National Native Title Tribunal

Registration test decision

Application name:	Boonthamurra
Name of applicant:	Mark Wallace, Barbara Olsen
State/territory/region:	South West Queensland
NNTT file no.	QC06/15
Federal Court of Australia file no.	QUD435 of 2006
Date application made:	2 November 2006
Date application last amended:	The Tribunal provided comments on a draft application on 17 October 2006. No assessment was provided on the application after it had been filed.
Name of delegate:	Brendon Moore

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(1B), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 5 April 2007

Brendon Moore

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

Reasons for decision

Table of contents

Introduction **5**

Delegation of the Registrar's powers 5
The test 5
Information considered when making the decision 5
Application overview 6
Procedural fairness steps 6

Procedural and other conditions: s. 190C **7**

Section 190C(2) Information etc. required by ss. 61 and 62 7
Delegate's comment 7
Native title claim group: s. 61(1) 7
Result 7
Reasons 7
Name and address for service: s. 61(3) 9
Result 9
Reasons 9
Native title claim group named/described: s. 61(4) 9
Result 9
Reasons 9
Application in prescribed form: s. 61(5) 9
Result 9
Reasons 9
Affidavits in prescribed form: s. 62(1)(a) 10
Result 10
Reasons 10
Application contains details required by s. 62(2): s. 62(1)(b) 11
Delegate's comment 11
Result 11
Information about the boundaries of the area: s. 62(2)(a) 11
Result 12
Reasons 12
Map of external boundaries of the area: s. 62(2)(b) 12
Result 12
Reasons 12
Searches: s. 62(2)(c) 12
Result 12
Reasons 12

Description of native title rights and interests: s. 62(2)(d) 13
Result 13
Reasons 13
Description of factual basis: s. 62(2)(e) 13
Result 13
Reasons 13
Activities: s. 62(2)(f) 14
Result 14
Reasons 14
Other applications: s. 62(2)(g) 14
Result 14
Reasons 14
Section 29 notices: s. 62(2)(h) 15
Result 15
Reasons 15
Combined result for s. 62(2) 15
Combined result for s. 190C(2) 15
Section 190C(3) No common claimants in previous overlapping applications 15
Result 16
Reasons 16
Section 190C(4) Authorisation/certification 17
Result 17
Reasons 18
Merit conditions: s. 190B 32
Section 190B(2) Identification of area subject to native title 32
Delegate's comment 32
Information regarding external and internal boundaries: s. 62(2)(a) 32
Result 32
Reasons 32
Map of external boundaries: s. 62(2)(b) 34
Result 34
Reasons 34
Combined result for s. 190B(2) 35
Section 190B(3) Identification of the native title claim group 35
Result 35
Reasons 35
Section 190B(4) Native title rights and interests identifiable 36
Result 36
Reasons 36
Section 190B(5) Factual basis for claimed native title 38
Result re s. 190B(5) combined 38
Reasons re s. 190B(5)(a)(b) and (c) 38
Section 190B(6) Prima facie case 46
Result 46

Reasons....46
Section 190B(7) Traditional physical connection....48
Result....48
Reasons....48
Section 190B(8) No failure to comply with s. 61A....49
Delegate's comments....49
No approved determination of native title: s. 61A(1)....49
Result....49
Reasons....49
No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)....49
Result....50
Reasons....50
No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)....50
Result....50
Reasons....50
Combined result for s. 190B(8)....50
Section 190B(9) No extinguishment etc. of claimed native title....51
Delegate's comments....51
Result re s. 190B(9)(a)....51
Reasons re s. 190B(9)(a)....51
Result re s. 190B(9)(b)....51
Reasons re s. 190B(9)(b)....51
Result re s. 190B(9)(c)....51
Reasons re s. 190B(9)(c)....51
Combined result for s. 190B(9)....52
Attachment A Summary of registration test result where application is not accepted for registration....53
Attachment B Documents and information considered....56

Introduction

This document sets out my reasons for the decision to accept or not accept, as the case may be, 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 all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court).

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 his 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 5 April 2007. 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.

Where the application has not been accepted for registration, a summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Section 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 judgements in the courts) relevant to the application of the registration test. Amongst 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.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

I have *not* considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Application overview

The application was filed with the Federal Court on 2 November 2006.

The application was intended as a replacement application for QC01/30 (Boonthamurra People) in which the Federal Court made an order that the application stand dismissed as of 30 March 2007.

The Tribunal provided comments on a draft application on 17 October 2006.

No assessment was provided on the application after it had been filed in the Court.

Section 190A(2)—Timeframe for decision due to notices under s. 29 of the Act

There is a s. 29 notice affecting the area claimed in this application. The notice has an end date of 6 April 2007, which is a public holiday. Therefore, the appropriate decision date is prior to the close of business on 5 April 2007.

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 fair, just and unbiased. 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 the Registrar has undertaken to ensure that procedural fairness is observed in this matter are as follows:

Please note: All references to legislative sections refer to the *Native Title Act 1993* (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition.

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 page 16.

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

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

Reasons

Law

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). That is one of the procedural requirements to be satisfied to secure registration. If the description of the native title claim group in the application indicates that not all persons in the native title claim group have been included, or that it is in fact a sub-group of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I should not accept the claim for registration. I am guided in this by the case of *Attorney General of Northern Territory v Doepel* [2003] FCA 1384, 203 ALR 385 (*Doepel*) at paragraph [36].

My consideration under this section does not involve me going beyond the information contained in the application: see *Doepel* [39]. In particular it 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 is in reality the correct native title claim group: *Doepel* at [37].

Information in the application

The description of the persons in the native title claim group is found in Attachment A of the application, which states:

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Boonthamurra People.
>
> The Boonthamurra People are the biological descendants of the following people:
>
> Pumpkin Burrakin
> Jimmy Jones
> Melon Head
> George Docherty Ray
> Kangaroo
> Alen Witchery Ray
> Tippo Ray
> Ronald Ray Pontius Pilot
> Basil Tully
> Kitty Ray (mother of Mark Wallace)
> Tiger Ray
> Mickey Ray
> Rosie Braddle
> Johnson Murray Jacobs
> Dick Ray
> George Jacobs
> Alec Jacobs
> Rosie Jacobs
> Topsy (spouse of Barney)
> Beemore Barney
> Dick Barney
> Frank Yalkili Miller
> Dick Reed
> Jack O'Lantern (Adopted)

Consideration

Although there are significant reasons to be concerned about the composition of the claim group, which are addressed elsewhere in this decision, on the basis of the material on the face of the application I am unable to find that this description does not include all the persons in the claim group or that it comprises a sub-group of a larger claim group.

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

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

Reasons

The name and the address for service of the applicant are found at Part B of the application.

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

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

Reasons

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. I am of the view that under this section my task is not to assess the quality or substance of the statement required by s. 62(1)(a)(v), rather it is to verify that a statement which, on its face, conforms to the requirements of the section has been made.

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

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

Reasons

s.61(5)(a)

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

s.61(5)(b)
The application was filed in the Federal Court, on 2 November 2006, according to s.61(5)(b).

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

s.61(5)(d)
The application is accompanied by affidavits in relation to the requirements of s.62(1)(a) from the applicants.

I am satisfied that the application has complied with s.61(5)(d) in relation to the requirement This condition is met.

See also my reasons in respect of s.62(1)(a) below.

s.62 (1)(b)
There has been compliance with the requirement to include a map pursuant to s. 62(1)(b).

See my reasons for decision under s. 62(1)(a) and s. 62(2)(b) below.

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 subparagraph (iv).

Result

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

Reasons

Law
Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn/affirmed by the applicant in relation to the matters specified in subsections (i) through to (v). To satisfy the

requirements of s. 62(1)(a), the persons comprising the applicant may jointly swear/affirm an affidavit or alternatively each of those persons may swear/affirm an individual affidavit.

Information before me

Affidavits are filed by both persons comprising the applicant. In each affidavit the required statements are interposed amongst other material. In [Applicant 1 – name deleted]'s affidavit relevant statements appear at paragraphs 6, 7, 8, 11 and 12. In [Applicant 2 – name deleted]'s affidavit they appear at paragraphs 4, 5, 6, 9 and 11.

Each of these affidavits are signed by the deponent and competently witnessed.

In relation to the statement required by s. 62(1)(a)(v), the deponents state that they are authorised as an applicant and describe the process of decision-making which occurred but without stating whether the process was a traditional one, or one which the group adopted.

A preliminary assessment of the application in October 2007 drew attention to other concerns about authorisation.

Consideration

A note to s. 62(1)(a), appearing at the foot of subsection (iv), directs the reader to s. 251B for the meaning of the word authorise. As this subsection does not state explicitly that the s. 62 affidavit must specify whether the method was traditional or agreed, I have come to the view that the presence of the note itself referring to s. 251B is explanatory in nature, and that the appropriate place to consider the merits of what is said in those affidavits is at s. 190C(4).

The affidavits do not state or allow identification of which form of process was used to authorise the applicant but I have come to the conclusion that a basis has been described even though it lacks particularity and may not satisfy the requirements of s. 190C(4).

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 8 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 at page 16 below and is one and the same as the result for s. 62(1)(b) here.

Result

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

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

Reasons

It is my opinion that there are maps and information contained in the application which may enable the area covered by the application to be identified with reasonable certainty.

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by ss. 61 and 62 of the Act. It does not require me to make any assessment of those details and that information beyond being satisfied that, on its face, it is responsive to the requirement of the section.

A written description and map that enables the external boundary of the area covered by the application to be identified is found in Attachments B and C of the application.

