National Native Title Tribunal

Registration test decision

Application name	Torres Strait Regional Sea Claim
Name of applicant	Leo Akiba, George Mye
State/territory/region	Torres Strait, Queensland
NNTT file no.	QC01/42
Federal Court of Australia file no.	QUD6040/01
Date application made	23 November 2001
Date application last amended	10 August 2009

Name of delegate Lisa Jowett

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).

Date of decision: 10 February 2011

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated** 2 August 2010 and made **pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

Attachment A sets out in detail the chronology of events of this application since it was first filed in 2001.

Since 2005, the Torres Strait Regional Sea Claim (TSRSC) application has been amended three times, with the first amended application accepted for registration on 2 March 2006. A second amended application, filed in August 2008 again triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act. On 25 November 2008, a delegate of the Registrar came to the view that the application did not satisfy the circumstances set out in s. 190A(6A) and that a full registration test would be required in relation to the amended application. The registration test was deferred because of the pending trial over part of the area covered by the application.

The Court granted leave to futher amend the application on 20 July 2009. A third amended application was filed on 10 August 2009 and received by the Registrar on 2 September 2009 pursuant to s. 64(4) of the Act. It is the claim made in the third amended application that I must consider for registration pursuant to s. 190A.

I am satisfied that neither s. 190A(1A) nor s. 190A(6A) apply to the third amended application. In my view, s. 190A(1A) does not apply because the order granting leave to amend dated 20 July 2009 was not made by the Court under s. 87A.

The following schedules or attachments in the application have been amended:

1. Information on 'definitions', 'sovereignty', 'the treaty' and 'the consent determinations'.
2. Schedule A—description of the native title claim group.
3. Attachment B—description of the application area.
4. Schedule E—description of the native title rights and interests.
5. Schedule F—general description of the claimed native title rights and interests.
6. Schedule G—activities
7. Schedule H—details of any other applications
8. Attachment J—draft order.
9. Schedule L—tenure and land use issues
10. Schedule M—details of traditional physical connection.
11. Schedule N—details about prevention from gaining access to the application area.
12. Schedule O—membership of any other claim group
13. Schedule P—claims for exclusive possession of offshore places.
14. Attachment S—amendments to the application.

These types of amendments are either not described in or do not comply with s. 190A(6A)(d)(i)-(v). In my view, s. 190A(6A) does not apply because the amendments within the third amended application extend beyond the minor changes discussed in s. 190A(6A)(d).

Therefore my consideration of the third amended application is governed by ss. 190A(6) and (6B) which together provide that I may only accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

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 among 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.

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment B.

Effect of determination made on 23 August 2010.

In 2008, the Court ordered that the TSRSC application be separated into two parts, to be called "Sea Claim Part A" and "Sea Claim Part B" with Sea Claim Part A to be considered separately and in advance of Sea Claim Part B.

Following the trial in relation to Part A, Justice Finn delivered judgment on 2 July 2010: see *Akiba on behalf of the Torres Strait Islanders of the Regional Sea Claim Group v State of Queensland (No 2)* [2010] FCA 643. An approved determination of native title giving effect to his Honour's reasons for judgment was made on 23 August 2010. In order 3, the Court determined that certain native title rights and interests exist in the areas described in Schedule 4 of the determination ('the native title areas'). In order 2, the court determined that native title does not exist in the area described in Schedule 3 of the determination.

Pursuant to s. 193 of the Act, the Registrar's delegate included the requisite details of the determination on the National Native Title Register (NNTR) on 27 August 2010. Those details include the native title rights and interests recognised in the determination, namely:

(a) the rights to access, to remain in and to use the native title areas; and

(b) subject to orders 6 and 9 of the determination, the right to access resources and to take for any purpose resources in the native title areas.

The entry on the Register of Native Title Claims (RNTC) was then amended on 30 August 2010 pursuant to s. 190(4)(da) to reflect the fact that there has, at this stage, been no determination of a prescribed body corporate (PBC). This means there is 'no registered native title body corporate' as defined in s. 253 for the native title areas. Therefore, in accordance with order 17 of the determination, the application is not finalised *except* over those areas described in Schedule 3 of the determination (i.e. the areas where, pursuant to order 2, it was determined that native title does not exist).

In accordance with s. 190(4)(e) of the Act, the entry on the RNTC was also amended so that it 'only relates to the matters in relation to which the application has not been finalised'. This was accomplished by inserting the statement: 'Those areas of Part A where native title has been determined not to exist are removed from this Register'.

The effect of all of these events is, in my view, that I must consider the claim made in the third amended application in relation to the whole of the area subject to that claim (i.e. Part A and Part B) *except* to the extent that it relates to the area described in Schedule 3 of the determination. This is because order 17 'finalises' the application in relation to the area referred to in order 2 (i.e. the area described in Schedule 3 of the determination).

Further, assuming s. 64(1B) does not apply,[1] I take Order 2 to be analogous in effect, i.e. the application should be taken to have been amended to remove the area described in Schedule 3 from the area subject to the claim made in the application. Therefore, that area is not subject to the claim I must consider for the purposes of 190A(1).

So, on this basis, in considering (for example) whether I am satisfied the factual basis provided supports the assertion that 'the native title claim group have,and the predecessors of those persons had, an association with the area' as required under s. 190B(5)(a), I take 'the area' to mean 'all of the area covered by the third amended application other that the area referred to in Order 2 of the determination'. This approach is taken throughout the reasons that follow.

Information considered when making the decision

Subsection 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.

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

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been 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).

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[1] Subsection 64(1B) provides that an application 'is taken to have been amended to reduce the area ... covered by the application if an order is made under section 87A by the Federal Court. The area ... is reduced by the area in relation to which the order is made'. It seems it does not apply in this case because the determination was not made 'under s. 87A'.

Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

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 made in a fair, just and unbiased way.

On 25 October 2010, the Tribunal advised the applicant and the State of Queensland that the registration test would be applied to the third amended application. Each was given the opportunity to provide any additional information or submissions relevant to the registration test for the delegate's consideration.

