National Native Title Tribunal

# Registration test decision

| | |
|---|---|
| Application name: | Boonthamurra People |
| Name of applicant: | Mark Wallace and Barbara Olsen |
| State/territory/region: | South West Queensland |
| NNTT file no.: | QC06/15 |
| Federal Court of Australia file no.: | QUD435/06 |
| Date application made: | 2 November 2006 |
| Date application last amended: | 5 July 2007 |

Name of delegate: Mia Bailey

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 am satisfied that each of the conditions contained in ss. 190B and C are met. I 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 satisfies all of the conditions in s. 190B.

**Date of decision:** 30 July 2007

___(signed)_____

Mia Bailey

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

# Reasons for decision - Edited

# Table of contents

# 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 30 July 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 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 judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

As the registration test in this case is being applied pursuant to Item 89 or 90 of the Transitional Provisions of the *Native Title Amendment Act 2007*, I have also considered the information provided by the applicant in relation to application QUD151/2007[1], as set out in Attachment B. I have applied the conditions of the registration test as if that information was contained in the application or accompanied the application when the application was made.

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 originally filed with the Federal Court on 2 November 2006 (Federal Court reference QUD435/06 and Tribunal reference QC06/15) (the new application). The application was intended as a replacement application for QC01/30 (Federal Court reference Q6028/01) (Boonthamurra People) (the preceding application) in which the Federal Court made an order that it stand dismissed as of 30 March 2007.

The only significant difference[2] between the new application and the preceding application was a reduction in the external boundary of the application area. I note that the preceding application was accepted for registration by a delegate of the Registrar on 18 December 2002.

The Tribunal provided preliminary comments on a draft of the new application on 17 October 2006. No further preliminary assessment was provided after the new application was filed in the Federal Court.

The new application was considered by a delegate of the Registrar and a decision was made on 5 April 2007 that it did not satisfy all the conditions of the registration test and was therefore not accepted for registration. In particular, the delegate found that the new application did not satisfy the requirements of ss. 190C(4), 190B(5), 190B(6) and 190B(7).

On 25 May 2007 Queensland South Native Title Services Ltd (QSNTS), on behalf of the applicant, filed an application (QUD151/2007) in the Federal Court under s. 69(1) seeking a review of the delegate's decision not to accept the original application for registration pursuant to s. 190D(2).

On 25 June 2007 Spender J ordered, with the consent of the parties, that leave be granted to discontinue the judicial review application QUD151/2007. His Honour also ordered that documents filed in relation to QUD151/2007 be taken to be filed in the new application.

---

[1] Refer below under 'Application Overview'.

[2] The other differences are the addition of one apical ancestor (Jack O'Lantern) and minor technical amendments.

## Timeframe for making of this decision

As part of the settlement of judicial review application QUD151/2007 on 25 June 2007 the Registrar gave an undertaking that best endeavours would be made to reapply the registration test to the new application by 30 July 2007. The requirement that the Registrar reconsider the new application has been triggered as a result of Item 89 of the Transitional Provisions to the *Native Title Amendment Act* 2007 (the 2007 Act) which commenced on 15 April 2007 (the commencing day).

On 27 June 2007 QSNTS filed a motion in the new application to amend the application. On 5 July 2007 the Federal Court granted leave to amend the new application in accordance with that filed on 27 June 2007. The main amendment has been to certify the application pursuant to s. 203BE.

The application which falls for consideration is therefore the amended application filed in the Federal Court on 27 June 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 procedural fairness is observed in this matter are as follows:

A copy of the application and all accompanying documents was provided to the State of Queensland (the State) on 6 November 2006;

A copy of the application and all accompanying documents was provided to QSNTS as the body performing the functions of a representative body for the application area;

A copy of the amended application and all material that was filed in relation to judicial review application QUD151/2007 has been provided to the State. A copy of the submission from QSNTS dated 20 July 2007 has also been provided to the State.

The State has not provided any comment in relation to this material as at the date of this decision.

**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.

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

In the case of *Attorney General of Northern Territory v Doepel* [2003] FCA 1384 (*Doepel*) Mansfield J stated that:

> ...I hold the view that, for the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself – at [39].

## *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**

***The 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. In this regard I note the following comments of Mansfield J in *Doepel*:

> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration – at [36].

As noted above, my consideration under this section does not involve me going beyond the information contained in the application: *Doepel* at [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 Schedule A of the amended 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***

On the basis of the material on the face of the application I am of the view that there is nothing to indicate 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. I am therefore satisfied that the description in Schedule A meets the requirements of s. 61(1).

## *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 address for service of the applicant are provided at Part B of the amended 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 ss. 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.

I am satisfied that the description of the claim group in Schedule A (as set out above) is sufficient to meet the requirements of this condition.

## *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

***Subsection 61(5)(a)***

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

***Subsection 61(5)(b)***

The amended application was filed in the Federal Court on 27 June 2007.

***Subsection 61(5)(c)***

The application contains all information prescribed in s. 62. I refer to my reasons in relation to s. 62 below.

***Subsection 61(5)(d)***

The application is accompanied by affidavits from each person comprising the applicant that satisfy the requirements of s. 62(1)(a). I refer to my reasons in relation to s. 62(1)(a) below.

The application also includes a map as required under s. 62(1)(b). I refer to my reasons 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

***The 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 in the application***

The application filed on 2 November 2006 included affidavits from both persons comprising the applicant, namely Barbara Olsen and Mark Wallace. Each affidavit includes the statements required under s. 62(1)(a)(i) – (v). In **[Applicant 1 – name deleted]** affidavit the relevant statements appear at paragraphs 6, 7, 8, 11 and 12. In **[Applicant 2 – name deleted]** affidavit the relevant statements appear at paragraphs 4, 5, 6, 9 and 11.

Each of these affidavits is signed by the deponent and appears to be competently witnessed.

I find that the requirements of s. 62(1)(a) are met.

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

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

### Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains eight paragraphs (from (a) to (h)), and I address each of these subrequirements in turn below. 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**

I am of the view that the application contains maps and information that enable both the area covered by the application and those areas within the external boundary that are not covered by the application to be identified with reasonable certainty.

As noted above, s. 190C(2) 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 appear to require me to make any assessment of those details and that information beyond being satisfied that, on its face, they conform to the requirements of the section.

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

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 that appears to show the external boundaries of the application area is found in Attachment C of the application.

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

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

**Result**

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

**Reasons**

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

Although this section requires 'details and results of all searches carried out', I understand the section as meaning those searches carried out by or on behalf of the applicant. It would seem unreasonable to burden the applicants with a requirement to provide details of searches carried out 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 of the amended application. 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 law***

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

Kiefel J 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].

***Consideration***

Attachment F of the amended 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 subsections 62(2)(e)(i) to (iii).

## *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

Schedule G of the amended application contains a list of activities that the native title claim group are said to currently carry out in relation to the application area.

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

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

### Result

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

### Reasons

Schedule H of the amended application states that this section is 'Not applicable'.

An overlap analysis of the application area undertaken by the Tribunal's Geospatial Services Unit as of 24 July 2007 confirms that there are no overlapping applications (registered or unregistered) that fall within the area.

## *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

Schedule I states that, 'No current section 29 or equivalent notices, as notified to the NNTT, fall within the external boundary of this application as at 15 September.' I understand this date to be a reference to 15 September 2006.

The geospatial assessment dated 24 July 2007 indicates that there are two s. 29 notices within the area of the application, both with notification dates of 20 April 2007.

I understand this section to require details of s. 29 notices 'of which the applicant is aware' and assume that the applicant was not aware of these notices.

### 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 outlined 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**

***The law***

Section 190C(3) 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'. The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) 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] to [56].

