

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Sarah Carnley

Application Name: Tagalaka People (#2)

Names of Applicants: Mrs Janet Busch, Mr Bill Fortune, Mrs Janette Owens, Mrs Maureen Douglas, Mrs Beverly Bowyang, Mrs Gladys Callope

Region: Far North Queensland NNTT No.: QC01/22
Date Application Made: 29/06/2001 Federal Court No.: Q6020/01

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

DECISION – Tagalaka People #2

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

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

Date of Decision

Brief History of the Application

This application was filed in the Federal Court, Queensland District Registry on 29 June 2001.

The application was made in response to a notice about proposed high impact exploration permits (application notice) issued pursuant to the *Mineral Resources Act 1989 (Qld)* – see schedule I of the application.

On 30 July 2001 the Federal Court granted the Applicants leave to amend the application. It is the amended application that I now consider under s190A(1) of the *Native Title Act 1993 (Cth)* (“the Act”).

This is the second application that has been made on behalf of the Tagalaka People. The first application is QG6109/98 (NNTT reference QC98/43). The first application is entered on the Register of Native Title Claims and was accepted for registration pursuant to s190A on 31/8/00.

Information considered when making the Decision

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

- The National Native Title Tribunal’s Working/Personnel Files, Legal Services Files, Party Files and Registration Testing Files for QC98/43 and QC01/22.
- Tenure information acquired by the Tribunal in relation to the area covered by this application (if any).
- The National Native Title Tribunal’s Working files and related materials for native title applications that overlap the area of this application (if applicable);
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims and Schedule of Native Title Applications;
- The National Native Title Register
- The Register of Indigenous Land Use Agreements

Note: I have not considered any information and materials provided in the context of mediation of the group’s native title applications. 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.

A. Procedural Conditions

s.190C(2)

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

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

Details required in section 61

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

Reasons relating to this sub-condition

At Schedule A of the application it is stated that the native title claim group is known to itself and all neighbouring Aboriginal groups as the Tagalaka, and is continuous both in terms of descent and in terms of continuous transmission of the Tagalaka identity from the group of the same name recorded in and around the claim area late last century and in various written sources since. I take the reference to the last century to be the 19th century. Membership of the group depends primarily on cognatic descent from the ancestors named in schedule A and also includes persons adopted in accordance with Tagalaka traditional laws and customs. The process of adoption is explained in schedule A. There are 8 ancestors named in schedule A.

I do not have any information before me 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

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

Reasons relating to this sub-condition

The names of the applicants and their address for service are detailed at the commencement and at Part B of the application.

Result: Requirements met

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

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 affidavits, as prescribed by s.62(1)(a) and 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.190C2 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

Sworn affidavits have been provided by all six applicants.

The affidavits are all dated, signed by each deponent and competently witnessed. Each affidavit sufficiently addresses the matters required by s62(1)(a)(i)-(v) of the Act.

I note that each affidavit refers in para. 6 to paragraph (d) – the reference to (d) is an obvious typographical error; the correct reference should be ‘5’. This minor error does not have the effect that the affidavits do not meet the requirements of this section.

I note that one of the applicants is named in the application as “*name deleted*”. A “*name deleted*” has made the requisite s62(1)(a) affidavit. I am prepared to accept that this one and the same person and that the discrepancy in the spelling of the first name of the applicant is a minor error that may be overlooked for the purposes of s190A registration. I direct that the Register of Native Title Claims contain the spelling of “*name deleted*” that appears in the s62 affidavit, also clearly visible as the spelling adopted by this applicant in the signing of her name.

To conclude, I am satisfied that the requirements of s62(1)(a)(i)-(v) are met.

Result: Requirements met

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

Comment on details provided

The application contains some details relating to ‘traditional physical connection’ at attachments F1, F2, F3, and F4 being a registration test report by an anthropologist and affidavits by members of the native title claim group.