As no adverse or additional material has been submitted in relation to this application, neither I, nor other officers of the Tribunal, have been required to undertake any further steps in relation to procedural fairness obligations.

Procedural and other conditions: s. 190C

Subsection 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.

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 below.

I note that I am considering this claim against the requirements of s. 62 as it stood *prior* to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

My consideration of each of the particular parts of ss. 61 and 62 (which require the application to contain details/other information or to be accompanied by an affidavit or other documents) is detailed below:

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.

The application **contains** all details and other information required by s. 61(1).

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). 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 subgroup 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—*Doepel* at [36].

Schedule A of the application describes the the native title claim group as comprising the living descendents of the persons listed in Attachment A, each of whom is a Torres Strait Islander. Attachment A lists the names of those ancestors.

There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the native title group, or that it is a sub-group of the native title claim group.

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

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

The application **contains** all details and other information required by s. 61(3).

The application contains both the name of the applicant and an address for service on page 48.

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.

The application **contains** all details and other information required by s. 61(4).

The application at Schedule A and Attachment A does not name the persons in the native title claim group but provides a description of the persons in the group.

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 (iv).

The application **is accompanied** by the affidavit required by s. 62(1)(a).

The application is accompanied by affidavits from the two persons currently comprising the applicant—Mr Leo Akiba and Mr George Mye. These affidavits were filed with the original application on 23 November 2001 and contain the statements required by s. 62(1)(a)(i) to (v) before the amendment of that provision by the *Native Title Amendment (Technical Amendments) Act 2007* (*Technical Amendments Act*). The transitional provisions to the *Technical Amendments Act* provide that applications made before 1 September 2007 do not require a fresh affidavit in the form of the new s. 62(1)(a) if amended after that date, as has occurred here.

The application states at Part A, paragraph 8 that the 'applicant is the survivors of the persons who were the authorised applicant in relation to the original application'. The original application is defined at paragraph 1 as the 'application filed 23 November 2001'. When the application was last considered for registration (2 March 2006) after being first amended, the applicant was defined in the same terms. The first amended application therefore removed two deceased persons from the group of persons comprising the original applicant, leaving the applicant to be constituted by Leo Akiba and George Mye.

I have therefore considered the original affidavits of the two persons comprising the applicant—Leo Akiba (sworn 7 November 2001) and George Mye (sworn 15 November 2001). The affidavits are signed by each deponent, appear to be competently witnessed and make the statements required by this section as it was framed prior to 1 September 2007.

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

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

The application **contains** all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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.

The application **contains** all details and other information required by s. 62(2)(a).

Attachment B application contains a description of the external boundary of the area covered by the application and Schedule B includes a description of the areas within the external boundary that are not covered by 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).

The application **contains** all details and other information required by s. 62(2)(b).

Schedule C refers to Attachment C which refers back to Schedule C but no map is actually provided with the third amended application. However, an A4 monochrome copy of a map is provided at Attachment C of the second amended application. Schedule S in both the second and

third amended applications confirms that the area subject of the TSRSC application has not been altered from the original application. In the Tribunal's reconsideration of the registration test in DC97/7—Jabiru Township—NTD6027/98, 11 November 2010, Deputy President Sosso found that the application should be read to include the original application in those instances where the relevant part of the original application is not amended by the amended application.

I am therefore satisfied that the third amended application contains the map showing the boundaries of the area covered by 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.

The application **contains** all details and other information required by s. 62(2)(c).

Schedule D of the application states that no searches have been carried out to determine the existence of any non-native title rights in relation to the land and waters in the area covered by the application.

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.

The application **contains** all details and other information required by. 62(2)(d).

Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application. The description does not consist only of a statement to the effect that the native title rights and interests are all the 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.

The application **contains** all details and other information required by s. 62(2)(e).

Schedule F at paragraphs 31 to 159 contains the general description and relevant information going to the factual basis on which it is asserted that the native title rights and interests claimed exist, and also for the particular assertions in the section.

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.

The application **contains** all details and other information required by s. 62(2)(f).

Schedule G states that native title claim group members carry on activities 'such as to fully exercise the rights and interests refered to in Schedule E' and these 'include all such activities as are necessary for or incidental to the sustenance of human life and society'—at [160] and [161]. Activities are described in more detail under Schedule F.

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.

The application **contains** all details and other information required by s. 62(2)(g).

Schedule H states that 'some such applications had been made prior to the making of the original application but all have now been withdrawn'.

Schedule O states that 'no other application covers the whole or part of the area covered by this application'.

Although there are a number of overlapping applications (discussed below in my reasons at s. 190C(3)) I accept the information in Schedules H and O to the effect that the applicant was not aware of these applications at the time of the filing of the third amended application.

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.

The application **contains** all details and other information required by s. 62(2)(h).

Schedule I states that the applicant is not aware of any such notices.

Subsection 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.

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

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 relevant 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—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9].

The current application was made when it was originally filed in the Court on 23 November 2001—see *Strickland FC*—at [44] and [45]. Therefore, any overlapping previous applications would need to have been on the Register on this date for it to be necessary to consider whether there are any common claimants between any previous overlapping applications and the current application.

A spatial overlap analysis I conducted on 7 February 2011 confirms that three registered native title determination applications currently fall within the external boundary of the TSRSC application: QC08/6—Kaurareg People #1—QUD266/08; QC08/7—Kaurareg People #2—QUD267/08 and QC08/8—Gudang Yadhaykenu People—QUD269/08.

All three overlapping applications were entered on the Register in 2009, which is long after the current application was made in 2001. Therefore there are no previous applications covering the whole or part of the area covered by the current application in the sense discussed in s. 190C(3)(a) to (c) and I do not need to consider the issue of common members.

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

Subsection 190C(4) Authorisation/certification

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

(a) the application has been certified under Part 11 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.

Note: The word ***authorise*** is defined in section 251B.