This application was originally 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.

***Information in the application***

The information provided at Schedule H of the amended application indicates that the applicant is not aware of any other applications that overlap the application area.

As noted above, I must consider the application as at the time of testing. A search of the Register of Native Title Claims and the Schedule of Applications – Federal Court, undertaken by the Tribunal's Geospatial Services Unit as of 24 July 2007, shows that there are no other applications that overlap the area claimed in this application. There is therefore no 'previous application' in the context of s. 190C(3) and as such I do not need to consider this section further.

# *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 satisfied that the circumstances described by s. 190C(4)(a) are the case in this application because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

## Reasons

### *The law*

The amended application is certified by QSNTS and therefore the requirements of s. 190C(4)(a) are applicable.

I note the following comments of Mansfield J in *Doepel* in relation to the requirements of s. 190C(4)(a):

> 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.
>
> Under s 190C(4)(a), the Registrar was required to identify the relevant native title representative body... He was also required to be satisfied that the application had been certified by the [relevant representative body] under s 203BE. He considered whether the certification was given by the [relevant representative body], and whether it was in accordance with s 203BE… In determining whether the certificate of the [relevant representative body] was in accordance with s 203BE, the Registrar addressed the terms of the certificate. In my judgment, that is what he was required to do… For the reasons already given, I do not consider that the Registrar was required to go beyond that point in this matter to be satisfied the condition imposed by s 190C(4)(a) was met. Upon being so satisfied, he was not required to address the condition imposed by s 190C(4)(b).
>
> Section 203BE(4) requires the certification to include a statement to the effect that the representative body is of the opinion that the requirements of subs (2)(a) and (b) are met and to

> briefly set out the reasons for the representative body holding that opinion... The alternative provided for in s 190C(4)(b), and the nature of the obligations of the representative body under s 203BE, indicate in my view that in the one case the responsibility for addressing the requirements of s 251B (to the extent they must be addressed when considering whether to accept an application for registration) rests in substance with the representative body, and in the other case with the Registrar. Section 203BE(2) provides emphatically that the representative body `must not' provide its certificate unless it is of the opinion that all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it. In my judgment, section 190C(4)(a) does not leave some residual obligation upon the Registrar, once satisfied of the matters to which s 190C(4)(a) expressly refers, to revisit the certification of the representative body.
>
> … s 190C(4)(a) does not require the Registrar to consider the correctness of the certification by the representative body, but only its compliance with the requirements of s 203BE – at [78] to [82].

In *Wakaman People 2 v Native Title Registrar* [2006] FCA 1198 (*Wakaman*), Kiefel J expressed her approval of the above-quoted statements of Mansfield J in *Doepel*:

> …The contrast between paragraphs (a) and (b) of subs (4) indicate that responsibility in the former rests with the representative body which is required to address the requirements of s 251B; and in the case of paragraph (b) the responsibility lies with the Registrar. It was to be noted, his Honour observed, that s 203B(2) emphatically states that the representative body 'must not' provide its certificate unless it is of the opinion that all persons in the claim group have authorised the applicant to make the application. In his Honour's view it followed that s 190C(4)(a) does not leave some residual obligation upon the Registrar, once satisfied of the matters to which it expressly refers, to revisit the certification of the representative body (at [81]). I respectfully agree – at [32] .

And her Honour states:

> A consideration of aspects of the authorisation process is not to be undertaken by a Registrar where the application in question has been certified in accordance with s 203BE. Certification means that the function has been carried out by the representative body and there is no basic function for the Registrar to carry out – at [34].

***Information in the application***

Schedule R of the amended application refers to Attachment R which is a copy of a certificate from QSNTS. I note that the original application was not certified. A failure to comply with the requirements of s. 190C(4)(b) was one of the grounds upon which the delegate found the original application not to satisfy the registration test.

The certificate in the amended application is signed by the Chief Executive Officer, QSNTS, and dated 27 June 2007. The certificate refers to QSNTS being a body funded under s. 203FE(1) of the Act for the purposes of performing the functions of a representative body and notes that the certification is given in accordance with ss. 203BE and 203FEA of the Act.

Section 203FEA(1) of the Act states that:

> A person or body to whom funding is made available under s. 203FE(1) to perform a function in respect of a particular area has the same obligations and powers in relation to the performance of that function as a body recognised as the representative body for that area would have in relation to the performance of that function.

This section gives QSNTS the power to certify a native title determination application in relation to applications that fall within its particular area.

The geospatial assessment dated 24 July 2007 confirms that QSNTS is the sole body performing the functions of a representative body in relation to the application area and is therefore the only body that can certify the application.

The certificate includes the statements required under s. 203BE(4)(a) and (b), namely it includes a statement to the effect that QSNTS is of the opinion that the requirements of s. 203BE(2)(a) and (b) have been met (at paragraphs 2, 3 and 4 of the certificate) and it briefly sets out QSNTS's reasons for being of that opinion (at subparagraphs 4(a) to (g) of the certificate). In relation to s. 203BE(4)(c) the certificate notes that the application area is not wholly or partly covered by any other application (at paragraph 5).

In its submission dated 20 July 2007 QSNTS refers to the statements of Kiefel J in *Wakaman*, as quoted above, and asserts that based on this authority the delegate must not look behind the certification of the amended application.

***Consideration***

I am satisfied that the certificate at Attachment R of the amended application meets the requirements of s. 203BE(4). In accordance with the statements of Mansfield J in *Doepel* and Kiefel J in *Wakaman*, as quoted above, I am not required to undertake any further consideration of the correctness of the certification. I therefore find that the requirements of s. 190C(4)(a) are met.

# 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 24 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 conditions of s. 190B(2) with respect to what is required by s. 62(2)(a).

**Reasons**

***The 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:
    (i) the area covered by the application (the external boundary of the application area); and
    (ii) 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.

Schedule B of the application includes a formulaic description of areas within the external boundary that are not included in the application.

In *Daniel for the Ngaluma People & Monadee for the Injibandi People v State of Western Australia* [1999] FCA 686 at [32] Nicholson J held that such 'formula' descriptions of areas not covered could be acceptable but that when it might be appropriate to do so depended on the circumstances of the particular case. His Honour noted at [38] 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. His Honour concluded 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 – at [39].

***Information in the application***

A written description of the external boundary of the application area is provided in Attachment B of the application and a map showing this boundary is at Attachment C.

Attachment B is entitled 'Description of external boundary' as prepared by the Tribunal's Geospatial Services and dated 15 September 2006. Attachment B is composed of two (2) sections: a general and a specific description of the external boundary. The general description of the external boundary of the claim area references topographic features, homesteads and coordinates. The specific description of the external boundary of the claim area is a coordinate list (decimal coordinates / GDA94) that compliments the general description. Notes relating to the source, currency and datum of data used to prepare the description are also included.

Schedule C refers to Attachment C which is an A4 monochromatic copy of an A3 colour map produced by Geospatial Services entitled 'Native Title Determination Application: QUD435/06 Boonthamurra People (QC06/15)', dated 15 September 2006 and includes:

- the application area depicted in a bold dark outline;
- a topographic base map on a scale of 1:1 million;
- a commencement point for the written description;
- scalebar, northpoint, coordinate grid and locality map; and
- notes relating to the source, currency and datum (GDA94) of data used to prepare the map.

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

• s.47B —Vacant Crown land covered by claimant application;

the area covered by the act is not excluded.

***Consideration***

The Tribunal's Geospatial Services assessed the map and written description in Attachments B and C respectively. In a report dated 24 July 2007 Geospatial Services concluded that the description and map are consistent and identify the application area with reasonable certainty.

