NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

Reasons for Decision

DELEGATE: Graham Miner

Application Name: Yalanji People

Names of Applicants: Eileen Walker, Peter Fischer, Agnes Walker, John Walker Jnr, Raymond Pierce, Hazel Douglas

Region: FNQ NNTT No.: QC94/13

Date Application Made: 7 December 1994 Federal Court No.: QUD6008/98

The application is **ACCEPTED** for registration pursuant to s.190A of the *Native Title Act* 1993 (C'th).

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

September 2005
Date of Decision

Brief History of the Application

The original application was lodged with the Tribunal on 7 December 1994. A notice of motion to amend the application was filed with the Federal Court on 26 August 1999 and leave to amend was granted by the Federal Court on 6 September 1999.

The registration test was applied and the application was accepted on the 13 September 1999.

A notice of motion to amend, together with an amended application, was filed in the Federal Court on 1 October 2001. On 11 October 2001, Deputy District Registrar Baldwin of the Federal Court granted leave to the applicants to amend the application.

Another notice of motion to amend was filed in the Federal Court on 24 March 2004. On 17 May 2004 leave was granted to the applicant by the Federal Court to amend the application. The Court also ordered that a settled clear version of the amended application be filed but not before 1 June 2004.

The applicant was granted leave by the Federal Court to further amend the application on 24 March 2005. A re-engrossed application was filed with the Court pursuant to the order dated 24 March 2005. The NNTT received this application from the Federal Court on the 26 April 2005. This is the application to be considered as required by s. 190A of the Act.

Information considered when making the Decision

In making this decision I have considered and reviewed the original and amended applications, and all of the information and documents from the following files, databases and other sources:

- The National Native Title Tribunal's administration files, legal service files and registration testing files for QC94/13 including the amendment application filed with the Court on 24 March 2004 and the amendment application filed with the Court on 24 March 2005.
- The National Native Title Tribunal's Geospatial Analysis & Mapping Branch's geospatial assessment and overlap analysis dated 20 June 2005.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.
- The amendment application filed on 26 August 1999.
- Registration Test decision on the 13 September 1999.
- The re-engrossed application filed with the Court pursuant to the order dated 24 March 2005.
- Affidavits sworn by the applicants lodged with the original application.
- Letter from Cape York Land Council (CYLC) dated 15 August 2005.

Copies of any material provided directly to the Registrar by the applicants in relation to my consideration of the application were provided to the State. The State did not provide any comments in relation to this material.

Note: I have not considered any information and materials that may have been provided in the context of mediation of the group's native title application. This is due to the 'without

prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

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

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

On 5 May 2005, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the *Native Title Act* 1993 (Cth).

The above delegation has not been revoked as at the date of the decision.

NOTE TO APPLICANT:

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

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

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

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then the merit conditions.

S190C: Procedural Conditions

Applications contains details set out in s. 61 and s. 62: S. 190C(2)

S. 190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s. 190C(2).

Native Title Claim Group: S. 61(1)

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

Reasons relating to this sub-condition
Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 of the Act.

I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). That is one of the procedural requirements to be satisfied to secure registration: s. 190A(6)(b). If the description of the native title claim group *in the application* indicates that not all persons in the native title group are included, or that it is in fact a sub-group of the native title claim group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration (see *AG of Northern Territory v Doepel* [2003] FCA 1384 (*Doepel*) [at 36].

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

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

The description of the persons in the native title claim group is found in Schedule A as follows:

> "The native title claim group is the Eastern Kuku-Yalanji, often referred to as "Yalanji side". This named identity of the group is the name by which the group identifies itself and is identified in the Aboriginal community of the Southeast Cape York Region. The group is continuous both in terms of descent and in terms of continuous transmission of the Eastern Kuku-Yalanji identity from the group of the

same name recorded in and around the claim area from late last century and in various written sources since.

Membership of the group

The current membership of the group is primarily identified by the principle of cognatic descent (i.e. descent traced through either one's father or one's mother) with an emphasis on patrilineal descent. Descent is traced from persons and groups recognised in the regional Aboriginal community as associated with Eastern Kuku-Yalanji identity, and with the claim areas, soon after European occupation. By these descent principles, the current membership of the Eastern Kuku-Yalanji people consists of the descent groups listed below:

a) The descendants of **[Person 1 – name deleted]**, **[Person 2 – name deleted]**, **[Person 3 – name deleted]**, and **[Person 4 – name deleted]** including the **[Family 1 – name deleted]** family.

b) The descendants of **[Person 5 – name deleted]**, **[Person 6 – name deleted]**, **[Person 7 - name deleted]** including the **[Family 2 – name deleted]** and **[Family 3 – name deleted]** (China Camp) families.

c) The descendants of **[Person 8 – name deleted]** and **[Person 9 – name deleted]**.

d) The descendants of **[Person 10 – name deleted]** and **[Person 11 - name deleted]**, including **[Family 4 – name deleted]**, **[Family 5 – name deleted]** and **[Family 6 – name deleted]** families.

e) The descendants of **[Person 12 – name deleted]** and **[person 13 – name deleted]** including the **[Family 7 – name deleted]**, **[Family 8 – name deleted]** and **[Family 9 – name deleted]** families.

f) The descendants of **[Person 14 – name deleted]** including the **[Family 10 – name deleted]** family.

g) The descendants of **[Person 15 – name deleted]** and **[Person 16 – name deleted]** including the **[Family 11 – name deleted]**, **[Family 12 – name deleted]**, **[Family 13 – name deleted]**, **[Family 14 – name deleted]**, **[Family 15 – name deleted]** families.

h) The descendants of **[Person 17 – name deleted]**.

i) The descendants of **[Person 18 – name deleted]**, **[Person 19 – name deleted]**, **[Person 20 – name deleted]** and **[Person 21 – name deleted]**, including the **[Family 16 – name deleted]** family and the Yalanji branch of the **[Family 17 – name deleted]** family.

j) The descendants of **[Person 22 – name deleted]**, **[Person 23 – name deleted]**, **[Person 24 – name deleted]**, and **[Person 25 – name deleted]**.

k) The descendants of **[Person 26 – name deleted]** including the **[Family 18 – name deleted]** and **[Family 19 – name deleted]** families.

l) The descendants of **[Person 27 – name deleted]**, and **[Person 28 – name deleted]**, **[Person 29 – name deleted]**, **[Person 30 – name deleted]**, **[Person 31 – name deleted]**, **[Person 32 – name deleted]**, **[Person 33 – name deleted]** and **[Person 34 – name deleted]** including the **[Family 20 – name deleted]** family.

m) The descendants of **[Person 35 – name deleted]** including the **[Family 21 – name deleted]** family.

n) The descendants of **[Person 36 – name deleted]** and **[Person 37 – name deleted]**, **[Person 38 – name deleted]**, **[Person 39 – name deleted]**, **[Person 40 – name deleted]**, **[Person 41 – name deleted]** and **[Person 42 – name deleted]** including the **[Family 22 – name deleted]** and **[Family 23 – name deleted]** families.

o) The descendants of **[Person 43 – name deleted]** and **[Person 44 – name deleted]**.

p) The descendants of **[Person 45 – name deleted]** and **[Person 46 – name deleted]** including the **[Family 24 – name deleted]** family.

q) The descendants of **[Person 47 – name deleted]**, **[Person 48 – name deleted]** and **[Person 49 – name deleted]** including the **[Family 25 – name deleted]** Family.

r) The descendants of **[Person 50 – name deleted]**, **[Person 51 – name deleted]**, **[Person 52 – name deleted]**, **[Person 53 – name deleted]**, **[Person 54 – name deleted]** and **[Person 55 – name deleted]** and **[Person 56 – name deleted]** and **[Person 57 – name deleted]**, including the **[Family 26 – name deleted]** and **[Family 27 – name deleted]** families.

s) The descendants of **[Person 58 – name deleted]** and **[Person 59 – name deleted]** including the **[Family 28 – name deleted]** family.

t) The descendants of **[Person 60 – name deleted]** and **[Person 61 – name deleted]** including the **[Family 29 – name deleted]** family.

u) The descendants of **[Person 62 – name deleted]** including the **[Family 30 – name deleted]** family.

v) The descendants of **[Person 63 – name deleted]** including the **[Family 31 – name deleted]** family.

w) The descendants of **[Person 64 – name deleted]** including the **[Family 32 – name deleted]** family.

x) The descendants of **[Person 65 – name deleted]** and **[Person 66 – name deleted]** including the **[Family 33 – name deleted]** family.

y) The descendants of **[Person 67 – name deleted]** and **[Person 68 – name deleted]** including the **[Family 34 – name deleted]** and **[Family 35 – name deleted]** families.

z) The descendants of **[Person 69 – name deleted]** and **[Person 70 – name deleted]** including the **[Family 36 – name deleted]** family.

aa) The descendants of **[Person 71 – name deleted]** including the **[Family 37 – name deleted]** family.

bb) The descendants of **[Person 72 – name deleted]** and **[Person 73 – name deleted]** including the **[Family 38 – name deleted]** family.

cc) The descendants of **[Person 74 – name deleted]** and **[Person 75 – name deleted]**.

dd) The descendants of **[Person 76 – name deleted]** including the **[Family 39 – name deleted]** family.

ee) The descendants of **[Person 77 – name deleted]** and **[Person 78 – name deleted]** including the **[Family 40 – name deleted]** family.

ff) The descendants of **[Person 79 – name deleted]**, **[Person 80 – name deleted]** and **[Person 81 – name deleted]**, and **[Person 82 – name deleted]**, **[Person 83 – name deleted]** including the **[Family 41 – name deleted]** family.

gg) The descendants of **[Person 84 – name deleted]**, **[Person 85 – name deleted]**, **[Person 86 – name deleted]**, **[Person 87 – name deleted]** and **[Person 88 – name deleted]**.

hh) The descendants of **[Person 89 – name deleted]** including the **[Family 42 – name deleted]** family.

ii) The descendants of **[Person 90 – name deleted]** and **[Person 91 – name deleted]** including the **[Family 43 – name deleted]** family.

jj) The descendants of **[Person 92 – name deleted]** and **[Person 93 – name deleted]** including the **[Family 43]**, **[Family 44 – name deleted]**, **[Family 45 – name deleted]** and the **[Family 46 – name deleted]** families.

(kk) The descendants of **[Person 94 – name deleted]** and **[Person 95 – name deleted]** including the **[Family 47 – name deleted]** and **[Family 48 – name deleted]** families.

ll) The descendants of **[Person 96 – name deleted]** and **[Person 97 – name deleted]** including the **[Family 49 – name deleted]** family.

mm) The descendants of **[Person 98 – name deleted]**, including the **[Family 50 – name deleted]** and the **[Family 51 – name deleted]** families.

nn) The descendants of **[Person 99 – name deleted]**, **[Person 100 – name deleted]**, **[Person 101 – name deleted]** and **[Person 102 – name deleted]**, including the **[Family 52 – name deleted]** and **[Family 53 – name deleted]** families.

oo) The descendants of **[Person 103 – name deleted]** and **[Person 104 – name deleted]**, including the **[Family 54 – name deleted]**, **[Family 55 – name deleted]** and **[Family 56 – name deleted]** families.

Membership of the group includes recruitment by adoption into the group, in accordance with traditional laws and customs. Attachment A of the application provides information concerning adoption.

I have considered the application in the light of the above statements of the Court in *Doepel* and I am of the view there is nothing on the face of the description of the persons in the native title claim group, or elsewhere in the application, to indicate that not all the persons in the native title claim group are included in the description or that it is in fact a sub-group of the native title claim group for the area of the application.

I am satisfied that this description of the persons in the native title claim group meets the requirement in s. 61(1), as is imposed by s. 190C(2).

Result: **Requirements met**

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

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

Reasons relating to this condition

The name of the persons named as the applicant appears at the commencement of the application and the address for service in Part B of the application.

Result: Requirements met

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

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

Schedule A of the application describes the native title claim group. For the reasons that lead to my conclusions (below) that the requirements for s. 190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

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

Reasons relating to this sub-condition

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

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

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

s. 61(5)(d)
As required by s. 61(5)(d) the application is accompanied by supporting affidavits as prescribed by s. 62(1)(a) and a map (maps) as prescribed by s. 62(2)(b). I refer to my reasons in relation to those sections of the Act.

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

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

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-condition

The application is accompanied by an affidavit from each of the six persons named as applicant. Each affidavit appears competently witnessed. Each affidavit contains the statements required by sub-paragraphs (i), (ii), (iii), (iv). Each of the deponents states the basis on which the applicant is authorised, as required by sub-paragraph (v).

