

***National Native Title Tribunal***  
**REGISTRATION TEST –V6001/2000**

DELEGATE	Sue Kee
CASE MANAGER	Ian Campbell-Fraser
DATE	14 August 2000

Application Name	Dja Dja Wurrung People		
Names of Applicants	Graham John Atkinson; Carmel Priscilla Barry; Trevor George Nicholson; Gary John Murray; Robert Herbert Nicholls; Connie Harrison-Edwards; Rodney John Carter		
Region	Victoria	NNTT No	VC00/1
Date Application Made	19 July 2000	Fed Court No	V6001/2000

The Delegate has considered the application against each Registration Test condition contained in s.190B and s.190C of the *Native Title Act 1993* and makes the following decision:

**DECISION**

Application V6001/2000 IS ACCEPTED for registration pursuant to s190A of the *Native Title Act 1993*.

.....  
Sue Kee  
Delegate of the Registrar

14 August 2000  
Date of Decision

## REASONS FOR DECISION – V6001/2000

### *Brief History of the application*

The Dja Dja Wurrung People's application for determination of native title was filed with the Victoria District Registry of the Federal Court on 19 July 2000.

The application was filed by Graham John Atkinson, Carmel Priscilla Barry, Trevor George Nicholson, Gary John Murray, Robert Herbert Nicholls, Connie Harrison-Edwards and Rodney John Carter who are members of the Dja Dja Wurrung Indigenous community and are authorised by the native title claim group to make the application and deal with matters related to it.

### *Information considered in making the decision*

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

- ◆ VC00/1 – Application & Registration File;
- ◆ The Register of Native Title Claims;
- ◆ The Native Title Register;
- ◆ The Register of Indigenous Land Use Agreements;
- ◆ Submissions and information provided by the Victorian Government Solicitor on the behalf of the State of Victoria on 4 August 2000;
- ◆ Applicants response to the submissions of the State of Victoria dated 9 August 2000 ;
- ◆ Additional *confidential* information provided to the Registrar in support of the application on 31 July 2000:-
  - ◆ Affidavit of [Name deleted to protect the privacy of an individual] affirmed 30 July 1999 (including a 'sanitised' version);
  - ◆ Affidavit of [Name deleted to protect the privacy of an individual] affirmed 2 December 1998 (including a 'sanitised' version);
  - ◆ Affidavit of [Name deleted to protect the privacy of an individual] sworn 2 December 1998 (including a 'sanitised' version);
  - ◆ Affidavit of [Name deleted to protect the privacy of an individual] sworn 1 December 1998 (including a 'sanitised' version);
  - ◆ List of Founding Ancestors: Dja Dja Wurrung;
  - ◆ Dja Dja Wurrung Ancestry of [Name deleted to protect the privacy of an individual];
  - ◆ Dja Dja Wurrung Ancestry of [Name deleted to protect the privacy of an individual];
  - ◆ Dja Dja Wurrung Ancestry of [Name deleted to protect the privacy of an individual];
  - ◆ Dja Dja Wurrung Ancestry of [Name deleted to protect the privacy of an individual];
  - ◆ Dja Dja Wurrung Ancestry of [Name deleted to protect the privacy of an individual];
  - ◆ Dja Dja Wurrung Ancestry of [Name deleted to protect the privacy of an individual];
- ◆ Additional *historical* information provided to the Registrar on 31 July 2000 in support of the application, being extracts from public documents which are not confidential, including:
  - Barwick, Diane E., 'Mapping the Past: An Atlas of Victorian Clans, 1835-1904', *Aboriginal History*, Volume 8, 1984 (map, p.118);
  - Brough Smyth, R., *The Aborigines of Victoria: with notes relating to the habits of Natives of other Parts of Australia and Tasmania compiled from various sources for the Government of Victoria*, Vol. I and II, John Currey, O'Neil, Melbourne, 1876 (map);
  - Clark, Ian, 'Aboriginal Languages and Clans: an historical atlas of western and central Victoria, 1800-1900', *Monash Publications in Geography*, No. 37, 1990 (extract, pp140-169);
  - Clark, Ian, *Aboriginal Language Areas in Victoria, a report to the Victorian Aboriginal Corporation for Languages*, 14 July 1996 (map, p.24);
  - Howitt, A.W., *The Native Tribes of South East Australia*, MacMillan and Co, London, 1904 (extract, pp 70-71 and map);

- Morrison, Edgar, *Early Days in the Loddon Valley*, memoirs of Edward Stone Parker 1802-1865, Victoria, 1966 (map); and
- Tindale, N.B., *Aboriginal Tribes of Australia, Their Terrain, Environmental Controls, Distribution, Limits and Proper Names*, University of California Press, Berkeley, 1974 (extract pp204-205, map).

## A. Procedural Conditions

<b>190C(2)</b>	<b><i>Information, etc, required by section 61 and section 62:</i></b> <b><i>The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.</i></b>
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### Reasons for Decision

I have examined all the details and other information together with the affidavits and other documents accompanying this application.

I find that s61 and s62 have been complied with. The application contains all information etc required by s61 and s62 as I have outlined below.

**s.61(3);** Name of applicants and address for service is provided.

**s.61(4);** Description of persons in native title claim group is provided.

In having regard to the State's submission of 4 August 2000 in relation to the procedural condition of s.61(4) (and consequently condition s.190C(2)) of the registration test, I note that the State asserts that the description of the native title claim group is not sufficiently clear so that it can be ascertained whether any particular person is in the group. However, in my reasons for decision relating to condition s.190B(3), below, I have formed the view that the requirements of the condition are met and so refer to those reasons in relation to my view that the procedural requirements of s.61(4) are met.

