

National Native Title Tribunal
REGISTRATION TEST
EDITED REASONS FOR DECISION

DELEGATE: Eleni Karagounis

Application Name: Ewamian People # 2

Names of Applicants: Barry Fisher, Katie Georgetown, David Hudson, Noel Lacey, Ron Richards

Region: FNQ NNTT No.: QC99/13

Date Application Made: 18 March 1999 Federal Court No.: QG6009/99

Date Application Amended: 18 March 2002

The delegate has considered the application against each of the conditions contained in s.190B and s.190C of the *Native Title Act* 1993 (Cwlth).

DECISION

The application IS ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (Cwlth).

Eleni Karagounis

9 July 2002
Date of Decision

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

This application was originally filed in the Federal Court on 18 March 1999 in response to a s29 Notice, ML30189. It was accepted for registration on 15 April 1999. It was amended on 18 March 2002 to:

- replace the applicants, **[person 1 – name deleted]**, **[person 2 – name deleted]** and **[person 3 – name deleted]** with new applicants, **[applicant 1 – name deleted]** and **[applicant 2 – name deleted]**, and
- to change the Claimant Group description so as to correspond with that in Ewamian #3 Claimant Application Q6018/01, this being in accord with Ewamian traditional law and custom

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

- ◆ The Registration Test Files for this application;
- ◆ The registration test files for QC01/16 (Q6018/01) Ewamian #3
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;
- ◆ The Schedule of Native Title applications;
- ◆ The National Native Title Register;
- ◆ The Register of Indigenous Land Use Agreements
- ◆ An affidavit by **[applicant 3 – name deleted]** dated 15 March 1999;
- ◆ An affidavit by **[applicant 4 – name deleted]** dated 19 March 1999;
- ◆ An affidavit by **[person 4 – name deleted]** dated 15 March 1999;
- ◆ An affidavit by **[person 5 – name deleted]** dated 15 March 1999;
- ◆ An affidavit by **[applicant 5 – name deleted]** dated 17 March 1999.
- ◆ A letter from NQLCAC dated 14 April 1999
- ◆ A letter from NQLCAC dated 15 April 1999
- ◆ An affidavit by **[solicitor 1 – name deleted]**, Principal Legal Officer of the North Queensland Land Council Aboriginal Corporation (NQLCAC) dated 15 April 1999
- ◆ An affidavit by **[solicitor 2 – name deleted]**, Legal Officer of NQLCAC dated 28 May 2002
- ◆ An email by **[solicitor 2]**, Legal Officer of the NQLCAC, dated 4 June 2002 attaching a letter dated 4 June 2002
- ◆ An email by **[solicitor 2]**, Legal Officer of the NQLCAC, dated 4 June 2002
- ◆ A facsimile from **[solicitor 2]**, Legal Officer of the NQLCAC, dated 4 June 2002 in relation to maps
- ◆ A letter from the Federal Court dated 5 July 2002 in relation to maps

Copies of the material provided directly to the Registrar in relation to the decision under s190A have been provided to the State of Queensland and the State provided with an opportunity to comment. The State has not provided any comments in response to the contents of this material.

Note: Information and materials provided in the context of mediation have not been considered in making this decision due to the without prejudice nature of those conferences and the public interest in maintaining the inherently confidential nature of such conferences.

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

A. Procedural Conditions

190C2	Information, etc, required by section 61 and section 62: The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.
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Details required in section 61

61(1)	The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.
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Reasons relating to this sub-condition

Has the application been made on behalf of all 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?

In *Risk v National Native Title Tribunal* [2000] FCA 1589, O’Loughlin J said the following:

‘By operation of subs 190C(2) the Registrar must be satisfied in relation to all the requirements contained in s 61. It follows that, when applying the registration test, the Registrar must consider whether (on the basis of the application and other relevant information) the application has been made on behalf of a ‘native title claim group’ [30]

‘The [Native Title] Act now ensures that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held . . . Subsection 61(1) imposes requirements not only in relation to the question of authorisation, but also in relation to the anterior question of whether the application has been made on behalf of a ‘native title claim group’ . . . An application which is not made on behalf of a ‘native title claim group’ cannot validly proceed . . .’ [29] – [30]

‘[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group’ [60]

Risk’s case is authority for the proposition that to comply with the requirements of s61(1), the application must be made on behalf of a ‘properly constituted group’, and ‘not individuals or small sub-groups’, as happened in *Risk*.

At Schedule A of the application, it is stated that the native title claim group identifies as and is recognised by other Aboriginal groups in the area as Ewamian. It is also stated in Schedule A that membership of the native title claim group is made up of all those persons who are descendants of the Ewamian ancestors named in Schedule A, and the adopted children of 5 named persons.

I note that the description of the Native Title Claim Group in Schedule A has altered when compared with the description provided in the original application dated 18 March 1999. In this regard, the comments in the affidavit of [anthropologist 1 – name deleted] dated 11 March 2002 in Attachment R6 to the application are relevant:

10. 'At the Meeting [of 9 and 10 March 2002] the Ewamian People discussed replacing the applicants ... and that the Claimant Group description be amended so that the applicants and the Claimant Group in this Ewamian #2 Native Title Claimant Application Q6009/99 and the Ewamian #3 Native Title Claimant Application Q6018/01 mirror each other.'

I also note that the meetings held on 9 and 10 March 2002 were attended by more than 130 Ewamian People (refer to affidavit of [solicitor 2] dated 28 May 2002 par 14).

I do not have any other information that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

Result: Requirements met

61(3)	<i>Name and address for service of applicant(s)</i>
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Reasons relating to this sub-condition

Requirements are met. Part B page 16 of the application identifies the names of the 5 applicants and their common address for service.

Result: Requirements met

61(4)	<i>Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons</i>
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Reasons relating to this sub-condition

Requirements are met. Schedule A of the application describes the native title claim group. The description of the native title claim group is sufficient for it to be ascertained whether any particular person is one of those persons. See further the reasons set out in my decision at s190B(3).

Result: Requirements met

61(5)	<i>Application is in the prescribed form; lodged in the Federal Court, contains prescribed information, and accompanied by prescribed documents and fee</i>
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Reasons relating to this sub-condition

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

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. As required by s.61(5)(d) the application is accompanied by supporting affidavits as prescribed by s.62(1)(a) and a map 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)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
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Reasons relating to this sub-condition

Each of the 5 applicants have sworn affidavits, similar in content, addressing matters required by s62(1)(a)(i) - (v). The 5 affidavits are appended to the application at Schedule R, and appear as R1 – R5.

The affidavits are all dated, signed by each deponent and competently witnessed. I am satisfied that the affidavits sufficiently address the matters required by s62(1)(a)(i)-(v).

Result: Requirements met

62(1)(c)	<i>Details of traditional physical connection (information not mandatory)</i>
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Comment on Details Provided

Schedule G of the application contains some details of activities currently being carried out by the native title claim group.

Further details of traditional physical connection are provided in Attachment F which consists of the Registration Test Report by [anthropologist 2 – name deleted].

A significant amount of affidavit and anthropological material has been reviewed and I refer to this information in more detail in my reasons for decision in relation to test conditions 190B(5), 190B(6), and 190B(7).

