National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Brendon Moore

Application Name: Torres Strait Regional Sea Claim
Names of Applicants: Mr Leo Akiba, Mr George Mye

Region: FNQ
NNTT No.: QC01/42
Federal Court No.: QUD6040/01
Date Application Made: 23 November 2001

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 s.190A of the *Native Title Act* 1993 (Cwlth).

Brendon Moore

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

2 March 2006
Date of Decision

Brief History of the Application

The application was made on 23 November 2001.

This is a claim by the Torres Strait Sea Claim native title claim group over the seas of the Torres Strait, Far North Queensland.

The native title claim group is comprised of Torres Strait Islanders who are descended from the ancestors named in Schedule A and are from the Torres Strait island communities that fall within the external boundaries of the sea claim.

On 4 July 2002 the delegate accepted the application pursuant to s.190A of the *Native Title Act* 1993 (Cwlth).

On 26 May 2005 an amendment application was filed and leave was granted to amend on 27 June 2005.

The latest amendment relates to:

1. The names of two of the persons, **[Deceased 1 – name deleted]** and **[Deceased 2 – name deleted]**, who together with **[Applicant 1 – name deleted]** and **[Applicant 2 – name deleted]** were the authorised applicant in relation to the original application, have been removed as those persons are now deceased.
2. The external boundaries of the claim area have not changed. The amended application clarifies those areas within the external boundaries that are not covered by the application (Schedule B Part B). The amended application also corrects two co-ordinates in the description at Attachment B which were incorrectly transcribed in the original application.
3. The description of the native title tights and interests claimed has been amended (Schedule E).
4. The description of the factual basis on which the native title rights and interests have been claimed has been amended (Schedule F).
5. The description of activities has been amended (Schedule G).
6. Details of other applications made in relation to the claim area (Schedule H) has been amended to reflect that the other applications that had been made have now all been withdrawn.
7. The draft orders sought if the application is unopposed have been amended (Schedule J).
8. Schedule L has been amended.
9. Schedule M has been amended.
10. Schedule N has been amended.
11. Schedule O has been amended.
12. Schedule P has been amended.

Information considered when making the Decision

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

- The National Native Title Tribunal's administration files, legal service files and registration testing files for QC01/42.
- The National Native Title Tribunal's files and related materials for Native Title applications that overlap the area of this application (if applicable).
- The National Native Title Tribunal's Geospatial Database.
- Information from the Tribunal's Geospatial Mapping and Analysis Branch who prepared a Geospatial Assessment and Overlap Analysis dated 22 June 2005.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.
- The amendment application filed with the Court on 26 May 2005.
- Federal Court order dated 27 June 2005.
- Preliminary assessment letter was sent to the legal representative (TSRA) on the 12 September 2005.
- A letter in response to the preliminary assessment was received on 5 October 2005 from the legal representative (TSRA) with additional information.

Copies of any material provided directly to the Registrar by the applicants in relation to my consideration of the application were provided to the State. I am advised that the State has not provided any comments in relation to this material.

Note: I have not considered any information and materials that may have been provided in the context of any mediation of the native title claim group's native title applications. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act 1993* (Cth) ('the Act') unless otherwise specified.

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

On 5 May 2005, Christopher Doepel, the 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 Act.

This delegation has not been revoked as at this date.

NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C.

Section 190B sets out the merit conditions of the registration test.

Section 190C sets out the procedural conditions of the registration test.

In the following decision, I test the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions.

A. Procedural Conditions

Applications contains details set out in ss61 and 62: S190C(2)

S190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

Native Title Claim Group: s.61(1)

The application is 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.*

Reasons relating to this sub-condition

Section 190C(2) provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61.

I must consider whether the application sets out the native title claim group in the terms required by s.61(1). That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group *in the application* indicates that not all persons in the native title group are included, or that it is in fact a sub-group of the native title claim group, then the requirements of s.190C(2)

would not be met and the claim could not be accepted for registration (*AG of Northern Territory v Doepel* [2003] FCA 1384 (*Doepel*) [at 36].

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group (*Doepel at paras 16 - 17, 37, 39)*.

I note, purely for the purposes of explanation, that this was not the law as it was understood on the last occasion on which the claim was subject to the registration test.

In light of *Doepel*, I have confined my considerations to the information contained in the application and accompanying affidavits.

The description of the persons in the native title claim group is found in Schedule A of the application, which states in the application:

> 'The native title claim group (Torres Strait Regional Sea Claim Group) comprises the descendants of the ancestors listed in the attachment A.
>
> Abai, Aolan, Agirri, Aib, Aiwa, Aki, Alau Messiah, Ale, Amani, Ani, Annai, Ano, Anu, Anu Namai, Apaga, Apap, Ape, Apelu, Arkerr Amalili, Asiah Messiah, Assau, Asse, Au, Auara, Auda, Aukapim, Aukapim, Aupau, Ausa, Ausi Waria,Awas, Bade/Bagari, Baigau, Bailat, Baira, Baki, Balozi, Bambu, Baniam, Bari, Barigud, Bauba, Bazi, Beiro, Bina, Bobok, Boggo Epei, Boingan, Buli, Busei, Dabad, Dabor, Dadu, Dako, Daleku, Daleku, Damu, Damui, Darima, Daugiri, Dawaoo, Demag, Deri, Diri, Diwadi, Dobam, Duawadi, Dudei, Eba/Matul, Ekai, Ema, Emeni, Enemi, Epei, Eti, Gabai, Gagabe, Gaiba, Gaidan, Gainab, Galeka, Ganagi, Ganume, Garmai, Gauid, Gawadi, Gebadi, Gedor, Geigi, Geigi, Geigi, Gemai, Getawan, Gewar, Gewar Gewe Jack, Gi Gibuma, Gizu, Goa, Gumaroo, Ika/Aiaka, Ikas, Ikob, Imai, In, Inor, Isaka, Jack Moa, Jack Oroki, Jannyt, Jawa, Jawai, Kadal, Kaidam, Kaigod, Kakai, Kalai, Kamui, Kapen, Kapen, Kapen Kuk, Karud, Kaupa, Kauta, Kawiri, Kebei, Kebekut, Kebisu, Keisur, Kelam Kober, Kogikep, Koia, Koim, Koiop, Koit, Komagaigai, Konai, Kopam, Kopam, Koreg, Kudin, Kuniam, Kupad, Kuri, Lag, Laieh, Laza, Maber/Garau, Mabo, Mabua, Madi, Madua, Maga, Maiamaia, Maigi, Maii, Maima, Maima, Maite, Maki/Salgar, Maku, Malili, Malo, Mamai, Mano, Mapoo, Mapoo, Marau/Daueme, Mariget, Masig, Mau, Maudar, Mele, Meo, Migui, Mogar, Mogi, Mononi/Babi, Morabisi, Nadai, Nadai, Naiama, Naisi, Namagoin, Namai, Namu, Nanai Pisupi, Narmalai, Nawarie Goba, Nazir, Nazir, Nazir, Nazir Mesepa, Neru, Newr, Nkipuri, Nokep, Nosarem, Nuku Idagi, Nunu, Odi (I), Odi (II), Odoro, Opiso, Oroki, Pagai, Pagem/Naii, Pai, Paipa, Paipe, Paipe/Alageda, Panetha, Peig, Petelu, Paipi, Pitpit, Pitu, Polpol, Porrie Daniel, Rebes, Rusia, Saba, Sagiba, Sagigi, Sagul, Saimo,

> Sakauber, Sam, Samukie, Sapal, Sawi, Seik, Sepa Bani, Seregay, Serib, Sesei (I), Sesei (II), Sesei/Mokar, Sibari, Siboko, Sida, Sidmu, Sigai, Sipo, Siwia, Sogoi, Sorogo, Soroi, Spia, Suere, Supaiya, Tabuy, Tabu, Tagai, Taku Taroa, Tau, Timoto, Toik, Tom Ober, Udai, Ugarie, Ulud, Ulud, Umai, Uria, Urpi, Vabun, Wabu, Wada, Wadai, Wagai, Waina, Wairu, Waisie, Wakaisu, Walit, Wamo, Waria, Wasada Wasalgi, Wasi, Wawa, Wawa, Waleboat, Whap, Wimet, Wyio, Yart, Zaber, Zaiar, Zarzar, Zaua, Ziai, Zib, Zimoia.

The use of the definite article 'the' in the phrase 'the descendants of' indicates that it is intended to be understood as 'all the descendants'. That being the case it can be seen that there are no exclusions of persons and I have neither information nor other reason to think that the named group is a subgroup of a larger body.

