

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

(ABBREVIATED DECISION)

DELEGATE: Kristy Eulenstein

Application Name: Kabi Kabi People
Names of Applicants: Edna Van Hemmen (nee Kina), Alexander Bond, Alexander Keith Davidson, Barry Donas, Ann Shirley Martin, Daphne Dux, Mischa Mari Fisher, Donella Hill, Stewart Hopkins, Lynette Johannessen, Arden Landers, Joan Mary Moore (nee Monkland).
Region: South East Queensland
NNTT No.: QC06/03
Date Application Filed: 13 January 2006
Federal Court No.: QUD12 of 2006

The delegate has considered the application against s.190C(2) and s.190C(4) of the *Native Title Act 1993* (Cwth).

DECISION

The application is NOT ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993* (Cwth).

Kristy Eulenstein
Delegate of the Registrar
Pursuant to Section 99 of the *Native Title Act 1993*
(Cwth) the powers given under ss. 190, 190A, 190B,
190C, 190D.

23 March 2006
Date of Decision

Information Relevant to the Decision

& Background of the Application

Information Relevant to the Decision

In making the following decision the delegate considered and reviewed the information and documents as listed below.

Material received in relation to Kabi Kabi (Fed Court No. QUD 12 of 2006 / NNTT No. QC06/03);

- Claimant application (QC06/03) and accompanying documents, filed in Federal Court 13 January 2006.
- GeoTrack 2006/0127, produced by NNTT dated 6 February 2006.
- Public Notice “Update Information Bulletin”, Courier Mail, 28 January 2006.
- Public Notice “Kabi Kabi Peoples’ Proposed Native Title Claim”, Courier Mail, 22 January 2006.
- Letter from Applicant 1 to NNTT, dated 21 February 2006.
- Letter from [Person 1], [Person 2], [Person 3], [Person 4], [Person 5] and [Person 6] to NNTT, dated 2 March 2006.
- Submission from Applicants for Kabi Kabi #2 (Federal Court No. QUD 65 of 2006) regarding Kabi Kabi (Federal Court No. QUD12 of 2006).
- Letter from [Applicant 1] to NNTT responding to QC06/06 submission, including anthropologist report, dated 22 March 2006.
- Statement of [Person 7], signed 22 March 2006 and faxed to NNTT 23 March 2006.

Material from older NNTT file, Gubbi Gubbi #2 (NNTT No. QC99/35);

- Original Claimant Application QC99/35 and accompanying documents, filed in Federal Court 24 December 1999.
- Letter from [Person 8] to NNTT objecting to registration of QC99/35, dated 24 August 2000.
- Letter from [Person 9] to NNTT objecting to registration of QC99/35, dated 24 August 2000.
- Letter from [Person 9] to NNTT withdrawing objection, dated 11 October 2000.
- Correspondence from [Person 10] to NNTT responding to objections, dated 15 September 2000.
- Letter from [Person 9] to NNTT objecting to registration of QC99/35, dated 3 April 2001.
- Letter from [Person 11] to NNTT objecting to registration of QC99/35, dated 4 April 2001.
- Letter from [Applicant 2] to NNTT objecting to registration of QC99/35, dated 3 April 2001.
- Letter from [Applicant 1] to NNTT, objecting to registration of QC99/35, dated 21 March 2001.

- Amended Claimant Application QC99/35 and accompanying documents, filed in Federal Court 23 August 2001.
- Registration Test Reasons for Decision QC99/35, dated 7 September 2001.
- Transcript of hearing, notice of motion by [Applicant 1] to join QC99/35 as indigenous respondent, dated 26 March 2004.
- Notice of Motion (s.66B) by [Applicant 1] QC99/35, dated 11 October 2004.
- Transcript of hearing, s.66B notice of motion, dated 20 December 2004.
- Court Decision - *Fesl v State of Qld* FCA 120 (22 February 2005)
- Court Decision – *Davidson v Fesl* FCAFC 183 (30 August 2005).

Please note that information and materials provided in the context of mediation, which are confidential, have not been considered in making this decision, due to the without prejudice nature of such conferences and the public interest in maintaining the inherently confidential nature of the mediation process.