Result: Provided

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

62(2)(a)(i)	<i>Information identifying the boundaries of the area covered</i>
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Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information and maps in the application are sufficient to enable the area

covered by the application to be identified.

Result: Requirements met

62(2)(a)(ii)	<i>Information identifying any areas within those boundaries which are not covered by the application</i>
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Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable any areas within the external boundaries of the claim area not covered in the application to be identified.

Result: Requirements met

62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>
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Reasons relating to this sub-condition

For the reasons that led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the maps contained in the application show the external boundaries of the claim area.

Result: Requirements met

62(2)(c)	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
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Reasons relating to this sub-condition

I am of the view that under this condition, I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition. To expect the applicant to have details of searches carried out by other persons would be unreasonably onerous.

The application contains the details and results of the applicants' search at Attachment D of the application. There is no indication in the material that is before me that the applicant has conducted any other searches requiring disclosure in the application pursuant to s62(2)(c).

Result: Requirements met

62(2)(d)	<i>Description of native title rights and interests claimed</i>
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Reasons relating to this sub-condition

The native title rights and interests are described in Schedule E of the application. 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. Additionally, for the reasons that I find that there has been compliance with s190B(4), I am also satisfied that the requirements of this section are met.

Result: Requirements met

62(2)(e)	<p><i>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></p> <p><i>(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and</i></p> <p><i>(ii) there exist traditional laws and customs that give rise to the claimed native title; and</i></p> <p><i>(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.</i></p>
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Reasons relating to this sub-condition

The decision in *Queensland v Hutchison [2001] FCA 416* at [25] is authority for the proposition that only material that is part of the application can be relied upon in support of this requirement.

Information relevant to this sub-section is contained in the following:

- Schedule F
- Attachment F – Registration Report by a consultant anthropologist

It is my view that the information amounts to a general description of the factual basis so as to comply with the requirements of s62(2)(e) (i)-(iii).

Result: Requirements met

62(2)(f)	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
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Reasons relating to this sub-condition

Details of activities carried on in relation to the claim area are found in Schedule G of the application. I am satisfied that this description of the details amounts to compliance with the provisions of s62(2)(f).

Result: Requirements met

62(2)(g)	<i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)</i>
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Reasons relating to this sub-condition

Schedule H of the application states: *‘As far as the Applicants are aware there are no native title determination applications entered on the Register of Native Title Claims covering any parts of the claim area.’*

Result: Requirements met

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of</i>
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Reasons relating to this sub-condition

The application contains a copy of a s29 notice in Schedule I. I am of the view that s62(2)(h) requires that s29 notices (or their equivalents) that are still current and in respect of which the

applicants are aware, to be included in the application.

In that regard, I note that there is a Low Impact Notice EPM 13685 that is currently running and has a notification date of 20 March 2002. This date is after the date of lodgement of this application, this being 18 March 2002. On that basis, I was prepared to infer that the applicants were not aware of this notice as at the date of filing.

A letter dated 4 June 2002 from NQLCAC informs me that this notice was not received by the NQLCAC until 25 March 2002, this being after the date of lodgement of this application. Consequently, the applicants were not aware of this notice as at the date of filing and the requirements of this condition are satisfied.

Result: Requirements met

s.190C(2)

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&62.

Aggregate Result: Requirements met

190C3	<p><i>Common claimants in overlapping claims:</i></p> <p><i>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:</i></p> <ul style="list-style-type: none"><i>(a) the previous application covered the whole or part of the area covered by the current application; and</i><i>(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</i><i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i>
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Reasons for the Decision

The original application was in response to a s29 Notice given by the State of Queensland on 18 December 1998. It was filed in the Federal Court on 18 March 1999. For the purposes of s190C(3)(b), the application is taken to have been “made” on that date. It covered the same area as application QC97/18, as well as additional areas.

The Tribunal was advised by the Federal Court on 14 April 1999 that a notice of discontinuance was filed in relation to QC97/18 on 26 March 1999. As a consequence, QC97/18 had been removed from the Register of Native Title Claims.

A search of the Geospatial database and Register of Native Title Claims reveals that there are no overlapping applications that cover the whole or part of the claim area that were entered on the Register of Native Title Claims as at 1 July 2002. Therefore this application does not offend the provisions of s190C(3).

Result: Requirements met

	<p><i>Certification and authorisation:</i></p> <p><i>The Registrar must be satisfied that either of the following is the case:</i></p>
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<p>190C4(a) and 190C4(b)</p>	<p>(a) <i>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</i></p> <p>(b) <i>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.</i></p> <p><i>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:</i></p> <p>(a) <i>includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></p> <p>(a) (b) <i>briefly set out the grounds on which the Registrar should consider that it has been met.</i></p>
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Reasons for the Decision

Under this section, I am only required to be satisfied that one of the conditions in s190C(4) is met.

The application has not been certified by the relevant representative Aboriginal/Torres Strait Islander body. Therefore, the requirements of s190C(4)(a) are not applicable.

Consequently, I need to consider whether there has been compliance with s190C4(b) – authorisation by the native title claim group.

There are two limbs in s190C(4)(b):

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

First Limb - applicants are members of the native title claim group

The application contains the following information relevant to this first limb of s190C(4)(b):

1. a statement at the commencement of the application, prior to the naming of the applicants, that the applicants are members of the claimant group.
2. a statement under the heading ‘AUTHORISATION’ that the applicants are holders of native title rights and interests in the claim area and are authorised by the Ewamian People under their traditional laws and customs to make the application on behalf of the native title claimant group.
3. In Schedule A, it is stated: “Based on [anthropologist 2] research the applicants are descendants of the above and therefore are members of the claimant group.”
4. [applicant 2] and [applicant 1] affirm that they are members of the native title claim group in par 1 of their affidavits dated 10 March 2002
5. [applicant 3] has the same surname as [ancestor 1 – name deleted], an apical ancestor identified in Schedule A
6. [applicant 4] has the same surname as [ancestor 2 – name deleted], an apical ancestor identified in Schedule A
7. in preparing the Registration Report for the purposes of s190B(5), membership of the claim group was researched by the consultant anthropologist. The research involved extensive interviews with claim group members and genealogical preparation (refer Attachment F1)
8. [anthropologist 1] affidavit dated 11 March 2002 refers to [applicant 3], [applicant 4], [applicant 1], [applicant 2] as well as [applicant 5], the authorised applicants for this claim (refer par 11)

On the basis of the above, I accept the information in Schedule A as satisfying the first limb of s190C(4)(b). I am also satisfied that the information set out in points 1-8 above amounts to the statement required by s190C(5)(a) and the brief setting out of the grounds required by s190C(5)(b) in relation to the first limb of s190C(4)(b).

Second Limb - the applicants 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.

In *Risk v National Native Title Tribunal* [2000] FCA 1589, O’Loughlin J noted that under the *Native Title Act 1993*, applications can only be lodged on behalf of properly constituted groups and that authorisation must come from all the persons who hold the common or group rights and interests. He noted that although the applicant did not have to be individually authorised to make the claim, the authorisation must be in accordance with a process of decision making recognised under the traditional laws and customs of the claimant group.

