditional ceremonies and telling of stories in relation to sites and places outlined in Attachment G indicate that the claim group maintain a spiritual connection with their country. Further, these activities indicate to me the existence of traditional laws and customs that give rise to the claimed rights.

s. 62(2)(e)(iii) - ***the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.***

The above information supports the assertion that the native title claim group has continued to hold the native title in accordance with traditional laws and customs. Refer to my reasons under s.62(2)(e)(ii) above. The applicants state at Attachment G that the claim group continues to visit country and that elders maintain cultural sites. They also state that the claim group carry out cultural heritage work and continue to pass on traditional laws and customs to the younger members of the community - for example, telling stories and singing songs relating to significant sites, conducting traditional ceremonies and bushcraft.

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

Attachment G and Attachment M of the application provides a description of activities that members of the claim group carry out in relation to the area claimed.

Attachment F provides current activities in exercise of native title rights and interests and traditional physical connection.

In my view the description of activities is sufficient to comply with the requirements of 62(2)(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 Attachment H the applicants state that they are not aware of any applications that have been made in relation to the whole or part of the application area.

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

Attachment I of the application states:

> "The applicants are not aware of any notices under section 29 of the Native Title Act (1993) (C'th) which relates to part of the area the subject of this application."

Result: **Requirements met**

Reasons for the Decision

For the reasons identified above the application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61 & 62.
I am satisfied that the application meets the requirement of this condition.

Aggregate Result: **Requirements met.**

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 application was filed in the Federal Court on 5 December 2001. For the purposes of s190C(3)(b) the application is taken to have been "made" on that date.

A search of the Geospatial database and Register of Native Title Claims (dated 14 March 2003) reveals that there are no overlapping applications that cover the whole or part of the claim area that were entered on the Register of Native Title Claims as at 14 March 2003. Therefore this application does not offend the provisions of s.190C(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 section 203BE, or has been certified under the former 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

Under this section, I am only required to be satisfied that one of the conditions in s190C(4) is met.

The application has not been certified by the relevant representative Aboriginal/Torres Strait Islander body. Therefore, the requirements of s190C(4)(a) cannot be met. Consequently, I need to consider whether there has been compliance with s190C(4)(b) – authorisation by the native title claim group.

There are two limbs in 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 the other persons in the claim group.

The first limb

Attachment R of the application states that the applicants are members of the native title claim group in that each applicant is descended from the 3 listed apical ancestors. The section goes on to list four other factors which identify the applicants as members of the native title claim group (in brief: 1 - acknowledged by elders, 2 - resident within the community, 3 - has maintained primary identification with claim group and 4 - recognized by elders as observing the laws and customs of the claim group).

Comparing the above with the description of the native title claim group in Attachment A, I note that the apical ancestors all appear in the list in Schedule A. Further, the applicants' s.62(1)(a) affidavits depose that all the statements in the application are true.

On the basis of the above, I am satisfied that all applicants are members of the native title claim group.

The second limb

Section 190C(5) provides the following requirements for compliance with s190C(4)(b):

- the inclusion in the application of a statement to the effect that the requirement in s190C(4)(b) has been met; and
- a brief statement setting out the grounds upon which I should consider that the requirement of s190C(4)(b) has been met.

In *Risk v National Native Title Tribunal* [2000] FCA 1589, O'Loughlin J noted that under the Native Title Act, applications can only be lodged on behalf of properly constituted groups and that authorisation must come from all the persons who hold the common or group rights and interests. His Honour noted that although the applicant did not have to be individually authorised to make the claim, the authorisation must be in accordance with a process of decision making recognised under the traditional laws and customs of the claimant group.

Section 251B of the *Native Title Act 1993* recognises that the applicants may be authorised using a decision making process that is either:

(a) in accordance with traditional laws and customs of the group; or
(b) agreed to and adopted by the native title claim group.

The application contains and is accompanied by these statements and information in relation to the authorisation of the applicants, as required by s190C(5):

- Part A.2 – the applicants are entitled to make the application as "persons authorised by the native title claim group to make the native title determination application";
- Part A2 also states – "The applicants, Lorna Kelly, Dulcie Nicholls, and Linda Vidler are the senior elders, holding the authentically transmitted knowledge of the sites in the claimant area and holding unbroken connection to the land, recognized as such by peer elders of the Bundjalung";
- In the applicants' s62(1)(a) affidavits, each applicant deposes that she is authorised by all the persons in the Native Title Claim Group to make the application and deal with matters arising in relation to it (para 4);
- Paragraph (v) of each of the applicants' s62(1)(a) affidavits details the basis for authorisation. I will quote the relevant paragraph from the affidavit of Linda Vidler dated 25 September 2001, the other affidavits being identical:

  "(v) The basis on which I am authorised as mentioned in paragraph (iv) above is set out in the affidavits and the anthropological material attached to this application".

  Attached to the application is an affidavit of Lorna Kelly sworn 25 September 2001. Ms Kelly deposes:

  "11. An authorisation meeting of the people who hold native title in the area of the application, called and organised by the New South Wales Aboriginal Land Council on the 7th and 8th October 2000 the following people were authorised to make the application for the greater lands of the Byron Bay Bundjalung people to which this affidavit relates: myself, Linda Vidler, Dulcie Nicholls, Yvonne Stewart, Stan Kay, Norman Graham, and Brian Kelly".

  Linda Vidler deposes in similar terms in her affidavit sworn on 25 September 2001, confirming that she, Lorna Kelly and the other applicants were authorised at the above meetings.

  However, I note that there is no additional anthropological material attached to the application and conclude that this reference was included in paragraph (v) in error.

- At paragraph 2 of Attachment R the applicants state that authorization meetings that were held in Byron Bay on 7 - 8 October 2000. The meeting was organized by, and advertised by the New South Wales Aboriginal Land Council. The meeting was advertised in the Koori Mail, local and national Newspapers. The Land Council arranged transport and accommodation for those who wished to attend. The applicants state that :

  "On 7th October all members of the native title claim group attending the meeting adopted a process of authorization and on 8 October by unanimous decision of the members of the native title claim group the applicants to this application were authorized to make the application on behalf of the native title claim group for the land covered in this application".

I am satisfied that the application contains the statements required by s190C(5)(a). I am satisfied that the information that is in the application relating to the grounds upon which I should be satisfied about authorisation is sufficient for the purposes of s190C(5)(b).

The information in the application and affidavits supports a finding that the authorisation decision was made by the native title claim group in accordance with a process of decision-making that has been agreed to and adopted as a process in relation to authorising matters of this kind.

I am also influenced by the fact that there is no objection, submission or suggestion to the effect that the applicants have not been authorised by all members of the native title claim group to make this claim on behalf of the claim group and to deal with matters arising in relation to the claim.

I am satisfied that the applicants are members of the native title claim group and are authorised by the native title claim group to make this application and to deal with matters arising in relation to it.

For the reasons outlined above I am satisfied that the applicants have been authorised as required by section 190(4)(b).

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

Map and External Boundary Description

External Boundary
A written description of the external boundary is found at Attachment B1. Attachment B1 is a metes and bounds description that defines the external boundary of the application area. Two additional parcels outside the described area are noted as inclusions and thirteen (13) parcels are specifically excluded.

