# *National Native Title Tribunal*

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Danielle Malek

| | | | |
|---|---|---|---|
| Application Name: | Torres Strait Regional Sea Claim | | |
| Names of Applicants: | Mr Leo Akiba, Mr Tabitiai Joseph, Mr George Mye, Fr Napoleon Warria | | |
| Region: | FNQ | NNTT No.: | QC01/42 |
| Date Application Made: | 23 November 2001 | Federal Court No.: | Q6040/01 |

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).

4th July 2002
Date of Decision

Danielle Malek

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

**Brief History of the Application**

- The application was made on 23 November 2002.
- It 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.

**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 regarding the written description and map of the external boundaries of the claim area.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.
- Letter Isaac Savage, Kaurareg representative to Torres Strait Regional Authority dated 28 November 2001 (copy provided to Tribunal by Mr Savage on 30 November 2001)
- Letter from Gordon Pablo dated 11 January 2002
- Letters Torres Strait Regional Authority to the Registrar dated 8 February 2002, 14 February 2002 & 26 February 2002
- Facsimiles Torres Strait Regional Authority to the Registrar dated 14 February 2002.
- E-mail Torres Strait Regional Authority to the Registrar dated 18 February 2002
- Facsimile response from the Commonwealth Attorney-General dated 3rd July 2002

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

Copies of the letters and other additional information provided directly by the applicants and other parties for my consideration has been provided to the State of Queensland, and to the Department of the Commonwealth Attorney-General. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*. The State has not provided any comments in response to the contents of this material. The response of the Attorney-General was provided to the Tribunal on the 3rd July, 2002.

**Note:** I have not considered any information and materials provided in the context of mediation of native title determination applications involving members of the Torres Strait Regional Sea Claim Group. 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.

## A. Procedural Conditions

**s.190C(2)**

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

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

**Details required in section 61**

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

**Reasons relating to this sub-condition**

Under s. 61(1), the Registrar or his delegate must be satisfied that the native title claim group for an application includes all the persons "who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed." In *Risk v NNTT* [2000] FCA 1589, O'Loughlin J commented that:

> "A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group...[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group." - at paragraph 60.

In applying s. 61(1), the delegate must be satisfied that the composition of the native title group is not of recent origin but has common rights and interests in the claim area having regard to traditional laws and customs (cf: *Risk* [2000] FCA 1589, O'Loughlin J at paras 30-31, 60; *Ward* (1998) 159 ALR 483 at 505 1-20, 545 35-45, 550 to 552). This requires the applicants to show the basis on which, under traditional law and custom, they form a native title group with common rights and interests.

The current application is made by a broad group comprising the peoples of Badu, Dauan, Erub, Ugar, Masig, Warraber, Poruma, Naghi, Iama, Mabuiag, Mer, Boigu, Moa and Sabai, the island communities that fall within the external boundaries of the claim area. The membership of the group is said to comprise the descendants of the ancestors identified in Attachment A from each of these islands.

Each island community has made one or more native title determination applications over the various islands that are located within the external boundaries of the sea claim area. I shall refer to these as the Torres Strait land claims. Determinations that native title exist have been made by consent in the Federal Court in nine of the Torres Strait land claims. There is also the historic determination of native title by the High Court over Murray (Mer) Island. In 1996, some of the island communities also made their own native title determination applications over the sea areas surrounding their islands. All of the individual sea claims have now been discontinued, presumably to make way for the Torres Strait regional sea claim.

The Torres Strait Regional Authority (TSRA) is the legal representative for the applicants and the representative body for much of the area covered by the claim. According to information provided in a letter dated 14th February 2002 to the Registrar by the TSRA, "[t]he native title group comprises fourteen island communities, with a very real history of connection and continuing rights and interests under traditional laws and customs with respect to the claim area. The Torres Strait Islanders are[a] a Melanesian, maritime people. All Torres Strait Islanders identify as such, and stress the separateness of this identity in relation to Australian Aborigines to the south, and Papua New Guineans to the north. Torres [p.3] Strait Islanders share what is known as Ailan Pasin ('Island way or custom'). These shared cultural meanings and activities set Torres Strait Islanders apart from other people, and include such things as Islander art, dance, music; their specific ordering of social relations in the idiom of kinship; a shared language (Broken, or Torres Strait Creole); and shared experiences of history and colonialism." (p.4)

"On the basis of linguistic and cultural affinities and differences, the islands of Torres Strait can be distinguished at a number of levels of inclusiveness. In pre-contact times the most significant divide was between Meriam Mir-speaking Eastern Islands (Ugar, Erub and Mer) on the one hand and the rest of the Torres Strait Islands on the other, whose inhabitants speak dialects of Kala Lagaw Ya, or Western Torres Strait language. Further discrimination divides the Torres Strait Islands into five regional groupings: these groups are the Eastern, Central, Inner, Western and Top Western. The five groups are comprised of a number of individual island communities or peoples, which are described in Attachment A of the application." [p.4]

"Between each of these groups there has been and still is a good deal of intermarriage and residential mobility. Consequently families have members spread among many islands, and given the high degree of intermarriage and adoption within each of the groups of islands, region-wide kin networks link the people of each together. These connections between island communities and sub-groups, and shared system of traditional laws and customs are a fundamental part of what it means to be a Torres Strait Islander and such a member of the a native title claimant group."

An examination of the Register of Native Title Claims and National Native Title Register has revealed some differences in the family and apical ancestor details between the regional sea claim application and the Torres Strait land claims. The question that this raises under s61(1) is whether there are some people recognised as being native title holders in the Torres Strait who are not included in the Torres Strait regional sea claim group. The response by the Torres Strait Regional Authority (see letter dated 14 February 2002) on this issue is, "[m]ost applications for native title were filed in 1996 prior to any anthropological research being conducted. The anthropology and genealogies for the region are constantly evolving as further research is undertaken and compiled. Changes to the description of the claim group may be attributed to many factors including the identification of earlier ancestors or variant spellings. They do not represent a constricting of a claim group but rather a more accurate description. These descriptions will never be static but will always be subject to change following further research." [p.3]

"From an anthropological perspective, the Regional Sea Claim Group description is no more than an amalgamation of each of the land holding groups in the Torres Strait region as best as it can be described at this point in time. Each person who holds native title rights and interests in any of the land claims/determinations located within the boundaries of the regional sea claim forms part of the Torres Strait Regional Sea Claim Group." (p.3)

"In respect of previous determinations of native title, the Court has not identified the native title holders except by their communal name (eg. Masigalgal). One of the native title rights and interests recognised is the right to decide who the native title holders are and to resolve disputes

about such matters. Therefore none of the determinations will be inconsistent with the description in the regional sea claim." [p.3]

A final issue that arises on an examination of the native title claim group descriptions that appear in the various Torres Strait land claims is whether the description of the Torres Strait Regional Sea Claim Group omits people who have been included in other native title applications in the Torres Strait, namely people who are included as members of the Torres Strait Islander native title claim group through a process of traditional adoption. This issue arises because the Torres Strait land claims include adopted people as members of each native title group, whereas the sea claim group does not include adopted persons. In relation to this issue, the Torres Strait Regional Authority advise (see letter dated 14 February 2002), "[t]raditional adoption was specifically mentioned in the land claim applications as children may be adopted into families on other islands in the Torres Strait. However traditional adoption would not extend to non-Torres Strait Islander families (see the determinations made to date). As the Torres Strait Regional Sea Claim Group includes all Torres Strait Islanders, there would be no traditional adoption outside the claim group. It is for this reason that the definition of traditional adoption was not considered necessary in the sea claim context." [p..3]

