National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE:	Danielle Malek
Application Name:	Town of Borroloola
Names of Applicants:	Wendy Roper, Gordon Lansen, Phillip Timothy, Graham Friday, Mavis Timothy on behalf of the Rrumburriya Borroloola group - ("the claimants")
Region:	Northern Territory (North)
NNTT No:	DC03/3
Federal Court No:	D6003/03
Date Application Made:	24 June 2003

The delegate has considered the application against each of the conditions contained in s.190B and s.190C of the *Native Title Act* 1993 (Cwlth).

DECISION

The application is **ACCEPTED** for registration pursuant to s190A of the *Native Title Act* 1993 (Cth).

Danielle Malek

Delegate of the Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D

13 February 2004
Date of Decision

Brief History of the Application

On 24 June 2003, the application was filed in the Northern Territory District Registry of the Federal Court of Australia ("the Court"). The application was made by Wendy Roper, Gordon Lansen, Phillip Timothy, Graham Friday, Mavis Timothy (on behalf of the Rrumburriya Borroloola group) ("the claimants").

The Northern Territory Government (NTG) was provided with a copy of the application on 26 June 2003 and given until Monday 7 July 2003, to respond. The NTG's submission was received on 7 July 2003. This submission was forwarded to the Northern Land Council (NLC) on 8 July 2003 requesting a response by COB 25 July 2003. The response was received on 1 August 2003.

Delegation Pursuant to Section 99 of the Native Title Act 1993 (Cth)

On 28 November, 2001 Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the *Native Title Act 1993* (Cth).

The delegation of 28 November, 2001 has not been revoked as at this date.

Information considered when making the Decision

In considering this application I have considered and reviewed all of the information and documents from the following files, databases and other sources:

- Federal Court Application;
- Correspondence with Northern Land Council dated 1 August 2003;11 September 2003(Provision of Certification Document)
- Correspondence with Northern Territory Government dated 7 July 2003,24 October 2003;
- The Registration Test File;
- Determination of Native Title Representative Bodies: their gazetted boundaries
- The National Native Title Tribunal Geospatial Database and Assessment dated 02 July 2003 Geospatial assessment No 2003\1294;Overlap Analysis dated 13 February 2004.
- The Register of Native Title Claims;
- The National Native Title Register;
- ILUA Database;

Please Note: All references to legislative sections refer to the *Native Title Act 1993* (*Cwlth*) unless otherwise stated.

A. Procedural Conditions

s.190C(2)

Information, etc., required by section 61 and section 62:

The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below. I find that the procedural requirements of sections 61 and 62 have been met and accordingly I find that the application meets the requirements of s.190C(2).

Details required in section 61

s.61(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-condition
Schedule A describes the native title claim group as the Rrumburriya Borroloola group who are comprised by all persons descended from the five apical Rrumburriya ancestors (and their descendants) named at para.3 of Schedule A. These people are said to be "traditionally connected with the area described in Schedule B ("the area claimed") through "spiritual, religious, physical and historical associations," "biological, classificatory lines of father's father, mother's father, father's mother, and mother's mother and; processes of succession." The applicants further note that they have a communal native title in the application area, from which their rights and interests derive.

In *Northern Territory of Australia v Doepel* [2003] FCA 1384, Mansfield J emphasises the procedural nature of s61(1). His Honour said that: "Section 190C, dealing with procedural and other matters, largely but not exclusively directs attention to the terms of the application itself. Section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62"; at [16]. Only "[i]f the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration": at [36]. As there is no information in the application which suggests to me that this group does not include, or may not include, all the persons who hold native title in the area of the application, I am satisfied that the application meets the requirements of s61(1).

Result: Requirements met

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

Reasons relating to this sub-condition
The applicants' name and address for service is supplied in Part B of the application.

Result: Requirements met

s.61(4) Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition
An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of section 61(4)(a) are not met.

However, for the reasons set out in relation to section 190B(3)(b), I find that the persons in the native title claim group are described sufficiently clearly at Schedule A, so that it can be ascertained if any particular person is one of those persons in accordance with section 61(4)(b).

Result: Requirements met

s.61(5) Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents

Reasons relating to this sub-condition
The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), *Native Title (Federal Court) Regulations 1998*. As required by s.61(5)(b), the application was filed in the Federal Court on 24 June 2003.

The application is accompanied by affidavits affirmed by the applicants as prescribed by s.62(1)(a) and by a map as prescribed by s.62(2)(b).

I refer to my reasons for decision in relation to those sections of the Act.

Result: Requirements met

Details required in section 62(1)

s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)

Reasons relating to this sub-condition
The application filed in the Federal Court was accompanied by affidavits from the named applicants. The applicants are identified by name and address. Each affidavit has been affirmed before a Solicitor.

In each affidavit, the applicant deposes satisfactorily to the matters required in s.62(1)(a)(i)-(iv). Section (1)(a)(v) also requires that each affidavit states the basis on which the applicant is authorised as mentioned in subparagraph (iv). Paragraph 5 of each affidavit states as follows: “I have been authorised, as a consequence of meetings conducted by the native title claim group, and in accordance with decision making processes under traditional laws acknowledged and customs observed, to make this application.”

In correspondence dated 7 July 2003, the NTG contends that the affidavits are deficient in relation to s62(1)(a)(v) as they “contain no information about when the [authorisation] meetings took place, that the relevant native title holders were in attendance at the meeting, and that all people required under the traditional laws and customs of the group

to make such decisions in fact did authorise the applicant in accordance with traditional laws and customs" (p. 3).

I do not find this argument compelling. S62(1)(a)(v) merely requires that each affidavit states the basis on which the applicant is authorised. Section 251B states what it means for the applicants to be authorised by all the persons in the native title claim group, namely that the authorisation is (a) in accordance with a process of decision making under traditional laws and customs, or, where there is no such process; (b) in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group. In fulfilment of this requirement, the applicants depose that they are authorised "in accordance with decision making processes under traditional laws acknowledged and customs observed." Section 62(1)(a)(v) seems to require no more of the applicants, and I note that there are other provisions (specifically s190C(4)) which look to the merits of the authorisation process.