Map
The written description at Attachment B1 is supplemented by a map showing the external boundary of the application area. Attachment C to the amended application is a monochrome copy of a map produced by LPI (NSW).

The Tribunal's Geospatial Unit's assessment dated 14 March 2003 concludes that the description and map are consistent and locate the area covered by the application with certainty.
I accept that expert advice.
It follows that I am satisfied that external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and map that are contained in the application.

I am satisfied that the physical description of the external boundaries meets the requirements of s.62(2)(a)(i) and that the map show the boundaries of the claim area in compliance with the requirements of s.62(2)(c).

Internal Boundaries
The internal boundaries are described in Attachment B of the application. Areas are excluded from the application as follows:

> The lands and waters included in application NC95/1 (NG 6010/98) are excluded from the application. The parcels within that application are listed.
>
> The applicants have also detailed a series of land tenure types that are excluded from the area of the application, and which corresponds to the classes of tenure defined in s.23B.
>
> Also all areas in which native title has been extinguished are excluded.

In determining whether this information complies with the requirements of section 190B(2) I need to consider whether the information is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular areas of land or waters *within* the external boundaries of the area claimed. It is my view that the description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require research of the tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants

I am satisfied that the class exclusions used in the application comply with the statutory requirement in s.62(2)(a)(ii).

To conclude, I am satisfied that the information and the maps required ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters.

The requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

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 complete list of names of all the persons in the native title claim group has not been provided. Accordingly, the requirements of s190B(3)(a) have not been met. It follows that
s.190B(3)(b) requires me 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.

Attachment A of the application states the native title claim group consists of those persons who meet the following criteria:

(a) they are descended * from the following persons:
Bobby of Bumberbin (born 1817 and 1837, and died 23 March 1907) and Alice (unknown);

Harry Bray (born 1850 and died 17 October 1922) and Clara (Bray) (born 1864 and died 7 May 1922); and

Linda Jane Bray (born between 1903 and 1905, and died 14 January 1953) and Jim Kay (born 1879 or 1901, and died 1977 at Ballina).

(b) they are personally known to the acknowledged elders of the native title claim group, or (in the case of children) are personally known to senior members of subsidiary families who are themselves members of the native title claim group;

(c) either:
- (i) they are resident with the claimant community in the traditional country of the native title claim group; or
- (ii) they have maintained their primary identification with the native title claim group through regular visits with the claimant community in the traditional country of the native title claim group; and

(d) they are accepted by the acknowledged elders of the native title claim group as recognizing and observing the laws and customs of the native title claim group.

* A person may be said to be "descended" from the named ancestors for the purpose of criterion (a) if they;

- (i) are direct biological descendants of one of those ancestors;
- (ii) have been adopted and brought up by, and take their primary identification from, a direct biological descendant of one of those ancestors; or
- (iii) are direct biological descendants of a person who had been adopted and brought up by, and had taken their primary identification from, a direct descendant of one those ancestors.

The process by which it can ascertained whether any particular person is a member of the native title claim group involves the following steps:

(1) Identifying the ancestry of the person through undertaking genealogical research including obtaining oral history of the native title claim group and (in particular) the acknowledged elders of the native title claim group;

(2) Establishing whether the person is known to other members of the native title claim group and (in particular) whether the person is known to the acknowledged elders of the native title claim group;

(3) Investigating the personal history of the person to establish their places of residence at birth in childhood and in adulthood (where relevant) the frequency and nature of their visits to the claimant community; and

(4) Making appropriate enquiries to establish whether the acknowledged elders of the native title claim group accept the person as acknowledging and observing the laws and customs of the native title claim group. This would include making enquiries to establish whether the person is accepted as recognizing the importance of meeting kinship obligations, showing respect for elders and of caring and protecting the traditional country of the native title claim group.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that*"[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially."* I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group.

It is apparent from the information in Attachment A that a person may be a member of the native title claim group through descent from the named apical ancestors and the process outlined.

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

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 the readily identified.

Reasons for the Decision

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

rights and interests to be readily identified. To meet the requirements of s190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

At Attachment E of the application the following native title rights and interest are listed as follows:

1. The native title rights and interest claimed in relation to the land and waters covered by the application are:

a) the right to own the determination area;
b) the right to possess the determination area;
c) the right to occupy the determination area;
d) the right to use and enjoy the determination area;
e) the right to make decisions about the use and enjoyment of the determination area;
f) the right to control the access of others to the determination area;
g) the right to use and enjoy resources of the determination area including, but not limited to:
    (i) the right to hunt and fish on or from the land, and to collect food from the land and waters;
    (ii) the right to take items from the land and waters such as timber, stones, resin and shells and to make such things as shelter, tools and hunting implements;
    (iii) the right to manage animals, plants and minerals on the determination area;
h) the right to control the use and enjoyment of others of resources of the determination area;
i) the right to trade in resources of the determination area;
j) the right to receive a portion of any resources taken by others from the determination area;
k) the right to maintain and protect places of importance under traditional laws, customs, and practices in the determination area;
l) the right to maintain, protect and prevent misuse of cultural knowledge of the Common Law Holders associated with the determination area;
m) the right to speak for the determination area;
n) the right to conduct ceremonies on the land and waters; and
o) the right of free access to the determination area for the purpose of satisfying the rights identified in the preceding sub-paragraphs.

2. Subject to paragraphs, 3, 4, 5 and 6 the native title rights and interests specified in paragraph 1 confer possession, occupation, use and enjoyment of the land and waters covered by the application on the native title claim group to the exclusion of all others.

The exclusive nature of the claimed rights and interests in paragraph 2 are subject to a number of qualifications.

Attachment E, Paragraph 3 states -.

The rights and interests claimed in paragraphs 1 and 2 above (the native title rights and interests) are:

a) Subject to the rights and interests of those lawfully exercising rights and interests which have been validly created and vested in them by the State of New South Wales; and
b) Subject to the rights and interests of those lawfully exercising rights and interests which have been validly created or vested in them by the Commonwealth of Australia.

There are additional qualifications at paragraphs 4 - 6

- At Schedule Q it is stated that the application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

- At Schedule P it is stated that the application does not claim exclusive possession over any offshore place.

Attachment L to the amended application states:

(a) the applicants believe that there are no areas for which a pastoral lease is held by or on behalf of the members of the native title claim group;
(b) the applicants are not aware of any area leased, held or reserved for the benefit of Aboriginal people or Torres Strait Islanders that is occupied by or on behalf of the members of the native title claim group;
(c) the applicants are not aware of any vacant crown land occupied by the members of the native title claim group;
(d) the applicants are not aware of any area mentioned in paragraphs (a), (b) or (c) over which the extinguishment of native title is required by section 47, 47A or 47B of the Act to be disregarded. However, the native title claim group claim the benefit of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) to the extent that they apply.

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.[1]

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 the legislative intent of the provision is to screen out claims that describe native title rights and interests in a manner that is vague, or unclear.