I have before me two letters from indigenous persons who also claim to hold native title in the area of the application:

- copy letter signed Isaac Savage, Kaurareg representative to the Torres Strait Regional Authority dated 28 November 2001 (provided to NNTT by Mr Savage on 29/11/01)
- Letter signed by Gordon Pablo (Traditional Owner, Injinoo People) dated 11 January 2002

In the letter written by Mr Savage he states, "Torres Strait Regional Authority has made representations to the Kaurareg People that they would be adequately consulted with over the boundary of the sea claim. It is with great concern that we have now been informed that the sea claim has been lodged and includes large areas of Kaurareg traditional sea country (p.1)." Mr Savage takes issue with the Torres Strait Regional Authority not honouring certain representations that were made to the Kaurareg people prior to the lodging of the sea claim. The representations identified by Mr Savage relate to the southern boundary of the proposed sea claim and consultation with the Kaurareg in relation to their interests in the seas of the Torres Strait. Mr Savage asks when funding will be made available to the Kaurareg people, so that they can protect their native title rights and interests. He concludes, "[w]e also note the reason we choose not to be part of the regional claim was because of our identity as Aboriginal people and not wanting to be subsumed under the Torres Strait identity". (p.2)

A search of the National Native Title Register reveals the existence of consent determinations of native title made by the Federal Court in favour of the Kaurareg People as the common law holders of native title in the following areas located north-west of the tip of Cape York Peninsular, and to the south of the southern boundary of the Torres Strait regional sea claim:

- Ngurupai (Horn Island) [QG6023/98]
- Murulag (Prince of Wales Island) eastern part [QG6024/98]
- Zuna (Entrance Island) [QG6025/98]
- Murulag (Prince of Wales Island) western part [QG6026/98]
- Damaralag (Dumuralug Islet), Yeta (Port Lihou Island), Mipa (Turtle Island or Pipa) and Tarilag (Packe Island) [QG6027/98].

These consent determinations of native title cover the land and waters on the islands to the high water mark. The native title determination applications remain on foot in respect of the intertidal zone on each of the islands. A search of the Register of Native Title Claims, National Native Title Register, Schedule of Native Title Applications and the NNTT Geospatial database reveals that there are no native title determination applications by the Kaurareg People which overlap with the area covered by the Torres Strait Regional Sea Claim.

Mr Pablo provides the following information: "…the Torres Strait Sea Claim covers areas of the Injinoo people's traditional sea country. I am a senior Traditional owner and I was very worried when I saw the maps of where the sea claim is being lodged (advertised in the Torres News), and I would like to point out the following:

- Injinoo Traditional country is made up of different tribal groups. These tribal groups had ownership and control over the sea areas that reached well into where the Torres Strait sea claim had been lodged.
- The northern most tribe of Injinoo is Gudang, and their country goes straight out from the tip of the northern east coast between Mt Adolphus and Albany Island due east, out to the Barrier Reef.
- From the south of Turtle Island or "Kai pulla" as my people know it, our traditional country goes east out to the Barrier Reef; and is country that is owned by Yadhaykanu, I am a Yadhaykanu elder and owner of this country.

Nobody has talked to us about the lodgment [sic] of this claim over our traditional country, and we are very concerned that our Native Title rights and responsibilities are being overlooked by the Torres Strait Regional Authority.

I would like to know on what ties, or connection the Torres Strait Islanders have to our sea country, my ancestors never told me that people from the Torres Strait have any ties to this sea country. Please let me know what group of traditional people of the Torres Strait has got a claim on that area. I know that people have dived here for trochus but does that fit in with Native Title?"

The Torres Strait Regional Authority has responded to this information in the following manner: "[I]n our view neither letter is relevant to authorisation of the sea claim. Section 251B requires the application to be authorised by persons in the claim group. As is clear from the letters themselves, neither the Kaurareg nor the Injinoo people form part of the claim group and therefore they are not required to authorise the claim. Further we note that Mr Pablo's letter appears to refer to areas outside the boundaries of the Torres Strait Regional Sea Claim" (see p.2 letter from the Torres Strait Regional Authority dated 14 February 2002). I note that the Injinoo people currently have no native title claim over any portion of this sea area.

As neither the Kaurareg nor the Injinoo traditional owners assert that they are Torres Starit Islanders and belong to the Torres Strait Regional Sea Claim group, I am of the view that the information they provide is not relevant for the purposes of s. 61(1). Rather, the Kaurareg and Injinoo traditional owners claim to be a distinct group or groups of traditional (Aboriginal) owners who claim native title rights in some of the sea-claim area. That said, this is not an appropriate forum to make any findings regarding the ability of Kaurareg and Injinoo traditional owners to make out these claims.

For these reasons, and having regard to the application as a whole, I am satisfied that the native title claim group described in the application includes all the persons who, according to their

traditional laws and customs, hold the native title claimed by the Torres Strait regional native title claim group over the sea claim area.

Additionally, I do not have any information before me which indicates that the group described in Schedule A does not include, or may not include, all the persons in the Torres Strait Regional Sea Claim Group who hold native title in the area of the application.

Section 61(1) also requires that the applicants must be members of the claim group. The applicants depose in their affidavits to being senior traditional landowners, and senior traditional elders. The term "traditional owner" seems to be used interchangeably by the applicants with the term "native title claim group" in their affidavits. On the basis of their sworn testimony that they are senior elders and traditional landowners, I am satisfied that the applicants are members of the native title claim group.

**Result:** **Requirements met**

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

**Reasons relating to this sub-condition**

The applicants' names are detailed at Part A of the application. The details of address for service appear at Part B of the application.

**Result:** **Requirements met**

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

**Reasons relating to this sub-condition**

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**

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

**Reasons relating to this sub-condition**

**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 s62(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**

**Details required in section 62(1)**

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

**Reasons relating to this sub-condition**

There are four applicants. Each applicant has sworn an affidavit, and the affidavits accompany the application that was filed in the Federal Court. The affidavits 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**

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

**Comment on details provided**

**Result: Provided at Schedule M**

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

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

**Reasons relating to this sub-condition**

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

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

For the reasons which 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 not covered by the application to be identified.

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

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 s190B(2).

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

It is stated at Schedule D that no searches have been carried out.

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

A description of the claimed native title rights and interests is contained at 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.

**Result: Requirements met**

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

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

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

***(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.***

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**

***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.

**Result:** **Requirements met**

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

**Reasons relating to this sub-condition**

Details of overlapping applications are provided at Attachment H of the application.

**Result:** **Requirements met**

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

**Reasons relating to this sub-condition**

It is stated at Schedule I that the applicants are not aware of any such notices.