Additionally, a written description of the areas within the external boundary of the application area, not covered by the application, is found in Schedule B of the application.

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

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

Reasons

A map apparently showing the outer or external boundaries of the application area is found in Attachment C to the application.

Searches: s. 62(2)(c)

The application must contains 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

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

Reasons

Schedule D of the application contains the statement that 'no searches have been carried out by the current applicant'.

The section requires 'details and results of all searches carried out' and the requirement is not limited by reference to who carries out those searches, except to say that as a matter of construction the delegate understands the section as meaning 'carried out by or on behalf of the applicant'. The section could not be intended to burden the applicants with a requirement to provide details of searches done by others.

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

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

Reasons

A description of the claimed native title rights and interests is found in Schedule E. The description does not merely consist of a statement to the effect 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.

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

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

Reasons

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained <u>in</u> the application, and can not be the subject of additional information provided separately to the Registrar or his delegate.

The Court said:

> The information here required by s 62(2)(e) is clearly part of the application filed in Court and changes to it should be notified to the Court and the parties in the manner prescribed, which is to say by a process of amendment: and see *Strickland & Anor v Western Australia & Ors* (1999) 89 FCR 117. Had such an application been made, the State would have been made aware of the new detail, either on or following the application and these proceedings would have been largely unnecessary. Other parties would also be notified after amendment: see s 64(4). At [21]

The application contains a general description of the factual basis for the assertion that the claimed native title rights and interests exist and for the particular assertions in Schedule F.

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

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

Reasons

The application contains these details in Schedule G.

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

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

Reasons

Schedule H of the application filed on 2 November 2006 lists the following matters:

> Wanggumara People #3–QUD 6013 of 1999; QC99/008.
> Mardigan People–QUD 6034 of 1998; QC99/015.
> Wangkamurra People 2–QUD 6026 of 1999; QC99/029.
> Kullilli People #2–QUD 6025 of 2002; QC02/028,
> Kullilli People #3–QUD 6026 of 2002; QC02/029.

All of these have been dismissed or discontinued since the application was filed.

An assessment by the Tribunal's Geospatial Unit dated 20 November 2006 also notes Bidjara People No 5–QUD370/06 and Boonthamurra People–QUD435/06 as being made in relation to part or the whole of the area, but they are not noted in the schedule. It also notes Wanggumara People #3–QUD 6013 of 1999, Mardigan People–QUD 6034 of 1998, and Wangkamurra People 2–QUD 6026 of 1999 but does not note Kullilli People #2 or Kullilli People #3.

The section requires the application to contain details of which 'the applicant is aware'. I have no reason to believe that the applicant was aware of the other matters and failed to list them.

Schedule H also does not mention Boonthamurra People QUD 6028/01, but it is noted at Schedule O and I am of the view that the requirements of the section are thus satisfied. By Order of the Federal Court that matter stood dismissed as at 30 March 2007. At the time of the making of this decision it has been dismissed.

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

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

Reasons

These details are found in Attachment I of the application.

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), as set out above. See also the result for s. 62(1)(b) above.

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

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

Reasons

Law

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3)—which essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application'—is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) FCR 33 (*Strickland FC)* at [9].

For the purposes of s. 190C(3)(c), consideration of the entry in relation to the previous application under s. 190A takes place at the time that the Registrar applies the registration test to the current application, i.e. the relevant time is not when the current application was made but when it is being considered under s. 190A—see *Strickland FC* at [53]-[56].

This application was filed in the Federal Court on 2 November 2006. For the purposes of s. 190C(3)(b), the application is taken to have been 'made' on that date.

As a first step, s. 190C(3) requires identification of previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A. The applicants state at Schedule H of the application that they are not aware of any other applications.

Information before me

I must consider the application as at the time of testing. An inspection of the Register of Native Title Claims and the Schedule of Applications by me on 3 April 2007 shows that the only application currently falling within the external boundaries of the application is Bidjara People No 5–QUD370/06.

Bidjara People No 5 is not registered.

Is there a relevant previous overlapping application?

I must consider whether subsections (a) – (c) apply. They are:

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

The Bidjara application covers part of the area claimed in the application under consideration, so this subsection applies.

(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.

The Bidjara application is not registered and thus the previous application was not on the Register at the time of making this decision.

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

As Bidjara #5 is not on the Register I need consider the matter no further.

I am satisfied that no person included in the native title claim group for the current Boonthamurra application is a member of the native title claim group for any previous application.

Section 190C(4) Authorisation/certification

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

(a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), 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. 203BE(4), certification of a claimant application by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and

(b) briefly set out the body's reasons for being of that opinion, and

(c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

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

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am not satisfied that the circumstances described by either ss. 190C (4)(a) or (b) are the case in this application and therefore the condition of s. 190C (4) as a whole is **not met**.

Reasons

Law

Authorisation or Certification: the role of the delegate

The nature of the Registrar's task was set out in *Doepel* at paragraph [78]

> 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).

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.

Does s. 190C(4)(a) or (b) apply?

The application has not been certified, so I must consider the requirements of s. 190C(b), which 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.

Is s. 190C(5) satisfied?

If the application has not been certified and s.190C(4)(b) applies, the Act imposes two conditions at s. 190C(5) (a) and (b) which are largely procedural in nature, being preconditions about which the Registrar must be satisfied before proceeding to consider the more evaluative task 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 statements required by both subsection (a) and (b) are to be found at Schedule R.

As both of these conditions are satisfied I now turn to consider whether I am satisfied 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 the other persons in the native title claim group.

How may applications be authorised?

Authorisation is defined at 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.

The importance of authorisation

The Federal Court has consistently emphasised the fundamental importance the NTA places on ensuring that claimant applications are properly authorised.[1] French J said this about authorisation in *Strickland v Native Title Registrar* [1999] *FCA 1530,* a decision upheld by the Full Court:

> 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* [2002] FCA 1147, 194 ALR 278 at [11] he 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.

---

[1] *Ankamuthi People v Queensland* [2002] FCA 897, Drummond J; *Strickland v Native Title Registrar* [1999] FCA 1530, 168 ALR 242, French J; *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637; *Quall v Risk* [2001] FCA 378 *Daniel v State of Western Australia* [2002] FCA 1147, French J.

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

Who must authorise?

Authorisation must be by 'all the other persons in the claim group'. It is clear as a matter of law that the requirement that the applicant be authorised by 'all the other persons' in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant[2]. There may, for example, be individual members of the claim group who for one reason or another are incapable of authorising an applicant—for example, because they are of unsound mind, ill, or unable to be located or are incapacitated. It may also be the case that 'all the other persons' do not individually have to authorise the making of the application, where, for example, a traditional process is used which allows only some persons, such as male elders, to make the relevant decisions[3].

More recent decisions of the Federal Court expanded the scope of what might be acceptable in satisfaction of the section. 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].

In *Noble v Mundraby* [2005] FCAFC 212 (*Noble*), in a s.66B application, the Full Court said:

> …Agreement within the contemplation of s 251B may be proved by the conduct of the parties. There was evidence in this case that the claim group conducted itself at the meeting on the basis that it agreed to a vote by the members of the group to determine the question of authorisation. All persons present voted in favour of the motion. Nobody is recorded as leaving the meeting or refusing to vote or in any other way conducting to indicate dissent from the course adopted. There was thus evidence from the conduct of the claim group on which the primary judge could base his conclusion that the requirements of s 251B were satisfied—at [18].

I do not understand these decisions, however, as in any way detracting from the emphasis placed on authorisation by the earlier authorities.

---

[2] *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J. Refer also O'Loughlin J, *Quall v Risk* [2001] FCA 378 at paragraphs [33–34].

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

In *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] *FCA 1637* (*Moran*) Wilcox J observed, of a factual situation sharing similarities with the present application:

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

In *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 (*Bolton*) French J said, again of a case with similar features to the one I am considering:

> As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title – *Western Australia v Strickland* (2000) 99 FCR 33 at 52; see also *Moran v Minister of Land and Water Conservation (NSW)* [1999] FCA 1637—at [43]
>
> If, as may well be the case, there is no relevant and mandatory traditional decision-making process applicable to the making and conduct of a native title determination application then a process 'agreed to and adopted by the persons in the native title claim group' will suffice as the source of authority for applicants representing members of the group. That is no light requirement. It means that the authorisation process must be able to be traced to a decision of the native title claim group who adopt that process. The conferring and withdrawal of authority for the purposes of a s 66B application must be shown as flowing from the relevant native title claim group—at [44].
>
> In my opinion, each of the motions for amendment under s 66B suffers from the same fatal deficiency. The evidence is insufficient to demonstrate that there has been notification to members of the native title claim group as defined or that those who attended belonged to it. A fortiori, there is no evidence that the meetings were, in any sense, fairly representative of the native title claim groups concerned. In so saying I do not wish to be taken to be critical of the SWALSC. It may be that there is a chronic difficulty that cannot be overcome despite its most heroic efforts because of the apathy, lack of interest, or divided opinions held by members of the relevant native title claim groups. If that be so, then that may be a reason for reconsidering whether the applications should proceed at all. It is not a basis for accepting a constructed 'decision-making' process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native

title claim group or persons properly representing them as a substitute for the authorisation required by the Act—at [46].

What does the application say about the authorisation process?