Furthermore, the phrases 'native title' and 'native title rights and interests' are used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the *Native Title Act 1993* (Cth).
s.223(1) is as follows:

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

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[2] rights to minerals and petroleum under relevant legislation,[3] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[4]

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

I have considered the description of native title rights and interests in the present application in light of previous judicial findings. In *Ward*, the High Court confirmed that a right to protect and prevent the misuse of cultural knowledge does not amount to a right in the land or waters and is not therefore a right or interest which is readily identifiable: [64]. Their Honours considered that "recognition" of such a right went beyond denial or control of access to land and would involve, for instance, the restraint of visual or auditory reproductions of what was to be found, or what was to take place there. They stated:

> "However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property…[t]he 'recognition' of this right would extend beyond denial or right of access to land held under native title…It is here that the second and fatal difficulty appears" at [59].

In the current application the applicants claim the right at paragraph 1.(l) *'to maintain, protect, prevent the misuse of cultural knowledge, of the Common Law Holders associated with the determination area'.* The wording of the right at (l) is similar to that of the right disallowed by *Ward.* In my view what is asserted goes beyond a right to control access to land and waters. As a result, I am of the opinion that the right claimed at (l) is not readily identifiable for the purposes of s.190B(4).

Pursuant to the qualifications quoted above, the applicants claim the right at paragraph 1.(b) of Schedule E to possess the determination area. I note that at Schedule L the applicants seek to rely upon ss. 47, 47A or 47B to the extent they apply. The description of the claimed right to "possess, occupy, use and enjoy to the exclusion of all others" the area claimed as specified at paragraph 2 is sufficient to allow the native title right and interest claimed to be readily identified where exclusive possession can be sustained (*Ward*).

The description of each of the rights and interests in para 1 as listed above (with the exception of the right at paragraph 1 (l)) is sufficient to allow those claimed native title rights and interests to be readily identified.

My reasons in relation to those rights and interests that may be *prima facie* established over those areas within the claim area where a claim to exclusive possession can be sustained are found under s.190B(6) below. Some of these rights and interests may also be sustained over areas where a claim to exclusive possession cannot be sustained.

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

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c).

For satisfaction of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as is the case for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard may be had to the application as a whole; subject to s.190A(3), regard may also be had to relevant information that is not contained in the application. Consequently, I have also had regard to information provided to the Tribunal and in other applications filed by the Byron Bay Bundjalung people.

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s.62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it." For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[5]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

Material which addresses the requirements of s.190B(5) is contained in Attachments F, G and M.

[5] See *Ward* at [382].

A general description of the factual basis on which it asserted that the three criteria identified at s.190B(5)(a) -(c) are met is provided in Attachment F of the application. Attachment G provides details of activities currently carried out within the claim area. Attachment M provides some details of the traditional physical connection of members of the claim group to the area claimed.

In addition to information contained within the application, the following information has been considered in relation to this section:

- **(Report name, Author and date deleted)**
- Affidavits of Lorna Kelly (sworn 16/11/99 and 25/9/2001), Yvonne Stewart (sworn 18/10/99), Linda Vidler (sworn 16 /11/99 and 25/9/2001) accompanying this application and the related native title determination application NC95/1 (NG6010/98) filed in the Federal Court on 18/11/99. Given the proximity of the area claimed in that application to the area claimed in the current application I am of the view that it is appropriate to consider information in the 1999 affidavits as relevant to the current application. I also note that each of these deponents is also an applicant in the application that I am considering.

It is my view that the information provided at Attachments F and G and Attachment M of the current application, in **(name deleted)** report and in the affidavits amounts to a sufficient factual basis to support the existence of at least some of the native title rights and interests listed at Attachment E of the application so as to comply with the requirements of s.190B(5)(a), (b) and (c).

<u>190B5(a) – that the native title claim group have, and the predecessors of those persons had, an association with the area.</u>

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

Lorna Kelly (16/11/99 and 25/9/01) deposes that she is a Bundjalung person of the Byron Bay area [para 2], and that she is a biological descendant of Bobby, King of Bumberbin and his son Harry Bray [para 5]. Both of these ancestors are named apical ancestors referred to in Attachment A from which the native title claim group identity can be established. Lorna Kelly is a recognized Bundjalung elder [para 4] and a biological descendant of one of the apical ancestors named in the application.

Lorna Kelly deposes at para 5 that:

> "My grandfathers are related to the Aboriginal people who occupied and used the land the subject of the applications since prior to 7 February 1788. A large camp of my kin of my grandparental and parental generation maintained camp based and mission based residence in the Byron Bay Bundjalung area throughout their lives."

The deponent also refers to interaction with either younger and/or older generations such that traditional laws and customs are passed on; including:

- continuously using the land and waters of the area in a traditional way throughout her life and in a manner taught to her by her elders, parents and grandparents [para 6];
- maintaining law in relation to people and country, as taught to her by her elders [para 7];
- that she and other members of the Byron Bay Bundjalung People continuing to carry on activities in the application area including: maintenance of sites, visiting,

> camping, traditional hunting and fishing, education of younger members, fossicking, ceremonies, naming sites and places, telling stories and singing songs about places in the area, monitoring activities in the area including land use; use of resources for various purposes [see para 14].

Lorna Kelly's affidavit sworn 25 September 2001 contains similar information to that of 16 November 1999.

These matters are also deposed to in similar terms by Yvonne Stewart (18/10/99) and Linda Vidler (16/11/99 and 25/9/2001).

Attachment F of the application states:

1) Prior to the acquisition of English sovereignty on 7 February 1788, an aboriginal community had rights and interests in relation to the application area, which rights and interests were possessed under the laws acknowledged, and the customs observed, by them.
2) The native title claim group are the descendants in accordance with Bundjalung laws and custom of the pre-sovereignty community which had rights and interests in relation to the area of the application.
3) From prior to the date of the arrival of the British to the present day, the native title claim group and their ancestors have done the following activities on the area covered by the application and on other lands and waters in Bundjalung country:
    a. continually occupied, lived, travelled and been present on, used and enjoyed the area;
    b. hunted and prepared animals and fish;
    c. gathered plants, cut timber and bark;
    d. quarried, knapped and collected clays, stones ochres and minerals;
    e. managed natural resources;
    f. carried out traditional ceremonies and activities;
    g. enjoyed free access, the right to speak for country; and transmitted knowledge.

The material presented by the applicants is supported by observations recorded in **(name deleted)** report, for example:

- **(Details removed. Passage summarises the writer's observations).**

I am satisfied that the above information provides a sufficient factual basis to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

Result: Requirements met

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

This subsection requires me to be satisfied that:

(a) traditional laws and customs exist;
(b) those laws and customs are respectively acknowledged and observed by the native title claim group; and
(c) those laws and customs give rise to the claim to native title rights and interests.

Paragraph 3 of Attachment F outlines activities carried out by the group on the area covered by the application from prior to the "arrival of the British" to the present day (see s190B(5)(a)).

The applicants also state in Attachment F that:

> "5 At all times since the date of English sovereignty, the Byron Bay Bundjalung and their ancestors have, in accordance with the system of rules observed by them, considered themselves the owners of the land and waters of the area of the application.
>
> 6. It is a traditional law and custom of the native title claim group to be present on, occupy, use and enjoy the area of the application."