**Result:** **Requirements met**

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**

**s.190C(3)**

***Common claimants in overlapping claims:***

***The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:***

***(a) the previous application covered the whole or part of the area covered by the current application; and***

***(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and***

***(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.***

**Reasons for the Decision**

A search of the Geospatial Database, the Schedule of Applications, and the Register of Native Title Claims reveals that the following applications were on the Register of Native Title Claims, when this application was made (23 November 2001); that these applications were on the Register following a consideration under s190A; and that these applications overlap the current claim.

| NNTT_No & Name | Area | Area of overlap with QC01/042 |
|---|---|---|
| QC96/035 Dalrymple (Damuth) Islanders | 0.708 sq.km | 0.607 sq.km |
| QC96/047 Mabuiag People | 7.525 sq.km | 0.002 sq.km |
| QC96/049 Mrs F Kennedy (Zuizin Island) | 0.077 sq.km | 0.014 sq.km |
| QC96/061 Ugar | 0.692 sq.km | 0.373 sq.km |
| QC96/063 Badu Island | 111.105 sq.km | 1.798 sq.km |
| QC96/077 Naghir Island | 3.405 sq.km | 0.121 sq.km |
| QC98/029 Boigu | 73.587 sq.km | 0.565 sq.km |

An expert geospatial assessment provides advice that these overlaps are technical in nature only, and relate to differing spatial data used to represent the external boundaries of these claims and

the external boundaries of the sea claim (see geospatial assessment dated 21st January 2001 at folio 22A, RT file, QC01/42).

I have examined the Register of Native Title Claims in relation to the claims identified in this table and see that each claim extends to the high water mark of each of the islands named in the claim. The Torres Strait sea claim extends up to the high water mark of each of the islands located within its external boundaries. I am satisfied that each of the Torres Strait land claims identified in the table above does not extend below the high water mark, and therefore do not encroach on the area covered by the Torres Strait sea claim. I note also that the overlap areas identified in the table above are small overlaps of a technical nature and are not so-called "on the ground" overlaps.

For these reasons, I am satisfied that the identified overlaps are technical in nature only and can be disregarded on the basis of the *de minim* principle. As a result, it is unnecessary for me to further consider these overlapping applications for the purposes of s. 190C(3) of the registration test.

I note that at the time that the Torres Strait sea claim application was made, there were a number of overlapping applications by groups within the Torres Strait community over areas of sea on the Register of Native Title Claims. All of these individual sea claims have now been discontinued and are no longer on the Register of Native Title Claims. Additionally, none of the previously made sea claim applications were on the Register of Native Title Claims as a result of being considered under s190A when this application was made on 23 November 2001, or since that date. This means that the stipulation in sub-paragraph (c) of s. 190C(3) does not apply to the previously made sea claim applications. It is therefore not necessary to consider these previously made applications against the conditions of s. 190C(3).

I am satisfied that there are no previously made applications that meet all of the requirements set out in (a), (b) & (c) of s190C(3). Accordingly, the current application does not infringe the conditions of s190C(3).

**Result: Requirements met**

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

***Certification and authorisation:***

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

***(a) the application has been certified under paragraph 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 an native title determination application is either certified by each representative Aboriginal/Torres Strait Island body that *could* certify the application. Alternatively, 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.

The application filed with the Federal Court purports to be an application certified by the Torres Strait Regional Authority (TSRA) pursuant to ss. 203B(1)(b) and 203BE(1)(a) of the *Native Title Act*.

The TSRA, it should be noted, 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.

A geospatial assessment of the current application, however, has revealed that while the claimed area is within the region of influence of the TSRA, it lies outside the gazetted boundaries of the TSRA.[1] As a result, the representative body is unable to validly certify the current application under s. 190C(4)(a) of the Act, and the certificate provided with the application must be taken to have failed.

This being the case, the Act provides that the delegate must, in the alternative, be satisfied that the application is one which is properly authorised (s. 190C(4)(b)). Proper authorisation of a claimant application is a fundamental requirement of the Act,[2] and all claimant applications, whether they purport to satisfy s. 190C(4)(a) or s. 190C(4)(b) of the Act must be properly authorised. All claimant applications, which purport to be 'certified' applications, are therefore also authorised applications. Consequently, s. 203BE (2) of the Act requires the Representative body to certify that the application is properly authorised and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title group. This requirement is incorporated into the Native Title Determination Application form at Schedule R.

However, while it is mandatory that an application for native title determination is properly authorised, I note that a certificate is not a prescribed document under the Act, and that neither s. 62(1)(a) nor s. 62(2) (pursuant to s. 62 (1)(b)) provide that evidence of authorisation must be contained in the application. Furthermore, I note that information provided after Schedule L of the Form 1 Application is "…not required, but will be relevant when the Native Title Registrar considers the claim for registration under section 190A of the Act."

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[1] Recognition of Representative Aboriginal/Torres Strait Islander Body 2000 (No 4) [Gazetted 22 March 2000:Gaz GN 11 of 2000]

[2] *Strickland (on behalf of the Maduwongga People) v Native Title Registrar* (1999) 168 ALR 242; *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J; *Ward v Native Title Registrar* [1999] FCA 1732, per Carr J; *Western Australia v Strickland* (2000) 99 FCR 33; *Risk v NNTT* [2000] FCA 1589.

The current application contains some information regarding authorisation at Part A, 2 of the application, in the affidavits which accompany the application (pursuant to s62 (1)(a)), and in the certificate provided by TSRA at Attachment R. Following correspondence regarding the invalidity of its purported certification, the TSRA has provided additional information relating to the authorisation of the applicants to make the application and to deal with matters arising in relation to it (see letter dated 26th February 2002)

Sub-paragraph (5) of s. 190C sets out the requirements for "uncertified" applications. It reads:

> "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 sets out the grounds on which the Registrar should consider that it has been met."

Statements of the kind required by s. 190C(5) are found in Part A, 2 of the application and in each of the applicant's s. 62(1)(a) affidavits.

The statement in Part A, 2 is in these terms:

> "There has been extensive consultation and discussion across the Torres Strait with all those indigenous Torres Strait communities that form part of the Torres Strait Regional Sea Claim Group in order to determine the appropriate applicants in this native title determination application.

In particular:

1) At a meeting of Central Island native title claimants held on Yam Island on 4 June 2001 Fr Napolean Warria was authorised as the applicant representing Central Islanders;
2) At a meeting of Eastern Island native title claimants held on Darnley Island on 5 June 2001 Mr George Mye was authorised as the applicant representing Central Islanders;
3) At a meeting of Western Island native title claimants held on Thursday Island on 6 June 2001 and followed by further meetings at Dauan on 10 September 2001, Sabai on 11 September 2001 and Boigu on 9 October 2001 with Top Western native title claimants Mr Leo Akiba was authorised as the applicant representing Top Western Islanders;
4) At a meeting of Western Island native title claimants held on Thursday Island on 6 June 2001 and followed by further consultations with native title claimants from Mabuiag, Badu and Moa Islands, Mr Tabitiai Joseph was authorised as the applicant representing Western Islanders."

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.

There are two limbs to s. 190C(4)(b):

1. the applicant must be a member of the native title claim group;
2. the applicant must be authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

In the affidavits which accompany the application, the four 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.

Evidence that the applicants are authorised to make the application and to deal with matters arising in relation to it by all the other persons in the claim group is found not only in Part A, 2 of the application, and in the affidavits which accompany the application, but also in further material provided to the Registrar (letters from TSRA, dated 26 February 2002 & 15 March 2002).

In *Strickland v Native Title Registrar* (1999) 168 ALR 242, French J held that the insertion of the word 'briefly' in s190C (5)(b) suggested that the legislature was not concerned to require any detailed explanation of the process by which authorisation was obtained, but that the sufficiency of the statement is primarily a matter for the Registrar. In determining whether or not the evidence of authorisation is sufficient, the Registrar is not confined to considering the information in the application and any accompanying affidavit.