**s.61(5);** Application is in prescribed form, lodged in Federal Court, contains prescribed information and is accompanied by any prescribed documents<sup>1</sup>

**s.62(1)(a)** The application is accompanied by an affidavit affirmed and signed by the applicants which addressed the requirements set out in s.62(1)(a).

In having regard to the State's submission of 4 August 2000 in relation to the procedural condition of s.62(1)(a)(iv) (and consequently conditions s.190C(2), s.190C(4) and s.190C(5)) of the registration test, I note that the State asserts that contrary to the statements in the applicants' affidavit accompanying the application, that they are 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, the process of authorisation disclosed in the affidavits forming attachment R to the application the process of authorisation is contrary to s.251B and hence s.62(1)(a)(iv). I also note the applicant's submission of 9 August 2000 in reply which sets out the view that the affidavits of the applicants in Attachment "R", when read together and in conjunction with the affidavit affirmed under s.62, constitute appropriate authorisation. In my reasons for decision relating to condition s.190C(4)(b) and s.190C(5), below, I have formed the view that the requirements of the condition are met and so refer to those reasons in relation to my view that the procedural requirements of s.62(1)(a) are met.

**s.62(1)(b);** Details required in s.62(2) are provided as detailed below.

**s.62(1)(c);** Details of physical connection are provided.

#### **Details required in section 62(2)**

**62(2)(a)(i);** Information which identifies the boundaries of the area covered by the application is provided.

<sup>1</sup> Note that pre 30.09.98 applications are deemed to have been filed in the Federal Court.

Note that "prescribed information" is that which is required by s.62(2) as set out in the text of this minute document.

**62(2)(a)(ii);** Information which identifies any areas within those boundaries that are not covered by the application is provided.

**62(2)(b);** A map showing the external boundaries of the area covered by the application is provided. The map and other information are consistent in their description of the area.

**62(2)(c);** The application indicates that no searches have been conducted to determine the existence of any non-native title rights and interests in relation to the area covered by the application.

I note that the State in its' submission of 4 August 2000 notes that the applicants have indicated that no searches have been undertaken.

**62(2)(d);** A description of the native title rights and interests claimed is provided, (see reasons at 190B(6) below).

**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:

**62(2)(e)(i);** the claim group have, and their predecessors had, an association with the area;

**62(2)(e)(ii);** traditional laws and customs exist that give rise to the claimed native title;

**62(2)(e)(iii);** the claim group has continued to hold native title in accordance with laws and customs.

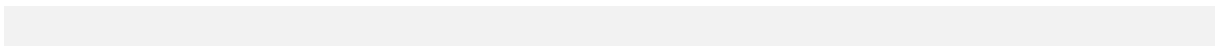
This general description of the factual basis is additionally referenced to the confidential additional material provided to the Registrar on 31 July 2000.

**62(2)(f);** Details are provided about activities that are carried on in relation to the land or waters.

**62(2)(g);** Details are provided by the applicants that they are aware of one other application for determination of native title that has been made in relation to the whole or a part of the area covered by the application.

**62(2)(h);** Details are provided by the applicants that they are aware of 5 notices under s.29 of the Act relating to the whole or a part of the area of the application.

For the reasons set out against the conditions listed above the Application **passes** the procedural requirements of section 190C(2) of the Act.



<b>Decision of Delegate (whole of s.190C(2))</b>	<b>PASS</b>	
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<b>190C(3)</b>	<i>No previous overlapping native title claim group</i>
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At the time this application was made on 19 July 2000 there were no entries on the Register of Native Title Claims relating to the single other application (VG6019/98) covering the whole or part of the area covered by this application. That other application had previously been considered under s.190A and was found not to meet the requirements of registration.

At Schedule B of the Application, the Applicants expressly exclude:

- ◆ Any areas included in any Native Title Determination Application included, pursuant to section 190A of the Act, in the Native Title Register [sic] at the date of lodgment of this Application;
- ◆ Any areas included in the Yorta Yorta Native Title Application VG6001/95;
- ◆ Any areas outside of the State of Victoria

The application therefore passes this condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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Either

<b>190C(4)(a)</b>	<i>Application has been certified by relevant Representative Body</i>	<i>N/A</i>	
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Or

<b>190C(4)(b)</b>	<i>Applicants have been authorised by the native title claim group</i>	<i>PASS</i>	
	<i>Statement about authorisation and grounds provided – s.190C(5)</i>	<i>PASS</i>	

The application has not been certified by the relevant Aboriginal/Torres Strait Islander body pursuant to s190C(4)(a). Therefore, the application falls to be considered under s190C(4)(b). I cannot be satisfied that the conditions of s190C(4)(b) are satisfied unless the requirements set out in s190C(5) are met.

At Part A of the application, the applicants state that they are members of the Dja Dja Wurrung Indigenous Community (ie the native title claim group as defined at Schedule A) and they are authorised by the native title claim group to make the application and to deal with matters related to it. The basis on which they assert that they have been so authorised is set out in a series of affidavits annexed to the application at Attachment R. The requirements of s.190C(5) have therefore been met.

In relation to the first limb of s.190C(4)(b), the applicants have stated at Part A of the application that they are members of the Dja Dja Wurrung Indigenous community. In their affidavits, which comprise Attachment R to the application, the 7 applicants all state that their individual families are part of the native title claim group. In addition the native title claim group is defined as the descendants of the founding ancestors (who have been identified in additional information provided in confidence to the Registrar on 31 July 2000). Genealogical information has been provided for six of the seven applicants demonstrating their descent from one or more of these founding ancestors. I am therefore satisfied that the applicants are members of the native title claim group.

