

# Registration test decision

Application name	Bandjalang People #1
Name of applicant	Mr Douglas Steven Wilson, Mr Anthony Edward Wilson
State/territory/region	New South Wales
NNTT file no.	NC96/16
Federal Court of Australia file no.	NSD6034/98
Date application made	17 May 1996
Date application last amended	3 October 2008
Name of delegate	Hamish MacLeod

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D, my opinion is that the claim does not satisfy all of the conditions in s. 190B.

**Date of decision:** 21 April 2009

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Hamish MacLeod

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth)

# Reasons for decision

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# Introduction

This document sets out my reasons for the decision to not accept the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to the claims made in all claimant applications given to him or her under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court), with the exception of certain amended applications specified under subsections 190A(1A) and 190A(6A).

Subsection 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met, in order for me to accept a claim for registration.

I note that the claim being considered here for registration is made in an amended application where the application was amended after the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (the Technical Amendments Act) on 1 September 2007, but that the claim was originally made prior to this date and was previously caught by the transitional provisions of Schedule 5 of the Technical Amendments Act.

**Note:** All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth), as in force on 1 September 2007, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

## Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated her powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 6 March 2009. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

## The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

A summary of the result for each condition is provided at Attachment A.

## **Application overview**

This claim is located at Evans Head at the North Coast of NSW. The Applicant lodged it with the Tribunal prior to the 1998 amendments of the *Native Title Act 1993* (Cwlth). Following the 1998 amendments, the Applicant filed an amended claim with the Federal Court on 30 November 1999 which was accepted for registration on 16 February 2000.

The application was further amended on 14 April 2004, and was caught by the *Native Title Amendments Act 2007* (Cwlth) transitional provisions. The applicant sought and was granted leave to amend again in 2008 and it is this application that is to be considered under s. 190A.

In September 2007 the Registrar of the Tribunal wrote to inform the Applicant that the Bandjalang#1 application was effected by Item 1 of Schedule 5 of the Transitional Provisions to the Native Title Amendment (Technical Amendments) Act 2007 (Cwlth). The Registrar was obliged to use his best endeavours to apply the registration test to the application by September 2008. The application was scheduled to have the registration test applied in July 2008.

On 3 October 2008, the Applicant filed the amended application with the Federal Court.

## **Information considered when making the decision**

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

However, given that the registration test has in this instance been triggered by item 1 Schedule 5 of the transitional provisions of the *Native Title (Technical Amendments) Act 2007* I must also abide by sub-item 1(4) of Schedule 5. This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person *after* the application *was made*.

The material I have considered in arriving at my decision is contained in the Tribunal file marked 'Case Management/Delegates NC96/16 Bandjalang People # 1' 2007/00308 Vol 07' and other documents I have referred to throughout the course of my decision.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

## **Procedural fairness steps**

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed are as follows:

- 22 September 2003: the Tribunal informed the Applicant and the State of the proposed timetable for registration testing;
- 26 November 2003: the Applicant requested an extension of time for the application of the registration test which was granted;
- 12 December 2003: the Tribunal wrote to the State informing that the Applicant's request of an extension of time had been granted to 9 February 2004;
- 14 April 2004: the Applicant filed a further amended application;
- 8 October 2004: the State provided their submission to the Tribunal;
- 12 October 2004: the Tribunal forwarded the State's submission to the Applicant;
- 1 November 2004: the Applicant provided their submission to the Tribunal;
- 30 November 2007: the Tribunal wrote to the Applicant informing that the extension of time had been granted;
- 26 June 2008: the Applicant wrote to the Tribunal requested an extension of time for the application of the registration test which was provided;
- 3 October 2008: the Applicant filed a further amended application with the Federal Court;
- 13 October 2008: the Tribunal wrote to the Applicant and State informing them of the registration test timetable;
- 28 October 2008: the State provided submissions regarding the application pursuant to s. 190a(3)(c) of the Act;
- 21 November 2008: The applicant provided a response to these submissions.

# Procedural and other conditions: s. 190C

## *Section 190C(2)*

### *Information etc. required by ss. 61 and 62*

The Registrar/delegate 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.

#### **Delegate's comment**

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at below.

I note that I am considering this claim against the requirements of s.62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

In the case of *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) Mansfield J stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62' — at [16]. His Honour also said in relation to the requirements of s. 190C(2): '...I hold the view that, for the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself — at [39].'

I am of the view that *Doepel* is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not (except in the limited instance which I explore below in my reasons under s. 61(1)) to undertake any qualitative or merit assessment of the prescribed information or documents, except in the sense of ensuring that what is found in or with the application are the details, information or documents prescribed by ss. 61 and 62.

### *Native title claim group: s. 61(1)*

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

#### **Result and reasons**

The application **meets** the requirement under s. 61(1).

In light of s. 190C(2), I must be satisfied that the application contains all the information required by s. 61(1). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was, in fact, a subgroup of the native title

group, then the requirements of s. 61(1) under s. 190C(2) would not be met and the claim could not be accepted for registration. This reasoning is drawn from *Doepel* at [36].

This consideration does not require me to look beyond the information contained in the application and prescribed accompanying affidavits. It also does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group has been correctly described: *Doepel* at [36] to [37]. In light of *Doepel* I have only considered the information contained in the application itself.

The description of the persons in the native title claim group is found in Schedule A of the application, which is reproduced in my reasons below at s. 190B(3). Schedule A states the Bandjalang People are those biologically descended from a list of eleven named people. There is nothing in the application before me which suggests that the claim group, as described in Schedule A, is a subgroup of a larger group or that not everyone has been included where they should have been.

### *Name and address for service: s. 61(3)*

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

#### **Result and reasons**

The application **meets** the requirement under s. 61(3).

Part B of the application provides the name and address for service of the applicant.

### *Native title claim group named/described: s. 61(4)*

The application must:

- (a) name the persons in the native title claim group, or
- (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

#### **Result and reasons**

The application **meets** the requirement under s. 61(4).

Schedule A of the amended application does not name the persons in the native title claim group, but contains a description of the persons in the group.

### *Application in prescribed form: s. 61(5)*

The application must:

- (a) be in the prescribed form,
- (b) be filed in the Federal Court,
- (c) contain such information in relation to the matters sought to be determined as is prescribed, and
- (d) be accompanied by any prescribed documents and any prescribed fee.

## **Result and reasons**

The application **meets** the requirement under s. 61(5).

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

It contains the information prescribed by ss. 61 and 62, and is accompanied by the prescribed documents (that is, an affidavit from each of the persons who comprise the applicant prescribed by s. 62(1)(a)) thereby meeting the requirements of s. 61(5)(c) and (d).

I am not required under s. 190C(2) to consider whether the prescribed fee has been paid to the Federal Court.

### *Affidavits in prescribed form: s. 62(1)(a)*

The application must be accompanied by an affidavit sworn by the applicant that:

- (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
- (ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
- (iii) the applicant believes all of the statements made in the application are true, and
- (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
- (v) stating the basis on which the applicant is authorised as mentioned in (iv).

## **Result and reasons**

The application **meets** the requirement under s. 62(1)(a).

To satisfy the requirements here the persons comprising the applicant may jointly swear/affirm an affidavit; alternatively each of those persons may swear/affirm an individual affidavit.

Affidavits sworn by each of the named persons comprising the applicant accompany the application. Each affidavit is competently witnessed and addresses each of the criteria stipulated in s. 62(1)(a)(i) to (v).

### *Application contains details required by s. 62(2): s. 62(1)(b)*

The application must contain the details specified in s. 62(2).

## **Delegate's comment**

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains eight paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found below and is one and the same as the result for s. 62(1)(b) here.

## **Result and reasons**

The application **meets** the requirement under s. 62(1)(b).

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

#### **Result and reasons**

The application **meets** the requirement under s. 62(2)(a).

The information at Schedule B of the application enables the boundaries of the application area and the areas not covered by the application to be identified. A qualitative assessment of this material is found in my reasons under s. 190B(2).

### *Map of external boundaries of the area: s. 62(2)(b)*

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

#### **Result and reasons**

The application **meets** the requirement under s. 62(2)(b).

Schedule C directs me to the map contained at Attachment C. This map shows the boundaries of the application area in accordance with s. 62(2)(b). A qualitative assessment of this material is found in my reasons under s. 190B(2).

### *Searches: s. 62(2)(c)*

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

#### **Result and reasons**

The application **meets** the requirement under s. 62(2)(c).

Schedule D of the amended application states 'The Applicant has been provided with a current and historical tenure report dated 20 May 2003 by the State of New South Wales. A copy of the tenure report can be made available should it be requested'. Section 62(2)(c) requires 'details and results of all searches carried out to determine the existence of any non-native title rights and interests'. The purpose of the information provided by the State of New South Wales is not stated, nor whether the information provided is the result of a 'search'. No other details of search results are referred to. This section does not require the applicant to provide details and results of searches carried out by others, even if the applicant is in possession of the search documents. As already noted, my role is not to undertake a merit or qualitative assessment, and I am satisfied that the information referred to is sufficient for the purposes of this section.

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

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

#### **Result and reasons**

The application **meets** the requirement under s. 62(2)(d).

A description of the claimed native title rights and interests is contained in Schedule E of the application. I am satisfied that it is not merely a statement to the effect that all rights and interests that may exist or have not been extinguished are claimed.

### *Description of factual basis: s. 62(2)(e)*

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

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

#### **Result and reasons**

The application **meets** the requirements under s. 62(2)(e).