In their letter dated 26 February 2002, the TSRA asserts:

> "The TSRA commenced discussions about the regional sea claim in 1998. The matter was extensively discussed at public meetings and other forums for some three years prior to lodging the sea claim. In this sense the consultation process was exhaustive and prolonged.
>
> A meeting was held at Yam Island on 4 June 2001 and was attended by representatives from Iama (Yam), Poruma (Coconut), Warraber and Masig (Yorke) Island communities collectively known as the Central Islands. This meeting authorised Father Napolean Warria to be the Central Islanders applicant in the regional sea claim on behalf of all Central Islanders.
>
> A meeting was held at Erub (Darnley Island) on 5 June 2001 and was attended by representatives from Erub (Darnley), Mer (Murray) and Ugar (Stephen) Islands, collectively referred to as the Central Islands. This meeting authorised Mr George Mye to be the applicant in the regional sea claim on behalf of all Eastern Islanders.
>
> A meeting was held on Thursday Island on 6 June 2001 and was attended by representatives from Sabai, Boigu and Dauan, collectively known as Top Western Islands. The issue of nominating an applicant for Top Western Islands was discussed and adjourned for further consideration. At subsequent meetings at Dauan on 10 September 2001, Sabai on 11 September 2001 and Boigu on 9 October 200[1] Mr Leo Akiba was nominated and authorised by each Top Western community to be the applicant in the regional sea claim on behalf of all Top Western Islanders.
>
> The meetings held on Thursday Island on 6 June 2001 was also attended by representatives of Badu, Moa and Mabuiag Islands, collectively known as Western Islands. The issue of nominating an applicant to represent Western Islanders was raised

> and adjourned for further consideration. Following community meetings and consultations at Badu, Moa and Mabuiag, Father Tabitiai Joseph was nominated and authorised by each Western community to be the applicant in the regional sea claim on behalf of all Western Islanders."

I refer also to the information that appears in the certification provided by the TSRA dated 22 November 2001 (at Attachment R of the application). It refers to the series of meetings (identified in the application and in the subsequent letter from TSRA) at which clear instructions were given by the group to the TSRA that the applicants were so authorised; it refers also to reliance on "extensive anthropological advice" as supporting the opinion held by TSRA that the applicants are properly authorised.

Finally, I have a facsimile letter from TSRA dated 15 March 2002 in which it is stated that the process followed at each of the meetings was a traditional decision making process as described in s251B(a), and that each of the applicants was chosen because of their status as Torres Strait Island elders and senior members of the their respective communities.

This information supports a finding that the authorisation decision was made by the native title claim group in accordance with a traditional decision-making process (per s. 251B of the Act), and that the applicants are authorised to make this application and to deal with matters arising in relation to it by the native title claim group. The evidence points to a comprehensive process involving all island communities which make up the Torres Strait Regional Sea Claim Group. In addition, I have not been provided with material from any source which indicates that the members of the Torres Strait Regional Sea Claim Group have not authorised the applicants to make the application and to deal with matters arising in relation to it.

As a result, I am satisfied that the application is properly authorised as required by s. 190C(4)(b).

**Result: Requirements met**

## B. Merits Conditions

**s. 190B(2)**

***Description of the areas claimed:***

***The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.***

**Reasons for the Decision**

It is stated in Schedule B that the claim area consists of Parts A and B, and that the dimensions of the claim area generally referred to as the "Top Hat" area is that portion of the claim area described at Part B in Attachment B. This area is also marked as Part B on the map in Attachment C.

It is stated in Schedule C that in the event of any inconsistency between the areas described in Attachment B and the areas shown on the map at Attachment C, the description in Attachment C shall prevail.

The written description in Attachment B divides the claim area into Parts A and B. Part A is made up of nine (9) areas. In each area, that what is claimed is "all the lands, waters, reefs, sandbanks, shoals, seabeds and subsoil on the seaward side of the high water mark contained within the "following external boundaries". In relation to Area 1, it is stated that the commencement point is "the point of Latitude 10 deg 33'30" South, 142 deg 08'00" East [a point at the western entrance of Prince of Wales Channel' and that it travels "thence in a westerly direction along the parallel of Latitude 10 deg 33'30" to its intersection with the Fisheries Jurisdiction Line as described at Annex 8 to the *Treaty between Austrlia 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 Torres Strait, and related Matters* ("the Treaty")". The description of the external boundaries of Area 1 that then refers to and is derived from the Treaty. Geographic co-ordinates and directions are provided of the path travelled by the external boundary line, back to the commencement point.

Areas 2- 9 are described as the "outer limit of the territorial sea" of:

- islands of Aubusi, Boigu and Moimi
- islands of Dauan, Kaumag and Saibai
- Anchor Cay and East Cay
- Black Rocks and Bramble Cay
- Deliverance Island and Kerr Islet
- Pearce Cay
- Turnagain Island
- Turu Cay.

The outer limits of the territorial sea for each of these areas is described by a continuous line (latitude/longitudes provided) and a series of intersecting arcs of circles three miles from points on the islands (latitude/longitudes provided). References from the Treaty are also provided.

Part B of the claim area (the "Top Hat" area) is described 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 Sabai as defined in Part A above contained within the following external boundary. . . ". A commencement point with latitude and longitude references is provided. The boundary description then refers to and is derived from the Treaty (Anex 8 – Fisheries Jurisdiction Line). These coordinates describe an area enclosed in the north by the "Fisheries Jurisdiction Line" to the west and east and extending south to meet the boundaries of Part A of the application.

Where an area is described as the outer limits of the territorial sea limits, the limit stated is three miles.

A map showing the external boundaries is provided at Attachment C. It is colour, A4 in size and clearly displays the Part A area (delineated by outline and hatching) and Part B (delineated by outline and opposing hatching to that of Part A). The areas within the external boundaries that are excluded from the claim area (i.e., those above the high water mark of the various land masses depicted on the map) are also outlined clearly. The areas covered by the application (Parts A & B)

and the excluded island groups within them are clearly labelled. The map shows a coordinate grid and a faint topographic map background.

The applicants' legal representative and the representative body for much of the claim area, Torres Strait Regional Authority ("TSRA") (see letter dated 14 February 2002) has provided additional information which clarifies some of the terminology used in the external boundary description:

1. There is a reference to the external boundary for Part A encompassing "lands (emphasis added), waters, reefs, sandbanks, shoals, seabeds and subsoil", yet elsewhere it is stated that the claim area extends only to the "seaward side of the high water mark". The question for me is whether there is any confusion about the claim area extending to areas on the landward side of the high water mark. In answer, TSRA say, ". . .we confirm that the word "land" in that context was inserted to clarify that the application includes the sea-bed in the intertidal zone . . . As the application is made only to the high water mark as defined in the *Land Act 1994* (Qld), we do not believe that the use of the word "land" causes any confusion . . .".

   I am satisfied that it is clear from the written description and the map that the claim area does not extend to the landward side of the high water mark of any land areas that fall within the external boundaries.

2. Attachment B does not contain a definition of "high water mark", although it is stated in Schedule J of the application (the section detailing the determination order sought by the applicants) that "high water mark" has the meaning given to it in the *Land Act 1994* (Qld). In answer to this, TSRA have responded as follows: ". . . we confirm that the definition of High Water Mark found in Schedule J (as defined in "*Land Act 1994* (Qld)) also applies to Attachment B of the application."