Result: **Requirements met**

s.62(1)(c) Details of traditional physical connection (information not mandatory)

Comment on details provided

Schedule G provides details of activities carried out in the application area. Schedule M provides details of traditional physical connection covered by the application.

Result: **Provided**

Details required in section 62(2) by section 62(1)(b)

s.62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-condition

Schedules B and C provide details of the area claimed. These schedules also refer to a map, which is provided as Attachment A.

Result: **Requirements met**

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

Reasons relating to this sub-condition

For the reasons which lead to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information provided by the applicant is sufficient to enable the identification of areas not covered by the application.

Result: **Requirements met**

s.62(2)(b) A map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition

Schedules B and C refer to a map contained in the application and labelled "Attachment A". The map identifies the external boundaries of the application.

Result: Requirements met

s.62(2)(c) Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests

Reasons relating to this sub-condition

Schedule D of the application states that the Applicant has not conducted any title searches of the area claimed. I have no information before me which indicates otherwise.

Result: Requirements met

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

Reasons relating to this sub-condition

A description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application together with statements which qualify these rights and interests claimed. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law. Additionally, for the reasons that I find that there has been compliance with s. 190B(4), I am also satisfied that the requirements of this section are met.

Result: Requirements met

s. 62(2)(e) The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

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

I distinguish the requirements of s62(2)(e) from those of s. 190B(5). Paragraph 62(2)(e) requires the application to contain a "general description of the factual basis" on which it is asserted that the native title rights and interests claimed exist, whereas s. 190B(5) requires me to 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 *Martin v Native Title Registrar* [2001] FCA 16, the Court commented on the relationship between s. 62(2)(e) and s. 190B(5), noting that in considering whether the application satisfies the requirements of s. 190B(5), a delegate was not limited to considering statements in the application (as with s. 62(2)(e)) but may refer to additional material under this condition.

Similarly in State *of Queensland v Hutchison* (2001) 108 FCR 575, Keifel J said that "such evidence goes beyond what was required to be set out in the application….Section 190B(5) may require more than s. 62(2)(e), for the Registrar [or his delegate] is required to be satisfied that the factual basis asserted is sufficient to support the assertion. " It is apparent then that what is required for s. 62(2)(e) is a 'general description', and that this description must be contained in the application only.

A general description of the factual basis as required by s62(2)(e) is contained within Schedules E, F, G and M of the application. I consider that this information contained in the application meets the requirement of the registration test for the purposes of s.62(2)(e)(i), (ii) and (iii). I am, therefore, satisfied that the information provided by the application satisfies the requirements of s62(2)(e) overall.

Result: Requirements met

s.62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-condition

Schedule G of the application provides a list of a number of current activities.

Result: Requirements met

s.62(2)(g) Details of any other application to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)

Reasons relating to this sub-condition

At Schedule H, the Applicants is said to be unaware of any other applications seeking a determination of native title or compensation over part of whole of the area covered by the application. I have no information before me which suggests otherwise.

Result: Requirements met

s.62(2)(h) Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of

Reasons relating to this sub-condition

At Schedule I, the Applicant asserts that the area claimed is not subject to any notices under section 29 of the Act. I have no information before me which suggests otherwise.

Result: Requirements met

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

s.190C(3)

Common claimants in overlapping claims:

The Registrar 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) an entry relating to the claim in 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 consideration of the previous application under section 190A.

Reasons for the Decision

If all three conditions nominated at section 190C(3) apply, I must consider whether any person included in the native title claim group was a member of the native title claim group(s) for any previous application(s).

A search of the Schedule of Native Title Applications and Register of Native Title Claims and the Tribunal's Geospatial Unit's assessment dated 2 July 2003, advise there are no applications which overlap this current application.

I therefore do not need to further consider conditions (b) and (c) of s.190C(3).

Result: Requirements met

s.190C(4)(a) or s.190C(4)(b)

Certification and authorisation:

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

(a) the application has been certified under paragraph 203BE by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: s.190C(5) – Evidence of authorisation:
If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons for the Decision

The application is certified by the Northern Land Council pursuant to section 190C(4)(b) (and s203BE) of the Act (see Schedule R). The Northern Land Council is the sole Aboriginal/Torres Strait Islander representative body that could certify the application under Section 203BE.

Both the NTG and the Tribunal noted transcription errors in the certification which accompanied the application at Schedule R. As a result, the NLC provided a corrected copy of the certification. An original of this corrected certification was filed in the Federal Court and a copy forwarded to the Solicitor for the Northern Territory.

In its submission dated 7 July 2003, the NTG contend that the requirement under s190C(4) has not been met. The requirements for meeting this condition of the registration test have most recently been considered by Mansfield J in *NT v Doepel* [2003]:

> "78 Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar. Section 190C(4) is set out at [14] above. The contrast between the requirements of subs (4)(a) and (4)(b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given. The nature of the enquiry is discussed by French J in *Strickland v NTR* at 259 - 260, and approved by the Full Court in *WA v Strickland* at 51 - 52. Both *Martin* at [13] - [18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b).
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> 79 As s 190C(4)(a) was found by the Registrar to have been satisfied in this matter, the Registrar was not required to undertake the task which s 190C(4)(b) would otherwise impose of considering whether, upon the material before him, the necessary authorisation had been given.
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> 80 Under s 190C(4)(a), the Registrar was required to identify the relevant native title representative body. He may have needed access to material beyond that in the application to do so. He identified the NLC. It is not contended that he erred in a reviewable way in taking that step. He was also required to be satisfied that the application had been certified by the NLC under s 203BE. He considered whether the certification was given by the NLC, and whether it was in accordance with s 203BE. There is no issue about whether the certification was given by the NLC. In determining whether the certificate of the NLC was in accordance with s 203BE, the Registrar addressed the terms of the certificate. In my judgment, that is what he was required to do. I also consider that the certificate did enable the Registrar to be satisfied that it met the requirements of s 203BE. For the reasons already given, I do not consider that the Registrar was required to go beyond that point in this matter to be satisfied the condition imposed by s 190C(4)(a) was met. Upon being so satisfied, he was not required to address the condition imposed by s 190C(4)(b)."

