

National Native Title Tribunal

NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Chris Loorham

Application Name: Mualgal People

Names of Applicant(s): Mr John Henry Manas

Region: Far North Queensland NNTT No.: QC96/20

Date Application Made: 17/06/96 Federal Court No.: QG6035 of 1998

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

DECISION – Mualgal People

The application is NOT ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993* (C'th).

Chris Loorham

March, 2001
Date of Decision

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

Brief History of the Application

The original application was lodged with the National Native Title Tribunal on 17/06/96. An amended application was lodged with the National Native Title Tribunal on 23 September 1998.

A consent determination of native title in regard to part of the area of this application was made on 12/02/99 by Justice Drummond of the Federal Court.

Since the determination over part of the claim area, the applicant has filed two further amended applications in the Federal Court. Details of the amendments are as follows:

- notice of motion to amend, together with an amended application, filed in the Federal Court on 30/8/00. On 19/09/00, Deputy District Registrar Robson of the Federal Court in Brisbane granted leave to the applicant to amend the application. This amendment excluded islands described in schedule B covered by an overlapping claim on behalf of the Naghir people (QC96/77).
- notice of motion to amend, together with an amended application, filed in the Federal Court on 25/10/00. On 8/11/00, Deputy District Registrar Robson of the Federal Court in Brisbane granted leave to the applicant to amend the application. This amendment excluded islands and land masses described in schedule B covered by an overlapping claim on behalf of the Badu people (QC96/63).

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 Files, Administration File, Legal Services File and Registration Testing File for QC96/20, including original application lodged 17/6/96
- 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 Native Title Register;
- Federal Court Order and Reasons for Judgment by Justice Drummond dated 12/2/99;
- Amended application lodged with National Native Title Tribunal on 23/9/98, together with letter from legal representatives dated 22/9/98, document enclosed with that letter entitled 'List of Amendments to QC96/20 and affidavit by the applicant sworn 16/9/98.

Copies of the material referred to in the last dot point, provided directly by the applicant for my consideration in the application of the registration test in QC96/20, has been provided to the State. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

The State has not provided any comments in response to the contents of this material.

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

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

All references to legislative sections refer to the Native Title Act 1993 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(3) *Name and address for service of applicant*

Reasons relating to this sub-condition

The name of the applicant and his 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

Para. A5 of the 23/9/98 amended application describes the native title claim group. For the reasons which led to my conclusion (below), that the requirements for s.190B(3) have not been met I find that that the persons in the native title claim group are not described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements not met

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

Reasons relating to this sub-condition

The amended application is in the form prescribed by Regulation.5(1)(a) Native Title (Federal Court) Regulations 1998. As required under s61(5)(b), the amended application was filed in the Federal Court. The application prior to 30/9/98 is taken to have been made to the Federal Court in accordance with Table A, Application, Savings or Transitional Provisions, item 6 case 3.

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 an affidavit 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.190C2 only requires me to consider details, other information and documents required by sections 61 and 62. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-condition

The applicant has provided an affidavit with the application lodged with the NNTT on 23/9/98. This affidavit was made on 16/9/98. I am satisfied that the affidavit satisfactorily addresses the matters required by s.62(1)(a)(i)-(iii) at paras. 17.1, 17.2, and 18 of the affidavit. I am satisfied that the affidavit satisfactorily addresses the matters required by s62(1)(a)(iv) & (v) at paras. 8-16 of the affidavit.

I note that the applicant relies on his affidavit made 16/9/98 to support the two amended applications filed 30/8/00 and 25/10/00. On each amendment hearing, the Federal Court did not require the filing of a fresh affidavit pursuant to s62 (1)(a). This approach accords with the decision made by Justice French in *Drury v State of Western Australia* [2000] FCA 132 wherein it was stated that:

‘Where an application is to be amended simply by contraction of the geographical area covered by it pursuant to an agreement, that is a matter in which the filing of fresh affidavits by the same applicants covering the matters in (i) to (v) would be a pointless bureaucratic imposition. The amendment proposed in this case does not require the filing of fresh affidavits by the applicants.’ [para 13]

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 this requirement at para. 2 of the applicant’s affidavit accompanying the amended application lodged on 23/9/98.