   I am satisfied that the application contains information that makes it clear that it is the *Land Act 1994* (Qld) definition of 'high water mark' that applies to the boundaries of this application.

3. Various distances referred to in the written description are described by the term "mile". This term is defined in the Commonwealth Act that has adopted the boundaries described in the Treaty[3] as an "international nautical mile being 1852 metres in length". In answer to this, the TSRA respond as follows: ". . . we confirm that we accept the definition of "international nautical mile being 1852 metres in length".

   In light of this statement, I am satisfied that the term "mile", derived as it is from the Commonwealth Act that has adopted the Treaty, and which is extensively used in the description of the external boundaries, is sufficiently certain to describe various distances travelled by the external boundary line.

4. The map at Attachment C does not contain a reference to the scale used or the datum or projection to which coordinates were referenced or to the source of information depicted. In answer to this the TSRA have said that "the application uses the reference system now known as AGD66 datum . . . As the map . . . has marked on it longitude and latitude and we have confirmed that the definition of international nautical mile applies . . . we do not see the need for a scale bar." I note that the Tribunal's Geospatial division has advised that the

[3] *Torres Strait Fisheries Act* (Cth) 1984, Part 1.1.f

Commonwealth Act that has adopted the Treaty boundaries[4] "determines the positional reference as being to "the Australian Geodetic Datum . . .It is assumed that the Schedule (Part 1.2) describes the reference system now known as AGD66 datum[5]."

I am satisfied on the basis of this additional information from the TSRA and material provided by the Geospatial Mapping Unit of the NNTT (dated 21/1/02) that the map provides reasonable certainty, and that the datum/projection source can be ascertained from the material in the application.

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**

**s.190B(3)**

***Identification of the native title claim group:***

***The Registrar must be satisfied that:***
***(a) the persons in the native title claim group are named in the application; or***
***(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.***

**Reasons for the Decision**

An exhaustive list of names of the persons in the native title claim group has not been provided. It is therefore necessary to consider if the application meets the requirements of s. 190B(3)(b).

Attachment A provides a description of the persons in the native title claim group as "the Torres Strait Regional Sea Claim Group are the descendants of the following ancestors . . .". This is followed by a list of the claim group's ancestors who are identified with traditional indigenous names and catalogued according to their particular island community.

I am satisfied that the descendants of the named ancestors could be identified with minimal inquiry, and as such, ascertained as part of the native title claim group.

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

**Result: Requirements met**

**s.190B(4)**

***Identification of claimed native title:***

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

[4] *Torres Strait Fisheries Act* (Cth) 1984, Schedule (Part 1.2)
[5] see Geospatial assessment dated 21/1/02 @ p3, item 6

**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 Rights and Interests*

1. Subject to paragraph 2 of this Schedule, the rights of the members of the Torres Strait Regional Sea Claim Group to be recognised as the traditional owners of the claim area pursuant to and in accordance with the traditional laws and customs of the claim group and to exercise all rights and interests flowing therefrom which are capable of recognition under the common law of Australia including:

   (a) the right to possess, occupy, use and enjoy the claim area;
   (b) the right to manage and care for the claim area;
   (c) the right to take, use, enjoy and develop the resources of the claim area including to make decisions about the allocation, exploitation and conservation of such resources;
   (d) the right to possess, control and determine the transmission of intellectual property in the mythology and ceremony pertaining to places and objects of particular significance in the claim area and other traditional knowledge pertaining to the claim area;
   (e) the right to trade in the resources of the claim area;
   (f) the right to exchange the resources of the claim area;
   (g) where others are granted permission under the traditional laws and customs of the claim group or the laws of Australia or Queensland to take resources from the claim area, the right to share the resources taken or the right to share the economic value of the resources taken;
   (h) the right to use the currents, winds and tides, including for the production of energy;
   (i) the right to control access, occupation, use and enjoyment of the claim area and its resources by others not members of the claim group;
   (j) the right to speak for, protect and control access to places and objects of particular cultural significance to the claim group;
   (k) the right to conduct social, cultural and religious activities on the claim area;
   (l) the right to resolve disputes concerning the claim area or membership of the claim group;
   (m) the right to transmit native title rights and interests to others."

The claimed rights and interests are qualified by the following statements:

Schedule B:-

2. In relation to that portion of the claim area which is described at Part B in Attachment B and which is generally referred to as the "Top Hat" area, the native title rights and interests claimed are limited to so many of the rights and interests specified in paragraph 1 above that are consistent with the fisheries and concurrent Jurisdiction enjoyed by Australia and described in relation to such area by 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 Torres Strait, and Related Matters signed at Sydney on 18 December 1978, Aust TS 1985 No 5. (Reprinted in (1979) 18 ILM 291) ("the Treaty"). The relevant Australian jurisdiction comprises a fisheries and residual jurisdiction as described and defined in the Treaty."

Schedule P:-

"The applicants do not seek to exclude the following other rights and interests in relation to the whole or a part of the determination area:

(a) the interests recognised 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 Torres Strait, and Related Matters* signed at Sydney on 18 December 1978 as in force at the date of this determination;
(b) the right of innocent passage in relation to the territorial sea of Australia, as recognised by Article 17 of the United Nations Convention on the Law of the Sea (1982);
(c) the public right to navigate in tidal waters recognised by the common law;
(d) the rights of persons at common law or validly created or granted pursuant to statue and currently in force to enter the waters of the determination area in accordance with and for the purposes of exercising such rights so existing, created or granted;
(e) other valid interests that may be held by reason of the force and operation of laws of the Commonwealth and of the State of Queensland."

Schedule Q:-

"The Torres Strait Regional Sea Claim Group claims ownership of minerals, petroleum or gas except to the extent to which the Commonwealth or the State is entitled to the sole beneficial ownership of such minerals, petroleum or gas and such ownership by the Commonwealth or the State has wholly extinguished any native title rights in such minerals, petroleum or gas."

The Commonwealth Attorney-General has submitted a view that, contrary to the decision of the High Court in the *Yarmirr*, the applicants seek exclusive possession of the claim area (at least in relation to that portion of the area known as the 'Top Hat' region (see facsimile letter to Tribunal dated 3rd July 2002). That the claim is one for exclusive possession is evidenced, the Attorney-General states, by the formulation of the draft order in Schedule J as well as from a consideration of Schedules E, F and P. I am not of that view. It is clear from the statements in Schedule E at para. 2, that non-exclusive native title rights and interests only are claimed in relation to Part B (the "Top Hat" area). I note too that although the applicants have claimed certain rights and interests in relation to the claim area which are inconsistent with a claim for exclusive possession (see my reasons for s. 190B(4)), para 1. of Schedule E specifies that the rights and interests claimed by the applicants are those which are "capable of recognition under the common law of Australia". I note too that the application is not framed in terms which suggest that the applicants claim rights 'to the exclusion of all others'. Rather, the rights and interests claimed are subject to those limitations, and further circumscribed by statements in the application in para 2., Schedule E, Schedule P and Schedule Q. For example, the statements in Schedule P make it clear that any native title rights and interests recognised under the law in relation to the claim area will be subject to the rights itemised in Schedule P. I am of the view that it is clear from the statements in Schedule P that in the event of any inconsistency between the claimed rights and interests in Schedule E and other existing valid rights, the non-native title rights and interests will prevail to the extent of any inconsistency. I note that I am not required by s190A to consider the merit of the draft order included in the application at Schedule J. The registration test set out in s190A is an

administrative procedure; what rights and interests are included in any determination over the claim area is a matter for the Court.