These affidavits are those provided with the earlier application. I am satisfied that these affidavits form part of the application as required by s. 61(5) and that these affidavits sufficiently address the matters required by s. 62(1)(a).

I also note that the affidavits at Attachment F address the requirements of s. 62(1)(a).

Result: Requirements met

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

Comment on details provided

The applicants have provided detail of traditional physical connection in six affidavits, one sworn by each of the applicants. The affidavits are attached to the application following Attachment F.

This is a convenient place to note that Attachments E and F were prepared by **[Anthropologist 1 – name deleted]**. I see that in a letter to the Tribunal dated 13 September 2005, CYLC said that **[Anthropologist 1]** is "an anthropologist of many years experience, who has worked with the Yalanji people since 1988. At the request of the native title applicants and Cape York Land Council, **[Anthropologist 1]** in 1996 prepared a confidential detailed report on the continuing connection of the Applicants to the land claimed for the purposes of mediation of the Yalanji Native Title Application. **[Anthropologist 1]** drew the content of Attachments E and F from that report, as well as from his knowledge of the Yalanji people and their traditional laws and customs from his many years of working with the Applicants".

Result: Provided

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

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

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

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

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

Reasons relating to this condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s. 190B(2) have been met, I am satisfied that the map contained in the application shows the external boundaries of the claim area.

Result: Requirements met

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

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

Reasons relating to this sub-condition

Schedule D states that:

> "In preparing the claim the applicants' legal representative CYLC undertook various searches in records of the then Department of Lands, Wet Tropics Management Authority and the then Department of Mines, and further assistance has been provided by the State and the National Native Title Tribunal since lodgement of the claim to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application, and the results of those searches are shown in Attachment D".

The application meets the requirements of this condition. See also my reasons for decision provided under s. 190B(2).

Result: Requirements met

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

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

Reasons relating to this sub-condition

Schedule E contains a description of the claimed native title rights and interests. The description does not amount to a mere assertion that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished at law. For the reasons given in my conclusion that the applicants have met the requirements of s. 190B(4), I am satisfied that the requirements of this section are met.

Result: Requirements met

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

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

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

(ii) there exist traditional laws and customs that give rise to the claimed native title; and
(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Reasons relating to this condition

The application contains a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. Schedule F states:

> "A general description of the native title rights and interest claimed and, in particular, the factual basis on which it is asserted that:
>
> (a) the native title claim group has, and the predecessors of those persons had, an association with the area; and
>
> (b) there exist traditional laws and customs that give rise to the claimed native title; and
>
> (c) the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.
>
> The factual basis on which it is asserted that the native title rights and interests claimed exist and the particular assertions as set out in paragraphs (a), (b), and (c), of this Schedule F are as follows:
>
> 1. The native title claim group is a community or group;
>
> 2. The native title claim group has ancestral connections to (or otherwise has as its predecessors) the community that was present on and connected to the land and waters of the area covered by the application at that time when those places became part of the colony of New South Wales, ie. on 27 January 1788;
>
> 3. The native title claim group members acknowledge and observe traditional laws and customs;
>
> 4. Those laws and customs are based on the traditional laws and customs of the community that was present on and connected to the land and waters of the area covered by the time sovereignty was extended to this area.

At Schedule G of the application the applicants state the following:

> "Activities carried out on Eastern Kuku-Yalanji country are activities in exercise of the rights and interests described in Schedule E, and cover all the categories listed in Schedule E. They include, for example:
>
> 1. A long historical and constant contemporary collection and use of natural resources.
> 2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands, including every major subdivision of those lands.
> 3. Generation of income and economic benefit from the claim areas - eg. through tourism ventures of their own and work area clearance contracts by the Mossman Gorge rangers.
> 4. Substantial and widespread exercise of management responsibilities for the traditional lands, and exercise of cultural property rights in them, both

within the claimant and wider regional Aboriginal communities, and externally through involvement in National Park and other conservation and tourism planning, site protection, and work area clearances.

5. Continual internal self regulation and demarcation of localized family and sub-group subdivisions and interests within the claim area under the direction of senior people of authority.
6. Asserting valid proprietary and possessory claims over the area covered by the application.
7. Speaking for, on behalf of and authoritatively about the area covered by the application.
8. Inheriting and transmitting native title rights and interests.
9. Conferring certain rights on others.
10. Asserting the right to control access, occupation, use and enjoyment of the area covered by the application and its resources by others;
11. Resolving disputes about who is or who is not an Eastern kuku Yalanji person.
12. Resolving disputes between Aboriginal people concerning the area covered by the application, with the assistance of native title holders of adjoining areas where such assistance is necessary.
13. Determining as between native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application.
14. Engaging in a way of life consistent with the traditional connection of the native title claim group to the area covered by the application.
15. Upholding, regulating, monitoring and enforcing the customary laws of the native title claim group in relation to the area covered by the application.
16. Excluding particular members of the native title claim group from the exercise of particular native title rights and interests in relation to particular parts of the area covered by the application.
17. Being buried on, and burying members of the native title claim group on, the area covered by the application.
18. Physically occupying the area covered by the application.
19. Physically enjoying and using the area covered by the application.
20. Living on and erecting residences and other infrastructure on the area covered by the application.
21. Protecting, managing and using the area covered by the application.
22. Manufacturing materials, artefacts objects and other products from the area covered by the application.
23. Disposing of Natural Resources taken from the area covered by the application and manufactured items derived from the area covered by the application, by trade, exchange or gift.
24. Engaging in economic life in relation to the area covered by the application.
25. Learning, determining, maintaining, communicating and expanding cultural, social, natural, environmental spiritual and cosmological knowledge, traditions, beliefs, customs, relationships, practices and institutions in relation to the area covered by the application, to ensure the continued vitality of the culture and wellbeing of the native title claim group.
26. Exercising all those rights, duties and responsibilities which are derived from and are necessary for, or ancillary to, the full exercise and enjoyment of the native title rights and interests referred to above."

In addition there are six affidavits, one sworn by each of the applicants, attached to the application following Attachment F. They are part of the application. I note that these

affidavits were originally provided to the Tribunal on a confidential basis attached to a letter from CYLC dated 25 August 1999.

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application, and cannot be the subject of additional information provided separately to the Registrar or his delegate. I am satisfied that this information is found in Schedules G, Attachment F of the application and the above affidavits of the applicants attached to the application following Attachment F – see my reasons under s. 190B(5) for details of this information.

I am satisfied that the information provided by the application amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e).

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

If native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities

Reasons relating to this condition

The application provides general details of activities that the native title claim group currently carry out in relation to the area claimed at Schedule G of the amended application. I consider that the activities that the group carries out in the claim area are described in general terms and that the application complies with this condition.

Result: Requirements met

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

The application contains 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 a determination of compensation in relation to native title;

Reasons relating to this condition

Schedule H of the application states – "Not applicable". I take this to mean that there is no such application of which the applicant is aware.

In an assessment dated 20 June 2005, the Tribunal's Geospatial Analysis & Mapping Branch states that no other claimant or non-claimant applications fall within the external boundaries of the current application**.**

Result: Requirements met

Details of s. 29 notices: S. 62(2)(h)

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area

Reasons relating to this condition

At Schedule I of the application the applicants cite details of one (1) s. 29 notices of which they are aware.

I note that the Tribunal's Geospatial Analysis & Mapping Branch assessment dated 20 June 2005 has confirmed there is one (1) notice issued under s.29 of the Act (or under a corresponding provision of a law of the State or Territory) in relation to the whole or part of the application area as at 20 June 2005.

I am satisfied that the application meets the requirements of this condition.

Result: Requirements met

s.190C(2)

Reasons for Decision

For the reasons identified above the application contains all details and other information, and is accompanied by the affidavits and other documents, required by ss.61 and 62.

Aggregate Result: Requirements met

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

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

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

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

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

Reasons for the Decision

A search of the Geospatial database and Register of Native Title Claims reveals that there are no overlapping applications that cover any of the area of this application which are on the Register of Native Title Claims, as a result of a consideration pursuant to s. 190A. This was confirmed in the overlap analysis dated 20 June 2005 prepared by the Tribunal's

Geospatial Analysis & Mapping Branch. Consequently, I need not consider this matter further.

I am satisfied that this application does not infringe the provisions of s.190C(3).

Result: Requirements met

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

Certification and authorisation:

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

(a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or

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

Note: s.190C(5) – Evidence of authorisation:

If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

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

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

Reasons for the Decision

The application is not certified pursuant to s.190C(4)(a). Consequently I must be satisfied that the requirements of s.190C(4)(b) are met. Thus I must be satisfied that the applicants 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 the other persons in the native title claim group.

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

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

The evidence of authorisation is contained in each of the applicant's affidavits provided as required by s. 62(1)(a). It is reiterated in their affidavits attached at Attachment F.

1. The applicant is a member of the native title claim group

I am satisfied that the six applicants are members of the native title claim group by virtue of their sworn evidence to that effect at the 5th paragraph of each of their respective s 62(1)(a) affidavits.

I also note that families bearing names of the surnames of the six applicants all appear in the definition of the members of the native title claim group at Schedule A of the amended application.

2. The applicant is authorised to make the application and to deal with matters arising in relation to it

Schedule R of the application says:

> "The Applicants are senior members of the native title claim group and are authorised to make the Application and to deal with matters arising in relation to it by all the other persons in the native title claim group in accordance with their traditional laws and customs, as senior members of the native title claim group nominated by unanimous agreement of the members of the native title claim group present at a meeting on 8 June 1999 to which all known members of the native title claim group had been invited and as set out in the attached affidavits."

The affidavits sworn by each of the six applicants required by s. 62(1)(a) of the Act provide further information as to the authorisation process (see para. 5), namely:

- each of the applicants is a senior member of the native title claim group;
- nominated by unanimous agreement of the members of the native title claim group present at a meeting on 8 June 1999;
- to which all known members of the native title claim group had been invited;
- in accordance with their traditional laws and customs.

I also see that in a letter to the Tribunal dated 15 August 2005 CYLC confirmed that in a letter dated 13 September 1999 from CYLC it is said that:

> "A meeting of the Eastern Kuku-Yalanji was held on 8 June at Wujal Wujal. The meeting was planned well in advance and CYLC devoted substantial resources to the meeting. The meeting formed part of a 3 day workshop held on 7, 8 and 9 June 1999.
>
> Wujal Wujal was chosen as a meeting venue as the most easily accessible location for the most people. Notices of the meeting were posted in a number of locations where it is known that Eastern Kuku Yalanji peoples reside as well as being sent by mail to known traditional owners. Notices of the meeting and invitation letters stated that the meeting was for the purposes of discussing the native title claim and that people should inform as many Eastern Yalanji Claimants as possible about the meeting. Telephone contact was made with members of the Eastern Kuku Yalanji steering committee. CYLC assisted with the provision of transport and accommodation to ensure as many people could attend as possible. This included flying some claim group members from interstate.
>
> CYLC management, administrative staff, project officers, junior and senior lawyers and consultant anthropologists assisted with and attended the meeting on 8 June 1999 and ensured Eastern Kuku Yalanji people either attended the meeting or otherwise provided authorisation in accordance with traditional law and custom for the nomination of the six people forming the Applicant.
>
> At the meeting of the native title claim group on 8 June 1999 a unanimous decision was made to authorise the people named as the Applicant to make the application and deal with matters arising in relation to it as evidenced by the affidavits accompanying the application. Furthermore a record of the meeting states that "Eastern Kuku Yalanji mob decided that there would now be 6 claimants whose names will be on the cover of the application as making the claim on behalf of all Kuku-Yalanji people. They are:**[Applicant 1 – name deleted]**, **[Applicant 2 – name deleted]**, **[Applicant 3 – name deleted]**, **[Applicant 4 – name deleted]**, **[Applicant 5– name deleted]** and **[Applicant 6 – name deleted]**".

Internal records of the meeting also show that CYLC staff and its consultant anthropologist explained to the claim group that:

- traditional owners must authorise the people who put the claim in and they must have the authority of the group.
- the Applicant makes the claim on behalf of all eastern Kuku-Yalanji people.

Please do not hesitate to contact CYLC should you require further information."

I am satisfied that the processes referred to in the affidavits and the above letter adequately evidence proper authorisation of the applicants, as defined in s. 251B of the Act.

It follows that I am satisfied that the requirements of s. 190C(5) are met as:

- the statement at Schedule R of the amended application, elaborated upon in the affidavit of the applicants constitute the requisite statement under s. 190C5(a);
- the affidavits referred to herein adequately set out the grounds on which I should consider that s. 190C4(b) has been met.