For s. 62(2)(e) to be satisfied the information in the application needs to be more than a mere recitation of the section, having regard to the authority in *Queensland v Hutchison* [2001] FCA 416 at [17] to [23]. The information contained at Schedule F and Attachment F of the application addresses the requirements of s. 62(2)(e) and it is not a mere recitation of the legislation.

### *Activities: s. 62(2)(f)*

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

#### **Result and reasons**

The application **meets** the requirement under s. 62(2)(f).

At Schedule G of the application, there is information about the activities that the native title claim group 'currently' carry out in relation to the application area.

### *Other applications: s. 62(2)(g)*

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

## **Result and reasons**

The application **meets** the requirement under s. 62(2)(g).

Schedule H refers to two Numbahjng Clan applications, NSD6018/1 and NSD124/07. I am satisfied that this meets the requirement that the applicant provide details of any other native title determination or compensation applications of which it is aware.

### *Section 29 notices: s. 62(2)(h)*

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

## **Result and reasons**

The application **meets** the requirement under s. 62(2)(h).

Schedule I states that the 'applicant is not aware of any section 29 notices that have been issued in the claim area during the life of the claim'.

### **Combined result for s. 62(2)**

The application meets the combined requirements of s. 62(2), because it meets each of the subrequirements of ss. 62(2)(a) to (h).

### **Combined result for s. 190C(2)**

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

## *Section 190C(3)*

### *No common claimants in previous overlapping applications*

The Registrar/delegate 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) 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 the previous application being considered for registration under s. 190A.

## **Result and reasons**

The application **satisfies** the condition of s. 190C(3).

The Tribunal's Geospatial Services provided an overlap analysis of the application area on 21 October 2008 (the geospatial report). One application as per the Register of Native Title Claims was identified. This was the Bandjalang People #1 which was accepted for registration, and is the

application to which this current application for amendment relates. As this is not a 'previous application', the condition of this section is satisfied.

## Section 190C(4)

### *Authorisation/certification*

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, 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.

Under s. 190C(5), if the application has not been certified, the application must:

- (a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
- (b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

### **Result and reasons**

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am satisfied the requirements of set out in s. 190C(4)(b) are met, including the condition of s. 190C(5).

Sections 190C(4) and 190C(5) are concerned with the authorisation of the applicant to make the application, and to deal with matters arising in relation to it, by the rest of the native title claim group.

As the application has not been certified, the requirements of s. 190C(4)(b) apply. These are that the Registrar (or his delegate) must be satisfied that:

- (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.

The role of the Registrar's delegate was set out in *Doepel*:

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

The Act imposes two further conditions at s. 190C(5) (a) and (b) which are conditions precedent about which the Registrar must be satisfied before proceeding to consider the requirement at s. 190C(4)(b). The section states that the Registrar may not be satisfied at s. 190C(4)(b) unless the application

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

The requisite statements are supplied in the body of the affidavits at Attachment R, which are affidavits of each of the five persons who jointly comprise the applicant.

I must now decide whether those persons are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all other persons in the group.

Authorisation is defined a s.251B of the Act:

For the purposes of this Act, all the persons in a native title claim group or compensation claim group authorise a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:

(a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

(b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Proper authorisation of all the persons making a native title determination application has been recognised by the Federal Court as crucially important under the NTA.

In *Strickland v Native Title Registrar (Strickland)* [1999] FCA 1530, a decision upheld by the Full Court, French J observed :

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

In *Daniel v State of Western Australia (Daniel)* [2002] FCA 1147, 194 ALR 278 at [11] his Honour said:

It is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so.

His Honour emphasised the importance of the 'ultimate' and 'continuing' authority of the native title claim group by ensuring 'the applicant' is properly authorised: *Daniel* at [16] and [17].

The requirement in s. 190C(4)(b) that authorisation be by 'all the other persons in the claim group' is not interpreted literally by the courts.

For example, in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) the Court said:

In s 251B(b) there is no mention of "all" and, in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process – at [25].

This decision does not, in my view, dilute the underpinning importance of authorisation emphasised by the previously mentioned authorities.

I refer also to what was said in *Ward v Northern Territory* 2002 FCA 171, (though this was in consideration of a s.66B application), by O'Loughlin J:

The information concerning the meeting that was held on 27 January 2002, the date of Mr Carlton's affidavit, is wholly deficient. There is no information about that meeting. Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24].

It may not be essential that these questions be answered on any formal basis such as in terms of the convening and conducting of a meeting in a commercial atmosphere, but the substance of those questions must be addressed.' – at [25].

I turn now to the process of authorisation described in the application. Schedule R addresses, in lieu of certification, the two preliminary issues of (a) a statement that 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 other persons in the native title claim group; and (b) the grounds on which the Registrar should consider the statement is correct:

- a) The individuals that comprise the Applicant are members of the native title claim group and are authorised to make the further amended application, and deal with all matters

arising in relation to it, by all the other person in the native title claim group. The authority was given at a meeting of the native title claim group held on 11 and 12 September 2007 in Coraki. The meeting arose out of a process of public notification by New South Wales Native Title Services.

The process of authorisation is further described in 'Attachment R' and in the affidavits of [name removed] and each other persons who jointly comprise the Applicant, which are annexed to Attachment R and marked R(1), R(2) and R(3).

- b) The grounds upon which the Registrar should consider the statement to be correct are:
- The applicant was authorised by the native title claim group to make the amendments to the application detailed in Attachment R at a meeting of the native title claim group held in Coraki on 11 and 12 September 2007.
  - The applicant is comprised of each of the people authorised by all members of the native title claim group to make this application at a meeting of the native title claim group held in Coraki on 11 and 12 September 2007.
  - The matters are deposed to in the affidavit [name removed] sworn on 16 May 2008, a copy of which is 'Attachment R1'.
  - The affidavit of Anthony Edward Wilson sworn on 9 October 2007, a copy of which is attached hereto and marked 'Attachment R2'.
  - The affidavit of Douglas Steven Wilson sworn on 9 October 2007, a copy of which is attached hereto and marked 'Attachment R3'.

The affidavit of [name removed] contained the following information:

- [details removed] employed by NTSCORP, (formerly NSWNTS), who are a body charged to carry out native title representative functions for the area over this native title determination application.
- The person previously authorised as the applicant on this application passed away in 2007.
- On 11 and 12 September 2007 NSWNTS convened a meeting of approximately 20 Aboriginal people who assert native title rights and interests in the claim area to authorise amendments to the application and replace the applicant.
- Prior to this, NSWNTS had placed an advertisement on 29 August 2007 in three local newspapers, the *Koori Mail*, the *Northern Star* and the *Richmond Express* regarding the meeting and its purpose. Copies of the notice were distributed to members of the claim group who had previously advised that they asserted native title in the claim area. The names of these people were drawn from a database held by NSWNTS which was updated on the basis of meeting attendance sheets. Telephone calls advising of the meeting were also made to these people. Travel assistance was provided to some attendees.
- Some persons of the claim group telephoned NSWNTS to advise that they were unable to attend, and would have family members to come in their place to contribute their views to the meeting. The people unable to attend expressed support for amending the application.

- At the meeting [*name removed*] observed the attendees unanimously pass a resolution that there was no traditional process of decision making. A process of decision-making was adopted whereby discussion of the issues would continue until there was general consensus. A motion would be read to the meeting, this motion to be forwarded and seconded by Bandjalang People. A decision would be made by voting by a show of hands with a majority being accepted as the decision. The attendees at the meeting agreed that they were sufficiently representative of the Bandjalang People to authorise amendments, and passed a resolution to this effect. A resolution was passed using the agreed decision-making method that the people in attendance were sufficiently representative. They were all descendants of apical ancestors and representative of family members and Elders who could not attend.
- The meeting unanimously passed a resolution using the adopted decision-making method to authorise and appoint Anthony Wilson and Douglas Wilson as the replacement applicant. The meeting also authorised amendment to the content of the application.

Copies of the newspaper advertisement referred to in [*name removed*] affidavit are attached to the application and labelled as 'Annexure B'. Under the heading 'Purpose' in the advertisement, is the subheading of 'Authorisation of amendments to the claim/s including' and lists 'Clarification of claim group description' as one of the topics covered under the subheading.

The invitation to the meeting is extended to: 'all the people who hold or may hold native title for the land and waters in and around' and a list of areas is then provided; 'All descendants, (including adopted descendants), of King Harry, Jack Wilson, George James, Frank Jock Snr and George Robinson.'

At this point I note that the apical ancestors listed in the application are:

- King Harry (b. ca 1820s)
- Jack Wilson (b. ca 1820s)
- Susannah (b. ca 1830) mother of Frank Jock Jnr.
- Michael 'Mundoon' Wilson (b. 1866, d. Coraki 1921)
- George James (b. ca 1885 Woodburn)
- Eliza Breckenridge (ca 1870)
- Jack Breckenridge (b. Coraki 1870, d. Coraki 1944)
- Frank Jock Jnr (b. Coraki 1879, d. Coraki 1930)
- Ada Jock (b. circa 1872, d. Coraki 1922)
- Gibson Robinson (b. Coraki circa 1871, d. Coraki 1947)
- Grace Bond (b. ca 1880)

The last category of invitees is 'Any Indigenous parties to the Bandjalang Peoples Native Title claims No. 1 and No. 2'.