Background of the Application

The application, Kabi Kabi People (QC06/03) was filed in the Federal Court of Australia on 13 January 2006. I note that on 17 March 2006 an amended application was filed in the Federal Court, however that amendment has not been heard by the Court as at this date. It is the application filed 13 January 2006 which has been registration tested and to which these reasons relate.

The application area is affected by a s.29 notice with a notification date of 23 November 2005. Under s.190A(2) of the Act the delegate should use her best endeavours to apply the registration test to such an application within four months of the notification date, for this application by 23 March 2006.

The current application covers an area substantially similar to the application area of a previously registered application Gubbi Gubbi People (QC99/35) which was discontinued by in February 2005.

Procedural Conditions – Section 190C

Test conditions at s.61 and s.62: s.190C(2)

Section 190C(2) of the Act requires the delegate to test the application against the registration test conditions at s.61 and s.62. If the application meets *all* these conditions, then it passes the registration test at s.190C(2).

Native title claim group: s.61(1)

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

Reasons relating to this sub-condition

Under s.61(1) of the Act I must be satisfied that the claim group for the current application is the native title claim group as required by the Act, namely that it includes all the persons who according to their traditional laws and customs hold the common or group rights and interests claimed.

If material reveals that other individuals or clan groups may hold native title in the claim area and they are members of the same native title claim group as the current application but not included in the claim, then the application may not comply with s.61. A distinction must be made between persons who may comprise or be part of the native title claim group and those who may comprise or be part of a *competing* native title claim group in respect of the claim area. The fact that there is or may be a competing native title claim group is not itself an impediment to a claim.

Kabi Kabi #2 (QC06/06) filed in the Federal Court on 22 February 2006, claims native title over all or part of the application area of the current application. As stated above, if QC06/06 is a competing native title claim group, then it will not affect the registration of the current claim.

What the applications say about the claim group/s

The claim group descriptions of each application may help in assessing whether the two claims were filed by competing native title claim groups, or by sub-groups of the same native title claim group.

The native title claim group as described in Schedule A of the current application comprises:

The biological descendants of the following apical ancestors:

- | | |
|------------------------|----------------------|
| 1. Jacky Baul/Ball | 7. Emma Dunn |
| 2. Jim Crowe | 8. Mary Brown |
| 3. Maggie Cain | 9. Ngim'burim Embrey |
| 4. Maggie Palmer | 10. Albert Williams |
| 5. Sarah Lloyd Nielsen | 11. William Kina |
| 6. Kalmakuta | 12. Thomas Dalton |

The Kabi Kabi #2 application (QC06/06) includes as part of its claim group description the biological ancestors of:

Maggie Palmer, Jim Crowe, Maggie Caine and Jack Baul (who drowned in the Maroochy River on 4 August 1903);...Mary Brown (who was born about 1876 in Yandina);...the union of Williw (Nudler) Crowe (who was born near Kenilworth) and his spouse Emma Dunn (who died on 26 September 1910 at Gympie); ...Sarah Lloyd (who was born 1975);...Nimburin Emrey;...Kal-ma-kuta (who was born 1854 and who died 1897 in the Pumicestone Passage between Toorbul Point and Bribie Island);...Arnold Kina (born 1923), whose father was Willie Kina of Gympie;...

It seems from all the information provided that the even though both applications have named some common ancestors, the members who authorised each application are different, it does not appear that both claims were filed by the same group of individuals. However, it seems clear from the claim group descriptions that the current application and Kabi Kabi #2 application do comprise the same native title claim group. Both applications seek native title on behalf of Kabi Kabi over a similar area, and agree to a certain extent on the membership of the Kabi Kabi (i.e those common ancestors listed above).

The claim group as described in Kabi Kabi #2 appears to include ancestors not contemplated by the current application. It is not my role to decide whether those additional ancestors are or are not Kabi Kabi. I believe it is sufficient to say that it appears, from the information provided in the applications that both claims contemplate the same native title claim group who hold the common rights in the area. In addition, as the current application does not include those individuals who comprise the Kabi Kabi #2 membership it therefore does not appear to include all persons who may claim native title in the area as required by s.61(1).

Additional material supplied by Kabi Kabi #2 applicant

My view is supported by the Kabi Kabi #2 applicant. On 17 March 2006 the Tribunal received a submission from the Kabi Kabi #2 applicant regarding the current application, QC06/03. The submission contends, among other things, that the current application is not brought on behalf of a properly constituted native title claim group in that it is not brought on behalf of all of the people who hold the common or group rights comprising the particular native title claimed because the descendants of certain apical ancestors are shut out from the claim.

