National Native Title Tribunal

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE: Brendon Moore

Application Name:	Mithaka People		
Names of Applicants:	John Gorringe, Scott Gorringe, Lorraine McKellar, Ada Marin, Richard "Darby" McCarthy		
Region:	South-west	NNTT No.:	QC02/35
Date Application Made:	28 November 2002	Federal Court No.:	Q6033/02

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

DECISION

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

Brendon Moore

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

24 December 2002
Date of Decision

Brief History of the Application

This application was filed in the Federal Court on 28 November 2002. An amended application was then filed on 13 December 2002. Leave was granted in the Federal Court on 16 December 2002, for the amended application to stand as the current application.

The following applications for Low Impact Authority to Prospect - Petroleum (application notices) were issued pursuant to s.486 of the *Mineral Resources Act 1989 (Qld):*

EPP656, EPM13222, EPP657 (Part 2), EPP657 (Part 1), EPP658, EPP660 (Part 2), EPM13224, ML95318, EPP589 (Part 1)and ML95235.

Information considered when making the Decision

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

- The National Native Title Tribunal's registration test, administration, legal services, notification and tenure files for QC02/35 – Mithaka People
- The National Native Title Tribunal's registration test, administration, legal services, notification and tenure files for QC00/3 – Kullilli People
- Working files for QC96/11 – Kullilli People (discontinued application)
- The National Native Title Tribunal's registration test, administration, legal services, notification and tenure files for QC99/29 – Wangkamurra People #2
- The National Native Title Tribunal's registration test, administration, legal services, notification and tenure files for SC97/3 – The Wangkangurru/Yarluyandi Native Title Claim
- The National Native Title Tribunal's registration test, administration, legal services, notification and tenure files for SC98/1 – Yandruwandha/Yawarrawarrka Native Title Claim
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- Schedule of Native Title Applications;
- The Native Title Register;
- Register of Indigenous Land Use Agreements;
- The following material provided directly to the Registrar for consideration under s.190A:
  - Facsimile from Queensland South Representative Body Aboriginal Corporation dated 9 December 2002.
  - Facsimile from Queensland South Representative Body Aboriginal Corporation dated 18 December 2002

Copies of the material provided directly to the Registrar in relation to the decision under s.190A have been provided to the State of Queensland and the State provided with an opportunity to comment. No response was received from the State of Queensland.

Note: Information and materials provided in the mediation of any of native title claims made on behalf of this native title group has not been considered in making this decision. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

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

A. Procedural Conditions

s.190C(2)

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

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

Details required in section 61

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

Reasons relating to this sub-condition

It is my view that I have to consider whether the application has been made on behalf of all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed

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

> *'By operation of subs 190C(2) the Registrar must be satisfied in relation to all the requirements contained in s 61. It follows that, when applying the registration test, the Registrar must consider whether (on the basis of the application and other relevant information) the application has been made on behalf of a 'native title claim group'* [30]
>
> *'The [Native Title] Act now ensures that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held . . . Subsection 61(1) imposes requirements not only in relation to the question of authorisation, but also in relation to the anterior question of whether the application has been made on behalf of a 'native title claim group' . . An application which is not made on behalf of a 'native title claim group' cannot validly proceed . . .' [30] – [31]*
>
> *'[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group'* [para. 60]

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

The application before me was made by the applicants on behalf of the Mithaka People. The native title claim group does not name all of the persons in the group. Schedule A of the application states that:

1) The native title claim group is comprised of the Mithaka People, being those persons who, according to traditional laws acknowledged and customs observed-
(a) are traditionally connected to the area covered by this application (the area claimed) through -
(i) spiritual, religious, physical and historical associations;
(ii) biological, classificatory or adoptive descent through the four grandparental lines of father's father, mother's father, father's mother and mother's mother; and
(iii) processes of succession; and

(b) have a communal native title in the area claimed, from which rights and interests derive.

2) More particularly, the Mithaka People are all those Mithaka persons descended from the following Aboriginal apical ancestors -

(a) Nangkaliya; which includes Mithaka persons in the following families: Gorringe, Fortune, McKellar, Lander, Curran, Hunter and Walton;
(b) Jacky Frew;
(c) Njira Taffy;
(d) Joe St Clair;
(e) Pantya-Wanku-Ngawiranha;
(f) Butcher
(g) Tyuka-Putali;
(h) Wargally and wife Moopina; which included Mithaka persons in the following families: McCarthy, Mallyer, Crawford, Burns, Murphy, Rose, Gray, Martin, Naylor, Troutman and Turnbull;
(i) Mingelli Joe and sister Maggie;
(j) Cameron Downs;
(k) Bluff Wanna.

I do not have any information before me in the application or otherwise that indicates that the group described in schedule A does not include, or may not include, all the persons who hold native title in the area of the application.

For these reasons, I am satisfied that the native title claim group described in the application includes all the persons who, according to their traditional laws and customs, hold the native title claimed over the area covered by the application. See my reasons under s. 190C(4) in relation to whether the applicants have been authorised by all the persons in the group to make, and to deal with matters arising in relation to, the application.

Result: Requirements met

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

Reasons relating to this sub-condition
The applicant names are detailed at Part A and the address for service appears at Part B of the application.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule A to the application describes the native title claim group. For the reasons which led to my conclusion set out below that the requirements for s.190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

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

Reasons relating to this sub-condition

s.61(5)(a)
The application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998

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

s.61(5)(c)
The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62(2)(a) to (h). I refer to my reasons in relation to s. 62 below.