*Native Title Rights and Exclusivity*:-

In *WA v Ward* (2000) 99 FCR 316, the majority of the Full Federal Court found that native title rights and interests in a claimed area are given their content from the communal, group or individual rights and interests of indigenous people in accordance with traditional laws and customs.[6] The content of native title, as derived from traditional laws and customs, is further delineated by a requirement that the common law can recognise such rights and interests (see s. 223 *NTA*). According to the majority of the High Court in *Commonwealth v Yarmirr*,[7] the fundamental question is "…about inconsistency between the asserted rights and the common law." In *Ward*, their Honours found that the native title rights and interests that are recognised and protected by the common law are those which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices [para. 104]. Native title rights, however, can be extinguished or circumscribed by surrender, loss of maintenance of connexion, and valid executive or legislative acts.

Whether or not a particular right or interest can be claimed may also depend, to some extent, on whether the claim is one for exclusive possession. If the claim is not one for exclusive possession, the residual content of native title will be arrived at after an examination of any other interests which co-exist with, and take precedence over, whatever native title rights and interest exist under traditional law and custom.

The majority in *Ward* held that the applicants had a non-exclusive right to the claimed area. As a consequence, the following rights and interests were included in the determination of the court:

- a right to possess, occupy, use and enjoy the land;
- a right to make decisions about the use and enjoyment of the land;
- a right of access to the land;
- a right to use and enjoy the traditional resources of the land; and
- a right to maintain and protect places of importance under traditional laws, customs and practices in the determination area.

It follows logically from this that these types of rights and interests are also capable of registration under s190A, where the applicants can establish such on a *prima facie* basis.

Excluded from the determination in *Ward*, however, were several rights determined by Lee J at the first instance. These included:

- the right to control the access of others to the determination area;
- a right to control the use and enjoyment of others of resources of the determination area;
- a right to trade in resources of the determination area; and
- the right to receive a portion of any resources taken by others from the claim area;

It would appear that once the applicants were found not to have an exclusive claim in the determination area, and so were unable to control the access of others to the claim area, the other three rights and interests could not be claimed. The nexus between exclusivity to the claim area

[6] Para. 58. See also *Commonwealth v Yarmirr* [2001] HCA 56, at 9.
[7] [2001] HCA 56 para 40.

and control over resources was explained by Olney J in the first instance in *Yarmirr* as follows: "control over resources is exercised by controlling who goes into the claimed area. It must necessarily follow that the right of control over the resources...is co-extensive with the right to control access." In any case, in *Ward*, the court found that the applicants had, *inter alia*, a non-exclusive right to use and enjoy the 'traditional' resources of the claimed area (see Determination, 5(d)).

This is not a claim for exclusive possession, and the rights of others in the area covered by this application are expressly recognised in Schedule P (see above for transcript of the statements in Schedule P).

Following on from the discussion above, and in light of the majority decision of the HCA in *Yarmirr* that exclusive possession of the sea beyond the low water mark is inconsistent with the common law, the following rights and interests are not capable of registration:

- 1(e): the right to trade in the resources of the claim area
- 1(f): the right to exchange the resources of the claim area
- 1(g): where others are granted permission under the traditional laws and customs of the claim group or the laws of Australia or Queensland to take resources from the claim area, the right to share the resources taken or the right to share the economic value of the resources taken;
- 1(i) the right to control access, occupation, use and enjoyment of the claim area and its resources by others not members of the claim group;
- 1 (j) the right to speak for, protect and control access to places and objects of particular cultural significance to the claim group;

Additionally, I am of the view that the following rights are not capable of registration:

- 1(d): the right to possess, control and determine the transmission of intellectual property in the mythology and ceremony pertaining to places and objects of particular significance in the claim area and other traditional knowledge pertaining to the claim area.
- 1 (h) the right to use the currents, winds and tides, including for the production of energy;

*Rights to Intellectual Property*:-

In *Ward*, a claim to " the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area" was allowed at the first instance, but was subsequently denied by a majority of the Full Federal Court on appeal.

Relying in part on dicta of the majority of the High Court in *Fejo v NT*[8] to the effect that a grant of fee simple "simply does not permit of the enjoyment by anyone else of any right or interest in respect of that land" and that "the rights of native title are rights and interests that relate to the use of the land by the holders of native title",[9] the majority in *Ward* concluded that:

> "…the native title rights and interests that are recognised and protected by the common law are those which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices."[10]

[8] [1998] HCA 58.
[9] *Ward*, para 103.
[10] *Ibid*., para 104.

Their Honours went on to say that "…the common law applies to protect only the physical enjoyment of rights and interest that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with the land." For this reason, the "right to maintain and protect places of importance under traditional laws, customs and practices in the determination area" was included in the determination (see Determination 5(e)), but a "right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area" was denied. In the former case, the right was physically referable to, grounded in and given expression to, in the land or waters claimed.

In *Yarmirr* the applicants claimed "the right to safeguard cultural knowledge associated with waters and land of the clan's estate". At first instance, Olney J expressed a similar notion:

> "Cultural knowledge of the type here described is clearly a manifestation of traditional law and custom and of its very nature is knowledge in relation to places within the relevant area by which the claimant group have a connection with the places concerned. But the right and duty according to traditional law and custom to safeguard knowledge can only be classed as a "right or interest in relation to land or waters' to the extent that the exercise of the right and duty involves the physical presence of relevant persons on or at the estate or site in question. If however, the need to safeguard cultural knowledge associated with the site in the claimed area requires, for example, a senior yuwurrumu member to visit the site with those who it is his obligation to teach the culture, then the safeguarding of the cultural knowledge could fairly be said to be a right in relation to the site, and thus in relation to the land or waters."[11]

In any case, the right as claimed in *Yarmirr* was included in the determination granting non-exclusive possession but was not the subject of appeal to either the Full Federal Court or High Court.

In the current case, right 1(d) is expressed in the following terms: "the right to possess, control and determine the transmission of intellectual property in the mythology and ceremony pertaining to places and objects of particular significance in the claim area and other traditional knowledge pertaining to the claim area." Although this right is not formulated with the same phraseology as that in *Ward*, on the balance the formulation is not sufficiently different to warrant distinction from that denied by the Full Federal Court in that case. There is nothing in this formulation which suggests that the right claimed here is physically referable to, grounded in or given expression by the land or waters claimed.

*The right to use the currents, winds and tides, including for the production of energy:-*

Right 1(h) claims "[t]he right to use the currents, winds and tides, including for the production of energy." A question which arises here is whether this right amounts to a right to control the claim area which is inconsistent with the non-exclusive nature of the claim. To the extent that this right simply refers to the right of the native title claim group "to use the currents, winds, and tides" for the purposes of navigation, it is a right the claim group have already by virtue of the common law. As a matter of construction, however, right 1 (h) expressly includes the qualifier: "including for the production of energy". The presence of this qualifier suggests that the applicants envisage harnessing these resources for economic benefit, a right of control of resources which is inconsistent with a claim for non-exclusive possession. In *Yarmirr*, the High Court has clearly

[11] *op cit*., para 127.

said that a native title right to exclusive possession of offshore places is not recognizable by the common law. For these reasons, I am of the opinion that right 1(h) is not capable of registration.