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 that led to my conclusion that the requirements of s.190B(2), in relation to the external boundaries of the claim area 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 that led to my conclusion that the requirements of s.190B(2) are not met in relation to the internal boundaries, I am satisfied that the information contained in the application is sufficient to enable certain of the areas described in the application as not being 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

The application contains a map that clearly shows the external 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

Details of searches conducted by the applicant appear at A7, A8 and attachments A8.1 and A8.2 of the 23/9/98 application. There is no information on the Tribunal files to indicate that the applicant has conducted searches other than those disclosed in the application.

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 A9 of the 23/9/98 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. I have outlined these rights and interests in my reasons for decision under s.190B(4).

Result: Requirements met

s.62(2)(e)(i) *Factual basis – claim group has, and their predecessors had, an association with the area*

Reasons relating to this sub-condition

This information is contained at A13 of the 23/9/98 application, supported by information in the accompanying affidavit by the applicant.

Result: Requirements met

s.62(2)(e)(ii) *Factual basis – traditional laws and customs exist that give rise to the claimed native title*

Reasons relating to this sub-condition

This information is contained at A13 of the 23/9/98 application, supported by information in the accompanying affidavit by the applicant

Result: Requirements met

s.62(2)(e)(iii) Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs

Reasons relating to this sub-condition

This information is contained at A13 of the 23/9/98 application, supported by information in the accompanying affidavit by the applicant.

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 general details of the activities which the native title claim group carries out in relation to the area claimed at A9(3) of the 23/9/98 application. Details are also provided in para. 2 of the applicant's accompanying affidavit.

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

This information appears at A13(6) of the 23/9/98 application.

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

This information appears at A13(7) of the 23/9/98 application.

Result: Requirements met

Reasons for the Decision in Relation to s190C2

Because of the failure to comply with the requirements of s61(4), the application does not meet all of the requirements of sections 61 and 62, and therefore does not meet the requirements of s190C2.

Aggregate Result: Requirements not 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

Section 190C3 requires me to be satisfied that any person who is a member of the Mualgal native title claim group (as defined in this native title determination application - “the Mualgal application”) is not also a member of the native title claim group for any previous native title determination application (“the previous application”), where:

- (a) the previous application overlaps in whole or part the claim area covered by the Mualgal application (cf. s190C3(a)); and
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the Mualgal application was made (cf. s190C3(b)); and
- (c) the entry in the Register was made, or not removed, as a result of consideration of the previous application under s190A (cf. s190C3(c)).

The Mualgal application was originally lodged with the NNTT on 17/6/96 - this is the date it as “made” for the purposes of s190C3(b).

A search of the Geospatial Database and Register of Native Title Claims reveals that:

1. no overlapping applications were entered on the Register when this application was lodged with the Tribunal on 17/6/96; and
2. there have been other applications made since 17/6/96 that overlap with the area of the Mualgal application, but none were entered on the Register of Native Title Claims when the Mualgal application was made.

To conclude, this application does not offend the requirements of s190C3 as the overlapping applications were not on the Register of Native Title Claims when the Mualgal application was made on 17/6/96.

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 Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or

Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d)

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

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

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

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

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

Reasons for the Decision

The application has not been certified pursuant to s. 190C(4)(a). The applicant has elected to provide evidence of evidence of authorisation pursuant to s190C4(b).

I must therefore be satisfied that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group pursuant to s190C4(b).

I am satisfied that the applicant is a member of the native title claim group on the basis of his sworn affidavit made 16/9/98.

Pursuant to s190C(5) the applicant has provided a statement to the effect that the requirement in s190C(4)(b) is met. A brief statement setting out the grounds and on which I should consider that the requirements of s.190C4(b) are met. is also provided.

At A5(3) of the application, it is stated that:

“The applicant is a senior elder and a member of the Native Title Claim Group, and is authorised by the Native Title Claim Group to make the application, and deal with matters arising in relation to it in accordance with the traditions and customs of the Native Title Claim Group. The grounds on which the condition in (the soon to commence) section 190B(4) of the Native Title Act 1993 has been met, are set out in paragraphs 8 – 16 inclusive of the accompanying affidavit of John Henry Manas dated 16 September 1998.”