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

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

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

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-condition

Affidavits by the six applicants accompany the application. Each affidavit is signed, dated and competently witnessed (by a solicitor). The affidavits satisfactorily address the matters required by s. 62(1)(a)(i)-(v).

Result: Requirements met

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

Comment on details provided

The application contains some details relating to traditional physical connection at Schedule M, as well as at Schedule F and Schedule G

Result: Provided

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

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the maps contained in the application show the external boundaries of the claim area.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule D of the application states that "no searches have been carried out to determine the existence of any non-native title rights and interests in relation to the area claimed". There is no other information before me which indicates that the applicants have carried out searches. I am therefore satisfied that the applicants have not conducted any searches. The requirements of disclosure in s.62(2)(c) are not triggered by this application.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule E contains a description of the claimed native title rights and interests. The description does not amount to a mere assertion that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished at law. For the reasons given in my conclusion that the applicants have met the requirements of s.190B(4), I am also satisfied that the requirements of this section are met.

Result: Requirements met

s. 62(2)(e) *The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*

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

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

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Reasons relating to this sub-condition

This information is contained in Attachment F, G and M of the application. It is my view that this information amounts to a general description of the factual basis so as to comply with requirements of s62(2)(e)(iii).

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

It is stated in schedule H that:

The Applicant is not aware of any other application to the High Court, Federal Court or a recognised State/Territory body, that have been made in relation to the whole or part of the area covered by this application and that seek a determination of native title or a determination of compensation in relation to native title, except the following native title determination applications:

- Kullilli #1 (Fed Ct No. Q6003/00)
- Wangkumarra #2 (Fed Ct No. Q6026/99)
- Wangkumarra & Yarluyandi (Fed Ct No. SG6016/98)
- Yandruwandha/Yawarrawarrka (Fed Ct No. SG6024/98)
- Maiawali & Karuwali #2 (Fed Ct No. Q6010/99)

Result: Requirements met

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

Reasons relating to this sub-condition

The application at Schedule I states that the applicant is aware that the following notices under section 29 of the NTA (or under a corresponding provision of a law of a State or Territory), have been given and relate to part of the area claimed:

- Authorities to Prospect No's 656, 657, 658 and 660.

Result: Requirements met

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

s.190C(3)

Common claimants in overlapping claims:

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

(a) the previous application covered the whole or part of the area covered by the current application; and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and

(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.

Reasons for the Decision

The Mithaka application was filed in the Federal Court on 28 November 2002. For the purposes of s.190C(3)(b) it was "made" on that day: see State of Western Australia v Strickland [2000] FCA 652 at paras 45, 55 and 56.

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

(a) the previous application overlaps in whole or part the claim area covered by the Mithaka People application (s.190C(3)(a)); and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the Mithaka People application was made (s.190C(3)(b)); and

(c) the entry in the Register was made, or not removed, as a result of consideration of the previous application under s.190A (s190C(3)(c)).

A search of the Tribunal's geospatial data, as at 5 December 2002, reveals that there are five native title determination applications overlapping the current application. Refer to my reasons for decision under s.62(2)(g) above. All of these applications were filed prior to the current application.

Application QC00/3 was not accepted for registration on 12 September 2001. It was therefore not on the Register of Native Title Claims as a result of consideration under s.190A at the time the current application was made. The four other applic ations were on the Register of Native Title Claims as a result of consideration under s.190A at the time the current application was made:

NNTT No	Date registered	Name	S190A compliance	Overlap Area (sq km)	Overlap
SC97/3	22/8/97	Wangkangurru/Yarluyandi	26/10/99	55423.231	Part
SC98/1	8/1/98	Yandruwandha/Yawarrawarrka	9/7/99	554223.231	Part
QC99/29	28/10/99	Wangkumarra People #2	28/10/99	55423.231	Part
QC99/11	19/4/99	Maiawali & Karuwali	19/4/99	55423.231	part

I have considered the Register entries and the descriptions of the native title claim groups and applicants for each of the relevant overlapping applications. My review of the material does not reveal the existence of any person named in the applications that would appear to be named also as either an ancestor, applicant or claim group member for the application presently before me.

Result: Requirements met

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

Certification and authorisation:

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

(a) the application has been certified under section 203BE, or has been certified under the former paragraph 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

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

S.190C(5) sets out the requirements of the Act where an Application has not been certified:

> If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:
>
> (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
>
> (b) *briefly set out the grounds on which the Registrar should consider that it has been met.*

Reasons for the Decision

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

The application has not been certified by the relevant representative Aboriginal/Torres Strait Islander body. Therefore, the requirements of s190C(4)(a) are not applicable.

Consequently, I need to consider whether there has been compliance with s190C4(b) – authorisation by the native title claim group.

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

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

The first limb

Each of the applicants has sworn an affidavit that he/she is a member of the native title claim group [see para 4 and 5 of each s62(1)(a) affidavit in the application].

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

The second limb

S190C(5) provides the following prerequisites for compliance with s190C(4)(b):

- the inclusion in the application of a statement to the effect that the requirement in s190C(4)(b) has been met; and

- a brief statement setting out the grounds upon which I should consider that the requirement of s190C(4)(b) has been met.