At Schedule R the application states that:

> (a) The Applicants are members of the Native Title Claim Group and are authorised to make this application and deal with matters in relation to it by all the other persons in the native title claim group.
>
> (b) The applicants were appointed at a meeting specially convened for the purpose on 22 April 2006 at the Quilpie Shire Hall, Quilpie that was attended by members of the claim group who had authority to make decisions on their own behalf and for the members of their respective family groups.
>
> (c) The meeting was widely advertised in state and indigenous newspapers and also by radio. Notices were displayed at local community indigenous centres such as Aboriginal legal centres and health centres.
>
> (d) Prior to the meeting a senior anthropologist was engaged by QSNTS to compile, from genealogical data of the claim group, a list persons (sic) who constituted the claim group (as being descendant from the apical ancestors specified in schedule A). On the day of the meeting only persons who were included on the list were admitted to the meeting (apart from officers and legal representatives of Queensland South Native Title Services and legal representatives).
>
> (e) A copy of agenda incorporating draft resolutions was circulated to the meeting and provided to senior family members of the claim group who were unable to attend the meeting.
>
> (f) Extensive discussions were undertaken at the meeting by those present and by telephoning senior members of the claim group who were not able to attend the meeting to ensure that the persons in attendance at the meeting had complete authority to make decisions on behalf of all the members of the claim group.
>
> (g) The meeting then approved the lodgement of this Application and authorisation of the Applicant. A copy of the notice of the meeting and minutes of the meeting is included in Attachment R.

[Person 1 – name deleted], Principal Legal Officer affirmed an affidavit on 1st day of November 2006, the relevant portions of which are:

> 2. On or about mid March 2006, I asked [Anthropologist 1 – name deleted], who was the senior anthropologist employed by QSNTS, to provide a claim group description for the Boonthamurra People. He also showed me a list of persons who he said constituted the claim group.
>
> 3. The claim group description included in this application was provided to me by [Anthropologist 1]. [Anthropologist 1] advised me that this list was compiled from genealogical

> research commissioned by Queensland South Native Title Services and that he was of the view that based upon this research no member of the claim group was also a member of a claim group of an overlapping claim.
>
> 4. On 22 April 2006, I attended a meeting for the Boonthamurra People held for the purposes of authorising this Application. Before the meeting, I saw [Anthropologist 1] checking off the persons attending against a list of persons referred to in paragraph 1. I asked [Anthropologist 1] whether he was satisfied that the persons present at the meeting (apart from QSNTS staff) were members of the claim group. He told me that he was satisfied.
>
> 6. I also asked [Anthropologist 1] whether he was satisfied that the persons attending the meeting had authority to speak and make decisions on behalf of the Boonthamurra claim group. He told me that he had spoken to the senior members of each of the Boonthamurra families and as a result was able to confirm that persons in attendance at the meeting did have authority to speak for the Boonthamurra claim group and make decisions for them.
>
> 7. At the meeting I observed that all of the decisions were reached unanimously and in my opinion reflect the views of the persons in attendance at the meeting.
>
> 8. [Anthropologist 1] is now no longer employed by QSNTS. I have been unable locate him to have him depose as to the subject matter of this affidavit.

It is worth noting at this point that I do not find this affidavit of much assistance. Not only is the material hearsay, but it does not satisfactorily address any issue other than whether non-members could gain admission. The documents referred to in it which might have constituted objective evidence, for example, are not provided to me. Nor does it clarify the nature of the process used. It speaks of senior members having authority to speak on behalf of others, but notes that the voting was unanimous. Finally, it provides no factual basis for the opinions set out there, other than the anthropologist's own satisfaction.

The relevant passages of [Applicant 1]'s affidavit dated are:

> 6. I have been authorised to make the Application and to deal with the matters arising from the Application. I was appointed at a meeting specially convened for the purpose on 22 April 2006 at the Quilpie Shire Hall, Quilpie that was attended by members of the claim group who had authority to make decisions on their own behalf and for the members of their respective family groups.
>
> 7. I did not attend the meeting; however, I accept that the persons who did had full authority to speak on my behalf and on behalf of other Boonthamurra family members. Before the meeting I had discussions with senior members of the Boonthamurra People and I agreed that my brother could make the decisions my behalf. From these discussions I know that all of the Boonthamurra families appointed representatives to speak on their behalf at the authorisation meeting. I am completely satisfied that the decisions made at the meeting unanimously reflect the views of the claim group and I unconditionally accept my appointment a person who will constitute the Applicant for this Claimant Application.

The relevant passages of [Applicant 2]'s affidavit are:

4. I have been authorised to make the Application and to deal with the matters arising from the Application. I was appointed at a meeting specially convened for the purpose on 22 April 2006 at the Quilpie Shire Hall, Quilpie that was attended by members of the claim group who had authority to make decisions on their own behalf and for the members of their respective family groups.

5. The meeting to which I refer in paragraph 3 was made up of persons who are acknowledged and respected by all members of the claim group to make decisions on their behalf. I was present at discussions both prior to and at the meeting where the senior members of each family were consulted and it was agreed that the persons present at the meeting could make the decisions on behalf of the claim group. Before the meeting I contacted senior members of the claim group to ascertain whether they would be attending the meeting and if they were not going I ascertained from them who would be their representative at the meeting. At the meeting I again telephoned any senior family member who wasn't present at the meeting and ascertained that the persons present at the meeting had authority to speak on behalf of the claim group. I am completely satisfied that the decisions made at the meeting unanimously reflect the wishes of the claim group and my sister and I have full authority to be the Applicant in the Claimant Application.

Consideration

The first issue

The description of the claim group is in the familiar form of a list of apical ancestors, all of whose descendants are said to be members. It is set out in full in my reasons under s. 190B(3). Whilst such a description may satisfy the requirements of s. 190B(3) it provides no information at all about a number of important, indeed critical, factual matters which must be addressed in any consideration of authorisation.

The first of these is the size of the group. From such descriptions it is not possible to know, or even to estimate how many persons are currently members of the claim group.

It could well be, as was noted in *Moran*, which was also an apical ancestor base description, that there may be hundreds of living descendants. Many of these people may be out of contact with any of the participants in these proceedings —at [34].

There is some oblique evidence that the number of members here may be quite large, given the fairly long list of apical ancestors (see, for example, the Carto-Cult Report at p. 4 where a list of 'families' is given).

I will return to consider the questions raised in that second sentence in *Moran* later.

The second difficulty is that there is no information provided as to how many members attended the meeting at Quilpie. As the total number of members is unknown I am unable to come to any conclusion even as to what percentage of the total membership attended.

It is clear from the affidavits reproduced above that the claim group's representatives have this information, at the very least in [Anthropologist 1]'s list of claim group members referred to in the affidavit of [Person 1], but that list is not provided to me, nor is any information about the number of persons attending, nor the size of the claim group.

How many members there are, and what proportion attended the meeting are not only relevant but fundamental facts if I am to be satisfied whether, the tests propounded in *Noble* and *Lawson* and the earlier cases are satisfied.

It is clear that in the meeting considered in *Noble* the whole claim group was present (see [7] and [18]). The Court held that the intentions of the claim group could be divined from the course of the meeting, at which the relevant process to be used was discussed and apparently agreed upon, at least by implication from the conduct of all the members. I am not convinced that all or even a majority of the members of the present claim group were present, for reasons which will become apparent. I am of the view that the circumstances in the matter before me are sufficiently different that to apply the test in *Noble* would be in error. It is the fact that I am unable to be satisfied about how many were at the Quilpie meeting which is the issue.

On the *Lawson* test I must consider, (subject to what follows in these reasons as the second and third issues about exactly which process was used and by what authority) whether 'the members of the claim group [were] given every reasonable opportunity to participate' in a majority decision making process, whilst bearing in mind the Court's injunctions as to the central importance of authorisation.

As French J said in *Bolton* :

> The evidence is insufficient to demonstrate that there has been notification to members of the native title claim group as defined or that those who attended belonged to it. A fortiori, there is no evidence that the meetings were, in any sense, fairly representative of the native title claim groups concerned … It is not a basis for accepting a constructed 'decision-making' process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native title claim group or persons properly representing them as a substitute for the authorisation required by the Act— at [46]

Without any information about these two factors I am unable to come to any positive satisfaction that the section is satisfied. I find that, whatever occurred at the meeting, I cannot be satisfied firstly whether the persons there constituted a majority of the members and secondly that the conduct of the persons there could be a guide to the intentions of the whole claim group.

The second issue

Directly relevant to satisfaction of the test in *Lawson* is that I must consider whether all the members were given 'every reasonable opportunity to participate' by being made aware of the fact of the meeting.

A copy of a Public Notice is attached at Schedule R. There is no indication whether that same notice or a different one was published in the 'state and indigenous newspapers' referred to, nor on how many occasions.

There is no suggestion that the members of the claim group were advised by mail, other than the following statement in Schedule R which I understand as meaning that certain 'senior family members unable to attend' were the only persons contacted in this way:

> (e) A copy of agenda incorporating draft resolutions was circulated to the meeting and provided to senior family members of the claim group who were unable to attend the meeting.

An anthropological report by Carto-Cult: Cartographic & Cultural Services Pty Ltd was provided for the purposes of the application of the registration test in the Bunthamarra application QC98/14. It is not dated, but refers to research being done in April and May 1999. The authors of that report found it necessary to conduct meetings with members in Quilpie, Roma, Oakey, Brisbane and Toowoomba (p.22). The report also notes that many of the Boonthamurra people were sent away to Government settlements, particularly Cherbourg (pp. 14, 15).

The same point is made in a Report on progress of [Anthropologist 2 – name deleted]'s research for QSNTS by Assoc. Prof (Adjunct) [Person 2 – name deleted], dated 5 December 2002, where he notes that:

> Like other areas in Queensland, but particularly true for southern Queensland, the 'Cluster' area has a bad history of removals, conflict and degradation of Aboriginal people. Under the various Queensland Acts, competition for grazing land led to European persecution of bush-living people, and from early on, the removal of Aboriginal peoples from their lands, and the subsequent diaspora to various settlements and missions, some as far away as Palm Island near Townsville. It is notable that there were no permanent Aboriginal settlements or missions established anywhere west of Cherbourg or Woorabinda, both well to the east—at p.3.

