National Native Title Tribunal

Registration test decision

Application name:	Kaurareg People # 2
Name of applicant:	Mr Isaac Savage, Mr Pearson Wigness, Mr Harry Seriat, Mr Milton Savage, Mr Paul Tom
State/territory/region:	Queensland
NNTT file no.:	QC08/7
Federal Court of Australia file no.:	QUD267/08
Date application made:	28 August 2008
Name of delegate:	Hamish MacLeod

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(3), my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 13 February 2009

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Hamish MacLeod

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 the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) 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), but with the exception of amended applications that satisfy ss. 190A(1A) or 190A(6A).

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on 1 September 2007, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

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 October 2008. 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.

A summary of the result for each condition is provided at Attachment A.

Application overview

The application for determination of native title by the Kaurareg People (the application) was filed in the Queensland District Registry of the Federal Court on 28 August 2008. This is the second of two new applications by the Kaurareg People over what they assert is their traditional sea country; with Kaurareg # 1, (Federal Court file number QUD266/08) lying north of the southern boundary of the Torres Strait sea claim and thus overlapping the Torres Strait sea claim area, whereas this application, Kaurareg #2, (QUD267/08), lies to the south and does not overlap the Torres Strait sea claim.

Information considered when making the decision

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

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

I have considered the following documents:

- Contents of National Native Title Tribunal Case Management/Delegates file, 2008/02221 Vol 1, QC08/6 Kaurareg People #2;
- The results of searches by myself and other officers of the Tribunal (including Geospatial Services), of the application area against entries on the Register of Native Title Claims, Federal Court Schedule of Native Title Applications, National Native Title Register and other databases to ascertain any overlaps between the application area and other native title applications or other interests such as s. 29 future act notices and representative body regions;The Geospatial Services reports dated 18 and 25 September 2008.

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

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

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are 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. All documents and material considered in arriving at my decision have either been filed in the Federal Court and are accessible by the parties, or are in the public domain. Copies of the application and accompanying documents were sent to the State of Queensland under s. 66(2) and (2A) of the Act. An invitation to comment on the application by 10 October 2008 was extended to the State on 12 September 2008. No response was received.

Procedural and other conditions: s. 190C

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

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

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) below.

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

I note that in the case of *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] Mansfield J stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss. 61 and 62'.

His Honour also said at [39] in relation to the requirements of s. 190C(2): '...I hold the view that, for the purposes of the requirements of s. 190C(2), the Registrar may not go beyond the information in the application itself.'

I am of the view that *Doepel* is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not (except in the limited instance which I explore below in my reasons under s. 61(1)) to undertake any qualitative or merit assessment of the prescribed information or documents, except in the sense of ensuring that what is found in or with the application are the details, information or documents prescribed by ss. 61 and 62.

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 and reasons

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

In *Doepel* Mansfield J provided some guidance on the task I must undertake to determine whether the requirement in s. 61(1), as imposed by s. 190C(2), is met. His Honour states:

> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration – [36].

Schedule A describes the native title claim group, as set out below in my reasons under s. 190B(3).

I do not find anything on the face of that description or elsewhere in the application which leads me to conclude that the description of the native title claim group 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.

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 and reasons

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

Part B of the application provides the name and address for service of the applicant.

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 and reasons

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

A description of the persons in the native title claim group is found in schedule A of the application, as set out below in my reasons under s. 190B(3).

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 and reasons

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

The application is in the form prescribed by Regulation 5(1)(a) and (b) of the Native Title (Federal Court) Regulations 1998 and was filed, as required, pursuant to s. 61(5)(a) and (b).

It contains the information prescribed by ss. 61 and 62, and is accompanied by the prescribed documents, (that is, an affidavit from each of the persons comprising the applicant prescribed by s. 62(1)(a)), thereby meeting the requirements of s. 61(5)(c) and (d).

I am not required under s. 190C(2) to consider whether the prescribed fee has been paid to the Federal Court.

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 approved determination of native title, 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) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

Result and reasons

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

There are five affidavits of each of the persons comprising the applicant at Attachment R1 of the application. They appear to be competently witnessed. I note that only the affidavit of Isaac Savage strictly complies with the requirements of subparagraph (v) in comprehensively setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. However, the affidavits of the other four applicants adopt the contents of Mr Savage's affidavit in subparagraph (iv) by swearing to the belief that all of the statements made in the application are true, and referring to the authorisation meeting in their affidavits. In addition to that, the affidavit of the group's legal representative, [Solicitor 1 – name deleted], sets out in detail the what was done to notify members of the group as contemplated in subsection (v) of this section. The affidavits sufficiently address the matters required by ss. 62(1)(a)(i)–(v).

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 9 paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here.

I note again my view that *Doepel* is authority that the consideration of s. 190C(2) does not involve going beyond the application, and in particular does not require some form of merit assessment of the material in determining whether the requirements of s. 190C(2) are met—at [36], [37] and [39].

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 and reasons

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

There is a description at Schedule B of the application of the area covered by the application, and areas that are excluded from it, together with a map that shows the external boundaries of the application area, and indicates the area 'as within the red line of the Map comprising attachment C'.

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 and reasons

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

There is a map marked 'Attachment C' referred to in Schedule C of the application which appears to show the boundaries.

Searches: s. 62(2)(c)

The application must contain the details and results of all searches carried out by or on behalf of the native title claim group 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 and reasons

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

Schedule D states that no searches have been carried out to determine the existence of non-native title rights and interests.

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 and reasons

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

Schedule E of the application provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application area. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

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

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

Result and reasons

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

The application, at Schedules F and G, refers to Attachments F, F1 and F2 which contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and for the particular assertions in the section. Further information in relation to the factual basis is provided at Schedule M.

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 and reasons

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

Schedule G states that the native title claim group access the application area and undertake fishing and hunting activities there and refers to material contained in Attachments F and F1 – F2.

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 and reasons

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

Schedule H states that the applicants are not aware of any other Native Title Determination Application in the claim area.

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

Result and reasons

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

Schedule HA states that the applicants are not aware of any such notices.

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 and reasons

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

Schedule I of the application, states that the applicant is not aware of any s. 29 notices that relate to the application area.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it meets each of the subrequirments of ss. 62(2)(a) to (h).