Attachment M of the application seeks details of traditional physical connection with the land or waters covered by the application. The applicants provide examples of how the claim group continues to exercise traditional activities such as hunting, fishing, gathering, walking and camping on the application area.

I have also considered the information at Attachment G of the application which details activities that are observed by the native title claim group in accordance with their traditional laws and customs. For example:

- Visitation and maintenance of cultural sites by elders and other Bundjalung members;
- Camping on the land;
- Traditional hunting and fishing;
- Use of available resources on the land in whatever ways service livelihood and trade;
- Cultural heritage work to maintain sites of significance;
- Education of younger members of the native title claim group in ways of Bundjalung culture;
- Fossicking;
- Traditional ceremonies;
- Naming of sites and places;
- Telling stories and singing songs in relation to sites and places;
- Telling of stories of own, parents and grandparents activities in the area through their lifetimes;
- Observation and comments on activities of non-relatives in the area and changes of land form and land use; and
- Use of medicinal resource mineral, vegetable and animal.

Attachment F of the application is outlined in my reasoning for part 190B(4)(a) as providing a list of activities that the Byron Bay Bundjalung ancestors and current claim group have undertaken. I have given consideration to, but will not repeat, the matters listed there.

The affidavits referred to above establish to my satisfaction that Lorna Kelly, Linda Vidler and Yvonne Stewart have acquired from their forbears Bundjalung traditional laws and customs relating to Bundjalung law, stories and songs, and language [paras 7 - 10]. The affidavits also support the conduct of the activities outlined in Attachment G – see for example para 12 of the affidavits of Lorna Kelly and Linda Vidler (25/9/2001).

(name deleted) report provides examples of the claim group members having learnt traditional laws and customs from the elders and continuing to observe such practices. For example, **(name deleted)** concludes:

- **(Details removed . Summarises claimants traditional uses of area)**

I am satisfied that the information contained in the application and otherwise supplied provides a sufficient factual basis to support the assertion 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.

190B5(c) – that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

For the reasons set out in 190B(5)(b), and having regard to the same affidavits and other material set out in respect of s.190B(5)(a) & (b), I am satisfied that there is a sufficient factual basis to support the assertion that the claim group have continued to hold native title in accordance with those traditional laws and customs.

To conclude, I am satisfied in the light of the above that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion.

Result: Requirements met

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 s190B(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 in s223 of the Native Title Act 1993. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

A. the rights and interests to 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).

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

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

> "The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight; on the face of it; as it

> appears at first sight without investigation." [citing *Oxford English Dictionary* (2nd ed) 1989]."

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

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s.190B(4) above. Under my reasons for decision in relation to s.190B(4), I determined that one native title right claimed at Attachment E was not readily identifiable for the purposes of the Act (namely, the right claimed at paragraph 1.(l)). For the same reasons, the right at paragraph (l) is not be capable of being established *prima facie* pursuant to s.190B(6). However, this is not to say that the right may not exist as a matter of fact among the native title claim group; rather, as the High Court said in *Ward*, it was not the kind of native title right or interest that the Act could recognise as a matter of law.

Paragraph 1 of Attachment E lists 15 native title rights and interests claimed over the application area. They include (b) the rights to possess the determination area, (c) the right to occupy that area and (d) the right use and enjoy that area. At paragraph 2 the applicants in effect sum up these rights as conferring possession, occupation, use and enjoyment of claimed land and waters on the native title claim group to the exclusion of all others. In practical terms, registration of an exclusive right to possession, occupation, use and enjoyment of the area would presumably subsume the rights listed because the Courts have indicated that the right to 'possession, occupation, use and enjoyment to the exclusion of all others is the fullest expression of native title rights and interests. That said, Attachment E is in my view constructed in such a way that each right in para. 1 is claimed separately and stands or falls independently.

I have noted the qualifications to these rights and interests under my reasons in relation to s.190B(4) above. Further at Attachment E the applicants state that the rights and interests claimed are subject to the qualifications set out in paragraphs 3 – 6.

I will consider whether each of the rights and interests claimed in the application can be established *prima facie* as required by s.190B(6) in the order in which they are listed in the application.

In considering whether the rights claimed by the applicants at Attachment E can be established *prima facie*, I have had regard to Attachments F, G and M of the application, **(name deleted)** report and the affidavits referred to above.

a) the right to own the determination area

Not established

The applicants state at Attachment F that:

"At all times since the date of English sovereignty, the Byron Bay Bundjalung and their ancestors have, in accordance with the system of rules observed by them, considered themselves the owners of the land and water of the application" [para 5].

The applicants also claim:

(b) the right to possess the determination area;
(c) the right to occupy the determination area;
(d) the right to use and enjoy the determination area.

Bearing in mind the claims in paragraphs (b) – (d), a claim for ownership of the land in my view is a claim for something more, something equivalent to a claim for an estate or

interest in the land itself. However the personal rights conferred by native title do not constitute an estate or interest in the land itself. The rights and interests claimed in 1. (b) – (d) if successful, may be seen as conferring on the native title holders rights analogous to, but not necessarily identical to, those of freehold title. I am of the opinion that the right to own the application area is not a right that is acceptable for registration.

b) the right to possess the determination area

Established but only in respect of areas where exclusive possession can be sustained.

Following *Ward,* a claim to exclusive possession, occupation, use and enjoyment may be able to be prima facie established over areas where a claim to exclusive possession can be sustained (ie. where there has been no extinguishment of native title and/or areas where the non-extinguishment principle found in s. 238 applies (e.g. areas 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). However, there are numerous comments by the majority of the High Court in *Ward* which lead me to conclude that a claim which is expressed as a composite right (i.e. the components are read together to form a single right) to non-exclusive possession, occupation, use and enjoyment is not a native title right and interest that is recognised by the common law of Australia. I believe it follows that possession cannot be prima facie established over areas where a claim to exclusive possession cannot be sustained (ie. over areas where there has been partial extinguishment of exclusivity, that is not able to be disregarded because of the provisions of ss. 47, 47A or 47B). See, for example, [29], [51], [52], [89] and [94] of *Ward.*

Attachment F of the application provides the following information:

- Prior to the acquisition of English sovereignty on 7 February 1788, an aboriginal community had rights and interests in relation to the application area, which rights and interests were possessed under the laws acknowledged, and the customs observed, by them.
- The native title claim group are the descendants in accordance with Bundjalung laws and customs of the pre-sovereignty community which had rights and interests in relation to the area of the application.
- From prior to the date of the arrival of the British to the present day, the native title claim group and their ancestors have undertaken traditional activities on the area covered by the application. (paras 1 – 3).

The applicants also state at Attachment F that:
"At all times since the date of English sovereignty, the Byron Bay Bundjalung and their ancestors have, in accordance with the system of rules observed by them, considered themselves the owners of the land and water of the application" [para 5].