In relation to the second limb of s190C(4)(b), the concept of authorising the making of an application is defined in s251B which provides:

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

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

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

The affidavits of the 7 applicants, which together form Attachment R to the application, include the following statements :-

- That the applicants have been authorised by their respective families – which are part of the native title claim group;
- That the applicants have attended numerous meetings with their families and, in particular, the elders of their families regarding decision making within the family;
- That as a result of those meetings it was decided, in accordance with traditional laws and customs, to authorise the applicants to make decisions in relation to the application;

- That the applicants, in making the application, are complying with the process of decision-making that under traditional laws and customs must be complied with; and
- That they believe the applicants are authorised to make the application on behalf of all members of the native title claim group.

I note that the State, in its submissions of 4 August 2000, is of the opinion that the affidavit material referred to above fails to properly set out the grounds upon which each of the applicants say they have been authorised by *all* the persons in the native title claim group as the applicants instead state that they have been authorised by the members of their families.

I have set out the requirements of s.251B of the Act above. I note that the Act does not specifically require that *every* member of the native title claim group authorise *each* applicant to make the application and make decisions in relation to it. On the contrary, the Act confirms that where a traditional decision-making process exists which must be complied with in relation to authorising matters of this nature, and where the persons in the native title claim group have authorised the persons to make the application in accordance with that traditional decision-making process, then the applicants are thus authorised.

I accept the applicant’s submission of 9 August 2000 in reply to the State’s submission of 4 August 2000, clarifies the view that the affidavits of the applicants in Attachment “R”, when read together and in conjunction with the affidavit affirmed under s.62, constitute appropriate authorisation.

I note that each of the applicants affirms in their affidavit forming Attachment R that:

‘I believe that other applicants and I are authorised to make this native title application and deal with matters arising in relation to it on behalf of all the members of the native title claim group.’

In summary in the current application, the applicants have satisfied me:

- that there exists a traditional decision-making process (in which decisions concerning country are made by families and, in particular, elders within families);
- that each of the applicants and their families are members of the native title claim group;
- that they have been authorised by their families in accordance with that traditional decision-making process; and
- the affidavits of the applicants in Attachment “R”, when read together and in conjunction with the affidavit affirmed under s.62, constitute appropriate authorisation by all of the persons in the native title claim group to make the application and deal with matters arising in relation to it.

The application passes this condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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## B. Merits Conditions

<b>190B(2)</b>	<i>Identification of area subject to native title</i>
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### Map

The Application includes the following maps at Attachment C:

1. Attachment C1 to the Application is a map showing the locality of the area covered by the Application.
2. Attachment C2 to the Application is a map showing the external boundaries of the area covered by the Application, subject to the exclusions set out in Schedule B, Paragraph B of the application

These maps are generated by Mirimbiak Nations Aboriginal Corporation based on a series of coordinate points defined by latitudinal and longitudinal references. I am satisfied that they provide a sufficient means by which it is possible to identify the location of the areas claimed on the surface of the earth. The coordinates are unambiguous and provide the means by which it is possible to locate the boundary of the Application area on the earth's surface.

### Written Description

In Schedule B, the applicants have provided a written description identifying the external boundary of the claim area in the form of a series of coordinate points defined by latitudinal and longitudinal references, some of which are cross referenced to geographically named places such as hydrological features. The Application covers all land and waters within the external boundary, subject to the exclusions set out in Schedule B, Paragraph B.

This information is consistent with the Maps (described above and provided in accordance with s62(2)(b)) attached to this application. Collectively, this information constitutes an accurate representation of the external claim boundary.

I am satisfied that this description enables the external boundaries of the application to be identified and therefore meets the requirements of s62(2)(a)(i).

### Internal Boundaries

At Schedule B the applicants have provided information identifying the internal boundaries of the claim area as follows:

A) the area covered by the application:

#### ***Land - includes road reserves***

*A reference to 'land' in the description of the area covered by this Application includes all crown land reserved for roads.*

#### ***Water***

*A reference to 'waters' in the description of the area covered by this Application includes:*

- All waterways, whether natural or man made, including rivers, creeks, tributaries, lakes, seas, tidal inlets, estuaries, harbours, dams, channels and subterranean waters.*
- All water which from time to time may be found within the area covered by the Application whether such water is at any time stationary or flowing, located in natural or man made waterways but excluding causal (sic) waters such as non-permanent pools following heavy rain.*
- The banks and beds under and/or otherwise supporting the waterways and the airspace over the waters.*
- The shore or subsoil under, and airspace over, the shore between high water and low water.*

#### ***Crown Grants***

*The area covered by this Application includes land or waters within the claimed area that have been granted to or had an interest vested in the Crown in any capacity or a statutory authority but does not include land or waters where:*

- i. *The grant or vesting extinguishes native title at common law; or*
- ii. *The use of the land extinguishes native title at common law.*

**Aboriginal Cultural Heritage**

*The claimed area includes places and objects of Aboriginal Cultural Heritage*

In Schedule B paragraph B the applicants detail the areas which are excluded from the Application