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

For the reasons set out below, I am **satisfied** that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

Schedule R of the third amended application provides the following statement:

> The original application was certified by the Torres Strait Regional Authority. The amendments to the application do not include any amendments to the area claimed or to the membership of the native title claim group—at [177].

A copy of the certificate has not been provided with the third amended application; however it was provided with the original application filed on 23 November 2001. Schedule R of the third amended application clearly indicates that the applicant and representative body continue to rely on that certificate despite the demise of two of the persons originally comprising the applicant. I have therefore considered the original certificate against the requirements of s. 190C(4)(a), without considering whether the applicant is in fact authorised, as directed by the authority of *Doepel* at [80] to [81] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 (*Wakaman*) at [32] and [34].

Doepel is authority that the Registrar's consideration under s. 190C(4)(a) is limited to:

- ensuring that the certifying body has power under Part 11 to make the certification; and
- that the certification complies with s. 203BE(4).

I am not therefore required to 'go beyond that point . . . to be satisfied the condition imposed by s. 190C(4)(a) has been met'—*Doepel* at [80].

Paragraph 190C(4)(a) 'does not leave some residual obligation upon the Registrar to revisit the certification of the representative body': *Doepel*—at [81]. This was approved by Kiefel J in *Wakaman* at [32] and [34].

Section 203BE(4) requires that a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs of s. 203BE(2)(a) and (b) have been met; and
- briefly set out the body's reasons for being of that opinion; and
- where applicable, briefly set out what the representative body has done to meet the requirements of subsection 203BE(3).

Pursuant to s. 203BE(2), a representative body must not certify . . . an application for a determination of native title 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; and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Tribunal geospatial assessments confirm that the Torres Strait Regional Authority (TSRA) is the only relevant native title representative body for the area covered by this application and is therefore the only representative body that could certify the TSRSC application under s. 203BE.

The certification is dated 22 November 2001 over the Common Seal of the TSRA, and although I am unable to read who has signed the certification, I am satisfied that it is the signature of a duly authorised officer. There are three recitals pertaining to:

A. the making of 'the Sea Claim';
B. the TSRA as the relevant representative body; and
C. the TSRA having made certain enquiries regarding the circumstances of the Sea Claim and satisfying itself as to those circumstances.

There follows a statement that TSRA is of the opinion that, in summary:

- the four persons named as the applicant have authority to make the application and deal with matters arising in relation to it, and
- all reasonable efforts have been made to describe or otherwise identify the claim group.

I am satisfied that for the purposes of s. 203BE(4)(a), the above are statements to the effect that the TSRA is of the opinion that the provisions of paragraphs 203BE(2)(a) and (b) have been met.

For the purposes of s. 203BE(4)(b), the certification states that it has formed these opinions on the basis of clear instructions given to it by the claim group at seven meetings between June and October 2001, as well as on the basis of extensive anthropological advice.

The final requirement of s. 203BE(4) at subsection (c), is that the representative body must also set out how it has met the requirements of s. 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. The subsection also states that a failure to do so does not invalidate any certification of the application issued by the representative body.

The TSRSC application has at various times since it was first made been overlapped to varying degrees by other applications. In my view the requirement in s. 203BE(4)(c) that the certification *must* briefly set out what the representative body has done to meet the requirements of subsection (3) is countered by the preceding words to this subsection, '*where applicable*' (my emphasis).

The certification does not make any statement about what the representative body has done to meet the requirements of s. 203BE(3). From this I infer that the TSRA has not considered it applicable for the certification to set out what it has done to meet the requirements of subsection (3). In my view, this interpretation is open to the representative body in circumstances where it is aware of overlapping applications but has not made reasonable efforts to achieve agreement between the overlapping groups or to minimise the number of applications covering the claim area.

Therefore, in order to meet the requirements of s. 203BE(4), it is sufficient in the circumstances before me that the certification only includes the statement set out in subsection 203BE(4)(a) and the reasons referred to in subsection 203BE(4)(b).

For the above reasons, I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s. 190C(4)(a).

Merit conditions: s. 190B

Subsection 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.

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

Schedule B contains a description of the area covered by the application in two parts: Part A for the external boundaries and description and Part B for the areas within the external boundaries that are not covered by the application.

External boundaries and description

Part A states that Attachment B contains the description of the external geographical boundaries of the area covered by this application and that Attachment C contains a map on which the external geographical boundaries are delineated and marked. Part A also states that "in the event of any inconsistency between the description and the delineation of the boundaries in Attachment B and Attachment C, the description in Attachment B shall prevail"—at [20].

Attachment B is entitled 'External Boundary Description', consisting of Part A and Part B, being a description distinguishing the area covered by the application into two parts. The area of the application is described by the use of geographic coordinates and by reference to Australian territorial sea limits and the Fisheries Jurisdiction Line and Seabed Jurisdiction Line[2].

The area covered by the application is largely contained within a broad external geographic boundary with waters claimed to the north and south of the maritime zones defined by the Fisheries and Seabed Jurisdiction Lines.

Part A

This contains a description of the area covered by application: '… all of the lands, waters, reefs, sandbanks, shoals, seabeds and subsoil on the seaward side of the high water mark within the following external boundaries...'. The external boundaries of Part A are then described in 9 sections:

- Section 1 describes the wider external boundary of the area claimed south of the Fisheries and Seabed Jurisdiction Lines (these delineating in part the external boundary), and
- Sections 2 to 9 describe the area claimed north of the Fisheries and Seabed Jurisdiction Lines. This area of the application includes:

[2] These being maritime zones Annex 8 and Annex 5 respectively as established under the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as the Torres Strait, and Related Matters*.

- waters in a discrete area bounded by the Fisheries and Seabed Jurisdiction Lines; and
- the full extent of the outer limit of the Australian territorial seas of Aubusi Island, Boigu Island, Moimi Island, Duan Island, Kaumag Island, Saibai Island, Anchor Cay, East Cay, Black Rocks, Bramble Cay, Deliverance Island, Kerr Islet, Pearce Cay, Turnagain Island, and Turu Cay.