This is supported by **(name deleted)** report referred to above in which she outlines in some detail the evidence supporting the identity of the claimants as Bundjalung and of their link to those in possession of the land before European settlement.
(name deleted) [at p41] provides a summary of four points of evidence of the claimants inheritance from the owners prior to European settlement;
(name deleted Passage summarises material regarding ancestors of the claimants)

In her affidavit Lorna Kelly (25/9/01) states she is of Byron Bay and deposes that:

- she is a Bundjalung person of the Byron Bay area (para 2);
- by Bundjalung law and custom the Byron Bay Bundjalung people's traditional country includes the area the subject of this application (para 3);
- she is an elder and has the right under traditional law and custom to speak for country including the area the subject of the application (para 4);

- she is a descendant of Bobby, King of Bumberbin and his son Harry Bray as are all Byron Bay Bundjalung People (para 5);
- her grandfathers are related to the Aboriginal people who occupied the land the subject of the application since 1788 (para 5);
- many of her kin of her grandparents and parents generation maintained camp and mission based residence in the Byron Bay Bundjalung area throughout their lives;
- she has continuously used the land and waters of the Bundjalung area throughout her life as taught to her by her elders including parents and grandparents (para 6), and
- she has inherited authority as owner and custodian of the lands the subject of the application having maintained her connection and obligations in relation to the land and sites in the land.

Linda Vidler in her affidavit sworn 25 September 2001 deposes similarly.

I note that in Schedule L the applicants have claimed the benefit of ss. 47, 47A, or 47B to the extent they apply.

c) the right to occupy the determination area

Established
I note that the concept of occupation in this context should be understood in the sense that indigenous people have traditionally occupied land rather than according to common law principles and judicial authority relating to freehold and leasehold estates and other statutory rights (Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32 at [162]).

The applicants state, in summary, in Attachment F that prior to 1788 the Byron Bay Bundjalung People possessed, used and occupied the area which includes the claim area (paragraphs 1 - 3).

Paragraph 3 of Attachment F refers to members of the Byron Bay Bundjalung People:

- Continually occupying, living, travelling and being present on, using and enjoying the area [para 3a]

The affidavit of Lorna Kelly (25/9/01) supports the above statements. Ms Kelly deposes that:

- a large group of her family from her grandparents and her parents generation maintained residences on the application area throughout their lives;
- she has continuously used the land and waters of the area in a traditional way throughout her life in the manner taught to her by elders including her parents and grandparents,
- she currently uses the land for camping, as well as other activities such as hunting and fishing and maintaining cultural sites.

In her affidavit sworn 25 September 2001 Ms Vidler deposes in similar terms.

(name deleted) provides further information to support the right to occupy, by setting out material that illustrates that the claimants:

- **(Details removed. Summarises claimants rights to occupy claim area.)**

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim.

d) the right to use and enjoy the determination area

Established
Please see the information outlined in my reasons in respect to (c) above.

At Attachment G the applicants outline activities carried out by the Byron Bay Bundjalung People on their traditional land, including:

- Visitation and maintenance of cultural sites by elders and other Bundjalung members;
- Camping on the land;
- Traditional hunting and fishing;
- Use of available resources on the land in whatever ways service livelihood and trade;
- Cultural heritage work to maintain sites of significance;
- Education of younger members of the native title claim group in ways of Bundjalung culture;
- Fossicking;
- Traditional ceremonies;
- Naming of sites and places;
- Telling stories and singing songs in relation to sites and places;
- Telling of stories of own, parents and grandparents activities in the area through their lifetimes;
- Observation and comments on activities of non-relatives in the area and changes of land form and land use; and
- Use of medicinal resource mineral, vegetable and animal.

At Attachment M, the applicants state that two of the applicants, Lorna Kelly and Linda Vidler, hunt, fish, gather, walk and camp on the area of the claim and adjacent areas in the claimant's country, as do other member of the native title claim group.

This further supported by the affidavits of Lorna Kelly and Linda Vidler sworn on 25 September 2001 in which they depose to activities including camping, hunting, fishing and fossicking in the area the subject of that application (para 12).

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim.

(e) the right to make decisions about the use and enjoyment of the determination area;

Established
Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained.

The right to 'make decisions' about the claim area is problematic, and perhaps suggests that the applicants are claiming a right which amounts to a right to control access to or use of the land of the application area.

However, I note that the applicants make explicit claims to control the access of others to the application area (at para. (f)), and to control the use and enjoyment of others of the resources of the application area (at para. (h)). This suggests that the applicants do not intend that the right to make decisions about the use and enjoyment of the application area implies a right to control access to or use of the land.

I understand the right at para. (e) to be a non-exclusive right which does not amount to a right to control the use or enjoyment of others of the application area. Nevertheless, pursuant to s.186(2) of the Act I would direct that a note be placed on the register noting that the right claimed at para. (e) is non-exclusive in nature.

It follows that I am satisfied that the right to make decisions about the use and enjoyment of the application area is capable of being established *prima facie*.

There is information to support this right in Attachment F, and in Attachment G and M. At Attachment F the applicants state that the native title claim group considers themselves to collectively be the 'owners' of the application area and pursuant to that ownership entitled as of right to exercise the rights, and carry out the activities, identified in the Attachment. Other activities are referred to in Attachment G and M. The exercise of those right and activities would, in my view, of necessity involve the making of decisions about the use and enjoyment of the claim area.

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim.

(f) the right to control access of others to the determination area;

Established but only in respect of areas where exclusive possession can be sustained.

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained. This is because the existence of rights to control access to and use of land are central to establishing whether or not a claim to exclusive possession can be made out.

In the present matter the applicants claim a right to possession and I am satisfied that the information provided by the applicants is sufficient to establish this right on a *prima facie* basis in respect of areas where exclusive possession can be sustained (see (b) above). Also the right to possession, occupation, use and enjoyment of the land to the exclusion of all others is a broad right which the courts have indicated amounts to the fullest expression of that bundle of rights which comprises native title.

The right to control the access of others to the application area, whilst an integral part of a right to exclusive possession, is claimed as a separate right, and as such must be considered separately pursuant to the requirements of s190B(6).

Lorna Kelly and Linda Vidler in their affidavits sworn 25 September 2001 depose that they are elders and have inherited authority as owner and custodians of the lands the subject of the application. In my view custodianship of land implies a native title right to control the access of others to the application area. Further, the deponents state that they carry out "visitation and maintenance of cultural sites" and carry out cultural heritage work to maintain sites of significance.

(name deleted) provides some material that supports the right to control access of others to the determination area. For example:

- **(Details removed. Passage summarises how applicants controlled access.)**

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of areas covered by the claim where exclusive possession can be sustained.

g) the right to use and enjoy resources of the determination area including, but not limited to:

i) the right to hunt and fish on or from the land, and to collect food from the land;

Established

Lorna Kelly and Linda Vidler depose in their affidavits sworn 25 September 2001 that they and other members of the Byron Bay Bundjalung group (amongst other activities) currently undertake traditional hunting and fishing, and use the available resources of the land in ways which service their livelihood and trade [see para 12].