I am satisfied that the persons named as the applicant are members of the native title claim group and properly authorised to make the application and to deal with matters arising in relation to it.

The application passes this condition of the registration test.

Requirements met

Merits Conditions: S. 190B

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

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

Reasons relating to this condition

The claim area is located in North Queensland, within the Local Government areas of Douglas Shire Council and Cook Shire Council.

External Boundaries
The Tribunal's Geospatial Service provided a Geospatial Assessment and Overlap Analysis of the description of the application area and map dated 20 June 2005.

Schedule B states:

"Area covered by the application (description of area):

(1) The boundaries of the area covered by the application are as set out in the document entitled "Description of External Boundaries" which is annexed as Attachment B but the area covered by this application does not include the area described in (2)."

See Attachment B of the application for the description of external boundaries.

Map

Schedule C refers to Attachment C which is an A3 size black and white copy of an AO size colour map produced by Native Title & Indigenous Land Services, Department of Natural Resources and Mines, Brisbane.

The Tribunal's Geospatial Analysis and Mapping Branch advises that the map includes:

- The amended application area colour coded and categorized by tenure type and with parcels labelled with lot on plan number (a set of 37 insets show detail of parcels included in the application area).
- Cadastral boundaries and casement boundaries (with extraction date shown as 8 November 2003).
- Major localities, roads and National Parks named.
- Scale bar, north point and projection statement.
- Notes relating to the source, currency and datum of data used to prepare the map.

I am satisfied that external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and map contained in the application.

The Tribunal's Geospatial Analysis and Mapping Branch concluded in its above assessment that the description and map are consistent and identify the application area with reasonable certainty.

I am satisfied that the physical description of the external boundaries meets the requirements of s.62(2)(a)(i) and that the maps show the boundaries of the claim area in compliance with the requirements of s.62(2)(c).

Internal Boundaries

The internal boundaries are described at Schedule B at para (2). These boundaries are described by way of a formula that excludes a variety of tenure classes from the claim area, in the manner indicated below:

(2) Subject to (3) (which describes an exception to this exclusion), the areas within the boundaries in (1) that are not covered by the application are:

(a) any area that is or was subject to any of the following acts as these are defined in the Native Title Act 1993 (Cth) and the act was or is attributable to the Commonwealth or the State of Queensland):

(i) a Category A past act;
(ii) a Category A intermediate period act;
(iii) a Category B past act that is wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights and interests.
(iv) a Category B intermediate period act that is wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights and interests.

(b) any area in relation to which a 'previous exclusive possession act', as defined in section 23B of the Native Title Act 1993 (Cth), was done and the act was an act attributable to the Commonwealth or the State of Queensland; and

(c) any area in relation to which the native title rights and interests have otherwise been wholly extinguished.

(3) Despite (2), an area within the boundaries in (1) is covered by the application if the area:

(a) is an area to which the non-extinguishment principle (as defined in section 238 of the Native Title Act 1993 (Cth) applies; or

(b) is an area to which any sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions mean that the extinguishment of native title rights and interests for an area described in (2) must be disregarded."

The applicants have detailed a series of land tenure types that are excluded from the area of the application. In my view the information in the application enables the internal boundaries of the application area to be adequately identified.

Accordingly I consider that the description provides a reasonable level of certainty in regard to whether native title rights and interests are claimed in relation to particular areas of land or waters within the external boundaries of the area the subject of the application.

In this regard I have taken into account the judgement of Nicholson J in *Daniels and Ors, et al v The State of Western Australia* [1999] FCA 686. I refer specifically to para 32 of Nicholson J's judgement in which he states:

> *"These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be satisfactory compliance with the statutory requirement."*

In the event that the validity of the grants identified is established in due course, in my view, the general exclusion clause in Schedule B of the application effectively excludes those areas which are subject to the identified tenure classes.

I am satisfied that the class exclusions used in the application comply with the statutory requirement in s.62(2)(a)(ii).

To conclude, I am satisfied that the information and the map required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters.

The requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: Requirements met

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

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons for the Decision

An exhaustive list of names of the persons in the native title claim group has not been provided. Consequently, the requirements of s. 190B(3)(a) of the Act are not met.

It is therefore necessary for the application to comply with s. 190B(3)(b). To meet this condition of the registration test the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

The description of the native title claim group is found at Schedule A of the amended application, elaborated upon at Attachment A to the application.

It is stated in Schedule A that the named identity of the native title claim group, the name by which the group identifies itself and the name by which it is identified in the Aboriginal community of the Southeast Cape York region is the Eastern Kuku-Yalanji, often referred to as "Yalanji side".

Schedule A says of the application that current membership of the group is *"primarily identified by the principle of cognatic descent (i.e. descent traced through either one's father or one's mother) with an emphasis on patrilineal descent. Descent is traced from persons and groups recognised in the regional Aboriginal community associated with Eastern Kuku-Yalanji identity, and with the claim areas soon after European occupation. By these descent principles, the current membership of the Eastern Kuku-Yalanji people consists of the descent groups listed below:*

> *(a) the descendants of* [a named ancestor or ancestors], [followed then, in some cases by . .] *including the* [a named family or families] *family/families"* .

There are 40 descent groups described in this fashion.

It is finally stated in Schedule A that membership of the group "*includes recruitment by adoption into the group, in accordance with traditional laws and customs. See Attachment A."*

Thus a person may be reckoned as a member of the native title claim group as:

- descended by cognatic descent (i.e. through one's father or one's mother) from one of the ancestors named in Schedule A, and where stated, as a member of the named families listed as descended from a particular ancestor or ancestors; or
- as a person recruited by adoption into the group, in accordance with traditional laws and customs.

<u>Members descended from named ancestors</u>

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that "[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially." I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual

inquiry would need to be made in these instances to determine if any one person is a member of the group.

I am satisfied that the descendants of the named persons could be identified with minimal inquiry and as such, be ascertained as part of the native title claim group. By referencing the identification of members of the native title claim group as descendants of named ancestors, it is possible to objectively verify the identity of members of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group.

Members recruited by adoption

At Attachment A, the applicants describe what is meant by "recruitment by adoption into the group, in accordance with traditional laws and customs". It is stated that "the incidence of adoption is low, and it is not an open-ended or casual process, but arises by similar means and accumulates much the same meaning and status as it does in the general Australian community."

Following from this are the five features by which the process of adoption can be tested, based upon practice under the laws and customs of the claimants and wider Southeast Cape York region:

- "Has the person been incorporated as a child into one of the Eastern Kuku-Yalanji descent groups by an adult member of the group who raised the child as one of their own? (This is commonly referred to as "growing up" that person).
- During the time the child was growing up, did they identify as a member of that descent group, and were they commonly identified as such by the other members.
- Were they given the same rights within the descent group as other members? If so, this would be expected to flow on to rights in land as well, since kin relations and relations in connection to country share a common structure – e.g. when one refers to "my mother('s) land", the relationship to that land is seen as of a similar order to, and derived from, one's relationship to one's mother.
- As the child matured, did they become recognized as a member of the adopting adult's descent group and as Eastern Kuku-Yalanji by a significant number of other descent groups (especially by those most closely related to the family involved), and eventually by a majority of the senior people of the Eastern Kuku-Yalanji claimant group?
- Has the adopted person closely associated with the claimant group throughout their life, and held an active association with, knowledge of, etc. the traditional country of the claimant community, comparable to that of the rest of the claimant community, and prior to the native title application?"

I find that these stated features of what it means to be adopted are a sufficiently clear description of how the process of adoption works for the native title claim group. As such, it offers an objective means of verifying whether a person has been adopted into one of the descent groups named in Schedule A.

I make this decision paying particular heed to the material in the application that the incidence of adoption is low, and not an open-ended or casual process. I note also the example stated in Attachment A as to when adoption does not apply (i.e. where a child is grown up by its grandparents or other close biological kin) and the example of when adoption can occur (i.e. in the case of a step-child of the adopting adult, and where the child's biological parentage belongs to a descent group within the native title claim group other than the adopting descent group).

The information provided makes it clear how the principle of adoption works for the native title claim group. It means (to summarise the material in the application) that a person is adopted if:

- as a child, it is taken into one of the descent groups by an adult member who raises the child as their own;
- the child identifies as a member of the descent group and is so identified;
- the child is accorded the same rights as other members; and
- when adult or grown up the child is recognised as a member and closely associates with the claimant group throughout their life.

All of these principles are clearly understandable, and from them, I find that it would be possible to verify objectively whether a person has been traditionally adopted by reference to the same.

I am satisfied therefore that the overall description of the claim group is sufficiently clear so that it can be ascertained whether any particular person is in the group.

I am satisfied that the requirements of s. 190B(3)(b) are met.

Result: **Requirements met**

Native title rights and interests are readily identifiable: S190B(4)

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

Reasons for the Decision

Schedule E of the application states:

> (1) In relation to areas (including but not limited to Unallocated State Land) where there has been no prior extinguishment of Native Title or where the non-extinguishment principle (Section 238 of the Native Title Act 1993 (Cth) applies or for those areas to which any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interest for an area described must be disregarded: The native title in the land and waters covered by the application ('the claim area') is equivalent to the fullest beneficial ownership, including possession, occupation, use and enjoyment to the exclusion of all others subject to the valid laws of the State of Queensland and the Commonwealth of Australia.
>
> (2) in all other areas where the rights of the fullest beneficial ownership including possession, occupation, use and enjoyment to the exclusion of all others, are not recognised, the following rights and interests are claimed, subject to the valid laws of Queensland and the Commonwealth of Australia, to
>
> a. Speak for, on behalf of and authoritatively amongst Aboriginal people about the area covered by the application;

b. Speak for, on behalf of and authoritatively amongst Aboriginal people about the use and access under traditional law and custom of the area covered by the application;
c. Inherit and transmit the native title rights and interests;
d. Confer customary use and access rights on other Aboriginal people who seek to use and access the area covered by the application under the traditional law and customs of the native title claim group;
e. Determine as between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application;
f. Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the area covered by the application against other Aboriginal people;
g. Resolve disputes about who is and who is not a native title holder;
h. Be buried on, and to bury members of the native title claim group on, the area covered by the application;
i. Occupy the area covered by the application;
j. Use and enjoy the area covered by the application;
k. Live on the area covered by the application;
l. Establish residences on the area covered by the application;
m. Establish outstations on the area covered by the application;
n. Establish and maintain seasonal camps on the area covered by the application;
o. Construct other infrastructure on the area covered by the application;
p. Protect and care for the natural and cultural resources of the area covered by the application;
q. Maintain and protect sites and areas within the area covered by the application which are of significance to the Native Title Holders under traditional law and custom;
r. Hold ceremonies on the land;
s. Hold ceremonies concerning the land;
t. Take natural resources from the area covered by the application;
u. Manufacture materials, artefacts objects and other products from the area covered by the application;
v. Dispose of cultural resources taken from, and manufactured items derived from, the area covered by the application by customary trade, exchange or gift with other Aboriginal people;
w. Engage in subsistence activities on the land;
x. Engage in production, customary trade and other customary economic activities on the land as they relate to other Aboriginal people with respect to indigenous cultural resources;
y. Care for the area for the benefit of the native title holders;
z. Hunt and fish in the area covered by the application;
aa. Use the area covered by the application for social, customary, religious and traditional purposes.

(3) The native title rights and interests claimed:-
a) are pursuant to the traditional laws and customs of the native title holders;
b) are not exclusive rights and interest if they relate to tidal waters, and;
c) do not include ownership of any minerals, petroleum or gas wholly owned by the Crown.
d) over any areas covered by the application that are subject to a Previous Non-Exclusive Possession Act (PNEPA), as defined by s23F of the Native Title Act 1993 (Cth) do not confer possession, occupation, use and enjoyment of the area

covered by the application to the exclusion of all others, except to the extent that the non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) applies, including those areas to which any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interest for an area described must be disregarded.

e) that are subject to a validly granted PNEPA, as defined s23F of the Native Title Act 1993 (Cth), do not include any native title rights or interests which were extinguished by that PNEPA, except to the extent that any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interest for an area described must be disregarded or the non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) may apply.

f) do not include rights and interests that have been extinguished by application of the common law."

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

1. The native title claim group does not claim ownership of minerals, petroleum, or gas wholly owned by the Crown: Schedule Q.