In *Risk v National Native Title Tribunal [2000] FCA 1589*, O'Loughlin J noted that under the *Native Title Act 1993*, applications can only be lodged on behalf of properly constituted groups and that authorisation must come from all the persons who hold the common or group rights and interests. He noted that the applicant did not have to be individually authorised to make the claim, the authorisation must be in accordance with a process of decision making recognised under the traditional laws and customs of the claimant group.

S251B of the *Native Title Act 1993* recognises that the applicants may be authorised using a decision making process that is either:
(a) in accordance with traditional laws and customs of the group; or
(b) agreed to and adopted by the native title claim group.

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

- I am 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.
- I am authorised to make this application, and to deal with matters arising in relation to it, on the basis of a meeting of the Mithaka People at Windorah on 16 and 17 November 2002, at which the Mithaka People, authorised a number of Mithaka persons, including myself, to make this application, and to deal with matters arising in relation to it.

Paragraphs 7, 8 of the facsimile dated 9 December 2002, details the authorisation process. I will quote the relevant paragraphs from this facsimile:

(7) As [anthropologist 1] has undertaken a substantial amount of anthropological research, over a number of years, concerning the Mithaka People, there was no need to advertise the meeting. Based on [anthropologist 1]'s advice, QSRBAC called the meeting by writing to and otherwise informing members of the Mithaka Peopl, regarding the proposed authroisation meeting.

(8) We advise that the persons who attended the authorization meeting were representative of the native title claim group in the current application.

A further facsimile dated 18 December 2002 was received from QSRBAC in relation to the decision making process of authorisation. It was stated that:

- *Elders and other members of each family group decided how many persons from each family group would be nominated to be applicants;*
- *Each family group (including elders) deciding who would be nominated to be their applicants;*
- *Each of the family groups (including elders) authorising their own and the other family groups nominated applicants, to make the native title claim, and to deal with matters arising in relation to it.*
- *Note that the process described above was conducted by the Mithaka People, rather than QSRBAC.*

I am satisfied that the application contains the statements required by s190C(5)(a).

In *Strickland v Native Title Registrar (1999) 168 ALR 242*, French J held that the insertion of the word 'briefly' in s190C (5)(b) suggested that the legislature was not concerned to require any detailed explanation of the process by which authorisation was obtained but the sufficiency of the statement is primarily a matter for the Registrar. In determining whether or not the evidence of authorisation is sufficient, the Registrar is not confined to considering the information in the application and any accompanying affidavit. His Honour emphasised that the authorisation question is a matter of considerable importance and mere formulaic statements are insufficient. This aspect of the decision by French J was upheld by the Full Federal Court in *Western Australia v Strickland (2000) 99 FCR 33*.

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

S 251B of the Act defines "authorization" and I am satisfied that the process adopted here is in accordance with that section.

The information in the application and provided to me separately supports a finding that the authorisation decision was made by the native title claim group in accordance with a decision making process that must be complied with by the group when authorising things of this kind. I am satisfied that the applicants are members of the native title claim group and are authorised to make this application and to deal with matters arising in relation to it by the native title claim group.

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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

Reasons for the Decision

Written Description and Map of External Boundaries

At Attachment A of the application the applicants provide a description of the external boundary of the area covered by the application.

Attachment B to the application provides a map depicting the external boundary with shading identifying the claim area. The map contains a scale bar, north point and locality map.

In the Geospatial assessment dated 10 December 2002 the Tribunal's Geospatial Unit confirmed that the description of the external boundaries and the map is sufficient to meet the requirements of s.62(2) and s.190B(2) and describes the application area with reasonable certainty. It follows that I am satisfied that the external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and the map contained in the application.

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

Internal Boundaries

The internal boundaries of the application are defined at paragraphs 2 and 3 of Schedule B of the application. These boundaries are described by way of a formula as follows:

(2) Any areas within those boundaries that are not covered by this application.

(2)(a) Subject to Schedule L, any area within the external boundaries of the area claimed in relation to which all native title rights and interests have been wholly and validly extinguished by laws of the Commonwealth, New South Wales or Queensland, including the common law, is excluded from the area claimed.

It is my view that the description of areas excluded by class can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data

held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants. Accordingly I consider that the description provides a reasonable level of certainty in regard to whether native title rights and interests are claimed in relation to particular areas of land or waters within the external boundaries of the area subject to the application.

Conclusion

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

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

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

Reasons for the Decision

Under this section, I am only required to be satisfied that one of the requirements in s190B(3) is met.

The application does not name all of the native title claim group and consequently, s190B(3)(a) is not applicable.

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

The native title claim group is described in Schedule A of the application. Schedule A provides, inter alia, that the persons in the native title claim group are all the Mithaka persons descended from named apical ancestors. It further lists family groups based upon those apical ancestors.

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

The requirements of s190B3(b) are satisfied.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

Native title rights and interests claimed by the applicants

The native title rights and interests claimed are described in Schedule E of the application as the rights and interests:

a) to make decisions about the use and enjoyment of the area;
b) to reside on the area
c) to have access to and within the area
d) to control the access of others to the area;
e) to use and enjoy the resources of the area;
f) to control the use and enjoyment by others of the resources of the area;
g) to share, exchange and trade in the resources of the area;
h) to a proportion of any resources taken by others from the area;
i) to exclude others from places of importance on the area;
j) to maintain objects and places of importance in the area;
k) to protect objects and places of importance in the area;
l) to carry out and maintain burials of deceased members of the native title claim group on the area;
m) to maintain the traditional laws and customs by which the native title claim group has a connection with the area, where such laws and customs relate to the control of access to and use of the area;
n) to determine and regulate membership of, and recruitment to, the native title claim group.

