National Native Title Tribunal

Registration test decision

Application name:	Kulkalgal People #2
Name of applicant:	(Applicant – name deleted)
State/territory/region:	Queensland, Torres Strait
NNTT file no.:	QC07/3
Federal Court of Australia file no.:	QUD6157/98
Date application made:	29 March 2007
Name of delegate:	Louahna Lloyd

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s.190D(1B), my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 5 July 2007

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Louahna Lloyd

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth)

Reasons for decision

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Introduction

This document sets out my reasons for the decision to accept or not accept, as the case may be, the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court).

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 17 May 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Information considered when making the decision

Section 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Amongst issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

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

I have *not* considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Application overview

The application was filed in the Federal Court of Australia (the Court) on 29 March 2007. It was referred to the Registrar for compliance testing on 4 April 2007. The application is not affected by any current s.29 notices.

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. There are no potentially aggrieved third parties in this matter and hence the requirement to give procedural fairness to other parties does not arise.

In my view the State of Queensland is the only third party potentially aggrieved by a decision to accept the application for registration. However, as the Registrar has provided the State with a copy of the application and any other documents filed by the applicant in the Federal Court pursuant to s. 66(2) of the Act and the applicant has not provided any other information separately to me in relation to my consideration of the application pursuant to s. 190A, I am of the view that procedural fairness has been provided to the State— see the decision of Carr J in *Western Australia v NTR* (1999) 95 FCR 93.

Please note: All references to legislative sections refer to the *Native Title Act 1993* (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition.

Procedural and other conditions: s. 190C

Section 190C(2)
Information etc. required by ss. 61 and 62

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

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 15.

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

Result

The application **meets** the requirement under s. 61(1).

Reasons

This section requires me to consider whether the application sets out the native title claim group in the terms set out in s. 61(1). That is one of the procedural requirements that must be satisfied to secure registration: s. 190A(6)(b).

If the description of the native title claim group in the application indicates that not all persons in the native title claim group have been included, or that it is in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and I should not accept the claim for registration: *Attorney General of Northern Territory v Doepel* 203 ALR 385 (*Doepel*) at [36].

My consideration under this section does not require me to look beyond the information contained in the application: see *Doepel* [39]. In particular it does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is the correct native title claim group: *Doepel* at [37].

I have considered Schedule A of the application, which sets out the description of the persons in the Kulkalgal People #2 native title claim group. Schedule A is in these terms:

> The claim group are the Kulkalgal, being:
>
> (a) the members of the (Place Name l – deleted), (Place Name 2 – deleted) and (Place Name 3 – deleted) who are the descendants of one or more of the following apical ancestors: (Ancestor 1 –

name deleted), (Ancestor 2 – name deleted), (Ancestor 3 – name deleted), (Ancestor 4 – name deleted), (Ancestor 5 – name deleted), (Ancestor 6 – name deleted), (Ancestor 7 – name deleted), (Ancestor 8 – name deleted), (Ancestor 9 – name deleted), (Ancestor 10 – name deleted), (Ancestor 11 –name deleted) , (Ancestor 12 – name deleted), (Ancestor 13 – name deleted), (Ancestor 14 – name deleted), (Ancestor 15 – name deleted), (Ancestor 16 – name deleted), (Ancestor 17 – name deleted), (Ancestor 18 – name deleted), (Ancestor 19 – name deleted), (Ancestor 20 – name deleted), (Ancestor 21 – name deleted), (Ancestor 22 – name deleted) or (Ancestor 23 – name deleted); and

(b) Torres Strait Islanders who have been adopted by the above people in accordance with the traditional laws acknowledged and traditional customs observed by those people.

There is nothing on the face of the application to indicate that the group described in Schedule A does not include, or may not include, all the persons who hold native title in the area of the application. Further there is no information in the application to indicate that the native title claim group has been assembled for administrative convenience, and is not a group as required by s. 61(1).

I am satisfied that the relevant requirement of s. 61(1) under s. 190C(2) has been met.

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

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

Result

The application **meets** the requirement under s. 61(3).

Reasons

The name of the person who is the applicant is provided at Part A of the application. The details of the address for service appear at Part B of the application.

Native title claim group named/described: s. 61(4)

The application must:

(a) name the persons in the native title claim group, or

(b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

The application **meets** the requirement under s. 61(4).

Reasons

The application contains a description of the persons in the native title claim group at Schedule A.

Application in prescribed form: s. 61(5)

The application must:

(a) be in the prescribed form,

(b) be filed in the Federal Court,
(c) contain such information in relation to the matters sought to be determined as is prescribed, and
(d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application **meets** the requirement under s. 61(5).

Reasons

The application meets the requirements of subsections (a), (b), (c) and (d) of s. 61(5).

It is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998 and was filed in the Federal Court as required pursuant to s. 61(5)(a) & (b). For the reasons below under s. 62(2) it contains all of the information prescribed by s. 62 and therefore meets the condition in s. 61(5)(c). It is accompanied by the prescribed documents (this is an affidavit from the persons who comprise the applicant prescribed by s. 62(1)(a)), thereby meeting the requirements of s. 61(5)(d).

Affidavits in prescribed form: s. 62(1)(a)

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).

Result

The application **meets** the requirement under s. 62(1)(a).

Reasons

In the application before me there is one person comprising the applicant and this person has made an affidavit pursuant to s. 62(2)(a). This affidavit required by s. 62(1)(a) can be found at the end of the application.

The affidavit was sworn by the deponent on 28 March 2007 and appears to have been properly witnessed. The affidavit contains the statements required by subsections (i) to (v) of s. 62(1)(a) at paragraphs 2 to 6 respectively. Those paragraphs of the affidavit state as follows:

> 2.I believe that the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application.
> 3.I believe that none of the area covered by the application is also covered by an existing entry in the National Native Title Register.
> 4. I believe that all of the statements made in the application are true.
> 5.A meeting was held on 21 February 2007 at which I was authorised by all the persons in the native title claim group to make the application and to deal with the matters in relation to it.
> 6.I was authorised on the following basis:
> a.I am a senior Kulkalgal elder;

b.The nature of my position within the community is such that I am an appropriate person to be the applicant;
c.I have the support of the elders and traditional owners in this regard; and
d.I am chairperson of the Kulkalgal (Torres Strait Islander) Corporation, a prescribed body corporate that holds native title over Aureed in trust for the Kulkalgal people in accordance with the determination of his Honour Justice Cooper in Warria on behalf of the *Kulkalgal v Queensland* [2004] FCA 1572 (7 December 2004).