See also the affidavit of [Claimant 1 – name deleted] dated 13 May1999 and filed in QC98/14, at paragraphs 8 and 9 where she deposes to the fact that 'during the mid 1930s …the government started moving Aboriginal people off the station properties' and that 'a whole lot of Aboriginal people were sent away'. She goes on to state that 'the government sent them to the Aboriginal missions and settlements of Barambah and Yarrabah'.

There is other evidence which supports the suggestion that a considerable number of members do not live in or near the claim area. One of the apical ancestors is said to have gone to live in the Kimberley in 1887 and died there in 1908.[4]

After considering all the material provided to me, including the various items of correspondence back and forth concerning the composition of the claim group since the earliest Boonthamurra applications and this application, and the writings of the anthropologists, both of which frequently

[4] Carto–Cult Report, p.10

supply addresses or note other geographic information concerning persons or families, I have come to the conclusion that a substantial portion, perhaps the majority, of the claim group does not live within the claim area. Many do not live in Queensland.

Another difficulty is that the meeting was being held in far south-western Queensland. At the foot of the Public Notice is the statement that:

> 'QSNTS regrets that it is not able to assist with transport to or from the meeting.'

It is difficult to accept that it would be possible or realistic to expect many members who were not locally resident to be able to attend. That would be so, even were the QSNTS able to assist, because of the huge distances involved. Although this might not be decisive of itself, it is a factor which cannot be ignored.

Given the material provided in the application, can I be satisfied that all members were given 'every reasonable opportunity' to participate? Although the Court did not give any guidance on what would be 'reasonable', I do not believe that I can.

Whilst a membership list obviously exists[5] it is noteworthy that there is no mention of written notice of the meeting being given to all the members. I find that written notice was not given to all the members.

The material at Schedule R concerning the steps which were taken to notify the membership of the meeting is sparse and in the most general terms, making any assessment of its efficacy difficult:

> (c) The meeting was widely advertised in state and indigenous newspapers and also by radio. Notices were displayed at local community indigenous centres such as Aboriginal legal centres and health centres.

Even assuming that the indigenous newspapers referred to were of national distribution and that the state newspapers were distributed throughout Queensland, in the absence of any information about their circulation or readership, it seems to me to be inherently improbable that such advertisements, all too often to be found in the classified or public notices sections at the back of the papers would be likely to come to the attention of many members, especially when, so far as I can tell from the material, the advertising of meetings has not happened before in this claim. I am therefore not persuaded to draw an inference, on the basis of the material before me, that such advertisements would be likely to have come, or did come to the attention of those members (in particular) who are living away from the area and who may not consult the public notices columns daily.

The notices exhibited locally at various centres may have drawn the attention of local members, but no more.

Bearing all these factors in mind I am not satisfied that the members of the group were afforded 'every reasonable opportunity' to attend.

---

[5] Schedule R at (d))

The third issue

The application before me is authorised, not certified by a Native Title Representative Body. Prior applications filed on behalf of the Boonthamurra however were certified pursuant to s. 190C(4)(a) by Queensland South Representative Body Aboriginal Corporation. Each of those applications was accompanied by affidavits satisfying the requirements of s. 62.

In the application filed 29 August 2001 in Q6028 of 2001, with the same claim group and the same applicant, a certificate was given by QSRBAC dated 28 August 2001. In a letter to the Tribunal dated 25 June 2002 the [Family 1 – name deleted] asserted that 'there had been no advertising or any other appropriate medium to notify any aboriginal people who had an interest in this particular area'. QSRBAC in a letter of 29 July 2002 did not contradict those facts but queried their importance. I do not have any information before me to suggest whether the same processes applied on subsequent occasions.

In the Amended Applications filed 28 September 2001 and 18 February 2002, the Further Amended Application filed 4 December 2002, and the Further Amended Application filed 30 January 2003, all with the same claim group and the same applicant, a certificate was issued by QSRBAC.

The Certificate in each of those applications was in the same form, the relevant passages stating:

> (4) Queensland South Representative Body Aboriginal Corporation has provided representation to the Boonthamurra People under the Native Title Act 1993 since approximately 1996. Substantial anthropological, archival, historical, archaeological and field research has been completed during that time for the purpose of making Native Title Determination Applications and other matters.
>
> (5) This representation and anthropological research has included detailed consideration of the system of traditional laws and customs which operates in the Boonthamurra region, including the composition of the traditional land owning group, and the identification of the traditional decision making process.
>
> (6) Queensland South Representative Body has conducted a meeting with the Boonthamurra People regarding this application, and other matters pertaining to traditional rights and interest. The Applicants are recognized, in accordance with traditional law and custom, as persons who are authorised to make this application and deal with matters arising in relation to it on behalf of all the other persons in the native title claim group.

Each application was accompanied by s.62 affidavits from the applicants verifying the application. The relevant passage in each affidavit was:

> 5. I have been authorized, as a consequence of a meeting conducted by the native title claim group, and in accordance with decision making processes under traditional laws and customs observed, to make this application.

There is no information available to me to suggest what are the details or even the broad nature of that traditional process but in the face of the certificates and the affidavits I must find that a traditional and mandatory process existed such as is referred to in s. 251(a).[6]

The scheme of the Act places particular reliance on the issuing of certificates by NTRBs. I note the following comments by His Honour Justice Mansfield in *Doepel* in relation to s. 190C(4):

> Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar. . . The contrast between the requirements of subs (4)(a) and (4)(b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. 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—at [78].

The application before me is said to have been authorised by a 'contemporary' process. No explanation is given as to why the mandatory traditional process previously relied upon in the certificates has not been used.

Even if I were to infer (although there is no material on which I might do so) that the traditional process had broken down, or found wanting in some way, some explanation is required. Such a possibility was recognised in *Anderson v State of Western Australia* [2003] FCA 1423 where it was said:

> The adoption by a native title claim group of a decision-making process by way of majority vote will be justifiable if there is no traditional decision-making method applicable to the processes of authorisation associated with the making and conduct of a native title determination application. And it may well be the case, in connection with the procedural aspects of native title litigation, that there is no relevantly applicable traditional decision-making method. Native title litigation is not exactly a traditional activity. However, the evidence, beyond reporting the fact of the resolutions about the decision-making process, did not address that anterior question—at [46].

The fact that the responsible NTRB certified that there exists a traditional method which was mandatory, and gave details of research which supported that conclusion is not to be lightly overlooked. No details of what that process was are given. I find that no sufficient explanation has been given, especially in the light of some of the other issues raised about participation in the current process.

If a process under s. 251(b) is to be used it must be 'agreed to and adopted' by the members. Is there any evidence of all the other members of the claim group deciding on a process of majority voting, or of 'senior members' having authority? I cannot find any. Nor, given my findings above, can I find that they were given every reasonable opportunity to do so at the meeting.

Schedule R says that:

> (e) A copy of agenda incorporating draft resolutions was circulated to the meeting and provided to senior family members of the claim group who were unable to attend the meeting.

---

[6] See *Wakaman People # 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [31]–[34].

No information is given as to the identity or number of the 'senior family members', nor how they were chosen. This passage however suggests that the decision that 'senior members' would represent others was already made prior to the meeting, but does not say by whom. The best available material is [Applicant 2]'s affidavit at paragraph (5), in which he talks of discussions he had prior to the meeting with 'senior members' but there is no information as to how or by whom they were chosen nor by what right or law or custom they asserted authority to represent other members.

Moran dealt with an analogous situation. There the Court said:

> …However, a person who wishes to rely on a decision by a representative or other collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body's authority to make decisions binding the members of the group and that the body has authorised the making of the application.
> ….. [N]o evidence has been put before the Court regarding the meeting. There is no evidence of the existence of a Council of Elders, its membership or its powers. There is no evidence as to the composition of any group of people represented by any such Council. Given the number of people likely to be descended from Murruin, and their apparent geographical spread, it seems unlikely there is an ongoing Council of Elders exercising general authority over, or on behalf of, all of them—at [34] and [35].

In this matter, although there is some evidence about the meeting, there is none which suggests that the other members had any role in the granting of that authority other than perhaps by way of individual phone calls, themselves only apparently made to certain persons.

The minutes of the meeting at Attachment B show that [Person 1] addressed the meeting before any resolutions were put before the meeting. [Person 1] is noted as saying that:

> The decision making process in use is contemporary as opposed to traditional
> —[Person 1] outlines the difference between a traditional and contemporary decision making process.

No further information is given as to when, how or by what method this decision was reached. The forwarding of the agenda to 'senior members…who could not attend' only supports this analysis that the decision had already been made before the meeting.

In *Bolton* French J said:

> As I observed in Daniel v Western Australia at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title – Western Australia v Strickland (2000) 99 FCR 33 at 52; see also Moran v Minister of Land and Water Conservation (NSW) [1999] FCA 1637—at [43}
>
> If, as may well be the case, there is no relevant and mandatory traditional decision-making process applicable to the making and conduct of a native title determination application then a process 'agreed to and adopted by the persons in the native title claim group' will suffice as the source of authority for applicants representing members of the group. That is no light requirement. It means

> that the authorisation process must be able to be traced to a decision of the native title claim group who adopt that process—at [44].
>
> ... It is not a basis for accepting a constructed 'decision-making' process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native title claim group or persons properly representing them as a substitute for the authorisation required by the Act—at[44].