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.

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

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

(a) the previous application covered the whole or part of the area covered by the current application, and
(b) the previous application was on the Register of Native Title Claims when the current application was made, and
(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

Result and reasons

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

For compliance with this section, I must ascertain that no person included in this application was a member of the native title claim group of any previous application in the circumstances set out above.

An analysis carried out by the Tribunal's Geospatial Services (Geospatial) on 25 September 2008 states 'No applications as per the Register of Native Title Claims falls within the external boundary of this application as at 25 September 2008'.

Schedule O states 'The Applicants are not members of any Native Title Claim Group in a native title application that has been made to the whole or part of the area covered by this Application'.

On the basis of this information, I am satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application.

Subsection 190C(4) Authorisation/certification

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

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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 and reasons

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(b) are met including that the condition of s. 190C(5) is met.

Sections 190C(4) and 190C(5) are concerned with the authorisation of the applicant to make the application and to deal with matters arising in relation to it by the rest of the native title claim group.

As the application has not been certified, the requirements of s. 190C(4)(b) apply. These are that the Registrar (or his delegate) 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 matters arising in relation to it, by all the other persons in the native title claim group.

The role of the Registrar's delegate in relation to s. 190C(4)(b) was set out in *Doepel:*

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given. The nature of the enquiry is discussed by French J in *Strickland v NTR* at [259]–[260], and approved by the Full Court in *WA v Strickland* at [51]–[52]. Both *Martin* at [13]–[18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b) – at [78].

The Act imposes two further conditions at s. 190C(5)(a) and (b) which are conditions precedent about which the Registrar must be satisfied before proceeding to consider the requirement at s. 190C(4)(b). The section states that the Registrar may not be satisfied at s. 190C(4)(b) 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.

Authorisation is defined in s. 251B of the Act:

> For the purposes of this Act, all the persons in a native title claim group or compensation claim group authorise a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
>
> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

> (b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Proper authorisation of the persons making a native title determination application has been recognised by the Federal Court as crucially important under the Act.

In *Strickland v Native Title Registrar (Strickland)* [1999] FCA 1530, a decision upheld by the Full Court, French J observed :

> Nevertheless, this is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications—at [57].

In *Daniel v State of Western Australia* (*Daniel*) [2002] FCA 1147, 194 ALR 278 at [11] his Honour said:

> It is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so.

His Honour emphasised the importance of the 'ultimate' and 'continuing' authority of the native title claim group by ensuring 'the applicant' is properly authorised: *Daniel* at [16] and [17].

The requirement in s. 190C(4)(b) that authorisation be by 'all the other persons in the claim group' is not interpreted literally by the court.

For example, in *Lawson on behalf of the `Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) the Court said:

> In s 251B(b) there is no mention of "all" and, in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process—at [25].

This decision does not, in my view, dilute the underpinning importance of authorisation emphasised by the previously mentioned authorities.

I refer also to what was said in *Ward v Northern Territory* 2002 FCA 171, (though this was in consideration of a s.66B application), by O'Loughlin J :

> The information concerning the meeting that was held on 27 January 2002, the date of Mr Carlton's affidavit, is wholly deficient. There is no information about that meeting. Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24]. It may not be essential that these questions be answered on any formal basis such as in terms of the convening and conducting of a meeting in a commercial atmosphere, but the substance of those questions must be addressed' – at [25].

I turn now to the process of authorisation described in Attachment R1 of the application. Attachment R1 consist of affidavits sworn by the five persons comprising the applicant, an affidavit sworn by the solicitor representing the applicant with annexures marked 'A' to 'E' that are described as true copies of newspaper advertisements in relation to the authorisation meeting.

Of the five applicant affidavits, that of Isaac Savage is the most detailed and descriptive of the authorisation process. The remaining four are identical in content and they essentially comply with the requirements of s. 62(1)(a) given the confirmation of the contents of the application, including the description of authorisation process, provided in paragraph two of their affidavits. I discuss this in my reasons at s. 62(1)(a) above. They go on to briefly state that on 22 August 2008 the Kaurareg Aboriginal people met with [Legal Representative - name deleted] at the Wongai Hotel on Horn Island in the Torres Strait. At the meeting they instructed the lawyers to prepare and lodge a native title determination application over that part of the Kaurareg sea country which is the subject of the application. The meeting nominated the five people who comprise the applicant to make the application on behalf of native title claim group.

Paragraphs (5) and (6) of Isaac Savage's affidavit describe the particular basis on which he believes that he is authorised by all persons of the native title claim group to make the application. I note the following statements made by Mr Savage:

- On 22 August 2008 he attended an authorisation meeting at the Wongai Hotel on Horn Island in the Torres Strait called for the purpose of allowing the claim group to authorise persons to act on their behalf as applicant to the Kaurareg Sea Claim Application and authorise other matters as necessary for that application.

- He knows and believes that the solicitors acting for the group had given notice of the authorisation meeting. Over 45 people attended the meeting. In his experience as a Kaurareg Aboriginal person, it would not be expected that all members of the community would attend at the meeting, but rather, it was to be expected that some would rely on others to make decisions, some would rely on other community members or family to keep them informed and matters which can influence participation can include traditional social structures, individual interest, seniority in a family and personal preference and life circumstance.

- His opinion was that that the meeting was well attended.

- He believes that only people who were described in Schedule A, (the native title claim group), of the application attended and voted at the meeting.

- He believes this because the attendance sheet requested the participants to identify the relevant ancestors from whom they were descended. There was no suggestion or complaint raised at the meeting that there were people there who were not known to other people at the meeting, nor that there were people in attendance who were not entitled to pass resolutions, nor that there were people not in attendance whose absence meant that it was inappropriate to deal with any of the matters dealt with at the meeting and all resolutions passed referred to the Kaurareg Aboriginal People as the native title claim group and no one at the meeting objected to this terminology. He is of the view that this was because it was apparent that this description applied equally to the attendees who participated in the passing of resolutions.