The persons comprising the applicant state in their affidavits attached to the application that they are senior traditional landowners, and senior traditional elders... I am satisfied that they are members of the native title claim group.

Result: **Requirements met**

Applicant in case of applications authorised by claim groups: s.61 (2)

Section 61(2) simply says who the applicant is in the case of a native title determination application. The applicant is the person or persons jointly (together) who are authorised by the native title claim group to make the application.

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

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

Reasons relating to this condition

The name and the address for service of the applicant appear at the commencement of the application and in Part B of the application.

Result: **Requirements met**

Native Title Claim Group named/described sufficiently clearly: s.61 (4)

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this condition

Schedule A of the application describes the native title claim group. For the reasons that lead to my conclusions (below) that the requirements for s.190B (3) have been met, I am 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.

Result: Requirements met

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

An Application must be in the prescribed form, and be filed in the Federal Court, and contain such information in relation to the matters sought to be determined as is prescribed, and be accompanied by any prescribed documents and any prescribed fee.

Reasons relating to this sub-condition

s.61 (5) (a)
The application is in the form prescribed by Regulation 5(1)(a) *Native Title (Federal Court) Regulations 1998*.

s.61(5)(b)
The application was filed in the Federal Court as required pursuant to s.61(5)(b).

s.61(5)(c)
The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to s.62 below.

s.61(5)(d)

As required by s.61(5)(d), the application is accompanied by the prescribed documents, being affidavits by each applicant (see s.62(1)(a)), and a map as prescribed by s.62(1)(b). I refer to my reasons in relation to those sections of the Act.

I note that s.190C(2) only requires me to consider details, other information and documents required by sections 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

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

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s.62(1)(a)(i) – s.62(1)(a)(v)

Reasons relating to this condition

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn by the applicant in relation to the matters specified in sub-paragraphs (i) through to (v).

There are now named two applicants and each applicant has sworn an affidavit. The affidavits accompany the application that were filed in the Federal Court are all dated, signed by each deponent, and competently witnessed. I am satisfied that the affidavits sufficiently address the matters required by s.62(1)(a)(i)-(v).

Result: Requirements met

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

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

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

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

Comment on details provided

Provided at Schedule M which refers to paras [20]-[21], [43] and [44] of the application.

Result: Requirements met

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

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

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

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

Reasons relating to this condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps in the application are sufficient to enable the area covered by the application to be identified.

Result: Requirements met

s.62(2)(a)(ii) Information, whether by physical description or otherwise that enables the boundaries of any areas within those boundaries that are not covered by the application to be identified

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information contained in the application is sufficient to

enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: **Requirements met**

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

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

Reasons relating to this condition

There is a map at Attachment C of the application which shows the external boundaries of the area covered by the application. See my reasons under s.190B(2).

Result: **Requirements met**

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

Reasons relating to this sub-condition

It is stated at Schedule D that:

"No searches have been carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application."

Result: **Requirements met**

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

The application contains a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and are all native title rights and interests that may exist, or that have not been extinguished, at law.

Reasons relating to this condition

A description of the claimed native title rights and interests is contained in Schedule E of the application. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law. I am satisfied that the requirements of this section are met.

Result: Requirements met

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

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.

A general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist and for the particular assertions in sub-paragraphs (i), (ii) and (iii) is found in Schedules F, G and M of the application.

Result: Requirements met

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

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

Details of current activities conducted by the native title claim group on the claim area is found in Schedule G and referred to in Schedule E.

Result: **Requirements met**

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

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

Schedule H of the application states that:

> "some such applications had been made prior to the making of the original application but all have now been withdrawn".

It is noted that the tribunal's Geospatial Assessment dated 22 June 2005 identifies a number of 'overlaps' between this application and a number of others. I accept the assessment by the Tribunal's Geospatial unit that these are the result of problems with spatial data rather than any true territorial overlap and I find that these are not 'overlaps' such as to attract the provisions of the section.

Result: **Requirements met**

Details of s29 notices: s.62(2)(h)

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

The applicants state at Schedule I that they are not aware of any such notices.

Result: **Requirements met**

Combined Decision for s.190C(2)

For the reasons identified above, the application contains all the details and other information, and is accompanied by the affidavits and other documents, required by ss. 61 and 62 of the Act. I am satisfied that the application meets the requirements of this condition.

Aggregate Result: Requirements met

Common claimants in overlapping claims: s.190C(3)

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

It is noted that the tribunal's Geospatial Assessment dated 22 June 2005 identifies a number of 'overlaps' between this application and a number of others. I accept the view of the Geospatial unit that these are the result of relatively insignificant inaccuracies in the spatial data rather than any overlap of the kind envisaged by the section..

Result: Requirements met

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

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

(a) the application has been certified under paragraph 202(4)(d) 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

Under s 190C(4) of the Act, the Registrar must be satisfied that a native title determination application is either (a) certified by each representative Aboriginal/Torres Strait Island body that *could* certify the application or alternatively, (b) the Registrar must be satisfied that the applicant is a member of the native title claim group, and is authorised to make the application and deal with all matter arising in relation to it by all the persons of that group.

Certification

The Torres Strait Regional Authority (TSRA) is the only ATSIC representative body in the Torres Strait region. It is, therefore, the only representative body that "could" certify the application as being a properly authorised application.

The application filed with the Federal Court is certified by the Torres Strait Regional Authority (TSRA) pursuant to ss.203B(1)(b) and 203BE(1)(a) of the *Native Title Act.* Attachment R to the application is a Certificate dated 22 November 2001 over the Common Seal of the Torres Strait Regional Authority. Although I am unable to read the signature I am satisfied that there is either actual or ostensible authority for its execution.

Section 190C(4)(a) requires the Registrar to be satisfied that 'the application has been certified.' In the case of a certified application the section requires no more. That may be contrasted with subsection (b) which deals with applications which have not been certified and which requires the Registrar to be satisfied, in short, that the applicant has been properly authorised by the members of the claim group. Where a certificate has been issued it appears to be 'the application' which is certified. In uncertified applications, what I must consider is whether the applicant is authorised.

Does the Certificate comply?

Because this application is certified I must consider firstly whether that certification complies with the requirements of s.203BE, which relevantly say:

> *Certification of applications for determinations of native title*
>
> (2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:
>
> > (a) 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
> > (b) 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.

The subsection sets out the obligations placed on a certifying body before a certificate may issue. Providing information about whether those steps have been taken is required by subsection (4) which states:

> *Statement to be included in certifications of applications for determinations of native title*
>
> (4) A certification of an application for a determination of native title by a representative body must:
>
> > (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
> > (b) briefly set out the body's reasons for being of that opinion; and
> > (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

My task is to consider compliance with subsection (4). The Certificate says at Recital C that:

> The Torres Strait Regional Authority has made certain enquiries regarding the circumstances of the Sea Claim and satisfied itself as to those circumstances.

The Certificate goes on to formally certify the application and the TSRA states that it is of the opinion that, in summary:

- The four named persons have authority to make the application and deal with matters arising, and
- All reasonable efforts have been made to identify the claim group, and
- That it has formed these opinions on the basis of clear instructions given to it by the claim group at very many meetings (for which dates are given), as well as on the basis of extensive anthropological advice.

Between the Recital C and the statements made the Certificate complies with s. 203BE(4) and as a result I am satisfied that the Certificate meets the requirements of s.190C(4) of the Act.

What is the effect of the death of two of the authorised persons?

The list of amendments at Schedule S notes that two of the persons who originally comprised the applicant are deceased and their names have been removed from the application. Each of those persons has filed an affidavit pursuant to s.62(1)(a) stating, inter alia, that they are authorised by all the persons in the claim group to make the application.

I must consider whether the applicant is authorised as at the time of testing. Section61(2) says:

> *Applicant in case of applications authorised by claim groups*
>
> (2) In the case of:
>
> (a) a native title determination application made by a person or persons authorised to make the application by a native title claim group; or
> (b) a compensation application made by a person or persons authorised to make the application by a compensation claim group;
>
> the following apply:
>
> (c) the person is, or the persons are jointly, the *applicant*; and
> (d) none of the other members of the native title claim group or compensation claim group is the *applicant*.