2. The applicants do not claim exclusive possession over any offshore place: Schedule P

The requirements of the Act

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

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." This terminology suggests that Parliament intended to screen out applications which describe native title rights and interests in a manner which is vague, or unclear.

Furthermore, the phrases 'native title' and 'native title rights and interests' are used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the *Native Title Act 1993* (Cth).

Section 223(1) reads as follows:

> 'The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (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

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

(c) the rights and interests are recognised by the common law of Australia'.

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

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

Turning to consider whether some of the native title rights and interests are readily identifiable.

f. Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the area covered by the application against other Aboriginal people;

This right is, in my view, a right in relation to people and not in relation to land or waters. In my opinion it is not readily identifiable as a native title right or interest. See *Neowarra v State of Western Australia* [2003] FCA 1402 at 488.

i. Occupy the area covered by the application;

j. Use and enjoy the area covered by the application;

I have considered the above two rights claimed in the light of the decision of the Full Federal Court in *Attorney General for the Northern Territory v Ward* [2003] FCAFC at [16] - [23]. Briefly, in that case a determination was sought for 'non-exclusive rights to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement' certain identified rights - see [16]. Among other things, Wilcox, North and Weinberg JJ rejected the inclusion of the word 'occupy.' saying that:

> "As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s 225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression. They might be understood as conveying the notion discussed by their Honours, including control of access. This would be inappropriate in this case. The right of absolute control of access must have been extinguished by the grant of the pastoral leases. There might be a surviving right to make decisions, pursuant to Aboriginal laws and custom, about the use and enjoyment of the land by Aboriginal people. That right would not be affected by the grant of a pastoral lease. However, that matter is specifically addressed by sub-para (e) of para 5. We think the word 'occupy' should be omitted from the opening words of para 5. (at [17]).

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

It is my view that the above is relevant as to whether the right to "occupy", claimed here can be readily identified in respect of areas where exclusive possession *cannot* be sustained. It is my view that, in light of the above decision, it cannot be so identified.

The Full Federal Court also considered in *Attorney General for the Northern Territory v Ward* [2003] FCAFC 283 how rights and interests which are not exclusive should be formulated. The Court held that because of the requirements of s.225 of the Act:

- there must be a specification of the content of the nature and extent of the relevant rights and interests;
- the statement of rights and interests in a determination must exhaustively indicate the determined incidents of the right to use and enjoy.

In particular, the Court said at [21]:

> *"A statement about the right to 'occupy, use and enjoy' (or merely 'use and enjoy') in accordance with traditional laws and customs conveys no information as to the nature and extent of the relevant rights and interests. It is equivalent to a statement that the holders of the traditional rights and interests are entitled to exercise their traditional rights and interests. Something more is obviously required. There must be a specification of the content of the relevant rights and interests. That is why the parties included sub-clauses (a) to (e). It is to those sub-clauses that a reader may look in considering the effect of the determination. They must exhaustively indicate the determined incidents of the right to use and enjoy."*

The rights claimed at paragraphs j. do not specify the content of the use and enjoyment and conveys no information as to the nature and extent of the relevant rights and interests and hence they are not, in my opinion readily, identifiable.

I am satisfied that the other rights and interests claimed by the applicants in Schedule E are native title rights and interests and that the description is sufficient to allow those native title rights and interests claimed to be readily identified. This is sufficient to meet the requirements of the section.

Under s. 190B(6) I will consider whether the claimed native title rights and interests can be prima facie established.

Result: **Requirements met**

Factual basis for claimed native title: S190B(5)

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

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

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

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

Reasons for the Decision

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

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that "[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it." For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[5]

In essence, I must be satisfied, pursuant to s. 190B(5), that a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided is sufficient to support those assertions that:

- the native title claim group have, and their predecessors had, an association with the area claimed;
- the traditional laws and customs, acknowledged and observed by the native title group exist, and
- the native title claim group continue to hold native title in accordance with those traditional laws and customs.

Material which addresses the requirements of s. 190B(5) is contained in Schedules F, G, M and Attachments E and F. there are also six affidavits each sworn by one of the applicants that follow Attachment F. I note that the affidavit of **[Applicant 5]** attached to the application is incomplete, the second page being missing. However a complete copy of that affidavit was supplied to the Tribunal in respect of an earlier application. I will have regard to **[Applicant 5]**'s affidavit.

A general description of the factual basis on which it asserted that the three criteria identified at s.190B5(a) - (c) is met is provided in Schedule F and Attachment F of the application.

Schedule G provides details of activities currently carried out within the claim area.

Schedule M briefly states that the traditional physical connection of members of the claim group to the area claimed has been maintained. The affidavits of the applicants support the above information.

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

Current Association

[5] See *Western Australia v Ward* (2002) 191 ALR (*Ward)* at [382].

To be satisfied under this criterion, it must be evident that the association with the area is and was communal, that is, shared by a number of members of the native title claim group.

At Schedule F the applicants state:

> *A general description of the native title rights and interest claimed and, in particular, the factual basis on which it is asserted that:*
>
> *(a) the native title claim group has, and the predecessors of those persons had, an association with the area; and*
>
> *(b) there exist traditional laws and customs that give rise to the claimed native title; and*
>
> *(c) the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.*
>
> *The factual basis on which it is asserted that the native title rights and interests claimed exist and the particular assertions as set out in paragraphs (a), (b), and (c), of this Schedule F are as follows:*
>
> *1. The native title claim group is a community or group;*
>
> *2. The native title claim group has ancestral connections to (or otherwise has as its predecessors) the community that was present on and connected to the land and waters of the area covered by the application at that time when those places became part of the colony of New South Wales, i.e. on 27 January 1788;*
>
> *3. The native title claim group members acknowledge and observe traditional laws and customs;*
>
> *4. Those laws and customs are based on the traditional laws and customs of the community that was present on and connected to the land and waters of the area covered by the time sovereignty was extended to this area.*

More information is provided at Attachment F

At Schedule G of the amendment application a number of activities carried out on Eastern Kuku-Yalanji country are activities in exercise of the rights and interests described in Schedule 'E' above, and cover all the categories listed there. They include, for example:

1. A long historical and constant contemporary collection and use of natural resources.
2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands, including every major subdivision of those lands.
3. Generation of income and economic benefit from the claim areas - eg. through tourism ventures of their own and work area clearance contracts by the Mossman Gorge rangers.
4. Substantial and widespread exercise of management responsibilities for the traditional lands, and exercise of cultural property rights in them, both within the claimant and wider regional Aboriginal communities, and externally through involvement in National Park and other conservation and tourism planning, site protection, and work area clearances.
5. Continual internal self regulation and demarcation of localized family and sub-group subdivisions and interests within the claim area under the direction of senior people of authority.

6. Asserting valid proprietary and possessory claims over the area covered by the application.
7. Speaking for, on behalf of and authoritatively about the area covered by the application.
8. Inheriting and transmitting native title rights and interests.
9. Conferring certain rights on others.
10. Asserting the right to control access, occupation, use and enjoyment of the area covered by the application and its resources by others;
11. Resolving disputes about who is or who is not an Eastern kuku Yalanji person.
12. Resolving disputes between Aboriginal people concerning the area covered by the application, with the assistance of native title holders of adjoining areas where such assistance is necessary.
13. Determining as between native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application.
14. Engaging in a way of life consistent with the traditional connection of the native title claim group to the area covered by the application.
15. Upholding, regulating, monitoring and enforcing the customary laws of the native title claim group in relation to the area covered by the application.
16. Excluding particular members of the native title claim group from the exercise of particular native title rights and interests in relation to particular parts of the area covered by the application.
17. Being buried on, and burying members of the native title claim group on, the area covered by the application.
18. Physically occupying the area covered by the application.
19. Physically enjoying and using the area covered by the application.
20. Living on and erecting residences and other infrastructure on the area covered by the application.
21. Protecting, managing and using the area covered by the application.
22. Manufacturing materials, artefacts objects and other products from the area covered by the application.
23. Disposing of Natural Resources taken from the area covered by the application and manufactured items derived from the area covered by the application, by trade, exchange or gift.
24. Engaging in economic life in relation to the area covered by the application.
25. Learning, determining, maintaining, communicating and expanding cultural, social, natural, environmental spiritual and cosmological knowledge, traditions, beliefs, customs, relationships, practices and institutions in relation to the area covered by the application, to ensure the continued vitality of the culture and wellbeing of the native title claim group.
26. Exercising all those rights, duties and responsibilities which are derived from and are necessary for, or ancillary to, the full exercise and enjoyment of the native title rights and interests referred to above.

In each of the six affidavits by the applicants attached to the application following Attachment F they speak convincingly of their association with the claim area; of their experiences with traditional Eastern Kuku-Yalanji activities/customs; and of their connection with communal life as a member of the native title claim group

All of the applicants were born on and live in or within the vicinity of Eastern Kuku-Yalanji traditional country.

They all talk of being taught their language, their Stories, the spirits of their old people, about their land, how to hunt, fish and use bush food and bush medicine and about their traditional laws and customs by their parents and grandparents and other old Kuku-Yalanji people. They talk of growing up on their country and walking all over that land with their parents, grandparents and other old Kuku-Yalanji people.

They all provide examples of how they currently associate with the land, including:

- fishing and hunting in traditional ways on the land;
- gathering traditional foods from the land (for which the traditional names are given);
- living on the land in a house built with help from other Kuku-Yalanji people;
- walking all over their land;
- making traditional things like spears, dilly bags, traditional musical instruments and artefacts from the resources of the land;
- camping on the land and following their people's traditional laws and customs whilst camping;
- teaching about Stories and story places and conducting ceremonies;
- still speaking their language and having the "smell" for their country, so that the Stories know that they are not outsiders.

For instance **[Applicant 5]** says in her affidavit sworn 1 August 1999:

1. I was born in Mossman on 7 August 1948.
2. My parents and grandparents and other old Kuku-Yalanji people lived on the land that is in the native title claim. They taught me about our traditional laws and customs, our language, our Stories, the spirits of our old people, and also about our land and how to hunt, fish and use bush food and bush medicine. We walked all over that land.
3. I remember some old Kuku-Yalanji people still living in the bush in the traditional way around the area covered by the application in the late 1950's and early 1960's. I knew those old people. They were my relations. They included **[Person 105 – name deleted]**, **[Person 106 – name deleted]**, **[Person 107 – name deleted]** and old **[Person 90]**.
4. I live at Mossman which is near some of the areas included in the claim. I often visit the claim land to collect scrub hen eggs, dig yams, catch fish, and gather nuts and berries. I have lived on Kuku-Yalanji country all my life and have continued to visit the claim areas during that time.
5. I operate my own business which is called "**[Business name deleted]**". I take tourists on a tour of some of our traditional country, and tell them about our traditional customs, including how to find and use bush tucker.
6. I still know the traditional laws and customs of my ancestors and I remember all those things my old people and other Kuku-Yalanji people taught me. Whenever I go camping on our land, I still follow all our traditional laws and customs. It's not just camping like a white person might do.
7. Under our traditional law and custom, the claim land and all of our traditional country belongs to us. We own it. We can possess, occupy, use and enjoy the land, to the exclusion of all others. Those are our rights under our law. It is not possible to list all the things we can do on our land under those rights.
8. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. Outsiders cannot do these things without our permission. We make and sell dilly bags, paintings of Story Places, and musical instruments such as didjaridoo and clap sticks.
9. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and

teaching our children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land.

10. We make decisions about the land and its resources, including whether others can use the land and resources and what they can do with them.

11. Kuku-Yalanji people are the only ones who have the language for that country. We are the only ones who know the Stories, and we are the only ones who have the smell for that place. The Stories know who outsiders are from the smell.

All of this points to a strong communal attachment to the claim area by the native title claim group and I find that the native title claim group has a current association with the land the subject of the claim, thereby meeting the requirements of the first limb of s190B5(a).

Predecessor's association with the land

I am satisfied that the claim group's predecessor's also had an association with the land. Each of the applicants swears in his/her affidavit to their grandparents, parents and other old Kuku-Yalanji people living on the land in traditional ways, and, indeed, remembering old Kuku-Yalanji people still living in the bush in the traditional way around the area covered by the application, dating back to the 1920's and in the 1950's and 1960's. They talk of being taught about Kuku-Yalanji traditions and customs by their grandparents, parents and other old Kuku-Yalanji people. See for instance **[Applicant 5]**'s affidavit above

I also find the following the anthropological material in Attachment F probative in reaching the finding that claim group's predecessor's also had an association with the land under claim. The material states that:

- The association of the area with the Eastern Kuku-Yalanji group . . .is recorded from late last century, These records consist of correspondence, early reports of Protectors Meston and Roth], who each report the tribal identity of the claim area and surrounding areas as Kuku-Yalanji. The ethnography of the 1930s to 1980s (eg McConnel, Sharp, Anderson) continues to report the tribal identity of the claim areas as Kuku-Yalanji, well before the advent of native title law."