**B) any area within those boundaries that are not covered by the application:**

*This Application does not include:*

- i. *Any areas subject to a previous exclusive possession act defined under section 23B of the Native Title Act 1993 ('the Act') save where the Act (including sections 47, 47A and 47B) and/or the common law allows those lands to be part of a Native Title Determination Application.*
- ii. *A claim for exclusive possession over previous non-exclusive possession act areas as defined under section 23F of the Act save where the Act and/or the common law allows those lands to be part of a Native Title Determination Application.*
- iii. *Any areas included in any Native Title Determination Application included, pursuant to section 190A of the Act, in the Native Title Register(sic) at the date of lodgment of this Application*
- iv. *Any areas included in the Yorta Yorta Native Title Application VG6001/95,*
- v. *Any areas outside of the State of Victoria*

I am satisfied that the applicants' use of the above exclusion formula satisfies the standard of "reasonable certainty" as required by s190B(2). I note that such class exclusions have been deemed acceptable by the Federal Court (see French J in *Strickland v Native Title Registrar* (W6018 of 1999) FCA1530 (Unreported) at paragraph 50; *Daniels v The State of Western Australia* (WAG6017 of 1996) FCA686 (Unreported); and *State of Western Australia v Native Title Registrar & Ors* [1999] FCA 1591-1594).

The formula description of areas excluded are consistent with the general rubric of 'reasonable certainty' required by this subsection as articulated by his Honour Justice French in *Strickland* at para 50. His honour found that:

'use of such clauses renders the application more rather than less certain'.

In *Daniels*, at paragraph 32, Nicholson J found that the

'[statutory] requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information...'

I am satisfied that the information and map provided by the applicants, read in conjunction with the exclusions specified by the applicants, are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to particular areas of land or waters.

The application **passes** this condition.

<b>Decision of Delegate</b>	<i>PASS</i>	
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<b>190B(3)</b>	<b><i>Identification of native title claim group</i></b>
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To meet this condition of the registration test the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

At Schedule A of the application, the native title claim group is described as follows:-

*“Members of the Dja Dja Wurrung People, being descendants of Indigenous ancestors henceforth referred to as the ‘founding ancestors’ identified with the territory of Dja Dja Wurrung People in the early years of white occupation who, by inference and on the evidence, can be properly assumed to be descendants of the occupants of the lands claimed in accordance with Aboriginal tradition at the time of sovereignty.*

*Further material may be provided to the Tribunal for the purposes of the Registration test. Such material does not form part of this Application.”*

I note that the State in its submission of 4 August 2000 asserts that the description of the native title claim group in Schedule A is not sufficiently clear so that it can be ascertained whether any particular person is in that group.

The Applicants, in a submission in reply to the State submission, dated 9 August 2000, contend that the description of the native title claim group in Schedule A, when read in conjunction with the information provided to the Tribunal [Registrar], is sufficiently clear so that it can be ascertained whether any particular person is in the claim group.

The correct administrative test, according to Justice Carr, requires a description by way of a set of rules or principles for the ascertainment of group members. (*Ward v The Registrar*, NNTT [1999] FCA 1732 at par 25)

The description of the native title claim group in this application provides for it to be ascertained, using objective criteria, to whether any particular person is a member of the Native Title Claim Group. The objective criteria are set out simply as:

- That the person is a member of the Native Title Claim Group if the person is a [biological] descendant of the Dja Dja Wurrung ‘Founding’ Ancestors.

The description is supported by genealogical information prepared by MNAC and provided to the Registrar in confidence on 31 July 2000. A list of the Dja Dja Wurrung Founding Ancestors has been provided. In addition, genealogical charts have been provided linking six of the seven applicants to a Dja Dja Wurrung Founding Ancestor. It is my view, contrary to the submission of the State, that the information provided is sufficient for it to be ascertained, using the criteria of biological descent which can be objectively verified, whether any particular person is a member of the Native Title Claim Group.

The application passes this condition.

<b>Decision of Delegate</b>	<b><i>PASS</i></b>	
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<b>190B(4)</b>	<b><i>Identification of claimed native title</i></b>
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Schedule E of the application lists ten specific native title rights and interests claimed by the applicants, which are:

**1. Exclusive Possession**

The rights and interests possessed by the native title claim group under the traditional laws acknowledged and traditional customs observed by them confer on them possession, occupation, use and enjoyment of the land and waters to the exclusion of all others.

## **2. Ownership**

The right and interest of possession, occupation, use and enjoyment of the land and waters.

The right to be acknowledged as the traditional Aboriginal owners (the indigenous owners, or the owners according to traditional law and custom) of the land and waters.

## **3. Right to natural resources**

The right and interest of ownership of the natural resources of the land and waters, and the right to take, use and enjoy those resources.

The natural resources of the land and waters includes, but is not limited to, animals, birds, plants, fish, marine animals, shellfish, timber, water, ochre, stone, minerals and subsurface materials.

## **4. Right to trade**

The right to trade in the natural resources of the land and waters by exchange, barter, sale or otherwise.

## **5. Right to make decisions**

The right to make decisions about the use of land or waters.

This right includes the right to care for the land and waters, to maintain the environmental health of the land and waters, and to protect the land waters and the natural resources of the land and waters from damage or harm.

## **6. Right to give or refuse access**

The right to give or refuse permission to have access to the land and waters, or to occupy, use or enjoy the land and waters, or to use and enjoy the natural resources of the land and waters.

## **7. Protection of heritage**

The right to protect places and areas of importance in the land and waters.

Such places include sacred sites, places of spiritual significance, places of historical and cultural significance, burial grounds, places that record the presence of the applicants' ancestors including scarred trees, camping areas, middens.

## **8. Management of spiritual business**

The right to manage the spiritual business and to safeguard the cultural knowledge associated with the land and waters.