The case law in relation to the conduct of claims would suggest that the individuals appointed do not have a severable function but must act jointly. The Courts have not yet given any guidance on the capacity, in the light of s.62(2)(c), of the remaining persons to continue to function as the applicant in circumstances where one or more has died. On one view of s.62(2)(c) the applicant, because of its joint nature, would have ceased to exist on the death of any one person, thus also raising the question of whether the certificate is still valid.

I have no reason to think that the certificate is not still of effect. There is nothing in the Act to suggest either how or when a certificate might be said to have 'expired' or to be no longer of effect. As certification is a function of the Representative body, I am of the view that it would be for that body to decide whether there were need for a further or amended certificate. I do not think it is necessary for me to decide what, if any, effect the deaths had on the certificate, and I do not.

If however I am wrong in that analysis, I have come to the view that the remaining persons in this matter are nonetheless presently authorised pursuant to s.251B(b) by implication.

In the preliminary assessment of the application provided to the applicant, this issue (amongst others) was raised. A letter received from the TSRA in response and dated 22 September 2005 advised that the Regional Sea Claim Negotiating Team ('the Team') had been formed. Significantly, the two 'remaining' applicants are members of the team

A further letter dated.5 October 2005, states the following:

> "The TSRA confirmed that a Regional Sea Claim Negotiating Team had been formed. The reason for having a Negotiating Team is to:
>
> - represent the members of the claim group at mediation conferences;
> - assist the Native Title Office (NTO) in providing information to their communities and giving feedback from their communities; and
> - to represent the traditional owners in other native title negotiations.
>
> Prior to forming the Negotiating Team the NTO held a series of Island cluster meetings with representatives of members of the claim group to, among other things, provide a briefing on the application and how the claim is progressing through the mediation and court process. The following Island cluster meetings have been held in the Torres Strait:
>
> - 18 April 2005 – Top Western cluster meeting with representatives from Saibai, Dauan, and Boigu attending a meeting at the Boigu Island sporting complex;
> - 19 April 2005 – Western cluster meeting with representatives from Badu, Mabuiag, Kubin (Mua) attending a meeting at the Badu Island community centre;
> - 20 April 2005 – Eastern cluster meeting with representatives from Erub, Mer and Ugar attending a meeting at the Darnley Island sports complex; and
> - 21 April 2005 – Central cluster meeting at Yam Island with representatives from Yam Island, Naghir, Warraber, Masig and Poruma attending the Yam Island Council office.
>
> At each of these meetings representatives of the members from each Island within the cluster group were comprehensively briefed in relation to, among other things, the nature of thee Native Title Determination Application. Representatives of members of the claim group have also been advised that two of the four applicants are now deceased and that the two remaining applicants are now the persons responsible for bringing the claim on behalf of the members of the claim group. During these meetings representatives of members from each of

the respective cluster groups did not object to the two remaining applicants bringing the claim, there was no indication that the two remaining applicants were no longer authorised and there was no indication that the two deceased applicants should be replaced.

The NTO has also provided a number of briefings to the Negotiating Team in addition to the Negotiating Team attending a NNTT convened mediation conference with the commercial fishermen. The Negotiating Team has attended the following briefings and /or mediation conferences:

- 17 August 2005 – Thursday Island – Briefing session with NTO in preparation for a mediation conference with commercial fishermen;
- 18 August 2005 – Thursday Island – NNTT convened mediation conference with commercial fishermen; and
- 30 - 31 August 2005 – Darnley Island – NTO and Senior Counsel provided a comprehensive two day briefing with the Negotiating Team to discuss various legal, anthropological and other issues surrounding the claim. At this briefing session the Negotiating Team were specifically advised that two applicants were now deceased and the remaining applicants were now bringing the claim on behalf of member of the claim group.

We confirm that at each briefing session they have conducted with the negotiating team there have been no objections from any members of the negotiating team that the two remaining applicants should continue to bring the claim, there has been no indication that the two remaining applicants are no longer authorised and there has been no indication that the two deceased applicants should be replaced."

I accept those submissions and rely on the evidence of an ongoing and regular pattern of meetings at which the claim group continues to give instructions to a Team which includes the applicants.

I note that the wording of the requirements of s.190C(4) is in the present tense:

> (4) The Registrar must be satisfied that either of the following **is** the case
> (a) the application has been certified….or
> (b) the applicant…**.is** authorised to make the application…

I understand that to mean that I must consider whether, at the time of testing, the applicant 'is authorised', whether evidenced by certification or whether evidenced by the required statements and affidavits from the claim group.

I also have available to me the many files held by the Registrar in relation to other Torres Strait claims. The claim group has a long history of acting through persons appointed as applicants.

I find that the processes of regular meetings and briefings as set out in that letter, and, over many years, in the files, are such that the remaining applicants have, by necessary implication from the conduct of the members of the claim group, been authorised at and by those meetings to continue as the applicant. I do not think it necessary to consider in any further detail the exact nature of that decision making process. The pattern of continuing meetings, instructions and negotiations is itself enough. I also take into account that there has been a large number of claims in the Torres Strait area and that there have been Determinations of Native Title. I have concluded that the claim group is familiar with the requirements of native title and understand the Act's requirements for an applicant.

I have considered what was said by Wilcox J. in *Moran v Minister for Land & Water Conservation for the State of New South Wales [1999] FCA 1637* concerning the ability of a Council of Elders, rather than the claim group, to authorise an applicant; a proposition which the Court did not accept.

> However, a person who wishes to rely on a decision by a representative or other collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body's authority to make decisions binding the members of the group and that the body has authorised the making of the application [at 34]

That case was one in which it was asserted that it was the Council itself which had the power to authorise and that it did so under traditional law and custom, whereas in the present case there is no assertion that it is the Negotiating Team *per se* which did so, nor is it suggested that the Team is an artefact of traditional law and custom. It is not the Regional Sea Claim Negotiating Team which has been authorised, neither is there reason to conclude that the Team has authorised the applicants.. As I understand the material before me t is the applicants who are authorised and who operate through the Team which is assisting or representing the applicants much as, say, their legal representatives might.

There has been no material adverse to this conclusion submitted to the Registrar, nor have I any reason otherwise to doubt the processes.

The current application contains information in the affidavits which accompany the application (pursuant to s.62(1)(a)), and in the certificate provided by TSRA at Attachment R.

The s.62(1)(a) affidavits provided by each applicant state that they are authorised by all the persons in the native title claim group to make this application and deal with matters arising in relation to it (para 5). The deponents then state (para 6) that the basis for their authorisation is as follows:

- they are senior traditional elders;
- the nature of their position within the community is such that they are an appropriate person to be an applicant; and
- they have the support of the traditional owners.

In the affidavits which accompany the application, the two applicants identify themselves as a "traditional landowner" and "senior traditional elder", who have the support of the "traditional owners". As these terms appear to be used interchangeably with the term "native title claim group," I am satisfied that the applicants are members of the native title claim group and that the two 'remaining' persons now comprise the applicant.

Result: **Requirements met**

B. Merits Conditions

Identification of area subject to native title: s.190B(2)

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

Schedule B states as follows:

> Part A. External Boundaries and Description
>
> 6. The external geographical boundaries of the area covered by this application (Torres Strait Regional Sea Claim Area) are described in Attachment B.
>
> 7. The external geographical boundaries of the area covered by this application are delineated and marked on the map at Attachment C.
>
> 8. 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.
>
> Part B. Areas within the external boundaries that are not covered by the application
>
> 9. Areas within the boundary that are not covered by the application are the following areas, if any, except where any extinguishment by the acts mentioned is required by s47A or 47B of the Native Title Act 1993 to be disregarded:
> (a) any area that, when the amended application is made, is subject to any of the following kinds of acts as they are defined in either the Native Title Act 1993, as amended (where the act in question is attributable to the Commonwealth), or Native Title (Queensland) Act 1993 (QLD), as amended (where the act in question is attributable to the State of Queensland).
> (i) Category A past acts;
> (ii) Category A intermediate period acts;

(iii) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests;
(iv) Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests;
(b) any area in relation to which a previous exclusive possession act under section 20 or 21 of the Native Title (Queensland) Act 1993 (QLD) was done and that act is attributable to the State of Queensland;
(c) any area in relation to which a previous exclusive possession act as defined by section 23B (including section 23B(7) of the Native Title Act 1993 was done in relation to the area and the act was attributable to the Commonwealth; and
(d) any area where native title rights and interests have otherwise been wholly extinguished;
(e) specifically, any area where there has been:
(i) an unqualified grant of an estate in fee simple;
(vi) a public work as defined in section 253 of the Native Title Act 1993.