Later in Attachment F at para (c) it is said:

- "Contemporary anthropological enquiry among the claimant group and their neighbours has revealed that:
    - a distinct Aboriginal community identifying, and identified by their Aboriginal neighbours, as Kuku-Yalanji persists in relation to the claim area;
    - the sources of this community is an indigenous group in occupation of the Kuku-Yalanji area at the time of colonial entry, for which evidence is drawn from current Aboriginal oral tradition among the claimants and their neighbours, genealogies of the claimants, and early protectorate and archival records"

The truth of the information in Attachment F is sworn to by five of the six applicants in their confidential affidavits.

These extracts from Attachment F support a finding that the predecessors of the native title claim group had an association with a territory of land, within which the claimed lands are located.

Having regard to all the information outlined above I am satisfied it supports the existence of a long history of the Kuku-Yalanji community having a connection with the claim area.

I am satisfied the predecessors of the native title claim group had, an association with the area.

I add that there is a view that the factual basis upon which it is asserted the native title claim group had, and has, an association with *an area* must be proved to the satisfaction of the Registrar, or delegate, in respect of each particular parcel or area of the land and waters claimed. The contention is that it is insufficient for the native title claim group to demonstrate that it previously had and still has connection to land or waters in a broader area of traditional country. It is of course necessary for the area claimed in the application to be within the area asserted to be the broader traditional country.

This contention has significance to this application, where the application is lodged in relation to a number of parcels of land. This claimant application is made in relation to areas that are part of a larger area of land and water that is asserted to be the broader traditional country of the native title claim group (see Schedule F, Attachment F and the affidavits of the applicants).

From the authorities, it appears that native title could continue to be held by a native title group to all the traditional country, subject to valid extinguishing legislative or executive acts, where sufficient connection has been maintained to that traditional area. This may not be dependent on a native title group having to show physical connection to every parcel or tenement or allotment within that broader traditional area. The applicants in effect state at Schedule F, Attachment F and in their affidavits that the claimants retain a traditional connection both to the area claimed and to their traditional country generally. In this regard, I am satisfied that the claim areas are located within the group's traditional country.

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

This subsection requires me to be satisfied that:

1. traditional laws and customs exist;
2. those laws and customs are respectively acknowledged and observed by the native title claim group, and
3. those laws and customs give rise to the claim to native title rights and interests.

In addition to the evidence outlined in my reasons under s. 190B(5)(a) I have found the following evidence of the applicants, in their affidavits attached to the application, probative on the issues raised by s. 190B5(b). There the applicants talk of the following matters relevant to s. 190B5(b):

- their traditional country and the claim land belonging to them under their traditional laws and customs;
- making decisions for the land and looking after the land, by, for example, burning, protecting their Stories and sacred places, walking over it; teaching their children about "all these things";
- being put on the land by the Stories, to look after the land;
- the claim group having the language for their country; being the only ones who know the stories; being the only ones who have the smell for "that place". Of the Stories knowing who outsiders are from the smell;

- of outsiders e.g. their neighbours the Djabugay people, only coming on to the land and using it if they ask permission. If outsiders come onto the land without permission they might get sick;
- of being grown up on the land by their parents, grandparent and other old Kuku-Yalanji people;
- hunting and fishing and gathering in accordance with the traditional ways taught to them by the old Kuku-Yalanji old people;
- still knowing their language and using their language.

I have also relied on the anthropological material in Attachment F. Attachment F refers to a system of law and custom of the claimants (and of their regional neighbours) relating to:

- a customary title system being a part of the local cosmology, e.g. the claimants and their neighbours hold that ancestor Beings created the titles of particular tribal groups and smaller descent groups within them over specific areas, and the mythological narrative of their actions provides the titles of the claim group with ancient authority;
- the claim group adhering to the doctrine that rights to an area of land derive from a spiritual connection to it;
- tribal identification of each area of Southeast Cape York is part of a system of mutually recognised divisions of the regions and the claim area is recognised as Kuku-Yalanji under this common, regionally shared system of like divisions;
- rights and interests are acquired on the basis of membership in one of the descent groups constituting the claim groups.

This material finds convincing expression in the sworn evidence of the applicants. They talk emphatically of owning their land and of this being their right under "our" law. They talk of outsiders needing permission to come onto it and use it. They give examples of how their ownership is expressed, e.g. in their Stories; in their use of the land; in their teaching of traditional laws and customs to their children; in their looking after the land in many traditional ways (e.g. burning, walking over it); in having the smell for story places, a smell that is recognised by the Stories; of outsiders not having the smell, so that the Stories know that they are outsiders. See for instance the affidavit of **[Applicant 5]**, part of which I have set out above. The other affidavits of the applicants are in similar terms.

In my view there is sufficient evidence to support the assertion that traditional laws and customs exist that are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

The requirements of s. 190B(5)(b) are therefore met.

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

Under this criterion, I must be satisfied that there is sufficient information available to support the assertion that the native title claim group has continued to hold native title in accordance with their traditional laws and customs.

The information reviewed at 190B(5)(a) and (b) is relevant to whether the application meets the requirements of s.190B(5)(c).

On the basis of my findings in relation to the evidence outlined above in relation to the requirements of s. 190B(5)(a) & (b), I am satisfied that there is a sufficient factual basis

which supports the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

In my view the evidence of the six applicants describes a traditional process by which spiritual and cultural knowledge, ownership of land and rights and interests associated with land in the claim area has been acquired, and is currently practised by members of the claim group. This is further supported by the anthropological information in Attachment F.

The requirements of s. 190B(5)(c) are therefore met.

Based on the above I am satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion

Conclusion

I am satisfied that all of the requirements of s. 190B(5) are met.

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

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

Reasons for the Decision

Under s. 190B(6) I must consider that, *prima facie*, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered.

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

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

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

I add that the meaning of *prima facie* was recently considered in and approved in *Northern Territory v Doepel* [2003] FCA 1384, see paras 134 -135. Briefly, 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.

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s. 190B(4) of the registration test.

The rights and interests claimed are further qualified by the following statements at Schedules P and Q.

- The native title claim group does not claim ownership of minerals, petroleum, or gas wholly owned by the Crown: Schedule Q.
- The applicants do not claim exclusive possession over any offshore place: Schedule P.

At Schedule L the applicants claim:

> "The following areas covered by the application are areas:
>
> (a) in respect of which the provisions of sections 47 and/or 47A of the Act apply. When this application was made, a pastoral lease was held by or on behalf of the members of the native title claim group and/or was expressly held for the benefit of Aboriginal people in each area, and members of the native title claim group occupied the areas such that extinguishment of native title is required by section 47 and/or section 47A of the Act to be disregarded:
>
> (i) Lot D on SR876; and
> (ii) Lot 43 on SR804.
>
> (b) of unallocated State land, which when this application was made were occupied by the members of the native title claim group, such that any extinguishment of native title is required by section 47B of the Act to be disregarded:
>
> All areas of unallocated State land included in the application."

Turning now to a consideration of whether the native title rights and interests claimed can be prima facie established. The applicants claim:

> (1) *In relation to areas (including but not limited to Unallocated State Land) where there has been no prior extinguishment of Native Title or where the non-extinguishment principle (Section 238 of the Native Title Act 1993 (Cth) applies or for those areas to which any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interest for an area described must be disregarded: The native title in the land and waters covered by the application ('the claim area') is equivalent to the fullest beneficial ownership, including possession, occupation, use and enjoyment to the exclusion of all others subject to the valid laws of the State of Queensland and the Commonwealth of Australia.*

Established

I see the claim as being for exclusive possession of the areas described.

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*) indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can, *prima facie*, be established in relation to some parts of a claim area.[6] A claim to exclusive possession may be able to be established over areas where there has been no previous extinguishment of native title or where the non-extinguishment principle in s.238 of the *NTA* applies (such as areas for

[6] At [51].

which the benefit of ss.47, 47A or 47B is claimed, and in relation to areas affected by Category C and D past and intermediate period acts).

I turn now to consider if the claim can be prima facie established.

Schedule G of the application sets out details of activities carried out by the group in relation to the land or waters. The activities are said to be carried out on Eastern Kuku-Yalanji country in exercise of the rights and interests described in Schedule E, and cover all the categories listed there. They are said include, for example:

1. A long historical and constant contemporary collection and use of natural resources.
2. Continual access to, camping upon, and residing in outstations with residences on the traditional lands, including every major subdivision of those lands.
3. Generation of income and economic benefit from the claim areas – e.g. through tourism ventures of their own and work area clearance contracts by the Mossman Gorge rangers.
4. Substantial and widespread exercise of management responsibilities for the traditional lands, and exercise of cultural property rights in them, both within the claimant and wider regional Aboriginal communities, and externally through involvement in National Park and other conservation and tourism planning, site protection, and work area clearances.
5. Continual internal self regulation and demarcation of localized family and sub-group subdivisions and interests within the claim area under the direction of senior people of authority.
6. Asserting valid proprietary and possessory claims over the area covered by the application.
7. Speaking for, on behalf of and authoritatively about the area covered by the application.
8. Inheriting and transmitting native title rights and interests.
9. Conferring certain rights on others.
10. Asserting the right to control access, occupation, use and enjoyment of the area covered by the application and its resources by others;
11. Resolving disputes about who is or who is not an Eastern Kuku Yalanji person.
12. Resolving disputes between Aboriginal people concerning the area covered by the application, with the assistance of native title holders of adjoining areas where such assistance is necessary.
13. Determining as between native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application.
14. Engaging in a way of life consistent with the traditional connection of the native title claim group to the area covered by the application.
15. Upholding, regulating, monitoring and enforcing the customary laws of the native title claim group in relation to the area covered by the application.
16. Excluding particular members of the native title claim group from the exercise of particular native title rights and interests in relation to particular parts of the area covered by the application.
17. Being buried on, and burying members of the native title claim group on, the area covered by the application.
18. Physically occupying the area covered by the application.
19. Physically enjoying and using the area covered by the application.
20. Living on and erecting residences and other infrastructure on the area covered by the application.

21. Protecting, managing and using the area covered by the application.
22. Manufacturing materials, artefacts objects and other products from the area covered by the application.
23. Disposing of Natural Resources taken from the area covered by the application and manufactured items derived from the area covered by the application, by trade, exchange or gift.
24. Engaging in economic life in relation to the area covered by the application.
25. Learning, determining, maintaining, communicating and expanding cultural, social, natural, environmental spiritual and cosmological knowledge, traditions, beliefs, customs, relationships, practices and institutions in relation to the area covered by the application, to ensure the continued vitality of the culture and wellbeing of the native title claim group.
26. Exercising all those rights, duties and responsibilities which are derived from and are necessary for, or ancillary to, the full exercise and enjoyment of the native title rights and interests referred to above.

The applicants swear in their affidavits that the statements made in the application are true.

In my opinion the above activities support the native title claim group's claim to the exclusive possession of the area described in para (1).

The prima facie establishment of this right is supported by the affidavits of the applicants at Attachment F. For instance **[Applicant 5]** says in her affidavit (1 August 1999):

1. I was born in Mossman on 7 August 1948.
2. My parents and grandparents and other old Kuku-Yalanji people lived on the land that is in the native title claim. They taught me about our traditional laws and customs, our language, our Stories, the spirits of our old people, and also about our land and how to hunt, fish and use bush food and bush medicine. We walked all over that land.
3. I remember some old Kuku-Yalanji people still living in the bush in the traditional way around the area covered by the application in the late 1950's and early 1960's. I knew those old people. They were my relations. They included **[Person 105]**, **[Person 106]**, **[Person 107]** and old **[Person 90]**.
4. I live at Mossman which is near some of the areas included in the claim. I often visit the claim land to collect scrub hen eggs, dig yams, catch fish, and gather nuts and berries. I have lived on Kuku-Yalanji country all my life and have continued to visit the claim areas during that time.
5. I operate my own business which is called "**[Business name deleted]**". I take tourists on a tour of some of our traditional country, and tell them about our traditional customs, including how to find and use bush tucker.
6. I still know the traditional laws and customs of my ancestors and I remember all those things my old people and other Kuku-Yalanji people taught me. Whenever I go camping on our land, I still follow all our traditional laws and customs. It's not just camping like a white person might do
7. Under our traditional law and custom, the claim land and all of our traditional country belongs to us. We own it. We can possess, occupy, use and enjoy the land, to the exclusion of all others. Those are our rights under our law. It is not possible to list all the things we can do on our land under those rights.
8. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. Outsiders cannot do these things without our permission. We make and sell dilly bags, paintings of Story Places, and musical instruments such as didjaridoo and clap sticks.
9. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children

about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land.