Also attached to the application are the affidavits of Anthony Edward Wilson and Douglas Steven Wilson marked R2 and R3 respectively, affirmed on 9 October 2007. They are identical in content, and reiterate the information supplied in the affidavit of [*name removed*].

While the number of people in attendance at the meeting was small, 'approximately 20', the Wilson affidavits, at paragraph 9 states, 'The meeting was well attended by people from many different Bandjalang families who make up the Bandjalang native title claim group'.

I note that a departmental submission (state submission) by the New South Wales Department of Lands by [name removed] for the Director General, dated 28 October 2008, on the subject of s. 190C4 authorisation states: 'Without further information such as minutes of the meeting or a list of the attendees, it is difficult to determine whether all the persons who claim to hold common or group rights and interests in the claim area were present and/or agreed to the decision-making process adopted and/or its outcomes'. The submission then notes the affidavit of Anthony Edward Wilson, which states that: 'a unanimous resolution was passed that the meeting was sufficiently representative to make those decision as each person who was present was attending as a representative of their family members, and other Bandjalang People to whom they had spoken, who could not be present'. The submission concludes that 'Prima facie on the information provided it could be seen as sufficient for satisfying the requirements of authorisation concerning the Amended Application, but it is open for the Registrar to determine whether the requirements under s. 190C(4)(b) have been met'.

The applicant's response refers to the affidavits of [name removed], Anthony Wilson and Douglas Steven Wilson to support the authority and representative nature of the meeting attendees, and refers to the passage in *Lawson* quoted above. It makes the point that meeting records are confidential and privileged.

In my view the authorisation process is, in this case, sufficient for the purposes of the Act. Information regarding the meeting and its purpose was disseminated by newspaper advertisement in two local, and one national Indigenous specific newspaper two weeks before it took place. This was supplemented by distribution of notices to Aboriginal persons who had previously been identified as asserting native title rights and interests in the claim area. These persons had been identified by means of an NSWNTS database that was updated on the basis of signatures on attendance sheets of claim group meetings. Various telephone calls were made to those persons asserting native title in the claim area.

The decision-making process, in lieu of a traditional of a mandatory traditional system, was unanimously agreed to, and a written resolution describing the process was unanimously passed. Thereafter motions were arrived at by consensus, and passed as resolutions on the basis of a show of hands and majority decision. The meeting agreed that it was sufficiently representative of the claim group members to authorise amendments to the application. The views of absent members were presented by *ad hoc* family and other representatives.

It is apparent that resolutions were formulated, passed and recorded in writing. Information about how the meeting was convened, to whom notice was given and how, the agenda, the chair, the status of the chair, some of the resolutions and the means of decision-making are all supplied. The substance of the questions posed by Justice O'Loughlin in *Ward* have been addressed. Records of the meeting have not been supplied due to confidentiality conditions. Sufficient information has been provided for me to find that the authorisation process has been validly exercised, and this section complied with.

# Merit conditions: s. 190B

## *Section 190B(2)*

### *Identification of area subject to native title*

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

### *Information regarding external and internal boundaries: s. 62(2)(a)*

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

### *Map of external boundaries: s. 62(2)(b)*

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

## **Result and reasons**

The application **satisfies** the condition of s. 190B(2).

The application complies with ss. 62(2)(a) and (b) as it contains a written description of the area covered (the external boundary) and areas not covered by the application (the internal boundaries) in Attachment B and a map showing the external boundary in Attachment C.

The location of the areas covered by the application on the earth's surface is described sufficiently clearly by the written description of the external boundary at Attachments B, B(1) and B(2), and the map showing the boundaries in Attachment C.

The state submission, on considering the information contained in the application as to 'Identification of area subject to native title' concluded that 'it appears that the Registrar can be reasonably certain of the particular land and waters to which the native title rights and interests are claimed in accordance with the requirements of s. 190B(2)'.

The state submission points out that there is no document entitled 'Description of External Boundaries' as referred to in Schedule B of the application. In correspondence from NTSC to the Tribunal dated 21 November 2008 in response to the state submissions, (applicant's response), NTSC state that 'The title 'Description of External Boundaries' referred to in Schedule B, was inadvertently omitted'. Instead it bears the headings 'Eastern Boundary Description', 'Southern Boundary Description' and other references.

At Schedule B of the application, the application refers to Attachment B 'Description of external boundaries'. At the conclusion of Schedule B, the application further refers to 'Attachment B', 'Attachment B(1)' and 'Attachment B (2)' as providing the description of the external boundaries of

the determination area and excluded areas. Attachment B states that both the map and description have been prepared by the Geospatial Unit of the National Native Title Tribunal.

Having regard to the comprehensive identification of the external boundary in Attachment B and the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

A written description of the internal boundaries is also found in Attachment B. This is a generic description that excludes from the application any areas subject to a number of acts defined in the Act. It also excludes land covered by acts described in s. 23B of the Act. It is finally stated that the application does not include areas where native title has otherwise been extinguished.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In these circumstances, I find the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

For these reasons, I am satisfied that the information and map in the application required by sections 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 areas of land or waters and the requirements of s. 190B(2) are therefore met.

## *Section 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.

### **Result and reasons**

The application **does not satisfy** the condition of s. 190B(3).

#### **The law**

The application does not name all native title claim group members individually, and consequently s. 190B(3)(a) does not apply.

Section 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.

In considering the operation of s. 190B(3)(b) in *Doepel*, Mansfield J stated that:

Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained – at [37].

The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3)(b).

The claim group description in this application, reproduced below, is similar to that considered in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64], where Carr J considered a claim group described as:

1. The biological descendants of the unions between certain named people;
2. Persons adopted by the named people and by the biological descendants of the named people; and
3. The biological descendants of the adopted people referred to in paragraph 2 above.

This method of identification was referred to as the ‘Three Rules’ by His Honour. He stated he was satisfied that the application of these rules described the group sufficiently clearly, his reasoning being:

The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. It 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. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55...in relation to definition of areas, apply equally to the issue of sufficient description of the native title group—at [67].

Carr J also referred to what was said by French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [55], which was that:

The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court.

### **The claim group description**

Schedule A of the application provides the following description of the claim group:

The Bandjalang People are the native title claim group on whose behalf the applicant makes this application. The Bandjalang People are all the descendants of the following apical ancestors:

- King Harry (b. ca 1820s)
- Jack Wilson (b. ca 1820s)
- Susannah (b. ca 1830) mother of Frank Jock Jnr.
- Michael 'Mundoon' Wilson (b. 1866, d. Coraki 1921)
- George James (b. ca 1885 Woodburn)
- Eliza Breckenridge (ca 1870)
- Jack Breckenridge (b. Coraki 1870, d. Coraki 1944)
- Frank Jock Jnr (b. Coraki 1879, d. Coraki 1930)
- Ada Jock (b. circa 1872, d. Coraki 1922)
- Gibson Robinson (b. Coraki circa 1871, d. Coraki 1947)
- Grace Bond (b. ca 1880)

Descendants include persons who are descendants by incorporation and adoption according to traditional law and custom.

Note: the terms "incorporation" and "adoption" are elaborated upon in Attachment A.

The one page Attachment A in the application is entitled 'Criteria for recruitment to and membership of the Bandjalang native title claimant group'. I have italicised fragments to which I will later refer.

In the first paragraph it states that 'membership of the land owning group is restricted to those who are descended from apical ancestors or *those who have an 'as if' connection to the apical ancestors*'.

The second paragraph refers to apical ancestor descent, and also the 'criteria of self-identification or general community acceptance'. The concept of adoption and incorporation are touched upon.

Paragraph three expands on the concept of adoption by stating, 'A person whose biological parents may or may not be Bandjalang is "reared up" or "grown up" by at least one Bandjalang parent. If this person self-identifies as Bandjalang then they are accepted as a member of the native title holding community and are accorded the same status as full biological offspring'.

The fourth paragraph explains the concept of 'incorporation':

Incorporation is different because it usually operates to formalise the relationship of a non-dependant person into the claimant group community. However, the descendants of the incorporated person are automatically accorded full rights and membership of the native title holding community so long as they self-identify. The genuineness of self-identification is to be determined by reference to all relevant facts *which can include* past conduct in relation to self-identification. People who are not descendants of an apical ancestor may also be members of the native title holding community and incorporated through a transfer of domicile which *usually* requires the person in question to:

- be closely associated with the area through having a long term physical association with the area;
- have requisite knowledge and cultural responsibilities for it;

- have real or putative kinship connections with Bandjalang people which enable ego to participate in the Bandjalang social world including in relation to assertions about traditional ownership of the land;
- self-identify as a member of the Bandjalang community and to be legitimised in that identification through recognition by the wider Bandjalang identifying community; and
- be generally accepted by other members of that community as a Bandjalang person through the legitimisation of self-identification and through exercising of rights to land in accordance with the Bandjalang traditional system of law and custom.

### **The state's submission**

The state's submission is that further clarification was needed on several points of the claim group description 'for the sake of completeness to this category and to be satisfied that the requirements of s. 190B(3) have been met'.

It refers to the criteria in Attachment A 'for recruitment to and membership of the Bandjalang native title claimant group'. It states that the 'Criteria numbered 1 refers to "an 'as-if connection" which it is submitted is a term which requires further clarification'. The submission then refers to the criteria numbered 4 '(with particular reference to "incorporation" as distinct from "adoption")'. It submits that the reference to 'all relevant factors,' 'transfer of domicile as a means of incorporation into the native title claimant group' and 'past conduct' are terms that need further clarification. It states that requirements in the listed dot points are 'general in nature' and require further elaboration. In particular the term 'requisite knowledge' is said to require greater particularity, and 'cultural responsibilities' is described as vague in its meaning.