The Geospatial Assessment of the map and description prepared by the Tribunal has provided the following information:

Assessment of Map & Description
This assessment provides an analysis of the description and map based on a copy of the description (Schedule B) and map (Schedule C) for the amended native title determination application QUD6040/01 – Torres Strait Regional Sea Claim (QC01/42) as intended to be filed in the Federal Court on 27 June 2005.

Amendment(s)
Schedule S notes that:

> *"… the external boundaries of the claim area have not changed. The amended application clarifies those areas within the external boundaries that are not covered by the application (Schedule B Part B). The amended application also corrects two co-ordinates in the description at Attachment B which were incorrectly transcribed in the original application."*

The area covered by the application has not been amended.

Description
Schedule B 'Identification of Boundaries" refers to the description in Attachment B. Schedule B also notes 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."*

Schedule B Part B lists general exclusions.

Attachment B describes "Part A" of the application area as being:

> *"… 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 description then lists separate external boundaries under 9 numbered sections.

Section one of Part A describes an external boundary using geographic coordinates and references to the "Fisheries Jurisdiction Line" which is Annex 8 to 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".*

This treaty is referred to as "the Treaty" elsewhere in the description.

Sections two to nine of Part A describe the outer limit of the territorial seas of islands within the application area and describes these by lines (geodesics) defined by geographic coordinates and series of intersecting arcs of circles of radius three miles. The geographic coordinates of the centre points of these circles are also listed. These sections also make reference to annexes of "the Treaty" from which these definitions are drawn.

Attachment B describes the "Part B" of the application area as:

> *"… the waters on the seaward side of the high water mark, but not the seabed or subsoil, exclusive of the territorial seas of Aubusi, Boigu, Moimi, Dauan, Kaumag and Saibai as defined in Part A above, contained within the following external boundary:"*

The external boundary description refers to, and is derived from, "the Treaty": Annex 8 - "Fisheries Jurisdiction Line".

These coordinates describe an area enclosed in the north by the "Fisheries Jurisdiction Line" to the west and east by meridians of Longitude 142° 03' 30" East and 142° 51' 00" East respectively and extending south to meet "Part A" of the application.

No areas are denoted as exclusions in Attachment B.

Map
Schedule C refers to Attachment C.

The A3 map in Attachment C "Torres Strait Regional Sea Claim" clearly displays Part A (delineated by outline and hatching) and Part B (delineated by outline and opposing hatching to that of Part A).

Excluded areas (those above "high water mark" within the external boundaries of Parts A & B) are also outlined clearly. The application areas and excluded island groups within them are clearly labelled. The map shows a coordinate grid and a faint topographic map background.

There is no reference on the map to the datum and projection to which coordinates are referenced or to the source of information depicted.

Assessment

Areas above the "high water mark" within the external boundaries of Areas A & B of the application are assumed to be excluded by the statements noted above and by the "sea" nature of the application. These areas are not otherwise defined in the description.

"The Treaty" as referenced in the description refers to the Schedule of the *Torres Strait Fisheries Act* (Commonwealth, 1984). The inclusion of descriptive material from "the Treaty" would have ensured clear, accurate and unambiguous description of the external boundaries of the application area.

The datum of geographic coordinates is not included in the description or on the map and the meaning of "mile" as used in the description is not defined. These things are defined in The Schedule to the Treaty, however their inclusion in the application description would avoid any possible doubt.

(The reference datum for geographic coordinates in the Schedule to the Treaty is the Australian Geodetic Datum of 1966. A "mile" as defined in the Schedule to the Treaty is an "international nautical mile being 1,852 metres in length").

The following seven suggestions are made with respect to the application description and map in the event that it is amended at some future time, but do not constitute part of my findings:

1. The Schedule of the *Torres Strait Fisheries Act* (Commonwealth, 1984) be added to the description as a reference and identified as being "the Treaty" referred to in the description.

2. The reference datum for geographic coordinates be included in the description and on the map, and the definition of "mile" be included in the description.

3. The definition of "High Water Mark" be added to the description as a definition.

4. The use of "land" in the description for Part A be removed to avoid confusion of the intended application area.

5. Areas excluded from the application area, i.e. islands or previous native title applications be listed as exclusions to avoid confusion.

7. A scale or scale bar and the projection/datum reference as mentioned above be added to the map at Schedule C.

Notwithstanding the above points and given that the material in the application description is clearly drawn from the Schedule of the Torres Strait Fisheries Act:

The description and map are consistent and identify the application area with reasonable certainty.

For these reasons, I am satisfied that the requirements of s.190B(2) are met. It follows that I am also satisfied that the description meets the requirements of s. 62(2)(a) and that the map shows the boundaries of the claim area in compliance with the requirements of s. 62(2)(b).

Result: **Requirements met**

Identification of the native title claim group: s.190B(3)

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

Section 190B(3) of the Act sets out the two ways in which a claim group may be described. It says:

> 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.

Because subsections (a) and (b) are presented as alternatives it must be assumed that the intention of the Act is that a description under either subsection will produce the same level of 'identifiability' of the members. That level is set by subsection (a).

As the persons are not named it is necessary to consider if the application meets the requirements of s. 190B(3)(b). Mansfield J in *Northern Territory v Doepel* [2003] FCA 1384 held that where an application falls within s.190B(3)(b):

> The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. (at[51])

Schedule A states that:

> "the native title claim group (Torres Strait Regional Sea Claim Group) comprises the descendants of the ancestors listed in Attachment A".

That description, because of its use of the definite article 'the', may be paraphrased as 'all the descendants of'.

A description of the native title claim group in terms of 'all the descendants of [named apical ancestors]' is acceptable under s.190B(3)(b) because, although a factual inquiry as to who all those persons are may be necessary, the description provides an objective way of verifying the identity of members of the native title claim group : see *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, per Carr J.

I am satisfied that the identities of the descendants of the named ancestors could be identified with minimal inquiry.

The requirements of s.190B(3)(b) are satisfied.

Result: Requirements met

Native title rights and interests are readily identifiable: s.190B(4)

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

S. 190B(4) requires the Registrar or his delegate to be satisfied that the description of the native title rights and interests (found at Schedule E of the application) is sufficient to allow the claimed rights and interests to be readily identified. To meet the requirements of s.190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be said that the native title rights and interests are readily identified.

Schedule E describes the claimed native title rights and interests in these terms:

> 'Native Title where traditional rights are wholly recognisable
>
> 12. Paragraph (13) applies to every part of the claim area, if any, that:
>
> (a) is not subject to the right of innocent passage, the public right to navigate or the public right to fish (in this Schedule E, collectively "public right"); or, if it is so subject, to any of such part where the public right is a prior interest whose extinguishment of native title rights and interests would be required by section 47A or 47B of the Native Title Act to be disregarded; and
>
> (b) has not been, and is not, covered by a valid or validated act that is inconsistent to any extent with the exclusive native title (in this Schedule E, "previous act"); or if it has been or is so covered, any of such part where the previous act is one whose extinguishment of native title rights and interests would be required by section 47A or 47B of the Native Title Act to be disregarded.
>
> 13. Where this paragraph applies the native title rights possessed under traditional law and customs and recognised by the common law of Australia is the right of possession, occupation, use and enjoyment of land and waters as against all others except Kauareg People in relation to southern central parts of Part A of the claim area.
>
> Native title where traditional rights are only partially recognisable
>
> 14. Paragraph (15) applies to every part of the claim area to which paragraph (13) does not apply.
>
> 15. Where this paragraph applies, the traditional rights possessed under traditional law and customs is the right referred to in paragraph (13) but the native title rights recognised by the common law of Australia are the rights and interests that comprise the right to referred to in paragraph

(13) to the extent not inconsistent with any public right that exists in, or any previous act that has been done in relation to, that part; in particular the rights to:

(a) have access to or enter and remain on the land and waters
(b) use and enjoy the land and waters
(c) take the resources of the land and waters;
(d) sustain a livelihood through utilisation and exchange of, and trade in, the resources of the land and waters;
(e) sufficient quantities of the resources of the land and waters to sustain a livelihood;
(f) preserve for themselves, sufficient quantities of the resources of the land and waters to sustain a livelihood;
(g) engage in trade by way of exchange or by utilising a medium of exchange;
(h) engage in trade and commerce utilising the resources of the land and waters;
(i) protect resources of importance and the habitat of those resources;
(j) except in relation to resources taken in exercise of the public right to fish - a share of resources taken by others from the land and waters or a share of the value of such resources;
(k) protect places of importance; and
(l) control the access to, and use and enjoyment of, the land and waters and the taking of resources by others except any person exercising:

(i) a public right;
(ii) a right comprised in or pursuant to a previous act; and
(iii) any right accorded by a law of the Commonwealth or Queensland;
(iv) a right 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 signed in Sydney on 18 December 1978 as in force at the date of this determination

Area covered by the native title and who holds the rights

16. Each of the native title rights referred to in each of paragraphs (13) and (15) exists in relation to the whole of the area referred to in each of those paragraphs respectively.