The Certification includes those statements required by s203 BE(2)(a) and (b) and by 203BE (4)(a) and (b). The Certificate is signed and dated 4th August 2003, by Mr. Norman Fry, CEO of the Northern Land Council. The representative body must not certify under this section, if it is of the opinion that proper authorisation has not occurred. The NLC has provided an opinion that proper authorisation has occurred and there is no information before me to indicate that this is not so. It follows that I am satisfied that the Northern Land

Council has met its requirements under the Act, and that the applicants have authority to lodge this application and deal with matters arising in relation to it.

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 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 and waters.

Reasons for the Decision

Map and External Boundary Description

A map is provided with the application and is identified as Attachment A. This map is an A3 colour copy of an untitled map with the application area depicted by a bold outline and hachured. The map includes cadastre colour-coded referenced in a legend. It also contains a scalebar.

Para. 1 of Schedule B describes the application area as follows: "[t]he land and waters subject to this application are in the Town of Borroloola in the Northern Territory. The area claimed is all land and waters located within the boundary of the Town of Borroloola (excluding those areas noted in paragraph (b) below) as symbolised on the map referred to in Schedule C. For convenience the map is hatched".

Paragraph (b) (specifically subparas. 2-4) of Schedule B sets out areas within the boundaries of the application area which are specifically excluded from claim.

In a preliminary assessment of the application provided to the Applicant, the Tribunal noted that while the description at Schedule B(b) excluded freehold land from claim, a number of hachured parcels within the claim area were hachured in the map at Attachment A. In response to this query, the NLC noted (letter, dated 1 August 2003) that "[t]he additional information contained on the map not only in relation to some tenures but also regarding the location of some streets and roads has been provided for convenience. This information is not intended to constitute all land subject to the exclusion clause in Schedule B or to be read as limiting the operation of that clause: neither the map nor schedule B so state nor can the map or schedule B on any reasonable construction be so understood." I accept this submission.

Further, I note that an expert assessment by the Tribunal's Geospatial Unit (dated 2 July 2003) concluded that the map and the description were consistent and clearly identified the application area with reasonable certainty.

For these reasons, I am satisfied that the requirements of s.190B(2) are met.

Result: Requirements met

s.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.

Reasons for the Decision

To meet this condition, the description of the claim group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

A list of names of all the persons in the native title claim group has not been provided in the application, so the requirements of section 190B(3)(a) are not met.

In the alternative, section 190B(3)(b) requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. It is my view that the section requires such a description to appear in the application itself.

the Rrumburriya Borroloola group who are comprised by all persons descended from the five apical Rrumburriya ancestors (and their descendants) named at para. 3 of Schedule A. These people are said to be “traditionally connected with the area described in Schedule B (“the area claimed”) through “spiritual, religious, physical and historical associations,” “biological, classificatory lines of father’s father, mother’s father, father’s mother, and mother’s mother and; processes of succession.” The applicants further note that they have a communal native title in the application area, from which their rights and interests derive.

It is not necessary to ascertain now whether a particular individual is a member of the group. It is necessary only to be satisfied that, on the information provided, this can be ascertained. I am satisfied that the description given in Schedule A constitutes an objective means of verifying the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

S190B(4) requires the delegate to be satisfied that the description contained in the application is sufficient to allow the native title rights and interests as defined by s.223 of the Act to be readily identified. The phrases 'native title' and 'native title rights and interests' are defined in s.223 of the *Native Title Act 1993* (Cwth).

s.223(1) reads as follows:

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

Schedule E of the current application states that the "applicants are entitled under traditional laws acknowledged and customs observed, to exercise native title rights and interests in relation to the area claimed." Paragraph 1 then lists ten native title rights and interests which are claimed in relation to the application area. All of these rights are subject to qualifications in Schedule E (2), (3), (4), (5) and (6).

Following the decision of the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1, it is clear that a right to protect and prevent the misuse of cultural knowledge does not amount to a right in the land or waters for the purpose of s223(1) of the NTA and is not therefore a right or interest which is readily identifiable: [64]. In the current application, the applicant claims the right to "maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs, and practices associated with the application area, where the traditional laws acknowledged and customs observed have a connection with the application area" (right 1(i), Schedule E). The phrasing of the right at (i) is similar to that of the right disallowed by *Ward*, with the addition of the phrase ' where the traditional laws acknowledged and customs observed have a connection with the application area'. In my view, the addition of this phrase does not address the difficulty referred to by their Honours; what is asserted may still go beyond a right to control access to land and waters: "…it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property…[t]he 'recognition' of this right would extend beyond denial or right of access to land held under native title…It is here that the second and fatal difficulty appears" at [59]. As a result, I am of the opinion that the right claimed at 1(i) is not readily identifiable for the purposes of s.190B(4).

I note that the claim to 'resources' which occurs in the right to "use and enjoy the resources of the application area" (right 2(e), Schedule E), the right "to control the use and

enjoyment of others of the resources claimed" (right 2(f)) and the right "to share, exchange and/or trade resources derived on and from the area claimed" is to be understood in light of the Applicant's disavowal to minerals, petroleum, and gas wholly owned by the Crown (Schedule Q).

Summary:

As a result, the following native title right and interest is not readily identifiable for the reasons given:

(i) *to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area, where the traditional laws acknowledged and customs observed have a connection with the application area.*

Subject to my findings in s.190B(5) and (6), the other claimed native title rights and interests are readily identifiable.