The Kabi Kabi #2 applicant submits that the claim group provided in the current application comprises only a portion of the Kabi Kabi people, for example:

- [Ancestor 1] is named as an apical ancestor in QC06/03 which cuts out most Kabi Kabi descendants as he was one of three descendants whose biological mother was [Ancestor 2].
- The QC06/03 application omits the descendants of the following apical ancestors, who are all Kabi Kabi: [Ancestor 3] and [Ancestor 4], [Ancestor 5], [Ancestor 6] and her son [Ancestor 7], [Ancestor 8], [Ancestor 9] and his wife [Ancestor 10] and [Ancestor 11], [Ancestor 12], [Ancestor 13] and [Ancestor 14], [Ancestor 15].

To support their contention the Kabi Kabi #2 applicant referred to material of the older Gubbi Gubbi #2 application QC99/35 where one of the persons comprising the applicant of the current application acknowledged Kabi Kabi families such as those of Ancestor 16 and [Ancestor 2] – although they are now apparently excluded from QC06/03.

Response by the applicant of QC06/03

On 23 March 2006 the Tribunal received from the QC06/03 applicant a number of documents in response to the submission put by the Kabi Kabi #2 applicant. The responses included the following points:

- [Ancestor 2] was inadvertently omitted from the claim.
- The applicant of QC06/03 believe [Ancestor 12] is Gurang Gurang.
- There appears to be people named in the Kabi Kabi #2 application who are historical persons without descendants or who are not recognised as being of Kabi Kabi descent. This may create the impression that QC06/03 is not as inclusive.
- [Person 7], Kabi Kabi Elder states that although he authorised the Kabi Kabi #2 application he believes that Kabi Kabi People should work together and he supports the QC06/03 application because it is inclusive and comprehensively covers all Kabi Kabi People.

The response confirms that the claim group description does not include all of the native title group, because not all the descendants of [Ancestor 2] are included. Therefore I cannot accept the claim for registration as it is clear that the claim group does not include all those who may claim native title in the area.

Delegate's Conclusion – Claim group

Having considered all the information before me, I am satisfied that Kabi Kabi #2 and QC06/03 are sub-groups of the same native title claim group. Therefore I cannot be satisfied that the current application includes all the persons who can claim native title in the application area, as it excludes some persons (i.e individuals from Kabi Kabi #2) who may hold the common group rights in the application area.

In the alternative, the applicant for the current application has conceded that some persons who may claim native title in the area have been excluded from the claim, namely some descendants of [Ancestor 2], for that reason the claim does not satisfy s.61(1).

Result: Requirement not met

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

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

Reasons relating to this sub-condition

Provided.

Result: Requirement met

Native title claim group named/described sufficiently clearly: s.61(4)

Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition

Schedule A of the application satisfies the procedural requirement set down in s.61(4) of the Act.

Result: Requirement met

Application is in prescribed form: s.61(5)

Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents

Reasons relating to this sub-condition

I am satisfied that the application is in the prescribed form so as to satisfy s.61(5) of the Act.

Result: Requirement met

Application is accompanied by affidavits in prescribed form: s.62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v).

Reasons relating to this sub-condition

Provided.

Result: Requirement met

Application contains details set out in s.62(2): s.62(1)(b)

Section 62(1)(b) asks the Registrar to make sure that the application contains the information specified in s. 62(2). Because of this, the delegate's decision for this condition is set out under s. 62(2) below.

Details of physical connection: s.62(1)(c)

Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate).

Reasons relating to this sub-condition

I am satisfied that this procedural requirement is met.

Result: Requirement met

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

s. 62(2)(a)(i) - Information, whether by physical description or otherwise that enables the boundaries of the area covered by the application to be identified;

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

Reasons relating to this sub-condition

Provided.

Result: Requirement met

Map of the application area: s.62(2)(b)

The application contains a map showing the external boundaries of the area covered by the application.

Reasons relating to this sub-condition

Provided.

Result: Requirement met

Details and results of searches: s.62(2)(c)

The application contains 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.

Reasons relating to this sub-condition

Satisfied.

Result: Requirement met

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

The application contains 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.