> 17. Members of the native title claim group hold the native title rights referred to in paragraphs (13) and (15) variously, collectively and for their respective entitlements according to the traditional laws acknowledged, and traditional customs observed, by them.

Activities currently carried on

> 18. Activities in exercise of the native title rights referred to in Schedule E are all such activities as are contemplated by those rights and interests and include the activities identified in Schedule G.

Definition

> "Resources" does not include minerals or petroleum wholly owned by the Crown.
>
> Schedule P refers to paragraphs 12 and 13 above.
>
> Schedule Q states that "the applicant makes no claim to any minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth or State of Queensland."

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.[1]

In *Doepel*, the Court saw the task in this way:

> 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 identifiably 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]).

Section 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:

[1] *Queensland v Hutchinson* (2001) 108 FCR 575.

> (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'.

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s. 223. They fall into three broad types:

- the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[2]
- rights to minerals and petroleum under relevant Queensland legislation,[3]
- an exclusive right to fish offshore or in tidal waters, and
- any native title right to exclusive possession offshore or in tidal waters.[4]

I have considered the description of native title rights and interests in the present application in light of previous judicial findings. As a result, I am satisfied that the rights and interests claimed by the applicants in Schedule E are readily identifiable.

Result: **Requirements met**

Factual basis for claimed native title: S.190B(5)

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;

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[2] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[3] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[4] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

(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

Section 190B(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).

To satisfy the requirements of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s.190A(3), regard will also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s.62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it."

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[5]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (" *Yorta Yorta*"), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were "rooted in pre-sovereignty traditional laws and customs": at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued "vitality" of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a

[5] See *Ward* at [382].

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].

These statements in the *Yorta Yorta* are of great importance 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 believe that in respect of this condition I must consider whether the factual basis provided by the applicant is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5) (a), (b) and (c). I have formed the view that the information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

The material provided in this amended application is substantially the same as was provided when it was last subject to the test. Having read and considered the reasons given at that time, I propose to adopt them, and they are reproduced below, with minor editorial amendments

The native title claim group have, and the predecessors of those persons had, an association with the area.

At Schedule F of the application, it is stated that the native title rights and interests "are those of and flowing from the right to possess, occupy, use and enjoy the claim area pursuant to the traditional laws and customs of the claim group".

It is asserted that "at the time sovereignty was asserted over the claim area, the ancestors of the claim group were entitled to exclusive possession, occupation, use and enjoyment" of the claim area and "had possession, occupation, use and enjoyment of the claim area". It is also stated in Schedule F that:

> "2. Such possession, occupation, use and enjoyment is and has been pursuant to and under the traditional laws and customs of the claim group, on the basis of:

(a) a system of traditional law concerning rights of individuals and groups in sea territory, in material objects and in non-material objects, and corresponding responsibility for the care and management of sea territory, material and non- material objects;

(b) a kinship system by which hereditary transmission of rights and responsibilities occurs;

(c) prescribed means by which identity as a member of the claim group is recognised, and prescribed means by which membership of any group within the broader claim group is recognised.

(d) prescribed means by which authority within the claim group is asserted and respected.

3. Such traditional law and custom has been transmitted through the generations preceding the present generations to the present generations of persons comprising the claim group;

4. The claim group continues to acknowledge and observe those traditional laws and customs;

5. The claim group by those laws and customs have a connection with the area in respect of which the claim is made;

6. The rights and interests are capable of being recognised by the common law of Australia."

Details of activities carried out by the native title claim group are provided at Schedule G of the application. It is also asserted in Schedule M of the application that

"Members of the Torres Strait Regional Sea Claim Group have maintained a traditional physical connection with the claim area from a time before the assertion of sovereignty continuously to the present especially by reason of the activities referred to in Schedule G. See the affidavits of the named applicants filed with this application."

Additional information in support of the factual basis is found in this affidavit material accompanying the application, being an affidavit by **[Deceased 1 – name deleted]** [16/11/01], **[Applicant 1 – name deleted]** [7/11/01], **[Deceased 2 – name deleted]** [19/11/01] and **[Applicant 2 – name deleted]** [15/11/01].

I am satisfied that the information included in the application and in the accompanying material is sufficient to satisfy the requirements of this condition.

(ii) there exist traditional laws and customs that give rise to the claimed native title

At Schedule F of the application, the applicants assert that the claimed rights and interests is and has been pursuant to and under the traditional laws and customs of the claim group, on the basis of a system of traditional law concerning rights of individuals and groups in sea territory, in material objects and non-material objects, and corresponding responsibility for the care and management of sea territory, material and non-material objects; a kinship system by which hereditary transmission of rights and responsibilities occur; prescribed means by which identity as a member of the claim group is recognised and by which membership of any group within the broader claim group is recognised; and a prescribed means by which authority within the claim group is asserted and respected. The factual basis for these assertions is set out in the accompanying material from the four applications and in Schedules F, G and M.

I refer to the following information in the accompanying affidavits/statement by each of the four deponents. Each of the deponents states that he is one of the senior traditional owners of the four parts of the claim area:

- **[Deceased 1 – name deleted]** states that he is an owner of the western part of the claim area;
- **[Applicant 1 – name deleted]** states that he is an owner of the Top Western part of the claim area;
- **[Deceased 2 – name deleted]** states that he is an owner of the central part of the claim area; and
- **[Applicant 2 – name deleted]** states that he is an owner of the eastern part of the claim area.

Each deponent provides information of the traditional laws and customs that exist in relation to the claim area and which give rise to the claimed native title:

- **[Applicant 2 – name deleted]** tells of his traditional name, given to him by his father and grandfather who had the same name, which he will pass onto his grandson when the time comes;

- Each deponent states that he (as did his ancestors before him) has continuously occupied, visited, travelled across and used the claim area throughout his life with other traditional owners, and through such activities has maintained a continuous physical connection with parts of the claim area;

- Each deponent tells of a system of laws and customs observed by the traditional owners in relation to land and sea ownership. These laws and customs determine who are the rightful owners of their part of the claim area, how such ownership might rightfully pass from one person to another, and collectively recognise the continuing traditional ownership of the claim area by Torres Strait Islanders.

o Each deponent tells of their ancestors passing on to them a rich lore of knowledge relating to the sea area, including myths and stories, songs and traditional environmental knowledge about the currents, tides, winds, seasons, and marine species of the area and traditional resource management activities. Ownership of this knowledge and its associated traditions is asserted by each applicant.

o **[Applicant 1 – name deleted]**, **[Applicant 2 – name deleted]** and **[Deceased 1 – name deleted]** tell of their continued use of the claim area for hunting, fishing and collecting marine resources, in accordance with their traditional laws and customs, and of continuing trade in the resources of the claim area with others inside the group, and with outsiders such as Papuan New Guineans. **[Deceased 2 – name deleted]** tells of using the claim area for such purposes when he was younger.

o Each deponent tells of trade with Papuans since time immemorial.

o **[Applicant 2 – name deleted]** and **[Deceased 1 – name deleted]** tell of the continued use of stone-walled fish traps built by the ancestors. **[Applicant 1 – name deleted]** tells of building crayfish houses when younger on the edges of the reefs to increase the productivity of this resource. **[Deceased 2 – name deleted]** also describes this.

o Each deponent describes their regular travel across the claim area to visit other islands for social, trade and ceremonial purposes.

o **[Applicant 2 – name deleted]** tells of advising people travelling from certain places to make small offerings to a mythical figure who symbolizes the spirit who created that place and the surrounding seas and reefs and the creatures belonging to that place, to show respect and to request fair weather.

o Each deponent tells of their position as a senior traditional man making them responsible for the passing of ceremonies and knowledge (including traditional fishing methods, language, place names and cultural heritage) in relation to the claim area to their children and grandchildren, just as their ancestors did before them.

I am satisfied that the information included in the application is sufficient to satisfy the requirements of this provision.

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

A general description of the continued holding of native title in accordance with traditional laws and customs is contained in Schedules F, G and M of the application.