- The meeting attendees passed resolutions that:

    1. It was an appropriate meeting to make decisions relating to the lodgement of a native title determination over Kaurareg sea country.
    2. There was no process of decision-making that must be complied with under traditional law in relation to authorising a person to make a native title determination application.
    3. A process of decision-making was agreed to and adopted whereby a majority vote indicated by a show of hands would be the means by which a decision as to authorisation would be made.
    4. The five persons comprising the applicant are authorised to make the native title determination application and deal with matters arising in relation to it.

An affidavit of [Solicitor 1 – name deleted], a solicitor for the applicant, is also part of Attachment R1. Copies of advertisements for the authorisation meeting, published in the *Torres Strait News* (13-19 August 2008), *Northern Territory News* (6 August 2008), *Cairns Post* (6 August 2008), *Townsville Bulletin* (6 August 2008) and *National Indigenous Times* (7 August 2008), are annexed to [Solicitor 1 – name deleted] affidavit.

The newspaper advertisements annexed to [Solicitor 1 – name deleted] affidavit are headed 'Authorisation meeting – native title determination application for Kaurareg Sea Country Friday 22 August & Saturday 23 August 2008' and state that, 'The meeting is being convened to authorise one or more persons on behalf of the Kaurareg people to make a native title determination application for Kaurareg sea country, especially that area of sea which is already covered by the Torres Strait Regional Sea Claim, and to deal with matters arising from a native title determination application for Kaurareg sea country.' It supplies meeting times and places, the purpose of the meeting, and who should attend. It provides the inclusive formula at Schedule A of the application

for the native title claim group as to who should attend. At the bottom of each advertisement is the statement 'Note: This is a very important meeting'.

I note the following information from [Solicitor 1 – name deleted] affidavit:

- On 6 August 2008 she wrote to the Secretary of the Kaurareg Traditional Elders Corporation and the Chairperson of the Kaiwalagal Aboriginal Corporation supplying them with bundles of notices in respect of the proposed authorisation meeting to be placed on notice boards in their locality.
- On 6 August 2008 law firm [Legal Representative – name deleted] sent correspondence containing copies of notices in respect of the authorisation meeting to 117 individuals in Torres Strait and Queensland. This correspondence also included an attendance slip and a stamped addressed envelope to [Legal Representative – name deleted] to confirm attendance at the meeting.
- Further letters enclosing notices were sent to a number of individuals on 12 and 13 August 2008 when their addresses were obtained.
- A facsimile of the notice was sent to 12 regional councils in the area of the claim on 6 August 2008 by [Legal Representative – name deleted] with a request that these be displayed on notice boards at the community councils.
- On 12 August [Solicitor 1 – name deleted] telephoned these councils to confirm that the notices had been posted as requested. Four councils had not posted the notices and she sent a further copy of the notices to be posted as requested, and was advised that this would be done.

Compliance with s. 190C(4)(b) and s. 190C(5)

The statements and information required by s. 190C(5) are supplied in the affidavits of each of the five persons comprising the applicant, at Attachment R1. The requirements of s. 190C(5) are therefore met.

In relation to s. 190C(4)(b), I must now decide whether I am satisfied that the persons comprising the applicant are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all other persons in the group.

Based on the statements made in each of the applicant affidavits, I am satisfied that the five persons comprising the applicants are members of the native title claim group.

In relation to whether I am satisfied that the applicant is authorised by the rest of the native title claim group to make the application and to deal with matters arising in relation to it, I note firstly that the authorisation process is comprehensively and sequentially described in the affidavit by Isaac Savage at Attachment R1. I note also that the other four persons comprising the applicant have made affidavits verifying that they were authorised as a result of the authorisation meeting on Wongai Island on 22 August 2008.

As detailed above, the evidence from the applicant's legal representative is that the authorisation meeting was advertised in five newspapers with circulation in the area of the claim and adjoining Northern Territory two to three weeks prior to its being held. Two relevant aboriginal corporations, the Kaurareg Traditional Elders Corporation, and the Kaiwalagal Aboriginal

Corporation were advised of the meeting by correspondence sent two weeks before the meeting. The correspondence contained bundles of notices of the meeting to be displayed on notice boards in their locality. A large number of people were contacted individually by post. Attendance lists were distributed with return post provisions. Twelve regional councils were advised of the meeting with subsequent follow-up confirmation of receipt of the notice, and redistribution of the notice where it had not been displayed. In my view, the efforts made to notify claim group members of the meeting were thorough and extensive.

Mr Isaac Savage, in his affidavit, notes that over 45 people attended the meeting. He explains, at paragraph 4, that full participation by members of the Aboriginal community of such a meeting may not occur due to various factors. He states that the meeting was very well attended for a meeting of that kind. He said, at paragraph 6, that only people who fell within the claim group's definition attended. This was due to the requirement of nominating their descent in the attendance sheet. No suggestion was raised at the meeting of attendance by people who were not entitled, nor was the absence of any crucial party noted by the attendees.

At paragraphs 7 (b) and (c) Mr Savage states that resolutions were passed that the attendees agreed that there was no traditional decision-making process under law and custom to be complied with in relation to authorising persons to make a native title determination application, and decision-making would be by majority vote evinced by a show of hands to indicate acceptance of a resolution. Subsections 251B (a) and (b) refer to the necessity of either a traditional decision-making process, or in lieu of that, a decision-making process agreed to and adopted by a native title claim group when authorising an application. In relation to an agreed and adopted process, I refer to these comments from *Anderson v State of Western Australia* [2003] FCA 1423 where it was said:

> The adoption by a native title claim group of a decision-making process by way of majority vote will be justifiable if there is no traditional decision-making method applicable to the processes of authorisation associated with the making and conduct of a native title determination application. And it may well be the case, in connection with the procedural aspects of native title litigation, that there is no relevantly applicable traditional decision-making method. Native title litigation is not exactly a traditional activity—at [46].

A resolution was passed that the meeting was an appropriate one to make decisions relating to lodgement of a native title determination application over Kaurareg sea country. Further resolutions were adopted to authorise the lodgement of such an application, and to specifically authorise the five persons comprising the applicant to make the application and to deal with matters arising in relation to it.