See also *Quandamooka People # 1 v State of Queensland* [2002] FCA 259 at [25] per Drummond J.

Finally, the minutes do not suggest that a decision was made only by these 'senior members' as the motion appears to have been put to the entire meeting.

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.

Delegate's comment

I consider whether the condition of s. 190B(2) is met firstly with respect to what is required by s. 62(2)(a) and then with respect to what is required by s. 62(2)(b). I come to a combined result for whether or not s. 190B(2) as a whole is met at page 37 below.

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.

Result

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(a).

Reasons

Law

Section 190B(2) requires that the information in the application describing the areas covered by the application 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. The information required to be contained in the application is that described in ss. 62(2)(a) and (b), namely:

- information, whether by physical description or otherwise, that enables the boundaries of:
  a. the area covered by the application (the external boundary of the application area); and
  b. any areas within those boundaries that are not covered by the application (internal areas within the external boundary that are not covered by the application)to be identified, and
- a map showing the external boundary of the application area

I note that the applicants make exceptions to the particular exclusions cited in the application by claiming the benefit of ss. 47, 47A and 47B of the Act at Schedule L of the application. The applicants assert such rights over various lands and waters which are detailed in Attachment L

The Courts have considered what information needs to be provided in satisfaction of this section. In *Daniel for the Ngaluma People & Monadee for the Injibandi People v State of Western Australia* [1999] FCA 686 Nicholson J held that such 'formula' descriptions could be acceptable (at [32) but that when it might be appropriate to do so depended on the circumstances of the particular case. He then considered the implications for both parties at [37] to [39], noting that the intent of the Act is to ensure that persons holding interests have such certainty as is available, but that certainty may have to await determination (at [38]). He concluded at [39] that;

> 'whether a class or formula description satisfies the Act requires consideration by the Court in the light of evidence of consideration given to the relevant issues by the first applicants and how feasible it is that greater certainty in detail can be provided consistently with the other requirements of the Act. '

I do not understand the Court as having said that there are no circumstances in which a formula description may not be used.

Information before me

A written description of the external boundary of the application area is found in Attachment B of the application and a map showing this boundary is found in Attachment C. The written description of the external boundary uses geographic coordinates in decimal degrees referenced to the Australian Geodetic Datum 1984 (GDA94). It also describes the boundary as it intersects with certain identified cadastral boundaries (such as pastoral leases, topographic features, ranges of hills and watercourses). The map marks the external boundary in a clear contrasting ink, with the application area also clearly hachured within that line. There is a scale bar, locality map and notes relating to its sources and the date it was produced. Underlying cadastral boundaries are shown.

At Schedule B the application excludes from that area certain parcels of land defined by tenure, as follows:

> 1. The area covered by the application excludes any land or waters that is or has been covered by:
> a) a Scheduled Interest;
> b) a freehold estate;
> c) a commercial lease that is neither an agricultural lease nor a pastoral lease;
> d) an exclusive agricultural lease or an exclusive pastoral lease;
> e) a residential lease;
> f) a community purpose lease;
> g) a lease dissected from a mining lease and referred to in s.23B(2)(c)(vii) of the Native Title Act 1993 (Cth);
> h) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.
> 2. Subject to paragraphs 4 and 5, the area covered by the application excludes any land or waters covered by the valid construction or establishment of any public work, where the construction or establishment of the public work commences on or before 23 December 1996.

3. Subject to paragraphs 4 and 5, exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State of Queensland.

4. Subject to paragraph 6, where the act specified in paragraphs 1,2 and 3 falls within the provisions of:

- s.23B(9)—Exclusion of acts benefiting Aboriginal Peoples or Torres Strait Islanders;
- s.23B(9A)—Establishment of a national park or state park;
- s.23B(9B)—Acts where legislation provides of non-extinguishment;
- s.23B(9C)—Exclusion of Crown to Crown grants; and
- s.23B(10)—Exclusion by regulation;

the area covered by the act is not excluded from the application.

5. Where an act specified in paragraphs 1, 2 and 3 affects or affected land or waters referred to in:

- s.47—Pastoral leases etc covered by claimant application
- s. 47A—Reserves etc covered by claimant application
- .47B —Vacant Crown land covered by claimant application;

the area covered by the act is not excluded.

I have a report from the Tribunal's Geospatial Services dated 20 November 2006 informing me that the description and map are consistent and identify the external boundary with reasonable certainty. I accept that assessment.

Consideration

I am satisfied that the information contained in the application describes the external boundary of the area covered by the application with reasonable certainty. I am of the view that the stated exclusion by class of areas within the external boundary also amounts to information that enables those areas to be identified with reasonable certainty.

In some cases, research and consideration of tenure data held by the State may be required, but nevertheless it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

I am satisfied that the information and the map required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters and the requirements of s. 190B(2) are met.

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

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(b).

Reasons

See above, as for s. 62 (2) (a).

Combined result for s. 190B(2)

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

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

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

Reasons

Law

In *Doepel* Mansfield J said at [16]:

> Section 190B . . . has requirements which do not appear to go beyond consideration of the terms of the application: subsections 190B(2), (3) and (4).

At [37], Mansfield J also noted in relation to s. 190B(3) that:

> Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group.

And at [51]

> 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.

The fact that some factual inquiry may be required to ascertain whether or not a person is in a claim group does not mean that the group has not been sufficiently described: Western Australia v Native Title Registrar (1999) 95 FCR 93 at [67]. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or his delegate to determine whether or not the description is sufficiently clear: *Ward v Native Title Registrar* [1999] FCA 1732. In my view, s. 190B(3)(b) requires that the description contain an objective method of determining who is in the claim group.

Information before me

The claim group description is provided at Schedule A of the application and is reproduced in my reasons at s. 61(1). The description, shortly, is that the group is comprised of 'the descendants of (24 apical ancestors). Because of the use of the definite article 'the', I read the description as meaning 'all the descendants of…'

Consideration

The application does not name the persons in the native title claim group and can not therefore comply with s. 190B(3)(a).

I must consider if the requirements of s.190B(3)(b) are met, namely 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 description of the class of persons is objective and does not rely on subjective factors such as 'identification' with the group by an individual or 'recognition' by others. The class is certain.

In my view, the description provides an objective means of ascertaining whether a person is a member of that group. The persons in the group are the biological descendants of the named ancestors. Some factual investigation may be necessary to ascertain whether a person is a biological descendant of one or more of the named ancestors, however, this is not an impediment to the description meeting the requirements of the section (see *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67]).

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. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Result

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

Reasons

Result

This condition is met.

Reasons relating to this condition

Law

I am of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified under this section, it must be a native title right and must describe what is claimed in a clear and easily understood manner.

The use of the phrases 'native title' and 'native title rights and interests' in s.190B(4) is intended to screen from registered status those rights and interests that do not fall within the definition of that term found in s. 223 of the Act. On this basis it may be argued that rights and interests that have been found by the courts to fall outside the scope of s. 223 can not be 'readily identified' for the purposes of s. 190B(4).

In *Doepel* Mansfield J suggests a dual test:

> In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning—at [123].

Examples of rights which are <u>not</u> readily identifiable include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[7] rights to minerals and petroleum under relevant Queensland legislation,[8] an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.[9]

To meet the requirements of s. 190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be registered.

Information before me

Schedule E of the application contains this description of the claimed 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 s238, ss47, 47A or 47B apply), the Boonthamurra People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
>
> 2. Over areas where a claim to exclusive possession cannot be recognised, the Boonthamurra People claim the following rights and interests:
>
> . (a) the right to access the application area;
> (b) the right to camp on the application area;
> (c) the right to erect shelters on the application area;
> (d) the right to exist on the application area;
> (e) the right to move about the application area;
> (f) the right to hold meetings on the application area;
> (g) the right to hunt on the application area;
> (h) the right to fish on the application area;
> (i) the right to use the natural water resources of the application area including the beds and banks of watercourses;

---

[7] *Western Australia v Ward* (2002) 191 ALR 1, para [59].

[8] *Western Australia v Ward*, para [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at [501]–[504]; 134 ALR 637 at [686]–[688].

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

(j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
(k) the right to conduct ceremony on the application area;
(l) the right to participate in cultural activities on the application area;
(m) the right to maintain places of importance under traditional laws, customs and practices in the application area;
(n) the right to protect places of importance under traditional laws, customs and practices in the application area;
(o) the right to conduct burials on the application area;
(p) the right to speak for and make non-exclusive decisions about the application area;
(q) the right to cultivate and harvest native flora according to traditional laws and customs

3. The native title rights and interests are subject to:
(a)The valid laws of the State of Queensland and the Commonwealth of Australia; and
(b)The rights conferred under those laws.

Consideration

I am of the view that all the above rights and interest satisfy the test in s. 190B(4) as explained in *Doepel* in that they are understandable as native title rights and interests and have meaning.

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.

Result re s. 190B(5) combined

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

Reasons re s. 190B(5)(a)(b) and (c)

Law

In *Doepel* Mansfield J held:

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].
>
> ... There is nothing in s 190B(5) or in s 190B generally which indicates that the assertions in the application itself may not be considered by the Registrar in addressing the condition imposed by s 190B(5). In both WA v Strickland at 54-55 [88 - 89] citing with approval *Strickland v NTR* at 261, and *Martin* at [23]–[26], the Court was prepared to consider the material included in the application as material relevant to the satisfaction of the condition imposed by s 190B(5)—at [125].