10. We make decisions about the land and its resources, including whether others can use the land and resources and what they can do with them.

11. Kuku-Yalanji people are the only ones who have the language for that country. We are the only ones who know the Stories, and we are the only ones who have the smell for that place. The Stories know who outsiders are from the smell.

12. Outsiders, for example our neighbours the Djabugay people, can only come onto and use the claim land if they ask us permission. If they do not ask permission, they cannot come onto it. If they do, they might get sick. It is the same way for other outsiders too, even white people.

13. I am authorised by the traditional laws and customs of the Eastern Kuku-Yalanji people to make this application and to deal with matters arising in relation to it, in conjunction with the other applicants.

14. I am recognised under our traditional laws and customs as a senior member of the Eastern Kuku-Yalanji people. As such, I can speak for the country covered by the application on behalf of all Eastern Kuku-Yalanji people. I was also nominated to be an applicant to make this claim on behalf of all the persons in the native title claim group and to deal with matters arising in relation to it, in accordance with the traditional laws and customs of the Eastern Kuku-Yalanji people, by unanimous agreement of those members of the native title claim group members present at a meeting on 8 June 1999, to which all known members of the native title claim group were invited."

In summary, the affidavit supports, amongst other matters, that under traditional law the native title claim group's traditional country belongs to the group. They own it. They can possess, occupy, use and enjoy the land, to the exclusion of all others. Those are said to be their rights under their law. They can use the land and its resources and control access to the land and the use of its resources.

Similar statements are made in the affidavits of the other applicants. For example **[Applicant 6]** says, amongst other things, in his affidavit:

> "Our traditional laws and customs also say that we have to look after the application land. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land. We make decisions about the land and its resources, including whether others can use the land and resources, and what they can do there (para 9)."

I am satisfied that the area subject to this application is within the broader traditional lands of the native title claim group to which much of the above information relates.

Having regard to the above information I am satisfied that the native title right and interest claimed at para (1) can be prima facie established in respect of the area claimed.

The framing of the rights and interests claimed at Schedule E takes account of the decisions in *Ward* and *De Rose*. The claim at paragraph 1 is confined to areas where exclusive possession can be sustained. In respect of those parts of the claim area where exclusive possession is not recognised, the applicants claim 27 individual rights. I will now consider each of those rights and interests and whether they can be *prima facie* established as required by s.190B(6).

In considering whether the rights claimed by the applicants at para (2) of Schedule E can be established *prima facie*, I have had regard to Schedules F, G, M and Attachments E and F of the application. I have also had regard to the affidavits of the applicants to which I have referred that follow Attachment F.

(2) In all other areas where the rights of the fullest beneficial ownership including possession, occupation, use and enjoyment to the exclusion of all others, are not recognised, the following rights and interests are claimed, subject to the valid laws of Queensland and the Commonwealth of Australia, to

> *a. Speak for, on behalf of and authoritatively amongst Aboriginal people about the area covered by the application;*

Established

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained.

In *Ward*, the majority of the High Court considered the right to 'speak for country' in the following terms [88]:

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

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

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

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

> 'It is also necessary to keep in mind that, in the second reading speech on the Native Title Bill 1993, the then Prime Minister, Mr. Keating, saw *Mabo (No 2)* as giving Australians the opportunity to rectify the consequences of past injustices. The Act

should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the "national legacy of unutterable shame" that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.

[After identifying the purpose of the Act,] the duty of the courts would be to ensure that that purpose was achieved. That would be so even if it meant giving a strained construction to or reading words into the Act. In an extrajudicial speech, Lord Diplock once said that "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed."

I also note that the applicants limit the right to *"speak for, on behalf of and authoritatively amongst Aboriginal people"*. It does not imply to me a right to control access to or use of the land. I also see that in *Attorney General for the Northern Territory v Ward* [2003] FCAFC 283 at [16] - [23] the Court said although the right of absolute control of access must have been extinguished by the grant of pastoral leases there might be a surviving right to make decisions, pursuant to Aboriginal laws and custom, about the use and enjoyment of the land by Aboriginal people. The Court said that that right would not be affected by the grant of a pastoral lease.

I understand the right at para. a. to be a non-exclusive right which does not amount to a right to control access or the use or enjoyment of others of the application area. Nevertheless, to avoid any doubt I direct, pursuant to s.186(2) of the *NTA,* that a note be placed on the register stating that the right claimed at para. (a) is non-exclusive in nature.

It follows that I am satisfied that the right discussed is capable of being *prima facie* established. There is evidence to support this right in the application and affidavits to which I have referred.

Amongst the activities referred to in Schedule G included is:

> "7. Speaking for, on behalf of and authoritatively about the area covered by the application."

In her affidavit (at Attachment F), **[Applicant 5]** deposes that:

> I am recognised under our traditional laws and customs as a senior member of the Eastern Kuku-Yalanji people. As such, I can speak for the country covered by the application on behalf of all Eastern Kuku-Yalanji people (para 14).

In his affidavit (1 August 1999) **[Applicant 3]** also says:

> "I am recognised under our traditional laws and customs as a senior member of the Eastern Kuku-Yalanji people. As such, I can speak for the country covered by the application on behalf of all Eastern Kuku-Yalanji people (para 14)."

I am satisfied this right can be prima facie established in respect of the area claimed.

> *b. Speak for, on behalf of and authoritatively amongst Aboriginal people about the use and access under traditional law and custom of the area covered by the application;*

Established

I refer to my comments under para a. above concerning the right *to speak for*.

I also note that as with the right claimed at para a. the applicants limit the right to "*speak for, and on behalf of and authoritatively amongst Aboriginal people **about** use and access ….*". Speaking *about* the use and access to the area does not in my opinion amount to a claim to control access. Nor does it imply to me a right to control access to or use of the land.

I understand the right at para. b. to be a non-exclusive right which does not amount to a right to control access or the use or enjoyment of others of the application area. Nevertheless, pursuant to s.186(2) of the *NTA*, I direct that a note be placed on the register noting that the right claimed at para. b. is non-exclusive in nature.

It follows that I am satisfied that the right discussed is capable of being *prima facie* established. There is evidence to support this right in the application and affidavits to which I have referred.

Based on the same information and for the same reasons as appears under para a. above I am satisfied this right can be prima facie established in respect of the area claimed.

c. Inherit and transmit the native title rights and interests;

Established

Amongst the activities referred to in Schedule G included is:

"8. Inheriting and transmitting native title rights and interests."

I refer to Attachment E prepared by **[Anthropologist 1]**, an anthropologist who the CYLC says has had many years of experience and who has worked with the Yalanji people since 1988 (see letter from CYLC to the tribunal dated 13 September 1999). Based on this information from CYLC I am satisfied that I can have regard to **[Anthropologist 1]**'s views. Attachment E says in part:

> "Genealogical transmission is the main instrument determining the native title holders.
>
> The term "transmit" rather than an incorrect term like "inherit" is used here so as to accurately convey the real situation in force in the claimant community. Among the claimant group, as in Aboriginal landed property systems in general, people do not acquire rights in land by inheritance, they acquire them by genealogically determined (or occasionally by adoption, conception or ritual infusion of eg patri-spirit) membership in tenuria groups. The ethnographic evidence is comprehensive and conclusive on this point. In the genealogically determined case, for example, the mechanism is passive, automatic transmission of rights at birth, rather than a: heir acquiring property upon the death of one's parents as is common in property systems featuring private property. The correct notion then is that of "transmission and acquisition" of rights, for which "transmission" is sufficient since acquisition follows from transmission as a matter of course."

I also refer to the affidavits of the applicants that outline their, and their families, association with the area, and their exercise of native title rights and interests. The implication is, in my view, that these rights and interests have been transmitted to them. See for instance the affidavit (1 August 1999) of **[Applicant 5]** set out above. The affidavits sworn by the other applicants contains similar information.

.

Based on the above information I am satisfied this right can be prima facie established in respect of the area claimed.

> *d. Confer customary use and access rights on other Aboriginal people who seek to use and access the area covered by the application under the traditional law and customs of the native title claim group;*

Established

An issue arises in respect of this right as to whether it involves the control of use of, and access to, the area. To the extent that it does it may not be able to be prima facie established in respect of areas where exclusive possession cannot be sustained. Being able to confer rights to use and access the area upon people may be seen as arising from a right of control of the area. However, the right as claimed speaks of conferring rights under traditional law and custom of the group rather than controlling use and access and hence I am of the view that it is capable of being prima facie established.

Schedule G includes amongst the activities currently being carried out by the native title claim group in relation to the land or waters, the following:

"9. Conferring certain rights on others."

The existence of this native title right and interest is supported by the affidavits of the applicants. For example **[Applicant 6]** says:

> "10. Eastern Kuku-Yalanji people are the only ones who have the language for that country. We are the only ones who know the Stories, and we are the only ones who have the smell for that place. The Stories know who outsiders are from the smell.
>
> 11. Outsiders, for example our neighbours the Djabugay people, can only come onto and use that land, including the application land, if they ask us permission. If they do not ask permission, they cannot come onto it. If they do, they might get sick. It is the same way for other outsiders too, even white people."

The other affidavits of the applicants contain similar information. The inference is that the claim group can confer rights on other Aboriginal people as claimed.

Based on the above information I am satisfied this right can be prima facie established in respect of the area claimed.

> *e. Determine as between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application;*

Established

I see that a right in the same terms as claimed here was recognised in *Wik People v State of Queensland (determination 1)*. Hence I am of the view that it is capable of being prima facie established.

Schedule G includes amongst the activities currently being carried out by the native title claim group in relation to the land or waters in the area claimed, the following:

"13. Determining as between the members of the native title claim group what are the

particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the area covered by the application."

This is supported by the applicants affidavits in which they refer to their right to make decisions about their land. See for instance para 10 of **[Applicant 5]** affidavit.

"10. We make decisions about the land and its resources, including whether others can use the land and resources and what they can do with them."

In my opinion included in that decision making would be the determination of such matters as are dealt with in this claimed right.

Based on the above information and reasons I am satisfied this right can be prima facie established in respect of the area claimed.

f. Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the area covered by the application against other Aboriginal people;

Not Established

For the reasons stated under s. 190B(4) above I am of the view that this right is not readily identifiable as a native title right and interest. It follows that it cannot be prima facie established.

g. Resolve disputes about who is and who is not a native title holder;

Not Established

I am of the view that this right is capable of being prima facie established. I say this because I see that a similar right was recognised in *Wik People v State of Queensland* (determination 1).

Schedule G includes amongst the activities currently being carried out by the native title claim group in relation to the land or waters in the area claimed, the following:

"11. Resolving disputes about who is or who is not an Eastern Kuku Yalanji person."

This reflects the wording of the right being claimed. I have been unable to locate any other information that supports the prima facie established of this claimed right.

I am not satisfied that the above information is sufficient to support the prima facie establishment of this right.

I note that at Attachment E **[Anthropologist 1]** says:

"Disputes in relation to an area of land or *details of membership of the native title-holders* usually involve boundaries, border estates, or persons of mixed affiliation. Resolution necessarily involves both groups, so the statement of rights and interests needs to make this clear rather than read as though it delivers the right to resolve such a matter (or impose a resolution) solely to the applicant native title group." (my italic emphasis)

Additional information may prima facie establish this right. I refer to s.190(3A) of the Act. That section permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested

and accepted for registration. In brief, provided that additional information satisfies the Registrar (or his delegate) that, had it been before him at the time of testing, the right would have been accepted for registration, then, subject to meeting the other conditions of the test, the right in question will be entered in the Register of Native Title Claims.

> *h. Be buried on, and to bury members of the native title claim group on, the area covered by the application;*

Not Established

Schedule G includes amongst the activities currently being carried out by the native title claim group in relation to the land or waters in the area claimed, the following:

> "17. Being buried on, and burying members of the native title claim group on, the area covered by the application."

This reflects the wording of the right being claimed. I have been unable to find any other information that supports the prima facie established of this claimed right. The above information in effect simply repeats what is claimed. I am not satisfied that the above information is sufficient to support the prima facie establishment of this right.

I refer to the provisions of s 190(3A) summarised above.