This includes the right to the cultural knowledge relating to the land and waters, to perform ritual relating to land and waters, to teach and transmit the knowledge, ritual and cultural heritage relating to the land and waters, to possess sacred objects relating to the land and waters.

## **9. Transmission of rights**

The right to inherit and dispose of land and waters in accordance with traditional laws and customs.

## **10. Care, Custody and Responsibility**

The right to care for, have the custody of and the responsibility for the area covered by this Application including for and of the material and non-material systems of the area including habitats, environments and ecosystems.

These ten native title rights and interests are all subject to the rights validly granted by the Crown pursuant to statute to others to possess, occupy, use or enjoy the land or waters.

At Schedule B of the Application, the applicants qualify the rights and interests claimed as follows:

*This Application does not include:*

*A claim for exclusive possession over previous non-exclusive possession act areas as defined under section 23F of the Act save where the Act and/or common law allows those lands to be part of a Native Title Determination Application.*

*Any areas included in any Native Title Determination Application included, pursuant to section 190A of the Act, in the Native Title Register (sic) at the date of lodgment of this Application*

At Schedule Q the rights and interests claimed are further qualified:

*To the extent that the Application includes native title rights and interests consisting of or including ownership of minerals, petroleum or gas, the Application does not consist of or include ownership of minerals, petroleum or gas where the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas.*

By particularising the rights and interests claimed into a list of ten specific rights and interests which are comprehensible, I am satisfied that the rights and interests identified by the applicants are clearly defined and therefore readily identifiable.

The application passes this condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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<b>190B(5)</b>	<i>Factual basis for claimed native title</i>
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There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the Applicants' assertion about the existence of the native title rights and interests listed at Schedule E of this application.

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

This criteria requires me to be satisfied that:

- the members of the native title claim group have an association with the area (under claim); and
- the predecessors of the members of the native title claim group had an association with the area (under claim).

In considering this condition I have had regard to information contained in the application and the affidavits of **[Names deleted to protect the privacy of an individual]**, the genealogical materials and historical information provided to me in confidence on 31 July 2000. In respect of the proof of the existence of the founding ancestors identified to the Registrar in the aforementioned confidential information, I note that the applicants have stated in their submission of 9 August 2000 that:

'[the] anthropologist has informed me that the application has been properly researched and he is satisfied, on the basis of that research and discussions with other experts, that the founding ancestors are real people'.

On the basis of the information provided it is clear that **[Name deleted to protect the privacy of an individual]** is a direct biological descendant of **[Name deleted to protect the privacy of an individual]**, a native title claim group Founding Ancestor.

With regard to whether the predecessors of the current native title group had an association with the area, the affidavit evidence refers to incidents within the knowledge of the deponents which satisfies me that the predecessors of the current native title claim group had an association with the area.

For example, **[Name deleted to protect the privacy of an individual]** states:-

*“I am Dja Dja Wurrung through my great-great-grandfather, who was known as [Name deleted to protect the privacy of an individual] and great-great-grandmother, [Name deleted to protect the privacy of an individual]. Both were members of the Loddon River Tribe known as the Dja Dja Wurrung. [Name deleted to protect the privacy of an individual] and [Name deleted to protect the privacy of an individual] lived in this area all their lives and had a son called [Name deleted to protect the privacy of an individual] who was born around 1850 at Majorca, near Cairn Curran Reservoir.”*

This is supported by additional information submitted which provides information as to the traditional boundaries of the Dja Dja Wurrung (including alternative spellings Jajowrong, Ja Jo Wurrung, Jajaurung, ‘Ja:Dwa) as depicted by various historical researchers in maps and written description. [See: Brough Smyth, R. *The Aborigines of Victoria: with notes relating to the habits of Natives of other Parts of Australia and Tasmania compiled from various sources for the Government of Victoria*, Vol. I, John Currey, O’Neil, Melbourne, 1876 (map); Barwick, Diane E., ‘Mapping the Past: An Atlas of Victorian Clans, 1835-1904’, *Aboriginal History*, Volume 8, 1984 (map, p.118); Clark, Ian, D., ‘Aboriginal Languages and Clans: an historical atlas of western and central Victoria, 1800-1900’, *Monash Publications in Geography*, No. 37, 1990 (extract, pp140-169); Clark, Ian, *Aboriginal Language Areas in Victoria: A Reconstruction, a report to the Victorian Aboriginal Corporation for Languages*, 14 July 1996 (map, p.24); Howitt, A.W., *The Native Tribes of South East Australia*, MacMillan and Co, London, 1904 (extract, pp70-71 and map); Morrison, Edgar, *Early Days in the Loddon Valley*, memoirs of Edward Stone Parker 1802-1865, Victoria, 1966 (map); and Tindale, N.B., *Aboriginal Tribes of Australia, Their Terrain, Environmental Controls, Distribution, Limits and Proper Names*, University of California Press, Berkeley, 1974 (extract pp204-205, map).]

With regard to the association of the current native title claim group to the claim area, [Name deleted to protect the privacy of an individual] has provided details of a strong continuing association with the claim area. He has provided evidence of learning and teaching traditional stories and dancing, of caring for and protecting sites of significance, of using the natural resources of the area for food and weapons, and of regulating the access of others to the claim area.

I am satisfied that the application and additional information provides a sufficient factual basis for the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

The application passes this condition.