Part B

This contains a description of the discrete area claimed north of the Seabed Jurisdiction Line. The west, north and east boundaries of this area are bounded by the Fisheries Jurisdiction Line and on the south by the Seabed Jurisdiction Line.

The external boundary of the area includes the islands Aubusi, Boigu, Moimi, Dauan, Kaumag and Saibai all of which are surrounded by the limit of the Australian Territorial Sea. For this area alone, the description states that the application covers '… the waters on the seaward side of the high water mark, but not the seabed or subsoil, exclusive of the territorial seas as defined in Part A above...'. I understand this to mean that for this part of the area of the application bounded by the Seabed and Fisheries Jurisdiction Lines, the TSRSC application claims the waters on the seaward side of the high water mark of the 6 named islands and this includes the seabed and subsoil but only in the area of the territorial seas.

Areas within the external boundary not covered by the application

Schedule B at Part B identifies the areas within the external boundary that are not covered by the application by listing general exclusions. I understand by the description that the area covered by the application does not include:

- Category A past and intermediate period acts, Category B past and intermediate period acts (that are wholly inconsistent with native title rights and interests) as they are defined in either the Act or the *Native Title (Queensland) Act 1993*;
- areas where a previous exclusive possession act was done under the *Native Title (Queensland) Act 1993* or under the NTA;
- any areas where native title has been wholly extinguished, specifically freehold grants and public works under the NTA.

These general exclusions are sufficient to offer an objective mechanism to identify which areas fall within the categories described and are therefore not included in the area covered by the application.

Map

Schedule C refers to Attachment C however, no map is included at Attachment C. For the reasons noted above at s. 62(2)(b), I have referred to the map included in the original application as filed 23 November 2001 and the map included in the second amended application filed 25 August 2008. The latter is the clearer of the maps and consists of an A4 monochrome copy of a map entitled 'Torres Strait Regional Sea Claim prepared by the Native Title Office – Torres Strait Regional Authority' dated 23 August 2008. It includes:

- the application area depicted by an area bounded by a bold white line labelled 'PART A' and 'PART B';
- excluded areas (those above "high water mark" within the external boundaries of Parts A & B) are also outlined by a bold white line; and
- scalebar; northpoint, coordinated grid and a faint satellite image as a background.

It is clear that the Parts A and B identified on the map reflect the Parts A and B of the description of the external boundary at Attachment B.

As discussed earlier in these reasons, the Court has determined that native title does not exist in some of the area of the TSRSC shown on the map that is provided with the second amended application. However, in my view, it is reasonably certain whether native title rights and interests are claimed in relation to particular land or waters because I take the application (including the map) to have been amended by Order 2 of Justice Finn's determination of 2 July 2010.

Consideration

The Tribunal's geospatial assessment of the map and written description is that the description and map are consistent and identify the application area with reasonable certainty.

I have referred to mapping of Australia's Maritime Zones in the Torres Strait produced by Geoscience Australia, 2001, to assist my understanding of the way the area is described and claimed. I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty. The areas not covered by the application are also clear to me.

I am therefore satisfied that the requirements of the condition are met.

Subsection 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.

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

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains a description and it is therefore necessary to consider whether the application satisfies the requirements of s. 190B(3)(b).

Schedule A of the application contains this description of the persons in the native title claim group:

> 13. The native title claim group (**sea claim group**) comprises the living descendents of the persons listed in Attachment A, each of who was a Torres Strait Islander.
>
> 14. The members of the sea claim group are the biological and socially recognised descendants of the ancestors.

15. Generally, the members of the sea claim group, the ancestors and deceased descendents of the ancestors are shown in the genealogies.

16. Because of the nature and extent of adoptions within the sea claim group it is impracticable to identify and show in the genealogies all relevant biological and adoptive connections of each member of the sea claim group.

17. The genealogies show many but not all socially relevant connections between the persons shown in the genealogies.

Attachment A lists those persons referred to in paragraph 13 quoted above. Paragraph 14 makes it clear that the native title claim group includes not only biological descendants but also socially recognised descendants of the persons listed at Attachment A. The latter category of descendants presumably includes the 'adoptive connections' referred to in paragraph 16.

In *Doepel*, Mansfield J stated that 'the focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group and they are described sufficiently clearly so it can be ascertained whether any particular person is in that group—at [51]. Additionally, *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [33] confirms that s. 190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification.

Guided by these two authorities, I am of the view that the native title claim group described at Schedule A and Attachment A is sufficiently clear to enable identification of any particular person in the native title claim group and I am therefore satisfied that the requirement of this condition is met.

Subsection 190B(4)
Native title rights and interests identifiable

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

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

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s. 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

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

The description of the native title rights and interests claimed in relation to particular land or waters is found at Schedule E, set out at paragraph 26:

The claimed rights and interests are the rights to:

(a) enter and remain;
(b) use and enjoy;
(c) access the resources;
(d) take the resources;
(e) a livelihood based upon access and taking resources;
(f)
(g)
(h)
(i)
(j) protect resources;
(k) protect the habitat of resources;
(l) protect places of importance

I am satisfied that the description of the claimed native title rights and interests is sufficient to allow them to be readily identified in the sense that they are described in a clear and easily understood manner.

Subsection 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.

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 below.

For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s. 190B(5). In *Doepel*, Mansfield J stated that:

> 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].

Consideration of this condition necessitates taking into account the concept and meaning of the word 'traditional'. The decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) defines 'traditional' in the context of the phrase 'traditional laws and customs'. That is:

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist—at [46] and[47].