S251B of the *Native Title Act 1993* recognises that the applicants may be authorised using a decision making process that is either:

- (a) in accordance with traditional laws and customs of the group; or
- (b) agreed to and adopted by the native title claim group.

The application contains and is accompanied by these statements and information in relation to the authorisation of the applicants, as required by s190C(5):

- Part A.2 – ‘The applicants are holders of native title rights and interests in the claim area and are authorised by the Ewamian People under their traditional laws and customs to make the application on behalf of the Native Title claimant group.

The Applicants [**applicant 3**], [**applicant 4**] and [**applicant 5**] were so authorised at a meeting of Ewamian People held at Mareeba on 10 June 1997, which was confirmed at Mareeba on 5 March 1999 and at Caboolture on 13 March 1999.

The grounds for this assertion are set out in the affidavits of the Applicants named above, provided and labelled as Attachments “R1” to “R3”, and the affidavit of [**solicitor 1**], acting Principal Legal Officer of the North Queensland Land Council dated 15 March 1999.

On 13 March 1999, there was an authorisation meeting in Caboolture. This meeting authorised [**person 3**], [**person 2**] and [**person 1**], as well as [**applicant 4**], [**applicant 3**] and [**applicant 5**] to make the application and deal with matters in relation to it (refer to affidavits of [**applicant 3**] and [**applicant 4**] dated 15 March 1999).

[**solicitor 1**] attests that those who attended the 5 March 1999 meeting agreed to abide by any decision made at the 13 March 1999 meeting about the appointment of three further people as applicants. He states that he obtained instructions from those who attended each meeting as to the names of those people authorised as the applicants for this application.

On 9 and 10 March 1992, there was an authorisation meeting of Ewamian People held at Undara National Park. This meeting confirmed the authorisation of [**applicant 3**], [**applicant 4**] and [**applicant 5**] and the new applicants, [**applicant 1**] and [**applicant 2**], were authorised by the claim group to replace [**person 1**], [**person 2**] and [**person 3**].

The grounds for this assertion are set out in the affidavits of the new applicants [**applicant 1**] and [**applicant 2**] and [**anthropologist 1**], the co-ordinating anthropologist for the North Queensland Land Council. These are provided and labelled as Attachments “R4” to “R6”.

The above applicants are also authorised by the Native Title claim group to deal with matters arising in relation to the application.'

- Applicants' s62(1)(a) affidavits - Each applicant deposes that he/she is authorised by all the persons in the Native Title Claim Group to make this application and deal with matters arising in relation to it

In relation to the authorisation of **[applicant 3]**, **[applicant 4]** and **[applicant 5]**:

- On 10 June 1997, there was an authorisation meeting at Mareeba. This meeting authorised **[applicant 4]**, **[applicant 3]** and **[applicant 5]** to make the application and deal with matters arising in relation to it (refer to affidavit of **[applicant 5]** dated 17 March 1999)
- On 5 March 1999, there was another authorisation meeting at Mareeba. This meeting authorised **[applicant 4]**, **[applicant 3]** and **[applicant 5]** to make the application and deal with matters in relation to it (refer to affidavits of **[applicant 3]** and **[applicant 4]** dated 15 March 1999)
- The affidavit of **[solicitor 1]** dated 15 April 1999 attests to the following:

- 3. THAT on or about 18 February, NQLCAC sent out notices to Ewamian people on NQLCAC's database informing Ewamian people of a proposed meeting for the 5th March 1999 at Mareeba.*
- 4. THAT I attended the above-mentioned meeting.*
- 5. THAT at the meeting Ewamian people discussed the native title application and agreed, according to the groups' decision making processes, to authorise **[applicant 5]**, **[applicant 4]** and **[applicant 3]** to make the application and to deal with matters arising in relation to it for people residing in NQLCAC's gazetted region. **[applicant 5]** and **[applicant 4]** are Ewamian elders and **[applicant 3]** has recently been made the main contact person for Ewamian native title matters.*
- 6. THAT at the meeting members of the native title claim group also instructed NQLCAC to organise a meeting for those Ewamian people living in southern Queensland as I understand there are a large number of Ewamian people currently residing in Cherbourg and Brisbane.*

In relation to the authorisation of **[person 1]**, **[person 2]** and **[person 3]**:

- The affidavit of **[solicitor 1]** attests to the following:
 - 10. THAT I attended the Ewamian meeting at Caboolture on the 13th March 1999.*
 - 11. THAT at the meeting in Caboolture I informed people that **[applicant 5]**, **[applicant 4]** and **[applicant 3]** had been authorised by the people at the Mareeba meeting to make the application and to deal with matters arising in relation to it.*
 - 12. THAT at the meeting in Caboolture people were asked to authorise their representatives to make the application and to deal with matters arising in relation to it together with **[applicant 5]**, **[applicant 4]** and **[applicant 3]**.*
 - 13. THAT at the meeting people instructed us they authorised **[person 1]**, **[person 3]** and **[person 2]** to make the application and to deal with matters arising in relation to it together with **[applicant 5]**, **[applicant 4]** and **[applicant 3]**.'*

In relation to the authorisation of **[applicant 1]** and **[applicant 2]**:

- On 14 February 2002, the Northern Queensland Land Council notified the Ewamian people

of a meeting at Undara National Park on 9 and 10 March . The notification occurred via

- Letters to the Ewamian Working Group, applicants and wider Ewamian community whose details were contained in their database
- Advertising in the Courier Mail and the South Burnett Times on 20 February 2002 (refer to par 5 of **[anthropologist 1]** affidavit, 11 March 2002)
- Advertising in the Tableland Advertiser on 28 February 2002 (refer to par 6 of **[anthropologist 1]** affidavit, 11 March 2002)
- Advertising in the Cairns Post on 6 March 2002 (refer to par 7 of **[anthropologist 1]** affidavit, 11 March 2002)

(refer to affidavits of **[applicant 1]** and **[applicant 2]** dated 10 March 2002 par 6(e))

- On 9 and 10 March 2002, the native title claim group confirmed its instructions to:
 - replace **[person 1]**, **[person 2]** and **[person 3]** with **[applicant 2]** and **[applicant 1]** as applicants
 - amend the claimant group description in this claim so that it mirrors the description in Ewamian #3 (Q6018/01)
 - authorise **[applicant 3]**, **[applicant 4]**, **[applicant 5]**, **[applicant 2]** and **[applicant 1]** to be applicants and representatives of the native title claim group and deal with matters arising in relation to both Ewamian Native Title applications. The authorisation was granted in accordance with traditional law and custom.

(refer to affidavits of **[applicant 1]** and **[applicant 2]** dated 10 March 2002 par 6(f) - (h) and affidavit of **[anthropologist 1]** dated 11 March 2002, par 10 – 13)

I am satisfied that the application contains the statements required by s190C(5)(a). I am satisfied that the information that is in the application relating to the grounds upon which I should be satisfied about authorisation is sufficient for the purposes of s190C(5)(b).

The information in the application and provided to me separately supports a finding that the authorisation decision was made by the native title claim group in accordance with a traditional decision making process that must be complied with by the group when authorising things of this kind. I am satisfied that the applicants are members of the native title claim group and are authorised to make this application and to deal with matters arising in relation to it by the native title claim group.