Attachment F of the application states that:

> "3. From prior to the date of the arrival of the British to the present day, the native title claim group and their ancestors have done the following activities on the area covered by the application and on other lands and waters in Bundjalung country:
>
> a) Continually occupied, lived, travelled and been present on, used and enjoyed the area;
> b) Hunted and prepared animals and fish;
> c) Gathered plants, cut timber and bark;
> d) Quarried, knapped and collected clays, stones ochres and minerals;
> e) Managed natural resources;"

(name deleted) reports material (anthropological, historical and anecdotal) which shows that the claimants and/or their ancestors:

- **(Details removed. Passage summarises observations of report writer).**

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim..

ii) the right to take items from the land, and waters such as timber, stones, resin and shells and to make such things as shelter, tools and hunting implements

Established

At Attachment F the applicants state:

> 3. From prior to the date of the arrival of the British to the present day, the native title claim group and their ancestors have done the following activities on the area covered by the application and on other lands and waters in Bundjalung country:
>
> a) continually occupied, lived, travelled and been present on, used and enjoyed the area;
> b) hunted and prepared animals and fish;
> c) gathered plants, cut timber and bark, and
> d) quarried, knapped and collected clays, stones ochres and minerals;

At Attachment G the applicants outline similar activities in which the native title claim group currently engages.

There is also material in **(name deleted)** report to illustrate and support the claim group's practice of taking resources from the land for purposes such as:

- **(Details deleted. Passage summarises material provided by the applicants in support of the observations in the report)**

In their affidavits, Lorna Kelly, Linda Vidler (25/9/01) and Yvonne Stewart (18/10/99) depose that they and other members of the Byron Bay Bundjalung group (amongst other activities) currently undertake traditional hunting and fishing, and use the available resources of the land in ways which service their livelihood and trade [para.12].

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim over which a claim to exclusive possession and non-exclusive possession can be sustained.

iii) the right to manage animals, plants and minerals on the determination area

Not established
This right, whilst it may be seen as an integral part of the right to exclusive possession, is claimed as a separate right and as such must be considered separately pursuant to the requirements of s190B(6). In a preliminary assessment of the application (dated 12 February 2003), the Tribunal noted that there was insufficient factual material to support a claim to this right (and several other rights) claimed at Attachment E. No further evidence going to this right was provided to the Registrar. Given the absence of material which would go to establishing, *prima facie*, this right I am not satisfied that the requirements of s.190B(6) have been met for this right.

I cannot find sufficient evidence in support of this claimed right.

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

h) the right to control the use and enjoyment of others of resources of the application area

Not established.

Please see my reasons in relation to f) in respect of right to control access to the land or a right to control the use to which it is put.

The right to control the use and enjoyment of others of resources of the application area may be seen as an integral part of a right to exclusive possession. Similarly it may be seen as flowing from the right to control access to the application area. However, the right is claimed as a separate right and as such must, in my view, be considered separately pursuant to the requirements of s190B(6). In a preliminary assessment of the application (dated 12 February 2003), the Tribunal noted that there may be insufficient factual material to support a claim to this right (and several other rights) claimed at Attachment E. While the applicants, responded to other enquiries made by the Tribunal in relation to the application, no further evidence going to this right was provided to the Registrar. Further, the applicants did not direct attention to any evidence in support of this right contained in the applications or supporting information. Given the absence of material

which would go to establishing, *prima facie*, the right to control the use and enjoyment of others of resources of the application area I am not satisfied that the requirements of s.190B(6) have been met for this right.

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

i) the right to trade in resources of the application area

Established but only in respect of areas covered by the claim where exclusive possession can be sustained

I read this as being a claim to the right to trade in traditional resources of the claim area.

In *Commonwealth v Yarmirr* (1999) 101 FCR 171, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that "[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land" [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

On appeal, the Full Federal Court spoke of this right in these terms: "It may well be right, as the argument runs, and as seems logical, to view the right to trade as 'an integral part,' or integral aspect of a right to exclusive possession." The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 of the Act but made no finding on the issue. The issue was not raised before the High Court.

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s.190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to *exclusive* possession, occupation, use and enjoyment of lands and waters [my emphasis].

(name deleted) report records evidence that **(details deleted).**

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of areas covered by the claim where exclusive possession can be sustained.

j) the right to receive payment on an agreed basis for any resources of the determination area

Not established
I refer to my comments in respect of the rights claimed at f) and h) above.

I am not satisfied that the information supplied prima facie establishes this right and interest in respect of any areas covered by the claim.

I also refer to my comment above in respect of s 190(3A).

k) the right to maintain and protect places of importance under traditional laws, customs, and practices in the determination area

Established
The right at para 1(k) "to maintain and protect places of importance under traditional laws, customs and practices" appears to amount to a claim to control access to and use of the area which could only be capable of being established *prima facie* over areas where a claim to exclusive possession can be made out. Nevertheless, in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. For this reason, these rights appear to be capable of being established *prima facie* over such areas.

At Attachment G the applicants state that elders and other members of the native title claim group maintain cultural sites and are involved in cultural heritage work to maintain sites of significance.

Lorna Kelly in her affidavit sworn on 25 September 2001 deposes that she and other members of the native title claim group visit and maintain cultural sites and engage in cultural heritage work to maintain sites of significance. Lorna Kelly also states that she observes and comments on activities of non-relatives in the application area and changes of land form and land use.

There is material in **(name deleted)** report to illustrate and support the claim group's practice of protecting places of importance. **(name deleted)** records:

- **(Details removed. Passage summarises how the applicants protect places of importance).**

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim.

l) the right to maintain protect and prevent misuse of cultural knowledge of the Common Law Holders associated with the determination area

Not established
Having regard to the High Court decision in *Ward*, this is not a native title right which can be readily identified and hence it cannot, prima facie, be established (see the reasons in respect of s.190B(4) above).

m) the right to speak for the determination area

Established
Evidence of a prima facie nature is contained in the affidavits of Lorna Kelly and Linda Vidler where at paragraph 4 the women state that they are recognized Bundjalung elders and have the right to speak for Byron Bay Bundjalung people's traditional country.

The right to "speak for the application area" may not be registrable if it amounts to a right to control access or to or a right to be asked permission how the area is to be used if exclusive possession cannot be sustained. However, I am satisfied that the qualification in para 3. of Schedule E indicates that if others have rights in respect of the claim area the claimants do not seek the right to control the area.

At Attachment F the applicants state that from prior to the date of the arrival of the British to the present day, the native title claim group and their ancestors have carried out activities on the area covered by the application and on other lands and waters in Bundjalung country.
Included in that those activities is the enjoyment of free access and the right to speak for country.

Lorna Kelly and Linda Vidler depose in their respective affidavits sworn on 25 September 2001 that:

- they are Bundjalung people of the Byron Bay area (para 3);
- by Bundjalung law and custom in the Byron Bay Bundjalung people's traditional country includes the area that is the subject of the application,
- they are recognized Bundjalung elders and have the right to speak for Byron a Bundjalung People's country including the areas included in the application.

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim over which a claim to exclusive possession and non-exclusive possession can be sustained.

n) the right to conduct ceremonies on the land and waters

Established.

At Attachment F the applicants state that from prior to the date of the arrival of the British to the present day, the native title claim group and their ancestors have carried out activities on the area covered by the application and on other lands and waters in Bundjalung country. Included in that those activities is the conduct of traditional ceremonies and activities.