I have considered the written description and map and the geospatial assessment dated 24 July 2007 and 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

I refer to my reasons above in relation to 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

***The law***

In *Doepel* Mansfield J said:

> 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 [16].

And in relation to s. 190B(3) his Honour said:

> 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 – at [37].
>
> The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so – at [51].

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 in the application contain an objective method of determining who is in the claim group.

***Information in the application***

The description of the native title claim group is contained in Schedule A of the amended application, as set out above in relation to s. 61(1). In summary, the description is that the group is comprised of the biological descendants of 24 apical ancestors. I understand the description as meaning 'all' the biological descendants of those named ancestors.

***Consideration***

The description in Schedule A does not name the persons in the native title claim group and cannot therefore comply with s. 190B(3)(a).

I must therefore 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.

In my view, the description in Schedule A provides an objective means of ascertaining whether a person is a member of the claim group. The persons in the group are all 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 does not prevent the description meeting the requirements of s. 190B(3)(b) (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

***The law***

Section 190B(4) requires the Registrar to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered (see *Doepel* at [16]).

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

It may be argued that the use of the phrases 'native title' and 'native title rights and interests' in s. 190B(4) are used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s. 223 of the Act which states:

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

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 are not 'readily identifiable' for the purposes of s. 190B(4). On another view, s. 190B(4) is only intended to cover those rights and interests that are not readily identifiable in the sense of being unintelligible or not understandable. On this view, rights that fall outside the scope of s. 223 should be considered under s. 190B(6) as not able to be 'prima facie' established. I

have adopted the latter interpretation and will consider those rights that fall outside the scope of s. 223 under s. 190B(6) below.

In *Doepel* Mansfield J said the following in relation to s. 190B(4) :

> 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].

I do not see these comments as being contradictory to the interpretation that I have adopted as described above.

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

***Information in the application***

Schedule E of the amended application contains the following 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;
>
> (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 of the claimed native title rights are readily identifiable in the sense of being clear and understandable and that the requirements of this section are therefore met.

# *Section 190B(5)*

# *Factual basis for claimed native title*

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

## Delegate's comments

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 37 below.

## Reasons re s. 190B(5)

***The law***

In *Doepel* Mansfield J said the following in relation to s. 190B(5):

> 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].

And:

> ... 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].

In *Wakaman* Kiefel J referred with approval to comments of Mansfield in *Doepel* in relation to the Registrar's general functions under ss. 190A to 190C of the Act:

> … As his Honour observed (at [12]), they separate the judicial decision-making processes under the Act from the administrative processes relating to registration. The Tribunal's task, his Honour considered, was not one of finding the real facts in every respect on the balance of probabilities or some other basis. Its role was not to supplant the role of the Court in adjudicating upon the application for determination of native title or generally to undertake a preliminary hearing of the application – at [31].

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 subsections 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 appropriate procedural fairness to the applicant, (refer to the 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 the Registrar or his delegate undertake a search for this material (see French J in *Martin v Native Title Registrar* [2001] FCA 16 at [23]).

In considering the application as required by this section I have also relied upon the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 (*Yorta Yorta*), particularly those passages at [50] to [56] and again at [82] to [89]. In that decision the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were 'rooted in pre-sovereignty traditional laws and customs': at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s. 223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued 'vitality' of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by an apparent revitalisation of the normative system because the laws and customs would then be those of the 'new' society. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would necessarily be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered.

The court emphasized the importance of the continuity of the society or group having those 'normative' laws and customs:

> To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. 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. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise – at [50].

As noted by Mansfield J in *Risk v NT of Australia* [2006] FCA 404 at [57], the requirement for continuity of connection is not absolute. In this regard, his Honour refers to the following statements from *Yorta Yorta* (at [83]):

> …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… The key question is whether the law and custom can still be seen to be a traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples…

I note that Mansfield J's decision in *Risk v NT of Australia* was upheld by the Full Court of the Federal Court in *Risk v NT of Australia* [2007] FCAFC 46.

A factual basis must be shown for the assertion 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' (*Yorta Yorta* at [89]).

***Information in the application***

There is information addressing this condition in Attachment F, Attachment M and at Schedule G of the amended application. Schedule G provides a list of activities that members of the claim group are said to currently carry out within the application area. Attachment F provides information in relation to most of the claimed rights and interests in Schedule E and is said to be 'primarily based on the preliminary research conducted by **[Anthropologist 1 – name deleted]**' Schedule M provides information in support of the maintenance by the Boonthamurra people of a traditional physical connection with the application area and is said to be 'primarily based on published sources augmented by the preliminary anthropology research conducted by **[Anthropologist 1]** in 2001...'

There is also relevant material in the affidavits of **[Applicant 1]** dated 27 October 2006 and **[Applicant 2]** dated 27 October 2006 (together with attachment 'MW1' being a copy of an affidavit of **[Applicant 2]** in relation to an earlier application QC98/14), which were filed with the preceding application.

***Other information***

There is material relevant to this condition in some of the documents filed in the Federal Court in support of the judicial review application QUD151/2007. Of particular relevance are the affidavit of anthropologist, **[Anthropologist 1]**, dated 18 June 2007 (**[Anthropologist 1]** affidavit) and another affidavit by **[Applicant 2]** dated 15 June 2007. I have also had regard to the anthropological and other material provided in relation to the preceding application, as outlined in Attachment B of these reasons and to the submissions of QSNTS in its letter to Tribunal dated 20 July 2007 (QSNTS submission).

***Consideration***

I note at the outset that s. 190B(5) was one of the conditions that the delegate for the new application found was not satisfied. In his reasons for decision dated 5 April 2007 (original reasons) the delegate for the original application details why he was not satisfied, based on the material before him, that the factual basis supported the assertions in each of the subsections of s. 190B(5). I note that I have been provided with additional information by QSNTS in support of this condition and where relevant I will address the basis upon which I have come to a different view to that of the delegate for the new application.

The QSNTS submission, in relation to s. 190B(5), states that the delegate should rely upon and adopt the findings of the delegate for the preceding application (who concluded that the requirements of s. 190B(5) were met) as that application was made by the same claim group and applied to the same area as that covered by this application (at page 4).[3] In my view it is not appropriate for an administrative decision maker to simply rely upon and adopt the findings of another. The principles of administrative decision-making require that the delegate make an independent, unbiased decision based upon all relevant material before him/her. I have considered the reasons for decision in relation to both the preceding application and the original application, as part of all relevant material before me, but I have made my decision in relation to this condition, and all other conditions, independently.

I now address each of the three subsections of s. 190B(5).

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

### Result re s. 190B(5)(a)

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

### Reasons re s. 190B(5)(a)

Information in support of this assertion is found in Schedule G and Attachments F and M of the application and in the affidavit evidence of **[Applicant 2]** (dated 27 October 2006 and 15 June 2007) and **[Applicant 2]** (dated 27 October 2006). The **[Anthropologist 1]** affidavit and the QSNTS submission also contain material of direct relevance to this assertion.

The delegate for the new application found that there was a sufficient factual basis to support the assertion that the claim group had an association with the area at the time of sovereignty (page 41 of original reasons). He also found that while there was a good deal of factual material to support the assertion that *some* members of the claim group currently have an association with the area he was not satisfied that there was a sufficient factual basis to support a continuing association by *all* members of the claim group (pages 41 – 43 of original reasons). In reaching this conclusion the delegate made the following observations, based on the material before him:

> (i) A significant percentage of the claim group does not appear to live on the application area (page 41 of original reasons);
> (ii) The claim group was likely to be reasonably large (page 41);
> (iii) The application area had a bad history of removals, conflicts and degradation of Aboriginal people (pages 41, 42);
> (iv) Reference to an affidavit of **[Person 1 – name deleted]** filed in relation to application QC98/14 which includes a statement that in the 1930s the government started moving

[3] The area covered by this application is slightly reduced in comparison to the preceding application.