It follows from the above discussion that the following native title rights and interests are capable of registration:

- 1(a): the right to possess, occupy, use and enjoy the claim area;
- 1(k): the right to conduct social, cultural and religious activities on the claim area;
- 1(l): the right to resolve disputes concerning the claim area or membership of the native title group;
- 1(m): the right to transmit native title rights and interests to others.

Whether such rights and interest have been established *prima facie* I leave for discussion under the relevant section of the Act (s. 190B(6)). I note here that there is no necessary correlation between the ability to readily identify the rights and interests claimed, and whether such rights are capable of being established on a *prima facie* basis. Rather, rights and interests claimed must first be identifiable, in order to facilitate a *prima facie* assessment of whether such rights and interests are conceivable under the common law: *State of Western Australia v Ward* (2000) 170 ALR 159.

The rights claimed at para. 1(b) & (c) of Schedule E are more problematic. A question which arises with respect to these rights is this: given that this is a claim for non-exclusive possession, to what extent can the applicants claim a "right to manage and care for the claim area" and a "right to take, use, enjoy and develop the resources of the claim area, including to make decisions about the allocation, exploitation and conservation of such resources" without implying a degree of control over the claim area which is inconsistent with the non-exclusive nature of the claim? It would seem that a native title holder with a non-exclusive interest in an application area might 'care' for the claim area without assuming a degree of control that amounts to exclusivity. The term 'manage' in right 1(b) implies something closer to control, but is not, in my opinion, inconsistent with a claim for non-exclusive possession. The right at 1(c) is more problematic, as the right to "develop the resources of the claim area" and "make decisions about the allocation….of such resources" may imply that a degree of control is required which is inconsistent with the non-exclusive nature of the claimed rights. To the extent that the applicants claim a right of control in relation to the claim area which excludes the rights of others, these rights are not capable of registration. However, given that this is a claim for non-exclusive possession, qualified by those rights and interests set out in Schedules E, P and Q, these rights appear to do no more than imply a right to participate in the care, management, and conservation of the claim area with other interest holders and not an absolute right of control.

**Result:** **Requirements met**

**s. 190B(5)**

***Sufficient factual basis:***

***The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:***

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

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

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

**Reasons for the Decision**

*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 Tabitiai Joseph [16/11/01], Leo Akiba [7/11/01], Napoleon Warria [19/11/01] and George Mye [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 applicants. Each of the applicants states that he is one of the senior traditional owners of the four parts of the claim area:

- Mr Joseph states that he is an owner of the western part of the claim area;
- Mr Akiba states that he is an owner of the Top Western part of the claim area;
- Fr Warria states that he is an owner of the central part of the claim area; and
- Mr Mye states that he is an owner of the eastern part of the claim area.

Each applicant 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:

- Mr Mye 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 applicant states that he (as did his ancestors before him) has continuously occupied, visited, traveled 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 applicant 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.
- Each applicant 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.

- Mr Mye, Mr Akiba and Mr Joseph 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. Fr Warria tells of using the claim area for such purposes when he was younger.
- Each applicant tells of trade with Papuans since time immemorial.
- Mr Mye and Mr Joseph tell of the continued use of stone-walled fish traps built by the ancestors. Mr Akiba tells of building crayfish houses when younger on the edges of the reefs to increase the productivity of this resource. Mr Joseph also describes this.
- Each applicant describes their regular travel across the claim area to visit other islands, for social, trade and ceremonial purposes.
- Mr Mye tells of advising people traveling 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.
- Each applicant 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 applicants 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 applicants 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 Mr Mye), the western group of islands (represented by Mr Joseph), the 'Top Western' group of islands (represented by Mr Akiba), and the central group of islands (represented by Fr. Warria). 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 Mr Pablo (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". Mr Savage (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. Mr Pablo's letter suggests, at least, that some form of native title right is exercised by Torres Strait Islanders in those sea areas identified by Mr Pablo 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.

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

**Result: Requirements Met**

**s.190B(6)**

***Prima facie case:***

***The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.***

**Reasons for the Decision**

Under s. 190B(6) I must consider that, *prima facie*, at least some of the native title rights and interests claimed in the application can be established. These requirements are relevant to matters I have already considered under s. 190B(4). I will draw on the conclusions I made under that section in my consideration of s. 190B(6). I have also had regard to the conclusions I have made in relation to s. 190B(5).

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]."

I have adopted the ordinary meaning referred to by their Honours in considering this application, and in deciding which native title rights and interests claimed can *prima facie* be established.

'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 the present application, at paragraph 1 of Schedule E, the claimants assert the right to be recognised as the traditional owners of the claim area (subject to the qualifications stated in paragraph 2 of Schedule E and also in Schedules P and Q) and to exercise all rights and interests flowing therefrom, which are capable of being recognised by the common law. The applicants then set out thirteen specific rights claimed. The Commonwealth Attorney-General has submitted a view (facsimile letter to Tribunal 3rd July 2002) that:

> "There is ambiguity as to whether the claimed rights and interests are purported to flow from the recognition of the Claim Group as traditional owners or from traditional laws and customs of the claim group. However, in either case, in the absence of a clear and express requirement that the claimed rights and interests must be exercised in accordance with traditional laws and customs of the Claim Group, none of the claimed rights can, prima facie, be established.
>
> Contrary to subsection 190B(6), none of the native title interests claimed in the Application can, prima facie, be established because there is no reference to the requirement that the claimed rights and interests must be exercised in accordance with traditional laws and customs. One the essential elements of native title in the definition in section 223 of the NTA is that "the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders."

I cannot agree with this view. Native rights and interests are both pursuant to and flow from traditional laws and customs and recognition of the Claim Group as traditional owners. While it is clear that s223(1) requires that any rights and interests in relation to land and waters must be those possessed under the traditional laws and customs of those Aboriginal People or Torres Strait Islanders making the claim, there is nothing in the Act which requires the applicants to include any express statement in Schedule E to this effect. Be that as it may, there are statements in para. 1 of Schedule E, in material sent to the tribunal by TSRA (refer para. 2,letter to Tribunal dated 14th February 2002) and in the affidavits of Mr. Joseph (dated 16/11/01), Mr. Akiba (dated 7/11/01), Fr. Warria (dated 19/11/01) and Mr Mye (dated 15/11/01) which clearly attest to the

fact that these rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by Torres Strait Islanders.

In relation to the requirement that the rights and interests be recognised under the common law of Australia, I note:

- the statement in paragraph 2 in Schedule E to the effect that the rights claimed in the "Top Hat" area are expressly limited to "so many of the rights and interests . . . that are consistent with the fisheries and concurrent jurisdiction enjoyed by Australia and described in relation to such area by 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 Torres Strait, and Related Matters* signed at Sydney on 18 December 1978, Aust TS 1985 No 5. (Reprinted in (1979) 18 ILM 291) ("the Treaty"). It is said in Schedule E that "[t]he relevant Australian jurisdiction comprises a fisheries and residual jurisdiction as described and defined in the Treaty".
- the provisions of Schedule P confirming that this is a non-exclusive claim that expressly does not seek to exclude other rights and interests in the claim area (see my reasons under s190B4 for the text of schedule P);
- although ownership of minerals, petroleum or gas is claimed it is not to the extent that "the Commonwealth or the State is entitled to the sole beneficial ownership of such minerals, petroleum or gas and such ownership by the Commonwealth or the State has wholly extinguished any native title rights in such minerals, petroleum or gas" (Schedule Q).