Result: Requirements Met

B. Merits Conditions

190B2	<p><i>Description of the areas claimed:</i></p> <p><i>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.</i></p>
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Reasons for the Decision

Map and External Boundaries

At Attachment C of the application, the applicants have provided 49 separate maps showing the boundaries of the areas covered by the application. The maps show the boundaries of all the parcels of land described in Attachment B to the application. In some cases, more than one map of the relevant land parcel is provided. In general, details of these land parcels are available on the public record and are sufficient to identify the location of the areas claimed on the surface of the earth.

There is 1 Queensland locality map and 9 other specific locality maps. The remaining maps contained in the application relate to each of the lots and constitute:

- 2 Queensland Department of Mines and Energy Cadastre Mining Claim Maps with longitude and latitude coordinates
- 18 Lot on Plan maps prepared by C&B Consulting Group based on data sourced from the Queensland Department of Resources
- 2 parish plans with no coordinates
- 11 BLINMAPs (based on Queensland Department of Natural resources Basic Land Information Network) with coordinates
- 1 Crown Plan with coordinates
- 5 1:5000 cadastral map produced by the Queensland Department of Natural resources with coordinates.

A number of the above maps have been prepared by the Queensland Department of Natural Resources based on their Basic Land Information Network (hence the description BLINMAPs). Although many of these described above do not provide coordinate points, I am satisfied that they provide a sufficient means by which it is possible to identify the location of the areas claimed on the surface of the earth. The maps provide details of a “map window position” (containing limited geographical coordinates), nearest locality, as well as the relevant subject parcel description. In some cases additional information is contained on the map to describe the relevant part of the parcel description claimed. These maps form part of a public record system upon which members of the community might reasonably rely to deal with land use issues. As each lot plan description is unique for all time, the reference to lot plan description is unambiguous and provides the means by which it is possible to locate the boundary of the area on the earth’s surface.

Other claim maps referred to above are Queensland Department of Mines and Energy Cadastre Mining Claim Maps which provide a system of coordinates by longitude and latitude coordinates. This provides a satisfactory means by which it is possible to identify the location of the area claimed on the surface of the earth. As with BLINMAPs, these maps form part of a public record system upon which members of the community might reasonably rely to deal with

land use issues.

Any other land parcel claimed and not supported by the provision of at least one BLINMAP or Department of Mines and Energy Cadastre Mining Claim Map, is detailed in other maps which provide satisfactory means to identify the location of the area, for similar reason to those expressed above.

Attachment A6.1.1

There is one map provided as Attachment A6.1.1 which suggests an overall claim area larger than that indicated by the physical description or any of the other 48 maps attached to the application.

There have been two submissions by the NQLCAC in relation to this: a letter dated 15 April 1999 and a letter dated 4 June 2002. Both letters advise that *'attachment A6.1.1 consists only of USL, SL, NP and Reserve land tenure contained within the boundary marked "claim area" and does not contain all land within same.'*

The letter of 15 April 1999 further advises that this map will be withdrawn from the application at the earliest possible opportunity. However, the letter of 4 June 2002 does not make this statement.

The map in Attachment A6.1.1 is a Locality Plan and states: *'This application only includes USL, SL, National Park and Reserve Land Tenure'*. I will only have regard to the specific lots within the area indicated on that map that are also physically described in the application in Schedule B as being the area claimed. On that basis, I have not concluded that it needs to be withdrawn.

Attachments 6.40 to 6.45

Maps 6.40 to 6.44 consist of 1:5000 cadastral maps prepared by DNR (Qld) in September 1998. Application parcels are indicated on these by hand-drawn bold outlines and "Ewamian Parcel Number" labels.

Map 6.45 has been prepared by DC & B Consulting Group and is an A1 monochrome locality map depicting the "original claim boundary", townships, major roads and some larger parcels of the application area. It also references enlargement maps.

I note that these were inadvertently omitted from filing when the current application was amended on 18 March 2002. A letter from the Federal Court dated 5 July 2002 confirms that the application has been corrected for this slip.

Description

Attachment B of the application describes the claim area covered by the application. The description has identified those areas by way of the legal description of land parcels, where such a definition exists, or by mining tenure reference. Lot numbers or other unique reference numbers that identify these land parcels, clearly according to the Queensland State Government's land tenure record system, are provided. The mining claim parcels (part lots) claimed are further described in Attachment B by an attached metes and bounds description.

Advice from the Tribunal's Geospatial and Mapping Analysis branch dated 30 April 2002 to the was that the metes and bounds description defining part lots 1LH6 (Black Braes) and 5LG813289 (WWF6) referred to in Attachment B were not appended to the Form 1 applications. As a result, the legal representatives filed these documents with the Federal Court on 4 June 2002.

I note that the Federal Court by way of letter dated 5 July 2002 confirmed that these documents were inadvertently omitted from the amended application and comply with the 'slip rule' which allows for minor corrections without further amendment.

Conclusion concerning maps and physical description

I am satisfied that the maps submitted with the application meet the requirements of s62(2)(b) as the boundaries of the areas covered by the application can be identified. I am satisfied that the physical description of the external boundaries meets with the requirements of s62(2)(a)(i). I note that advice from the Tribunal's Geospatial and Mapping Analysis branch dated 1 July is that the description and map are consistent and identify the application area with reasonable certainty.

Internal Boundaries

The internal boundaries are described at Schedule B part B, C, D and E of the application. 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:

B *The area covered by the application excludes any land or waters covered by:*

- a) a scheduled interest*
 - b) a valid non- Aboriginal freehold estate*
 - c) a commercial lease that is neither an agricultural lease nor a pastoral lease*
 - d) an exclusive agricultural lease or an exclusive pastoral lease*
 - e) a residential lease*
 - f) a community purpose lease*
 - g) a lease dissected from a mining lease and referred to in S.23B(2)(vii)*
 - h) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters*
 - i) a public road*
- which was validly granted or vested on or before 23 December 1996.*

C *Subject to paragraph (E), the area covered by the application excludes any land or waters covered by the valid construction or establishment of any public work, where the construction or establishment of the public work commenced on or before 23 December 1996.*

D *The area covered by the application excludes land or waters where the native title rights and interest 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) pursuant to s.190B(9)(c).*

E *Where the act specified in paragraphs B & C falls within the provisions of:*

- 1) s.23B(9)- Exclusions of acts benefiting Aboriginal people or Torres Strait Islanders:*
 - 2) s.23B(9A)- Establishment of a national or state park;*
 - 3) s.23B(9B)- Acts where legislation provides for non-extinguishment*
 - 4) s.23B(9C)- Exclusion of Crown to Crown grants; and*
 - 5) s.23B(10)- Exclusion by regulation*
- the area covered by the act is not excluded from the application.*

I am satisfied that this information is sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of land or waters within the external boundaries of the claim area.

The applicants have detailed a series of land tenure types that are excluded from the area of the application. These are outlined above. Such class exclusions amount to information that enables the internal boundaries of the application area to be adequately identified. This may require considerable research of tenure data held by the State of Queensland, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants.

Paragraph E of Schedule B states that the exclusions are subject to the provisions of sections 23B(9) to (10). Particulars allowing the claiming of the benefit of these sections are not provided. I consider that the description provided allows it to be shown objectively, upon the provision of such particulars, whether applicants may have benefit of these provisions and that this is all that is required by this section.