> Aboriginal people off station properties and out of towns like Birdsville, Eromanga and Quilpie (page 42);
> (v) At least one of the apical ancestors left the application area and died in the Kimberley (page 42);
> (vi) The claim group may have been assembled on the primary basis of genealogical descent rather than law and custom and that the material casts significant doubt on whether there is a sufficient factual basis for the widespread existence of traditional law and custom by which all members of the group maintained connection despite no longer living on country (page 42).

The QSNTS submission addresses each of the above and refers to additional material provided to refute these findings, principally to the **[Anthropologist 1]** affidavit. **[Anthropologist 1]** states in his affidavit that he has been working and maintaining contact with Boonthamurra families over the last 8 years (paragraph 6). **[Anthropologist 1]** prepared a preliminary connection report in relation to the Boonthamurra people for the former representative body for the area in May 2001 and is currently in the early stages of preparing a full connection report for QSNTS for the purpose of negotiating a consent determination with the State (paragraphs 6, 9).

In relation to point (i) above, the QSNTS submission refers to paragraphs 11, 12 and Exhibit PG1 of the **[Anthropologist 1]** affidavit. **[Anthropologist 1]** notes that there is only one township in the application area (Eromanga) and states that many of the claim group live in all towns adjacent to the area and some members of the group are employed on pastoral properties within the area. **[Anthropologist 1]** states that:

> Regardless of residential location, many claim group members and their families continuously visit the area for a range of traditional reasons. I have established through my research that each of the persons listed in Exhibit PG1 has visited their traditional lands and most have done so regularly.

Exhibit PG1 is a list of 35 names of members of the claim group including the name(s) their apical ancestor(s) and place of residence.

QSNTS also refers to the affidavit of **[Applicant 2]** dated 15 June 2007 (paragraphs 3, 8, 14) as evidence that the claim group has an organised communication network that extends well beyond the claim area that ensures that all Boonthamurra families are consulted and kept informed of activities on their traditional lands.

In relation to point (ii) above, the QSNTS submission refers to paragraph 10 of the **[Anthropologist 1]** affidavit in which **[Anthropologist 1]** states that based upon his research it is his preliminary view that the claim group is not particularly large, consisting of approximately 60 members of the applicant's generation who are today 50 to 60 years old. The applicant's generation are the most senior living members of the group and these persons are at the head of a number of families of a few hundred individuals, more than half of whom live in towns located in the vicinity of the application area.

In relation to point (iii) above, the QSNTS submission refers to paragraphs 12 and 15 of the **[Anthropologist 1]** affidavit. **[Anthropologist 1]** notes that while his original report referred to

Southern Queensland as having a bad history of forced removals, conflict and degradation of Aboriginal people, it is his opinion, based upon recent genealogical research, that only a few (approx. 7) Boonthamurra people were removed and even then most maintained contact with the area from their more distant residential locations in the east. **[Anthropologist 1]** states that these people and their descendants did and do visit the area for a range of traditional purposes (paragraph 12).

At paragraph 15 of his affidavit **[Anthropologist 1]** refers to the delegate's 'strong reservations regarding continuous physical connection of Boonthamurra people with country'; a view which he notes seems to be based primarily on a number of statements made by **[Person 2 – name deleted], [Applicant 2], [Person 3 – name deleted], [Person 1] and [Person 4 – name deleted]** and on information in the 'Carto-Cult Report' which was provided in relation to the Bunthamarra People application (QC98/14, QUD6184/98). **[Anthropologist 1]** states that his genealogical research has established that, with the exception of **[Applicant 2]** and **[Applicant 1]**, all those persons are not Boonthamurra people, are not descended from the Boonthamurra apical ancestors in Schedule A of the application and cannot therefore form part of the claim group for this application. **[Anthropologist 1]** states that in his view it is irrelevant whether or not the **[Persons 1, 2, 3 & 4]** families have maintained a continuous connection to the application area as they have no basis to assert Boonthamurra identity. **[Anthropologist 1]** notes that the Carto-Cult Report also contains substantial material supplied by these persons.

**[Anthropologist 1]** states that he is of the 'strong opinion that the claim group as a whole has a continuous connection with the claim area' (paragraph 16).

In relation to point (iv) above, the QSNTS submission refers to paragraphs 12, 15, 16, 21 and 22 of the **[Anthropologist 1]** affidavit. The content of paragraphs 12, 15 and 16 of the **[Anthropologist 1]** affidavit has been referred to above. In paragraphs 21 and 22 of his affidavit **[Anthropologist 1]** states that in his opinion the apical ancestors listed in Schedule A of the application make up the core of a very strong Boonthamurra society which received and greatly assisted the settlement of the first pastoralists in the area, being the **[Family name 1, 2 & 3 – names deleted]** families. **[Anthropologist 1]** notes that most pastoral properties in the area are still owned by the direct descendants of these families who accept the Boonthamurra people as the traditional owners of the land and are the 'first to acknowledge that Boonthamurra society had a complex system of traditional laws and customs...'

**[Anthropologist 1]** states that it was because of the excellent relationship between the early pastoralists and certain Boonthamurra people that Boonthamurra society was allowed to continue as a traditional society (paragraph 13).

In relation to point (v) above, the QSNTS submission refers to paragraph 13 of the **[Anthropologist 1]** affidavit in which **[Anthropologist 1]** states that the life history of **[Ancestor 1 – name deleted]** is not important for the history of the Boonthamurra people since the establishment of the pastoral

industry in Boonthamurra country and **[Ancestor 1]** story does not mean that the whole of the Boonthamurra people were dispersed throughout the country.

In relation to point (vi) above, the QSNTS submission refers to paragraphs 14, 22, 23, 24, 25, 26 and 27 of the **[Anthropologist 1]** affidavit. **[Anthropologist 1]** states that in his opinion 'Boonthamurra laws and customs stress that demonstration of an unbroken Boonthamurra descent line is a prerequisite to Boonthamurra membership. Knowledge of laws and customs increases the status or seniority or custodianship of the individual within the society. In this sense the unbroken genealogical descent from a Boonthamurra apical ancestor (rather than standing apart from law and custom) is the primary source of law and custom because it determines group identity and membership of the group' (paragraph 14).

**[Anthropologist 1]** details other indicators of the continued existence of traditional law and custom of the claim group including the process of traditional arranged marriages (paragraph 23) and the passing down of Boonthamurra culture and traditions from one generation to the next via informal and formal meetings between Elders at which younger generations were allowed to attend (paragraphs 26, 27). **[Anthropologist 1]** states that the main Boonthamurra traditions handed down included those relating to bush food, bush medicine, descent systems, meaning and location of significant places in the Boonthamurra landscape and the protocol to follow in various situations such as entering country, approaching waterholes or caves (paragraph 27).

**[Anthropologist 1]** states that the 'Boonthamurra people never went through a period of so-called 'extinction' from country, in cultural terms and in physical terms' (paragraph 26).

In my view, based on the material before me, the asserted facts can support the assertion at s. 190B(5)(a). I note that it is not my role 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 (*Doepel* at [17]).

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

### Result re s. 190B(5)(b)

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

### Reasons re s. 190B(5)(b)

Information in support of this assertion is found in Schedule G and Attachments F and M of the application and in the affidavit evidence of **[Applicant 2]** (dated 27 October 2006 and 15 June 2007) and **[Applicant 1]** (dated 27 October 2006). The **[Anthropologist 1]** affidavit and the QSNTS submission also contain material of direct relevance to this assertion.