The steps to be taken required by the case law are also met. The statements of Mr Savage and [Solicitor 1 – name deleted] are specific, and non-formulaic as is required by *Strickland.* The affidavits of the other four people listed as applicants are identical in content, but nonetheless support the evidence of Mr Savage that the applicant is authorised as a result of the meeting in August 2008. While not every detail regarding the circumstances of the authorisation meeting discussed in the *Ward* decision referred to above have been supplied, the information that is supplied either alludes to these requirements, (such as the attendance list), or mentions them specifically. *Lawson* is further authority as to the content of the process which the particular group must follow. The information regarding the conduct of the parties in the decision-making process

is adequate. Notification to members of the native title claim group through media advertisements, personalised correspondence and dissemination of notices to various community organisations, regional councils and specific Kaurareg corporations is comprehensive.

In conclusion, based on the information before me, I am satisfied that the five persons comprising the applicant are authorised, in accordance with an agreed and adopted decision-making process, at the meeting of 22 August 2008 to make the application and deal with matters arising in relation to it by all the other persons in the claim group. I am satisfied that the applicant is currently authorised.

Merit conditions: s. 190B

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

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

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.

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 and reasons

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

A written description of the claim area is contained at Schedule B and a map at Attachment C, as filed in the Court on 28 August 2008.

Schedule B describes the application area as "the land and waters described in Attachment B and shown as within the red line of the Map comprising Attachment C".

Paragraph 1 of Schedule B specifically excludes:

- the land and waters the subject of Federal Court Proceeding QUD 6040 of 2001 *(Akiba 7 Ors v State Queensland & Ors)* which is shown by the Red Hatching on the Map comprising Attachment C:
- the land and waters between High Water Mark and Low Water Mark for that part of the claimed land and waters which adjoins the mainland of Cape York; and
- the Determination of Drummond J made 23 May 2001 in *Kaurareg People v Queesland (QG6023 of 1998, QG6024 of 1998, QG 6025 of 1998, QG6026 of 1998 and QG6027 of 1998).*

The application area only extends to the Low Water Mark of the mainland and to the High Water Mark throughout the remaining area of the application.

Schedule C refers to Attachment C which is an A4 monochrome copy of a colour map produced by Geospatial Services, entitled "Kaurareg People Native Title Determination Application", dated 15/08/2008 as amended by the applicants and includes:

- the application area depicted as a stippled area bordered by a bold line;
- the land and waters within that area, subject to Federal Court Proceeding QUD 6040 of 2001 depicted by hatching;
- topographic information such as towns, rivers and creeks over the Torres Strait area;
- relevant native title determination and application areas;
- scalebar, northpoint, coordinate grid and legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

An assessment of the map and description carried out by Geospatial on 25 September 2008 states:

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

Data reference and source are stated as application boundary data compiled by the National Native Title Tribunal, with the High Water Mark as defined by the Queensland *Land Act 1994*. The description includes notes relating to the source and data used to prepare the description.

Together with the map at Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of the claim area on the earth's surface can be identified with reasonable certainty.

Paragraphs 2 and 3 of Schedule B of the application lists general areas excluded from the application. This is a generic description that excludes from the application area any land subject to certain kinds of acts defined in the Act as having extinguished native title. I am satisfied that the description of the internal boundaries by general exclusions provides an objective mechanism to identify those areas which fall within the class exclusions as determined in the case *Daniels for the Ngaluma People & Monadee for the Injibandi People v State of Western Australia (Daniels)* [1999] FCA 686 at [32].

Subsection 190B(3)
Identification of the native title claim group

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

Result and reasons

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

As the application does not name all native title claim group members individually, s. 190B(3)(a) is not applicable.

My consideration must then turn to whether the description in the application meets the requirement in s. 190B(3)(b). This section requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

At [37] His Honour states that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of [sic] any particular person in the identified native title claim group can be ascertained'.

The description of the claim group in Schedule A of the application is in these terms:

> The Native Title Claim Group on whose behalf the claim is made is the Kaurareg Aboriginal people , being the descendants of the following people:
> [Schedule A then names 18 individuals. Attachment F refers to these individuals as 'apical ancestors'.]

The description indicates that the group is comprised of all persons who are the descendants of the named ancestors. I take this to mean only biological descendants. By supplying the names of 18 apical ancestors, (as they are referred to in attachment F), the applicants have provided a formula by which the claim group membership can be ascertained through a description of sufficient clarity. In my view, it is an objective means of identification by which it can be ascertained (with some further factual inquiry) whether any particular person is in the group.

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

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

Result and reasons

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

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

Section 62(2)(d) requires that the application contain 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law'. The phrases 'native title' and 'native title rights and interests' are defined by s. 223(1) which provides as follows:

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

In *Doepel* His Honour Justice Mansfield suggested this test:

> In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning— at [123].

Further observations on the requirements of the section are made by His Honour in *Doepel* at [91] to [92], [95] and [98] to [101].

Schedule E contains a description of the claimed native title rights and interests, I reproduce these in full in my consideration of s. 190B(6) below.

In my view, the description of all the claimed native title rights and interests is clear, understandable and makes sense. The requirements of this section are therefore met.

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
>
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
>
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
>
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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) below.

In *Doepel*, Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; *but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests.* In other words, the Registrar

> is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts – at [17]. (Emphasis added.)

This paragraph of the *Doepel* judgment was quoted with approval in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (27 August 2008), (*Gudjala FC*) at [83],with the emphasis in italics as appears above. The Full Court in *Gudjala FC* went on to say:

> …Indeed, there is no reason to doubt that this statutory scheme contemplates that it would be open to the Registrar to accept an application based on the application, including the accompanying affidavit, without having regard to other information of the type referred to in s 190A(3). *Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit. Of course, if an applicant fails to fully and comprehensively furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim* although that risk is ameliorated by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a) – at [90]. (*emphasis added)*

and at [92]:

> Of central importance in this appeal are the details specified by s 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii). Those details are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests. The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. *In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim* (*emphasis added).*

I have quoted sections of this decision at length, and italicised the parts that directly refer to the assessment of s. 190B(5), the wording of which is similar to ss. 62(2)(e)(i),(ii) and (iii). The Full Court finding in this decision is that, by inference, the high standard of evidentiary detail required under the first instance *Gudjala People 2 v Native Title Registrar (Gudjala)*[2007] FCA 1167 has been modified (although the first instance *Gudjala* did not refer directly to evidentiary standards, that concept is dealt with in the Full Court consideration of the first instance decision).