I note the following qualifications to the claimed rights and interests:

1. Schedule E states at paragraph 2 that:

   'the native title claim group acknowledges that:

   a. their native title rights and interests are subject to all valid and current laws of the Commonwealth, South Australia and Queensland.
   b. the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws;
   c. native title rights and interests may have been partially extinguished by relevant valid laws of the Commonwealth, New South Wales, South Australia and Queensland.'

2. Schedule E states at paragraph 3 that the applicant does not in this application claim any native title rights and interests which have been validly extinguished under laws of the Commonwealth, New South Wales, South Australia or Queensland, including the common law, including the following rights and interests:

(a) to exclude others from places of importance on the area;
(b) to control the access of others to the area.

3. Schedule Q of the application states that the applicants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

4. Schedule P of the application indicates that the applicants do not claim exclusive possession over any offshore place

The requirements of the Act
Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered. [1]

S.62(2)(d) requires that the application contain "a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law." This terminology suggests that Parliament intended to screen out applications which describe native title rights and interests in a manner which is vague, or unclear.

The phrases 'native title' and 'native title rights and interests' are defined in s.223 of the *Native Title Act* 1993 (Cwth).

s.223(1) reads as follows:

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

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

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

only be satisfied that at least one of the rights and interests claimed is sufficiently described for it to be readily identified.

I have considered the description of native title rights and interests in the present application in light of previous judicial findings. As a result, I am satisfied that the rights and interests claimed by the applicants in Schedule E are native title rights and interests and that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

The application meets the requirements of s.190B(4) and s 62(2)(d).

Result: Requirements met

s.190B(5)

Sufficient factual basis:

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

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

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

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

Reasons for the Decision

For satisfaction of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s.190A(3); regard will also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it." For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[5] ." I will therefore look at the totality of information in the application, in reaching my decision under this section.

I must be satisfied, pursuant to s.190B(5), that a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided to support the assertions that:

- the native title claim group have, and their predecessors had, an association with the area claimed;
- traditional laws and customs, acknowledged and observed by the native title group, exist;
- the native title claim group continue to hold native title in accordance with those traditional laws and customs;

is sufficient to support those assertions: see *Martin v Native Title Registrar* [2001] FCA 16

Material which addresses the requirements of s.190B(5) is contained in Schedules F, G and M. A general description of the factual basis on which it asserted that the three criteria identified at s.190B(5)(a) -(c) are met is provided in Schedule F of the application. Refer to my reasons under s.62(2)(e) above.

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

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

Predecessors Association

I refer to my reasons above in relation to the requirement of s.62(2)(e)(i) in which I set out the information and general description provided by the applicants.

Current Association

At Schedule F of the application the applicants refer to information in Schedule G in relation to traditional usage of the land and waters included in the claim area. This information demonstrates the continuing association of members of the native title claim group with the claim area.

Some of the current activities carried out by members of the native title claim group described at Schedule G include:

- residing on the area (a)
- hunting and collecting animals, fish and other foods (b)
- building and using shelters on the area (c)
- using waters from the area (d)
- sharing, trading, and exchanging resources derived from the land and waters within the area (e)
- camping on the area (j)
- building and using traps on waterways (h)
- restricting the access of outsiders to the land and waters within the area (m)
- responsibility for caring for the land and waters within the area in accordance with spiritual, economic and social obligations. (n)
- maintaining traditional knowledge of the land and waters and passing that knowledge on to younger generations (q)

Conclusion

Having regard to the information contained in the application, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

(b) existence of traditional laws acknowledged by, and traditional customs observed by, the native title claim group

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

On the basis of the information in Schedule G and Attachment F of the application it is clear that there exist traditional laws and customs observed by the native title claim group that give rise to the claim to native title rights and interests.

At Schedule G of the application the applicants provide details of activities currently carried out by members of the claim group and of traditional physical connection by some members of the

claim group to the claim area. Examples of these activities are set out in my reasons for s.190B5(a) above. These activities support the existence of traditional laws and customs relating to hunting and food gathering, sharing and exchange of resources, regulating the access of outsiders to the land and waters within the claim area, conduct of ceremony, responsibility for caring for the land and waters within the claim area, and passing on traditional knowledge to the younger generation.

Having regard to the information contained in the application, I am satisfied that there is a sufficient factual basis to support an assertion that some traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to some native title rights and interests.

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

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

Schedule G of the application contains information in relation to current activities, which reflects the contemporary exercise of traditional laws and customs. Examples of these activities are set out in my reasons for s.190B5(a) above.

These activities suggest the continued existence of traditional laws and customs relating to hunting and food gathering, sharing and exchange of resources, regulating the access of outsiders to the land and waters within the claim area, conduct of ceremony, responsibility for caring for the land and waters within the claim area, and passing on traditional knowledge to the younger generation. Refer to my reasons under s.190B(5)(a) and (b) above.