The delegate for the new application concluded that he was unable to find a sufficient factual basis for the assertion that there exist traditional laws and customs that are communal in nature (page 44 of original reasons). The delegate noted that the bulk of the information concerning the existence of laws and customs appears in Attachment F, which provides no detail of what the laws and customs are or how they give rise to rights in land and provides little detail as to how those members of the claim group, who do not presently live or have not for some generations lived on country, exercise their claimed rights (page 44 of original reasons). The delegate also found (at page 45) that, based on the material before him he could not be satisfied that there was a sufficient factual basis to establish the existence of a set of laws and customs of a normative society, nor that those laws and customs have continued substantially unchanged since sovereignty.

In regard to these findings, the QSNTS submission refers to the **[Anthropologist 1]** affidavit at paragraphs 26, 27 and 28.

I note the following information from the **[Anthropologist 1]** affidavit:

- The apical ancestors named in Schedule A make up the core of a very strong Boonthamurra society (paragraph 21).
- In **[Anthropologist 1]** opinion, within the application area, at sovereignty, there existed an Aboriginal society consisting of the apical ancestors of the contemporary claim group, which by its traditional laws and customs, had a normative system which gave rise to the rights and obligations on the part of its members in relation to the land and waters in the area. The archaeological evidence points to there having been some complex form of society at that time and the observations of the first European settlers are consistent with there being such a society. Further the collective memories of the contemporary claim group (who remember and have stories of their apical ancestors), the current practices and observance of their customs also point to the fact that at sovereignty there existed such a society (paragraph 24).
- Based on his research, **[Anthropologist 1]** states that the Aboriginal society which existed at sovereignty in the area is, in general terms, the same society, with substantially the same traditional laws and customs as those which are observed by members of the contemporary claim group (paragraph 25).
- The Boonthamurra people never went through a period of so-called extinction from country, in cultural terms and physical terms. Boonthamurra culture and traditions were passed down from one generation to the next (paragraph 26).
- The Boonthamurra community of today is a vibrant dynamic society which embraces its history and traditions and has survived European settlement with its laws and customs substantially intact. Specific examples are provided in support of this statement, including:

- Members of the claim group value and appreciate their identity and origin and have a clear understanding of the boundaries of their traditional lands, how a person is entitled to assert Boonthamurra identity and the rules that govern seniority within the community (paragraph 28(a));
- Existence of criteria that determine membership to the group of Elders, being age and personal knowledge of Boonthamurra country, traditions, laws, customs and genealogies. The Elders are custodians of Boonthamurra laws and customs and of knowledge on family genealogies and folklore (paragraph 28(b));
- Hunting, fishing and foraging are still widely practised within the application area. Traditional methods and customs in relation to carrying out these practices are still observed and widely known by members of the group (paragraph 28(c));
- There is widespread knowledge of the location and importance of significant sites within the application area and widespread observance of rules about avoiding and caring for sites and following rituals before entering specific sites. Specific examples are provided of the knowledge and duty some members of the claim group have about their country. This knowledge and duty is regarded by Boonthamurra people as a shared responsibility which does not disappear when its members move off country (paragraph 28(d));
- Cultural knowledge has been passed down orally from one generation to the next without interruption since sovereignty. Cultural heritage management is an important activity carried out by all Boonthamurra families in the area. Specific examples are provided in support of such activities (paragraph 28(e)).

In my view, based on the material before me, the asserted facts can support the assertion at s. 190B(5)(b). The additional material provided by QSNTS provides greater details and context in relation to the traditional laws and customs of the claim group and how they give rise to the claimed rights and interests in the area. As noted above, it is not my role 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 (*Doepel* at [17]).

## Subsection 190B(5)(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)(c)

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

### Reasons re s. 190B(5)(c)

I refer to my reasons above in relation to ss. 190B(5)(a) and (b). I am of the view that some of the material referred to in relation to those subsections provides a factual basis to support the assertion that the claim group have continued to hold native title in accordance with their traditional laws and customs. Based upon the material before me I am satisfied that the asserted facts can support the assertion at s. 190B(5)(c).

**Combined result re s. 190B(5)**

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

# *Section 190B(6)*

# *Prima facie case*

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

**Result**

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

**Reasons**

***The law***

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

In *Doepel*, Mansfield J noted that s. 190B(6), together with ss. 190B(5) and (7), 'clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s. 190A(3) may be relevant' – at [16].

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

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

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

I note that the meaning of prima facie was recently considered in and approved in *Doepel* at [134] – [135]. Briefly, the Court concluded that although the above case was decided before the 1998

amendments to the Act, there is no reason to consider the ordinary usage of 'prima facie' there adopted to be no longer appropriate.

I am of the view that my task under s. 190B(6) is to consider whether there is any probative factual material before me evidencing the existence of the particular native title rights and interests claimed.

As noted in my reasons under s. 190B(4) above, I have taken the view that it is under this condition that I must consider whether the claimed rights and interests have been found by the courts to be 'native title rights and interests' within s. 223. If a claimed right and interest has been found by the courts to fall outside the scope of s. 223, then it will not be capable of being 'prima facie established' for the purposes of s. 190B(6).

I have noted already the description of native title rights and interests claimed by the applicants in Schedule E of the application under my reasons for decision for s. 190B(4) above.

I turn now to a consideration of whether each of the native title rights and interests claimed in Schedule E can be prima facie established:

**1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238, ss. 47, 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.**

**Result: Not established**

**Reasons**

In *Western Australia v Ward* (2002) 191 ALR 1 at [51] (*Ward*), the majority of the High Court found that a right of possession, occupation, use and enjoyment is the fullest expression of native title there is and where 'native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms'.

And:

> The expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms – at [89].

Therefore a claim to possession, occupation, use and enjoyment is only capable of being prima facie established in relation to those areas where a claim to exclusive possession can be recognised. In light of the comments in *Ward*, I am of the view that in order to prima facie establish this claimed right, there must be sufficient information available to establish, prima facie, the right of the claim group to control access to and use of those parts of the claim area in relation to which a right to exclusive possession can be recognized.

I am not able to find affidavit or other evidence in support of the right of the claim group, under traditional law and custom, to control access or use by non-Aboriginal people to the application area. Paragraph 1 of Attachment F, in relation to the 'right to access the application area', includes the statement that:

> In accordance with traditional Aboriginal law and custom the Boonthamurra People have enjoyed possession, use and occupation of the application area ... since prehistory.

The information at paragraph 1 talks of Boonthamurra People accessing the area for work, visitation of sites, hunting, fishing and foraging but does not refer to the claim group controlling access to or use of the area.

Paragraph 16 of Attachment F, in relation to the 'right to speak for and make non-exclusive decisions about the application area', contains information which appears to be contrary to this claimed right. It is stated that:

> With the process of colonisation and the well documented physical and socio-cultural disruption of traditional Aboriginal society, Boonthamurra people all but lost the right to make exclusive decisions about their lives, and their country...

The paragraph goes on to say that some Boonthamurra people retained 'the right to contribute to decision making processes about the area'. This seems to me to indicate that the claim group do not exercise the right to control access to, use of, or make binding decisions, in relation to the application area. I also note that the list of activities in Schedule G of the application does not refer to the exercise of any element of control of access in relation to the area.

I am not able to find any information in Attachment M or the affidavit or other material before me that would establish a prima facie basis for this right.

I am of the view that there is insufficient information available to prima facie establish a right of possession, occupation, use and enjoyment in relation to part or all of the application area. I am therefore not satisfied that, on the basis of the information available to me, this claimed right can be prima facie established in relation to those areas where a claim to exclusive possession can be sustained.