For the information to be satisfactory it must, on the one hand, 'be in sufficient detail to enable a genuine assessment of the application…and be something more than assertions at a high level of generality', but, on the other hand it need be no more than 'a general description of the factual

basis on which the application is made', and need not 'provide evidence that proves directly or by inference the facts necessary to establish the claim'. Balanced against this is the passage quoted above from the decision in *Doepel* where the Court considered the test the Registrar is required to apply under s. 190B(5). The Full Court chose to quote and emphasize that section of those reasons, namely:

> That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests.

I turn now turn to the quality of the asserted factual basis provided in support of this application.

In addressing 'the quality of the asserted factual basis' I note the status and origin of the information supplied.

I have had regard to the information contained in Attachments F, F1 – F2 and Schedule M of the application. Each of the persons comprising the applicant has signed affidavits that swear that they believe the statements made in the application are true.

Schedule M states:

> Members of the Native Title Group continue to:
> (1) Visit, traverse, use and occupy the land and waters of the Application area;
> (2) Fish, hunt, gather natural resources from and within the application area.

Attachment F is headed 'Factual basis for the native title rights and interests claimed', with information then appearing under three subheadings that correspond with ss. 190B(5)(a) to (b) . Further information is provided under the subheading, 'The rights and interests claimed are supported by a native title determination on adjoining land and waters'.

Attachment F1 provides an extract of the decision of Justice Drummond in *Kaurareg People v State of Queensland* [2001] FCA 657 (*Kaurareg*) at [2] to [13]. This was a consent determination of the native title rights of the Kaurareg People in respect of seven islands, the majority of which fall within the waters that are covered by this new application. It carries considerable evidentiary support for the application which contains extensive reference to the use of the waters by the applicants in which the *Kaurareg* islands are situated.

Attachment F2 comprises chapter thirteen of a publication titled 'Customary Marine Tenure in Australia', which is titled 'The Sea of Waubin The Kaurareg and their Marine Environment' by [Anthropologist – name deleted] and the Kaurareg Tribal Elders.

Result and reasons 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).

Information supporting this subparagraph is contained under paragraph 1 of Attachment F, and is expanded upon in Attachments F1 and F2.

Attachment F, paragraph 1 states that the Kaurareg people, as a group, has had an association with the Kaurareg Archipelago and surrounding waters, including the claim area, between the date of sovereignty (said to be May 1872) and the present. Reference is made to the findings of fact by Justice Drummond in *Kaurareg* where he states that:

> That there has long been identified in the historical records of Australia the existence of a separate people known as Kaurareg is demonstrated by the evidence available to me. These records show that the Kaurareg were the original inhabitants of the islands of the Kaurareg Archipelago prior to and at the time of the claim of sovereignty made on behalf of the English Crown in 1770 by Captain Cook and thereafter – at [2].

Attachment F, paragraph 1 includes the following information:

- Historical first-hand observations by Captain Cook, and subsequent Europeans visiting the area throughout the eighteenth and nineteenth centuries, further support the above findings of Drummond J.
- The list of apical ancestors in Schedule A of the application, from which members of the claim group are descended, consists of original inhabitants, and their immediate descendants, of the land and waters of the Kaurareg Archipelago as at May 1872.
- A process of diaspora is described as occurring in 1869 where the surviving Kaurareg inhabitants of Muraleg (Prince of Wales) Island were moved to Kirriri (Hammond) Island after they were subjected to mistaken retribution by the then authorities, (the actual culprits being the Kulkalgal of Naghi Island (paragraph 1, F2). They were moved from there to Moa Island, immediately north of the claim area, by the Queensland Government in 1922, from whence they continued to visit their homelands and maintain laws and customs associated with them.
- The Kaurareg Aboriginal people's sea extended as far as the channel between Waral Island and Dollar Reef. The sea country also extends to Mt Adolphus Island and Kagar Reef in the east.
- In1947 [Ancestor 1- name deleted], father of one of the persons comprising the applicant, [Applicant – name deleted], moved back first to Kirriri, and then to Nurupai (Horn) Island where the Kaurareg resettled and remain to the present day.
- Kaurareg people currently live predominantly on Horn Island with other smaller communities on Hammond and Moa Islands.
- The Kaurareg people have continued to reside permanently on or close to their traditional country and have continued to use their traditional land and sea country, including the claim area, since sovereignty to the present.

Result and reasons 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).

Gudjala is of assistance when applying this subparagraph to the material in the application:

> The decision in *Yorta Yorta* (supra), (*Members of the Yorta Yorta Aboriginal Community v Victoria (Yorta Yorta)* (2002) 194 ALR 538), demonstrates that the requirement that the laws and customs be traditional means that they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society. The applicant submits that this does not lead to the conclusion that the apical ancestors must have comprised a society. I accept that submission – at [63] and
> The starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860 – at [66].

This approach to the *Yorta Yorta* decision, that the factual basis for s. 190B(5)(b) must include a description of how the laws and customs of the claim group are rooted in the traditional laws and customs of a society that existed at the time of sovereignty, was endorsed in *Gudjala FC* – at [96].

The terms 'native title', 'native title rights and interests' and 'traditional' used in this subparagraph are further defined in the Act and relevant case law. Section 223(1) of the Act defines 'native title' and 'native title rights and interests':

> (1) 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 or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;

The terminology in ss. 190B(5)(b) and (c) is similar to that found in s. 223(1)(a). The High Court in *Yorta Yorta* considered the word 'traditional' in the context of s. 223(1)(a). The High Court held that:

> "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

The High Court made further reference to the term 'traditional laws and customs' in s. 223(1)(a):

> First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws

> and customs out of which rights and interests must spring if they are to fall within the definition of native title– at [46] to [47]. (Emphasis in original.)

In my view, the application provides a wealth of material in attachments F, F1 and F2.