I am satisfied that the affidavit is in the prescribed form and complies with s. 62(1)(a).

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

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

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains 8 paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 15 below and is one and the same as the result for s. 62(1)(b) here.

Result

The application **meets** the requirement under s. 62(1)(b).

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
(i) the area covered by the application, and
(ii) any areas within those boundaries that are not covered by the application.

Result

The application **meets** the requirement under s. 62(2)(a).

Reasons

A written description of the area covered and areas not covered by the application is found in Schedule B of the application. The written description does not identify areas within the boundaries of the application that are not covered by the application.

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

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **meets** the requirement under s. 62(2)(b).

Reasons

A map showing the boundaries of the area covered by the application is referred to in Schedule C of the application and is found in Attachment C1.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(c).

Reasons

Schedule D of the application states that a Tenure History Report was provided by the Department of Natural Resources on 13 September 1999 revealing no non-native title rights and interests in the claim area.

A copy of the Tenure History Report forms Attachment D to the application.

Schedule D of the application further provides that enquiries with the Queensland Department of Natural Resources and Mines and Water have confirmed that as at 15 March 2007 there had been no additional tenures or interests granted.

I am satisfied that the requirements of this section are met.

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

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

Result

The application **meets** the requirement under s. 62(2)(d).

Reasons

A description of the claimed native title rights and interests is found in Schedule E. 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. It states in part, as follows:

> The native title rights and interests possessed under traditional laws acknowledged and traditional customs observed by the applicants are the same as those identified by the High Court of Australia in *Mabo v Queensland* (No 2) 107 ALR 1 in respect of Mer Island.

The descriptions then sets out in considerable detail the specific rights and interests that are claimed.

This condition is therefore met.

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Result

The application **meets** the requirements under s. 62(2)(e).

Reasons

Under this section I must be satisfied that the application contains a general description of the factual basis to support the assertion that the claimed native title rights and interests exist. The factual basis must support the particular assertions set out in subsections (a), (b) and (c) of s.190B(5). Those subsections require a factual basis for the assertions that the native title claim group have a current association with the area, that the predecessors of the native title claim group had an association with the area, that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests and that the group has continued to hold the native title in accordance with those traditional laws and customs.

Schedule F of the application contains a description of the factual basis for the native title claimed. Schedule F is in the following terms:

> The Association between the Native title claim group, their Ancestors and the Area Covered by the Application
>
> 1.At the time of acquisition of sovereignty over the Torres Strait by the British Crown (through the colony of Queensland), the Native title claim group's ancestors were the exclusive possessors of the land making up the Claim area.
> 2.The Native title claim group's rights and interests in the land making up the Claim area were inherited from their ancestors in accordance with traditional laws and customs which continue until the present time.
> 3.The Native title claim group continues to acknowledge traditional laws, observe traditional customs and exercise their traditional rights and interests in relation to the Claim area.
>
> Traditional Laws and Customs on which Native Title Rights are Based
>
> The traditional laws and customs of Torres Strait Islanders are comprehensible in terms of a number of fundamental principles, including the following:
>
> 1.acknowledgment of proprietary rights of individuals and groups in territory, in material objects and in non-material objects, and corresponding responsibility for the care and management of territory, material and non-material objects;

2.acknowledgment of a kinship system that provides the idiom by which hereditary transmission of proprietary rights and responsibilities occurs;
3.prescribed means by which membership of the claimant group is recognized;
4.prescribed means by which authority within the claimant group is asserted and respected.

Continuity of Native Title Rights and Interests

The Native title claim group and their ancestors have maintained a continuous association with the Claim area, visiting the area for a variety of purposes. They have asserted ownership from a time prior to the assertion of sovereignty by the British Crown to the present, and they have continuously exercised the rights and interests claimed as native title in this application.

I am satisfied that the information contained in Schedule F is a general description of the factual basis required. The factual basis is described in relation to assertions that the native title claim group have a current association with the area, that the predecessors of the native title claim group had an association with the area, that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests and that the group has continued to hold the native title in accordance with those traditional laws and customs.

Activities: s. 62(2)(f)

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application **meets** the requirement under s. 62(2)(f).

Reasons

The application contains a list of the details of current activities carried out by members of the native title claim group in Schedule G of the application. The listed activities are described as follows:

1. physical occupation of the claim area by visiting and camping on the land;
2. hunting, fishing and foraging on the claim area;
3. collecting other material resources from the claim area;
4. consuming, sharing, trading and exchanging resources derived from the claim area or using the claim area as a base for harvesting resources for consumption, sharing, trading and exchanging;
5. building, maintaining and using manufactured structures in the claim area;
6. traveling across the claim area;
7. regulating the travel of members of the Native title claim group, Torres Strait Islanders and others across the claim area, and regulating their access to particular places within it, including the observation of restrictions and cultural sanctions in relation to particular places;
8. maintaining the transmission of mythological information about the claim area to appropriate persons;
9. maintaining sites of particular cultural significance on the claim area;

10. assertions in all available public forums of the rights and responsibilities held by the claimant group to speak for and make decisions about the claim area in accordance with their traditional laws and customs.

I am satisfied that the information required by s. 62(2)(f) is provided in the application.

Other applications: s. 62(2)(g)

The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

Result

The application **meets** the requirement under s. 62(2)(g).

Reasons

Schedule H identifies one overlapping application, being that made by (Overlapping Application Applicant – name deleted) (Zuizin) #1, Federal Court proceeding QUD6064 of 1998 (the Zuizin application). I note that this application was discontinued in the Federal Court on 29 March 2007 pursuant to leave granted by the Federal Court on 5 December 2006. As the application before me was filed on the same day, it may be that at the time of filing, the Zuizin application was still an overlapping application.

An overlaps analysis dated 19 April 2007 by the Tribunal's expert geospatial and mapping analysts[1] is evidence that there are currently no overlapping applications in the area covered by this application, now that the Zuizin application has been withdrawn.