**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**

**Result: Established**

**Reasons**

Schedule G of the application refers to various activities which involve the claim group accessing the application area, for example, visiting the area, using the area for customary, cultural and ceremonial purposes, hunting, gathering and fishing on the area. Attachments F and M contain information in support of this claimed right.

There is also a considerable amount of affidavit and other material in support of this claimed right. For example, the affidavits of **[Applicant 2]** and **[Applicant 1],** dated 27 October 2006, both contain statements about them accessing the application area for various purposes including hunting, fishing and collecting bush tucker (paragraphs 5, 9 of **[Applicant 1]** affidavit and paragraph 7 of **[Applicant 2]** affidavit).

Information in support of this right is also found in the **[Anthropologist 1]** affidavit; for example at paragraph 28(c) and (d), there is information regarding members of the claim group accessing the area for hunting, fishing and foraging and to care for and maintain sites of significance.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(b) the right to camp on the application area**

**Result: Established**

**Reasons**

Schedule G of the application refers to the claim group camping on the application area. Attachment F at paragraph 2 provides information in support of this claimed right, noting that Boonthamurra families continue to visit old campsites and enjoy the right to camp on the application area in accordance with traditional law and custom. There is a specific reference to **[Applicant 1]** taking her family camping to areas within the application area.

The affidavit of **[Applicant 1]** dated 27 October 2006 also contains relevant material in support of this right. For example, at paragraph 4, **[Applicant 1]** talks of camping with her mother on the application area.

The **[Anthropologist 1]** affidavit refers to Boonthamurra people visiting the area for a range of traditional purposes including camping (paragraph 12).

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(c) the right to erect shelters on the application area**

**Result: Established**

**Reasons**

Attachment F, at paragraph 3, provides information relevant to this claimed right. Information is provided regarding the construction of traditional shelters made from earth and wood in the area around the 1920s and it is claimed that Boonthamurra families continue to erect shelters on the application area in accordance with traditional law and custom. A specific example is provided regarding **[Applicant 1]** and her family erecting shelters when camping in the area.

I also refer to my reasons above in relation to camping on the application area as being relevant to this right.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(d) the right to exist on the application area**

**Result: Established**

**Reasons**

I understand this right to involve a right to live on and access the application area. Attachment F, paragraph 4, contains information in relation to this claimed right. It is stated that personal histories of Boonthamurra claimants demonstrate a continued physical presence in the application area and specific examples are given of Boonthamurra people being born on, living and working in the area.

The **[Anthropologist 1]** affidavit notes that some members of the claim group live on pastoral properties within the application area and many of the claim group live in towns adjacent to the application area and continuously visit the area for a range of traditional reasons (paragraph 11).

I also refer to my reasons set out above in relation to right 2(a) in regard to the claimed right to access the application area.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(e) the right to move about the application area**

**Result: Established**

**Reasons**

I refer to my reasons above in relation to rights 2(a) and 2(d) as being relevant to this claimed right. Attachment F, paragraph 5, also provides information specific to this right.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(f) the right to hold meetings on the application area**

**Result: Established**

**Reasons**

Attachment F, paragraph 6, provides information in relation to this claimed right. It is stated that Boonthamurra people continue to hold meetings on the application area in accordance with law and custom for the purpose of instructing young people on traditional cultural practice and for discussion and observance of significant places.

The **[Anthropologist 1]** affidavit refers to Boonthamurra people visiting the application area for the traditional education of their children in country and cultural heritage management activities through participation in development activities in country (paragraph 12). At paragraph 26 of the **[Anthropologist 1]** affidavit he refers to formal and informal meetings between Boonthamurra Elders during which laws, customs and folklore were taught and passed down to younger generations. **[Anthropologist 1]** states that these meetings were held in country as well as other locations such as Cherbourg.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(g) the right to hunt on the application area**

**Result: Established**

**Reasons**

Schedule G lists 'hunting, gathering and fishing on the application area' as one of the activities currently carried out by members of the claim group. Attachment F, paragraph 7, contains information in support of this claimed right and specific examples are given of Boonthamurra people engaging in hunting activities in the area.

The affidavit of **[Applicant 1]** dated 27 October 2006 refers to her uncles 'showing the men how and where to hunt kangaroo, kulpari (emu) and wild turkey' and that she was sometimes allowed to go with the men when they hunted (paragraph 5).

The affidavit of **[Applicant 2]** dated 27 October 2006 refers to him accessing the application area for hunting game in conjunction with other Boonthamurra people (paragraph 7).

The **[Anthropologist 1]** affidavit refers to Boonthamurra people visiting the application area for a range of activities including hunting (paragraph 12).

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(h) the right to fish on the application area**

**Result: Established**

**Reasons**

As noted above, Schedule G lists 'hunting, gathering and fishing on the application area' as one of the activities currently carried out by members of the claim group. Attachment F, paragraph 8, contains information in support of this claimed right and specific examples are provided in relation to **[Applicant 2]** and **[Applicant 1]** and their families engaging in fishing activities within the application area.

**[Applicant 1],** in her affidavit dated 27 October 2006, states that she, together with other Boonthamurra people, accesses the application area to fish the waters in accordance with Boonthamurra customs and traditions (paragraph 9). **[Applicant 2]** makes similar statements in his affidavit dated 27 October 2006.

The **[Anthropologist 1]** affidavit refers to Boonthamurra people visiting the application area for a range of activities including fishing (paragraph 12).

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(i) the right to use the natural water resources of the application area including the beds and banks of watercourses**

**Result: Established**

**Reasons**

Attachment F, paragraph 9, contains information in support of this claimed right. It is stated that Boonthamurra families continue to visit water sources within the application area and teach younger generations about the traditional significance of such water sources.

**[Applicant 1],** in her affidavit dated 27 October 2006, states that her mother showed her 'gilgai' (little water holes) and told her of their spiritual significance (paragraph 4). **[Applicant 1]** also states that her mother told her of other important sites including Kyabra Creek (paragraph 4).

The **[Anthropologist 1]** affidavit refers to Boonthamurra people observing traditional methods and customs in relation to their use of water resources in the application area. For example, before swimming in a waterhole or throwing in a fishing line or yabby trap, Boonthamurra people are still talking to the spirits of these places (paragraph 28(c)).

I also refer to my reasons above in relation to right 2(h) as being relevant to this claimed right as the right to fish necessarily involves use of water resources within the application area.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(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**

**Result: Established**

**Reasons**

Schedule G lists 'collection of resources for food', 'collection of resources for cultural purposes' and 'collection of flora, fauna and mineral resources for medicinal and cultural purposes' among the activities currently being carried out on the application area by claim group members.

Attachment F, paragraph 10, contains information in support of this claimed right. It is noted that Boonthamurra people continue to collect bush tucker (plants and animals) for food and medicinal purposes. Examples are provided of how some members of the claim group collect and use bush tucker.

The affidavit of **[Applicant 1]** dated 27 October 2006 refers to how she was taught to find a variety of bush tucker (paragraph 5) and that her children and other Boonthamurra people make traditional artefacts from resources found within the application area (paragraph 9). A similar statement is made in the affidavit of **[Applicant 2]** dated 27 October 2006 (paragraph 7).

The **[Anthropologist 1]** affidavit refers to Boonthamurra people visiting the application area for a range of traditional purposes including collecting medicinal plants, fishing and hunting (paragraph 12).

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(k) the right to conduct ceremony on the application area**

**Result: Established**

**Reasons**

Schedule G refers to 'use of the application area for customary, cultural and ceremonial purposes'. Attachment F, paragraph 11, contains information in support of this claimed right, noting that Boonthamurra people have continued to conduct ceremonies and partake in the passing down of law and custom on the application area.