Attachment F, paragraph 2, lists a number of features of the laws and customs of the Kaurareg people at sovereignty. These laws and customs are said to have bound the group as a normative society in terms of: firstly, common membership and identity with Kaurareg laws, customs and beliefs and secondly binding the society as a whole to the land and waters of the Prince of Wales Archipelago. These laws and customs are said to give rise to and support the rights and interests claimed. Paragraph 7 of F1 states 'It is worthy to note that the Kaurareg, in addition to the close cultural spiritual connection they have with the islands have traditionally played an important part in the complex trade and customary exchange networks that have long linked Australia, the various Torres Strait Islands, and New Guinea'.

In Drummond J's findings, at F2, paragraph 2, he states:

> That there has long been identified in the historical records of Australia the existence of a separate people known as the Kaurareg is demonstrated by the evidence available to me. These records show that the Kaurareg were the original inhabitants of the islands of the Kaurareg Archipelago prior to and at the time of the claim of sovereignty made on behalf of the English Crown in 1770 by Captain Cook and thereafter.

I also note the following information from Attachment F2:

> Central to Kaurareg marine tenure is the mythological figure Waubin, whose exploits provide the charter for Kaurareg tenure of both land and sea: '[T]hus it is that the whole sea area enclosing the Kaurareg islands is called Waubin in Malu'... The calling up of species is still an important factor of Kaurareg hunting and fishing. It is often said that only people who know how to 'talk to country' – whether on land (*murrup*) or sea (*malu*) – are able to hunt or fish successfully in a given locality, and 'the institution of *gangar* shows that on an informal level there was (and is) some kind of individual tenure of the sea. A *gangar* is a fishing spot where a particular individual regularly fishes. Some *gangar* are closely guarded secrets and are handed down to a man by his father, together with a spell or magic formula that ensures good fishing.'

Under the heading 'Traditional Knowledge of the Marine Environment', the following statements are made:

> Kaurareg people distinguish amongst at least six different kinds of tide…the Kaurareg used detailed knowledge of the tides in the exploitation of the marine environment... currents are thought to be caused by ancestral spirits. In some cases, currents can be slowed down by making offerings to the spirits associated with them…Kaurareg people still placate the spirit of this potentially treacherous patch of sea by throwing bread into the water, or by lighting a cigarette and throwing it into the sea.

Reference is made to the current division of the year into two main seasons according to prevailing wind direction. Specific types of fish or sea mammals are eaten during various times of these respective seasons.

A description of the use of a traditional celestial calendar governing fishing and the harvesting of bush tucker is also described.

The reference to the mythological figure Waubin and other information provided in attachments F-F2 establishes, in my view, the existence of traditional custom that in its observation defines the extent of the customary marine tenure. Traditional customary fishing practices add further weight to the claim that there exist traditional laws and customs that give rise to the claim to native title over the areas of this application. Reference is made to the contemporary practice of tradition and custom that give rise to the fishing, hunting and gathering rights and interests claimed and how they are practised, which is derived from the Kaurareg society in existence when sovereignty was asserted in 1872. In my view all of the material provides a sufficient factual basis to support the existence of a normative system post-sovereignty. The findings of fact by Justice Drummond in *Kaurareg*, and the information contained in F2 confirm this continuum. I am of the view that the information before me in support of this assertion is pitched more specifically than a 'high level of generality'.

Result and reasons 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).

Again the decision of the first instance *Gudjala* assists in the application of this subsection:

> Subsection 190B(5) required that there be a factual basis supporting the assertion that the Native Title claim group have continued to hold Native Title in accordance with traditional laws and customs. This implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty – at [82].

This does not appear to have been overturned by *Gudjala FC* – (at [96]).

There are various examples in Attachment F, paragraph 3 that support the assertion, nine of which are listed at paragraph 3.4.

The description of the contemporary practice of law and custom to which I have referred in my analysis of the material in s. 190B(5)(b) is equally applicable to this subparagraph for the purposes of continuity. The factual basis therefore supports that current or contemporary law and custom is that of a society with a continuous vitality since sovereignty.

This is shown in the existence of *gangar,* the associated magic formula or spells and the continued practice of talking to the country. The celestial and meteorological determination of the seasons and the time for particular hunting, gathering and fishing activities also point to a traditional customary continuum.

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.

Subsection 190B(6)
Prima facie case

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

Result and reasons

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

Under s. 190B(6), I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 (*North Ganalanja*) by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who 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].

This test was recently considered and approved in *Doepel* where the court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate when considering the condition in s. 190B(6).

I have adopted the ordinary meaning referred to in *North Ganalanja* in considering whether some of the claimed native title rights and interests claimed can be established on a prima facie basis.

The application contains the following description of the claimed native title rights and interests:

> The Applicants claim the following non-exclusive rights in relation to the whole of the Application area:
> (a) The right to access, traverse and be present on the Application Area;
> (b) The right to fish, hunt, gather and use natural resources on and from the Application Area, including the right to hunt and take turtle and dugong;
> (c) The right to trade and exchange the natural resources of the Application Area;
> (d) The right to manage and conserve the sea, seabed and the natural resources of the Application Area;
> (e) The right to speak for and about and make decisions with respect to the Application Area;
> (f) The right to access and to protect sites of spiritual or cultural significance on the Application Area;
> (g) The right to maintain and transmit knowledge in respect of the Application Area and its resources;
> (h) The right to conduct, transmit and maintain cultural, spiritual and religious practices in respect of the Application Area;
> (i) The right to inherit, succeed and transmit the Native Title Rights and Interests in the Application Area to other Native Title Holders;
> (j) The right to resolve disputes between the Native Title Holders in relation to the Application Area;
> (k) The right to build structures for the purposes of hunting, fishing and gathering in the Application area, including stone fish traps and dugong platforms;

(l) The right to anchor and moor vessels; and
(m) Such other rights and interests that the Court considers appropriate on the evidence.

I note from the outset that all the rights are claimed in a non-exclusive capacity. I note also that the bulk of the claim is over the sea. I will consider each right and interest separately, or, where they are of a like nature, as a group.

(a) The right to access, traverse and be present on the Application Area;
(b) The right to fish, hunt, gather and use natural resources on and from the Application Area, including the right to hunt and take turtle and dugong;

Result: Both rights established.