In my consideration of the factual basis for the claim made in this application, I am therefore guided by principles outlined in *Yorta Yorta*:

- traditional laws and customs are ones that a society passes on from one generation to another;
- laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- traditional laws or customs are derived from a body of norms or normative system that existed before sovereignty;
- rights and interests are rooted in pre-sovereignty traditional laws and customs; and
- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

That these principles from *Yorta Yorta* guide consideration of the condition in s. 190B(5) was discussed by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 07*)at [26]. I note that the review of that decision by the Full Court in *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) did not criticise this approach. I note that the most recent decision by Dowsett J in *Gudjala #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 09*) again points to the *Yorta Yorta* principles as guiding the Registrar's consideration of the condition in s. 190B(5).

The test in s. 190A involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests *exist*.

It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country as that is a judicial enquiry.

Below, I consider each of the three assertions set out in the three paragraphs of s. 190B(5) and I have referred only to those statements in the material before me which are pointedly relevant to each of the assertions.

Reasons for s. 190B(5)(a)

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

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the native title claim group (the sea claim group) has, and its predecessors had, an association with the area of the application. Whilst it is not necessary for the factual basis to support an assertion that *all* members of the native title claim group have an association with the area *all* of the time, it is necessary to show that the claim group *as a whole* has an association with the area—*Gudjala 07* at [51] and [52].

The definitions at paragraph [1] define both the application area and an 'application region':

> (d) The application area means the area the subject of the application
> (e) The application region means the application area and all the islands that lie within the external perimeter of the application area

It is clear that whilst the application area is over the waters only within the external perimeter of the application area, the islands are intrinsically relevant to the sea claim group's association with the area covered by the application and its acknowledgement and observance of its traditional laws and customs.

It is clear to me from the information going to the factual basis for the application that the sea claim group is and was a marine oriented society characterised by:

- exploitation, utilisation and management of the marine environment and its resources;
- maritime lore and knowledge enshrined in songs and myths;
- cultural orientation towards the sea including amongst other things, beliefs in dugong and turtle hunting magic, dance and story telling, religion, mythology, totems, art, music, personal identity;
- a number of island based sub-groups all connected by the sea; and
- regular marine fishing, hunting and gathering activities.

There are some 13 permanent residential island communities within the application region, each occupied by descendants of the original inhabitants. Members of the sea claim group frequently travel to, inhabit and use these and many other islands in the applications region—paragraph [57] of the application.

Under the heading of Connection the application refers to the sea claim group's past and present association with the area—[143] to [159]:

- association with the application is area is by the current laws and customs, and pursant to these the sea claim group carry out activities in exercise of the claimed rights and interests and acknowledge and observe their laws and customs;
- many of the current group's ancestors and predecessors were born, lived most of their lives in the region and are buried in the region;
- many members of the group have been born and have lived all or much of their lives in the application region and frequently travel to, inhabit and use the islands in the region;
- members of the current group are biologically and socially recognised descendants of Torres Strait Islanders alive at sovereignty;
- the Torres Strait has been inhabited for several millennia and the sea claim group's predecessors occupied, inhabited and used over more than 25 islands in the region and the application area prior to sovereignty;
- economic use was made by the predecessors of the application area and the region and such use continues extensively and intensively by the current group in accordance with its traditional laws and customs;
- members of both the current group and its predecessors, in accordance with law and custom, are said to be the 'proper' people for the area, regarding the area as being owned by them through their continued occupation, habitation and use of the area;
- through the laws acknowledged and customs observed, there is an instrinsic link between people and place;
- geographical places of the application area and their marine resources have been extensively named by the group's ancestors pursuant to the original laws and customs; and
- as part of law and custom, members of the group and its predecessors have and have had knowledge of, hold and own mythological stories associated with the 'story people' and the places of the application area.

I am of the view that I am able to find sufficient references within the amended application to support the assertion that the sea claim group currently has an association with the whole of the area and that the predecessors of the claim group had an association with the whole of the claim area.

Reasons for s. 190B(5)(b)

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

This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the sea claim group and that these give rise to the claimed native title rights and interests.

Dowsett J recently considered the requirements of s. 190B(5) and addressed the adequacy of the factual basis underlying an applicant's claim in *Gudjala 09*. He makes the following statements

about the assessment of the adequacy of a general description of the factual basis of the claim at [29]:

- assertions should not merely restate the claim, and
- there must be at least an outline of the facts of the case.

Schedule F details the broad aspects of traditional laws and customs for both the current and original societies of the sea claim group. Broadly speaking the sea claim group is regulated by traditional laws and customs into different levels of 'inclusiveness' or society sub-groups—families, community groups, cluster groups and language groups. A complex system of entitlements of members of the sea claim group across the application area and its marine territories reflects the laws and customs regulating the relationships between individual members, communities and the other groupings of the sea claim group—at [56(h)].

Traditional laws and customs are acknowledged and observed in relation to:

- acknowledgment and respect for the knowledge and authority of elders;
- cultural knoweldge and practice—ceremonies, hunting, fishing, gathering, cultivation, preparation, distribution of consuption of food, medicinal and other resources;
- *gud pasin* (seeking of permission to access and take from maine territory) and the exclusion of strangers;
- *ailan pasin* as a body of principles regulating island custom and the way things are done;
- sharing, reciprocity, avoidance, sanction and prohibition; and
- regulation of trading relationships and dealings.

There exist laws and customs relating particularly to marine territory, whereby:

- ownership of place is vested in the biological and socially recognised descendants of the original occupiers ;
- to inhabit an island is to inhabit its associated marine territory;
- permission must be sought to access another's marine territory (g*ud pasin*); and
- the exploitation and utilisation of marine resources is regulated through reciprocity and assocation.

A feature of the group's traditional law and custom is that successive storypeople are regarded as the bringers of certain laws and customs—[68]. Story people are associated with mythological narratives and named sites, and play a role in the regional cultural consolidation —Four Brothers ([Story People – Brother 1 – name deleted], [Story People – Brother 2 – name deleted], [Story People – Brother 3 – name deleted] and [Story People – Brother 4 – name deleted) and]), [Story People – Brother 5 – name deleted] and [Story People – Brother 6 – name deleted]—[69].