I am satisfied that the application meets the requirement under s. 62(2)(g).

Section 29 notices: s. 62(2)(h)

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(h).

Reasons

Schedule I of the application provides that there are no section 29 notices of which the applicant is aware in relation to the whole of the claim area. A Tribunal geospatial mapping analyst has found that as at that date, there were no s. 29 or equivalent notices, as notified to the Tribunal, which fell within the external boundary of the application.

[1] see Geospatial report dated 19 April 2007

Combined result for s. 62(2)

The application meets the combined requirements of s. 62(2), because it meets each of the subrequirements of s. 62(2)(a) to (h), as set out above. See also the result for s. 62(1)(b) above.

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

Section 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

Result

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

Reasons

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) — which essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration and any overlapping 'previous application' — is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) FCR 33 ('*Strickland FC'*) at [9].

Although there was one overlapping application in the Federal Court when this application was made on 29 March 2007 (this is the Zuizin application) this application was not on the Register of Native Title Claims as a result of it being accepted for registration pursuant to s. 190A and has since been discontinued, such that it is no longer a proceeding in the Federal Court and has been removed from the Register of Native Title Claims. It is therefore not an overlapping application that needs to be considered under this section. Further, there are no other overlapping applications—see overlap analysis dated 12 April 2007 by a Tribunal's expert geospatial and mapping analyst. Accordingly, the requirement that I be satisfied that there are no common members between the Kulkalgal People #2 application on the one hand and any overlapping application on the other hand is not triggered.

I am therefore satisfied that this application complies with s. 190C(3).

Section 190C(4) Authorisation/certification

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

(a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

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

Under s. 203BE(4), certification of a claimant application by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and

(b) briefly set out the body's reasons for being of that opinion, and

(c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

Under s. 190C(5), if the application has not been certified, the application must:

(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and

(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

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

Reasons

Attachment R of the application contains the native title representative body certification. The certification states that the TSRA is the recognised Native Title Representative Body pursuant to s. 203AD of the Act for the area which is the subject of the claim and that the TSRA has made certain enquiries regarding the circumstances of the claim and satisfied itself as to those circumstances. It also states as follows:

> NOW, pursuant to section 203(1)(b) of the NTA, the Torres Strait Regional Authority HEREBY CERTIFIES the application, being of the opinion that:
>
> 1.(Applicant – name deleted) has the authority to make the application and deal with matters arising in relation to it, on behalf of all other persons in the native title claim group; and

> 2. All reasonable efforts have been made to ensure that the application properly describes or otherwise identifies all the other persons in the native title claim group.
>
> And the basis of the opinion of the Torres Strait Regional Authority is the instructions of the native title claim group which supported these opinions and was given to the Torres Strait Regional Authority at a meeting at Poruma Island on 21 February 2007.

I note that there is no s. 203(1)(b) in the Act and that the certification therefore contains an error. The section of the current Act that deals with certification of claimant applications is s. 203BE. However, I do not take the view that the certification is rendered ineffective because of what appears to me to be a mere typographical error.

The certification in Attachment R is in accordance with Part 11 of the Act in that it does comply with s. 203BE. In particular, it contains the statements required by s. 203BE(4)(a) and (b). As there are no current overlapping applications, the certificate need not contain the information required by s. 203BE(4)(c). The statements required by subparagraphs (a) and (b) of s. 203BE(4) relate to the representative body's opinion that all the persons in the native title claim group have been authorised to make the application and deal with matters arising in relation to it 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 claim group and the reasons for the representative body being of those opinions. I therefore take the view that as the application complies with s. 203BE, it is properly certified under Part 11 of the Act and therefore meets the condition in s. 190C(4).

Merit conditions: s. 190B

Section 190B(2)
Identification of area subject to native title

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

Delegate's comment

I consider whether the condition of s. 190B(2) is met firstly with respect to what is required by s. 62(2)(a) and then with respect to what is required by s. 62(2)(b). I come to a combined result for whether or not s. 190B(2) as a whole is met at page 19 below.

Information regarding external and internal boundaries: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

Result

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(a).

Reasons

Schedule B of the application contains a written description of the external and internal boundaries.

The written description of the external boundary states as follows:

> The area covered by the application (the Claim area) is Zuizin (Half Way Island), being the land described as Lot 49 on Survey Plan TS208, in the County of Torres in the State of Queensland.
>
> AND INCLUDES all that land, waters, seas, seabeds, reef, rivers, riverbeds and banks encompassed within the abovementioned area to the high water mark.*
>
> *High water mark has the meaning ascribed to it in the Land Act 1994 (Qld).

There are no areas within the external boundary that are excluded from the claim area.

Having regard to the written description and the expert opinion of the Tribunal's geospatial services analysts[2] (Geospatial), I am satisfied that the external boundaries of the application area

[2] see Geospatial report dated 19 April 2007

have been described such that the location of the area on the earth's surface can be identified with reasonable certainty.

Map of external boundaries: s. 62(2)(b)

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(b).

Reasons

A map showing the external boundary is referred to in Schedule C of the application and is found in Attachments C1 and C2 of the application. It is a map generated from the State of Queensland's BLINMAP database dated 29 June 1999.

The map shows the application area depicted by a solid black line. It also contains a scale, coordinate grid and notes relating to the source and currency of data used to prepare the map. The geospatial assessment is that the written description and map are consistent and identify the application area with reasonable certainty. Having regard to the clarity of the depiction of the external boundary on the map and the geospatial expert opinion I am of the view that the requirements of this section are met.

Combined result for s. 190B(2)

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

Section 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.

Result

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

Reasons

The application does not name the persons in the native title claim group pursuant to s. 190B(3)(a) and it is therefore necessary to decide if the requirements of s. 190B(3)(b) are met. The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group: *Doepel* at [51].

Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93 accepted as sufficient for the purposes of s. 190B(3)(b) a claim group description which provided that there were 'three rules' of claim group membership, namely:

1. The biological descendants of the unions between certain named people;

2. Persons adopted by the named people and by the biological descendants of the named people; and

3. The biological descendants of the adopted people referred to in paragraph 2 above.

In a later case of *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732, Carr J said the following:

> The delegate clearly understood that the test was whether the group was described sufficiently clearly so that it could be ascertained whether any particular person was in the group i.e. by a set of rules or principles … In my view, it was clearly open to the delegate to find that she was not satisfied that the persons in the claim group were described sufficiently clearly within the requirements of s 190B(3)(b). The matter is largely one of degree with a substantial factual element—at [25] to [27].

I understand these authorities to mean that the description needs to contain some objective way of identifying or ascertaining the members of the group.

The description of the native title claim group is in these terms:

> The claim group are the Kulkalgal, being:
>
> (a) the members of the (Place Name 1 – deleted), (Place Name 2 – deleted) and (Place Name 3 – deleted) who are the descendants of one or more of the following apical ancestors: (Ancestor 1 – name deleted), (Ancestor 2 – name deleted), (Ancestor 3 – name deleted), (Ancestor 4 – name deleted), (Ancestor 5 – name deleted), (Ancestor 6 – name deleted), (Ancestor 7 – name deleted), (Ancestor 8 – name deleted), (Ancestor 9 – name deleted), (Ancestor 10 – name deleted), (Ancestor 11 – name deleted), (Ancestor 12 – name deleted), (Ancestor 13 – name deleted), (Ancestor 14 – name deleted), (Ancestor 15 – name deleted), (Ancestor 16 – name deleted), (Ancestor 17 – name deleted), (Ancestor 18 – name deleted), (Ancestor 19 – name deleted), (Ancestor 20 – name deleted), (Ancestor 21 – name deleted), (Ancestor 22 – name deleted) or (Ancestor 23 – name deleted) ; and
>
> (b) Torres Strait Islanders who have been adopted by the above people in accordance with the traditional laws acknowledged and traditional customs observed by those people.

I have taken descendants in paragraph (a) to mean biological descendants. I note that there is mention of adoption in paragraph (b). Such adoption is said to be in accordance with the traditional laws acknowledged and traditional customs observed by the claim group. There is some detail provided of the traditional laws and customs on which native title rights are based in Schedule F of the application, in particular, 'the acknowledgment of a kinship system that provides the idiom by which the hereditary transmission of proprietary rights and responsibilities occurs'. Because of the reference to adoption in Schedule A, it follows that 'hereditary' as it is used in Schedule F means having title, possession and responsibility through traditional or ancestral inheritance and I have not read it in the narrower sense of genetic inheritance alone.

This description clearly describes the persons in the native title claim group. I take the view that this description means that all of the descendants of those named apical ancestors, whether biological descendants or persons adopted by the ancestors or their biological descendants in accordance with the traditional laws acknowledged and traditional customs observed by those people, are persons belonging to the native title claim group.

In relation to the identification of the native title claim group, the certificate by Torres Strait Regional Authority (TSRA) provided at Schedule R of the application states:

> 1.(Applicant – name deleted) has the authority to make the application and deal with matters arising in relation to it, on behalf of all other persons in the native title claim group; and
> 2.All reasonable efforts have been made to ensure that the application properly describes or otherwise identifies all the other persons in the native title claim group.

And the basis of the opinion of the TSRA is the instructions of the native title claim group which supported those opinions and was given to the TSRA at a meeting at Poruma Island on 21 February 2007.

I am satisfied that the application contains a description of the persons in the native title claim group which is sufficiently clear so that it can be ascertained whether any particular person is in that group.

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

> The Registrar must be satisfied that the description contained in the application as required by s. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Result

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

Reasons

For a description to be sufficient to allow the claimed native title rights and interests to be readily identified under this section, it must describe what is claimed in a clear and easily understood manner.

The description of the claimed native title rights and interests is found in Schedule E:

> **Native Title Rights and Interests**
> The native title rights and interests possessed under traditional laws acknowledged and traditional customs observed by the applicants are the same as those identified by the High Court of Australia in Mabo v Queensland (No 2) 107 ALR 1 in respect of Mer Island.
>
> That is, the Native title claim group were and are "entitled as against the whole world to possession, occupation, use and enjoyment" of the Claim area.
>
> Accordingly, the Native title claim group states as follows:

1. The Native title claim group are traditional owners of the Claim area, and as such have exclusive proprietary and beneficial rights in the Claim area. The Native title claim group believes that their native title rights to the Claim area includes:
   a. the right of possession, occupation, use and enjoyment to the exclusion of all others;
   b. the right to manage and care for the Claim area, including its material resources;
   c. the right to transmit rights of ownership to others, in particular to descendants of members of the Native title claim group.
2. Rights deriving from the proprietary and beneficial rights include:
   a. the right to access and occupy the Claim area;
   b. the right to take, use, enjoy and develop the natural resources of the Claim area;
   c. the right to derive economic benefit from the Claim area, including trade in its resources;
   d. the right to share in the benefit of resources taken from the Claim area by others;
   e. the right to make decisions about, speak authoritatively for and manage and conserve the Claim area and its resources;
   f. the right to control access, occupation, use and enjoyment of the Claim area and its resources by others;
   g. the right to speak for, protect and control access to the Indigenous cultural heritage of the Claim area, including places of particular significance;
   h. the right to maintain, manage, develop and transmit the Indigenous cultural heritage of the Claim area;
   i. the right to conduct social, cultural and religious activities on the Claim area;
   j. the right to resolve disputes concerning the Claim area or membership of the native title group.

No native title rights or interests are claimed where such rights have previously been extinguished and such extinguishment cannot be disregarded by virtue of sections 47(2), 47A(2) and 47B(2).

It is my view that the description of the claimed native title rights and interests is clear, understandable and makes sense and accordingly the requirements of this section are met.

Section 190B(5)
Factual basis for claimed native title

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

(a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
(c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Delegate's comments

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 26 below.

Result re s. 190B(5)(a)

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

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

Schedule F of the application contains a description of the factual basis for the native title claimed. Relevantly, Schedule F states as follows:

> **The Association between the Native title claim group, their Ancestors and the Area Covered by the Application**
>
> 1.At the time of acquisition of sovereignty over the Torres Strait by the British Crown (through the colony of Queensland), the native title claim group's ancestors were the exclusive possessors of the land making up the claim area.
> 2.The Native title claim group's rights and interests in the land making up the Claim area were inherited from their ancestors in accordance with traditional laws and customs which continue until the present time.
> 3.The Native title claim group continues to acknowledge traditional laws, observe traditional customs and exercise their traditional rights and interests in relation to the claim area.