Result: Requirements met

s.190B(5)

Sufficient factual basis:

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;

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;

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

Reasons for the Decision

S190B(5) requires that the Registrar (or his delegate) must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in subparagraphs (a), (b) and (c).

The phrases 'native title' or 'native title rights and interests', found in s.190B(5), are defined in s.223 of the NTA. See my reasons under s. 190B(4) for the text of this section.

In *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (the *Yorta Yorta* decision), the majority of the High Court considered the meaning and import of the definitions found in s.223. The comments of the High Court about the meaning of the word 'traditional', as it appears in s. 223 are useful for consideration of the present condition. The majority were of the view that this phrase, as used in s.223, in conjunction with 'laws and customs', refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty

traditional laws and customs": at [46], [79]. This normative system must have continued to function from the time of acquisition of sovereignty to the time when the native title group sought their determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system.

Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could "no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified" - at [82] and [83].

I find these statements in the *Yorta Yorta* decision of assistance in interpreting the terms "traditional laws", "traditional customs" and "native title rights and interests", as found in s.190B(5). However, I am also mindful that the "test" in section 190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and it is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing. I note also that the test in s.190B(5) requires the provision of a sufficient factual basis for the assertion that the native title rights and interests claimed exist; it is not the task of the Registrar or his delegates to make findings about whether or not the claimed native title rights and interests exist. Indeed, the particular wording of s.190B(5) differs from the definition in s.223, and this suggests to me that I should pay close attention to whether the factual basis satisfactorily addresses the particular assertions identified in sub-paragraphs (a) to (c).

Material which addresses the requirements of s190B(5) is contained in Schedules E, F, G and M. Schedule F contains a general description of the rights and interests claimed and describes, in particular, the factual basis on which it is asserted that the three criteria identified at s 190B5(a)–(c) are met. Schedule G provides details of activities currently being carried out within the area claimed. Schedule M provides some examples of activities of the traditional physical connection the claimants assert they have maintained with the application area.

In its submission, the NT contended (*inter alia*) that there was insufficient material in the application and affidavits to support the assertion that native title rights claimed exist, "particularly when each of the rights is considered on its own" (p.2). A similar submission was made to the Federal Court in relation to a decision of the Registrar to accept an application for registration in the locality of Killarney Delamere in the Northern Territory. His Honour, Mansfield J, there characterised the submission of the Territory as follows:

> "The error of the Registrar, it is submitted, is to have presumed or inferred from evidence of continued occupation in accordance with tradition `a cornucopia' of rights, including from material in the Land Rights Reports, whereas the Registrar should have been required to have more explicit and firmer evidence." [116]
>
> "Further errors of the Registrar were said to be that the Registrar took into account what was stated in the application itself, when such material is irrelevant, and that the Registrar

> failed to take into account the relevant consideration of the absence of reference in the Land Rights Reports to the specific rights asserted in Sch E par 1": [117]

His Honour was not, however, persuaded that the Registrar's approach to s.190B(5) revealed any reviewable error ([124]). He noted that all that s190B(5) requires is " the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist" [124]. As the Registrar was satisfied that the factual basis asserted in Schedules F, G and M of the application established `some degree of factual basis' for the claimed rights and interests, and that the material presented to him in the Land Claims Reports was relevant and probative, he had committed no reviewable error. It is useful to repeat his Honour's conclusions in relation to that submission here:

> "130 The Registrar has then carefully reviewed the material, separately with respect to each of the matters to which subcl (a), (b) and (c) of s 190B(5) refer, to determine if he is satisfied about them. I consider his analysis of the material, and his conclusions, reveal no reviewable error on his part. I do not consider it is necessary for the relevant material, for example the Land Claim Reports, to address specifically and separately each of the claimed native title rights and interests for the Registrar to have been able to be satisfied in terms of s 190B(5). He has not reasoned from the very general to the very particular. His reasoning involves a careful and detailed analysis of the particular information available to address, and making findings about, the particular matters to which s 190B(5) refers, in terms of his satisfaction. It was the combination of the material which led to his conclusions.
>
> 131 In both *Martin* at [20]-[22] and [27], and *Hutchison* at [25], French J and Kiefel J respectively recognised that s 190B(5) reflects the positive requirements of s 62(2)(e), although as noted Kiefel J noted the possible difference between there being `a general description' on the one hand and `sufficient' description on the other in the two provisions. In neither case was it suggested that the particular focus of s 62(2)(e) or s 190B(5) was only one of two significant requirements of those provisions. Section 62(2)(e) dictates a required content of an application for determination of native title. Its expression is to indicate generally the topic to be addressed, and within that topic particular features or aspects of the topic which must be addressed. It does not provide for two different sets of content obligations which must each be met, but one with a particular focus. In my view, what has apparently been assumed *sub silentio* in those cases, at least by the parties who have not chosen to argue to the contrary, reflects a sensible reading of both s 62(2)(e) and s 190B(5). Each requires the factual basis for the claimed native title rights and interests to be asserted. Each identifies the particular assertions which must be supported by the factual basis set out. It follows, in my view, that the general requirement beyond the particular is not intended to involve a parallel or equally onerous obligation in relation to each of the claimed native title rights and interests separately. Had that been intended, it could readily have been stated.
>
> 132 Consequently, in my view, the Registrar did not err in focussing primarily upon the particular requirements of s 190B(5). That is the way in which the NT Act directs his attention. If any of the particular requirements were not met, then the general requirement would not be met. Having been satisfied of the particular requirements, of s 190B(5), and because s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed, it follows that the Registrar is not shown to have erred in his consideration of s 190B(5) in the manner asserted by the Territory. I do not regard the necessity of the Court to address each claimed right or interest separately when deciding an application for native title (see e.g. per Nicholson J in *Daniel 2003* at [137] - [151]) illuminates the task of the Registrar under s 190B(5).

As with the Applicant in the Killarney matter, the current Applicant has provided additional material directly to the Registrar to meet the requirements of this condition in the form of extracts from the Borroloola Land Claim and the Warnarrwarnarr-Barranyi (Borroloola No.