Normative force is given to the sea claim group's traditional laws and customs through:

- kinship and other relationships;
- punitive measures for breach of laws and customs and fear of sorcery;
- respect of elders; and

- association with the actions of story people and respected ancestral figures.

Schedule F contains extensive information on the territorial and social organisation of the original society through which it is stated that the current laws and customs have continued to be acknowledged and observed. The original society of the sea claim group was a 'stateless society' without political authority. Groups were associated with places on the basis of occupation and inheritence. Prior to 1872, the ancestors of the sea claim lived in small groups over 25 islands in the region of the application area and were simultaneously autonomous in day to day life and interdependent for intermarriage and trade purposes—[84].

The description of the original society includes that:

- laws and customs referred to above existed and formed part of the original laws and customs of the original society;
- the marine environment was relied upon by the original society of the sea claim group and integral to cultural knowledge and practice, for example, trade and exchange of resources);
- societal sub group speaking different languages had the same or similar myths;
- the cosmology, mythology and religion included totemic beliefs, use of magic to assist fishing and hunting, gardening and healing, a widespread belief and practice in sorcery; and
- ceremonial activites were regulated by law and custom.

The material provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the sea claim group and that these give rise to the native title rights and interests claimed.

Reasons for s. 190B(5)(c)

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

This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the sea claim group continues to hold native title in accordance with its traditional laws and customs.

The application states that the original society's 'laws and customs and ecological and other imperitives inclined Torres Strait Islanders to be receptive to innovation and change through engagement with others'—[102]. Adaptation and change has been a continuous characterisation of the sea claim's society before and after sovereignty—[134] to [142]:

- the orignal society was open to and accomodated innovation and change;
- new trading relationships and partnerships were developed and new methods and technologies were utilised in the exploitation of marine resources; and
- knowledge and exploitation of marine resources continuously evolving to accommodate changes in the group's social and natural environment in relation to trade activities and interactions with other societies.

It is stated that at all times since sovereignty the sea claim group has and its predecessors have had a connection to the area and region of the application—[159]. There has been continuity of traditional law and custom in the society of the sea claim group since sovereignty—[120] to [133]:

- the normative system as it exists today is substantially continuous with that which existed at sovereignty;
- laws and customs acknowledged and observed continue to sustain the same rights and interests that existed at sovereignty;
- laws and customs have been handed down by word of mouth and common practice;
- laws and customs relating to social and territorial organisation, marine orientation, innovation and change, trade, exchange, economy and commerce, are substantially continuous with original laws and customs;
- laws and customs relating to cosmology, mythology and religion are derived and adapted from or have their origins in the original laws and customs—for example through narratives and sites which are part of the cultural property of the current society, the incorporation of traditional ceremony and understanding into Christian festivals and traditions; and
- occupation of the Torres Strait and the application area has been substantially continuous.

There is sufficient information before me to support the assertion that the sea claim group continues to hold native title in accordance with its traditional laws and customs.

Subsection 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.

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

Under s. 190B(6) I must be satisfied 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 registration requires a minimum of only one right or interest to be established. In *Doepel*, Mansfield J noted the following:

> Section 190B(5), (6) and (7) however 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. Even so, it is noteworthy that s. 190B(6) requires the Registrar to consider whether `prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle—at [16].

I refer to the further comments from *Doepel* about the nature of the test at s. 190B(6):

- It is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].
- It involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

It follows in my view that the task under this section is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed. In performing this task, I have had regard to settled law about:

- what is a 'native title right and interest' (as that term is defined in s. 223);
- whether or not the right has been extinguished; and
- whether or not the right is precisely expressed such that it sets out the nature and extent of the right.

If a described right and interest in this application has been found by the courts to fall outside the scope of s. 223(1) then it will not be established prima facie for the purposes of s. 190B(6).

As mentioned above in relation to the requirements of s. 190B(5), the registration test involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are, prima facie, capable of being established.

I note that, in my view, as set out above at s. 190B(5), the application provides a sufficient factual basis (set out at [33] to [159] of the application) to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

I note that the application states at Schedule P that the 'claimed rights do not include a right [sic] exclusive possession'—[174] and therefore the rights claimed are claimed as 'non-exclusive' rights.

In the circumstances where I have found that particular claimed rights cannot be prima facie established, I refer the applicant to the provisions of s. 190(3A) of the Act. I note that the provisions of s. 190(3A) are available to the applicant if there is further information which would support a decision under that section to include a right on the Register.

In my consideration below of the rights claimed in the application, I have grouped together rights which appear to be of a similar character and therefore rely on the same evidentiary material or which require consideration of the same case law as to whether they can be established.

(a) enter and remain

Established

In my view there is sufficient material in the application to establish prima facie the observance of traditional law and custom giving rise to the right to 'enter and remain' on the area covered by the application. Members of the sea claim group reside permanently in 13 island communities and frequently travel to, inhabit and use many other islands and the surrounding waters, reefs,

lagoons, shoals, sandbanks, mud banks and marine resources in the application region—[57]. Day to day acitvities of the sea claim group, both the past and present, include activities which necessitate entering and remaining in the claim area, such as near shore and off shore fishing, inter-island travel, trading, collecting of marine resources and conducting ceremonial, custodial and religious acitvities.

(b) use and enjoy;

Not Established

I note that in the recent part determination of this application, *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 (*Akiba*), Finn J decided that a formula such as 'use and enjoy' might be taken to signify an exclusive right which included to 'possess and occupy'. His Honour commented that 'shorn of the words 'and enjoy', the description of the right is both apt and unobjectionable'—at [522].

I am of the view that there is sufficient material in the application to establish prima facie the right to use the area of the application and this has been referred to in my reasons above at s. 190B(5). However, as long as the right is framed as it is, in conjunction with 'and enjoy', I am of the view that it cannot be established prima facie as a non-exclusive right.

(c) access the resources;

(d) take the resources;

Established

In my view there is sufficient material in the application to establish prima facie the observance of traditional law and custom giving rise to the right to to access and take resources. In accordance with their traditional law and custom members of the sea claim group exercise, and their predecessors have exercised, their rights to use and trade in the resources of their individual and shared territories—[58] to [62] and [91] to [100].