Under this section I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist. The factual basis must support the particular assertions set out in subsections (a), (b) and (c) of s.190B(5). These sub-sections set out the important aspects of the overall requirement that there is a sufficient factual basis for the assertion that the claimed native title rights and interests exist, referring as they do to the current and previous members of the native title claim group having an association with the area, the existence of traditional laws and customs acknowledged and observed by the native title claim group and that group continuing to hold the native title in accordance with those traditional laws and customs.

I am not limited to consideration of information contained in the application but may have regard to information provided by the applicant (*Western Australia v Strickland* (2000) 99 FCR 33 at [88] – [89] (*Strickland FC*)). I may also have regard to information from other sources relevant to my consideration, subject to providing procedural fairness to the applicant, where it is potentially adverse and the applicant has not seen that material (refer concluding words of s. 190A(3) that the Registrar 'may have regard to such other information as he or she considers appropriate').

However, the provision of material demonstrating a sufficient factual basis for the claimed rights and interests is ultimately the responsibility of the applicant and there is no requirement that I undertake a search for this material (see French J in *Martin v Native Title Registrar* [2001] FCA 16 at [23]).

I do not understand *Doepel* or *Martin* as holding that I must uncritically accept all material that is before me, nor to say that I may not consider potentially adverse information in the assessment of what is before me. The assessment of any 'proper' (see *Doepel*), or 'sufficient' (see words in the section) factual basis must necessarily involve an assessment of the factual basis provided both as to its credibility or weight, as well as to ascertain whether it conforms with the High Court's consideration in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*) of what the term 'traditional' means in the s. 223 definition of the expressions 'native title' and 'native title rights and interests' particularly as these expressions are found also in s. 190B(5).

I have also considered the Second Reading Speech of the Attorney-General, Hansard, House of Representatives, 9 March 1998 at p. 784 when the Attorney-General explained the purpose of the

introduction of the proposed amendments to Part 7 of the Act so as to introduce a more stringent test (the registration test) to be applied by the Registrar when considering applications for registration and entry onto the Register of Native Title Claims, thereby allowing the registered native title claimant to participate in the right to negotiate process:

> . . . it is essential to the continuing acceptance of the right to negotiate process that only those people with a credible native title claim should participate. Application of an improved test will go a long way to removing the ambit and unprepared claims which are now clogging the National Native Title Tribunal .

It is my view that the factual basis condition found in s. 190B(5) is critical to Parliament's intent, namely that the Registrar deny registration to 'ambit and unprepared claims'.

A preliminary assessment made of the application drew the attention of the applicants' representatives to some of the issues below.

Information in the application describing the factual basis

The application provides a description of the factual basis in Attachment F and of physical activities in Attachment M. There is also relevant material at Schedule G.

Affidavits from the applicants mainly concerning the authorization process also contain a little relevant material. [Applicant 2]'s affidavit annexes and relies upon a copy of his affidavit filed in QC98/14, to which I will refer further.

Other information

I also have available the anthropological and other material which has been made available to the Registrar previously and which is listed at the commencement of these reasons, as well as affidavits going to authorization matters, but which also include material relevant here, by Ms [Applicant 1] dated 27 October 2006, and by [Applicant 2] dated 27 October 2006, together with an earlier affidavit by the same deponent dated 4 May 1999 (The year is uncertain in the copy I have but appears likely to be 1999).

A considerable body of material was provided in QC98/14 Bunthamurra, in particular affidavits by [Claimant 2 – name deleted], [Applicant 2], [Claimant 3 – name deleted], [Claimant 1] and [Claimant 4 – name deleted]. Also provided for the Registration test was the Carto-Cult Report. The copy I have is undated but the relevant registration test decision referring to it is dated 22 July 1999.

I have likewise considered the material in QC01/30, the 'predecessor' to this application and identical in significant content other than for the external boundary. This material is thus more directly relevant than that from the other associated claims.

Finally, I have the limited material in relation to QC02/17 and QC98/17.

I have considered all that material. A preliminary assessment made of the application drew the attention of the applicants' representatives to some of the issues below.

Consideration

I will consider the three subsections in order.

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

The claim group is described as being the biological descendants of certain apical ancestors. What I must then consider is whether a sufficient factual base is provided to support the assertion that the predecessors of all of the persons in the group had an association with the area, and that the current members, rather than a subset of them, currently have an association with it.

I must consider the claim group as a whole as it is described.

I will consider the requirements of the section in chronological order, by firstly seeking to find a sufficient factual base for the predecessors of the claim group being on country.

There is material in Schedule F ('Attachment F') concerning the archaeological evidence for Aboriginal occupation of the claim area for at least 14,000 years. The Carto-Cult report also contains a significant quantity of factual material concerning the prehistory of the area and its people at pages 8 – 11 and 12 – 15.

The people who met the first whites arriving in the area identified themselves as Boonthamurra and their oral traditions are that Boonthamurra people were the people of that area. There is also factual material in the records of the first white settlers in the area, being the [Family 2 – name deleted], who arrived there in 1868 to the effect that the persons they met there identified themselves as Boonthamurra. They clearly had an association with it at the time of first contact, and I so find.

The drawing of inferences which would allow me to find that those persons first recorded by the white explorers and settlers were those who had been there since sovereignty seems to me to be reasonable in all the circumstances; there is no material which suggests that there were major population movements in the area, nor is there reason to doubt the accounts of the settlers or the Boonthamura people themselves whose accounts they recorded in that regard. I find that the Boonthamurra people had an association with the area at the time of sovereignty.

The second leg, whether there is a sufficient factual basis for the assertion that the claim group (currently) has an association with the area, is more difficult.

There is a good deal of factual material to support the assertion that some members of the claim group currently have an association with the area. The affidavits of [Applicant 2] and [Applicant 1] demonstrate clearly that they and their families have associations with the area, for example. In all of the material provided with the application, however, only they and persons who I take from the names to be their near relatives are mentioned in any way which allows them to be identified as members of the claim group.

I concluded at s. 190C (3) that, when the material as a whole is considered, it is evident that a significant percentage of the claim group does not appear to live on the area. I also formed the view, on the basis of the number of apical ancestors, that the claim group was likely to be reasonably large. The conclusion that a significant number of the claim group does not live in the area appears throughout the material. Some examples:

- Assoc. Prof. (Adjunct) [Person 2] notes in his 'Report on [Anthropologist 2]'s research' at page 3 that 'Like other areas in Queensland, but particularly true for southern Queensland, the

'cluster' area has a bad history of removals, conflict and degradation of Aboriginal people … and from early on, the removal of Aboriginal peoples from their lands, and the subsequent diaspora to various settlements and missions, some as far away as Palm Island near Townsville. It is notable that there were no permanent Aboriginal settlements or missions established anywhere west of Cherbourg and Woorabinda, both well to the east.

- [Claimant 1]'s affidavit filed in QC 98/14 states at 8 that: 'During the mid 1930's the government started moving Aboriginal people off the station properties and out of towns like Birdsville, Eromanga and Quilpie. A whole lot of Aboriginal people were sent away … Then, the government sent them to the Aboriginal missions and settlements of Barambah and Yarrabah.'

- At least one of the apical ancestors left during his own lifetime to live and subsequently die in the Kimberley.

- Schedule M notes that 'some members of succeeding generations have been continuously within this area'.

I have also come to the view that the claim group may have been assembled on the primary basis of genealogical descent rather than law and custom. That is not to say that law and custom does not exist amongst some claim group members but the material casts significant doubt on whether there is a sufficient factual base shown for the widespread existence of traditional law and customs by which all the members of the group as described might have maintained connection despite no longer living on country. Throughout the discussions about the composition of the claim group the only factor mentioned as relevant is that of descent, but nothing to show that descent alone was the only operative law or custom. Where there is some mention of how descent may be calculated it appears that for some members a cognatic system was asserted but by others a patrilineal model was asserted.

- The lengthy correspondences between [Company 1 – name deleted], solicitors for [Claimant 4] , and Queensland South Representative Body Aboriginal Corporation (QSRBAC), and the references therein to the investigations by Acacia research ([Anthropologist 2] 's company) make it clear that decisions as to the composition of the claim group have been made entirely on the basis of research into descent lines: I can find no mention of adherence to law and custom as a determinant of membership. Further correspondence between the Registrar's delegate and QSRBAC, when QC 01/30 was subjected to the registration test, supports this analysis.

- Schedule M notes that 'Recognised descent from a small number of ancestors is the primary link between members of the applicant group and between this group as a whole and the area itself.'

Whether connection may be maintained when the parties are not present on the area has been considered in a number of cases, and a summary of the applicable law appears in *Neowarra v State of Western Australia* [2003] FCA 1402 at [347] – [352]. A convenient summary is this statement in *De Rose v State of South Australia* [2003] FCAFC 286 at [328]:

> Depending on the circumstances, it may well be possible for Aboriginal people, by their traditional laws and customs, to maintain a connection with land notwithstanding that they ceased to reside there because of the influence of European social and work practices.

I understand the case law, in essence, to be that where there is not an ongoing physical connection then there needs to be some evidence of how that connection can be and is maintained through the particular and traditional laws and customs of the claim group. I am unable to find any sufficient factual basis adduced as to the existence or content of those laws and customs.

Because of those matters set out above I have considered whether there is a sufficient factual base to support the assertion that the claim group as a whole (rather than some members of it) have a continuing association with the claim area when it is apparent that many do not live there, and may not have for some considerable time. The assertions which are made are in my view are too general and do not satisfy the need to deal with the position of all members of the claim group. Given that almost all the factual material provided appears to be from a small group of persons still living on country, and that there appears to be no or little factual material which would support an assertion of the capacity to establish ongoing connection through traditional law and custom I have come to the conclusion that a sufficient factual basis has not been made to support a continuing association by all the members.