These rights are kindred. They have been confirmed as non-exclusive rights in the determinations of *Mary Yarmirr & Ors v Northern Territory of Australia and Ors* [1998] FCA 1185 at paragraph [5(a) & (b)], and *Lardil Peoples v Queensland [2004] FCA 298* at paragraph [7(1) & (2)]. Both determinations qualify the rights and interests with the words 'in accordance with and subject to their traditional laws and customs' in the former, and 'for the purposes allowed by and under their traditional laws and customs' in the latter. Although there is no such qualification in the application before me, Schedule E of the application refers to 'Native Title Rights and Interests' and so qualify the non-exclusive rights claimed.

Factual evidence of past and contemporary practice is provided at attachments F, F1 and F2, some of which has been referred to above under s. 190B(5).

I am satisfied that these rights are prima facie established.

(c) The right to trade and exchange the natural resources of the Application Area;

Result: Established.

In *Northern Territory v Alyawarr, Kayteteye, Warumungu, Wakay Native Title Claim Group* (2005) 229 ALR 431 (*Alyawarr*) the view of the Court was that:

> The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it could not be a right in relation to land – at [153].

Trading rights and practice are mentioned extensively in the attachments. The findings of fact by Justice Drummond in *Kaurareg* at Attachment F1 state:

> the Kaurareg...have traditionally played an important part in the complex trade and customary exchange networks that have long linked Australia, the various Torres Strait Islands and New Guinea – at [7].

Further, in Attachment F2, reference is made to 'the days when heads were an important item in the trade between Torres Strait and New Guinea' – at page 224.

At Attachment F, 2.1(8) reference is made to 'Involvement in the complex and extended trading network which existed between mainland Australia and Papua New Guinea especially the Fly River people, including the trade of natural marine resources'. Further, at paragraph 3.4(5) there is reference to 'A continued system of reciprocity and exchange both within the claimant group and with its indigenous neighbours'.

I am satisfied that this right is prima facie established.

(d) The right to manage and conserve the sea, seabed and the natural resources of the Application Area;

Result: Established

This right was recognised, on a non-exclusive basis, in *Kaurareg* as the right to 'maintain and manage the Determination Area for the benefit of the Native Title Holders, including to: (b) conserve and safeguard the Natural Resources of the Determination Areas' – at [6(b)]. It was further recognised in the consent determination of *Andrew Passi on behalf of the Meriam People v Queensland* [2001] FCA 697 as the right to '(b) conserve, manage, use and enjoy the natural resources of the determination area for the benefit of the common law holders including for social, cultural, economic, religious, spiritual, customary and traditional purposes'—at [para 3(b)].

At page 222 of Attachment F2, mention is made of 'a principle of marinel law that one can only fish or hunt successfully when one is hungry. There were strong sanctions, enforced both by the elders and by clan leaders, against extravagant exploitation of species'. Further Attachment F, at paragraph 3.4(2), reference is made to 'continued management and conservation of the marine environment'.

I am satisfied that this right is prima facie established.

(e) The right to speak for and about and make decisions with respect to the Application Area;

Result: Not established

In *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* [2004] FCAFC 187 (*Wandarang*) the Full Court revisited the original consent determination and varied the rights, excluding that section of the claimed right 'to make decisions about the use and enjoyment' of the determination area. The use of that phrase imports an aspect which is inconsistent with a non exclusive exercise of the right.

Although examples are given in the material before me that could support the right to speak for the application area, in my view the importation of exclusivity by the reference to the making of decisions prevents this right being prima facie established.

(f) The right to access and to protect sites of spiritual or cultural significance on the Application Area;

Result: Established

This right was recognised, on a non-exclusive basis, in *Alyawarr* – at [135] – [140]. At attachment F2, page 226, contemporary reference is made 'the role of dugong and turtle meat in Kaurareg feasts, held at 'tombstone openings'. At page 224 of the same attachment it is stated 'Kaurareg people still placate the spirit of this potentially treacherous patch of sea by throwing bread into the water or by lighting a cigarette and throwing it into the sea'. These activities point to a current access and protection of site activity.

I am satisfied that this right is prima facie established.

> **(g) The right to maintain and transmit knowledge in respect of the Application Area and its resources;**
> **(h) The right to conduct, transmit and maintain cultural, spiritual and religious practices in respect of the Application Area;**

Result: Neither right established

These two claimed rights are kindred. Despite the fact that they are non-exclusive, these rights have been found by the Courts to not be rights in relation to land as required by s. 223(1) of the Act. This was discussed in *Western Australia v Ward* [2002] 213 CLR 1:

> To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the NTA. However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). 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 to be 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].

As these are not rights recognised by law as 'native title rights', it is unnecessary for me to examine whether their practice is supported by activities described in the application. I am of the view that these rights cannot be prima facie established.

> **(i) The right to inherit succeed and transmit the Native Title Rights and Interests in the Application Area to other Native Title Holders;**

Result: Established

In *Mundraby v State of Queensland* [2006] FCA 436 the right to 'pass on native title in relation thereto in accordance with traditional laws and customs' was granted in a consent determination.

At page 222, information is provided about 'gangar', a fishing spot where a particular individual regularly fishes. 'Some gangar are closely guarded secrets and are handed down to a man by his father, together with a spell or magic formula that ensures good fishing.' This relates both to the passing on of native title rights and interests, and traditional knowledge.

I am satisfied that this right is prima facie established.

(j) The right to resolve disputes between the Native Title Holders in relation to the Application Area;

Result: Not established

This right was considered by Justice Sundberg in *Neowarra v Western Australia* (*Neowarra*) [2003] FCA 1402 where it was found to be 'a right in relation to people and not in relation to land or waters'.

I am of the view that this right cannot be prima facie established.

(k) The right to build structures for the purposes of hunting, fishing and gathering in the Application area, including stone fish traps and dugong platforms;

Result: Established

The contemporary use of a 'dugong platform' is described in the 'Dugong and Marine Turtle Knowledge Handbook' [(2006), North Australian Indigenous Land and Sea Management Alliance] at page 24. It is described as 'a structure unique to Torres Strait. It is made of six bamboo poles lashed together on top of which rests a canoe centreboard'.

At attachment F2, page 222, reference is made to the fact that 'there were at least two stone fish traps in Kaurareg waters'.

In *Alyawarr* the Full Court discussed the potential inconsistency of a permanent structure with a pastoral leaseholder's rights:

> The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so. Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise – at [131].