In conclusion, I am satisfied that the information and the 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 or interests are claimed in relation to particular areas of the land or waters. Consequently, I am satisfied that the requirements of s190B(2) are met.

190B3	<p><i>Identification of the native title claim group:</i></p> <p><i>The Registrar must be satisfied that:</i></p> <p><i>(a) the persons in the native title claim group are named in the application; or</i></p> <p><i>(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</i></p>
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Reasons for the Decision

Under this section, I am only required to be satisfied that one of the requirements in s190B(3) is met.

The application does not name all of the native title claim group and consequently, s190B(3)(a) is not applicable.

Turning my attention to s190B(3)(b), this sub-section requires that the Registrar be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The description of the persons in the group is found at Schedule A of the application. The membership of the group is said to be all those persons who are descendants of named Ewamian ancestors and adopted children of the five persons named in Schedule A. Each ancestor and adoptive parent is described with a first or Christian name and a surname.

I am satisfied that the descendants of the named persons (ie the ancestors and five adoptive parents named in Schedule A) could be identified with minimal inquiry and as such, ascertained as part of the native title claim group. By identifying members of the native title claim group as descendants of named ancestors and the adopted children of named people, 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.

Result: Requirements Met

190B4	<p>Identification of claimed native title</p> <p><i>The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.</i></p>
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Reasons for the Decision

To meet the requirements of s190B(4) I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

Schedule E of the application sets out the native title rights and interests claimed (including any activities in exercise of those rights and interests) with qualifications. Schedule E states:

'The native title rights and interests held by the native title claim group in the claim area include:

- 1. the right to possess, occupy, use and enjoy the claim area to the exclusion of all others subject to:

 - i. the valid laws of the State of Queensland and the Commonwealth of Australia; and*
 - ii. any valid rights and interests conferred upon non-native title holders, or the subject of an agreement made under the Native Title Act 1993 (Cth), or by the principles of aboriginal law and custom.**

- 1. the right to have access to, and use of the natural resources of the claim area including the right to:

 - i. maintain and use the claim area;*
 - ii. conserve the natural resources of the claim area;*
 - iii. safeguard the claim area and the natural resources of the claim area for the benefit of the native title holders;*
 - iv. manage the claim area for the benefit of the native title holders;*
 - v. use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes;**

and more particularly to:

- A. reside on, camp on, and travel across the land and, subject to regional customary-lawful expectations and protocol, permit non-native title holders to do so;*
- B. exercise rights of use and disposal over the natural resources, including the right to confer use of those natural resources upon non-native title holders;*
- C. exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of native title rights and interests;*
- D. discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:

 - preserve sites of significance to the native title holders and other Aboriginal people on the claim area;*
 - conduct secular, ritual and cultural activities on the claim area;*
 - conduct burials on the claim area;*
 - determine, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition;**

- regard the claim area as part of the inalienable affiliation of the native title holder to the claim area
 - maintain the cosmological relationship, beliefs, practices and institutions through proper and appropriate custodianship of the claim area, and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders
 - inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition
 - determine who are the native title holders
 - resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area
- E. construct and maintain structures for the purpose of exercising the native title rights and interests within the claim area.’

Schedule F of the application provides a further qualification to the rights and interests by indicating that the rights and interests held by the native title claim group:

- do not operate exclusive of the Crown's valid ownership of any minerals, petroleum or gas;
- are not exclusive rights and interests if they relate to waters in an offshore place; and
- will not apply if they have been extinguished in accordance with State and Commonwealth laws.

I note that the first category of rights and interest under 1. is made subject to the conditions under i. and ii. It is not explicitly stated that the second category is subject to the same conditions but the rights included within this category are derived from the broader claim for the right to possess, occupy, use and enjoy the claim area to the exclusion of all others. Therefore I consider the limiting conditions applicable to the first category should be read as being equally applicable to the second.

This interpretation is confirmed as accurate by the NQLCAC in their letter dated 14 April 1999. This letter states that “*We confirm that the native title rights and interests described in both section 1 and 2 of Schedule E are subject to the valid laws of the State of Queensland and the Commonwealth of Australia; and the valid rights and interests conferred upon non-native title holders, or the subject of an agreement made under the Native Title Act 1993, or by the principles of Aboriginal law and custom*”.

By particularising the rights and interests claimed into two general areas, and then further listing the particulars of comprehensible specific rights and interests, I consider the rights and interests identified by the applicants to be clearly defined and therefore readily identifiable. Therefore the application meets the requirements of s190B(4) and s62(2)(d).

Result: Requirements Met

190B5	<p>Sufficient factual basis:</p> <p>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:</p> <p>(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;</p> <p>(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</p>
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	<p><i>title rights and interests;</i></p> <p>(c) <i>that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</i></p>
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Reasons for the Decision

There are three criteria to consider in determining whether I am satisfied that there is a sufficient factual basis to support the applicant’s assertion about the existence of the native title rights and interests listed at Schedule E of the application.

In *Martin v Native Title Registrar* [2001] FCA 16, French J considered this condition of the registration test. I have had regard to his Honour’s findings that:

“Provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material” [23].

With respect to paragraph (a) of s190B(5), his Honour said:

“...What he (the delegate) had to be satisfied of was that the factual basis on which it was asserted that the native title rights and interests claimed exist supported the proposition that the native title claim group and the predecessors of those persons had an association with the area” [22].

His Honour imparts the same formulation of the question to the circumstances of paragraph (b) – see [27].

With respect to paragraph (c), his Honour noted that:

“...the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5)” [29]

Information Considered

A general description of the factual basis is provided in Schedule F of the application. It refers to these matters:

- the native title claim group and their predecessors have possessed, occupied, used and enjoyed the claim area since sovereignty
- Such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that the rights and interests in the land and waters vest in members of the native title claim group on the basis of, but not limited to:
 - descent from Ewamian ancestors
 - birth in the area
 - filiation with Ewamian people
 - death and burial on Ewamian country
 - linguistic affiliation with Ewamian country
 - personal name
- traditional laws and customs being passed on by traditional teaching from generation to generation

- the continuing acknowledgement and observance of traditional laws and customs by the native title claimant group
- the rights and interests being capable of being recognised by the common law of Australia.

It is stated in Schedule F that further information to support the factual basis for the assertions is found in **[anthropologist 2]** Ewamian Registration Report at Attachment F.

The other information which I found to be probative in making my decision under this section consists of the following affidavit material provided to the Tribunal on a confidential basis :

- **[applicant 3]** affirmed 15 March 1999;
- **[applicant 4]** sworn 19 March 1999;
- **[person 4]** sworn 15 March 1999;
- **[person 5]** sworn 15 March 1999;
- **[applicant 5]** sworn 17 March 1999.

Conclusion

I have read this material and am satisfied that it expands on the general description of the factual basis in Schedule F and provides specific and relevant information that supports the factual basis for the existence of the claimed native title.

It is stated in Schedule F that **[anthropologist 2]** is a senior anthropologist who has based her report on extensive interviews with members of the Ewamian claimant group, recorded details of sites on the claim area and a review of the available anthropological and linguistic literature. The author's qualifications appear at p1 of the report. On the basis of her qualifications and her work with the Ewamian People, I am satisfied that **[anthropologist 2]** is an authoritative source of information in relation to the native title claim group.