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/statement by each of the 4 applicants referred to in Schedule M and accompanying the application. I turn now to an individual consideration of rights claimed by the applicants.

The following rights <u>can be established *prima facie*</u>:

*Right 1(a): the right to possess, occupy, use and enjoy the claim area;*

There is sufficient information in Schedule F, Schedule G (1-5), and in the affidavits/statements by Mr Joseph (3-4, 6, 8-12), Mr Akiba (3-4, 6, 8-12), Fr Warria (3-4, 6, 8-11) and Mr Mye (4-5, 7, 9-13) to satisfy me that this right can be established *prima facie*.

*Right 1(b): the right to manage and care for the claim area;*
There is sufficient information in Schedule F, Schedule G (1,4,6-7), and in the affidavits/statements by Mr Joseph (6-7, 10-11, 13-14), Mr Akiba (6-7, 10-11, 13-14), Fr Warria (6-7, 10, 12-13) and Mr Mye (7-8, 11-12, 14-15) to satisfy me that this right can be established *prima facie*.

*Right 1(c): the right to take, use, enjoy and develop the resources of the claim area, including to make decisions about the allocation, exploitation and conservation of such resources;*
There is sufficient information in Schedule F, Schedule G (1,4,6-7), and in the affidavits/statements by Mr Joseph (6-14), Mr Akiba (6-14), Fr Warria (6-13) and Mr Mye (7-15) to satisfy me that this right can be established *prima facie*.

*Right 1(k): the right to conduct social, cultural and religious activities on the claim area;*
There is sufficient information in Schedule F, Schedule G (8), and in the affidavits/statements by Mr Joseph (7, 11, 15), Mr Akiba (7, 15), Fr Warria (7, 14) and Mr Mye (2, 8, 12 16) to satisfy me that this right can be established *prima facie*.

*Right 1(l): the right to resolve disputes concerning the claim area or membership of the claim group;*
There is sufficient information in Schedule F, Schedule G (6), and in the affidavits/statements by Mr Joseph (6, 13), Mr Akiba (6, 13), Fr Warria (6, 12) and Mr Mye (7, 12, 14) to satisfy me that this right can be established *prima facie*.

*Right 1(m): the right to transmit native title rights and interests to others*
There is sufficient information in Schedule F, Schedule G (6), and in the affidavits/statements by Mr Joseph (6), Mr Akiba (6), Fr Warria (6) and Mr Mye (7, 12) to satisfy me that this right can be established *prima facie*.

The following rights cannot be established *prima facie*, being rights which are not currently capable of recognition by the common law (refer discussion under s. 190B(4)):

- *1(d): the right to possess, control and determine the transmission of intellectual property in the mythology and ceremony pertaining to places and objects of particular significance in the claim area and other traditional knowledge pertaining to the claim area.*
- *1(e): the right to trade in the resources of the claim area;*
- *1(f): the right to exchange the resources of the claim area;*
- *1(g): where others are granted permission under the traditional laws and customs of the claim group or the laws of Australia or Queensland to take resources from the claim area, the right to share the resources taken or the right to share the economic value of the resources taken;*
- *1(h): the right to use the currents, winds and tides, including for the production of energy;*
- *1(i) the right to control access, occupation, use and enjoyment of the claim area and its resources by others not members of the claim group;*
- *1(j): the right to speak for, protect and control access to places and objects of particular cultural significance to the claim group.*

I am satisfied that the application complies with s. 190B(6).

**Result: Requirements met**

**s.190B(7)**

***Traditional physical connection:***

***The Registrar must be satisfied that at least one member of the native title claim group:***

***(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or***

***(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:***

***(i) the Crown in any capacity; or***

***(ii) a statutory authority of the Crown in any capacity; or***

***(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.***

**Reasons for the Decision**

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 contains the following statement:

> "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."

Reference is made to the affidavits by the four applicants, detailed in my reasons under sections 190B(5) and 190B(6) above.

In applying this condition, I have further relied upon the affidavit material provided by the four applicants. 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**

**s.190B(8)**

***No failure to comply with s.61A:***

***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.***

**Reasons for the Decision**

A search of the Geospatial Database, the Schedule of Applications, and the Register of Native Title Claims has revealed seven (7) applications on the Register of Native Title Claims which overlap with the current claim. However, the area claimed in each of the seven claims listed as overlaps extends to the high water mark of each the named islands in the claim. The Torres Strait sea claim extends up to the high water mark of each of the islands located within its external boundaries. As a result, none of the Torres Strait land claims (some of which are the subject of determination) extend below the high water mark; nor do they encroach on the area covered by the Torres Strait sea claim.

In addition, the TSRA confirmed that any 'land'-only claims over islands in the Torres Strait which extended to the low–water mark would be amended prior to consideration of the current claim for registration testing (dated 8th February 2002). This amendment has occurred, and the two claims in question, Boigu (QC98/29) and Aureed Island (QC01/7) are now on the Register of Native Title Claims. As a result, I am satisfied that these 'overlaps' are small overlaps of a technical nature only and are not so-called "on the ground" overlaps.

There is nothing in the application, and I am not aware of any other information that would cause me to believe that this application does not comply with s. 61A. I am therefore satisfied that the conditions in s. 190B(8) are met.

**Result: Requirements met**

**s.190B(9)(a)**

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

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

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

**Reasons for the Decision**

At Schedule Q the claimants state that the Torres Strait Regional Sea Claim group claims ownership of minerals, petroleum or gas except (emphasis added) to the extent to which the Commonwealth or the State is entitled to the sole beneficial ownership of such minerals, petroleum or gas and such ownership by the Commonwealth or the State has wholly extinguished any native title rights in such minerals, petroleum or gas." The Commonwealth Attorney-General has submitted a view that "[t]he formulation proposed by the applicants….does not address the relevant consideration set out in paragraph 190B(9)(a)" (facsimile letter, 3rd July 2002). S190B(9)(a) simply requires that the applicants make no claim to minerals, petroleum or gas wholly owned by the Crown. 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**

**s.190B(9)(b)**

***Exclusive possession of an offshore place:***

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

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

**Reasons for the Decision**

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 of the application that:

"The applicants do not seek to exclude the following other rights and interests in relation to the whole or a part of the determination area:

(a) the interests recognised 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 Torres Strait, and Related Matters signed at Sydney on 18 December 1978 as in force at the date of this determination;

(b) the right of innocent passage in relation to the territorial sea of Australia, as recognised by Article 17 of the United Nations Convention on the Law of the Sea (1982);

(c) the public right to navigate in tidal waters recognised by the common law;

(d) the rights of persons at common law or validly created or granted pursuant to statute and currently in force to enter the waters of the determination area in accordance with and for the purposes of exercising such rights so existing, created or granted;

(e) other valid interests that may be held by reason of the force and operation of laws of the Commonwealth and of the State of Queensland."

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**

**s.190B(9)(c)**

***Other extinguishment:***

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

***(c) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2).***

**Reasons for the Decision**

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**

*End of Document*