Result: Provided

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

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps provided by the applicant are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

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

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information contained in the application and provided by the applicant 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

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

Reasons relating to this sub-condition

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

Result: Requirements met

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

Reasons relating to this sub-condition

The requirements of s.62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicant in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect the applicant to have knowledge of, and obtain details about all searches carried out by every other person or body. Schedule D states that the applicants are not aware of any searches that have been carried out over the claim area. There is no information on the Tribunal files to indicate that the applicant has conducted any searches.

Result: Requirements met

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

Reasons relating to this sub-condition

An adequate description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. The description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law. See my reasons for decision under s.190B(4) for details of the description found in the application of the claimed rights and interests.

Result: Requirements met

s.62(2)(e)(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) 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 sub-condition

This information is contained at Schedule F of the application, the anthropologist's registration test report at attachment F1 and the three affidavits by members of the group at attachments F2, F3 and F4. It is my view that this information provides a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist so as to comply with the requirements of s.62(2)(e)(i), (ii) and (iii).

Result: Requirements met

s.62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-condition

The application provides details of the activities which the native title claim group carries out in relation to the area claimed at schedule G of the application. This description of activities is sufficient to comply with the requirements of s.62(2)(f).

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule H of the application provides the requisite details. I am satisfied that the application complies with the requirements of s 62(2)(g).

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule I contains details of notice of high impact exploration permits issued under the *Mineral Resources Act 1989* (Qld) and a copy of the notice is found in attachment I of the application.

Result: Requirements met

Reasons for the Decision

For the reasons identified above the application contains all the details and other information, and is accompanied by the affidavits and other documents, required by ss61 and 62 of the NTA. I am satisfied that the application meets the requirements of this condition.

Aggregate Result: Requirements met

s.190C(3)

Common claimants in overlapping claims:

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

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

Reasons for the Decision

This application was filed in the Federal Court on 29 June 2001 and for the purposes of s190C(3)(b) it was “made” on that day.

A search of the Geospatial database and Register of Native Title Claims reveals that native title determination application Q6018/01 (Ewamian People #3) QC01/016 overlaps the area of this application to the extent of 0.165 Sq m. According to section 5.15.3 of the National Native Title Tribunal’s Registration Test procedures, small overlaps, such as this one, may be disregarded on the basis of the ‘de minimus principle’. The aforementioned overlap is likely to be ‘technical’ in nature, resulting from differing levels of detail on computerised data sets. Accordingly, I am of the opinion that the overlap of 0.165 Sq m with the Ewamian People #3 application should be disregarded.

I am therefore satisfied that this application does not offend 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 applicants are members of the native title claim group

The application contains the following information relevant to this first limb of s190C4(b):

- A statement at the commencement of the application, prior to the naming of the applicants that the ‘Applicants for this Native Title determination application are the following members of the claimant group’.
- A statement in Part A(2) on page 1 of the application under the heading ‘Authorisation’ that the applicants are members of the native title claim group.
- A statement at Schedule R of the application that the applicants are members of the claim group.
- A statement by each applicant in their s62(2)(a) affidavits that they believe that they are members of the native title claim group (see para 1 of each affidavit).
- Attachment F7 (affidavit by “name deleted”, anthropologist employed by the applicants’ legal representative, para. 13) where “name deleted” states that on the basis of their laws and traditions the Tagalaka people authorised the applicants, who are all members of the claim group, to make and deal with the application.

I am therefore satisfied on the basis of this information in the application that the applicants are members of the native title claim group. The above recited information amounts to the statement required by s190C5(a) and the brief setting out of the grounds required by s190C5(b) in relation to this first limb of s190C4(b).

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.

A prerequisite to compliance with s190C(5) is provision by the applicants of:

- a statement to the effect that the requirement in s190C(4)(b) is met; and

- a brief statement setting out the grounds on which I should consider that the requirements of s.190C4(b) are met.