Similarly, at Attachment G the applicants state that included in activities currently being carried out in relation to the land or waters by the native title group is the conduct of traditional ceremonies, naming of sites and places, telling stories and singing songs in relation to sites and places.

(name deleted) provides an account of anthropological, historical and anecdotal evidence of the claim group conducting ceremonies in the claim area including:

- **(Details removed. Passage summarises material presented by the applicants to report writer)**

I am satisfied that the above-mentioned material prima facie establishes this right and interest in respect of any areas covered by the claim over which a claim to exclusive possession and non-exclusive possession can be sustained.

o) the right of free access to the determination area for the purpose of satisfying the rights identified in the preceding sub-paragraphs.

Established
At Attachment F the applicants state that from prior to the date of the arrival of the British to the present day, the native title claim group and their ancestors have carried out activities on the area covered by the application and on other lands and waters in Bundjalung country. Included in that those activities is the free access to and the right to speak for country.

At Attachment M the applicants state that in the present day, Lorna Kelly, Linda Vidler hunt, fish and gathered, walk and camp on the area of the claim and adjacent areas in the Byron Bay Bundjalung country, as do other members of the native title claim group. Also, in their affidavits sworn on 25 September 2001 Lorna Kelly and Linda Vidler depose to having continuously used the land and waters of the Bundjalung area in a traditional way throughout their life in the manner taught to them by their elders including their parents and grandparents.

I am of the opinion that the above information is consistent with the applicants exercising the rights that have been prima facie established, e.g. at (c), (d) and g(i) above. It is implicit that the native title claim group must have access to the application area to exercise such rights.

I am satisfied that this claimed right is prima facie established.

2. **The right to possession , occupation, use and enjoyment of the land and waters covered by the application to the exclusion of all others.**

Established only in relation to areas where a claim to exclusive possession can be sustained.
As indicated above and as a matter of convenience I have considered this claim in the order in which it has been presented in the application.

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, *prima facie*, be established in relation to some parts of a claim area.[6] A claim to exclusive possession may be able to be established over areas where there has been no previous extinguishment of native title or where the non-extinguishment principle in s.238 of the Act applies (such as areas for which the benefit of ss.47, 47A or 47B is claimed, and in relation to areas affected by category C and D past and intermediate period acts). This is recognised in that the claim is subject to paragraphs 3 – 6 of Attachment E. At Attachment L the applicants have claimed the benefit of ss 47, 47A, or 47B to the extent they apply.

Over areas where a claim to *exclusive* possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "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": at [51].[7] Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [919].[8]

In applying the registration test, I must look to the language of the relevant provisions of the Act.[9] These provisions must be read in context, having regard to relevant court decisions and other principles of statutory interpretation. If, as in *Ward* and *De Rose,* the courts cast serious doubt on whether or not a particular description of a right and interest falls within the definition of 'native title right or interest' in s.223, then those

[6] At [51].
[7] Refer also *Ward*, [48], [52], [53] and [89].
[8] Refer also *De Rose*, [918]-[920]
[9] *Western Australia v Ward* (2002) 191 ALR 1 at [2] and [25] per Gleeson CJ, Gaudron, Gummow and Hayne JJ

doubts affect the standard applied for the purposes of the test. It would seem, then, that without further investigation, a non-exclusive right to possession, occupation, use and enjoyment is not capable of being established *prima facie* pursuant to s.190B(6).

I have considered at 1. b), c) and d) separately, whether possession, occupation, use and enjoyment of the application area can be *prima facie* established. On the basis of my conclusions there I am satisfied that this right can be prima facie established in respect to areas where *exclusive* possession can be sustained.

In summary, I am satisfied the following rights and interests can be registered.

A . In respect of areas covered by the claim over which a claim to exclusive possession can be sustained:

1. a) *Not established*
   b) the right to possess the determination area;
   c) the right to occupy the determination area;
   d) the right to use and enjoy the determination area;
   e) the right to make decisions about the use and enjoyment of the determination area*;
   f) the right to control the access of others to the determination area;
   g) the right to use and enjoy resources of the determination area including, but not limited to:
      i. the right to hunt and fish on or from the land, and to collect food from the land and waters;
      ii. the right to take items from the land and waters such as timber, stones, resin and shells and to make such things as shelter, tools and hunting implements;
      iii. *Not established;*
   h) *Not established*;;
   i) the right to trade in resources of the determination area;
   j) *Not established*
   k) the right to maintain and protect places of importance under traditional laws, customs, and practices in the determination area;
   l) *Not established*
   m) the right to speak for the determination area;
   n) the right to conduct ceremonies on the land and waters; and
   o) the right of free access to the determination area for the purpose of satisfying the rights identified in the preceding sub-paragraphs.

(* The applicants understand this right to be non-exclusive in nature.)

2. The right to possession, occupation, use and enjoyment of the land and waters covered by the application to the exclusion of all others.

B. In respect of the balance of the claim area where a claim to exclusive possession cannot be sustained, I am satisfied that the following native title rights and interests are prima facie established:

1. a) *Not established*
   b) *Not established;*
   c) the right to occupy the determination area;
   d) the right to use and enjoy the determination area;
   e) the right to make decisions about the use and enjoyment of the determination area*;
   f) *Not established*;

g) the right to use and enjoy resources of the determination area including, but not limited to:

i. the right to hunt and fish on or from the land, and to collect food from the land and waters;

ii. the right to take items from the land and waters such as timber, stones, resin and shells and to make such things as shelter, tools and hunting implements;

iii. *Not established;*

h) *Not established*;

i) *Not established;*

j) *Not established*

k) the right to maintain and protect places of importance under traditional laws, customs, and practices in the determination area;

l) *Not established*

m) the right to speak for the determination area;

n) the right to conduct ceremonies on the land and waters; and

o) the right of free access to the determination area for the purpose of satisfying the rights identified in the preceding sub-paragraphs.

(* The applicants understand this right to be non-exclusive in nature.)

2. *Not established*

I also direct that the statements from paragraph 3 – 6 of Attachment E of the application also be entered on the Register of Native Title Claims

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:

(a) currently has or previously had a traditional physical connection or

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

(i) the Crown in any capacity; or

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

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

Reasons for the Decision

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

Traditional physical connection is not defined in the Act. 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. I am of the view that the connection must amount to more than a transitory access or intermittent non-native title access.

For the reasons given at s190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support the traditional physical connection.

I am further satisfied based on the information supplied and identified previously that Lorna Kelly and Linda Vidler currently have a traditional physical connection with the land or waters covered by the application. In Attachment M the applicants state that:

> "In the present day Lorna Kelly, Linda Vidler hunt, fish and gather, walk and camp on the area of the claim and adjacent areas in the Byron Bay Bundjalung country, as do other members of the native title claim group."

Linda Vidler and Lorna Kelly both depose at paragraph 6 of their respective affidavits (sworn 25/9/01) that they have continuously used the land and waters of the Bundjalung area in a traditional way throughout their lives in that the manner taught to them by their elders including on their parents and grandparents. They also depose that they currently carry out a range of activities in the area, including visiting and maintaining cultural sites, camping, hunting, fishing and use of traditional resources. They also state that they engage in cultural heritage work, education of claim group members, and traditional ceremonies amongst other activities (para 12).