### **The applicant's response**

The applicant's response is contained in three substantive paragraphs reproduced below:

2.2 The relevant test of the clarity of description of the native title claim group is set out in s. 61(4) (as restated in s. 190B(3)) namely that the persons in the group must be described 'sufficiently clearly' so that it can be ascertained whether any particular person is in the group. The Applicant submits that the description of the group as 'all the descendants of the following apical ancestors' provided that clarity. 'Descendants' are defined as including persons descended by incorporation and adoption according to traditional law and custom. The applicant submits that the Registrar may, by objective application of the claim group description appearing in Schedule A (together with the further information provided in Attachment A) ascertain whether any particular person is in the group.

2.3 Description of the claim group in terms consistent with the model employed in Schedule A of the Application has been specifically approved by the Federal Court where the descendants are not individually named (*State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 per Carr J at [67]).

2.4 The terms 'incorporation' and 'adoption' simply amplify who may be a descendant in a manner that is culturally determined and regulated by the claim group. It is sufficient for the purposes of s. 190B(3)(b) to describe the broad operation of these terms. How they function in each specific instance is not an enquiry the Registrar needs to make. The Registrar cannot go beyond the information contained in the application to undertake some form of merit assessment to establish the correctness of the claim group description (*Attorney General of Northern Territory v Doepel* [2003] FCA 1384 per Mansfield J at [37]).

## **Reasons**

From the outset, I disagree that the applicant's submission in paragraph 2.2 correctly reflects the Registrar's task. It is not for the Registrar to apply the claim group description to ascertain whether any particular person is in the group, but rather to decide whether the description is sufficient to allow that enquiry to be successfully undertaken.

I agree with the applicant's submission insofar as the first element of the description is encompassed by the 'Three Rules' formula of Justice Carr. The names of the listed apical ancestors provide a starting point. It can be ascertained whether a particular person/persons is in the group of descendants of the named apical ancestors.

Part of the second element of the 'Criteria for recruitment to and membership of the Bandjalang native title claim group' provided at Attachment A. Incorporation differs from the terminology used in the description considered in *State of Western Australia v Native Title Registrar*. In that case the description refers to 'Persons adopted by the named people and by the biological descendants of the named people'. There is a direct nexus between the list in the first element, and the next tier in the second element in that description.

The description in the application before me however states that 'descendants include persons who are *descendants by incorporation...according to traditional law and custom*'. There is no complete explanation provided as to how traditional laws and customs operate to determine membership of the claim group on the basis of incorporation.

## **Adoption**

The process of adoption referred to in paragraph 3 of Attachment A states that a person must be 'reared up' or 'grown up' by at least one Bandjalang parent. If, in addition the adopted person self identifies as Bandjalang then they are accepted as a member of the native title holding community. In my view, this description of adoption may be adequate for the purposes of s. 190B(3). The requirement of at least one Bandjalang biological or adoptive parent is sufficient to ascertain claim group membership. The other element of the criteria for adoption into the group, self-identification, can be ascertained by enquiry.

## **Incorporation**

The description of 'incorporation' must be sufficient to objectively ascertain membership of the group according to that criterion.

The explanation provided in Attachment A does not help in defining the term 'incorporation'. The terms 'as-if' connection' and reference to 'can include' and 'usually' in paragraph 4 are terms which are, in my view, open ended, vague and comprised of a number of variables.

The first tranche of paragraph 4 of the attachment includes the concept of incorporation of a 'non-dependant person' in that persons who are not descended from one of the named apical ancestors can be 'incorporated' into the claim group (usually via the factors listed) and the descendants of those incorporated persons will be members of the claim group if they self-identify.

The genuineness of self-identification 'is to be determined by all relevant facts'. These 'can include past conduct'. The clear inference is that there may be other relevant facts that have not been described.

The word 'usually' is used when explaining the concept of incorporation for the purposes of transfer of domicile. It states that people who are not descendants of an apical ancestor can become claim group members by a 'transfer of domicile which *usually* requires the person to...', and then gives five criteria of what an incorporated claim group member may do to qualify for membership. The criteria are not comprehensive. There may be other instances of what a potential claim group member may do to qualify for membership that have not been included in the description.

The words and phrases I have referred to above create uncertainty in the description. An 'objective application of the claim group description appearing in Schedule A' (as it is referred to in paragraph 2.2 of the applicant's response) is not possible due to the uncertainty created by the incomplete nature of the information provided in Attachment A.

The effect is that it is not possible to ascertain membership of a particular person of the identified claim group through the application of a factual enquiry.

The claim group description is inadequate, and fails to satisfy the conditions of s. 190B(3).

## Section 190B(4)

### *Native title rights and interests identifiable*

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

#### **Result and reasons**

The application **satisfies** the condition of s. 190B(4).

The rights and interest claimed must be described in a clear and easily understood manner to meet the requirements of this section: *Doepel* at [91] to [92], [95], [98] to [101], [123].

The phrases 'native title' and 'native title rights and interests' are defined by s. 223(1) of the Act which provides 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.

The state submission contends that it is doubtful whether the rights referred to in points (a), (e), (g), (h), (m) and (r) of the Schedule E native title rights and interests are native title rights and

interests as defined in s. 223, according to the decision of *Western Australia v Ward (Ward)* (2002) 76 ALJR 1098.

I discuss whether these are native title rights as defined by s. 223 and whether they can be established prima facie in relation to the requirements in my consideration of s. 190B(6) below. I also reproduce in full the description of the twenty-two rights and interests listed at Schedule E of the application in my examination of that section.

The description of the twenty-two claimed native title rights and interests listed in Schedule E is clear, understandable and makes sense and accordingly the requirements of this section are met.

## *Section 190B(5)*

### *Factual basis for claimed native title*

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

### **Delegate's comments**

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) below.

In *Doepel*, Mansfield J stated that:

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; *but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests*. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts – at [17]. (Emphasis added.)

This paragraph of the *Doepel* judgment was quoted with approval in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (27 August 2008), (*Gudjala FC*) at [83], with the emphasis in italics as appears above. The Full Court in *Gudjala FC* went on to say:

...Indeed, there is no reason to doubt that this statutory scheme contemplates that it would be open to the Registrar to accept an application based on the application, including the accompanying affidavit, without having regard to other information of the type referred to in s 190A(3). *Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to*

*satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit. Of course, if an applicant fails to fully and comprehensively furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim although that risk is ameliorated by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a) – at [90] (emphasis added).*

and at [92]:

*Of central importance in this appeal are the details specified by s 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii). Those details are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests. The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim (emphasis added).*

I have quoted sections of this decision at length, and italicised the parts that directly refer to the assessment of s. 190B(5), the wording of which is similar to ss. 62(2)(e)(i),(ii) and (iii). The Full Court finding in this decision is that, by inference, the high standard of evidentiary detail required under the first instance *Gudjala People 2 v Native Title Registrar (Gudjala)*[2007] FCA 1167 has been modified (although the first instance *Gudjala* did not refer directly to evidentiary standards, that concept is dealt with in the Full Court consideration of the first instance decision).

For the information to be satisfactory it must, on the one hand, 'be in sufficient detail to enable a genuine assessment of the application...and be something more than assertions at a high level of generality', but, on the other hand it need be no more than 'a general description of the factual basis on which the application is made', and need not 'provide evidence that proves directly or by inference the facts necessary to establish the claim'. Balanced against this is the passage quoted above from the decision in *Doepel* where the Court considered the test the Registrar is required to apply under s. 190B(5). The Full Court chose to quote and emphasize that section of those reasons, namely:

*That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests.*

I turn now to the quality of the asserted factual basis provided in support of this application. In addressing 'the quality of the asserted factual basis' I note the status and origin of the information supplied.

Schedules E, F, G and M of the application refer to five affidavits of Anthony Edward Wilson, (Attachments F(1) and F(2)), [name removed], (Attachment F(3)), [name removed], (Attachment F(4)) and [name removed], (Attachment F(5)).

The affidavit of [name removed] at Attachment F(4) is the most comprehensive of the affidavits supplied, being 171 paragraphs. It was executed in 2002, and [name removed] passed away in 2007. [name removed] was the last surviving initiated Bandjalang [removed], and identified [name removed] as the appointed custodian of Bandjalang lore and country.

[paragraph removed]

The state submission makes the general observation at page 5 that:

On the basis of the Amended Application alone, it may be difficult for the Registrar to be reasonably satisfied that the factual basis on which it is asserted that the native title rights and interests claimed to exist are sufficient to support the assertion that native title has been continually held by the claim group in accordance with traditional laws and customs.

The state submission raised further objections which I address under the sub-headings below.

### **Result and reasons re s. 190B(5)(a)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

#### **The state submission**

The state submission as regards this subsection refers to assertions in the application at Attachment F, subparagraphs A(1) to (5) that:

- Members of the claim group had rights and interests prior to 26 January 1788 that continue to the present day;
- The claim group are descended from members of the Bandjalang People who had a presence in the area subject to the claim prior to 1788;
- That the claim group have maintained a system of law and custom which has existed since before 26 January 1788 (even though those laws and customs have undergone some changes since white settlement);
- That the claim group owns the claim area according to traditional laws and customs.