Having regard to the information contained in the application, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

Conclusion

The three subsections of S.190B(5) are however all governed by the requirement in the section that ..":the factual basis …is sufficient to support the assertion." The word "sufficient" here is significant and in order that I be satisfied I must consider whether the facts (as distinguished from assertions) are credible, relevant and relate both to the applicants and the area

In this application the applicants have provided very little by way of supporting material and I am basically confined to the material within the schedules. It is important to note that the affidavits verifying the Application as a whole give to the material in the Application a higher degree of credibility as evidence than would unsworn material but I must nonetheless find the necessary facts and this in the end must be a subjective assessment Given the paucity of information available to me then it is difficult for me to to reach the requisite degree of certainty that such a sufficient factual basis has been

shown without a need for further enquiry on my part (see :Martin v Native Title Registrar) although appropriate inferences may be drawn.
Taking all the above matters into consideration, I am satisfied that the factual basis provided sufficiently supports some of the native title rights and interests claimed but in the absence of further material (such as, for example, anthropological or contact reports or affidavits by the applicants) I cannot find sufficient facts to be satisfied as to others.
I am satisfied that a sufficient basis exists for the following rights and interests:

- to reside on the area
- to have access to and within the area
- to use and enjoy the resources of the area
- to maintain objects and places of importance in the area.

Result: Requirements Met

s.190B(6)

Prima facie case:

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

Reasons for the Decision

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

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

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

The definition is closely aligned with all the issues I have already considered under s.190B5. I will draw on the conclusions I made under that section in my consideration of s.190B6.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:
"The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight; on the face of it; as it appears at first sight without investigation." [citing Oxford English Dictionary (2nd ed) 1989]."

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

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s.190B(4) of the registration test. My decision in relation to which of the claimed native title rights are prima facie established now follows. I have considered the same material against this section as was detailed in my reasons relating to s.190B(5).

a) To possess, occupy, use and enjoy the area to the exclusion of all others

Not established

I will nonetheless give consideration to this claim and those following pursuant to S190B(6) even where I have concluded that they have not satisfied the requirements of S190B(5)..

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, *prima facie*, be established.[6]

However, the Court indicated that such a claim may only be able to be established *prima facie* in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (i.e., where the applicants claim the benefit of ss.47, 47A or 47B). Over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms": at [51].[7] Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [919].[8]

It would seem, then, that without further investigation, a non-exclusive right to possession, occupation, use and enjoyment is not capable of being established *prima facie*.

I note the following statements in Schedule E:

(2) the native title claim group acknowledges that:

d. their native title rights and interests are subject to all valid and current laws of the Commonwealth and the State of Queensland.
e. the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws;
f. native title rights and interests may have been partially extinguished by relevant valid laws of the Commonwealth, New South Wales and Queensland.'

(3) Subject to Schedule L, the applicant does not claim any native title rights and interests which have been validly extinguished under laws of the Commonwealth, New South Wales of Queensland, including the common law, including the following rights and interests:
(a) to possess, occupy, use and enjoy the area to the exclusion of all others;
(b) to control the access of others to the area.'

At Schedule L of the application the applicants claim the benefit of s.47, 47A and 47B. They state, but do not otherwise particularize, that at least one member of the native title claim group occupied the vacant crown land in the area covered by this application when this application was made.

I am of the view that a reading of the statements in Schedule E, following the right described at a), may amount to a description of a composite right to 'possession, occupation, use and enjoyment' non-exclusively over areas where there has been partial extinguishment of any exclusivity in respect of the native title rights and interests that may be claimed. Following the obiter of the majority in *Ward*, I am of the view that this is not a native title right and interest that

[6] At [51].
[7] Refer also *Ward*, [48], [52], [53] and [89].
[8] Refer also *De Rose*, [918]-[920]

can be prima facie established over any part of the claim area covered by this application, where a claim to exclusive possession cannot be sustained.

Insofar as this right relates to any part of the claim area where a claim to exclusive possession can be sustained, I have had regard to the following material:

At Schedule F of the application, it is stated that:

- the Mithaka people are traditionally the owners of the land and waters in the area covered by the application. (para 1)
- since time immemorial, in accordance with traditional laws and customs, the area claimed has been regarded as belonging to the Mithaka people. (para 5)
- The area claimed has continued to be owned and occupied by the Mithakapeople after the assertion of sovereignty by the Crown of the United Kingdom. (para 6)

There is evidence at Schedule G of the application to support occupation, use and enjoyment of the claim area. The applicants state that they:

- reside on the area
- hunt and collect animals, fish, and other foods from the land and waters within the area
- share, trade and exchange resources derived from the land and waters
- travel across the land and waters
- camp on the area
- conduct ceremonies
- are responsible for caring for the land and waters with in the area in accordance with spiritual, economic and social obligations
- bury the dead on the area
- maintain traditional knowledge of the land and waters
- pass on the knowledge to younger generations

although it should be noted that I have found at S190B(5) that insufficient factual basis has been provided for some of these.

My findings in relation to S190B(5) however were that there was not sufficient factual basis provided to support all those assertions and accordingly I must also find that this claim cannot prima facie be established

In light of the decision in *Ward*, the applicants cannot claim exclusive possessory or proprietary rights over land and waters where there may have been extinguishing acts except if they are claiming the benefits of ss.47, 47A or 47B. As the applicants, at Schedule L of the application have claimed the benefits of s 47B, the right , were there to be sufficient factual material to satisfy S190B(5) could otherwise prima facie be established.

b) To make decisions about the use and enjoyment of the area

Not established

The majority in *Ward* were of the view that without the right, as against the whole world, to possession of an area of land/waters (i.e. exclusive possession), it is doubtful that there is any right to control access to land or to make binding decisions about the use to which it is put – at [51]-[52]. I am of the view that the right described at (b) seeks to establish a right to make binding decisions about the use to which land is put. I am of the view that this is not a native title right and interest that may be prima facie established where a claim to exclusive possession cannot be sustained. Accordingly, this right and interest can only be established where a claim to exclusive possession can be successfully sustained.