*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.*

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

In considering this condition I have had regard to the affidavits of [Names deleted to protect the privacy of an individual] and the affidavits of the seven applicants forming attachment ‘R’ to the application. The affidavits provide evidence of the existence of the traditional laws acknowledged and customs observed by the native title claim group.

By way of example, [Name deleted to protect the privacy of an individual]’s affidavit provides evidence of the existence of traditional laws acknowledged by the Dja Dja Wurrung including the assumption of certain obligations in relation to the protection of Dja Dja Wurrung country and the Dja Dja Wurrung community. [Name deleted to protect the privacy of an individual]’s affidavit also provides evidence of the existence of traditional customs observed by the Dja Dja Wurrung native title claim group. In [Name deleted to protect the privacy of an individual]’s case these customs include the speaking, learning and teaching of traditional language; the performing, learning and teaching of traditional dance; the care and protection of sites of significance; the trade of goods with other indigenous communities; and the practice of traditional skills (e.g. making a shield, [Sensitive information deleted at the request of the applicants], etc.).

On the basis of the affidavits submitted I am of the opinion that there is a sufficient factual basis to support the assertion that there exist traditional laws and customs observed by the native title claim group that give rise to

the claim to native title rights and interests. A broad range of continuing traditional culture is described in the affidavits. The source of this culture is claimed to be the Dja Dja Wurrung law and custom.

For these reasons, I am satisfied that the affidavits provide a sufficient factual basis for the assertion 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.

190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

The affidavits of the members of the native title claim group referred to above provide evidence of a continuing system of rules and beliefs adhered to by members of the native title claim group. They specify many of the rights and responsibilities of members of that group and processes by which those rights and responsibilities are recognised and exercised.

There is evidence that members of the claim group continue to hold native title rights and interests in accordance with traditional laws and customs. The evidence I have reviewed shows that the native title claim group continue to pass on custodianship of the land, and tell traditional stories through art and craftwork. The affidavit of [Name deleted to protect the privacy of an individual] refers to him making decisions and handing down knowledge to younger Dja Dja Wurrung people.

In his affidavit of 30 July 1999 [Name deleted to protect the privacy of an individual] tells of inheriting Dja Dja Wurrung culture from his ancestors and of the importance of learning aspects of his culture from his ancestors and passing this knowledge down to his child.

I am satisfied that the application and additional information provides a sufficient factual basis for the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

I note that the State in its submission of 4 August 2000 makes no comment in relation to this test condition.

The application passes this condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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<b>190B(6)</b>	<i>Prima facie case</i>
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Under s190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

The native title rights and interests claimed are described at Schedule E of the application. I have outlined a general description of the claimed rights and interests in my reasons for decision in relation to s.190B(4). I note that the applicants have limited the native title rights and interests claimed in respect of the valid rights and interests of others. This qualification is significant when considering the *prima facie* establishment of the claimed native title rights and interests.

I must decide whether or not in law and fact each of the particular native title rights and interests claimed in Schedule E of the amended application is *prima facie* capable of being established.

I consider that the native title rights and interests claimed in the application can be *prima facie* established. I refer to examples of the evidence that *prima facie* support the claimed native title rights and interests.

The deponents have provided me with specific evidence addressing each of those rights and interests, with examples as follows:

1. *Exclusive Possession*

In his affidavit of 30 July 1999, **[Name deleted to protect the privacy of an individual]** states that he calls the area the subject of the application his traditional country; that the land owns him and that he, as a member of the Dja Dja Wurrung community, has traditional rights in that country, including the right to refuse permission to others to enter into certain special places.

A variety of statements in the affidavits, the maps and extracts from historical resources provided by the applicants all provide a roughly consistent description of the extent of the traditional boundaries of Dja Dja Wurrung country.

In *State of Western Australia v Ward* [2000] FCA 191 the Federal Court held that where previous extinguishing acts have occurred over an area under claim, applicants cannot claim exclusive rights over these areas.

In this application this claimed right is subject to the validly granted rights and interests of others and is distinguishable from the right rejected by the majority in *Ward* and I am of the opinion that in so far as this right is subject to those rights and interests it is able to be recognised as a native title right.

On this basis, at a *prima facie* level, I am of the opinion that the right to exclusive possession can be made out.

2. *Ownership*

The evidence referred to above also enables me to be satisfied on a *prima facie* basis, that the right to ownership of parts of the claim area can be established.

3. *Right to natural resources*

The affidavits of **[Names deleted to protect the privacy of an individual]** constitute provide evidence of the use of the natural resources of the claim area by members of the native title claim group. In particular there is evidence that members of the native title claim group exploit natural resources such as fish, kangaroos, witchetty grubs, stones, wood and bark.

On a *prima facie* basis I am satisfied that this right and interest can be established.

4. *Right to trade.*

The affidavit of **[Name deleted to protect the privacy of an individual]** states that he trades resources acquired from the bush in Dja Dja Wurrung country (stones, kangaroo and self-made artefacts) with other Aboriginal communities. In return he receives things they have made, including things to ensure safe passage through their country.

I note that the majority in *The State of Western Australia v Ward* [2000] FCA 191 (*Ward*) held that the native title rights and interests which are recognised by the common law are those which involve:-

- ◆ Physical presence on the land or
- ◆ Activities on the land associated with traditional, social and cultural practices

and that in that case a right “to trade in resources of the claim area” was found not to be a registrable native title right or interest.

In this application this claimed right is sufficiently connected with the land and waters claimed to be distinguishable from the right rejected by the majority in *Ward* and I am of the opinion that in so far as this right requires physical presence on and/or activities on the land and waters, it is able to be recognised as a native title right.