Reasons relating to this sub-condition

Description provided.

Result: Requirement met

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

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

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

Reasons relating to this sub-condition

Provided.

Result: Requirement met

Activities carried out in application area: s.62(2)(f)

If the native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities.

Reasons relating to this sub-condition

Provided.

Result: Requirement met

Details of other applications: s.62(2)(g)

The application contains 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 a determination of compensation in relation to native title.

Reasons relating to this sub-condition

Satisfied.

Result: Requirement met

Details of s.29 notices: s.62(2)(h)

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area.

Reasons relating to this sub-condition

Satisfied.

Result: Requirement met

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

Application is authorised/certified: s.190C(4)

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

- (a) the application has been certified under paragraph 203BE by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or*
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.*

s.190C(5) – Evidence of authorisation:

If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

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

Reasons relating to this sub-condition

Under the Act, where an application is not certified, the delegate must be satisfied that the applicant is authorised by all members of the native title claim group to make the application and deal with all matters in relation to it.

There are twelve persons listed on the current application said to comprise the applicant. Schedule R of the application provides information about authorisation of the claim. However aspects of this material appear to be in conflict. Schedule R (paragraph 3) indicates that the persons comprising the applicant named in the application were authorised at a meeting held on 16 December 2005. Then (at paragraph 4) it states that [Person 12] was proposed to be a person comprising the applicant, but after the authorisation meeting of 16 December 2005 withdrew from claim. This suggests to the delegate that the persons who were authorised to comprise the applicant on 16 December 2005 included [Person 12]. If she was a person to comprise the authorised applicant, but is no longer part of the claim, and no additional authorisation meeting was held after her withdrawal, the applicant listed on the application is not in my view properly authorised.

In addition, Schedule R (paragraph 4) and the letter from [Applicant 1], of 21 February 2006 states that as well as [Person 12], [Person 13] withdrew from the claim group after the meeting of 16 December 2005. The letter from [Applicant 1] states clearly that [Person 12] and [Person 13] are not descendants of any of the named persons in Schedule A of the application, and that the application area was not changed in anyway since the authorisation meeting of 16 December 2005. Because the application area has not changed since [Person 12] and [Person 13] were part of the claim group (that is up until after 16 December 2005) it seems then that they must be persons who may hold native title within the area, but are excluded from the application. If this is the case, s.61(1) of the Act cannot be satisfied and therefore s.190C(4) cannot be satisfied.

Even leaving the issues of [Person 12] and [Person 13] aside, I cannot be satisfied that the condition in s.190C(4) is met. This is because there is a competing claim of Kabi Kabi #2 which appears to contain members who are in fact members of the common claim group. Information provided to me demonstrates that the members of Kabi Kabi #2 have not been involved in the authorisation of the applicant for QC06/03. Therefore I cannot be satisfied that this application is properly authorised when it appears that not all those who have native title rights and interests in the land have authorised the making of the claim, or that the native title claim group may not be the native title claim group as required by s.61(1).

For the reasons outlined above, I consider that the application fails the conditions contained in s.190C(4).

Conclusion – Reasons for Decision

Having considered the Kabi Kabi application (QC06/03), as filed on 13 January 2006 in the Federal Court, as well as the additional material provided, I am of the view that the application fails the registration test.

I am of the view that the application does not satisfy either s.190C(2) or s.190C(4) of the Native Title Act.

There is information before me that indicates that the claim group as set out in the application is not the native title claim group as required by s.61(1) of the Act, as not all the persons who may hold native title in the area as Kabi Kabi people are included in the claim.

In addition because not all the persons who may hold native title were included in the authorisation of the applicant, I cannot be satisfied that the application satisfies s.190C(4).

Under s.190A(6) of the Act the Registrar (or his delegate) must accept a claim for registration if it satisfies all of the conditions in s.190B and s.190C. In any other case the claim must not be accepted for registration. Given that the conditions at s.190C(2) and s.190C(4) have not been met, the claim cannot be registered, therefore I have not considered it necessary to apply the registration test in respect to the merit requirements set out at s.190B of the Act.

The application is NOT ACCEPTED for registration pursuant to s.190A of the Native Title Act 1993.

Written notice of the decision and the reasons for the decision, are to be provided to the applicant and to the Federal Court, in accordance with s.190D of the Native Title Act.