Schedule F of the application states that "such traditional law and custom has been transmitted through the generations preceding the present generations to the present generations of persons comprising the claim group" and that "the claim group continues to acknowledge and observe those traditional laws and customs" and "by those laws and customs have a connection with the area in respect of which the claim is made". The traditional laws and customs relate to a system of traditional law concerning rights of individuals and groups in the claim area; rights through the kinship system, and prescribed means by which membership of the claim group and authority within the claim group is recognised and asserted.

In Schedule G, the applicants provide examples of traditional laws and customs which are still observed, including:

- hunting, fishing and foraging on the claim area;
- collecting other material resources from the claim area;
- consuming, sharing, trading and exchanging resources derived from the claim area;
- travelling across the claim area;
- continuing to exercise traditional laws and customs which deal with:
  - controlling access to country;
  - conducting ceremonies in relation to the claim area;
  - maintaining and transmitting mythological information about the claim area;
  - asserting rights and responsibilities to country in all available public forums.

Further information supporting these claims is contained in the accompanying affidavits/statement by the deponents referred to above. Each applicant provides information about contemporary activities carried out on the claim area in accordance with traditional law and custom, as passed down from their collective ancestors.

The affidavits of the four deponents refer, of course, to the factual basis of the claim in relation to each of the four primary areas of the Torres Strait Sea, these being the eastern group of islands (represented by **[Applicant 2 – name deleted]**), the western group of islands (represented by **[Deceased 1 – name deleted]**), the 'Top Western' group of islands (represented by **[Applicant 2 – name deleted]**), and the central group of islands (represented by **[Deceased 1 – name deleted]**). Nevertheless, as these groups of islanders share common or group rights in the claim area, and there is a high degree of intermarriage and residential mobility between them, factual material contained in the application and in these affidavits relates more generally to the Torres Strait Sea at large.

Although **[Person1 – name deleted]** (on behalf of Injinoo traditional owners, letter dated 28th November 2001) states that "my ancestors never told me that people from the Torres Strait have any ties to this sea country", and that "[the Injinoo people] had ownership and control over the sea area that reached well into where the Torres Strait claim has been lodged", he notes that "[Torres Strait] people have dived here for trocus".

[Person 2 – name deleted] (on behalf of the Kaurareg people, letter dated 28th November 2001) similarly claims that parts of the present claim area "includes large areas of Kaurareg traditional sea country". However, despite these comments, I note that it is not incumbent on a native title group to show physical connection to *every* tenement, allotment or area within a broader traditional area; nor it this an appropriate forum in which to make findings about the ability of the Kaurareg and Injinoo traditional owners to make out these claims . **[Person1 – name deleted]** letter suggests, at least, that some form of native title right is exercised by Torres Strait Islanders in those sea areas identified by **[Person1 – name deleted]** as traditional sea areas of the Injinoo people. In addition, I note that the Injinoo people currently have no native title claim over any portion of this sea area, nor is there a native title determination application by the Kaurareg People which overlaps with the area covered by the Torres Strait Regional Sea Claim.'

I note here that the present amended claim includes, as will be seen in the reasons at s190B(6), that an aspect of that Kaureg claim has been recognised in this amended application.

For these reasons, I am therefore satisfied that the conditions of s.190B(5) have been met.

Native title rights and interests claimed established prima facie: s.190B(6)

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 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 Registrar takes the view that this requires only one right or interest to be registered.

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].'*

And at 35:

> *However, the notion of a good prima facie claim which, in effect, is the concern of s.63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success.*

This test was explicitly considered and approved in *Northern Territory v Doepel* 2003 FCA 1384 at paras 134-5 :

> *'134. Although North Ganalanja Aboriginal Corporation v The State of Queensland (1996) 185 CLR 595 (Waanyi) was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima facie' there adopted is no longer appropriate: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided*
>
> *135. ……see e.g. the discussion by McHugh J in Waanyi at 638 - 641. To adopt his Honour's words, 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.'*

I have adopted the ordinary meaning referred to by their Honours and the expressions of it in the concepts of 'material which, if accepted, will result in the claims success' and 'a claim which is arguable, whether involving disputed questions of fact or disputed questions of law should be accepted on a prima facie basis' .in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

'Native title rights and interests' are defined at s. 223 of the *Native Title Act*. This definition specifically attaches native title rights and interests to land and water, and in summary requires;

A. the rights and interests to be linked to traditional laws and customs;
B. those claiming the rights and interests to have a connection with the relevant land and waters; and
C. those rights and interests to be recognized under the common law of Australia.

In considering whether the rights claimed by the applicants at Schedule E can be established *prima facie*, I have had regard to Schedules F, G and M of the application. I have also had particular regard to the affidavits by each of the 4 applicants in the application.

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

> 'Native Title where traditional rights are wholly recognisable
>
> 12. Paragraph (13) applies to every part of the claim area, if any, that:
>
> (a) is not subject to the right of innocent passage, the public right to navigate or the public right to fish (in this Schedule E, collectively "public right"); or, if it is so subject, to any of such part where the public right is a prior interest whose extinguishment of native title rights and interests would be required by section 47A or 47B of the Native Title Act to be disregarded; and
>
> (b) has not been, and is not, covered by a valid or validated act that is inconsistent to any extent with the exclusive native title (in this Schedule E, "previous act"); or if it has been or is so covered, any of such part where the previous act is one whose extinguishment of native title rights and interests would be required by section 47A or 47B of the Native Title Act to be disregarded.
>
> 13. Where this paragraph applies the native title rights possessed under traditional law and customs and recognised by the common law of Australia is the right of possession, occupation, use and enjoyment of land and waters as against all others except Kaurareg People in relation to southern central parts of Part A of the claim area.

This is a claim to exclusive possession. That a claim to exclusive possession may be made where those entitled to the benefit of it are comprised, apparently, of two different groups was accepted By Lee J in Ben Ward & Ors v State of Western Australia & Ors [1998] FCA 1478 where paragraph 2 of the determination reads:

> '2. Native title in the *"determination area"* is held by the Miriuwung and Gajerrong People, and in respect of that part of the *"determination area"* known as Boorroonoong (Lacrosse Island), native title is also held by the Balangarra Peoples, both parties being described hereafter as the common law holders of native title. '

That finding was not considered on appeal and accordingly I am of the view that it is an acceptable formulation of this right. The extent and manner of exercise of the two holders of exclusive possession is a matter for their own laws and customs.

Established

Schedule E then goes on to claim certain non-exclusive rights subject to the following:.

> Native title where traditional rights are only partially recognisable
>
> > 14. Paragraph (15) applies to every part of the claim area to which paragraph (13) does not apply.
> >
> > 15. Where this paragraph applies, the traditional rights possessed under traditional law and customs is the right referred to in paragraph (13) but the native title rights recognised by the common law of Australia are the rights and interests that comprise the right to referred to in paragraph (13) to the extent not inconsistent with any public right that exists in, or any previous act that has been done in relation to, that part; in particular the rights to: [the rights set out below as (a) to (l)

There is a difficulty here which I must address. It is whether the use of the phrase 'in particular' at the conclusion of paragraph 15 is intended to convey that the list of rights claimed is not an exhaustive list but a 'selection'. In my view that would be the proper construction of the phrase taken alone.

In *Attorney-General of the Northern Territory v Ward [2003] FCAFC 283* the Court considered the phrase 'occupy, use and enjoy' where non-exclusive rights may be claimed and said as follows about the requirement, pursuant to s225, that an exhaustive list of the incidents of native title is required.

> 18 The argument for an exhaustive, rather than inclusive, list of the incidents of the entitlement is based on para (b) of s 225 of the Act. That paragraph requires 'a determination of ... the nature and extent of the native title rights and interests in relation to the determination area'.
>
> 19 In their High Court joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ said (at [51]):
>
> *'A determination of native title must comply with the requirements of s 225. In particular, it must state the* ***nature*** *and* ***extent*** *of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.'* (Original emphasis)
>
> 20 Mr Basten argues that s 225(b) is satisfied by the reference in clause 5 of the proposed determination to 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs'. He says

> this is the required specification of the nature and extent of the rights and interests; sub-clause (a) to (e) merely identify some incidents of those rights and interests.
>
> 21 We cannot agree with this approach. A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy.