It appears from part A(2) and schedule R of the application that the applicants were authorised to make and deal with the application at a meeting of Tagalaka people held at "*place deleted*" "*date deleted*". It is stated in schedule R that the authorisation was in a manner consistent with traditional law and custom of the Tagalaka people that Tagalaka elders make decisions on behalf of their people and that the elders' decision binds the group as a whole.

These statements are elaborated upon in the authorisation affidavits by all of the applicants at Attachment "R1" to "R6" of the application and the affidavit by the anthropologist employed by the applicants' legal representative at attachment "R7".

The applicants state in their affidavits that they attended the meeting at "*place deleted*" on "*date deleted*". In relation to the meeting, each applicant states that:

- NQLC (the applicants' legal representative) contacted the members of the group as a result of which the meeting was convened to discuss and authorise a new Tagalaka application
- The Tagalaka people present at the meeting discussed who would be authorised to act as representative for the Tagalaka people, to make and deal with the application and matters arising in relation to it.
- The application was agreed to by the Tagalaka people at the meeting. It was also agreed that the applicants would be authorised to make and deal with the application.

The anthropologist deposes in his affidavit (see attachment R7) that:

- The Tagalaka people reside mainly in the Croydon and Normanton area.
- NQLC has a database containing the names and addresses of Tagalaka people.
- The Tagalaka people named on the database were advised by letter of the proposed meeting on "*date deleted*" at "*place deleted*".
- Advertisements notifying the proposed meeting were also placed in the Normanton Chronicle and the Croydon Gazette.
- He was present at the meeting.
- The applicants were authorised to make and deal with matters arising in relation to the application at this meeting, according to the group's laws and customs.

The above-referred statements in the application amount to compliance with s190C5(a). The information in schedule R, and the affidavits at attachments R1 to R7 amount to a brief setting out of the grounds, as required by s190C5(b).

On the basis of this information, I am satisfied that the native title claim group have a process of decision making that under its traditional laws and customs has been complied with, whereby the applicants are authorised to make the application and to deal with matters arising in relation to it. This information discloses that the Tagalaka held a well-publicised meeting at which the native title claim group made a decision to authorise the applicants to make the application and to deal with matters arising in relation to it, in accordance with their traditional laws and customs.

I am therefore satisfied that the applicants are authorised to make the application and to deal with matters arising in relation to it by all the persons in the native title claim group, thereby meeting the requirements of s190C4(b).

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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

Reasons for the Decision

External Boundaries

The claim area is located in North-Western Queensland, east of Normanton and Karumba on the coast with the Gulf of Carpentaria. The township of Croydon is located near the centre of the claim area. The written description for the external boundary is found in para. A of schedule B and attachment B1 of the application. The written description is supplemented with a map that shows the external boundary at attachment C1, and photocopies of topographical maps at attachment C2, C3, C4 and C5 of the application.

The written description defines the external boundary by reference to named geographic and man-made features, directions and approximate geographic coordinate references. The approximate geographic coordinates are referenced to Australian Geodetic Datum 1966 (AGD66) Australian Map Grid Zone 54. It is stated that these coordinates are intended as a guide only.

The boundary is stated in the written description to commence at the intersection of the centreline of Walker Creek and the Burke Development Road. The boundary is then expressed to travel in various directions (eg. westerly, southerly, etc.) and to a number of other reference points along the boundary back to the starting point. Each reference point is identified by reference to approximate geographic coordinate references and the geographic or man-made features located at the various reference points (eg. creeks, rivers or roads). Where the boundary travels along or intersects with a watercourse or road it is stated that it does so at the centreline thereof.

The information in the written description is then shown on the map in attachment C1.

Attachment C1 depicts the external boundary of the whole application area. The application area is shown with a solid external boundary and internal hatching. No internal boundaries are shown. Towns, rivers, creeks and roads are depicted though not all are named. Reference points A through to L are also shown. A note that boundaries refer to the centreline of rivers, creeks and roads unless otherwise indicated is provided.

Included on the map at Attachment C1 are two insets that show the application boundary in more detail. Inset "A" shows reference points F & G and Inset B shows reference points J, K & L. The scale for both insets is quoted as 1:200 000.