On a *prima facie* basis I am satisfied that this right and interest can be established.

5. *Right to make decisions*

The affidavits provided by the seven applicants as part of the application at attachment 'R' and the affidavit evidence of **[Name deleted to protect the privacy of an individual]** provide evidence of the decision-making process used by members of the native title claim group in relation to the use of the land and waters.

On a *prima facie* basis I am satisfied that this right and interest can be established.

6. *Right to give or refuse access*

In his affidavit **[Name deleted to protect the privacy of an individual]** cites an example of when he exercised this right in relation to an individual who had "mucked up". In her affidavit **[Name deleted to protect the privacy of an individual]** details the importance of limiting access to certain parts of Dja Dja Wurrung country.

On a *prima facie* basis I am satisfied that this right and interest can be established. Note also my comments on the impact of the *Ward* decision above in the light of the qualifications on the rights asserted by the applicants.

7. *Protection of heritage*

Affidavits provide evidence of the current and historical efforts of members of the native title claim group to protect their cultural heritage, including places or sites of particular significance to them. **[Name deleted to protect the privacy of an individual]**'s affidavit gives examples of attempts to protect a significant women's site, of a desire to make decisions about proposed mining licences in Dja Dja Wurrung country and of claim group member's regular involvement in the protection of flora and fauna. In his affidavit, **[Name deleted to protect the privacy of an individual]** details his own experiences in looking after Dja Dja Wurrung sites and cleaning and protecting water wells and special places.

I am of the opinion that this right can be established on a *prima facie* basis.

8. *Management of spiritual business*

*The right to manage the spiritual business and to safeguard the cultural knowledge associated with the land and waters.*

*This includes the right to the cultural knowledge relating to the land and waters, to perform ritual relating to land and waters, to teach and transmit the knowledge, ritual and cultural heritage relating to the land and waters, to possess sacred objects relating to the land and waters."*

I note that the majority in *The State of Western Australia v Ward [2000] FCA 191* (Ward) held that the native title rights and interests which are recognised by the common law are those which involve:-

- ◆ Physical presence on the land or
- ◆ Activities on the land associated with traditional, social and cultural practices

and that in that case a right "to maintain, protect and prevent the misuse of cultural knowledge of the common law holders" was found not to be a native title right or interest.

In this application this claimed right is sufficiently connected with the land and waters claimed to be distinguishable from the right rejected by the majority in *Ward*. Specifically it requires ritual related to the area, teaching and transmission of knowledge related to the area and possession of objects related to the area.

However, to make it clear, in so far as this right requires physical presence on and/or activities on the land and waters, it is able to be recognised as a native title right.

I find that there is *prima facie* evidence that this right can be established in relation to presence or activities on the land. I refer to the information contained in **[Name deleted to protect the privacy of an individual]**'s affidavit in relation to performing, learning and teaching traditional dance and language and the practice of traditional skills. I refer also to **[Name deleted to protect the privacy of an individual]**'s

affidavit and her statements about passing on stories to her grandchildren and the importance of passing on cultural information.

In relation to this claimed right I direct that the Register of Native Title Claims be annotated to say “ **The Registrar’s delegate finds this right is prima facie made out in so far as it requires activities or presence on the land or waters, the subject of this application.**”

9. *Transmission of Rights*

[Name deleted to protect the privacy of an individual]’s affidavit details the importance he attaches to passing on his cultural knowledge to his child. In his affidavit, [Name deleted to protect the privacy of an individual] states that as a recognised Elder of the Dja Dja Wurrung he is able to hand down knowledge to younger Dja Dja Wurrung people and that the connection to Dja Dja Wurrung land “keeps bringing us back”. I am of the opinion that *prima facie* this right can be established.

On a *prima facie* basis I am satisfied that this right and interest can be established.

10. *Care, Custody and Responsibility*

The evidence established in 5, 6 and 7 (above) also satisfies this native title right.

On a *prima facie* basis I am satisfied that this right and interest can be established.

The application **passes** the condition

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

The affidavits referred to in my reasoning for s190B(6) (above) are also relied on here. The affidavits of [Names deleted to protect the privacy of an individual] present evidence of a strong continuing physical connection with the claim area. I note that the State in its submission of 4 August 2000 is of the opinion that the evidence provided of physical connection makes no reference to the physical connection being traditional (i.e. in accordance with the traditional laws and customs of the native title claim group).

I note also that the applicants in their submission in reply to the State submission, dated 9 August 2000, contend that contrary to the assertions of the State, the information in Schedule M and the supplementary affidavits clearly indicates that the members of the native title claim group have a traditional physical connection to the claim area; see for example the affidavit of [Name deleted to protect the privacy of an individual], paragraph 6.

For the reasons set out below I am satisfied that much of the connection of the members of the native title claim group with the claim area occurs in accordance with traditional customs and practices.

By way of example, [Name deleted to protect the privacy of an individual]’s affidavit states that he has lived in Dja Dja Wurrung traditional country for almost all of his life. His mother, a member of the Elders Council of the Dja Dja Wurrung, has also lived in the traditional country of the Dja Dja Wurrung for most of her life. He states that from an early age he was taught traditional language, customs, stories and traditional dancing. He continues to learn aspects of his culture from his ancestors and details the importance he attaches to passing this knowledge on to his own child.