> (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

Native title is defined as the 'communal, group or individual rights and interests' at s. 223. Because the application asserts at Schedule E that the rights and interests claimed are those of 'the Boonthamurra people' I must assume that the rights sought are communal, rather than 'group' or individual'. The application, when read as a whole, also supports that conclusion. There does not seem to be any suggestion that the rights might differ within the corpus of the claim group.

What I must consider is whether a sufficient factual basis is provided for the assertion that traditional laws and customs exist and that they give rise to the claimed (communal) native title rights and interests. In doing so I am guided and bound by the reasoning of the High Court in *Yorta Yorta* at paragraphs [42]–[56] and [79]–[89] concerning the interpretation of the word 'traditional.'

The High Court stressed that the laws and customs observed and acknowledged must have their roots in pre-sovereignty laws and customs, and be laws and customs having normative content [42], and having their origin in a normative system [43]. That system must have had a continuous existence and vitality since sovereignty [47]. The laws and customs and the society which acknowledges and observes them are inextricably interlinked [55] and in this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs [49].

'Traditional' must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty [86] and acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty [87].

The High Court noted the consequences of European sovereignty:

> It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative

> system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs—at [89].

The fact that there is some current practice or observation of laws and customs does not of itself demonstrate that they are 'traditional'.

> If the laws and customs do not have that normative content there may be observable patterns of behaviour but not rights or interests in relation to land or waters—at[42]. 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 —at[47]. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality—at [50].
>
> If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, that later society, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society—at [53].

The Court acknowledged the possibility of adaptation or change:

> What is clear, however, is that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not necessarily be fatal to a native title claim—at [83] and
> Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom—at [44].

Bearing these strictures in mind I have been unable to find a sufficient factual base for the assertion that there exist traditional laws and customs which are communal in nature and I now consider why.

I do not repeat here much of the material considered and conclusions drawn at s .190C(4) but it is relevant in consideration of this section also.

The bulk of the information concerning the existence of laws and customs appears in Attachment F. Much of it is rather formulaic in that the wording 'in accordance with traditional Aboriginal law and custom the Boonthamurra people have enjoyed the right to' followed by an exposition of a right, commences each of the paragraphs, but there is no detail provided of what those laws and customs might be or how they give rise to rights in land. What follows in each paragraph is a description of the activities of three or four persons, mostly apparently from the one family. There

is little at all to detail how those members of the claim group who have not for some generations or who do not presently live on country exercise or pursue the rights they are said to have.

It is notable that the material in Attachment F has little information about the exercise of laws and customs and the society united in and by their acknowledgement in the period between the coming of white settlement and the present, other than in the most general terms.

The use of the apical ancestry model to describe the claim group provides no information at all as to when the various ancestors lived or even whether their lives were contemporaneous. There are some small pieces of information to be gleaned from the material. One ancestor, [Ancestor 1 – name deleted], went to the Kimberley in 1887. Another ancestor, [Ancestor 2 – name deleted], seems to have been the grandfather of current members. It is hard to conclude that those two ancestors, at least, were of the same society at the same time. There is no factual basis for me to find that the apical ancestors constituted the Boonthamurra people at any particular time.

Similarly, there is little information concerning the period since the lives of those named ancestors about continuity of law and custom. Whilst inferences could possibly be drawn, the absence of any real facts concerning the group over such a lengthy period does not allow me to reasonably do so. That is particularly so because of the material which does exist which raised questions about how many of the claim group members live on country and how connection has been traditionally maintained by them.

There is virtually no factual base provided from which could be established the existence of a set of laws and customs of a normative society at any one time, nor that those laws and customs have continued 'substantially unchanged' during the period since sovereignty. There is no sufficient factual material as to what the content of the laws and customs now asserted were prior to or even after sovereignty. Nor is there any material from which I could safely draw inferences about their content or the society that existed at sovereignty.

I am not persuaded that a sufficient factual basis has been established that, whatever form they take, the laws and customs relied upon are those of a 'society', of which *Yorta Yorta* said:

'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—at [47]), and

'acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty'—at[87]), and

'Law and custom arise out of and, in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs' —at [49).

There is no material before me which would constitute a sufficient factual basis to suggest that the apical ancestors named in Schedule A could be said to have constituted a 'society'.

This is not to say that further evidence at trial might not establish otherwise or that Boonthamurra law and custom has been lost, or is perhaps held by a smaller group of people, as that is plainly not the case. What I must find is to be considered in the light of those matters to which the High

Court directs me. I must find that the laws and customs are 'traditional' as that word was explained by the High Court.

I note what the Full Court said in *De Rose v State of South Australia* [2003] FCAFC 286 at [200]–[201] to the effect that a biological link to the native title holders at sovereignty is not a necessity, but nor is descent alone sufficient . I also note that it might be argued that my conclusion above could be a result of the way in which the group has been described, by the convention of descendants from apical ancestors.

Having regard to the above, I am not satisfied that a sufficient factual basis is provided to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests claimed and thus I conclude that the requirements of s.190B(5)(b) have not been met.

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

Because I have been unable to find a sufficient factual basis for concluding that the laws and customs asserted are in nature 'traditional, I am also unable to find that the group has continued to hold native title in accordance with them.

To conclude, I find myself unable to be satisfied that a sufficient factual basis is provided for the assertion that the claimed native title rights and interests exist and for the particular assertions in subs (a) to (c) of s. 190B(5).

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

The application **does not satisfy** the condition of s. 190B(6).

Reasons

Description of the claimed native title rights and interests in the application
The claimed rights and interest are set out in my reasons at s. 190B(4) above.

Law

Northern Territory of Australia v Doepel [2003] FCA 1384

> Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and

interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim—at [126]

On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). As counsel for the Territory also pointed out, addressing s 190B(6) may also require consideration of controverting evidence. Indeed, in *Martin* at [22] and [27] French J pointed out that the Registrar had erred in formulating the questions posed by s 190B(5) as being whether he was satisfied as to the existence of the three matters referred to in subcl (a), (b) and (c)—at [127].

All it requires is that the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist—at [128].

The Registrar in this matter was satisfied that the factual basis asserted in Sch F, G and M of the application established `some degree of factual basis' for the claimed rights and interests. Schedule F is in fact designed to provide the factual basis for the assertions: see s 62(2)(e). As Kiefel J in *State of Queensland v Hutchison* (2001) 108 FCR 575; [2001] FCA 416 (*Hutchison*) said at 583 - 584 [25], s 62(2)(e) requires only a general description of the factual basis for the assertions as to the existence of the claimed native title rights and interests. In fact the Registrar recognised that such material might not establish a `sufficient' factual basis for them. He looked extensively to the Upper Daly Report, the Kidman Springs Report, the Old Top Spring's Report, and the 158 Agreement. He considered that material to be relevant, notwithstanding the contention of the Territory made to him that it was not. And, as the passage set out in [103] above indicates, he correctly identified the question which s 190B(5) raised—at [129].

The Registrar has then carefully reviewed the material, separately with respect to each of the matters to which subcl (a), (b) and (c) of s 190B(5) refer, to determine if he is satisfied about them. I consider his analysis of the material, and his conclusions, reveal no reviewable error on his part. I do not consider it is necessary for the relevant material, for example the Land Claim Reports, to address specifically and separately each of the claimed native title rights and interests for the Registrar to have been able to be satisfied in terms of s 190B(5). He has not reasoned from the very general to the very particular. His reasoning involves a careful and detailed analysis of the particular information available to address, and making findings about, the particular matters to which s 190B(5) refers, in terms of his satisfaction. It was the combination of the material which led to his conclusions—at [130].

In both *Martin* at [20]-[22] and [27], and *Hutchison* at [25], French J and Kiefel J respectively recognised that s 190B(5) reflects the positive requirements of s 62(2)(e), although as noted Kiefel J noted the possible difference between there being `a general description' on the one hand and `sufficient' description on the other in the two provisions. In neither case was it suggested that the particular focus of s 62(2)(e) or s 190B(5) was only one of two significant requirements of those provisions. Section 62(2)(e) dictates a required content of an application for determination of native title. Its expression is to indicate generally the topic to be addressed, and within that topic particular features or aspects of the topic which must be addressed. It does not provide for two different sets of content obligations which must each be met, but one with a particular focus. In my view, what has apparently been assumed *sub silentio* in those cases, at least by the parties who have not chosen to

argue to the contrary, reflects a sensible reading of both s 62(2)(e) and s 190B(5). Each requires the factual basis for the claimed native title rights and interests to be asserted. Each identifies the particular assertions which must be supported by the factual basis set out. It follows, in my view, that the general requirement beyond the particular is not intended to involve a parallel or equally onerous obligation in relation to each of the claimed native title rights and interests separately. Had that been intended, it could readily have been stated—at[131].

Consequently, in my view, the Registrar did not err in focussing primarily upon the particular requirements of s 190B(5). That is the way in which the NT Act directs his attention. If any of the particular requirements were not met, then the general requirement would not be met. Having been satisfied of the particular requirements, of s 190B(5), and because s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed, it follows that the Registrar is not shown to have erred in his consideration of s 190B(5) in the manner asserted by the Territory. I do not regard the necessity of the Court to address each claimed right or interest separately when deciding an application for native title (see e.g. per Nicholson J in *Daniel 2003* at [137] - [151]) illuminates the task of the Registrar under s 190B(5)—at[132].

Reasons relating to this condition

As I have found that a sufficient factual basis is not provided for the assertion that the claimed native title rights and interests exist, it follows that I do not consider, for the reasons outlined above under s. 190B(5) that at least some of the native title rights and interests can be prima facie established.