I see that Schedule A of the application identifies the group's apical ancestors.

Schedule G contains assertions about the current activities that are carried out by members of the native title claim group in relation to the claim area. The listed activities are described as follows:

> 1. physical occupation of the claim area by visiting and camping on the land;
> 2. hunting, fishing and foraging on the claim area;
> 3. collecting other material resources from the Claim area;
> 4. consuming, sharing, trading and exchanging resources derived from the Claim area or using the claim area as a base for harvesting resources for consumption, sharing, trading and exchanging;
> 5. building, maintaining and using manufactured structures in the Claim area;
> 6. traveling across the claim area;
> 7. regulating the travel of members of the Native title claim group, Torres Strait Islanders and others across the claim area, and regulating their access to particular places within it, including the observation of restrictions and cultural sanctions in relation to particular places;
> 8. maintaining the transmission of mythological information about the Claim area to appropriate persons;
> 9. maintaining sites of particular cultural significance on the Claim area;
> 10. assertions in all available public forums of the rights and responsibilities held by the claimant group to speak for and make decisions about the Claim area in accordance with their traditional laws and customs.

It is also asserted in Schedule M that the native title claim group has maintained physical connection with the claim area through visitation and use of the claim area, that members of the native title claim group frequently visit the claim area, often camping there while fishing and that they maintain sites of particular cultural significance on the claim area. Schedule M also states that members of the claim group obtain resources for subsistence from the claim area and use the claim

area as a base for commercial harvest of resources and for other cultural, social and recreational reasons.

The affidavit of (Applicant – name deleted) sworn on 28 March 2007 states that the claim group's ancestors visited and lived on the claim area, maintained continuous physical connection with the claim area and were also traditional owners of the claim area. The affidavit also states as follows:

> 9. Kulkalgal people have an acknowledged system of traditional laws and customs which we have observed and continue to observe relating to, among other things, land ownership.
> 10. Kulkalgal people's laws and customs determine who are the rightful owners of the particular land, how such ownership may rightfully pass from one person to another and collectively recognize the continuing traditional associations with the claim area of the Kulkalgal.
> 11. Kulkalgal people have always enjoyed, and continue to enjoy, their rights to use Halfway Island and to exclude others from it and to use and enjoy the natural resources of Halfway Island.
> 12. Kulkalgal people continue to regularly camp on Halfway Island when fishing for cray fish (language name: kaiar), trochus (language name: kabar) and fin fish (language name: wape).
> 13. Kulkalgal people continue to hunt over the claim area, forage the claim area, and generally use the resources of the claim area, including the following:
>
> a. There is a deep channel in the southern reef of Halfway Island where turtles (language name: waru) are regularly trapped. Kulkalgal people hunt turtles in that channel, and sometimes bring those turtles to Halfway Island for butchering;
> b. Kulkalgal people collect turtle eggs (language name: waru kakur) from Halfway Island;
> c. Kulkalgal people collect the eggs of black headed turns (language name: sara) from Halfway Island;
> d. Kulkalgal people collect wild arrowroot (language name: gasee) from Halfway Island;
> e. Kulkalgal people hunt frigate birds (language name: wamer) on Halfway Island; and
> f. Halfway Island was traditionally an important place for collecting pandanus leaves (language name: kousar). Pandanus was dried and used for weaving bedding, floor mats or walls and is still used to repair floor mats. Pandanus was also used for making war headbands, arm bands, skirts and decorations for celebrations.
>
> 14. Kulkalgal people leave their land to their children and others in accordance with their traditional laws and custom and grant and withhold permission for others to use their land.
> 15. Kulkalgal people also manage and care for Halfway Island. Kulkalgal people have duties to look after that place and are responsible for that place.
> 16. Kulkalgal people trade and share in their natural resources amongst themselves and with other Torres Strait Islanders.
> 17. Kulkalgal people also trade with Papuans. Traditionally Kulkalgal people traded natural resources and Papuans traded yam, taro, sweet potato and banana.
> 18. Kulkalgal people conduct social, spiritual and economic activities upon the claim area including the avoidance of sites of significance such as the special site which cannot be visited due to cultural, social and spiritual reasons.
> 19. Kulkalgal people continue to speak for Halfway Island within the community of Torres Strait Islanders. Kulkalgal people also continue to resolve disputes concerning Halfway Island in accordance with traditional law and custom, and regulate membership of the native title group.

I am satisfied that the information contained in Schedules F, G, M and in the affidavit of (Applicant – name deleted), provides a factual basis sufficient to support the assertion contained in s. 190B(5)(a).

Result re s. 190B(5)(b)

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

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

I have considered the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yort*a) and take the view that I am bound by the Court's consideration of the term 'traditional' in the context of the s. 223 definition of 'native title' and 'native title rights and interests'. I have also considered *Yorta Yorta* in the context of how native title rights and interests can said to be possessed as a result of the acknowledgment and observance of traditional laws and customs.

Relevantly, Schedule F of the application states as follows:

> **Traditional Laws and Customs on which Native Title Rights are Based**
>
> The traditional laws and customs of Torres Strait Islanders are comprehensible in terms of a number of fundamental principles, including the following:
>
> 1.acknowledgment of proprietary rights of individuals and groups in territory, in material objects and in non-material objects, and corresponding responsibility for the care and management of territory, material and non-material objects;
> 2.acknowledgment of a kinship system that provides the idiom by which hereditary transmission of proprietary rights and responsibilities occurs;
> 3.prescribed means by which membership of the claimant group is recognized;
> 4.prescribed means by which authority within the claimant group is asserted and respected.

The affidavit of (Applicant – name deleted) states as follows:

> 9.Kulkalgal people have an acknowledged system of traditional laws and customs which we have observed and continue to observe relating to, among other things, land ownership.
> 10.Kulkalgal people's laws and customs determine who are the rightful owners of the particular land, how such ownership may rightfully pass from one person to another and collectively recognize the continuing traditional associations with the claim area of the Kulkalgal.
> 11.Kulkalgal people have always enjoyed, and continue to enjoy, their rights to use Halfway Island and to exclude others from it and to use and enjoy the natural resources of Halfway Island.