In the concluding paragraph on this subsection the submissions states, 'The statements contained in the affidavits, namely the Affidavit of Lawrence Wilson, refer to events which occurred in the early history of settlement'.

It is unclear to me what shortcomings the state submission identifies in relation to information supplied in the application for the purposes of this subsection. By drawing attention to the assertions in Attachment F that refer to an association with the area prior to sovereignty, and then stating that the information supplied refers to events 'which occurred in the early history of settlement', it may be that, inferentially, the state submission is that the applicant has failed to provide a factual basis for the assertion that the predecessors of the claim group had an association

with the area prior to sovereignty. This pre-sovereignty connection is inextricably mixed with the post-sovereignty position. This is more appropriately addressed under s. 190B(5)(b) as I discuss below. I am, however, satisfied that there is a factual basis for this assertion.

### **The applicant's response**

The applicant's response is that 'The Applicant relies on Schedule F and the affidavits appearing at Attachment F(1) – (5) of the Application. The claimants also rely on the Affidavit of *[name removed]* (enclosed) dated 27 May 2008.'

This affidavit, sworn on 27 May 2008 by *[name removed]*, identifies *[removed]* as a historian, refers to expert material filed with the Federal Court in relation to Bandjalang People # 1 Application, (but not included with the current amended application under consideration), lists the reports supplied by *[name removed]*, anthropologist, and *[name removed]*, linguist, and refers to a document titled 'Bandjalang People # 1 NC 96/16 (NC6034/98) Native Title Determination Application – Third Anthropologist's Report, November 2005' written by *[name removed]* and provided to the State as a confidential document as part of the credible evidence process. These reports are not supplied with the current application. On 22 January 2008, NTSCORP advised that Tribunal that it would not be sending any further submissions in relation to the affidavits in the Bandjalang #1 application.

The affidavit of *[name removed]*, at paragraphs 55 to 65, lays down the basis for the assertions made under s. 190B(5)(a). Under the heading 'Growing up – learning about cultural beliefs and customary practices', *[name removed]*, who was born *[details removed]*, describes how as an eight-year-old *[removed]* undertook a walk with Bandjalang elders from *[details removed]* where there was to be a six-to-eight week camp attended by about eighty people. He repeated this walk 'at least twice more with *[name removed]*'. This practice lasted until 'the 1960's or early 1970's when we were told we were not allowed to camp there anymore'. During the course of this journey *[removed]* was taught lore, fishing, hunting and gathering, and shown the various sites and resources such as waterholes and fishing spots. He was taught totems and taboos, and in particular his totem, *[details removed]*.

Anthony Wilson, in his 1999 affidavit, states that 'I was taught my traditional boundaries by my Elders', and 'I am aware of the location of many traditional campsites, middens, scar trees, sites having traditional cultural significance, pathways, bush food, plants and animal species, and I am aware of many stories about animals, insects, birds and plants located within the traditional Bandjalang territory'. In his 2003 affidavit, at paragraph 19, he states 'Dad always spoke about his mother's grandfather, great great grandfather Harry, the King himself. He was Bandjalang too...Dad told me a story about great grandfather Harry escaping the massacre at Evans Head'. Mr Wilson junior corroborates his father's recollections of camping at *[location removed]* at paragraph 39: 'One time I remember going down to *[location removed]* in an old bus, from the New England Bus Company. Our people had big camps near the beach opposite the pub...I went with my parents, grandparents and other members of my family...It wasn't just our clan, there were people from all over the place there...but if they wanted to go into any of the sacred areas they would have to ask *[names removed]*'.

The respective affidavits contain many other references to examples of activities practised by families and predecessors of the deponents that confirm an association with the area. They mention other Bandjalang people who are not directly associated with the Wilson family. They cite specific locales within the claim area with which there is, and has been an association. Frequent

reference is made to the Evans Head Massacre of the 1840s which point to early association with the area. 'King Harry himself' is a named apical ancestor born in the 1820s.

### **Result and reasons re s. 190B(5)(b)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

*Gudjala* is of assistance when applying s. 190B(5)(b) to the material in the application:

The decision in *Yorta Yorta* (supra), (*Members of the Yorta Yorta Aboriginal Community v Victoria (Yorta Yorta)* (2002) 194 ALR 538), demonstrates that the requirement that the laws and customs be traditional means that they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society. The applicant submits that this does not lead to the conclusion that the apical ancestors must have comprised a society. I accept that submission – at [63] and  
The starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860 – at [66].

This approach to the *Yorta Yorta* decision, that the factual basis for s. 190B(5)(b) must include a description of how the laws and customs of the claim group are rooted in the traditional laws and customs of a society that existed at the time of sovereignty, was endorsed in *Gudjala FC* – at [96].

The terms 'native title', 'native title rights and interests' and 'traditional' used in this s. 190B(5)(b) are further defined in the Act and relevant case law. Section 223(1) of the Act defines 'native title' and 'native title rights and interests':

- (1) 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 or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;

The terminology in ss. 190B(5)(b) and (c) is similar to that found in s. 223(1)(a). The High Court in *Yorta Yorta* considered the word 'traditional' in the context of s. 223(1)(a). The High Court held that:

“traditional” does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

The High Court made further reference to the term 'traditional laws and customs' in s. 223(1)(a):

First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander

societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are “traditional” laws and customs.

Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title. (Emphasis in original.) – at [46] to [47].

### **The state submission**

‘The affidavits at Attachment F provide some, but not extensive, evidence of the activities purportedly carried out and detailed at Schedule G. It is submitted that it is unclear as to whether the activities detailed therein, which are asserted as laws and customs traditional in their origin, are continually observed by the present claim group having specific regard for law and custom.’

### **The applicant’s response**

- Contemporary evidence of activities practiced by the claim group in exercise of their traditional rights and interests (as articulated in Schedule E) is provided by the ‘lengthy and extensive affidavit evidence’ found at Attachments F(1) – (5).
- The 2003 affidavit of Anthony Edward Wilson provides ‘contemporary examples of activities which are the practical expression of rights and interests derived from the pre-sovereignty normative system of Bandjalang laws and customs’. Examples and paragraph citations are provided for:
  - The telling of stories in relation to sites and places as well as activities of ancestors on the claim area;
  - Upholding customary laws in relation to the claim area;
  - Continuing physical occupation of the area, hunting, fishing, foraging, camping and protecting cultural sites.
- Similar examples can be found in the affidavit of *[name removed]*. Examples and paragraph citations are provided for the maintenance of activities relating to:
  - Upholding customary law including taboos associated with: eating certain foods; approaching certain sites; and behaving in certain ways;
  - Transmission of traditional laws and customs.
- Further examples can be found in the affidavit of *[name removed]* relating to the transmission of traditional laws and customs.
- The 2002 affidavit of *[name removed]* demonstrates a ‘continuing chain of inheritance from the system which pre-dates the British acquisition of sovereignty to the present. The other affidavits ‘demonstrate the maintenance of activities practiced by preceding generations of

Bandjalang people who occupied the claim area before the time of colonisation to the present'. Examples and paragraph citations are provided for:

- Hunting fishing and foraging practices;
  - Education in Bandjalang laws and customs;
  - Physical occupation, including camping and travelling to the claim area;
  - The telling of stories in relation to sites of spiritual significance.
- Collectively the affidavits 'provide conclusive evidence of the Bandjalang people's continuing acknowledgement of and adherence to traditional laws and customs through the practice of activities outlined in schedule G'.
  - Reference is made to *Gudjala FC*: 'what the applicant is not required to do is provide anything more than a general description of the factual basis on which the applicant is based...the applicant is not required to provide evidence that proves directly or by inference the facts necessary to directly or by inference the facts necessary to establish the claim' at—[92].
  - Schedules F, G and M provide a sufficient factual basis to support the assertion that the native title rights and interests exist.

In light of *Yorta Yorta*, the factual basis required by this subsection must describe how the laws and customs currently acknowledged and observed by the native title claim group are rooted in the traditional laws and customs of a society that was in existence at the time of European settlement of the area covered by the application and which has continued in a substantially uninterrupted way since that time. This approach was supported in *Gudjala* and not disturbed by the subsequent *Gudjala FC*.

Dowsett J in *Gudjala* characterised the requisite asserted facts along the following lines:

- that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society — at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content — at [65] and see also at [66] and [81];
- that explains the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage' — at [66] and see also at [81].

The affidavit of [name removed] describes in detail the account of the Evans Head massacre and the subsequent diaspora of the Bandjalang, and in particular the fate of his immediate forebears. He says that [removed] great grandfather, [name removed], (a family name retained by the first born male of [removed] line) and [removed] grandmother, [name removed] escaped the massacre. [removed] can remember [name removed] relating stories and lore to [removed] and other Bandjalang. [removed] was taught the traditional concept of [description removed], respect, for elders. [removed] spoke Bandjalang at home.

From paragraph 27, under the heading 'Growing up – hunting and gathering' [removed] relates how [removed] was taught hunting and gathering for traditional foodstuffs on which [removed] and other Bandjalang subsisted until the 1970s. When hunting [removed] was taught to call out to the spirits in language to give them food for the children, old people and themselves. Various seasonal occurrences such as the blossoming of the Silky Oak flower were observed to determine when it was best to eat certain game such as [description removed] – at para 33. [description removed], were a major food source, as were their eggs, the hunting and harvest of which was subject to strict protocols for preservation of stock. [removed] describes preparation and cooking techniques for [description removed] and their eggs.