I note that both the report and affidavits refer to areas of land not claimed in this application, as being part of the traditional land of the native title. For the purpose of considering this section, I am treating the areas claimed in the application as representative of areas over which the group is able to make such a claim under the *Native Title Act 1993*. However, I accept that the traditional land of the native title claim group extends to the areas deposed and that it is appropriate for me to have regard to information relation to these areas in this decision.

190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area.

The registration test report indicates that a number of historical sources provide evidence of aboriginal groups in the vicinity of the claim area as early as 1844. **[anthropologist 2]** indicates that the literature provides specific association with the native title claim group and their predecessors from the late 1930's including interviews and genealogies of parents and grandparents of current members of the native title claim (**[person 6 – name deleted]** and **[person 7 – name deleted]**).

[anthropologist 2] also states that the claim groups' association with the claim area is supported by occupational histories of members dating back to 1910 and extensive genealogies dating back to early 1880's. The report observes that the claimants maintain their association with the area claimed through one or more of the following criteria:

- Birth on Ewamian country;
- Descent from Ewamian predecessors;
- Death and burial of genealogically related persons on Ewamian country;
- Occupation of Ewamian country;
- Linguistic affiliation;

- Personal names.

All the affidavits provided also detail the ongoing association of the deponents and their ancestors with the claim area. For example, [person 4] states at par 5 of her affidavit ‘*We know this Ewamian country because we grew up there and the old people told us about places on this country*’.

I am satisfied that the native title claim group has, and the predecessors of those persons had an association with the area.

190B(5)(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.

The registration test report summarises some of the literature detailing certain traditional customs and traditional laws observed by the predecessors of the native title claim group including beliefs in totems (named places and natural species) and ritual scarification of the chest and abdomen area.

[anthropologist 2] explains that the Ewamian claimants believe their entitlement to possession, occupation, use and enjoyment of the claim area derives from the legacy of their “old people” and the continued presence and activities of a number of spirit beings on the claim area. The Ewamian claimants believe that these “beings” along with the “old people” ensure the sacred status of Ewamian lands and waters, and protect the land.

The report also states that the Ewamian claimants acknowledge a range of protocols when occupying and using lands. In the past this resulted in the predecessors of the claim group defending Ewamian land from European trespassers. The report notes that currently traditional protection of land is evidenced by recent resistance to non-sanctioned use and occupation of their lands and waters such as mining activities.

All the affidavits provided also detail various traditional laws and customs and how these are passed on by the Elders. Refer to affidavits of:

- [applicant 5] at para 3, 5, 6, 8, 9, and 10
- [person 5] at para 6 and 7
- [applicant 4] at para 6, 7, 8, 9, and 10
- [applicant 3] at para 4, 5 and 6
- [person 4] at para 5 and 7.

I am satisfied that traditional laws and customs existed to give rise to the claimed native title.

190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The registration test report states that the following activities demonstrate that the native title claim group have continued to hold native title in accordance with traditional law and custom:

- Participation in cultural heritage surveys; including information regarding edible flora and fauna, the medicinal value of certain plant species, location of water sources and general environmental details;
- The claim groups active role in determining and monitoring the nature of non aboriginal development such as mining, power line erection and tourism;

Additional evidence of the continued holding of native title is deposed to in the affidavits provided including:

- Acknowledgement of “old people” and a desire to observe protocols or risk upsetting them; ([applicant 3] affidavit at para 5); ([applicant 5] affidavit at para 8);
- Continued teaching of traditional activities and beliefs including fishing, dancing, collecting bush tucker and traditional hunting practices ([applicant 3] affidavit at para 6); ([applicant 4] affidavit at paras 6 - 10);
- Occupation of traditional land ([applicant 3] affidavit at para 3 and 4); ([applicant 4] affidavit at para 3); ([person 4] affidavit at para 3,4,5, 7); ([person 5] affidavit at para 3)
- Knowledge of sites ([applicant 5] affidavit at para 5)

I am satisfied that the native title claim group has continued to hold the native title in accordance with their traditional laws and customs.

The application satisfies section 190B(5)

Result: Requirements Met

190B6	<p><i>Prima facie case:</i></p> <p><i>The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.</i></p>
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Reasons for the Decision

Under s190(B)(6) I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

I have already decided that the native title rights and interests claimed at Schedule E are readily identifiable. To meet the current condition, only some of these rights and interests, prima facie, need to be able to be established.

The term ‘prima facie’ was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted: “*The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie” is: ‘At first sight, on the face of it; as appears at first sight without investigation.’*” [Citing the *Oxford English Dictionary* (2nd ed. 1989)].

I have adopted the ordinary meaning referred to by their Honours when considering this application.

‘Native title rights and interests’ are defined at s223 of the *Native Title Act 1993*. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

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

The definition is closely aligned with all the issues I have already considered under s190B(5). I will also draw on the conclusions I made under that section in my consideration of s190(B)(6).

Information considered:

I note that there is information included in the application at Schedule G that contains a list of

activities described in general terms. I have also considered the following material in relation to this section (note that the affidavit material has been provided to the Tribunal on a confidential basis):

- **[anthropologist 2]** Ewamian Registration Report at Attachment F;
- **[applicant 3]** affidavit dated 15 March 1999;
- **[applicant 4]** affidavit dated 19 March 1999;
- **[person 4]** affidavit dated 15 March 1999;
- **[person 5]** affidavit dated 15 March 1999;
- **[applicant 5]** affidavit dated 17 March 1999.

Conclusion

On the basis of the affidavits and registration test report that have been considered, there is sufficient material and information to satisfy me on a prima facie basis that a number of the native title rights and interests claimed by the applicants at Schedule E of the application can be established.

Discussion of Relevant Case Law

Since 15 April 1999, the date upon which this application was originally subjected to the registration test under s190A, there are some further qualifications that the case law has set down in relation to the native title rights and interests which may be claimed. These are discussed below.

Native Title Rights and Interests and Exclusivity

In *WA v Ward (2000) 99 FCR 316 (Ward's case)*, the majority of the Full Federal Court found that some of the rights and interests included in the determination of native title made by Lee J at first instance may not be recognisable at common law. Their Honours found that the native title rights and interests which are recognised and protected by the common law are those which *involve physical presence on the land, and activities on the land associated with traditional social and cultural practice*. (See also *Mabo (No 2)* at CLR 188 per Toohey J). While the relationship of indigenous people with their traditional home land is 'primarily a spiritual affair', or as Blackburn J described it in *Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 at 167*, a 'religious relationship', *the common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land and does not protect purely religious or spiritual relationships with land.* [104] (my emphasis).