2) Land Claim Report (letter to Tribunal, dated 1 August 2003). The Borroloola Land Claim covered areas including the 'Borroloola Common' which completely surrounds the Town of Borroloola claimed in this application. Three local descent groups were held to have 'traditional ownership' over this Common and while land within the township itself was not claimable under the Land Rights Act, the Land Commissioner's Report indicates that group B are 'traditional Aboriginal owners' within the meaning of that Act to land within the Town of Borroloola. In its submission dated 1 August 2003, the NLC provide extracts from this report, commenting on potential discrepancies between genealogies in the Land Claim report and in the current native title application. As the NLC note, and rightly in my opinion, "the test of 'traditional Aboriginal owners' in the Land Rights Act is considerably more stringent and difficult to satisfy than the test under the NTA" (p.1, letter 1 August 2003). Moreover, there are crucial differences between the two regimes such that groups of persons who constitute "traditional Aboriginal owners" under the *Aboriginal Land Rights (Northern Territory) Act* may not necessarily constitute all those persons who hold native title rights and interests in lands and waters subject to a native title determination application under the NTA. At any rate, consequently, there is unlikely to be exact identity between the two groups. At any rate, as there is usually a significant overlap between those Aboriginal persons who have proved their rights under traditional laws and customs pursuant to the ALRA regime and those claiming native title in the present matter, the land reports are not without relevance to the application of s.190B(5). As a result, I find this information to be both relevant and probative in my consideration of this condition.

Having regard to information contained in the application and in the additional materials provided to me, I am 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, and in particular, the three assertions set out in s.190B(5)(a)-(c).

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

Schedule F provides a description of the association of the native title claim group and their predecessors to the application area, including statements which assert that:

- the claimants are traditionally owners of the land and waters of the application area (para. 1)
- the native title claim group and their predecessors have an association with the application area since time immemorial, including at the time when sovereignty was asserted by the Crown of the United Kingdom and at the time of contact with non-Aboriginal people (para. 2, 5, 6)
- the traditional connection of the claimants with the claim area and particularly their native title rights and interests, were inherited by the claimants from their ancestors (para. 3)
- the applicants continue to acknowledge traditional laws, observe customs, and possess and exercise their traditional rights and interests, in relation to their country (including the area claimed) (para. 4)
- Sites of significance on the applicants' country and within the area claimed, which exist and/or have been recorded and/or registered under the *Northern Territory Aboriginal Sacred Sites Act* (para 7)
- the connection of the members of the native title claim group is illustrated by material evidence of physical connections by the ancestors of the claimants in relation to their country; this is further shown by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation. The assertion is that the evidence includes artefact fragments, rock art and traditional occupancy sites (para. 8)

Schedule M states that the claimants have maintained a traditional physical connection with the application area. Examples of this connection are given, both in respect of their country generally, and in the vicinity of the area claimed.

There is some factual basis for the assertion that the native title claim group have, and their predecessors had an association with the application area in the additional material provided to me, including details that verify that the traditional Aboriginal owners (many of whom are identified as native title claimants in the current application) and their ancestors have and had an association with the area claimed (refer Original Borroloola Land Claim Report, esp. pp.30-31, p. 42-44)

In my view, the information contained in the application, together with additional materials and references as noted by the claimants, provides a sufficient factual basis to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

(b) that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

The applicants assert in Schedule F:

- the applicants continue to acknowledge traditional laws, observe customs, and possess and exercise their traditional rights and interests, in relation to their country (including the area claimed) (para. 4)
- the claimants observe traditional laws and customs including a common kinship system, observance of common laws relating to land tenure, and traditional usage of land and waters (para. 9), details of which are given at para. 10
- Common traditional laws and customs give rise to a connection to the area claimed and these are possessed under the common traditional laws and customs (para. 13)

Schedule G lists details of activities in regard to traditional usage of their country to support these traditional laws and customs. These activities include:

- residing on the land;
- hunting and collecting animals, fish, and other foods from the land and waters;
- building and using shelters on the land;
- using waters from the land;
- using, sharing, trading, and exchanging resources derived from the land and waters;
- collecting materials including timber, stones, minerals, ochre, resin, grass and shell from the land and waters;
- burning the land;
- building and using traps on waterways;
- travelling across the land and waters;
- camping on the land;
- conducting ceremonies on the land;

- observance of laws and sanctions restricting access to areas of the land and waters according to divisions of gender, age, and ritual experience;
- restricting the access of outsiders to the land and waters;
- responsibility for caring for the land and waters in accordance with spiritual, economic and social obligations;
- burial of the dead on the land;
- bearing, rearing, teaching children on and about the land and waters;
- maintaining traditional knowledge of the land and waters, and passing that knowledge on to younger generations.

Assertions of the activities associated with traditional law and customs are also provided in Schedule M. Examples include:

- Entering and travelling across the area claimed;
- Hunting, fishing and collecting natural resources from the area claimed;
- Visiting and protecting sites of significance on the area claimed.

Additionally, there is some factual basis for the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests in the Land Claim Report provided to me. The Borroloola 2 claim is proximate to the present application area although (unlike the original Borroloola claim) it is not adjacent to it or in the same geographical area. At any rate, I accept that information in this Report is relevant to the current native title application being "evidence of the continuing strength of Aboriginal tradition in the general region, of which the town forms a part" (NLC letter, 1 August 2003, p.4). In particular, I am directed to information at [4.16.3], [5.1-5.13] of the Borroloola 2 Claim report that provide evidence of the existence of traditional laws and customs which give rise to the claimed native title rights and interests. There is also some reference to a factual basis in material contained in the original Borroloola Claim (see [34-35], [38-39]).

This information and the information contained in the application provides a sufficient factual basis to support the assertions made and is therefore sufficient for me to be satisfied that this condition is met.

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

Assertions of the continued observation of traditional laws and customs s provided as follows:

- Processes for transmission of rights and interests (succession) (Schedule A(1)(a)).