[Name deleted to protect the privacy of an individual] also states that on a regular basis he visits and maintains sites of significance to the Dja Dja Wurrung because he has been taught that “*the land owns me and that I, as a member of the Dja Dja Wurrung community, have traditional rights in that country*”. He states that he makes artefacts such as didgeridoos, boomerangs, clap sticks and spears and gathers stones, plants and animals from the bush in Dja Dja Wurrung country – sometimes for the purpose of trading with other Aboriginal communities. He practices traditional skills such as making a traditional shield or building [Sensitive information deleted at the request of the applicants] and passes on these traditional skills to children.

I am therefore satisfied that at least one member of the native title claim group currently has and previously had a traditional physical connection with a part of the claim area. The application meets this test condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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<b>190B(8)</b>	<i>No failure to comply with section 61A</i>		
<b>62A(1)</b>	<i>Approved determination of native title</i>		<i>No</i>
<b>61A(2)</b>	<i>A previous exclusive possession act has been done in relation to the area</i>		<i>No</i>
<b>61A(3)</b>	<i>A previous non-exclusive possession act has been done in relation to the area <u>and</u> a right of exclusive possession has been claimed</i>		<i>No</i>
<b>61A(4)</b>	<i>The application states that section 47, 47A or 47B applies to it</i>	<i>Yes</i>	

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

Schedule B of the application states that the application does not include:

- ◆ *any areas subject to a previous exclusive possession act defined under s.23B of the Native Title Act 1993 (“the Act”) save where the Act (including sections 47, 47A and 47B) and/or the common law allows those lands to be part of a native title determination application; and*
- ◆ *a claim for exclusive possession over previous non-exclusive possession act areas as defined in s.23F of the Act, save where the Act and/or the common law allows such a claim to be part of a native title determination application.*

Schedule L of the application includes a statement that pursuant to:

- ◆ *section 47B of the Native Title Act 1993, all vacant crown land included in the Application is occupied by the members of the native title claim group.*

I refer to the reasons set out in my decision for condition s.190B(2) above as they are analagous in holding the view that the application of the saving provisions of s.47, s.47A or s.47B can not be resolved without substantial inquiry to establish whether any particular area of land or waters within the external boundary of the application falls into these provisions. I consider that the description provided allows it to be shown objectively, upon the provision of particulars, whether the applicants may have benefit of these provisions and that this is all that is required by this section.

The State, in its submission of 4 August 2000, queries the applicants’ assertion. In my view, the veracity of the assertion of the applicants is not a matter to be tested in this administrative decision.

The application passes this condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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<b>190B(9)(a)</b>	<i>Native title rights and interests claimed do not include ownership of minerals, petroleum or gas wholly owned by the Crown</i>
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At Schedule E of the application the applicants have asserted a right to natural resources - which is defined to include the right of ownership and the right to take, use and enjoy ochre, stone, minerals and subsurface materials.

However, at Schedule Q of the application, the applicants state that to the extent that the application includes native title rights and interests consisting of or including ownership of minerals, petroleum or gas, the application does not consist of or include ownership of minerals, petroleum or gas where the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas.

The application passes this condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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<b>190B(9)(b)</b>	<i>No claim to exclusive possession of waters in an offshore place</i>
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The area claimed does not include any offshore area. It is therefore not necessary for me to consider this section further.

The application passes this condition

<b>Decision of Delegate</b>	<b>PASS</b>	
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<b>190B(9)(c)</b>	<i>No other extinguishment (except that to be disregarded under s.47, s.47A or s.47B)</i>
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The application and accompanying documents do not disclose, nor am I otherwise aware, that the application contravenes the criteria set out in s.190B(9)(c).

I note that the State, in its submission of 4 August 2000, queries the Applicant's assertion in Schedule L of the application that all vacant crown land in the Application is occupied by the members of the native title claim group. On this matter I refer to my comments in relation to condition 190B(8).

The application passes this condition.

<b>Decision of Delegate</b>	<b>PASS</b>	
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## **Decision of Delegate**

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

The Registrar is to give notice of the decision, as required by s.66(3) of the *Native Title Act*.

\_\_\_\_\_  
*DELEGATE*

\_\_\_\_\_  
*DATE*

ATTACHMENT 1

**THE FOLLOWING IS TO BE ENTERED AS CONTENTS OF THE REGISTER OF  
NATIVE TITLE CLAIMS PURSUANT TO S186**

S186 (1)

(a) Where this the application was filed in the Federal Court or lodged with a recognised State/Territory body

**The application was filed in the Federal Court.**

(b) if the application was lodged with a recognised State/Territory body – the name of that body

**Not applicable**

(c) the date on which the application was filed or lodged

**19 July 2000**

(ca) the date on which the claim is entered on the Register

**15 August 2000**

(d) the name and address for service of the applicants

Applicants: **Graham John Atkinson, Carmel Priscilla Barry, Trevor George Nicholson, Gary John Murray, Robert Herbert Nicholls, Connie Harrison-Edwards and Rodney John Carter**

Address for service:

**Mirimbiak Nations Aboriginal Corporation  
75-79 Chetwynd Street  
NORTH MELBOURNE VIC 3051**

(e) the area of land or waters covered by the claim:

**As per Schedule B – Part A**

(f) the area covered by the application excludes any land or waters covered by:

**As per Schedule B – Part B**

(g) a description of the persons who it is claimed hold the native title

**As per Schedule A**

(h) a description of the native title rights and interests in the claim that the Registrar in applying the subsection 190B(6); considered, prima facie, could be established.

**As per Schedule E with the following notes:**

**After “8. Management of Spiritual Business”**

*Note: The Registrar’s delegate finds this right is prima facie made out in so far as it requires activities or presence on the land or waters, the subject of this application.*