The affidavit then goes on to list some of the native title rights and interests held by the claim group.

Schedule E of the application gives a detailed description of the native title rights and interests claimed in relation to the claim area. As noted in my reasons under s. 190B(4) above, I am satisfied that the description contained in Schedule E is clear and understandable. I am also satisfied that Schedules E, F, G and M, when read with the affidavit of (Applicant – name deleted), provide a factual basis sufficient to support the assertion that 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.

Result re s. 190B(5)(c)

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

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

In addition to what Schedule F states about the association between the native title claim group, their ancestors and the area covered by the application (see my reasons under s. 190B(5)(a)), Schedule F also states as follows:

> **Continuity of Native Title Rights and Interests**
>
> The Native title claim group and their ancestors have maintained a continuous association with the claim area, visiting the area for a variety of purposes. They have asserted ownership from a time prior to the assertion of sovereignty by the British Crown to the present, and they have continuously exercised the rights and interests claimed as native title in this application.

The affidavit of (Applicant – name deleted) states that the claim group's ancestors visited and lived on the claim area, maintained continuous physical connection with the claim area and were also traditional owners of the claim area. His affidavit also provides detailed information about the nature of the native title held by the claim group in accordance with their traditional laws and customs.

Schedule G of the application lists the current activities carried out by members of the claim group in exercise of their native title rights. The contents of Schedule G are included in my reasons in relation to s.62(2)(f) above.

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

Combined result for s. 190B(5)

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

Section 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.

Result

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

Reasons

Only one of the claimed native title rights or interests needs to be prima facie established for the claim to be registered (subject to all other requirements being met). However those that cannot be prima facie established will not be entered on the Register of Native Title Claims.

My consideration under this section of the Act is constrained by the words 'prima facie'. This terminology directs that I do not delve into or attempt to resolve disputed questions of fact or law in my consideration of what rights and interests can be established. The consideration by the High Court in *North Ganalanja Aboriginal Corporation v QLD* (1996) 185 CLR 595 (*North Ganalanja*) of the term 'prima facie' as it appeared in the registration sections of the Act, prior to the 1998 amendments, seems to me still relevant. In that case, the majority of the High Court said:

> 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 the Oxford English Dictionary (2nd ed) 1989]—at [615] to [616].

The High Court also said:

> However, the notion of a good prima facie claim which, in effect, is the concern of s. 63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the [old Native Title] Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success—at [620].

The test in *North Ganalanja* was considered and approved in *Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*):

> Although *North Ganalanja* was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate—at [134].

His Honour Justice Mansfield in *Doepel* also approved of comments by Justice McHugh in *North Ganalanja* as informing what prima facie means under s. 190B(6):

> …if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis—at [135].

The authority in *Doepel* supports the view that it is not for the Registrar to resolve disputed questions of law (such as those about extinguishment and the applicability or otherwise of s. 47B) in considering whether a claimed right or interest is prima facie established under s. 190B(6) of the Act.

It seems to me to follow, having regard to the above authorities on what is meant by prima facie, that it is not my role to resolve whether the facts claimed in the application as supporting a determination of native title will be made out at trial. The task under this section is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed, having regard to settled law about:

- what is a 'native title right and interest' (as that term is defined in s. 223); and
- whether or not the right has been extinguished.

In making my decision under this section I pay particular regard to the definition of the phrase 'native title rights and interests' in s. 223 of the Act:

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

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

I have found that a sufficient factual basis is provided for the assertion that the claimed native title rights and interests exist and I consider that many of the native title rights and interests can prima facie be established. Schedule E of the application states that the native title rights and interests are the same as those identified by the High Court of Australia in *Mabo v Queensland (no 2)* 107 ALR 1 in respect of Mer Island, and I am of the view that based on the applicant's affidavit and other information as set out in Schedules F, G and M, the following rights and interests can prima facie be established:

> 1. The Native title claim group are traditional owners of the Claim area, and as such have exclusive proprietary and beneficial rights in the Claim area. The Native title claim group believes that their native title rights to the Claim area includes:
>
> a. The right of possession, occupation, use and enjoyment to the exclusion of all others;

I see that the application area does not extend beyond the high water mark, such that there are no impediments to this exclusive right. I am satisfied that the claimed right of possession, occupation, use and enjoyment to the exclusion of all others is prima facie established. I refer to Schedule G of the application which lists activities that are currently being carried out by the native title claim group. The activities set out in Schedule G all support a right of possession, occupation, use and enjoyment, but there are two activities in particular that I think support this right to the exclusion of all others. Those activities are as follows:

> 7. regulating the travel of members of the Native title claim group, Torres Strait Islanders and others across the claim area, and regulating their access to particular places within it, including the observation of restrictions and cultural sanctions in relation to particular places;
>
> 10. assertions in all available public forums of the rights and responsibilities held by the claimant group to speak for and make decisions about the claim area in accordance with their traditional laws and customs.

I also refer to Schedule M which contains details of any traditional physical connection with any of the land or waters covered by the application by any member of the claim group. Schedule M states as follows:

> The Native Title Claim Group has maintained physical connection with the Claim Area through visitation and use of the Claim Area.

> Members of the Native Title Claim Group frequently visit the Claim Area, often camping there while fishing.
>
> They maintain sites of particular cultural significance on the Claim Area, obtain resources for subsistence from the Claim Area and use the Claim Area as a base for commercial harvest of resources. They also use the Claim Area for other cultural, social and recreational reasons.

In my view Schedules G and M, along with Schedule F of the application, as set out in my reasons under s. 190B(5), all support the prima facie establishment of a right to possession, occupation, use and enjoyment of the claim area to the exclusion of all others.

I also refer to paragraphs 9 to 19 of the affidavit of (Applicant – name deleted), as set out in my reasons for decision under s. 190B(5), and find that the affidavit also contains evidence that enables the right to possession, use and enjoyment of the claim area to the exclusion of all others, to be prima facie established.