The question then is whether the list of rights claimed at (a) to (l) is in fact exhaustive notwithstanding the words 'in particular.' Should I take the phrase to have its usual meaning? I have come to the conclusion, considering the application, and the supporting material as a whole, that it is intended to be an exhaustive list I have also considered the kinds of rights which have been able to be established in litigated determinations and although each case is decided entirely on its own facts, there is nonetheless a pattern of similar rights being established..

Most significantly, however, I have carefully considered the very useful material prepared by the persons comprising the applicant, in affidavit form, and have formed the view that their intention was to provide a complete 'picture' of their native title rights. It is chiefly upon that factual ground that I consider that the use of the words 'in particular' is unhappy, but mere surplusage

I will now consider each such right.

(a) have access to or enter and remain on the land and waters

There is sufficient information in Schedule F and in the affidavits by **[Deceased 1 – name deleted]** (4-13), **[Applicant 1 – name deleted]** (4-13), **[Deceased 2 – name deleted]** (5-12) and **[Applicant 2 – name deleted]** (5-13) to satisfy me that this right can be established *prima facie*.
Established

(b) use and enjoy the land and waters;

There is sufficient information in Schedule F and in the affidavits by **[Deceased 1 – name deleted]** (3-4, 6, 8-12), **[Applicant 1 – name deleted]** (3-4, 6, 8-12), **[Deceased 2 –**

name deleted] (3-4, 6, 8-11) and **[Applicant 2 – name deleted]** (4-5, 7, 9-13) to satisfy me that this right can be established *prima facie*.
Established

(c) take the resources of the land and waters;

There is sufficient information in Schedule F (para 21 (e & g) para 27) and in the affidavits by **[Deceased 1 – name deleted]** (7-13), **[Applicant 1 – name deleted]** (7-13), **[Deceased 2 – name deleted]** (7-13) and **[Applicant 2 – name deleted]** (8-14) to satisfy me that this right can be established *prima facie*.
Established

(d) sustain a livelihood through utilisation and exchange of, and trade in, the resources of the land and waters

(e) sufficient quantities of the resources of the land and waters to sustain a livelihood;

(f) preserve for themselves, sufficient quantities of the resources of the land and waters to sustain a livelihood;

These three claimed rights may be dealt with together as, in my conclusion, none of them may be established, for the same reasons in each case.

In *Attorney-General of the Northern Territory v Ward [2003] FCAFC 283* the se of composite expressions was considered in the terms below. The present rights are not, of course, expressed as simply 'use and enjoy', but in my view suffer from similar difficulties in that it is not possible to determine the nature and extent of the rights sought. The Court in *Ward* said:

> 18 The argument for an exhaustive, rather than inclusive, list of the incidents of the entitlement is based on para (b) of s 225 of the Act. That paragraph requires 'a determination of ... the nature and extent of the native title rights and interests in relation to the determination area'.
>
> 19 In their High Court joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ said (at [51]):
>
> > *'A determination of native title must comply with the requirements of s 225. In particular, it must state the **nature** and **extent** of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be*

> *appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.'* (Original emphasis)
>
> 20 Mr Basten argues that s 225(b) is satisfied by the reference in clause 5 of the proposed determination to 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs'. He says this is the required specification of the nature and extent of the rights and interests; sub-clause (a) to (e) merely identify some incidents of those rights and interests.

Neowarra v State of Western Australia [2003] FCA 1402 further explained why:

> *As a result of the injunction in Ward at [52] that in certain situations it will be preferable to express rights by reference to activities that may be conducted as of right on or in relation to land and waters, the applicants also claim the right to engage in particular activities. They say the activities are "particular incidents of, but do not comprise or define the legal content of the rights previously considered". But for extinguishment considerations, there would be no need to examine the various things that could be done in the exercise of the applicants' general ownership right. But where, as here, pastoral leases are involved, it is useful to consider the activities relied on to illustrate aspects of inconsistency of rights'.*(at [501])

Each of these rights is expressed to be subject to prior acts or public rights, giving them their 'non-exclusive' character . Paragraph 15 of Schedule E says that they are:

> 'not inconsistent with any public right that exists in, or any previous act that has been done in relation to, that part'

In order to be able to consider the inconsistency of rights some measure of precision is, in my view, necessary. I do not think that these rights do that.

The factual basis on which I must consider them is set out in the affidavits referred to above. None of those affidavits provides any information on which I could rely to determine the nature and, particularly, the extent of claimed rights to

- 'sufficient quantities of',
- 'sustain a livelihood'
- 'preserve for themselves'

Each of these claims seem to me to assert the right in terms which which do not allow for an assessment of the inconsistencies of rights between them and the public or other prior right s which are described in paragraph 15. It could be that an exercise of these rights to their fullest extent could not be consistent with the public right. A right 'to take fish', for example, may be consistent with the public right, but when expressed as a

right to apparently take a fixed quantity, the right looks more like an incident of exclusive possession..

It might also be said that 'a right to sustain a livelihood' is a right beyond any mortal power or a court's ability to determine.

Even if I am wrong in that analysis, I am unable to find in the supporting material a sufficient factual base for their assertion. There is ample evidence going to the exploitation of resources but not to a defined level as these call for.

Finally, I note that rights to 'receive a portion' of catches was not allowed in *Yarmirr v Northern Territory FCA 1185* at [118] in that it was not a right in land or waters, and, by analogy, I do not accept that a right 'to sustain a livelihood' is a right in land or waters.
Not Established

(g) engage in trade by way of exchange or by utilising a medium of exchange;

The right to trade has been recently considered by the Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 where the Court said:

> 153 The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.
>
> 154 Olney J in *Yarmirr* at first instance referred to evidence of exchange of goods. The evidence was that of Mary Yarmirr. It related to trade by way of exchange, between indigenous groups of items including spearheads, stone axes, bailer shells, cabbage palm baskets and turtle shells. His Honour said (at 587):
>
> > *'Whilst there can be no doubt that the trade here described related to objects which can properly be categorised as resources of the waters and land, the trading was constituted by the exchange of goods. The so-called "right to trade" was not a right or interest in relation to the waters or land. Nor were any of the traded goods "subsistence resources" derived from either the land or the sea.'*
>
> 155 Olney J's observation does not involve the proposition that trade in the resources of the land can never be a 'right' in relation to the land. There the evidence was of an activity. It did not amount to evidence of the exercise of a right……. *Yarmirr* cannot be taken as authority for the proposition that there cannot be a right to trade in the resources of the land as a right in relation to the land.

Having come to this conclusion, however, the Court was of the opinion that there had been insufficient evidence before the Court at first instance for the right to survive on

appeal. The finding by the Court was that the word 'trade' should be omitted from the lower Court's formulation, leaving as the right:

> "the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.'(at [157])

By taking that view I believe that the Court has implicitly accepted that the right to trade is also a readily identifiable right in land which is capable of being established where satisfactorily evidenced over land where exclusive possession is not available.

Thee is ample evidence of trade in the affidavits supplied that a sufficient factual basis has been shown. Each of the deponents speaks of systems of sharing, exchanging and trading and provides examples of the kinds of natural resources the subject of these activities.
Established

> **(h) engage in trade and commerce utilising the resources of the land and waters;**

I am unable to find this right established. The use of the word 'commerce', in the absence of a sufficiently probative factual basis as to its nature and extent, is in my view fatal. That is not to say that a 'commercial' use of resources could not be established as a native title right if a sufficient evidentiary base were provided but that base would, I think, need to encompass notions of adaptation and change of traditional rights to a more contemporary expression.

I do not find a sufficient factual basis of that kind.
Not Established

> **(i) protect resources of importance and the habitat of those resources;**

The right to maintain and protect **places** (my emphasis) of significance, and similar rights, have long been accepted by the Courts. This right, which at first sight seems analogous, is sought on a non-exclusive basis. It is however in far wider terms than those right s previously 'found' by the Courts. There are two difficulties which have not allowed the right to be *prima facie* established

The first of these is the use of the words 'resources' and 'habitat'. There is no definition provided as to what the application intends in using those terms. No doubt, on one analysis, the whole of the claim area would be regarded by the claim group as their most valuable resource. On another, it may mean no more than, say, the protection from damage of a particular atoll, but there is no factual basis on which I can rely to know which of these is intended. The word 'habitat' must be seen in the same light. In the absence of any guidance from the application I must give the words their normal,

common meanings: the Macquarie Dictionary gives these as its first two definitions of 'resource':

> '**1**.a source of supply, support or aid. **2**. (plural) the collective wealth of a country or its means of producing wealth.'