- Continued observance of a common kinship system by the claimants, and outlined in Schedule F(10) includes:

    a) recognition of common ancestors;
    b) recognition of group and individual responsibilities towards land and waters;
    c) recognition and acceptance of common patterns of descent;
    d) affiliation, on a group and individual basis, with totemic beings which relate to land/waters and law;
    e) participation in, and responsibility for ceremony.

A description of common laws relating to land tenure (Schedule F(11) includes:

a) Fulfilment of spiritual obligations with regard to the land and waters;
b) The observation of restrictions imposed by gender, age and ritual experience;
c) The observation of restrictions imposed by the presence of sites of significance on the land and waters;
d) The observation of restrictions imposed by the presence of Dreamings on the land and waters.

Activities to support these rights and interests claimed is provided in Schedule G and quoted above. There is also ample evidence for the continued observance of these traditional laws and customs in the two Land Claim Reports discussed above.

Therefore, in the light of the additional information provided by the applicants and the information contained in the application, I am satisfied that the factual basis provided is sufficient for the purposes of this condition.

Result: Requirements met

s.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.

Reasons for the Decision

Under s190B(6) I must consider that, prima facie, at least some of the native rights and Under s. 190B(6) I must consider that, *prima facie*, at least some of the native rights and interests claimed, as defined at s.223 of the Act, can be established.

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

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

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 at [134], Mansfield J confirms that the ordinary meaning approach taken to the term "*prima facie*" in that case is still appropriate despite *North Ganalanja* being decided before the 1998 amendments to the Act. Accordingly I have adopted the ordinary meaning approach in considering this application, and in deciding which native title rights and interests claimed can *prima facie* be established.

In the present application, the applicants claim that they are "entitled, under traditional laws acknowledged and customs observed, to exercise native rights and interests in relation to the area claimed" (Schedule E (1)). Ten rights and interests are then expressed in the subparagraphs which follow.

These rights and interests are subject to a number of qualifications, which include the following at Schedule E:

"2. The claimants acknowledge that:

> *"(a) their native title rights and interests are subject to all valid and current laws of the Commonwealth and the Northern Territory;*
> *(b) the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws and*
> *(c) their native title rights and interests might have been partially extinguished by relevant valid laws of the Commonwealth, South Australia and the Northern Territory."*

"3. Subject to schedule L, this application does not claim that the native title rights and interests confer:

(a) possession, occupation, use and enjoyment to the exclusion of all others;
(b) the right to control the access of others to the application area; or
(c) the right to control the use and enjoyment of others of the resources of the application area;

in relation to any area regarding which a previous non-exclusive possession act under s.23F of the NTA has been done."

The claimed native title rights and interests are also qualified by statements at Schedules P and Q, and limited by specific exclusions set out at para. (b) of Schedule B.

Generally, a claim to exclusive possession may be able to be established, *prima facie*, over areas where there has been no previous extinguishment of native title and where the non-extinguishment principle found in s 238 of the NTA applies eg areas where ss 47, 47A or 47B applies and in relation to areas affected by category C and D past and intermediate period acts. No claim to the benefit of ss47, 47A or 47B is made at Schedule L.

In its submission dated 7 July 2003 (p. 3), the NTG note that the application area includes a number of Crown Lease Perpetuals, Crown Lease Terms, and Lots set aside for government use (see also Attachment to that letter which provides tenure history for lots in the Town of Borroloola). It contends that "[a]t least some of these acts are previous non-exclusive possession acts which amount to the creation or assertion of rights to control access to land by the government" and that as a consequence, native title rights and interests which are expressed exclusively cannot be registered in these areas (such as those at para. 1(b) and 1(f)). I will deal with this submission as it arises in relation to the two claimed rights and interests (right 1(b) and 1(f)), although I note firstly that, by virtue of para. 3 of Schedule E, the Applicant excludes from claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others, or the right to control the access of others to the area claimed in relation to any area regarding which a previous non-exclusive possession act under s23F has been done.

Identifiable Rights and Interests

In light of this, I will consider in turn each of the rights and interests claimed in the application and whether these can be established prima facie as required by s190B(6) of the *NTA*; in doing so I am mindful of tenure issues outlined above.

Under my reasons for decision in relation to s190B(4) above, I determined that the right at para. 1(i) was not readily identifiable. As a result, I do not consider this right further here.

(a) to possess, occupy, use and enjoy the area claimed to the exclusion of all others

In *Western Australia v Ward* (2002), the majority of the High Court indicate that a right to possess, occupy, use and enjoy lands and waters as against the whole world (as here) is a native title right and interest which is capable of being established *prima facie*: at [51].

There is *prima facie* evidence for the existence of such a right in the application at Schedules F (particularly paras. 5, 6, 7, 8), G and M and a modicum of information in the additional material contained in the extracts of the two Borroloola Land Claim Reports provided to me as additional material (for example, Borroloola No 2 Land Claim, 5.9.2, 5.13]

However, over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of non-exclusive possession in a native title context. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that: "it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms": at [51]. At determination, the Full Federal Court expressed similar views in relation to the phrase 'occupation, use and enjoyment'.[4] Their Honours expressed similar reservations in relation to a claim for non-exclusive possession, use, occupation and enjoyment as a composite right: at [29], [52], [89], and [94]. The majority of the Court said that "without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - at [52].

It follows that in areas where a claim to exclusive possession are not made out, the right at para (a) is not capable of being established *prima facie*.

(b) to speak for and to make decisions about the use and enjoyment of the application area

There is evidence for the existence of this right at Schedule F (paras. 5, 10, 11), G and M and a modicum of information in the additional material contained in the extracts of the two Borroloola Land Claim Reports provided to me as additional material (for example, Borroloola No 2 Land Claim, 5.6].