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

The application **does not satisfy** the condition of s. 190B(7).

Reasons

As I have found that a sufficient factual basis is not provided for the assertion that the claimed native title rights and interests exist, it follows that I do not consider, for the reasons outlined above under s. 190B(5), that a member of the native title claim group has currently or previous had a traditional physical connection with the application area or any part of it.

A preliminary assessment made of the application drew the attention of the applicants' representatives to such a possible finding.

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 at page 53.

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

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

Reasons

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.

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

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

Reasons

The application expressly identifies that the application area does not include areas covered by a previous exclusive possession act.

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

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

Reasons

It is stated in Schedule E that no claim is made to exclusive possession over areas covered by any previous non-exclusive possession act.

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. 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.

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 sub-condition under s. 190B(9) in turn and I come to a combined result at page 53.

Result re s. 190B(9)(a)

The application **satisfies** the sub-condition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

The application states in Schedule Q that no claim is made to minerals, petroleum or gas wholly owned by the Crown.

Result re s. 190B(9)(b)

The application **satisfies** the sub-condition of s. 190B(9)(b).

Reasons re s. 190B(9)(b)

The application does not cover offshore places.

Result re s. 190B(9)(c)

The application **satisfies** the sub-condition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

The application and accompanying documents do not disclose, and it is not readily apparent, that the native title rights and interests claimed have not been extinguished by any mechanism, including:

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;

- by the non-existence of a system of traditional laws and customs linking the group to the area;
- an entry on the Register of Indigenous Land Use Agreements;
- Legislative extinguishment.

In addition, at Schedule B paragraph 6 of the application, the applicant excludes any areas where native title rights and interests have otherwise been wholly extinguished. I am satisfied that because native title rights and interests must relate to land and waters (s.223 of the Act), the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.

The application does not disclose, and I am not otherwise aware that the native title rights and interests have otherwise been extinguished.

Combined result for s. 190B(9)

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

[End of reasons]

Attachment A
Summary of registration test result where application is not accepted for registration

Application name:	Boonthamurra
NNTT file no.:	QC06/15
Federal Court of Australia file no.:	QUD435 of 2006
Date of registration test decision:	5 April 2007

Test condition (see ss.190B and C of the Native Title Act 1993)	**Sub-condition/requirement**	**Result**
s. 190C(2)		Combined result: met
	re s. 61(1)	met
	re s. 61(2)	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)	met
	re s. 62(2)(a)	met
	re s. 62(2)(b)	met
	re s. 62(2)(c)	met
	re s. 62(2)(d)	met

	re s. 62(2)(e)	met
	re s. 62(2)(f)	met
	re s. 62(2)(g)	met
	re s. 62(2)(h)	met
s. 190C(3)		met
s. 190C(4)		not met
s. 190B(2)		Combined result: met
	re s. 62(2)(a)	met
	re s. 62(2)(b)	met
s. 190B(3)		met
s. 190B(4)		met
s. 190B(5)		Combined result: not met
	re s. 190B(5)(a)	not met
	re s. 190B(5)(b)	not met
	re s. 190B(5)(c)	not met
s. 190B(6)		not met
s. 190B(7)		not met
s. 190B(8)		Combined result: met
	re s. 61A(1)	met
	re ss. 61A(2) and (4)	met
	re ss. 61A(3) and (4)	met
s. 190B(9)		Combined result:

		met
	re s. 190B(9)(a)	met
	re s. 190B(9)(b)	met
	re s. 190B(9)(c)	met

Attachment B
Documents and information considered

The following lists **all** documents and other information that were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

The delegate considered and reviewed the application and relevant information and documents set out below, which are drawn from the following files, databases and other sources:

- The National Native Title Tribunal's Administration Files, Legal Services Files, Party Files and Registration Test Files
- The National Native Title Tribunal's Administration Files, Legal Services Files, Party Files and Registration Test Files for related applications
- The National Native Title Tribunal Geospatial Database, Geotrack
- The Register of Native Title Claims and Schedule of Native Title Applications
- The National Native Title Register

Material considered

1. Form 1 application and the accompanying documents filed in Federal Court

2. Copies of documents provided by any other party for the attention of the Registrar in applying the registration test to this application.

3. Copies of potentially relevant documents provided to me from Tribunal files for this application, overlapping applications or other applications involving this group.

QC98/14–BUNTHAMARRA PEOPLE–QUD6184/98

- Affidavits dated May 1999 (Folio 7a Volume 1)
- Letter from [Claimant 3] dated 19/05/1999 (Folio 8 Volume 1)
- Letter from [Claimant 1] dated 09/06/1999 (Folio 12 Volume 1)
- Registration Test Decision dated 22/07/1999 (Folio 15 Volume 1)
- Letter to the Registrar dated 20/08/1999 (Folio 18 Volume 1)
- File Note dated 01/09/1999 (Folio 20 Volume 1)
- Letter from [Person 3 – name deleted] on behalf of [Claimant 1] dated 21/06/2006 (Folio 31 Volume 1)
- 'Anthropological Report Constituting Additional Information for the purpose of The Application of the Registration test in the Bunthamurra Native Title Application QC 98/14' prepared by Carto-Cult: Cartographic & Cultural Services Pty Ltd (hereafter referred to for simplicity as 'the Carto-Cult report')
- Letter to Registrar from Goolburri Aboriginal Corporation Land Council dated 07/04/1998 (Folio 2 Volume 1)
- Letter to NNTT from Goolburri Aboriginal Corporation Land Council dated 01/05/1998 (Folio 12 Volume 1)

QC98/17–BUNTHAMARA PEOPLE –QUD6187/98

- Letter to Registrar dated 14/04/1998 and Form 1 (Folio13 Volume 1) including Form 1.

QC02/17 – BUNTHAMURRA (SOUTHERN PEOPLE)

- Application filed 8 April 2002
- Correspondence relating to this application, from [Company 1], Solicitors for the applicant [Claimant 5 – name deleted] is noted below.

QC01/30–BOONTHAMARRA PEOPLE–QUD6028/01

- Letter from Federal Court and Application filed 29/08/2001 (Folio 2 Volume 1)
- Letter from Federal Court and Amended Application filed 28/09/2001 (Folio 20 Volume 1)
- File review/summary of relevant information (Folio 49 Volume 1)
- Letter to [Family 1] from [Claimant 1] dated 07/02/2002 (Folio 54 Volume 1)
- Fax to [Person 4 – name deleted] from [Person 5 – name deleted] dated 12/02/2002 (Folio 61a Volume 1)
- Letter from Federal Court and Amended Application filed 18/02/2002 (Folio 79 Volume 1)
- Fax to [Person 5] from [Person 6 – name deleted] dated 20/02/2002 (Folio 91 Volume 1)
- Letter to [Person 6] dated 28/02/2002 (Folio18 Volume 2)
- Copy of letter dated 28/02/2002 faxed to [Person 6] (Folio 120 Volume 2)
- Letter from Acacia Heritage Research dated 14/03/2002 (Folio 133a Volume 2)
- Copy of letter to Queensland South Representative Body Aboriginal Corporation dated 10/04/2002 (Folio 149 Volume 2)
- Fax to [Person 5] from [Person 7 – name deleted] dated 26/04/2002 (Folio 155 Volume 2)
- File note dated 20/05/2002 — assistance provided by [Person 8 – name deleted] (Folio 163 Volume 2)
- Letter to [Person 6] dated 18/07/2002 (Folio 168 Volume 2)
- Fax to [Person 9 – name deleted] dated 29/07/2002 (Folio 172 Volume 2)
- Letter from [Person 10 – name deleted] on behalf of the Descendants of [Ancestor 3 – name deleted] dated 01/08/2002 (Folio 173 Volume 2)
- Letter from [Company 1] dated 05/09/2002 (Folio 176 Volume 2) .
- Letter to [Person 6] dated 24/09/2002 (Folio 177 Volume 2)
- Fax to [Person 11 – name deleted]/[Person 9] dated 25/10/2002 (Folio 182 Volume 2)
- Letter to [Person 9] dated 25/11/2002 (Folio 188 Volume 2)
- Confidential Documents dated 12/12/2002 (Folio 191 Volume 2)
- Letter from Federal Court and Amended Application filed 04/12/2002 (Folio 193 Volume 3)
- Letter from [Company 1] dated 09/12/2002 (Folio 199 Volume 3) .
- Letter to [Person 6] dated 08/11/2002 (Folio 200 Volume 3)
- Amended Application filed 30/01/2003 (Folio 236 Volume 3)
- Letter to [Person 12 – name deleted] QSRBAC dated 18/02/2004 (Folio 60 Volume 4)
- Letter from [Person 3] dated 21/06/2006 (Folio 100 Volume 4)
- File note from [Person 13 – name deleted] dated 12/09/2006 (Folio 107 Volume 4)
- Email [Person 13] to [Person 1] dated 17/10/2006 (Folio 6 Volume 5)
- Anthropological Research in the Kullilli Cluster dated 05/12/2002 (Folio 14a Volume 1)
- Federal Court Order dated 26/04/2006 and agreement (Folio 139 Volume 2)
- Transcript of proceedings dated 10/11/2006 (Folio 156 Volume 2)

- Geospatial settlement dated 20 November 2006, and copies of extracts from CMS/RNTC/ILUA databases for overlapping applications or ILUAs (i.e. QC01/30 Boonthamurra People and QC 99/15 Mardigan People, and QI2003/041 and QI2002/063)

Note: Information and materials provided in the context of mediation on any native title determination application by the claim group have 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.

[End of document}