(e) a livelihood based upon access and taking resources;

Not established

In this regard, I refer to comments by Finn J in *Akiba* that this is not a recognisable right; rather it is something encompassed by a right to take and access resources—at [530]. His Honour rejects the contention that there are laws and customs relating to livelihood:

> 'it is not itself a law or custom. Still less is it a right possessed under laws and customs. In saying this, I do not question that it may properly and appropriately be characterised as a "custom" in the discipline of anthropology—at [293].

He goes on to say:

> ...the right to livelihood presupposed a right under the Islanders' laws and customs that has been clearly established. That right is to use and take the marine resources of the Islanders' own or shared territory—at [294].

Finn J re-framed the three rights claimed at (c), (d) and (e) and determined them in *Akiba* as:

> (ii) the right to access resources and to take for any purpose resources in those areas

However, for the purposes of my consideration at s.190B(6), as currently framed and following Finn J's reasoning, this right cannot be established prima facie as it is not a right sourced in traditional law and custom.

(j) protect resources;

(k) protect the habitat of resources;

(k) protect places of importance

Not established

As currently expressed, these rights appear to include a right of control that is inconsistent with public rights at common law.

In *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 (*Gumana*) at [62] Mansfield J was of the view that a right to protect would include a right to exclude others which would be inconsistent with public rights to fish and navigate. His Honour did not consider that the *maintenance* of a particular site involves the assertion of an exclusive right inconsistent with those public rights, but the *protection* of a particular site would have that effect (emphasis added). 'Maintain and protect' rights have been recognised by the courts. It is my view that without the qualifier of the word 'maintain', rights to 'protect' infer a notion of control that is inconsistent with public rights at common law over sea areas.

Additionally, the scope of what may be meant by the terms 'resources' and 'habitat' is not specific or particularised in the current expression of these three rights. This tends to further imply that what is being sought is a right to control resources and places within the application area.

I refer to commnets by Finn J in *Akiba*:

> the protect rights, in the broad terms in which they have been cast, still have the purpose of control at their core, notwithstanding that illustrations may be able to be given of their being able to be used in some situations consistently with the common law as, for example, repairing or restoring damaged areas, or group members practising conservation measures in a marine area. It is for this reason that the Applicant has not been able to give a coherent account of "the class of non-exclusive protect rights"—at [762].

I am therefore not satisfied that these three rights can be established prima facie in relation to the application area. In any event, it is also my view that there is no information in the application that particularises what is protected by the sea claim group nor is there any information identifying the traditional laws and customs under which such rights may exist.

Conclusion

I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient information to establish prima facie their existence. I am satisfied, having considered the information before me, that some of the rights claimed in this application can be established prima facie. Therefore the rights to be registered on the Register of Native Title Claims are as follows:

> The claimed rights and interests are the rights to:
> (a) enter and remain

(c) access the resources
(d) take the resources

Subsection 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.

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

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. The condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application'—*Gudjala FC* [84].

In *Doepel*, Mansfield J also considered the nature of the Registrar's task at s. 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It 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].

The long form affidavits filed with the original application of George Mye (19 November 2001) and Leo Akiba (7 November 2001) both attest to having maintained a continuous physical connection with the parts of the claim area, continuously occupying, visiting, travelling across and using the claim area throughout their lives with other other traditional owners. George Mye is a senior traditional owner for the 'land, seabed, subsoil, reefs, shoals, sandbars and waters that make up the eastern part of the claim area. Leo Akiba is a senior traditional owner of the top western part of the claim area. Both attest to acknowledging and observing a system of laws and customs relating to land and sea ownership; hunting, fishing and collecting the marine resources of the claim area; and possessing and passing onto younger generations a 'rich lore of knowledge relating to the sea area – myths, stories, songs traditional knowledge about the currents, tide, winds, seasons and marine species of the area'.

Sufficient material is also provided in the application in broad terms to show that the sea claim group has traditional physical connection with the waters of the application area (as well as the

application region). The material has been referred to in my consideration for both s. 190B(5) and s. 190B(6).

Schedule M at [172] refers to earlier paragraphs in the application which relate to traditional connection. Schedule G at [160] states that members of the native title claim group carry on activities on the claim area such as to fully exercise their rights and interests.

I am satisfied that at least one member of the claim group currently has a traditional physical connection with parts of the application area.

Subsection 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.

Section 61A provides:

(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.

(2) If :

(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;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (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

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application **does not** offend the provisions of s. 61A(1).

As noted in the Application Summary of these reasons (Attachment A), Finn J split the original TSRSC application into Part A and Part B in 2008. On 2 July 2010 native title was determined to exist in relation to part of the Part A determination area and on 23 August 2010 Finn J made orders in terms of the agreed draft determination: *Akiba on behalf of the Torres Strait Islanders of the Regional Sea Claim Group v State of Queensland* [2010] FCA 643. The orders provide that pursuant to s.190(4)(da) of the *Native Title Act 1993* (Cwlth), those areas of Part A where native title has been determined to exist will remain on the Register until a Prescribed Body Corporate is determined in relation to those areas:

> In respect of the native title areas, application QUD 6040 of 2001 is not "finalised" within the meaning of s 190(4)(e) of the Native Title Act until a prescribed body corporate has been determined, in accordance with s 56(1) or s 57(2) of the Native Title Act, to perform the functions mentioned in s 57(1) or s 57(3) of that Act as the case may be in respect of all parts of the native title areas—at [17].

Although there has been a determination of native title in relation to part of the area covered by the TSRSC application, it is conditional upon the determination of a prescribed body corporate. I am therefore of the view that these circumstances are not contrary to the requirements of s. 61A(1) and am satisfied that no determination exists in relation to any area of the application.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Paragraph 21(b) under Schedule B of the application makes the relevant statements that the area covered by the application does not include any area that is or was the subject of a previous exclusive possession act.