Ward is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use made of the land, are unlikely to be capable of registration where a claim to exclusive possession cannot be maintained. A question which arises here is whether this right to 'speak for country' and 'make decisions about the use and enjoyment of the application area' necessarily amounts to a right to control use of and access to the area which would not be capable of being established over areas where a

[4] [2003] FCAFC 283 at [16]-[23].

claim to exclusive possession were not made out. In *Ward*, the majority of the High Court considered the right to 'speak for country' in the following terms [88]:

> "It may be accepted that…'a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'". It is the rights under traditional law and custom to be asked permission and to "speak for country" that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others. The expression of these rights and interests in these terms reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing."

Paragraph [88] of the *Ward* decision, however, should be read in conjunction with para. [14] of the majority opinion which, in my view, qualifies, or rather ameliorates what is said in [88]. In [14], their Honours have this to say of the right:

> "'Speaking for country' is bound up with the idea that, at least in some circumstances, others should ask permission to enter upon country or use it or enjoy resources, *but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture*." [my emphasis]

It seems clear from this, then, that although the right to speak for the application area may be seen as a right which amounts to a right to control access to and use of the land in some circumstances (as the NTG submit), it does not *necessarily* amount to such a claim. To assume that the right is necessarily a right to control access or use of the land would be not only to 'oversimplify' the nature of the connection Aboriginal people have with their land but to fail to apply the *NTA* beneficially as the preamble to the Act requires administrative decision-makers to do. I note that in *Commonwealth v Yarmirr* (2001) 184 ALR 113 at [124] to [125], after noting the warning given by the High Court in *North Ganalanja* about construing the Act, McHugh J went on to say that:

> 'It is also necessary to keep in mind that, in the second reading speech on the Native Title Bill 1993, the then Prime Minister, Mr. Keating, saw *Mabo (No 2)* as giving Australians the opportunity to rectify the consequences of past injustices. The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the "national legacy of unutterable shame" that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.
>
> [After identifying the purpose of the Act,] the duty of the courts would be to ensure that that purpose was achieved. That would be so even if it meant giving a strained construction to or reading words into the Act. In an extrajudicial speech, Lord Diplock once said that "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed."

The right to 'make decisions' about the claim area (which is also part of the right claimed at para. (b)) is similarly problematic. However, in the context of other native title rights and interests claimed by the Applicant at Schedule E (which, in contrast, are explicitly expressed in a way which claims control of use and access to the lands and waters) and in light of the application as a whole, I am of the opinion that it does not.

It follows that I am satisfied that the right at para. (b) is capable of being established *prima facie*.

(c) to reside upon and otherwise have access to and within the application area;

The Applicant claims the right to reside on and otherwise have access to the application area. A question which arises here is whether the right to reside on the land *necessarily* amounts to a right to control access to and use of the claim area. To the extent that is would do so, such a right would be *prima facie* incapable of being established over areas for which a claim to exclusive possession could not be sustained.

I note that, despite the absence of exclusive possession in that case, the majority decision in *Ward* did not preclude the recognition of native title rights to reside upon the claim area; nor is there is anything in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. Rather, rights to control access to or use of the claim area are claimed separately at paras. (d) and (f).

It follows that I am satisfied that the right to reside upon and otherwise have access to and within the application area is capable of being established *prima facie*. There is evidence for this right in Schedules F, G (see for instance, 1(a), (c), (i), (j)) and a modicum of information in the additional material contained in the extracts of the two Borroloola Land Claim Reports provided to me as additional material (for example, Borroloola No 2 Land Claim, 5.13].

(d) to control the access of others to the application area;

Ward is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained. It follows that this right is not capable of being established where a claim to exclusive possession is not maintained.

That said, where a claim to exclusive possession is maintained, there is evidence for the existence of this right at Schedule F (for example, paras. 10 (b), (e) and 11) ,G and M and a modicum of information in the additional material contained in the extracts of the two Borroloola Land Claim Reports provided to me as additional material (for example, Borroloola No 2 Land Claim, 3.4.4, 5.9.2].

(e) to use and enjoy the resources of the application area;

The right at para. (e) is a right to use and enjoy the resources of the claim area. At Schedule Q, the Applicant states that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown (in compliance with the requirements of s.190B(9)(a)). Given this qualification, I am satisfied that this right can be established *prima facie* (subject to the satisfaction of other requirements) whether or not a claim to exclusive possession can be sustained over the lands and waters of the claim area.

There is *prima facie* evidence for the existence of this right at Schedules F, G (see for example, para. (1)(b), (d), e), (f), etc), M, and a modicum of information in the additional material contained in the extracts of the two Borroloola Land Claim Reports provided to me as additional material (for example, Borroloola No 2 Land Claim, 5.9.1].

(f) to control the use and enjoyment of others of the resources of the application area;

Ward is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained. It follows that this right is not capable of being established where a claim to exclusive possession is not maintained.

That said, where a claim to exclusive possession is maintained, there is evidence for the existence of this right at Schedule F (for example, paras. 10, (e) and 11),G and M. I find nothing in the additional material to indicate the existence of this right. However, given the low 'prima facie' threshold required for this condition to be met, I am satisfied that the application provides sufficient evidence for the existence of this right where a claim to exclusive possession can be made out.

(g) to share, exchange and/or trade resources derived on and from the application area;

In *Commonwealth v Yarmirr* (1999) 101 FCR 171, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that "[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land" [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

On appeal, the Full Federal Court spoke of this right in these terms: "It may well be right, as the argument runs, and as seems logical, to view the right to trade as 'an integral part,' or integral aspect of a right to exclusive possession." The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 of the *NTA*, but made no finding on the issue. The issue was not raised before the High Court.

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to *exclusive* possession, occupation, use and enjoyment of lands and waters [my emphasis].

There is a modicum of evidence in the application which goes to establish this right (see for example, Schedule G, para. (1) (e), (f). However, given the low 'prima facie' threshold required for this condition to be met, I am satisfied that the application and accompanying material provides evidence for the existence of this right where a claim to exclusive possession can be made out.