> b.The right to manage and care for the Claim area, including its material resources;

I am satisfied that this right is prima facie established. I refer to the affidavit evidence of (Applicant – name deleted), in particular paragraph 15, and find that it prima facie establishes the right to manage and care for the claim area, including its material resources. I also refer to Schedules F and G of the application and note that the latter lists activities that the claim group currently carry out in relation to the claim area, including:

> 3.collecting other material resources from the claim area;
> 4.consuming, sharing, trading and exchanging resources derived from the claim area or using the claim area as a base for harvesting resources for consumption, sharing, trading and exchanging;
> 5.building, maintaining and using manufactured structures in the claim area;
> 7.regulating the travel of members of the Native title claim group, Torres Strait Islanders and others across the claim area, and regulating their access to particular places within it, including the observation of restrictions and cultural sanctions in relation to particular places;
> 8.maintaining the transmission of mythological information about the claim area to appropriate persons;
> 9.maintaining sites of particular cultural significance on the claim area;

I am satisfied that the affidavit evidence and the material set out in Schedules F and G prima facie establish a right to manage and care for the claim area, including its material resources.

> c.The right to transmit rights of ownership to others, in particular to descendants of members of the Native title claim group.

I am satisfied that this right is prima facie established. I refer to the affidavit evidence of (Applicant – name deleted) and note that in particular, paragraphs 9 and 10 are relevant here. I also find the material set out in Schedule F of the application enables this right to be prima facie established.

2.Rights deriving from the proprietary and beneficial rights include:
a.The right to access and occupy the Claim area;

I am satisfied that this right is prima facie established. I refer to paragraphs 11, 12, 13, 14, 15 and 18 of the applicant's affidavit and find that the evidence contained in those paragraphs prima facie establishes the right to access and occupy the claim area. I also find that Schedules F and G prima facie establish this right.

b. The right to take, use, enjoy and develop the natural resources of the Claim area;

I am satisfied that this right is prima facie established. I refer to paragraphs 11, 12, 13, 16 and 17 of the applicant's affidavit and also paragraphs 3, 4, 5, 7, 8 and 9 of Schedule G of the application, and find that the right to take, use, enjoy and develop the natural resources of the claim area is prima facie established.

c.The right to derive economic benefit from the Claim area, including trade in its resources;

I am satisfied that this right is prima facie established. I refer to paragraphs 11, 16 and 17 of the applicant's affidavit and paragraph 4 of Schedule G and find that this right is prima facie established.

d. The right to share in the benefit of resources taken from the Claim area by others;

I am satisfied that this right and interest can be prima facie established. I refer to paragraph 16 of the applicant's affidavit which states the claim group trade and share in their natural resources amongst themselves and with other Torres Strait Islanders. The affidavit also states that the Kulkalgal People also trade with Papuans and that traditionally, they traded natural resources and Papuans traded yam, taro, sweet potato and banana.

e.The right to make decisions about, speak authoritatively for and manage and conserve the Claim area and its resources;

I see that the application area does not extend beyond the high water mark, such that there are no impediments to this exclusive right. Rights to make decisions and speak for country are an incident of exclusive possession, occupation, use and enjoyment and as I have found this to be prima facie established I am similarly satisfied that the right at (e) is prima facie established. I refer to paragraph 19 of the applicant's affidavit and paragraph 10 of Schedule G of the application.

f. The right to control access, occupation, use and enjoyment of the Claim area and its resources by others;

I see that the application area does not extend beyond the high water mark, such that there are no impediments to this exclusive right. Rights of control are an incident of exclusive possession, occupation, use and enjoyment and as I have found this to be prima facie established I am similarly satisfied that a right to control access etc, is also prima facie established. I refer to paragraphs 11, 14 and 15 of the applicant's affidavit and paragraphs 7 and 8 of Schedule G.

> g.The right to speak for, protect and control access to the Indigenous cultural heritage of the Claim area, including places of particular significance;

I am not satisfied that this is a native title right and interest as that term is defined in s. 223. I refer to the decision of the High Court in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*) where the Court considered that a right to 'maintain, protect and prevent the misuse of cultural knowledge of the common law holders' is not a native title right and interest as defined in s. 223(1). See these statements:

> . . .the recognition of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was found there or took place, there, or elsewhere' at [59].
>
> The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s. 223(1) at [60].

I find that the right at (g) is sufficiently similar to that considered by the High Court and as such it can not be prima facie established having regard to the authority in that matter.

> h. The right to maintain, manage, develop and transmit the Indigenous cultural heritage of the Claim area;

For the reasons in relation to the right at (g) I am also of the view that this is not a native title right and interest that can be prima facie established.

> i. The right to conduct social, cultural and religious activities on the Claim area;

I am satisfied that this right is prima facie established. I refer to the applicant's affidavit generally, but in particular, paragraphs 12, 13 and 18 of the affidavit. I am also satisfied that Schedule G prima facie establishes a right to conduct social, cultural and religious activities on the claim area.

> j. The right to resolve disputes concerning the Claim area or membership of the native title group.

In *Neowarra v State of Western Australia* [2004] Sundberg J was of the view that the evidence did not establish the existence of this right but if it had it 'is a right in relation to people and not in relation to land or waters' paragraphs [488] and [489]. With this authority in mind I am not satisfied that this right and interest can be prima facie established.

Section 190B(7)
Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
    (i) the Crown in any capacity, or
    (ii) a statutory authority of the Crown in any capacity, or
    (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Result

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

Reasons

Satisfactory evidence of traditional physical connection is provided in relation to the applicant and other members of the native title claim group. This evidence can be found in Schedules E, F, G and M of the application and in (Applicant's – name deleted) affidavit. I am satisfied that members of the native title claim group currently have or previously had a traditional physical connection with some part of the land or waters covered by the application.

Section 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.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 34.

No approved determination of native title: s. 61A(1)

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

Result

The application **meets** the requirement under s. 61A(1).

Reasons

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

No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which
(a) a previous exclusive possession act (see s. 23B)) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:
(a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

Schedule D of the application states as follows:

> A Tenure History Report was provided by the Department of Natural Resources on 13 September 1999 revealing no non-native title rights and interests in the Claim area.
>
> A copy of the Tenure History Report forms Attachment D to this application.
>
> Enquiries with the Department of Natural Resources and Mines and Water have confirmed that as at 15 March 2007 there have been no additional tenures or interests granted.