The affidavit of **[Applicant 2],** which is annexed as 'MW1' to his affidavit dated 27 October 2006, refers to him attending a corroboree on Tobermory Station.

The **[Anthropologist 1]** affidavit refers to Boonthamurra society having had a complex system of traditional laws and customs which included large corroborees and ceremonial sites (paragraph 22). At paragraph 24 **[Anthropologist 1]** refers to there being a 'very large number of complex ceremonial stone arrangements scattered throughout the entire area...'

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(l) the right to participate in cultural activities on the application area**

**Result: Established**

**Reasons**

As noted above in relation to right 2(k), Schedule G refers to 'use of the application area for customary, cultural and ceremonial purposes'. Attachment F, paragraph 12, contains information in support of this claimed right.

There is a considerable amount of information before me to support the right of the claim group to participate in cultural activities on the application area. Both **[Applicant 2]** and **[Applicant 1]** in their affidavits dated 27 October 2006 refer to visiting the area for the purpose of maintaining significant sites and teaching the younger generation of the importance of such sites and passing on Boonthamurra stories.

The **[Anthropologist 1]** affidavit provides various examples of Boonthamurra people accessing the application area to participate in cultural activities including visiting and maintaining significant sites, visiting the burial sites of their ancestors and for the traditional education of their children (paragraph 12). **[Anthropologist 1]** also refers to the increasing participation of Boonthamurra people in cultural heritage management activities and provides examples of such activities (paragraphs 12, 28).

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(m) the right to maintain places of importance under traditional laws, customs and practices in the application area**

**Result: Established**

**Reasons**

In relation to the use of the word 'maintain' in this claimed right, I am satisfied that it does not involve an assertion of a right to control access and to exclude others from the claim area. In this regard I refer to my comments below under right 2(n) in regard to the use of the word 'protect'.

Schedule G refers to 'visitation and maintenance of cultural or traditional sites by Elders' and other members of the claim group. Attachment F, paragraph 13, contains information in support of this claimed right, including specific examples of how certain members of the claim group are responsible for maintaining certain important sites within the application area. There are statements relevant to this right in the affidavits of **[Applicant 2]** (paragraph 8) and **[Applicant 1]** (paragraph 10) dated 27 October 2006.

The **[Anthropologist 1]** affidavit also contains material in support of this right. For example at paragraph 28(d) of his affidavit **[Anthropologist 1]** refers to the widespread knowledge within Boonthamurra society of the location and importance of significant sites within the claim area and the widespread observance of rules about avoiding and caring for sites. He states that some sites are subject to regular maintenance and repair if needed by senior Boonthamurra people and various examples are provided.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(n) the right to protect places of importance under traditional laws, customs and practices in the application area**

**Result: Established**

**Reasons**

In relation to the use of the word 'protect' in this claimed right, I am satisfied that it does not involve an assertion of a right to control access and to exclude others from the claim area. In this regard, I note the comments of the Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 ('*Alyawarr*') in relation to a claimed right to 'have access to, maintain and protect places and areas of importance on or in the land and waters …' where it was found that such a right did not necessarily imply a general control of access.

In light of the above, I find that this right is capable of being prima facie established in relation to those areas where a claim to exclusive possession cannot be recognized.

I understand this right to involve maintenance and repair of significant sites and the enforcement within the Boonthamurra community of relevant restrictions of access to certain sites. In this regard I refer to my reasons above in relation to right 2(m) as being relevant to this claimed right. There is also information in support of this claimed right in Attachment F, paragraph 14.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(o) the right to conduct burials on the application area**

**Result: Established**

**Reasons**

Attachment F, paragraph 15, contains material in support of this claimed right. It refers to evidence of burial sites within the application area and notes that Boonthamurra people continued to exercise their right to conduct burials on the area throughout the period of pastoral establishment. It is stated that:

> In more recent times the practice of conducting burials on the application area has become less common due to changing trends in the wider public's own burial practices. However, Boonthamurra people continue to visit the gravesites of their ancestors on the application area... in accordance with traditional law and custom.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

**(p) the right to speak for and make non-exclusive decisions about the application area**

**Result: Not established**

**Reasons**

In the unreported decision of *Neowarra v State of Western Australia* [2003] FCA 1402 Sundberg J was of the view that the 'right to speak for country involves a claim to ownership' and could only be recognised in relation to areas where exclusive possession could be established. I note also the unreported decision of French J in *Sampi v State of Western Australia* [2005] FCA 777 where his Honour stated:

> The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation – at [1072].

In light of the above authority, I am of the view that the 'right to speak for' the application area cannot be prima facie established in relation to those areas where exclusive possession cannot be recognised.

I note that this right is expressed as a composite right, namely the right to 'speak for **and** make non-exclusive decisions about the application area' (my emphasis). I am of the view that if one part of the right cannot be established, the overall right cannot be established. Further, I am of the view that the 'right to make non-exclusive decisions about the application area' is not sufficiently clear in its scope and meaning.

I find that this right is not capable of being prima facie established in relation to those parts of the application area where a claim to exclusive possession cannot be recognised.

**(q) the right to cultivate and harvest native flora according to traditional laws and customs**

**Result: Established**

**Reasons**

I refer to my reasons above in relation to right 2(j) as being relevant to this claimed right. As noted above there are various references in Attachment F and the affidavit evidence of members of the claim group collecting 'bush tucker' including native flora.

I am satisfied that there is sufficient information before me to prima facie establish this claimed right.

***Conclusion***

For the reasons outlined above I have found that at least some of the native title rights and interests claimed in Schedule E can be prima facie established. I therefore find that the requirements of s. 190B(6) are met.

I note that the delegate for the new application found that the requirements of s. 190B(6) could not be satisfied because of his finding that the requirements of s. 190B(5) were not met (page 48 of

original reasons). As I have found that the requirements of s. 190B(5) are met, it is possible, and for the reasons outlined above, I have found that the requirements of s. 190B(6) are met.

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

**Reasons**

***The law***

Under s. 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

In *Doepel* Mansfield J made the following comments in relation to s. 190B(7):

> Section 190B(7) … does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration – at [18].

In regard to the phrase 'traditional' physical connection I refer to the statements of the High Court in *Yorta Yorta* as set out above in relation to s. 190B(5).

***Consideration***

I have dealt in some detail with information provided in support of this condition, including the information in Schedule G and Attachments F and M of the application and the affidavit evidence of **[Applicant 2]** and **[Applicant 1]** dated 27 October 2006 and the **[Anthropologist 1]** affidavit, in

my reasons above in relation to ss. 190B(5) and 190B(6). I do not propose to repeat that information here, except to say that much of it is also relevant to this condition.

I am satisfied that at least one member of the native title claim group currently has a traditional physical connection with the application area. Based upon the affidavit evidence of **[Applicant 2]** and **[Anthropologist 1]** I am satisfied that **[Applicant 2]** currently has a traditional physical connection with parts of the application area. There is information before me to indicate that **[Applicant 2]** regularly visits the application area for a range of traditional purposes including hunting, fishing and gathering bush tucker and for the visitation, maintenance and repair of significant sites for which he has a particular responsibility.

I note that the delegate for the new application found that the requirements of s. 190B(7) could not be satisfied because of his finding that the requirements of s. 190B(5) were not met (pages 48- 49 of original reasons). As I have found that the requirements of s. 190B(5) are met, it is possible, and for the reasons outlined above, I have found that the requirements of s. 190B(7) are met.

# *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 52.

## *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 shows that there is no determination of native title in relation to the area claimed in this application as at the date of this decision.