(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;

The right at para (h) "to maintain and protect places of importance under traditional laws, customs and practices" appears to amount to a claim to control access to and use of the area which could only be capable of being established *prima facie* over areas where a claim to exclusive possession can be made out. Nevertheless, in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of

cultural importance over an area where a claim to exclusive possession was not available. For this reason, this right appears to be capable of being established *prima facie* over such areas.

That said, there is evidence for the existence of such a right at Schedules F (see para. 10(c), (e), and para. 11), G (para. (1)(l), (n)) and a modicum of information in the additional material contained in the extracts of the two Borroloola Land Claim Reports provided to me as additional material (for example, Borroloola No 2 Land Claim, 5.6, 5.9.2].

(i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge customs and practices associated with the application area, where the traditional laws acknowledged and customs observed have a connection with the application area.

For the reasons set out under s.190B(4), this right is not readily identifiable and so is not capable of being established prima facie. Consequently, the right is not considered further here.

(j) to determine and regulate membership of and inclusion in the native title claim group

At Schedule F of the application, the Applicant states at paragraph 9 that the system of common traditional laws observed by the claimants include recognition of a common kinship system and common laws which relate to land tenure, and traditional usage of land and waters. Para. 10 sets out some of the incidentals of this kinship system, including laws which relate to determining and regulating membership of and inclusion in the native title claim group. There is further evidence for this right at Schedule G and a modicum of information in the additional material contained in the extracts of the two Borroloola Land Claim Reports provided to me as additional material (for example, Borroloola No 2 Land Claim, 3.4.4, 5.13].

Summary:

In areas where a claim to exclusive possession can be sustained, the following rights and interests can be established *prima facie* pursuant to s.190B(6):

1. The claimants are entitled, under traditional laws acknowledged and customs observed, to exercise the native title rights and interests in relation to the area claimed which include as follows:

(a) to possess, occupy, use, and enjoy the area claimed to the exclusion of all others
(b) to speak for and make decisions about the use and enjoyment of the application area
(c) to reside upon and otherwise have access to and within the application area
(d) to control the access of others to the application area
(e) to use and enjoy the resources of the application area
(f) to control the use and enjoyment of others of the resources to the application area
(g) to share, exchange and/or trade resources derived on and from the application area
(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area
(i) *not established*
(j) to determine and regulate membership of and inclusion in the native title claim group

In areas where a claim to exclusive possession cannot be sustained, i.e., where the claim is non-exclusive, the following native title rights and interests only have been established *prima facie* pursuant to s.190B(6):

1. The claimants are entitled , under traditional laws acknowledged and customs observed, to exercise the native title rights and interests in relation to the area claimed which include as follows:

(a) *not established*
(b) to speak for and make decisions about the use and enjoyment of the application area
(c) to reside upon and otherwise have access to and within the application area
(d) *not established*
(e) to use and enjoy the resources of the application area
(f) *not established*
(g) *not established*
(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area
(i) *not established*
(j) to determine and regulate membership of and inclusion in the native title claim group

As I need only be satisfied that 'some' of the claimed rights and interests are established, the requirements of s.190B(6) are met.

Result: Requirements met

s.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 have been expected currently to 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.

Reasons for the Decision

This section requires that I am 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 covered by the application. Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.

I have had regard to statements contained in the application including Schedules E, G and M. The individuals who comprise the Applicant depose that the statements in the application are true. Schedule G lists activities currently being carried out by the native title claim group, and Schedules E and M detail traditional physical connection to the land or

waters covered by the application by one or more members of the native title claim group. Mindful of the different parameters of the two regimes, I note that there is also evidence for traditional physical connection of members of the native title claim group with the application area in the two Borroloola Land Claim reports provided directly to me by the Applicant (and dated 1 August 2003).

I am satisfied that the application meets the requirements of s.190B(7).

Result: Requirements met

s.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.

Reasons for the Decision

S61A(1) – Native Title Determinations

A search of the National Native Title Register shows no approved determinations of native title for the application area claimed in this application.

S61A(2) - Previous exclusive possession acts

Previous exclusive possession acts under s.23B have been excluded from the area of the application by virtue of Schedule B(b)(2). The application complies with s.61A(2).

S61A(3) - Previous non-exclusive possession acts

The applicants state in Schedule E (3) that subject to Schedule L they do not claim that native title rights and interests confer:

(a) possession, occupation, use and enjoyment to the exclusion of all others;
(b) the right to control the access of others to the application area; or
(c) the right to control the use and enjoyment of others of the resources of the application area;

in relation to which a previous non-exclusive possession act under s.23F of the Act has been done.

The application therefore complies with s.61A(3).

S61A(4) - s.47, 47A 47B

No information is provided in the application.

Conclusion

I am satisfied the application is sufficient to meet the requirements of s 190B(8).

Result: Requirements met

s.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;

Reasons for the Decision

Schedule Q of the application states that:

"The claimants do not claim ownership of minerals, petroleum, or gas wholly owned by the Crown. The claimants assert that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application"

A question which arises in the present context is whether this second statement discloses an intention to claim minerals, petroleum, or gas wholly owned by the Crown. I am of the opinion that it does not. While the Applicant asserts at Schedule Q that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application, it is clear that where the Crown is shown to wholly own these resources, the Applicant explicitly disavows any claim to ownership.

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:

(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;

Reasons for the Decision

The present application does not make any claim to exclusive possession of an offshore place.

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:

(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 subsection 47(2), 47A(2) or 47B(2).

Reasons for the Decision

Under the requirements of this section, I must consider whether there are any native title rights and interests claimed by the applicants that have been otherwise extinguished.

The application does not disclose and I am not otherwise aware of any additional extinguishment of native title rights and interests in the area claimed. I note that the Applicant specifically excludes from claim any area in relation to which native title has been otherwise extinguished (see Schedule B, (b)2(b)).

The application meets the requirements of s.190B(9)(c).

Result: Requirements met

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