Schedule L of the application is in the following terms:

> The entirety of the claim area which is the subject of this application is reserved as Aboriginal Reserve R65 for the benefit of the Aboriginal Inhabitants of the State.
>
> The entirety of the claim area is occupied by the native title claim group such that section 47A or 47B is operative.

I have considered the above schedules and Attachment D of the application which contains a Tenure History Report and Usage Report dated 2 July 1999. Attachment D states that the land was vacant crown land until 20 March 1926, at which time the whole of Halfway Island was gazetted as a Crown Reserve. The Reserve was then placed under the control of the 'Director of Aboriginal and Islander Affairs, as trustee' on 13 September 1969. The report indicates that there are no other relevant prior dealings with the land listed in the DNR reports and no non-native title rights and interests.

The evidence in the tenure report is that the only historical grant over the application area is a reserve such that the provisions of s. 47A may be available to the applicant. I have no other information before me to suggest that there are other previous exclusive possession acts over the

application area and as such I am satisfied that the application and accompanying documents do not disclose, and it is not otherwise apparent, that pursuant to s. 61A(2) the application should not have been made.

No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

For the same reasons as those set out in relation to s. 61A(2) and (4), I am satisfied that the application meets the requirement under s. 61A(3), as limited by s. 61A(4).

Combined result for s. 190B(8)

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Section 190B(9)
No extinguishment etc. of claimed native title

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

Delegate's comments

I consider each sub-condition under s. 190B(9) in turn and I come to a combined result at the end of this page.

Result re s. 190B(9)(a)

The application **satisfies** the sub-condition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

The application states in schedule Q that no claim is made to minerals, petroleum or gas wholly owned by the Crown.

Result re s. 190B(9)(b)

The application **satisfies** the sub-condition of s. 190B(9)(b).

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

The application states in schedule Q that no claim is made to minerals, petroleum or gas wholly owned by the Crown.

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

The application **satisfies** the sub-condition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

I do not have any information before me to find that the claimed native title rights and interests have otherwise been extinguished.

Combined result for s. 190B(9)

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

[End of reasons]

Directions under s.186: Information to be included on the Register of Native Title Claims

Application name:	Kulkalgal People #2
NNTT file no.:	QC07/3
Federal Court of Australia file no.:	QUD6157/98
Date of registration test decision:	5 July 2007

In accordance with ss. 190(1) and 186 of the *Native Title Act 1993* (Cwlth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

29 March 2007

Date application entered on Register:

6 July 2007

Applicant:

(Applicant – name deleted)

Applicant's address for service:

Principal Legal Officer

Native Title Office

PO Box 261

Thursday Island QLD 4875

Area covered by application

The area covered by the application (the Claim area) is Zuizin (Half Way Island), being the land described as Lot 49 on Survey Plan TS208, in the County of Torres in the State of Queensland.

AND INCLUDES all that land, waters, seas, seabeds, reef, rivers, riverbeds and banks encompassed within the abovementioned area to the high water mark.*

*High water mark has the meaning ascribed to it in the Land Act 1994 (Qld).

Persons claiming to hold native title

The claim group are the Kulkalgal, being:

(a)the members of the (Place Name 1 – deleted), (Place Name 2 – deleted) and (Place Name 3 – deleted) who are the descendants of one or more of the following apical ancestors: (Ancestor 1 – name deleted), (Ancestor 2 – name deleted), (Ancestor 3 – name deleted), (Ancestor 4 – name deleted), (Ancestor 5 – name deleted), (Ancestor 6 – name deleted), (Ancestor 7 – name deleted), (Ancestor 8 –name deleted), (Ancestor 9 – name deleted), (Ancestor 10 – name deleted), (Ancestor 11 – name deleted), (Ancestor 12 – name deleted), (Ancestor 13 – name deleted), (Ancestor 14 – name deleted), (Ancestor 15 – name deleted), (Ancestor 16 – name deleted), (Ancestor 17 – name deleted), (Ancestor 18 – name deleted), (Ancestor 19 – name deleted), (Ancestor 20 – name deleted), (Ancestor 21 – name deleted), (Ancestor 22 – name deleted) or (Ancestor 23 – name deleted); and

(b)Torres Strait Islanders who have been adopted by the above people in accordance with the traditional laws acknowledged and traditional customs observed by those people.

Registered native title rights and interests

1. The Native title claim group are traditional owners of the Claim area, and as such have exclusive proprietary and beneficial rights in the Claim area. The Native title claim group believes that their native title rights to the Claim area includes:
a.The right of possession, occupation, use and enjoyment to the exclusion of all others;
b. The right to manage and care for the Claim area, including its material resources;
c.The right to transmit rights of ownership to others, in particular to descendants of members of the Native title claim group.
2. Rights deriving from the proprietary and beneficial rights include:
a.The right to access and occupy the Claim area;
b. The right to take, use, enjoy and develop the natural resources of the Claim area;
c.The right to derive economic benefit from the Claim area, including trade in its resources;
d.The right to share in the benefit of resources taken from the Claim area by others;
e.The right to make decisions about, speak authoritatively for and manage and conserve the Claim area and its resources;
f. The right to control access, occupation, use and enjoyment of the Claim area and its resources by others;
i. The right to conduct social, cultural and religious activities on the Claim area;

No native title rights or interests are claimed where such rights have previously been extinguished and such extinguishment cannot be disregarded by virtue of sections 47(2), 47A(2) and 47B(2).

_____

Louahna Lloyd

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** **(Cwlth)**

Attachment A
Documents and information considered

The following lists **all** documents and other information that were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

1. Form 1 application filed in the Court on 29 March 2007 and referred to the Registrar by letter dated 4 April 2007.

2. Reports by the Tribunal's geospatial and mapping analysts on their assessment of the area description and map contained in the application and of the searches made against the Register of Native Title Claims, National Native Title Register, Federal Court Schedule of Applications and other databases. These reports are found in an overlaps analysis dated 12 April 2007 and a memo from a Tribunal geospatial and mapping analyst dated 19 April 2007.

[End of document}