Schedule G of the application provides further evidence of the members of the native title claim group exercising and/or having this right It is stated that the members of the native title claim group:

- Hunt and collect animals; fish and other foods from the lands and waters within the area (para 1((b))
- observe laws and sanctions restricting access to areas of the land and waters within the area according to division of gender, age, and ritual experience (para 1(l)); and
- have responsibility for caring for the land and waters within the area in accordance with spiritual, economic and social obligations (para 1(n)).

On the basis of this material and my findings under S190B(5), I cannot be satisfied that the above native title right and interest is prima facie established .

c) **Reside on the area**

Established

There is material provided to me to support the prima facie establishment of this right and interest. See the letter from QSRBAC of 9 December 2002 , in which they assert that one of the members of the native title claim group, [person 1]" lives on Mithaka country, has worked almost all his life on Mithaka country, and regularly visits and maintains places of importance on Mithaka country."

The applicants state at Schedule G that they reside on the area (1(a)), camp on the area (1(j)) and travel across the land and waters (1(i)). At Schedule M of the application the applicants state that Mithaka People reside on country generally and the area claimed in particular, and have used the land and waters within the area, including entering and travelling across the area claimed.

I am satisfied that this right and interest is prima facie established. It is my view that the prima facie establishment of this right and interest is not restricted to areas where a claim to exclusive possession can be sustained.

(d) to have access to and within the area

Established

Having regard to the same material that I considered above in relation to the prima facie establishment of the right to reside on the area, I am satisfied that this right is also prima facie established. It is my view that the prima facie establishment of this right and interest is not restricted to areas where a claim to exclusive possession can be sustained.

There is sufficient detail, subject to my findings at S190B(5), provided at Schedule G of the application that indicates that the Mithaka People have access to and within the area in that they hunt, collect animals, fish and other foods from the area, they burn within the area, conduct ceremonies, and care for the land and water within the area. These activities could not be carried out without access to and within the area. In particular I note [person 1] activities.

At Schedule F of the application the applicants state that the area claimed continued to be owned and occupied by the Mithaka people after the assertion of sovereignty by the Crown of the United Kingdom. At Schedule M they state that the members of the native title claim group have used the land and waters in the area covered by the application, including entering and traveling across the area claimed.

I am satisfied that this right and interest is prima facie established. It is my view that the prima facie establishment of this right and interest is not restricted to areas where a claim to exclusive possession can be sustained.

e) Control the access of others to the area

Not established
The majority in *Ward* were of the view that without the right, as against the whole world, to possession of an area of land/waters (i.e. exclusive possession), it is doubtful that there is any right to control access to land or to make binding decisions about the use to which it is put – at [51]-[52]. I am of the view that the right described at (e) seeks to establish a right to control the access of others to the area. I am of the view that this is not a native title right and interest that may be prima facie established where a claim to exclusive possession cannot be sustained. Accordingly, this right and interest can only be established where a claim to exclusive possession can be successfully sustained.

At Schedule F of the application the applicants claim that the kinship system recognised by the Mithaka people includes recognition of sanctions and prohibitions relating to relationships, access to land and waters and custodianship (para 10(e)).

At Schedule G of the application the applicants claim that traditional usage by Mithaka People of the area claimed includes restricting the access of outsiders to the land and waters within the area.

On the basis of this material and my findings as to sufficiency under S190B(5), I cannot be satisfied that the above native title right and interest is prima facie established .

f) Use and enjoy the resources of the area

Established
The current legislation reserves the Crown's rights in minerals, petroleum and gas, and as such, these resources are not claimable. At Schedule G para 1(f) of the application the applicants state that they collect *materials including timber, stones, minerals* (my emphasis), *ochre, resin, grass and shell from the land and waters within the area.* In the *Ward* case at [383] it was said that all minerals and petroleum as defined under the Queensland legislation are the property of the Crown.
.
I note that the applicants make the express statement at Schedule E (para 2) that their rights and interests are subject to all valid and current laws of the Commonwealth and the State of Queensland. At Schedule Q (para (1)) the applicants state that they do not claim ownership to minerals, petroleum or gas wholly owned by the Crown. Taking these two statements together, I am of the view that the applicants specifically exclude minerals and that this exclusion clause over-rides the particlars in Schedule E.

At Schedule G of the application the applicants state that they hunt and collect animals, fish and other foods from the land and waters within the claim area (para 1(b)), and that they collect materials including timber, stones, ochre, resins, grass and shell from the claim area (para 1(f)).

I am satisfied that this right and interest is prima facie established. It is my view that the prima facie establishment of this right and interest is not restricted to areas where a claim to exclusive possession can be sustained.

g) Control the use and enjoyment by others of the resources of the area

Not Established
This right and interest is closely aligned to the right and interest I have considered at (e) above. The majority in *Ward* were of the view that without the right, as against the whole world, to possession of an area of land/waters (i.e. exclusive possession), it is doubtful that there is any right to control access to land or to make binding decisions about the use to which it is put – at [51]-[52]. I am of the view that the right described at (g) seeks to establish a right to control access to land or to make binding decisions about the use to which it is put. I am of the view that this is not a native title right and interest that may be prima facie established where a claim to exclusive possession cannot be sustained. Accordingly, this rights and interest is only readily identifiable where a claim to exclusive possession can be successfully sustained.