The map was originally produced in A3 size but has since been reduced to A4. The scales of Insets A & B are consequently incorrect. In addition, the scale of the main map is not maintained but the scale-bar is still accurate. I am of the opinion that the problems identified with the scales

do not affect the description of the area covered by the application. The actual area described is still the same and I do not consider that this issue impacts on whether the description of the external boundary of the application is reasonably certain.

Attachments C2 to C4 are not maps but are photocopies of 1:100 000 topographical maps produced by AUSLIG. Attachment C5 is a photocopy of a BLINMAP provided by the Department of Natural Resources and Mines (Qld). These attachments provide detail of certain sections of the external boundary, and further assist in the location of the external boundary on the earth's surface.

I note that there are differences between the datums and projections used in the definition of the application area in Attachment B1, in the map at attachment C1 and attachments C2 through to C5. However, I am of the opinion that the difference in datums does not render the description not reasonably certain.

The written description and maps appear to me to satisfactorily locate the external boundaries of the claim area on the earth's surface.

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

I am satisfied that the physical description of the external boundaries meets the requirements of s62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s62(2)(c).

Internal boundaries

The internal boundaries are described in schedule B of the application. These boundaries are described by:

- a formula that excludes a variety of tenure classes from the claim area, in the terms of s23B of the Act, being the section of the Act that defines Previous Exclusive Possession Acts and certain exceptions thereto.
- a statement that the area covered by the application excludes land or waters where the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsections 47(2), 47A(2) or 47B(2)) pursuant to s190B(9)(c).
- a statement that excludes from the claim area the land and waters covered by the Tagalaka #1 application QG6109/98 (QC98/43) – the area so excluded is further identified by lot and plan reference in attachment B2 of the application.
- A statement that excludes from the claim area any land or waters covered by the Ewamian People's Native Title claimant application #2 QG6009/99 (QC99/13).

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 applicant has detailed a series of land tenure types that are excluded from the area of the application and, at para. E, has detailed a number of tenure types that are excepted from the general class exclusion. This form of class exclusion (and exceptions) follows the wording of

s23B. In my view it amounts 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.

The areas specifically excluded include those areas covered by the Tagalaka People #1 application (QG6109/98) and by the Ewamian People's Application #2 (QG6009/98). Both applications are entered on the Register of Native Title Claims. In relation to QG6109/98, the areas excluded are also set out in Attachment B2 which contains details of the lot, plan and tenure reference for the land parcels. I am satisfied that these areas can be identified with reasonable certainty, having regard to the State of Queensland's land and tenure identification system, and the details that are on the Register of Native Title Claims in relation to the applications.

It follows that I am also satisfied that the information in the application regarding the internal boundaries of the claim area meets the requirements of s62(2)(a)(ii).

The requirements of s62(2)(a), s62(2)(b) and s190B2 are met.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:

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

Reasons for the Decision

Section 190B(3)(a) does not apply, as all the persons in the group are not named in the application.

The application must therefore meet the requirements of s190B(3)(b). In order 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 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 the named Tagalaka ancestors and also includes adopted persons. It is stated that adoption is in accordance with Tagalaka traditional laws and customs.

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

The description in schedule A of how one may become a member of the group as an adopted person refers to five clear criteria by which it could be ascertained whether or not an individual had been adopted by a member of the native title claim group.

I find that these stated features of what it means to be adopted as a Tagalaka person provide 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.

The definition 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, they are taken into one of the descent groups by an adult member who raises the child as their own (referred to as “growing up” the child);
- the child identifies as a member of the descent group and is so identified;
- the child is accorded the same rights as other family 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 therefore satisfied that this limb of the description is sufficient and that the application satisfies the requirements of s190B(3).

I am satisfied that the overall description of the claim group is sufficiently clear to ascertain with minimal inquiry whether any particular person is in the group. Therefore the requirements of this condition have been met.