I am satisfied that Linda Vidler and Lorna Kelly have the required connection with land and waters covered by the application.

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 formed the conclusion that there has been compliance with s.61A and that the provisions of this section are met.

s.61A(1) – Native Title Determination

The Tribunal's Geospatial Assessment dated 17 March 2003 advises that there is one determination as per the Native Title Register that falls within the external boundary of this application. The application is Byron Bay Bundjalung People #2 - NC97/036 (NG6088/98). However, the Native Title Register discloses that the determination in respect of that application was that native title did not exist in the land the subject of that application. Paragraph 5 of Attachment B to the current application excludes all areas in which native title has been extinguished. I am consequently of the view that the area of NC97/036 is excluded from the current application. It follows that I am satisfied that there is no approved determination of native title in relation to any or all of the area claimed in this application.

s.61A(2) – Previous Exclusive Possession Acts

In paragraph 2 of Attachment B to the application, areas covered by a previous exclusive possession act, as referred to in s.23B of the Act, are excluded from the claim area.

s.61A(3) – Previous Non-Exclusive Possession Acts

Attachment E makes it clear that the claim to native title is subject to any rights and interests granted under a Previous Non-Exclusive Possession Act. Attachment E also makes it clear that the claim to native title is subject to rights and interests validly created by the State of NSW and the Commonwealth.

s.61A(4) – ss.47, 47A and 47B

At Attachment B the applicants state that:

"4A. Where an Act referred to in clause 2 and 3 covers the land or waters referred to in:

(a) s. 47 - pastoral leases held by members of the native title claim group;

(b) s. 47A - reserves at separate covered by claimant applications; or

(c) s. 47B - vacant Crown land covered by claimant applications,

the area covered by the Act is not excluded from this application"

At Attachment L of the application the applicants state that:

(a) The applicants believe that there are no areas for which a pastoral lease is held by or on behalf of the members of the native title claim group;

(b) The applicants are not aware of any area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders that is occupied by or on behalf of the members of the native title claim group;

(c) The applicants are not aware of any vacant Crown land occupied by members of the native title claim group;

(d) The applicants are not aware of any area mentioned in paragraphs 9a), (b) or (c) over which the extinguishment of native title is required by section 47, 47A for 47B of the Act to be disregarded. However, the native title claim group claim the benefit of sections 47, 47A and 47B of the Native Title Act 1993 (Cth) to the extent that they apply.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s.61A. In my view ss.61A(4) of the Act provides that an application may be made in the terms expressed in Attachments B and L. Whether or not the applicants can provide sufficient information to bring any area within the ambit of the sections the benefit of which they have claimed is a matter to be settled in another forum.

The application passes this condition.

Result: Requirements met

s.190B(9)(a)

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

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

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

Reasons for the Decision

Schedule Q of the application states that the application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown. The application passes this condition.

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

Schedule P states that the application does not make any claim of exclusive possession to all or part of an offshore place. The application passes this condition.

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 application and accompanying documents do not disclose, and I am not aware of, any additional extinguishment of native title rights and interests in the area claimed. Further, para. 5 of Attachment B states that all other areas in which native tile has been extinguished are to be excluded from the application.

The application therefore passes this condition.

Result: Requirements met

End of Document

ATTACHMENT A

THE FOLLOWING IS TO BE ENTERED AS CONTENTS OF THE REGISTER OF NATIVE TITLE CLAIMS PURSUANT TO S186

S186 (1)

(a) whether the application was filed in the Federal Court or lodged with a recognised State / Territory body

Application was filed in the Federal Court

(b) if the application was lodged with a recognised State / Territory body – the name of that body

Not applicable

(c) the date on which the application was filed or lodged

The original application was lodged with the Tribunal on 5 December 2001. The current application is an amended application filed on 4 March 2003

(c.a) the date on which the claim is entered on the Register

4 April 2003

(d) the name and address for service of the applicants:

Applicants:
Ms Lorna Kelly, Ms Linda Vidler, Ms Dulcie Nicholls, Ms Yvonne Stewart, Mr Stan Kay, Mr Norman Graham and Mr Brian Kelly.

Address for service:
Wroth Wall
Solicitors
P.O. Box 646
Mullumbimby NSW 2482
DX: DX20002

(e) the area of land or waters covered by the claim

As per CMS and Attachment B and B1 to the application

(f) a description of the persons who it is claimed hold the native title

As per CMS and Attachment A to the application.

(g) a description of the native title rights and interests in the claim that the Registrar in applying the subsection 190B(6); considered, prima facie, could be established.

A . In respect of areas covered by the claim over which a claim to exclusive possession can be sustained:

1. a) *Not established*
   b) the right to possess the determination area;
   c) the right to occupy the determination area;
   d) the right to use and enjoy the determination area;
   e) the right to make decisions about the use and enjoyment of the determination area*;
   f) the right to control the access of others to the determination area;
   g) the right to use and enjoy resources of the determination area including, but not limited to:
      i. the right to hunt and fish on or from the land, and to collect food from the land and waters;
      ii. the right to take items from the land and waters such as timber, stones, resin and shells and to make such things as shelter, tools and hunting implements;
      iii. *Not established;*
   h) *Not established*;;
   i) the right to trade in resources of the determination area;
   j) *Not established*
   k) the right to maintain and protect places of importance under traditional laws, customs, and practices in the determination area;
   l) *Not established*
   m) the right to speak for the determination area;
   n) the right to conduct ceremonies on the land and waters; and
   o) the right of free access to the determination area for the purpose of satisfying the rights identified in the preceding sub-paragraphs.

(* The applicants understand this right to be non-exclusive in nature.)

2. The right to possession, occupation, use and enjoyment of the land and waters covered by the application to the exclusion of all others.

B. In respect of the balance of the claim area where a claim to exclusive possession cannot be sustained, I am satisfied that the following native title rights and interests are prima facie established:

1. a) *Not established*
   b) *Not established;*
   c) the right to occupy the determination area;
   d) the right to use and enjoy the determination area;
   e) the right to make decisions about the use and enjoyment of the determination area*;
   f) *Not established*;
   g) the right to use and enjoy resources of the determination area including, but not limited to:
      i. the right to hunt and fish on or from the land, and to collect food from the land and waters;

ii. the right to take items from the land and waters such as timber, stones, resin and shells and to make such things as shelter, tools and hunting implements;
iii. *Not established;*

h) *Not established*;
i) *Not established;*
j) *Not established*
k) the right to maintain and protect places of importance under traditional laws, customs, and practices in the determination area;
l) *Not established*
m) the right to speak for the determination area;
n) the right to conduct ceremonies on the land and waters; and
o) the right of free access to the determination area for the purpose of satisfying the rights identified in the preceding sub-paragraphs.

(* The applicants understand this right to be non-exclusive in nature.)

2. *Not established*

Include paragraphs 3 – 6 of Attachment E

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

The applicants do not claim exclusive possession of all or part of an offshore place.

S186 (2):

The Registrar may include in the Register such other details about the claim as the Registrar thinks appropriate.

I direct that the following attachments from the application be attached to the Register:

Attachment C – Map of the claim area.