[removed] refers to other game and fish in the Bandjalang language such as [description removed] – at para 40. Techniques for locating, killing and preparing [description removed] are described with the contemporary adaptation of cooking in a baking bag in the oven. Some foods were forbidden due to totemic avoidance. [removed] describes specific sites throughout the claim area in which [removed] hunted.

Under the heading 'Growing up – learning spiritual beliefs' beginning at paragraph 75, [removed] describes the concept of [description removed] and how they can cause trouble. [description removed] are sacred to the Bandjalang. [removed] supplies a list of elders who taught [removed], and the concept of [description removed] for whom the Bandjalang are caretakers. He describes [description removed] who inhabit specific sites within the claim area.

Under the heading 'Initiation' at paragraph 86 [removed] talks of the last three [description removed] to be initiated, and how, at the time of deposing [removed] affidavit, [removed] was the last survivor. [removed] cites specific sites such as '[location removed]' of which his family are custodians.

At paragraph 89, 'Being taught about Bandjalang country' [removed] talks of being taken around the claim area as an initiate. [removed] describes how [removed] group are associated with the [description removed] and the geographical and geological formations at Goanna Headland, Evans Head and Snake Island that resulted from [removed] struggles with the Snake. [removed] describes how the custodianship of the land was passed down from [name removed] to [removed] grandfather, then to [name removed] who in turn passed it on to [removed].

The identification of specific sites associated with ancestral beings, foraging techniques and protocols, hierarchical societal structures and descriptive names in Bandjalang language all point to a pre-sovereignty society living according to identifiable laws and customs. An unbroken chain leading back to at least some of the apical ancestors is provided. The information provided in [name removed] affidavit is of a detailed and precise nature, and confirms a practice of such law and custom, at least until the time of [removed] death. The observation and continuity of this law and custom is reiterated in the affidavits of the other four deponents. I expand on the content of the other affidavits in my reasoning below.

### **Result and reasons re s. 190B(5)(c)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

### **The state submission**

‘Whilst the affidavits attached to the Amended Application indicate that members of the claim group continue to observe some of the traditional laws and customs listed Attachment F (paragraph C), the evidence which has been provided thus far do (sic) not extensively detail the laws and customs said to give rise to a claim of native title as observed and practiced on the land subject to the Amended Application.’

### **The applicant’s response**

- The affidavits provide extensive evidence of traditional laws and customs of the Bandjalang People to support the current claim of native title.
- The length and extent of the affidavits make it impractical to set out all the evidence contained in the application which goes to the continued observance of law and custom. Some salient examples of connection are provided as:
  - The maintenance of and visitation of culturally significant sites and stories including the relevance of *[locations removed]* and the stories of the *[description removed]*, and the fight between *[description removed]*, (examples and paragraph citations are then provided).
  - Traditional beliefs associated with spirit beings and sites of spiritual significance as well as associated activities, customs and rituals. Specifically in relation to various spirit beings including *[description removed]*. Paragraph citations are then provided.
  - Observation of traditional Bandjalang laws and customs associated with authority and responsibility to care for and protect sites of significance, make decisions and control access to claim area and specific sites of significance. Paragraph citations are then provided.
- The affidavits demonstrate that the native title claim group continues to hold native title in accordance with traditional laws and customs.

The assertion in s. 190B(c) is also referable to the second element of what is meant by the term ‘traditional laws and customs’ in *Yorta Yorta*, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way: see *Yorta Yorta* at [47] and also at [87].

*Gudjala* indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

I agree with the applicant’s response to the state submission. The affidavit of *[name removed]* shows continuity of observation of traditional law and custom stemming back to the time of sovereignty. This is evinced by confirmation by the surviving deponents of the extensive descriptions provided by the *[name removed]*. While the evidence provided in the affidavits of *[removed]* is strong, the affidavit of *[name removed]* refers at paragraph 27 to a traditional avoidance relationship practised between *[names removed]*:

My [name removed] and my mother did not look at each other and seldom spoke to each other. I felt the way they behaved towards each other was very awkward, but my mother told me and I accepted it was their tradition.

This would indicate that [name removed] would have received her knowledge of law and custom from sources independent to that of [removed], or at least was not in the same close contact with [removed] as the other deponents would have been as children. [removed] is also able to provide gender specific woman's knowledge not available to [removed]. Despite this, [removed] evidence is corroborative of that of [removed] and cousins.

As mentioned above, some of the material evidencing observance of law and custom is not as comprehensive as that of [name removed], but it is still extensive and associated with language and specific site location that precedes European settlement, and is contemporaneously practised.

### **Combined result for s. 190B(5)**

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

## *Section 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.

### **Result and reasons**

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be established prima facie are identified in my reasons below.

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

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

This test was recently considered and approved in *Doepel* where the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate when considering the condition in s. 190B(6).

I have adopted the ordinary meaning referred to in *North Ganalanja* in considering whether some of the claimed native title rights and interests claimed can be established on a prima facie basis.

The application contains the following description of claimed exclusive native title rights and interests:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238 and/or ss. 47, 47A and 47B apply), the Bandjalang People as defined in Schedule A of this application, claim the right to possess, occupy, use and enjoy the lands and waters of the area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales.

It was confirmed in the High Court case *Western Australia v Ward* (2002) 213 CLR 3; (2002) 191 ALR 1 (*Ward*) at [49] to [52] that such a claim to exclusivity can be established prima facie in relation to parts of a claim area, such as those parts of the claim area where there has been no previous extinguishment of native title, or where the non-extinguishment principle found in s. 238 of the Act is enlivened. This applies, for example, to areas where ss. 47, 47A or 47B apply and in relation to areas affected by category C and D past and intermediate period acts. I do not find that such a claim can be established in this instance.

There is not sufficient material before me to show prima facie that the claim group specifically exercised the rights of possession, occupation, use and enjoyment of the claim area to the exclusion of all others.

**Result: Right is not established.**

A list of non-exclusive rights and interests is listed at paragraph 2 of schedule E:

2. Over areas where a claim to exclusive possession cannot be recognised, the Bandjalang People claim the following non-exclusive rights and interests subject to the valid laws of the State of New South Wales and the Commonwealth (including the right to conduct activities necessary to give effect to them) to:
  - a) Access, move about, use and enjoy the application area;
  - b) Hunt and fish in the application area;
  - c) Occupy, camp and live on the application area;
  - d) Light camp fires on the application area;
  - e) Construct shelters and other structures for that purpose on the application area;
  - f) Protect and care for the natural and cultural resources of the application area;
  - g) Maintain and protect sites and areas of significance to the Native Title Holders under traditional law and custom within the application area;
  - h) Hold ceremonies on and concerning the land;
  - i) Take natural resources from the application area;
  - j) Manufacture materials, artefacts, objects and other products from the natural resources of the application area;
  - k) Engage in customary barter, exchange or gift with other Aboriginal people with cultural resources and manufactured items derived from the natural resources of the application area;
  - l) Engage in production, customary barter and other customary economic activities on the land as they relate to other Aboriginal people with respect to Bandjalang cultural resources;
  - m) Care for the area for the benefit of the native title holders;
  - n) Use the area covered by the application for social, customary, religious, spiritual and traditional purposes;
  - o) Speak for, on behalf of and authoritatively amongst Aboriginal people about the application area;

- p) Speak for, on behalf of and authoritatively amongst Aboriginal people about the use of and access under traditional law and custom to the application area;
- q) Confer customary use and access rights on other Aboriginal people who seek to use and access the application area under the traditional law and customs of the native title claim group;
- r) Inherit and transmit the native title rights and interests;
- s) Determine as between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the application area;
- t) Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the application area by other Aboriginal People;
- u) Carry out traditional practices with respect to birth on the application area;
- v) Be buried on, and to bury members of the native title claim group on, the application area.

Paragraph 3 of schedule E lists further qualifications on the rights claimed:

3. The native title rights and interests claimed:

- a) are pursuant to the traditional laws and customs of the native title holders;
- b) are not exclusive rights and interests if they relate to tidal waters;
- c) do not include ownership of any minerals, petroleum or gas wholly owned by the Crown;
- d) over any areas covered by the application that are subject to a Previous Non-Exclusive Possession Act (PNEPA), as defined by s23F of the Native Title Act 1993 (Cth) do not confer possession, occupation, use and enjoyment of the area covered by the application to the exclusion of all others, except to the extent that they non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) applies, including those areas to which any sections 47, 47A, or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interests for an area described must be disregarded;
- e) that are subject to a validly granted PNEPA, as defined by s23F of the Native Title Act 1993 (Cth), do not include any native title rights or interests which were extinguished by that PNEPA, except to the extent that any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that prior extinguishment of native title rights and interests for an area described must be disregarded of the non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) may apply';
- f) do not include rights and interests that have been extinguished by application of the common law.

Finally, a definition of 'natural resources', 'cultural resources' and 'cultural activities' is provided at Schedule E:

For the purposes of this application "natural resources" include bush foods and medicinal plants and trees and foodstuffs, animal and plant products, timber, charcoal, ochre, vegetation, food stuffs, stone and wax and resin.

For the purposes of this application "cultural resources" include

- all bush foods and medicinal plants, trees and foodstuffs, animal and plant products, timber, charcoal, ochre, vegetation, stone, wax and resin necessary to maintain, protect, care for and preserve places and areas of importance on or in the land and waters within the claims area;
- preserving rock art engraving sites within the claim area;
- making ceremonial stone arrangements within the claim area;
- conducting ceremonies within the claim area;
- "cultural activities" within the claim area include activities in relation to the above and those related to birth and death and transmitting cultural knowledge.