At Schedule F of the application the applicants state that the kinship system recognised by the Mithaka people includes recognition of sanctions and prohibitions relating to relationships, access to land and waters and custodianship (para 10(e)). At Schedule G the applicants state that the traditional usage by the Mithaka people of the area claimed includes restricting the access of outsiders to the land and waters within the area (para 1(m)).

There is insufficient factual material for this right to be established on a prima facie basis.

On the basis of this material, I am not satisfied that the above native title right and interest is prima facie established.

h)Share, exchange and trade in the resources of the area

Not established
The Full Federal Court in *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171 noted, obiter, that:
"It may well be right… and as seems logical, to view the right to trade as 'an integral part' or integral aspect of a right of exclusive possession".

At first instance Olney J in this case commented (obiter) that the trade consisted of the exchange of goods and did not amount to a right or interest in relation to land or waters as required by s 223. This finding was noted by Merkel J on appeal but his Honour made no comment about it. This issue was not put before the High Court. However, based on the obiter comments of the Full Court, it seems that rights of trade are not recognisable as native title rights and interests as defined in s.223 and cannot be readily identifiable over areas where exclusive possession cannot be claimed.

A right to 'trade' in resources, in light of Ward, is not currently recognised as a registrable native title right, unless it is in relation to 'traditional resources'. At Schedule G para 1(f) of the application the applicants state that they collect materials "including timber, stones, minerals, ochre, resin, grass and shell from the land and waters within the area". The statement in Schedule Q that the native title claim group do not claim ownership of minerals petroleum or gas wholly owned by the Crown satisfies me that the right to trade claimed does not extend to such resources. It could therefore be inferred that the applicants are seeking to claim a right to share, exchange, and trade in traditional resources.

This is evidenced by information at Schedule G of the application in relation to the current activities carried out by Mithaka people in the claim area. These activities include:

- hunting and collecting animals, fish, and other foods from the land and waters (b)
- sharing, trading, and exchanging resources derived from the land and waters within the area (e)
- collecting materials including timber, stones, minerals, ochre, resin, grass and shell from the land and waters within the area (f)

On the basis of this material and my findings under S190B(5), and whilst I accept that these activities may be plausible, I cannot be satisfied that the above native title right and interest is prima facie established.

i) A proportion of any resources taken by others from the area

Not establishe d

I find that recognition of this right and interest is limited to areas where a claim for exclusive possession can be sustained. However, there is insufficient evidence in the material before me to support this right on a prima facie basis.

j) Maintain objects and places of importance in the area

Established
The information in the application provides sufficient evidence of the members of the native title claim group exercising and/or having this right on a prima facie basis.

At Schedule F the applicants state that:

- there are many sites of significance to the Mithaka People on the area claimed (para 7);
- they fulfill their spiritual obligations with regard to the land and waters (para 11(a)); and
- they observe restrictions imposed by the presence of sites of significance on the land and waters (para 11(c))

In the letter dated 16 December 2002, it is stated that [person 1]

- maintains places of importance on Mithaka country

At Schedule G of the application the applicants state that the traditional usage by the Mithakapeople of the area claimed includes responsibility for caring for the land and waters within the area in accordance with spiritual, economic and social obligations (para 1(n)).

I am satisfied that this right and interest is prima facie established. It is my view that the prima facie establishment of this right and interest is not restricted to areas where a claim to exclusive possession can be sustained.

k) protect objects and places of importance in the area

Not established
This right and interest is closely aligned to the right and interest I have considered at (j) above however it requires a higher level of control but as before I find that it lacks sufficient factual basis under S190B(5) to be established prima facie..

l)Carry out and maintain burials of deceased members of the native title claim group

Not Established
The applicants state at Schedule G of the application that they bury the dead on the area (para 1 (o)).

There is no material currently before me that can establish this right on a prima facie basis.

m) Maintain the traditional laws and customs by which the native title claim group has a connectio n with the area, where such laws and customs relate to the control of access to and use of the area

Not established
This right and interest is closely aligned to the rights and interests I have considered at (e) and (g) above. Refer to my reasons for de cision under those rights and interests. Given that this right and interest involves control of access to and use of the area, I am of the view that this is not a native title right and interest that may be prima facie established where a claim to exclusive possession cannot be sustained. Accordingly, this rights and interest is only readily identifiable where a claim to exclusive possession can be successfully sustained.
Given my findings under S190B(5) however this right cannot be established.

n)Determine and regulate membership of, and recruitment to, the native title claim group.

Not established
In Schedule F of the application the applicants outline a number of traditional laws and customs relating to determining and regulating membership of the native title claim group. They state that the kinship system includes:

- recognition of common ancestors (10(a));
- common and interdependent familial ties which determine traditional rights and customs regarding land and waters (10(b));
- recognition of individual or group connection to lands and waters (10(f));
- recognition of each individual's connection to land and waters through his or her place of conception, place of birth, his or her mother's place of birth and his or her father's place of birth (10(i)).