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

In relation to areas of non-exclusive possession, the majority in *Ward* held that the applicants could claim the following:

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

Logically, it follows that these types of rights and interests are also capable of registration in a claim for exclusive possession where the applicants can establish such on a *prima facie* basis. Excluded from the determination for areas of non-exclusive possession in *Ward*, however, were several rights determined by Lee J at first instance. These included:

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

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

However, the Full Court in *Ward* said that where:

"the evidence establishes that the indigenous community is entitled as against the whole world to possession, occupation, use and enjoyment of the land, *that entitlement will be similar in its enjoyment to the incidents which attach to a freehold title*. Subject to the general laws of Australia which regulate or restrict the use and enjoyment of the land, insofar as those laws apply to the indigenous community, *the community will have the right to control access to the land, to make decisions as to its use and enjoyment of its resources, subject to its own traditionally-based laws and customs*" [207] (my emphasis).

At this point, although the authorities are unclear as to whether a native title claim for exclusive possession is equivalent to a freehold title, this statement suggests that where a claim is one for exclusive possession, then the rights and interests excluded from determination in *Ward* may be capable of registration.

The specific rights and interests claimed

I note that the references to information provided in support of the native title rights and interests are not exhaustive; there may be others in the application.

1. *the right to possess, occupy, use and enjoy the claim area to the exclusion of all others*

In *State of Western Australia v Ward* [2000] FCA 611, this right formed part of the determination made by their Honours. I have read the rights/interests that follow to be examples of this broader right.

The information that supports this native title right/interest is as follows:

[applicant 4] para 2, 3, 4, 5, 6, 7, 8, 9, 10

[person 4] para 2, 3, 4, 5, 6, 7

[person 5] para 2, 3, 5, 6, 7

[applicant 5] para 2, 3, 4, 5, 6, 8, 9, 10

[applicant 3] para 3, 4, 5, 6

I am satisfied that this right can be *prima facie* established.

2. *the right to have access to, and use of the natural resources of the claim area including the right to:*

(i) *maintain and use the claim area;*

(ii) *conserve the natural resources of the claim area;*

(iii) *safeguard the claim area and the natural resources of the claim area for the benefit of*

- the native title holders;*
- (iv) *manage the claim area for the benefit of the native title holders;*
 - (v) *use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes;*

Use of the term ‘natural resources’

In Ward’s case, the majority considered the meaning of the term ‘resources’ and concluded that *‘[i]n the present context, that is, a claim based upon custom and tradition, it would seem that his Honour [Lee J] was referring to resources of a customary or traditional kind.* Consequently, the majority of the court found that the applicants had a non-exclusive right to use and enjoy *‘traditional resources’* [517].

The absence of the word ‘traditional’ could imply that the applicants are claiming a larger right – to use both traditional and non-traditional resources in the area. However, the material in support of these rights/interests provided by the applicants indicates that they are using what may be categorised as ‘traditional’ resources of the area (refer to material provided in support of right B below). Therefore, my decision is that the right/interest claimed is the right to use traditional resources of the claim area.

Native Title Right/Interest in 2(v)

As a result of the decision in *Ward’s case*, the use of the claim area and the natural resources for religious and spiritual purposes is not a right/interest that may be registered. Consequently, I will read native title right/interest as follows:

- (vi) *use the claim area and the natural resources of the claim area for social, cultural, economic, customary and traditional purposes;*

The specific evidence relating to the rights numbered 2 (i) – (v) above is equally applicable to the further particularised rights sought in this clause. This evidence is detailed below and I find it to be sufficient to support the rights sought in 2 (i) – (v).

and more particularly to:

- A. *reside on, camp on, and travel across the land and, subject to regional customary-lawful expectations and protocol, permit non-native title holders to do so;*

I read this right/interest as having two limbs:

- the ability to reside on, camp on, and travel across the land
- the ability to permit non-native title holders to reside on, camp on, and travel across land

The affidavit evidence that has been provided to support these rights/interests is as follows:

- [applicant 4] - para 3, 4, 7, 9
- [person 4] - para 4, 5, 6
- [person 5] - para 3, 5, 6
- [applicant 5] - para 3, 4, 10
- [applicant 3] - para 3, 5

Accordingly, I find that there is sufficient evidence to support the existence of these native title rights/interests on a prima facie basis. As the claim is one for exclusive

possession, I consider that the native title holders have the ability to make a claim for controlling access to the land by non-native title holders (refer to *Ward's case* para [207])

- B. *exercise rights of use and disposal over the natural resources, including the right to confer use of those natural resources upon non-native title holders;*

I read this right/interest as having two limbs:

- the ability to exercise rights of use and disposal over the natural resources by the native title holders
- the ability to confer use of natural resources to non-native title holders

The affidavit evidence that has been provided to support these rights/interests is as follows:

- [applicant 4] - para 7, 8, 9
- [person 4] - para 6, 7,
- [person 5] - para 4, 6
- [applicant 5] - para 6, 9
- [applicant 3] - para 6

Accordingly, I find that there is sufficient evidence to support the existence of these native title rights/interests on a prima facie basis. As the claim is one for exclusive possession, I consider that the native title holders have the ability to make a claim for controlling the use of natural resources by non-native title holders (refer to *Ward's case* para [207])

- C. *exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of native title rights and interests;*

I am reading this native title right/interest as including the right to trade of natural resources.

The affidavit evidence that has been provided to support this right/interest is as follows:

- [applicant 5] - para 9, 10

Accordingly, I find that there is sufficient evidence to support the existence of this native title right/interest on a prima facie basis.

- D. *discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:*

- *preserve sites of significance to the native title holders and other Aboriginal people on the claim area;*
- *conduct secular, ritual and cultural activities on the claim area;*
- *conduct burials on the claim area;*
- *determine, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition;*
- *regard the claim area as part of the inalienable affiliation of the native title holder to the claim area*
- *maintain the cosmological relationship, beliefs, practices and institutions*

through proper and appropriate custodianship of the claim area, and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders

- *inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition*
- *determine who are the native title holders*
- *resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area*

I note that:

- The decision in *Ward's* case precluded the recognition of purely religious/spiritual relationships with land, even though the decision acknowledged that this is the manner in which indigenous people view their relationships with the land (refer [104]).
- The majority in *Ward's case* had this to say about 'a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area':

'Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.' [666]

This impacts the rights/interests claimed as follows:

- I read right/interest D as:

discharge cultural, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to: (ie excluding the word 'spiritual')

- *conduct secular, ritual and cultural activities on the claim area – these are only claimable to the extent to which they are not religious or spiritual*
- *determine, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition – this cannot be claimed as a result of par [666] in Ward's case*
- *regard the claim area as part of the inalienable affiliation of the native title - holder to the claim area – I view this as a spiritual/religious relationship and consequently this is precluded by Ward's case*
- *maintain the cosmological relationship, beliefs, practices and institutions through proper and appropriate custodianship of the claim area, and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders - I view this as a spiritual/religious relationship and consequently this is precluded by Ward's case*

In light of the above, I read the rights/interests that are prima facie claimable as follows:

D. *discharge cultural, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:*

- *preserve sites of significance to the native title holders and other Aboriginal people on the claim area;*
- *conduct burials on the claim area;*
- *inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition*
- *determine who are the native title holders*
- *resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area*

The affidavit evidence that has been provided to support these rights/interests is as follows:

- [applicant 4] - para 7, 10
- [person 5] - para 3, 4
- [applicant 5] - para 5, 6, 7

Accordingly, I find that there is sufficient evidence to support the existence of these native title rights/interests on a prima facie basis.