### *The arguments for and against*

In their submission in relation to s. 190B(4) the state identified concerns they held in relation to specific claimed rights and interests. They submitted:

that there is doubt as to whether the following rights are rights in the land and waters of the claim area, and therefore, whether they are native title rights and interests as defined in s. 223, according to the decision of *Western Australia v Ward (Ward)* (2002) 76 ALJR 1098

The submission then lists the claimed rights of (a), (e), (g), (h), (m) and (r).

This submission is based on the *Ward* decision, which has been superseded by later decisions that recognise the specific rights that the state nominates as unsustainable. I have listed the decisions that accept those rights by way of rebuttal to the state's concern. Albeit some of the rights recognised are as a result of consent determination, it is my view that the rights and interests are still capable of being recognised as native title rights and interests.

As regards s. 190B(6), the state submission refers back its previous submissions, and states that 'in view of the comments made in relation to ss. 190B(3), 190B(4) and 190B(5) and comments below, the position as to whether the requirements of s. 190B(6) have been met is uncertain'. In their submissions regarding these three previous subsections, the only mention of specific claimed rights and interests is with reference to s. 190B(4) which I have referred to above, and I have considered other case law below which supplements the decision in *Ward*.

The applicants response is that it contends that the requirements of s. 190B(6) have been satisfied, and rely upon all their submissions in the 24 various preceding subparagraphs taken from paragraphs 2 to 4 in which they rebut the state submissions in subsections 190B(3) to 190B(5).

In addition to this, in their response to the state submission regarding s. 190B(4), the applicant response provides authorities that support the claimed rights and interests upon which the state submission casts doubt.

The application refers to the applicant affidavits and Schedules F, G and M for further examples of cultural activities.

Schedule G, 'Activities', and schedule M, 'Traditional physical connection' paragraph 1 and 2 provide examples of the practice of some of the rights claimed, while the affidavits of Attachment F provide instances of specific individual practice and experiences of the four deponents which cite further examples.

Schedule M, at paragraph 1, refers to Anthony Wilson, Douglas Wilson, [names removed] who 'have previously and currently hunt, fish, gather walk and camp in the claim area and adjacent areas in Bandjalang country in accordance with traditional law and custom, as to other members of the

native title claim group'. At paragraph 2 reference is made to 14 'current activities of claim group members as part of their ongoing observation of traditional laws and customs by which they continue their traditional physical connection to the claim area'. The reference to specific individuals and activities raises the evidence provided to something greater than 'a high degree of generality'.

### *Non-exclusive rights and interests*

I note from the outset that rights a) to v) are claimed in a non-exclusive capacity. I will consider each right and interest separately, or, where they are of a like nature, as a group.

**a) Access, move about, use and enjoy the application area;c) Occupy, camp and live on the application area;**

**d) Light camp fires on the application area;**

**e) Construct shelters and other structures for that purpose on the application area**

### **Result: Rights established**

In *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*) and *Ward* the Full Court of the Federal Court considered similarly worded non-exclusive rights. They concluded that this right was sustainable. *Alyawarr* had words akin to the present rights (a), (c), (d) and (e) under consideration, and contains the same elements as follows:

In *Attorney-General (NT) v Ward* [2003] FCAFC 283; (2003) 134 FCR 16 (*Ward FC 2*), the Full Court, on remittal from the High Court, determined by consent native title rights and interests held by the applicants by way of non-exclusive rights to occupy, use and enjoy land and waters in accordance with their traditional laws and customs including as an incident of that entitlement:

#### **(b) the right to live on the land, to camp, to erect shelters and to move about the land.**

The pastoral leases which have affected the claim area in the present case are historical grants. The relevant extinguishment of native title rights and interests derives only from inconsistency with the rights historically conferred by those leases. No question of prospective activity under a subsisting pastoral lease arises. Consistently with what was said by Nicholson J in *Daniel (No 2)* and Sundberg J in *Neowarra*, the right to 'live' on the land can be interpreted as a right to live permanently on the land without any conflict with pastoral leaseholders' rights. That right does not necessarily involve permanent settlement at a particular place. The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so. Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise.

The inconsistency posited by the Northern Territory in respect of the grant of historical pastoral leases long expired, is based on a theoretical conflict which would not inevitably have occurred.

No inconsistency of rights giving rise to extinguishment of the native title right to live on the land and to erect permanent structures thereon is demonstrated. The concept of 'permanency' referred to here is, in any event, a relative one.

The right defined in par 3(b) to live on the land, to camp, to erect shelters and other structures, and to travel over and visit any part of the land and waters, should stand—at [129 – 133].

The applicant, in response to the state submission, cites the right to 'Access, move about, use and enjoy the application area' which was recognised in *Daniel v Western Australia* [2003] FCA – at [510] to [520] and *De Rose v South Australia (No 2) (De Rose)* [2005] where the full court recognised 'The right to access and move about the determination area'. The applicant response also refers to the *Alyawarr* decision and also the Federal Full Court decision of *Western Australia v Ward* [2000] 170 ALR per Beaumont and von Doussa JJ which recognised a right to use and enjoy 'traditional resources'. I accept that these cases establish that such rights are capable of recognition. As to right '(e)', the right to construct shelters and other structures, the applicant refers to *Daniel v Western Australia (Daniel)* [2003] FCA 666 per Nicholson J – at [1163], and *Attorney General (NT) v Ward* [2003] 134 FCR 16, and again *Alyawarr*. I agree that these authorities support the proposition that such rights are capable of recognition.

Schedules G and M, and the four deponents refer to the ongoing exercise of the rights and interests (a), (c), (d) and (e) in the claim area, and specific examples are referred to in the affidavits in Attachment F. The *Alyawarr* decision establishes that these rights and interests can be sustained, and assuage doubts aired by the state as to (a) and (e) as to whether 'they are native title rights and interests as defined in s. 223'.

**b) Hunt and fish in the application area;**

**i) Take natural resources from the application area;**

**j) Manufacture materials, artefacts, objects and other products from the natural resources of the application area**

**Result: Rights established**

These rights have been recognised as non-exclusive in nature in several cases including in *Sampi v State of Western Australia (No 3)* [2005] FCA 1716 (*Sampi (No 3)*) and *De Rose v South Australia (De Rose1)* [2002] FCA 1341.

Schedule M paragraph 2 (h) refers to the collection of bark and ochre for artwork and painting, and (i) to collecting materials for the making of boomerangs, clap sticks, coolamons and spears. The 2002 affidavit of [name removed] at paragraph 6 refers to the manufacture of dilly bags out of bull rushes. The instances of hunting and fishing are almost too numerous to mention throughout the affidavits of the four deponents. At paragraph 31 of the 2002 affidavit of [name removed], reference is made to the traditional practice of calling to the spirits of the country to provide bounty during their hunting activities. At paragraphs 36 and 38, the traditional 'bag' limits of prey, and the distribution of particular parts of prey amongst various sections of the community are described.

**k) Engage in customary barter, exchange or gift with other Aboriginal people with cultural resources and manufactured items derived from the natural resources of the application area;**

**l) Engage in production, customary barter and other customary economic activities on the land as they relate to other Aboriginal people with respect to Bandjalang cultural resources**

**Result: Rights established**

In *Alyawarr* the view of the Court was that:

The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it could not be a right in relation to land – at [153].

Schedule G, paragraph 22 refers to ‘Utilising natural resources taken from the application area for manufacture, exchange and barter’.

The affidavit of [name removed] at paragraph 91 refers to the elders practice of trade in ochre with other clans for them to use for ceremonial purposes.

**f) Protect and care for the natural and cultural resources of the application area;**

**g) Maintain and protect sites and areas of significance to the Native Title Holders under traditional law and custom within the application area;**

**m) Care for the area for the benefit of the native title holders**

**Result: Rights established**

These rights have been recognised as non-exclusive in nature as confirmed in *Wik Peoples v State of Queensland (determination 2)* [2004] FCA 1306 (*Wik 2*) and *Alyawarr* at [3(d)] respectively. The state submitted that these rights were not capable of recognition, however these cases as authority for the proposition that these rights can be recognised.

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, this right appears to be capable of being established prima facie over such areas.

More recently in the determination *Rubibi v State of Western Australia (Rubibi)* per Merkel J [2001] FCA 1553, the right claimed was ‘the right to care for and maintain and protect the land and waters, including places of spiritual or cultural significance.’

The applicant response also correctly, in my view, cites *Daniel* – at [1163], *Alyawarr* – at [136] and *De Rose* – at [3].

Schedule G, paragraph 1, and M paragraph 2 (l) refer to this caring, maintenance and protection role. The various affidavits refer to traditional ‘bag limits’ for swan eggs, and various dietary taboos. At paragraph 53 deponent [name removed] refers to caring for camping sites, and at 120 how [removed] alerted white men about the significance of shield, dish and kurrajong trees, and his interaction with developers and government officials in his role as custodian. [name removed] also

refers to [removed] ongoing maintenance activities at [location removed] where [removed] worked for several years for the [business removed].

**h) Hold ceremonies on and concerning the land;**

**n) Use the area covered by the application for social, customary, religious, spiritual and traditional purposes**

**Result: Right established**

In *Mundraby v Queensland (Mundraby)* [2006] FCA 436 the right to '(vi) perform social, cultural, religious, spiritual or ceremonial activities thereon and to invite others to participate in those activities in accordance with traditional laws and customs [para 3(b)(vi)]' was recognised as a right in a non-exclusive sense.