Result: Requirements Met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

Under this condition I must be satisfied that the description of the native title rights and interests (found at Schedule E of the application) is sufficient to allow the claimed rights and interests to be readily identified.

The description contained at Schedule E of the application, describes the native title rights and interests as:

‘The native title rights and interests claimed are the right to exclusive possession, occupation, use and enjoyment of the claimed area as against the whole world, pursuant to the traditional laws and customs of the claim group’.

The claimed rights and interests are qualified by these statements in the application:

- schedule E – ‘Where the area is covered by a valid, previous non-exclusive possession act (s.23F) the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others’
- schedule Q – ‘The native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown in a manner which is inconsistent with continuing native title rights residing in those substances’
- schedule B – ‘The area covered by the application excludes land or waters where the native title rights and interests claimed have otherwise been extinguished (except to the extent that extinguishment is required to be disregarded under subsections 47(2), 47A(2) or 47B(2)) pursuant to s190B(9)(c)’

This description of the claimed rights and interests, and the stated qualifications, enables them to be readily identified and satisfies the requirements of s190B(4).

Result: Requirements met

s.190B(5)

Sufficient factual basis:

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

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

Reasons for the Decision

I must be satisfied pursuant to s190B5 that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support that assertion, and, particularly, the assertions in sub-sections (a), (b) and (c).

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, pursuant to the group’s traditional laws and customs, based on:
 - descent from Tagalaka ancestors
 - birth in the area
 - filiation with Tagalaka people
 - death and burial of a relative on Tagalaka country
 - linguistic affiliation with Tagalaka country
 - personal name, occupation and place of initiation
- passing on of traditional laws and customs by traditional teaching from generation to generation

- continuing to acknowledge and observe their traditional laws and customs
- the rights and interests are 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 this material in the application:

- attachment F1 (“*name deleted*” Tagalaka Registration Report)
- attachments F2, F3 and F4 (affidavits by claim group members, “*names deleted*”).

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 “*name deleted*” is a senior anthropologist who has based her report on extensive interviews with members of the Tagalaka claimant group, her recording of 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. I am satisfied on the basis of the information in relation to her qualifications and her work with the Tagalaka People, that “*name deleted*” is an authoritative source of information in relation to the native title claim group.

(a) An association with the area;

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

In considering this condition, I have had regard to information contained at Schedule F of the application, the anthropologist’s registration test report at attachment F and the affidavits “*names deleted*” (members of the native title claim group) at attachments F2, F3 and F4. It is clear from the information in their affidavits that they have an association with the claim area and are descended or adopted (in accordance with Tagalaka traditional laws and customs) from people who also had an association with the claim area. See:

- “*name deleted*” (20/1/00), paras 5-6, 11, 13-24
- “*name deleted*” (20/1/00), paras 4-5, 7-14
- “*name deleted*” (18/1/00), paras 4-11, 13-14

The registration report by “*name deleted*” also provides a sufficient factual basis for the assertion that the predecessors of the native title claim group are associated with the claim area: see pages 4-8.

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.

This subsection requires me to be satisfied that traditional laws and customs exist; that those laws and customs 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.

I have had regard to information contained at Schedule F of the application, the anthropologist’s registration test report at attachment F1 and the affidavits “*names deleted*” (members of the native title claim group) at attachments F2, F3 and F4. On the basis of their affidavits it is clear that

there exist traditional laws and customs observed by the native title claim group that give rise to the claim to native title rights and interests. The laws and customs include rights to access, utilising and trading the resources of Tagalaka land, preserving culture, including stories and language, learning and passing on knowledge of Tagalaka country and exercising responsibility for Tagalaka country. See:

- “name deleted” (20/1/00), paras 1, 4, 6, 8-9, 11, 13, 15-16, 18-24
- “name deleted” (20/1/00), paras 4, 5, 7-14
- “name deleted” (18/1/00), paras 4-11, 13-14

This is supported by the information that is in the Registration Report by the anthropologist at pages 8-12.