## *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

Schedule B of the amended application excludes from the application area any 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:
    (iii) the act was an act attributable to the Commonwealth, or
    (iv) 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

Schedule B of the amended application states that exclusive possession is not claimed over areas covered by any valid previous non-exclusive possession acts done by the Commonwealth or State of Queensland.

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

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

# *Section 190B(9)*

# *No extinguishment etc. of claimed native title*

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

### Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result at page 53.

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

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

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

Schedule Q of the amended application states 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 subcondition of s. 190B(9)(b).

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

Schedule P of the amended application states that no claim is made to exclusive possession of all or part of an offshore place.

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

The application **satisfies** the subcondition 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 been extinguished.

At Schedule B, paragraph 6, of the amended application the applicant excludes any areas where native title rights and interests have been otherwise 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.

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

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

[End of reasons]

# Attachment 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.

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

**QC06/15 – Boonthamurra People**

Form 1 application and accompanying documents filed in Federal Court 2 November 2006.

Amended Form 1 application and accompanying documents filed in Federal Court 27 June 2007.

Application for relief under s. 190D(2) NTA filed 25 May 2007 in Federal Court (QUD151/07).

Letter from **[Lawyer 1 – name deleted],** QSNTS, dated 20 April 2007, attaching copy of Registration Test Reasons for Decision dated 18 December 2002 in relation to QC01/30 (Folio 52 Volume 2).

Affidavit of **[Lawyer 1]**, QSNTS, dated 20 April 2007 (Folio 79 Volume 2).

Federal Court Order made by Deputy District Registrar Fewings dated 5 July 2007.

Letter from QSNTS dated 18 June with attached affidavit of **[Anthropologist 1]** dated 18 June 2007 (Folio 33 Volume 3).

Affidavits of **[Applicant 2]** dated 15 June 2007, **[Person 5 – name deleted]** dated 12 June 2007, **[Person 6 – name deleted]** dated 12 June 2007, **[Person 7 – name deleted]** dated 12 June 2007, **[Person 8 – name deleted]** dated 12 June 2007, **[Person 9 – name deleted]** dated 13 June 2007, **[Person 10 – name deleted]** dated 12 June 2007, **[Person 11 – name deleted]** dated 12 June 2007, **[Person 12 – name deleted]** dated 14 June 2007 and **[Person 13 – name deleted]** dated 12 June 2007.

Affidavit of **[Person 14 – name deleted]** dated 22 June 2007.

Submission from QSNTS to Tribunal (with attachments) dated 20 July 2007.

NNTT 'Geospatial Assessment and Overlap Analysis' Internal Memorandum dated 24 July 2007.

Registration Test Decision and Reasons for Decision in relation to QC06/15 dated 5 April 2007.

**QC01/30–Boonthamarra People**

- Letter from Federal Court and Form 1 Application filed 29 August 2001 (Folio 2 Volume 1)

- Letter from Federal Court and Amended Application filed 28 September 2001 (Folio 20 Volume 1)
- File review/summary of relevant information (Folio 49 Volume 1)
- Letter to [Family name 4 – name deleted] Family from **[Person 1]** dated 7 February 2002 (Folio 54 Volume 1)
- Fax to **[Tribunal employee 1 – name deleted]** from **[Tribunal employee 2 – name deleted]** dated 12 February 2002 (Folio 61a Volume 1)
- Letter from Federal Court and Amended Application filed 18 February 2002 (Folio 79 Volume 1)
- Fax to **[Tribunal employee 2]** from **[Lawyer 2 – name deleted]** dated 20 February 2002 (Folio 91 Volume 1)
- Letter to **[Lawyer 2]** dated 28 February 2002 (Folio18 Volume 2)
- Copy of faxed letter dated 28 February 2002 to **[Lawyer 2]** (Folio 120 Volume 2)
- Letter from Acacia Heritage Research dated 14 March 2002 (Folio 133a Volume 2)
- Copy of letter to Queensland South Representative Body Aboriginal Corporation dated 10 April 2002 (Folio 149 Volume 2)
- Fax to **[Tribunal employee 2]** from **[Lawyer 3 – name deleted]** dated 26 April 2002 (Folio 155 Volume 2)
- Internal File note dated 20 May 2002 — assistance provided by **[Tribunal employee 3 – name deleted]** (Folio 163 Volume 2)
- Letter to **[Lawyer 2]** dated 18 July 2002 (Folio 168 Volume 2)
- Fax to **[Tribunal employee 4 – name deleted]** dated 29 July 2002 (Folio 172 Volume 2)
- Letter from **[Person 15 – name deleted]** on behalf of the Descendants of **[Person 16 – name deleted]** dated 1 August 2002 (Folio 173 Volume 2)
- Letter from Paul Hoolihan and Company dated 5 September 2002 (Folio 176 Volume 2)
- Letter to **[Lawyer 2]** dated 24 September 2002 (Folio 177 Volume 2)
- Fax to **[Tribunal employee 5 – name deleted] / [Tribunal employee 4]** dated 25 October 2002 (Folio 182 Volume 2)
- Letter to **[Tribunal employee 4]** dated 25 November 2002 (Folio 188 Volume 2)
- Confidential Documents dated 12 December 2002 (Folio 191 Volume 2)
- Letter from Federal Court and Amended Application filed 4 December 2002 (Folio 193 Volume 3)

- Letter from Paul Hoolihan and Company dated 9 December 2002 (Folio 199 Volume 3)
- Letter to **[Lawyer 2]** dated 8 November 2002 (Folio 200 Volume 3)
- Amended Application filed 30 January 2003 (Folio 236 Volume 3)
- Letter to **[Lawyer 4 – name deleted]** QSRBAC dated 18 February 2004 (Folio 60 Volume 4)
- Letter from **[Person 17 – name deleted]** dated 21 June 2006 (Folio 100 Volume 4)
- File note from **[Tribunal employee 6 – name deleted]** dated 12 September 2006 (Folio 107 Volume 4)
- Email from **[Tribunal employee 6]** to **[Lawyer 5 – name deleted]** dated 17 October 2006 (Folio 6 Volume 5)
- Anthropological Research in the Kullilli Cluster dated 5 December 2002 (Folio 14a Volume 1)
- Federal Court Order dated 26 April 2006 and agreement (Folio 139 Volume 2)
- Transcript of proceedings dated 10 November 2006 (Folio 156 Volume 2)

**QC98/14 – Bunthamurra People**

- Affidavits dated May 1999 (Folio 7a Volume 1)
- Letter from **[Person 3]** dated 19 May 1999 (Folio 8 Volume 1)
- Letter from **[Person 1]** dated 9 June 1999 (Folio 12 Volume 1)
- Registration Test Decision dated 22 July 1999 (Folio 15 Volume 1)
- Letter to the Registrar dated 20 August 1999 (Folio 18 Volume 1)
- File Note dated 1 September 1999 (Folio 20 Volume 1)
- Letter from **[Person 17]** on behalf of **[Person 1]** dated 21 June 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 (the Carto-Cult report)
- Letter to Registrar from Goolburri Aboriginal Corporation Land Council dated 7 April 1998 (Folio 2 Volume 1)
- Letter to NNTT from Goolburri Aboriginal Corporation Land Council dated 1 May 1998 (Folio 12 Volume 1)

**QC98/17–Bunthamara People**

- Letter to Registrar dated 14 April 1998 and Form 1 application (Folio13 Volume 1).

**QC02/17 – Bunthamurra (Southern People)**

- Form 1 application filed 8 April 2002
- Correspondence relating to this application, from Paul Hoolihan and Company, Solicitors for the applicant **[Person 18 – name deleted]** (refer above in relation to QC01/30).

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.