The applicant's response to the state's submission also refers to, correctly in my view, *Rubibi, Daniel* – at [1163] and *De Rose* to support the establishment of these rights.

At paragraph 86, [name removed] refers to [removed] initiation on country, and [removed] subsequent education as to boundaries, and sites of significance— some of which [removed] family has responsibility for.

**o) Speak for, on behalf of and authoritatively amongst Aboriginal people about the application area;**

**p) Speak for, on behalf of and authoritatively amongst Aboriginal people about the use of and access under traditional law and custom to the application area;**

**q) Confer customary use and access rights on other Aboriginal people who seek to use and access the application area under the traditional law and customs of the native title claim group**

**Result: Rights established**

In *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 (3 June 2004) 'a right to speak for the determination area' [para 3(b)] was considered. The right was accepted where the claim is, as in this case, non-exclusive.

In the 2003 affidavit of Anthony Edward Wilson, at paragraph 40, he refers to [name removed] being asked by a Christian group to go to [details removed].

**r) Inherit and transmit the native title rights and interests**

**Result: Right established**

In *Mundraby* the right to 'pass on native title in relation thereto in accordance with traditional laws and customs' was granted in a consent determination.

In addition, the applicant response cites *Yorta Yorta* – at [46], and *Alyawarr* – at [76] as authority for this right as concomitant and cognisable respectively.

At paragraph 138 of his 2002 affidavit [*name removed*] refers to having the responsibility and authority to pass on to the next generation Bandjalang traditions laws and customs. Further on [*removed*] refers to the inherited custodianship for the area.

**s) Determine as between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the application area;**

**t) Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the application area by other Aboriginal People**

### **Result: Rights not established**

In *Neowarra v State of Western Australia (Neowarra)* [2003] FCA 1402 – at [488] the court found that ‘In this case the right is, in my view, a right to uphold and enforce laws and customs. That is a right in relation to people and not in relation to land or waters’. The mention of the phrase ‘in relation...to the application area’ does not save this claimed right.

**u) Carry out traditional practices with respect to birth on the application area;**

**v) Be buried on, and to bury members of the native title claim group on, the application area.**

### **Result: Rights established**

In *Alyawarr* ‘the right to do the following activities on land: participate in cultural practices relating to birth and death, including burial rights’ para 3[c] was recognised as a right and interest. Burial practices are referred to in the affidavit of Anthony Edward Wilson at paragraph 65, and paragraph 148 of that of [*name removed*]. [*name removed*] refers to birth rituals and taboos at paragraph 35 and onwards.

## *Section 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 with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently 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.

## Result and reasons

The application **satisfies** the condition of s. 190B(7).

I understand the phrase 'traditional physical connection' to be a physical connection in accordance with the particular traditional laws and customs of the claim group, in accordance with *Yorta Yorta* as referred to above. At [29.19] of the Explanatory Memorandum to the *Native Title Amendment Act 1998*, further clarification is given to the term 'connection' as described in s. 190B(7) in that it 'must amount to more than a transitory access or intermittent non-native title access'.

The state submission is equivocal. It refers to the information regarding activities currently being carried out by the native title claim group at schedules G and M stating that the list contained in the latter is 'substantially similar' to the former. It notes that the latter affidavits of [*names removed*] are not entirely explanatory in confirming whether the 'Bandjalang People' carry out activities on the land and waters covered by the amended application'. It goes on to say, noting that these latter affidavits are often couched in the past tense that: 'It is queried whether these general statements and on the basis of the Amended Application alone adequately demonstrate that, at least, one of the *present* (state italics) named Applicants and other members of the claim group have maintained a traditional physical connection in the claim area'. The submission then concedes that: 'As stated above, however, the evidence that has been provided in the past may well satisfy the 'traditional physical connection' requirement. Further, that requirement in 190B(7)(a) that "the Registrar must be satisfied that at least one member of the native title claim group currently or previously had a traditional physical connection..." has been met by virtue of the extensive evidence of [*name removed*].' This latter statement apparently acknowledges that the content of the Attachment F affidavit of [*name removed*] meets the requirement of this section. I agree that it does.

The applicant response is that the requirements of this section have been satisfied, and then cites a number of subparagraphs in their submission that support this. Their submission as regards s. 190B(7), to which the reader is directed, adequately provides the contemporary current connection activities of the present named applicants about which the state submission has doubts, and provides the evidence that satisfies me as to the content of the application. For example, the applicant response points to the affidavit of Anthony Edward Wilson which describes ongoing practice of the telling of stories in relation to sites and places as well as the activities of ancestors on the claim area; the upholding of customary laws in relation to the claim area; the continuing physical occupation of the area, hunting, fishing, foraging, camping and protecting cultural sites; and transmission of traditional laws and customs. From the affidavit of [*name removed*], the applicant response cites upholding customary law including taboos associated with: eating certain foods; approaching certain sites, and behaving in certain ways; and transmission of traditional laws and customs.

I agree with the latter part of the state submission, and the applicant response. At least two of the applicants describe a current traditional physical connection, and I am satisfied on that basis.

## *Section 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.

#### **Delegate's comments**

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result below.

### *No approved determination of native title: s. 61A(1)*

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

#### **Result and reasons**

The application **meets** the requirement under s. 61A(1).

The Geospatial report dated 21 October 2008 states: 'No determinations as per the National Native Title Register fall within the external boundary of this application as at 21 October 2008'. A further search on the Tribunal's 'iSpatialView', or geospatial database, on 20 April 2009 confirms this.

### *No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)*

Under s. 61A(2), the application must not cover any area in relation to which

- (a) a previous exclusive possession act (see s. 23B)) was done, and
- (b) either:
  - (i) the act was an act attributable to the Commonwealth, or
  - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:

- (a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

#### **Result and reasons**

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

At Schedule B, paragraphs 1 and 3, any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application.

### *No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)*

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

- (a) a previous non-exclusive possession act (see s. 23F) was done, and
- (b) either:
  - (i) the act was an act attributable to the Commonwealth, or
  - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

- (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

### **Result and reasons**

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

At Schedule E, where the description of native title rights and interests claimed by the each of the persons comprising the applicant is listed, the limitation to the area where exclusive possession is claimed is stated in paragraph 1, reproduced above.

A further limit to the extent of rights and interests is expressed at paragraph 3 of the same Schedule reproduced in full above at my consideration of s. 190B(6).

The combined effect of these two paragraphs of respective exclusion satisfy me that exclusive possession is not being claimed over any areas where non-exclusive possession acts, as defined by s. 23F, have been done.

### **Combined result for s. 190B(8)**

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

### *Section 190B(9)*

### *No extinguishment etc. of claimed native title*

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

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (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 ss. 47, 47A or 47B.

### **Delegate's comments**

I consider each subcondition under s. 190B(9) in turn and I come to a combined result below.

#### **Result and reasons re s. 190B(9)(a)**

The application **satisfies** the subcondition of s. 190B(9)(a).

Schedule Q states 'The Applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown'.

#### **Result and reasons re s. 190B(9)(b)**

The application **satisfies** the subcondition of s. 190B(9)(b).

At Schedule P of the application it is stated that 'The Applicant does not claim exclusive possession over any offshore place'.

#### **Result and reasons re s. 190B(9)(c)**

The application **satisfies** the subcondition of s. 190B(9)(c).

I am not aware, and nothing in the application or accompanying documents before me discloses, that the claimed native rights and interests have otherwise been extinguished. I note that Schedule B, paragraph 1 (c) excludes areas where native title has otherwise been wholly extinguished.

#### **Combined result for s. 190B(9)**

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]

# Attachment A

## Summary of registration test result

Application name:	Bandjalang People # 1
NNTT file no.:	NC96/16
Federal Court of Australia file no.:	NSD6034/98
Date of registration test decision:	21 April 2009

### Section 190C conditions

Test condition	Sub-condition/requirement	Result
s. 190C(2)		Aggregate result: Met
	re s. 61(1)	Met
	re s. 61(3)	Met
	re s. 61(4)	Met
	re s. 61(5)	Met
	re s. 62(1)(a)	Met
	re s. 62(1)(b)	Aggregate result: Met
	s. 62(2)(a)	Met
	s. 62(2)(b)	Met
	s. 62(2)(c)	Met
	s. 62(2)(d)	Met
	s. 62(2)(e)	Met
	s. 62(2)(f)	Met
	s. 62(2)(g)	Met

Test condition	Sub-condition/requirement	Result
	s. 62(2)(h)	Met
s. 190C(3)		Met
s. 190C(4)		Overall result: Met
	s. 190C(4)(a)	Not applicable
	s. 190C(4)(b)	Met

#### Section 190B conditions

Test condition	Sub-condition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Not met
	s. 190B(3)(a)	Not met
	s. 190B(3)(b)	Not met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

<b>Test condition</b>	<b>Sub-condition/requirement</b>	<b>Result</b>
	<b>re ss. 61A(3) and (4)</b>	<b>Met</b>
<b>s. 190B(9)</b>		<b>Aggregate result:</b> <b>Met</b>
	<b>re s. 190B(9)(a)</b>	<b>Met</b>
	<b>re s. 190B(9)(b)</b>	<b>Met</b>
	<b>re s. 190B(9)(c)</b>	<b>Met</b>