E. *construct and maintain structures for the purpose of exercising the native title rights and interests within the claim area.*

The affidavit evidence that has been provided to support this right/interest is as follows:

- [applicant 4] - para 3
- [person 4] - para 4

Accordingly, I find that there is sufficient evidence to support the existence of this native title right/interest on a prima facie basis.

Summary of Rights/Interests established on a prima facie basis

Based upon the above analysis, the rights/interests which are claimable and established on a prima facie basis are as follows:

1. *the right to possess, occupy, use and enjoy the claim area to the exclusion of all others*
2. *the right to have access to, and use of the natural resources of the claim area including the right to:*
 - i. *maintain and use the claim area;*
 - ii. *conserve the natural resources of the claim area;*
 - iii. *safeguard the claim area and the natural resources of the claim area for the benefit of the native title holders;*
 - iv. *manage the claim area for the benefit of the native title holders;*
 - v. *use the claim area and the natural resources of the claim area for social, cultural, economic, customary and traditional purposes;*

and more particularly to:

- A. *reside on, camp on, and travel across the land and, subject to regional customary-lawful expectations and protocol, permit non-native title holders to*

- do so;*
- B. exercise rights of use and disposal over the natural resources, including the right to confer use of those natural resources upon non-native title holders;*
 - C. exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of native title rights and interests;*
 - D. discharge cultural, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:*
 - preserve sites of significance to the native title holders and other Aboriginal people on the claim area;*
 - conduct burials on the claim area;*
 - inherit or dispose of native title rights and interests in relation to the claim area in accordance with custom and tradition*
 - determine who are the native title holders*
 - resolve disputes between the native title holders and other Aboriginal persons in relation to the claim area*
 - E. construct and maintain structures for the purpose of exercising the native title rights and interests within the claim area.*

As indicated above, the rights and interests claimed in Schedule E of the application are qualified as follows:

- the native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown – Schedule Q
- they will not apply if they have been extinguished in accordance with valid State and Commonwealth laws – refer to Schedule E and letter of NQLCAC dated 14 April 1999
- they will not apply if there have been any valid rights and interests conferred upon non-native title holders, or the subject of an agreement made under the Native Title Act 1993, or by the principles of Aboriginal law and custom – refer to Schedule E and letter of NQLCAC dated 14 April 1999.

Result: Requirements Met

190B7	<p><i>Traditional physical connection:</i></p> <p><i>The Registrar must be satisfied that at least one member of the native title claim group:</i></p> <ul style="list-style-type: none"> <i>(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</i> <i>(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 land or waters) by:</i> <ul style="list-style-type: none"> <i>(i) the Crown in any capacity; or</i> <i>(ii) a statutory authority of the Crown in any capacity; or</i> <i>(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</i>
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Reasons for the Decision

Under s190B(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.

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application. This is found in the affidavit of **[applicant 4]**, dated 19 March 1999 for this purpose.

This affidavit states that the deponent is an elder and applicant in the Ewamian application. He was born on the Aboriginal reserve in Georgetown, situated within the area claimed.

[applicant 4] grew up in Georgetown and currently resides in Mareeba. He deposes that, as a youth, he accompanied his father on droving trips on Ewamian country and how his father “*passed on the Law about that country to me, just as I have to tell my children about our country*” (para 6).

[applicant 4] provides details about how he and his family spend time on parts of the claim area, carrying out a range of activities that are permitted under Ewamian traditional laws and customs. He and his family have lived, worked, hunted and fished on various parts of the claim area. **[applicant 4]** has also assisted archaeologists on cultural heritage surveys showing them sites and paintings, as well as explaining “*different kinds of bush tucker and bush medicine and where we find water in our country*”. (para 7)

I am satisfied on the basis of his sworn testimony, that the deponent is a member and elder of the native title claim group. He provides information to support the assertion that he has an association and connection with the claim area.

On the basis of the above, I am satisfied that **[applicant 4]** previously had a traditional physical connection with the land covered by the application.

Without it being strictly necessary, I also note that the application claims the protection of s47A over the Georgetown Aboriginal Reserve, one of the preconditions for this being that one or more members of the native title claim group occupy the area at the time the application is made.

In Schedule L, the following statement is made: “(c) *At the time of the application the Ewamian people occupy the land as demonstrated by such activities as controlling noxious plants, burning the land in accordance with traditional land management practices and fencing the boundary of the land.*”

Consequently, I am satisfied that this information substantiates that at least one member of the native title claim group currently has traditional physical connection with the land covered by the application.

The application passes this condition.

Result: Requirements Met



	<p>No failure to comply with s61A: <i>The application and accompanying documents must not disclose, and the Registrar</i></p>
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190B8	<i>must not otherwise be aware, that, because of s61A (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.</i>
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Reasons for the Decision

For the reasons that follow, I have concluded that there has been compliance with s61A.

S61A(1) – Native Title Determination

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

S61A(2) – Previous Exclusive Possession Acts

In Schedule B of the application, Parts B and C exclude any area which is covered by a previous exclusive possession act, as defined in s23B of the *Native Title Act 1993*, from the claim area.

S61A(3) – Previous Non-Exclusive Possession Acts

I am satisfied that the applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. I have interpreted Schedule B Part D and Schedule E - Items 1(i) and (ii) to have this effect. Also relevant is the letter from the North Queensland Aboriginal Land Council Aboriginal Corporation dated 14 April 1999 which advises that the conditions in Items 1(i) and (ii) also apply to the rights/interests detailed in Item 2.

S61A(4) – s47, 47A, 47B

The application does not claim the benefit of section 47 or 47B. However, Attachment B to Schedule B indicates that one lot is identified as attracting the benefit of s47A of the *Native Title Act 1993*, namely the *Aboriginal Freehold* described as *Sandy Creek – Georgetown*. This is described as Lot 22 CP898386 owned by the Ewamian Aboriginal Land Trust.

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 s47A is a matter to be settled in the Federal Court. S61A(4) provides that an application may be made in these terms.

Conclusion

For the reasons set out above, I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s61A the application should not have been made.

190B9	<i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i>
(a)	<i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i>
	<i>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i>

Reasons for the Decision

At Schedule Q of the application, it is stated that: *“The native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown.”*

This exclusion is consistent with the requirements of s190B(9)(a).

Result: Requirements Met

190B9 (b)	<p><i>Exclusive possession of an offshore place:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place - those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;</i></p>
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Reasons for the Decision

No offshore places are claimed in this application – Schedule B, Attachment B and the maps in Attachment C of the application establish that this claim area is located inland from the coast. See also the statement in Schedule P that the claim area does not include any offshore areas.

Result: Requirements Met

190B9 (c)	<p><i>Other extinguishment:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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)).</i></p>
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Reasons for the Decision

The application does not disclose and I am not otherwise aware of any other extinguishment of native title rights and interests in the area claimed.

I note also the statement in Schedule B of the application that native title rights and interests are not claimed where they have otherwise been extinguished pursuant to this section, except in the limited circumstances permitted by s47, s47A and s47B. A search of the Register of Indigenous Land Use Agreements reveals that there are no agreements registered over the claim area which provide for the extinguishment of native title by surrender.

I am satisfied that the requirements of this section have been met.

Result: Requirements Met