The structures cited in the current claimed right are not, in my view, of a permanent nature, and do not exert an exclusive right.

I am satisfied that this right is prima facie established.

(l) The right to anchor and moor vessels;

Result: Not established

There is no case law on this claimed right, as far as I am aware, it has neither been discussed nor recognised by the courts.

At a prima facie level the question is whether there is any factual basis for such a right under traditional law and custom.

I find no activity in the material before me that would support this right, nor anything that such a right exists under traditional law and custom.

I am of the view that this right cannot be prima facie established.

(m) Such other rights and interests that the Court considers appropriate on the evidence.

Result: Not established

In my view this is a statement rather than a description of a specific right or interest.
I am of the view that this right cannot be prima facie established.

Subsection 190B(7)
Traditional physical connection

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

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

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

(i) the Crown in any capacity, or

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

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

Result

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

Reasons

I understand the phrase 'traditional physical connection' to be a physical connection in accordance with the particular traditional laws and customs of the claim group, in accordance with *Yorta Yorta* as referred to above. At [29.19] of the Explanatory Memorandum to the *Native Title Amendment Act* 1998, further clarification is given to the term 'connection' as described in s. 190B(7) in that it 'must amount to more than a transitory access or intermittent non-native title access'.

Schedule M states that:

Members of the Native Title Claim Group continue to:

(1) Visit, traverse, use and occupy the land and waters of the Application Area;

(2) Fish, hunt and gather natural resources from and within the Application Area;

Schedule F and its referred attachments support the assertions of Schedule M that there are members of the claim group who do the things asserted. In my view, these activities amount to traditional physical connection within the application area.

The information provided in attachment F2, though general, provides confirmation of permanent native title access, and this is acknowledged and reinforced in the *Kaurareg* findings. I have discussed this above in my consideration of s. 190B(5).

The affidavits of all the persons comprising the applicant at Attachment R1 of the application endorse the contents of the application. Four comply with the requirements of s. 62(1)(a), while the fifth, that of Isaac Savage, provides more detail, specifically in regard to the authorisation process adopted. Mr Savage refers to his 'experience as a Kaurareg Aboriginal person'. This experience encompasses meeting attendance where decisions on matters relating to land and sea and cultural heritage are made. He was able to offer an opinion on traditional social structure, he refers, in his affidavit, to 'my experiences as a Kaurareg aboriginal person'. This consultant role infers a past or present traditional physical connection which forms the basis of his specialised knowledge.

Kaurareg was a consent determination recognising the Kaurareg peoples' native title over the land and inland waters of various islands including Horn Island which are surrounded by the current claim area. There were three associated Indigenous Land Use Agreements executed at the same time dealing with cultural heritage, native title and recognition of native title or traditional ownership. The Kaiwalagal Aboriginal Corporation is the Prescribed Body Corporate for the determination area and is registered with the Office of the Registrar of Indigenous Corporations. It was first registered on 13 November 2001. It lists Mr Isaac Edward Savage as contact person/secretary with a postal address on Horn Island. It forms part of the archipelago that constitutes the traditional Kaurareg seat territory according to the information contained in attachment F2, (page 221). Amongst other things, it administers the Indigenous Land Use Agreements. I am able to infer from this information that Mr Savage has a traditional physical connection with the claim area. His stated personal knowledge as a Kaurareg Aboriginal person is corroborated by his corporate status, and references to experience within the community. The inextricable mixture of land and sea in the Kaurareg society and culture provides, inferentially, an association with the seas that form the subject of this claim. Attachment F2 refers to this homogeneous association at page 222, paragraph 3 in reference to the calling up species of prey, and knowing how to 'talk to country', whether on land or sea.

The information above may, to an extent, be characterised as inferential. *Doepel* makes observations about the Registrar's task in reference to s. 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration – at [18].

Paragraphs 1.9 and 1.10 of attachment F state:

> In 1947, [Ancestor 1- name deleted], *father of present day claimant* [Applicant – name deleted], attempted to move back to his country on Kirriri, (Hammond Island), and then to Nurupai (Horn) Island. From that time, and in the face of further government attempts to move Kaurareg to the mainland, the Kaurareg resettled on Nurupai [emphasis added].
>
> Kaurareg Aboriginal people currently live predominantly on Nurupai (Horn Island) with other smaller Kaurareg communities on Hammond Island and at Kubin on Moa Island.

Material supplied at Attachment F indicates a contemporary vibrant marine culture being practised by members of the Kaurareg people.

I am satisfied that at least one member of the claim has a current (or previous) traditional physical connection.

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

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

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 below.

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 and reasons

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

The Geospatial report dated 25 September 2008 states: 'No determinations as per the National Native Title Register fall within the external boundary of this application as at 25 September 2008'.

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 and reasons

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

A Schedule B, paragraphs 2 and 3, any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application.

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 and reasons

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

At Schedule E, 'Description of Native Title Rights and Interests', all rights and interests claimed are non-exclusive.

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.

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

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

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

Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result below.

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

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

Schedule Q states 'The Native Title Claim Group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown'.

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

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

The rights and interests claimed at Schedule E are all non-exclusive, and therefore do not purport to exclude any other rights and interests in relation to offshore waters. Schedule P also confirms this.

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

The application **satisfies** the subcondition of s. 190B(9)(c).I am not aware, and nothing in the application or accompanying documents before me disclose, that the claimed native rights and interests have otherwise been extinguished. Schedule B, paragraph 2(b) excludes areas where native title has otherwise been wholly extinguished.

Combined result for s. 190B(9)

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

[End of reasons]

Attachment A
Summary of registration test result

Application name:	**Kaurareg People # 2**
NNTT file no.:	**QC08/7**
Federal Court of Australia file no.:	**QUD267/08**
Date of registration test decision:	**13 February 2009**

Section 190C conditions

Test condition	**Sub-condition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 61(5)		**Met**
	re s. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**

Test condition	Sub-condition/requirement		Result
		s. 62(2)(ga)	Met
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		Not met
	s. 190C(4)(b)		Met

Section 190B conditions

Test condition	Sub-condition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	Not met
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

Test condition	Sub-condition/requirement	Result
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**