Habitat is defined thus:

> '**1**.The native environment or kind of place where a given animal or plant naturally lives or grows such as warm seas, mountain tops, fresh waters etc. **2** place of abode, habitation.'

Accepting these definitions, as I do, the scope of the right sought is one compatible only with exclusive possession

Even without resort to the dictionary, however, when the evidence in those cases where rights to 'maintain and protect' have been determined is considered, it is clear that the evidence before those Courts has been in relation to the protection of what might be paraphrased as 'sites' rather then whole environments. I am of the view that any right to protect an environment is of such a degree that it must necessarily be an incident of exclusive possession.

Quite apart from the definitional problems is that there is not, in any event, a sufficient factual basis on which I could find these rights prima facie established. The material at schedule F is expansive but general in its nature. It gives a comprehensive summary of the group's association with the area over considerable periods of time, its laws , customs and culture, as well as the basis for the continuation of native title. The affidavits are similarly comprehensive. There is, however, no specific reference to the protection of resources and habitats. Whilst it is tempting to conclude that the purposes of many of the laws and customs cited may well be to achieve the ends described by the right, that is a leap beyond the given factual basis which is not available to me.

Not Established

> **(j) except in relation to resources taken in exercise of the public right to fish - a share of resources taken by others from the land and waters or a share of the value of such resources**;

For the same reasons as I gave above, I do not think this right can be established.

The definitional problem of what it meant by 'resources' and 'the value' is one which the material provided does not me to solve. Again, if the words are given their widest meanings, the right would be; all else being equal, able to be established only as an incident of exclusive possession. There is a similar lack of a sufficient factual basis.

In any event, a 'right to receive a portion of major catches' and a 'right of clan members to receive a portion of a major catch' were specifically held not to be native title rights in *Yarmirr v Northern Territory FCA 1185* at [118]
Not Established

(k) protect places of importance;

There is sufficient information in Schedule F (para 21 (e & g) para 27) and in the affidavits by **[Deceased 1 – name deleted]** (7-13), **[Applicant 1 – name deleted]** (7-13), **[Deceased 2 – name deleted]** (7-13) and **[Applicant 2 – name deleted]** (8-14) to satisfy me that this right can be established *prima facie*.
Established

(l) control the access to, and use and enjoyment of, the land and waters and the taking of resources by others except any person exercising;

(i) a public right;

(ii) a right comprised in or pursuant to a previous act; and

(iii) any right accorded by a law of the Commonwealth or Queensland;

(iv) a right 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 signed in Sydney on 18 December 1978 as in force at the date of this determination

The Full Court of the Federal Court, which I must follow, in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135* considered rights expressed in similar terms at [141]-[155] and in doing so quoted extensively from other considerations of the law . Commencing at [146] the court said:

> ….The Northern Territory contended that the native title rights and interests set out in the determination must be native title rights and interests that existed at sovereignty. It was not open to determine, post-extinguishment, a qualified residual right which did not exist at sovereignty.
>
> 147 In *Neowarra* the applicants sought the right to make decisions about use and enjoyment of the claim area expressed as a qualified right to make access decisions in relation to persons other than persons holding a pastoral lease or

exercising a statutory right in relation to the use of the land and waters. Sundberg J said (at [475]):

> *'The amendment does not avoid the difficulties. It confuses the separate processes required by the legislation. First there must be a determination of each native title right and interest. Then there must be a comparison between that right and interest and other interests that exist in the claim area. Each right or interest now propounded by the applicants for comparative purposes must be a native title right or interest. No native title right approximating to the reformulation is established by the evidence… It is not surprising that the evidence does not establish the amended right. The subject matter of the qualification (a pastoral leaseholder and a person exercising a statutory right) did not then exist.'*

His Honour went on to identify a further difficulty with the amendment by reference to the decision of the High Court in *Yarmirr* (at [98]). In that case the applicants sought to express wide-ranging native title rights in the sea as subject to public rights to navigate and fish and the right of innocent passage. Gleeson CJ, Gaudron, Gummow and Hayne JJ in their joint judgment said the two sets of rights were fundamentally inconsistent and could not stand together. It was not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests was to be subject to the other public and international rights. Sundberg J in *Neowarra* said (at [475]):

> *'That applies to the attempt to reconcile the fundamentally inconsistent native title right to make decisions about the use and enjoyment of the land and waters and the rights granted by a pastoral lease.'*

His Honour applied the same reasoning to reject a proposed right to control the access of others to the claim area – [477].'

Not Established

Result: **Requirements met**

Traditional physical connection: s. 190B(7)

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

The requirements of this section are such that 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.

'Traditional physical connection' is not defined in the 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. The explanatory memorandum to the *Native Title Act* 1993 explains that this "connection must amount to more than a transitory access or intermittent non-native title access" (para 29.19 of the 1997 EM on page 304).

Schedule M refers to paragraphs [20]-[21], [43] and [44] of the application.

I have further relied on the affidavits provided by the four applicants, detailed in my reasons under sections 190B(5) and 190B(6) above.

Each applicant provides information in relation to the following aspects of his traditional physical connection with the claim area:

- Continuous occupation, visitation, travelling across and use of the claim area all throughout his life;
- Occupation, visitation and use of the claim area by ancestors of the deponent as traditional owners;
- Continued occupation, visitation, and use of the claim area for the purpose of hunting, fishing and collecting marine resources, in accordance with traditional law and custom;
- Various other statements that demonstrate an observance of cultural practices according to traditional law and custom in the claim area, including the passing on from their ancestors of a rich lore of knowledge relating to the sea area, including myths and stories, songs, dances and traditional environmental knowledge about the currents, tides, winds, seasons and marine species of the area.

For these reasons, I am satisfied that at least one member of the native title group has demonstrated a traditional physical connection with the claim area as required by s.190B(7)(a) of the Act.

Result: **Requirements met**

No failure to comply with s. 61A: s.190B(8)

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

Reasons for this condition

Section 61A contains four sub-conditions. Because s.190B(8) asks the Registrar to test the application against s. 61A, the decision below considers the application against each of these four sub-conditions.

S. 61A(1) Native Title Determination

The overlap analysis dated 22 June 2005 prepared by the Tribunal's Geospatial Analysis & Mapping Branch confirms the there are some technical overlaps and the information provided states that they have been validated as "technical" overlaps (i.e. issues with spatial records, but not overlaps "on the ground").

I accept that analysis.

S. 61A(2) Previous Exclusive Possession Acts

In Schedule B of the application, any area that is covered by the categories of previous exclusive possession acts defined in s.23B, is excluded from the claim area. I am therefore satisfied that the claim is not made over any such areas.

S. 61A(3) Previous Non-Exclusive Possession Acts

The applicants state in Schedule B that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts (s. 23F).

Conclusion

For the reasons as set out above I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s. 61A the application should not have been made.

Result: Requirements met

No claim to ownership of Crown minerals, gas or petroleum: 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

At Schedule Q the applicants makes no claim to any minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth or State of Queensland.

I am satisfied that the statement included in Schedule Q complies with this requirement and lays claim to no minerals, petroleum or gas wholly owned by the Crown.

Result: Requirements met

No exclusive claim to offshore places: s. 190B(9)(b)

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

This is an application where the claimed native title rights and interests relate to waters in an offshore place.

It is stated at Schedule P to refer to paragraphs [12] and [13] in Schedule E:

"12. Paragraph (13) applies to every part of the claim area, if any, that:

(a) is not subject to the right of innocent passage, the public right to navigate or the public right to fish (in this Schedule E, collectively "public right"); or, if it is so subject, to any of such part where the public right is a prior interest whose extinguishment of native title rights and interests would be required by section 47A or 47B of the Native Title Act to be disregarded; and

(b) has not been, and is not, covered by a valid or validated act that is inconsistent to any extent with the exclusive native title (in this Schedule E, "previous act"); or if it has been or is so covered, any of such part where the previous act is one whose extinguishment of native title rights and interests would be required by section 47A or 47B of the Native Title Act to be disregarded.

13. Where this paragraph applies the native title rights possessed under traditional law and customs and recognised by the common law of Australia is the right of possession, occupation, use and enjoyment of land and waters as against all others except Kaurareg People in relation to southern central parts of Part A of the claim area."

On the basis of these statements, I am satisfied that the claimed native title rights and interests do not purport to exclude all other rights and interests in relation to the whole or part of the offshore place.

Result: Requirements met

Native title not otherwise extinguished: S. 190B(9)(c)

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

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the claim area have been extinguished.

Result: **Requirements met**

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