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

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs. For the reasons set out in 190B(5)(b) and having regard to the same material I am satisfied that there is a factual basis for the claim group continuing to hold native title in accordance with those traditional laws and customs.

Result: Requirements met

s.190B(6)

Prima facie case:

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

Reasons for the Decision

Under s190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

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

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

The definition is closely aligned with all the issues I have already considered under s.190B5. I will draw on the conclusions I made under that section in my consideration of s.190B6.

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

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

I have adopted the ordinary meaning referred to by their Honours when considering this application. At Schedule E to the application it is stated:

“The native title rights and interests claimed are the right to exclusive possession, occupation, use and enjoyment of the claimed area as against the whole world, pursuant to the traditional laws and customs of the claim group.

Where the area is covered by a valid, previous non-exclusive possession act (s.23F) the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.”

In making my findings under this section, I rely on the information contained in schedules G and F and attachments F1-F4 (being the registration report and affidavits by 3 members of the group).

This material supports a finding that:

- there exist traditional laws and customs acknowledged and observed by the claimant group that give rise to the native title rights and interests claimed (see my reasons under s190B5 for details of the material that supports this finding);
- members of the native title claim group carrying out activities in accordance with native title rights to occupation, use and enjoyment of the claim area (schedule G, attachment F1, F2, F3 and F4);
- members of the native title claim group living on the claim area throughout their lives with other Tagalaka people, knowing about sacred places and stories on Tagalaka country, practicing traditional activities on country such as hunting and foraging for bush foods and passing on traditional knowledge to young Tagalaka people (F2, F3 and F4);
- members of the native title claim group assert traditional rights and interests in the claim area, including having responsibility to care for their country, being recognised as the senior person for special places and requiring to have a say in any development of their country (F2, F3 and F4)
- a belief in the ‘old people’ as the spirits of Tagalaka country and their on-going spiritual connection with Tagalaka lands and waters.

On the basis of this information, I am satisfied that rights and interests of “exclusive possession, occupation, use and enjoyment”, with the stated qualifications, can be prima facie established, within the limits of that recognised by the common law. The stated qualifications to this claim (see my reasons under s190B4 for the text of the qualifications that appear in the application) satisfy me that rights are not claimed where these are not recognised at law.

Result: Requirements met

s.190B(7)

Traditional physical connection:

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

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

Reasons for the Decision

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.

The affidavit material provided by the applicants satisfies me that a number of members of the native title claim group currently have and have had traditional physical connection to parts of the claim area. I refer specifically to:

- “name deleted” (20/1/00), paras 5, 11, 13-24
- “name deleted” (20/1/00), paras 4, 7-14
- “name deleted” (20/1/00), paras 4, 6-10, 13-14

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

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

Reasons for the Decision

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 determination of native title in relation to the area claimed in this application.

S61A(2)- Previous Exclusive Possession Acts

In Schedule B of the application, part B and C, any area that is covered by a previous exclusive possession act, as defined in s23B of the Native Title Act, is excluded from the claim area.

S61A(3) – Previous Non-Exclusive Possession Acts

The applicants do not seek exclusive possession over areas the subject of previous non-exclusive possession acts – see the statement to this effect in schedule E of the application.

S61A(4) – s47, 47A, 47B

The application states at schedule L that all vacant crown lands within the claim area are areas to which the provisions of s47B apply.

Section 61(A)(4) permits an application to contain such a statement. Whether the provisions of s47B can be relied upon is an issue for another forum.

Conclusion

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

Result: Requirements met

s.190B(9)(a)

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

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

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

Reasons for the Decision

At Schedule Q 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 in a manner which is inconsistent with continuing native title rights residing in those substances.*

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

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

At Schedule P of the application it is stated that:
“The area covered by the application does not include any offshore areas”.

It appears from the written description and maps of the claim area that this application covers areas inland from the coast.

I am satisfied that the application complies with the requirements of s190B9(b).

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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

Reasons for the Decision

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

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