Paragraph 171 under Schedule L states that the applicant has not identified any area covered by the application whereby extinguishment of native title rights and interests would be required by sections 47, 47A or 47B to be disregarded.

Reasons for s. 61A(3)

Section 61A(3) provides that an 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 previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

In my view, the application **does not** offend the provisions of s. 61A(3).

The application makes no claim to exclusive possession.

Subsection 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.

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

Reasons for s. 190B(9)(a):

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

The application at Schedule Q states that the applicant does not make any claim for minerals, petroleum or gas wholly owned by the Crown.

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

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

The whole of the area of the application covers offshore places and Schedule P provides the statement that the claimed rights do not include a right to exclusive possesion.

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

The application **satisfied** the subcondition of s. 190B(9)(c).

Paragraph 21(d) under Schedule B of the application contains the relevant statements that the application excludes land or waters where the native title rights and interests have otherwise been wholly extinguished.

[End of reasons]

Attachment A
Application overview

The original Torres Strait Regional Sea Claim (TSRSC) application was filed 23 November 2001 and accepted for registration under s. 190A on 4 July 2002. Leave was granted to amend the application on 27 June 2005 and the amended application accepted for registration on 2 March 2006.

Since that time a series of events have occured in relation to this application which are set out chronologically below:

21 January 2008	Leave granted by the Court to the amend the application.
18 August 2008	The Court made consolidated orders in relation to the trial of the TRSC, to commence in the week of 29 September 2008.
25 August 2008	Second amended application was filed.
23 September 2008	The Court ordered that the application be separated into two parts, to be called "Sea Claim Part A" and "Sea Claim Part B" with Sea Claim Part A to be considered separately and in advance of Sea Claim Part B. Sea Claim Part A remained subject to the directions of 18 August 2008 and the orders as they related to Sea Claim Part B were vacated. Sea Claim Part B was adjourned to a date to be fixed for further directions.
25 November 2008	A delegate of the Registrar decided that the second amended application did not satisfy the circumstances set out in s. 190A(6A) and that the amended application would need to be considered for registration under s. 190A.
7 May 2009	A request was made by the representative for the applicant for an extension of time for the application of the registration test. An extention was granted by a delegate of the Registrar to 20 August 2009.
10 August 2009	Third amended application was filed.
2 September 2009	Third amended application was forwarded to the Native Title Registrar (the Registrar).
8 September 2009	A second extension of time was granted at the request of the representative for the applicant to 11 December 2009.
14 January 2010	A third request was made by the representative for the applicant that consideration for registration of the third amended application be deferred indefinitely.
5 February 2010	A third extension of time to 30 June 2010 was granted based on the fact that a determination in relation to Sea Claim Part A was imminent.
2 July 2010	Native title was determined to exist in relation to part of the Part A determination area.
23 August 2010	Justice Finn made orders in terms of an agreed draft determination: *Akiba on behlaf of the Torres Strait Islanders of the Regional Sea Claim group v State of Queensland* [2010] FCA 643.

Attachment B
Summary of registration test result

Application name	**Torres Strait Regional Sea Claim**
NNTT file no.	**QC01/42**
Federal Court of Australia file no.	**QUD6040/01**
Date of registration test decision	**10 February 2011**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result: met**
	re s. 61(1)		**met**
	re s. 61(3)		**met**
	re s. 61(4)		**met**
	re s. 62(1)(a)		**met**
	re s. 62(1)(b)		**Aggregate result: met**
		s. 62(2)(a)	**met**
		s. 62(2)(b)	**met**
		s. 62(2)(c)	**met**
		s. 62(2)(d)	**met**
		s. 62(2)(e)	**met**
		s. 62(2)(f)	**met**
		s. 62(2)(g)	**met**
		s. 62(2)(h)	**met**

Test condition	Subcondition/requirement	Result
s. 190C(3)		**met**
s. 190C(4)		**Overall result:** **met**
	s. 190C(4)(a)	**met**
	s. 190C(4)(b)	**N/A**

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		**met**
s. 190B(3)		**Overall result:** **met**
	s. 190B(3)(a)	**N/A**
	s. 190B(3)(b)	**met**
s. 190B(4)		**met**
s. 190B(5)		**Aggregate result:** **met**
	re s. 190B(5)(a)	**met**
	re s. 190B(5)(b)	**met**
	re s. 190B(5)(c)	**met**
s. 190B(6)		**met**
s. 190B(7)(a) or (b)		**met**
s. 190B(8)		**Aggregate result:** **met**
	re s. 61A(1)	**met**
	re ss. 61A(2) and (4)	**met**
	re ss. 61A(3) and (4)	**met**

Test condition	Subcondition/requirement	Result
s. 190B(9)		**Aggregate result:** **met**
	re s. 190B(9)(a)	**met**
	re s. 190B(9)(b)	**met**
	re s. 190B(9)(c)	**met**

Attachment C
Documents and information considered

The following lists **all** documents and other information that I have considered in coming to my decision about whether or not to accept the application for registration.

1. The application as filed in the Federal Court on 23 November 2001, including attachments and affidavits.
2. Registration Test Decision, QI01/42—Torres Strait Regional Sea Claim (first amended application), accepted for registration 2 March 2006.
3. The second amended application as filed in the Federal Court on 25 August 2008.
4. Decision pursuant to s. 190A(6A), made by a delegate of the Registrar on 25 November 2008.
5. The third amended application as filed in the Federal Court on 10 August 2009.
6. The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis' (the geospatial report) for 25 November 2008 and 14 September 2009, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent.
7. Mapping of Australian Maritime Zones in the Torres Strait, Geoscience Australia.
8. Federal Court orders in *Leo Akiba & George Mye on behalf of the Torres Strait Regional Seas Claim and State of Queensland and Ors*, dated 23 September 2008 and 23 August 2010.
9. Reasons for determination in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* (includes Corrigendum dated 9 August 2010) [2010] FCA 643 (2 July 2010).

[End of document}