> *i. Occupy the area covered by the application;*
>
> *j. Use and enjoy the area covered by the application;*

Not Established

For the reasons stated under s. 190B(4) above I am of the view that these two rights at i. and j. are not readily identifiable as native title rights and interests. It follows that they cannot be prima facie established.

> *k. Live on the area covered by the application;*

Established.

The applicants claim the right to live on the application area. A question which arises here is whether the right to live on the land *necessarily* amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas where a claim to exclusive possession cannot be sustained.

I note that, despite the absence of exclusive possession in that case, the majority decision in *WA v Ward* (2002) did not preclude the recognition of native title rights to reside upon the claim area. I see the right to live on the land as being similar to the right to reside upon the claim area. Further there is nothing in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas.

It follows that I am satisfied that the right to live upon the application area is capable of being *prima facie* established.

There is adequate evidence for the prima facie establishment this right in Schedules G, and the affidavits of the applicants to which I have referred earlier. Schedule G speaks of the group living on and erecting residences and other infrastructure on the area covered by the application (para 20). The affidavits of the applicants speak of their, and others, living on or near the area covered by the application. For instance **[Applicant 5]** says in her affidavit:

2. My parents and grandparents and other old Kuku-Yalanji people lived on the land that is in the native title claim. They taught me about our traditional laws and customs, our language, our Stories, the spirits of our old people, and also about our land and how to hunt, fish and use bush food and bush medicine. We walked all over that land.

3. I remember some old Kuku-Yalanji people still living in the bush in the traditional way around the area covered by the application in the late 1950's and early 1960's. I knew those old people. They were my relations. They included **[Person 105]**, **[Person 106]**, **[Person 107]** and old **[Person 90]**.

4. I live at Mossman which is near some of the areas included in the claim. I often visit the claim land to collect scrub hen eggs, dig yams, catch fish, and gather nuts and berries. I have lived on Kuku-Yalanji country all my life and have continued to visit the claim areas during that time.

[Applicant 4] says in her affidavit:

2. My parents and grandparents and other old Kuku-Nyungul people lived on the land that is in the native title claim. They taught me about our traditional laws and customs, our language, our Stories, the spirits of our old people, and also about our land and how to hunt, fish and use bush food and bush medicine. We walked all over that land.

3. I remember some old Kuku-Nyungul people still living in the bush in the traditional way around the area covered by the application They included **[Person 14]**, **[Person 108 – name deleted]**, **[Person 30]**, **[Person 109 – name deleted]**, **[Person 110 – name deleted]**, **[Person 111 – name deleted]**, **[Person 53]**, **[Person 50]**, **[Person 112 – name deleted]**, and **[Person 113 – name deleted]**.

4. I live at Wujalwujalwarra which is adjacent to and surrounded by some of the areas included in the claim. I often visit the claim land to fish (for example at Kawai which is on the claim land), hunt for freshwater turtle and gather yams and mudcrabs, pippi' s, mussells and other shellfish. I have continued to walk all over Kuku Nyungul land all my life.

[Applicant 3] says in his affidavit:

1. I was born at Rossville, which is on Eastern Kuku Yalanji country and is in the middle of the area covered by this Application.

2. My parents and grandparents and other old Kuku-Yalanji people lived on the land that is in the native title claim. They taught me about our traditional laws and customs, our language, our Stories, the spirits of our old people, and also about our land and how to hunt, fish and use bush food and bush medicine. We walked all over that land.

3. I remember some old Kuku-Yalanji people still living in the bush in the traditional way at Shiptons Flat, inside the Application Area, in the 1960s. I knew those old people. They were my relations. They included **[Person 113]**, **[Person 47]**, and **[Person 114 – name deleted]** and **[Person 115 – name deleted]**.

4. I live at Hope Vale which is near some of the areas included in the claim. I often visit the claim land to fish, hunt and gather a range of bush foods and medicine, including freshwater turtle, scrub hen eggs, turkey eggs, eel, wild honey, ginger, and yams. I also hunt things like pigs. I have lived on or close to Kuku-Yalanji country all my life and have continued to visit the claim areas during that time.

Based on the above information and for the above reasons I am satisfied this right can be prima facie established in respect of the area in relation to which it is claimed.

l. Establish residences on the area covered by the application;

Not Established

A question also arises in respect of this right whether it *necessarily* amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession could not be sustained.

I note that, despite the absence of exclusive possession in that case, the majority decision in *WA* v *Ward* (2002) did not preclude the recognition of native title rights to reside upon the claim area. However, the right to erect residences in my view goes beyond residing on the land and involves the construction of permanent buildings. I believe this necessarily implies the control of access to, or the control of the use and enjoyment of, the claim area involved.

It follows that I am of the opinion that the right is not capable of being prima facie established in respect of the area over which it is claimed.

m. Establish outstations on the area covered by the application;

Not Established

The description of this right indicates to me that the construction of permanent structures would be involved which I believe necessarily implies the control of access to, or control of the use and enjoyment of, the claim area involved.

It follows that I am of the opinion that the right is not capable of being prima facie established in respect of the area over which it is claimed.

n. Establish and maintain seasonal camps on the area covered by the application;

Established

Unlike the right claimed at m. above this right does not convey to me an intention or capacity on the part of the members of the native title claim group to control access to, or use of, those areas. I say this because I see such seasonal camps as being of a temporary nature related to the exercise of other rights, e.g. hunting and fishing. It follows that I am of the opinion that the right is capable of being prima facie established in respect of the area in respect of which it is claimed.

There is adequate information available to support the prima facie establishment of this right. For instance **[Applicant 5]** speaks of living on the land hunting fishing and conducting ceremonies as follows:

8. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. Outsiders cannot do these things without our permission. We make and sell dilly bags, paintings of Story Places, and musical instruments such as didjaridoo and clap sticks.

9. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land.

[Applicant 6] makes similar statements in his affidavit.

I see those activities as involving the temporary establishment of camps and hence I am satisfied that the claimed right can be prima facie established.

o. Construct other infrastructure on the area covered by the application;

Not Established

On one view the lack of information about, or a description of the "other infrastructure", may result in this right being vague and not readily identifiable.

In any event, this right implies the construction of permanent structures which I believe necessarily involves the control of access to, or control of the use and enjoyment of, the claim area involved.

For the reason which I have outlined above, it follows that I am of the opinion that the right is not capable of being prima facie established in respect of the area in respect of which it is claimed.

p. Protect and care for the natural and cultural resources of the area covered by the application;

Established

The right at para p. appears to amount to a claim to control access to and use of the area which could only be capable of being established *prima facie* over areas where a claim to exclusive possession can be made out. Nevertheless, in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. I see this right as being similar.
For this reason, this right appears to be capable of being established *prima facie* over such areas.

I am satisfied that there is adequate information available to support the prima facie establishment of this right. Attachment E states, in part, as follows:

> The claimant community, and all the Aboriginal community of Southeast Cape York, view the carriage of responsibility for land as an indivisible aspect of rights and interests in it. To hold land carries an obligation toward it in indigenous presumption, and indeed rights are so strongly wedded to responsibility that people wit the strongest customary rights in any given part of the Yalanji claim area often make their first, up-front statement of ownership in such terms as, eg "We are the people who look after that area". This is a classical feature of Aboriginal culture, not simply the result of recent exposure to the global conservation ethic, from which it differ in important respects (e.g. it is not primarily grounded in aesthetic considerations but in pragmatic resource sustainability), and is widely reported throughout the country (e.g. see Sutton 1998).
>
> Over the years, the applicants have often expressed their concern when they've commented on how land has become scrubby and closed-in due to the changed firing regime of pastoralists and National Parks personnel, of: the conversion of a permanent waterhole into a tank-complex by bulldozing and the movement of earth, on the dynamiting of a rockpool to increase its storage of fresh water and the like. Their statements not only express deep ties of sentiment to the land, but also their sense of responsibility to it.
>
> Apart from resource protection, the management of country involves such matters as approaching sites in the correct manner prescribed by local law and custom so as to avoid offense to or

management of the powers o these sites. Examples include the proper introduction of strangers to the sites, and the avoidance of loud and disrespectful conduct at them. Wrong approach may threaten the community by aggravating the site Powers, but also sites are seen as resources themselves, e.g. in some cases they contain healing water, but in all cases they are the sources or outlets of the spiritual potency responsible for the maintenance of the land and the social order.

Examples of management responsibilities are:

- to conserve the resources of the land;
- to correctly burn off country in the manner required by Aboriginal law as part of the maintenance of the country;
- to deal with such issues as the presence of noxious species, land damage and conservation of resources and biological diversity.

The use of fire is subject to customary restrictions as to who directs it, the amount of country that can be burned at any one time (limited, with the desired object being "mosaic burning" - ie a patchwork of burned and unburned areas) and the times of year when burning is to be applied. There is an extensive ethnographic literature on these practices throughout Cape York and north Australia, one of the most recent being a recent study of contemporary traditional burning practices in the Eastern Kuku Yalanji area of Southeast Cape York by Hill *et al.* (1999) ." (para 2.2 of Attachment E)

This information is supported by the applicants' affidavits. For instance **[Applicant 6]** speaks about the groups' obligation to look after the land and resources.

9. Our traditional laws and customs also say that we have to look after the application land. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land. We make decisions about the land and its resources, including whether others can use the land and resources, and what they can do there.

[Applicant 5] makes similar statements in para 8 of his affidavit.

Similarly **[Applicant 4]** says:

8. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children about all these things Outsiders don't know these things. We were put on the land by the Stories, to look after the land

Based on the above information I am satisfied that the claimed right can be prima facie established.

q. Maintain and protect sites and areas within the area covered by the application which are of significance to the Native Title Holders under traditional law and custom;

Established

Based on the same information and for the same reasons as outlined under p. above I am satisfied that the claimed right can be prima facie established.

r. Hold ceremonies on the land

s. Hold ceremonies concerning the land;

Established

The applicants speak in their affidavits about living on the land and teaching about the Stories, and conducting ceremonies on the land. See for example para 7 of the affidavits of **[Applicant 1]** and **[Applicant 4]**. Also para 8 of the affidavits of **[Applicant 2]** and **[Applicant 6]**.

Based on the above information I am satisfied that the claimed rights at r. and s. can be prima facie established.

t. Take natural resources from the area covered by the application;

Established

At Schedule G the applicants speak of the native title claim group disposing of natural resources taken from the area covered by the application and manufactured items derived from the area covered by the application by trade, exchange or gift (para 23).

I note that the applicants do not claim minerals, petroleum or gas wholly owned by the Crown – see Schedule Q.

The statement in Attachment G is supported by the affidavits of the applicants who speak of hunting, fishing and using the application area. See for example **[Applicant 1]**'s affidavit at paras 4 and 6 – 9. There is similar information in the affidavits of the other applicants.

I am satisfied that the claimed right can be prima facie established.

u. Manufacture materials, artefacts objects and other products from the area covered by the application;

Established

Included in the activities currently being carried out by the native title claim group described in Schedule G is the following:

"22. Manufacturing materials, artefacts objects and other products from the area covered by the application."

This is supported by the affidavits of the applicants. For instance **[Applicant 5]** says:

7. Under our traditional law and custom, the claim land and all of our traditional country belongs to us. We own it. We can possess, occupy, use and enjoy the land, to the exclusion of all others. Those are our rights under our law. It is not possible to list all the things we can do on our land under those rights.
8. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. Outsiders cannot do these things without our permission. We make and sell dilly bags, paintings of Story Places, and musical instruments such as didjaridoo and clap sticks.
9. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our

> children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land.

Similar statements appear in the affidavits of other applicants. See those of **[Applicant 2]** and **[Applicant 1]**.

Based on the above information I am satisfied that the claimed right can be prima facie established.

v. Dispose of cultural resources taken from, and manufactured items derived from, the area covered by the application by customary trade, exchange or gift with other Aboriginal people;

Not established

'The right to trade in the resources of the waters and land of the clans estate' was disallowed by Olney J in *Yarmirr v NT (1998)* on the basis that it was not a right in relation to land or waters nor were any of the traded goods 'subsistence resources' derived from either the land or sea.[7] On appeal a majority of the Full Court concurred with this view but added that it "seems logical to view the right to trade as 'an integral part' or integral aspect of a right to exclusive possession", however on the facts it was not necessary to decide.[8] The issue was not raised before the HCA.