I am satisfied that this right and interest is not prima facie established for the reasons given in my findings under S190B(5)..

Conclusion
I am satisfied that the following native title rights and interests are prima facie established:

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

a) *not established*
b) *not established*;
c) to reside on the area
d) to have access to and within the area
e) *not established*
f) to use and enjoy the resources of the area;
g) *not established*

h) not established
i) not established
j) to maintain objects and places of importance in the area;
k) *not established*
l) *not established*
m) *not established*
n) *not established*

B . In respect of areas covered by the claim over which a claim to exclusive possession cannot be sustained

a) not established
b) not established;
c) to reside on the area
d) to have access to and within the area
e) not established
f) to use and enjoy the resources of the area;
g) not established
h) not established;
i) not established
j) to maintain objects and places of importance in the area;
k) *Not established*
l) *not established*
m) *not established*
n) *not established*
.

Result: Requirements met

s.190B(7)

Traditional physical connection:

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

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

(i) the Crown in any capacity; or

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

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

Reasons for the Decision

Under s190B(7)(a), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application. This is found in Schedules F, G, L and M.

Paragraphs 4 and 5 at Schedule F, states that:

> *"The Mithaka People continue to acknowledge traditional laws, observe customs, and possess and exercise their traditional rights and interests, in relation to country which includes the area claimed"; and*
> *"Since time immemorial, and in accordance with traditional laws and customs, the area claimed has been regarded as belonging to the Mithaka People.*

Schedule M of the application asserts that the Mithaka People have maintained a traditional physical connection with the land and waters within the claim area and the throughout their lives members of the native title claim group have used the land and waters within the area covered by this application, including entering and traveling across the area claimed.

Schedule G of the application includes and description of activities carried out by the native title claim group. Such activities include:

- Residing on the area;
- Traveling across the land and waters within the area;
- Camping on the area; and
- Conducting ceremonies on the area;

It is also stated in Schedule L of the application that at least one member of the native title claim group occupied the Vacant Crown Land in the area covered by this application when this application was made.

Also in a letter from QSRBAC to the National Native Title Tribunal dated 9 December 2002, it is stated that:

"[person 1] (one of the applicants) lives on Mithaka country, has worked almost all his life on Mithaka country, and regularly visits and maintains places of importance on Mithaka country".

Based on this information and the sworn affidavits of all applicants, I am satisfied that the claim group has the requisite traditional physical connection.

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

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

Reasons for the Decision

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

S61A(1) Native Title Determination

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

S61A(2) Previous Exclusive Possession Acts

In Schedule B of the application class exclusions are made. For the reasons provided above at s190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded which includes all previous exclusive possession acts apart from those where s47B operates..

S61A(3) Previous Non-Exclusive Possession Acts

The applicants do not state that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts.

However Schedule E of the application states at Paragraph 2 that

'the native title claim group acknowledges that:

a) their native title rights and interests are subject to all valid and current laws of the Commonwealth and the State of Queensland.
b) the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws;
c) native title rights and interests may have been partially extinguished by relevant valid laws of the Commonwealth, New South Wales and Queensland.'

This statement is repeated in paragraph 4 of Schedule J of the application (the draft order) in the following terms:

'To the extent that valid interests, other than native title rights and interests, exist in the determination area, in these draft orders called 'the other interests', the native title rights and interests described in paragraph 3 above and the other interests are concurrent rights and interests in relation to that part of the determination area to which the other interests relate, but by operation of laws of the Commonwealth and Queensland, including the common law, the exercise of some of those concurrent rights, including the native title rights and interests, may be regulated, controlled, curtailed, restricted, suspended or postponed'.

At Paragraph 3 of Schedule E of the application the applicants state that they do not claim any native title rights and interests which have been validly extinguished under laws of the Commonwealth, New South Wales of Queensland, including the common law, including the following rights and interests:
(a) to possess, occupy, use and enjoy the area to the exclusion of all others;
(b) to control the access of others to the area.

Accordingly, I am satisfied that the applicants' intention was to qualify the exclusivity of the rights and interests. I have read this qualification to mean that the rights and interests claimed do not extend to excluding others in respect of any area where a previous non-exclusive possession act as defined in s.23F was done or a valid non-exclusive tenure exists which, at law affects permanently the rights or interests of native title holders.

S61A(4) - s.47, 47A 47B

The applicants claim the benefit of s47B at Schedule L of the application. I am required to ascertain whether this is an application that should not have been made because of the provision s61A. In my opinion, the applicants' express statements with respect to the provisions of that section are sufficient to meet the requirements of s190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of s47B is a matter to be settled in another forum.

Conclusion

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

Conclusion

For the reasons as set out above I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s.61A the application should not have been made.

Result: Requirements met

s.190B(9)(a)

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

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

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

Reasons for the Decision

Schedule Q of the application states that:

1. The native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.
2. The native title claim group does not assert that the Crown does not wholly own minerals, petroleum or gas in and beneath the area covered by this application.

I accept that this exclusionary clause over-rides the claim made, inter alia, that minerals are collected at ScheduleG (f)

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

The claim area does not include any offshore area. Furthermore, in Schedule P of the application, the applicants have stated that this section is "Not Applicable".

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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

Reasons for the Decision

The application does not disclose and I am not otherwise aware of any other extinguishment of native title rights and interests in the area claimed. I am satisfied that the requirements of this section have been met.

Result: Requirements met

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