In *Wik Peoples v State of Queensland* (2000) (determination 1) the Court allowed the right to 'take use and enoy the natural resources from the determination area for the purpose of manufacturing artefacts, objects and other products and disposing of those natural resources and manufactured items by trade, exchange or gift save only that the right of disposal of natural resources taken from the waterways…of the determination is only a right to do so for non-commercial purposes.'[9] In determinations 2 and 3 however in 2004 no rights to trade were expressly determined to exist.[10]

In *WA* v *Ward* (2000) a majority of the Full Federal Court found evidence of trading and exchange of artefacts between groups within and outside the claim area after settlement. The right to trade however, was not included in the determination and no reasons were given.[11] Justice Lee, at 1st instance,[12] and Justice North,[13] on appeal, expressly allowed the right. No right to trade was included in the eventual consent determinations relating to the West Australian and Northern Territory portions of the claim area.[14]

In *Neowarra v WA* (2003) Sundberg J held that the 'right to trade in the resources of the claim area' was expressed in such a 'broad and general manner' as to be inconsistent with the rights conferred by a pastoral lease in particular the removal of feed or fauna was

[7] *Yarmirr v Northern Territory (No 2)* (1998) 156 ALR 370. It is unclear on what basis Olney J found a requirement that traded goods must be "subsistence resources derived from either the land or sea" and it is difficult to reconcile his Honour's factual findings. –at [120] to [122].

[8] No claim to exclusive posesssion could be established *Commonwealth v Yarmirr* (1999) 101 FCR 171 at [250].

[9] FCA 1443, [3(f)(i) and (ii)].

[10] *Wik Peoples v State of Queensland* [2004] FCA 1306.

[11] *WA v Ward* [2000] FCA 191 at [287].

[12] *Ward v WA* (1998) 159 ALR 483 at 639.

[13] Lee J was correct to include the right to trade at [843].

[14] *Attorney-General for the Northern Territory v Ward* [2003] FCAFC 283.

inconsistent with right to graze and cut timber.[15] The decision left open possibility of right to trade in resources not inconsistent with the rights of pastoral lessees, for example ochre.

'The right to share, exchange or trade subsistence and other traditional resources obtained on and from the land and waters' was allowed over both exclusive and non-exclusive areas by Mansfield J in *Alyawarr v Northern Territory* (2000*).*[16] However, the right to trade was disallowed on appeal.

It would appear then that, where it can be factually established, the right to trade in traditional resources can be claimed over areas of exclusive possession. However it appears very doubtful that it can be prima facie established over other areas where exclusive possession *cannot* be sustained.

I note that the right claimed here is limited to customary trade. However, I am of the view on balance, that the right claimed does not appear to be capable of being established *prima facie* pursuant to s.190B(6) in respect of the application area where exclusive possession is not claimed.

I add that I am unable to exclude trade from this claimed right as that would involve amending the application.

w. Engage in subsistence activities on the land;

Established

Based on the affidavits of the applicants I am satisfied that this right can be prima established pursuant to s.190B(6). For instance **[Applicant 5]** says in her affidavit:

4. I live at Mossman which is near some of the areas included in the claim. I often visit the claim land to collect scrub hen eggs, dig yams, catch fish, and gather nuts and berries. I have lived on Kuku-Yalanji country all my life and have continued to visit the claim areas during that time.
5. I operate my own business which is called "**[Business name deleted]**". I take tourists on a tour of some of our traditional country, and tell them about our traditional customs, including how to find and use bush tucker.
6. I still know the traditional laws and customs of my ancestors and I remember all those things my old people and other Kuku-Yalanji people taught me. Whenever I go camping on our land, I still follow all our traditional laws and customs. It's not just camping like a white person might do
7. Under our traditional law and custom, the claim land and all of our traditional country belongs to us. We own it. We can possess, occupy, use and enjoy the land, to the exclusion of all others. Those are our rights under our law. It is not possible to list all the things we can do on our land under those rights.
8. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. Outsiders cannot do these things without our permission. We make and sell dilly bags, paintings of Story Places, and musical instruments such as didjaridoo and clap sticks.
9. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our

[15] FCA 1092 at [481].
[16] *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* (2004) 207 ALR 539 [para 3(g)].

children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land.

Similarly **[Applicant 4]** says in her affidavit:

4. I live at Wujalwujalwarra which is adjacent to and surrounded by some of the areas included in the claim. I often visit the claim land to fish (for example at Kawai which is on the claim land), hunt for freshwater turtle and gather yams and mudcrabs, pippi's, mussells and other shellfish. I have continued to walk all over Kuku Nyungul land all my life.
5. I still know the traditional laws and customs of my ancestors and I remember all those things my old people and other Kuku-Yalanji people taught me. Whenever I am on our land, I still follow our traditional ways.
6. Under our traditional law and custom, the claim land and all of our traditional country belongs to us. We own it. We can possess, occupy, use and enjoy the land, to the exclusion of all others. Those are our rights under our law. It is not possible to list all the things we can do on our land under those rights.
7. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. . We also still make dilly bags, spears and woomeras. Outsiders cannot do any of these things without our permission.

Based on the above information I am satisfied that the claimed right can be prima facie established.

x. Engage in production, customary trade and other customary economic activities on the land as they relate to other Aboriginal people with respect to indigenous cultural resources;

Not established

This right seems similar to that claimed at v. above.

For the same reasons as appear in respect of v. above I am of the view that this right, involving as it does the right to trade, cannot be prima facie established pursuant to s 190(B)(6).

I add that I am unable to exclude trade from this claimed right (or the right claimed at v.) as that would involve amending the application.

y. Care for the area for the benefit of the native title holders;

Established

Included in the activities described in Schedule G, said to be currently carried out by the native title claim group, is the following:

"21. Protecting, managing and using the area covered by the application."

This is supported by information in the affidavits of the applicants. For instance **[Applicant 4]** says:

8. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over

it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children about all these things Outsiders don't know these things. We were put on the land by the Stories, to look after the land

9. We make decisions about the land and its resources, including whether others can use the land and resources and what they can do with them.

Similarly **[Applicant 6]** speaks of having to look after the land in the claim and the rest of "our traditional country" (paras 7 and 8), as does **[Applicant 5]** (paras 9 and 10).

Based on the above information I am satisfied that the claimed right can be prima facie established in respect of the relevant application area.

z. Hunt and fish in the area covered by the application;

Established

The applicants speak of hunting and fishing in their affidavits. For example **[Applicant 5]** says:

10. I live at Mossman which is near some of the areas included in the claim. I often visit the claim land to collect scrub hen eggs, dig yams, catch fish, and gather nuts and berries. I have lived on Kuku-Yalanji country all my life and have continued to visit the claim areas during that time.

Also **[Applicant 2]** says in his affidavit:

8. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. Outsiders cannot do these things without our permission.

9. Our traditional laws and customs also say that we have to look after the application land. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land. We make decisions about the land and its resources, including whether others can use the land and resources, and what they can do there.

Based on the above information I am satisfied that the claimed right can be prima facie established in respect of the area where it is claimed.

aa. Use the area covered by the application for social, customary, religious and traditional purposes.

Established

I am of the view that there is an adequate specification of the content of the claimed right to use the area claimed, i.e. for social, customary, religious and traditional purposes, so that it is capable of being readily identified and being prima facie established.

Included in the activities described in Schedule G, said to be currently carried out by the native title claim group are, amongst others, the following:

24. Engaging in economic life in relation to the area covered by the application.

25. Learning, determining, maintaining, communicating and expanding cultural, social, natural, environmental spiritual and cosmological knowledge, traditions, beliefs, customs,

relationships, practices and institutions in relation to the area covered by the application, to ensure the continued vitality of the culture and wellbeing of the native title claim group.

26. Exercising all those rights, duties and responsibilities which are derived from and are necessary for, or ancillary to, the full exercise and enjoyment of the native title rights and interests referred to above.

I refer to the applicants' affidavits. I am satisfied they support the establishment of this right. They speak of the groups' use of the area. For instance **[Applicant 5]** says:

"8. For example, Kuku-Yalanji people can live on that land, hunt, fish, trade its resources, teach about the Stories and story places, conduct ceremonies, and use it for anything that respects our laws and customs. Outsiders cannot do these things without our permission. We make and sell dilly bags, paintings of Story Places, and musical instruments such as didjaridoo and clap sticks.

9. Our traditional laws and customs also say that we have to look after the land in the claim and the rest of our traditional country. We do that by living on it, walking over it, hunting, fishing, burning, keeping outsiders off the land, protecting our Stories, and sacred places, and teaching our children about all these things. Outsiders don't know these things. We were put on the land by the Stories, to look after the land."

Similar statements are made in other affidavits.

The above information is adequate in my view to prima facie establish the group uses the area covered by the application for social, customary, religious and traditional purposes.

Qualifications

The rights and interest claimed are said in Schedule E to be subject to the following.

"(3) The native title rights and interests claimed:-

a) are pursuant to the traditional laws and customs of the native title holders;

b) are not exclusive rights and interest if they relate to tidal waters, and;

c) do not include ownership of any minerals, petroleum or gas wholly owned by the Crown;

d) over any areas covered by the application that are subject to a Previous Non-Exclusive Possession Act (PNEPA), as defined by s23F of the Native Title Act 1993 (Cth) do not confer possession, occupation, use and enjoyment of the area covered by the application to the exclusion of all others, except to the extent that the non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) applies, including those areas to which any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interest for an area described must be disregarded;

e) that are subject to a validly granted PNEPA, as defined s23F of the Native Title Act 1993 (Cth), do not include any native title rights or interests which were extinguished by that PNEPA, except to the extent that any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interest for an area described must be disregarded or the non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) may apply;

f) do not include rights and interests that have been extinguished by application of the common law."

As some of the native title rights and interests claimed can be prima facie established The application meets the requirements of s. 190B(6).

Result: **Requirements met.**

Traditional physical connection: S. 190B(7)

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

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

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

(i) the Crown in any capacity; or

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

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

Reasons relating to this condition

Under s. 190B(7)(a) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

Traditional physical connection is not defined in the *Native Title Act*. I interpret this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.

For the reasons given at s.190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

The affidavits of the applicants to which I have referred above provide adequate evidence to meet the requirements of this condition. Based on this material I am satisfied that these people are senior members of the native title claim group who currently have, and previously have had, traditional physical connection to the claim area.

Result: **Requirements met**

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

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

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

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s. 61A.

S. 61A(1) Native Title Determination

A search of the Native Title Register has revealed that there is no determination of native title in relation to the area claimed in this application. This has been confirmed by the Tribunal's Geospatial Analysis and Mapping Branch.

S. 61A(2) Previous Exclusive Possession Acts

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

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

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

S.61A(4) - s.47, 47A 47B

The application states (at Schedule L) that the provisions of s. 47 and s. 47B applies in the following terms:

> The following areas covered by the application are areas:
>
> (a) in respect of which the provisions of sections 47 and/or 47A of the Act apply. When this application was made, a pastoral lease was held by or on behalf of the members of the native title claim group and/or was expressly held for the benefit of Aboriginal people in each area, and members of the native title claim group occupied the areas such that extinguishment of native title is required by section 47 and/or section 47A of the Act to be disregarded.
>
> (i) Lot D on SR876; and
> (ii) Lot 43 on SR804.
>
> (b) of unallocated State land, which when this application was made were occupied by the members of the native title claim group, such that any extinguishment of native title is required by section 47B of the Act to be disregarded:
>
> All areas of unallocated State land included in the application.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s. 61A. In my opinion, the applicants' express statements with respect to the provisions of that section are sufficient to meet the requirements of s 190B(8). Sub-section 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled in another forum.

It follows therefore that the application passes this condition.

<u>Conclusion</u>

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of s. 61A the application should not have been made.

Result: Requirements met

No claim to ownership of Crown minerals, gas or petroleum: S. 190B(9)(a)

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

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

Reasons for the Decision

At Schedule Q of the amended application it states that the native title rights and interests in relation to the area covered by the application do not consist of or include ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth or the State of Queensland.

Result: Requirements met

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

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

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

Reasons for the Decision

The applicants state at Schedule P of the application that this is "not applicable". I take this to mean that applicant does not claim exclusive rights to any offshore place.

Result: Requirements met

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

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

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

Reasons for the Decision

The application and accompanying documents do not disclose, and I am not otherwise aware of, any area where an extinguishing act has occurred and yet the application seeks

native title rights and interests over such an area. I am satisfied that the requirements of this section have been met.

An overlap analysis carried out by the Tribunal's Geospatial Branch dated 20 June 2005 indicates that no agreements as per the Register of Indigenous Land Use Agreements fall within the external boundary of this amended application as at 20 June 2005.

Result: **Requirements met**

End of Document