The applicant states in his affidavit (sworn 16/9/98) that:

- 1. the original application was made by {name deleted} on behalf of the Mualgal people;*
- 2. {Name deleted} died in March 1998;*
- 3. on 2/6/98 the applicant and other members of the native title claim group attended a meeting on Moa Island (the centre of the claim area). The meeting was held to talk about matters relating to the application;*
- 4. at this meeting it was decided in accordance with tradition and custom to appoint a group of persons from the native title claim group, consisting of some traditional elders and other group members to act as representatives of the native title claim group. These representatives are referred to in the applicant’s affidavit as the Mualgal Native Title*

Committee (exhibit JM-2 is a copy of the committee members list – there are 21 names on this list);

5. *on 25/6/98 the applicant attended another meeting held by the Mualgal Native Title Committee, to talk about substituting the late {name deleted} with another senior elder of the native title claim group;*
6. *It was decided at this meeting that the applicant should be so substituted in the Mualgal application;*
7. *On 15 & 16 September 1998, the applicant attended meetings of the Mualgal Native Title Committee on Moa Island to talk with the legal representatives about matters relating to the application and in particular, the effect of the soon to commence amended NTA and what action was required to ensure the application would satisfy the requirements of the Act;*
8. *During these meetings, the Mualgal Native Title Committee resolved that, in light of the applicant's position as applicant for the application (decided on 2/6/98), he was also authorised to deal with all matters arising in relation to the application in accordance with the tradition and custom of the native title claim group*

The affidavit by the applicant illustrates that the claim group has authorised the applicant to make the application and to deal with matters arising in relation to it. This has entailed a traditional decision making process involving members of the native title claim group deciding upon a committee of representatives for the native title claim group, made up of some traditional elders and also of other group members. The committee then resolved to authorise the applicant as the new applicant (on the death of the previous applicant) and to deal with all matters arising in relation to the application.

It follows that I am satisfied that the requirements of s190C5 are met as:

- the statement at A5(3), as elaborated upon in the applicant's affidavit sworn 16/9/98 constitute the requisite statement under s190C5(a);
- the information in the application and applicant's affidavit adequately set out the grounds on which I should consider that s190C4(b) has been met.

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

Written Description and Map of External Boundaries

The external boundaries of the claim area are described at A6 of the application. The claim area is described generally in A6 as being the whole of Moa Island (situated in the Torres Strait, Qld), together with the seas, reefs and islands surrounding Moa Island. There are two maps at

attachment A6.1 of the application depicting the external boundary. The extent of the external boundary is specifically described in these terms:

'The boundary commences from a point south-west of Warral Island from a point bearing longitude 142 degrees 19 east, and 10 degrees 44 south.

And then by a line bearing roughly north-east 2 km west of the North Torres (No. 3) Reef, to a point 2 km east of the eastern-most shore of Warral Island.

And then in a north-west direction by a line passing west of Kulbai Kulbai Island and Zurat Island, and east of Martu Island, and continuing north-west leaving the Duncan Islands to the east.

And then in a sweep outside the western-most points of the two sand shoals, south of Coconut Point on Badu Island to a point 2 km west of Coconut Point and then by a line roughly south-east to the south of Rugged Point on Badu Island.

And then turning roughly north-east leaving Wia Island to the east, and then bearing roughly north-east equidistant from Badu Island and Moa Island in the channel separating the two Islands, and on leaving that channel, roughly north-east to a point longitude 142 degrees 36 east and 10 degrees 93 south.

And then by a line due east to a point 142 degrees 64 east and 10 degrees 93 south.

And then by a line due south to a point 142 degrees 64 east, 10 degrees 53 south, then due east to a point 2 km south-east of Mokanab Islet.

And then by a line roughly south-west to the centre line of the Simpson Channel roughly 2 km south of the southern boundary of North Torres (No. 3) Reef back to the starting point.'

The maps in attachment A6.1 are A4 size maps, showing the external boundary line described in A6 in black ink (A6 states that the line is drawn in red – the maps appear to be photocopies, hence the black rendition of the boundary line). It is stated in A6 that the maps are reproduced from a Qld Dept. of Lands cadastral working map and Map 7377 of the Australian Government 1:100000 series for the Torres Strait. The reproduced map from Map 7377 has a detailed series of coordinate points that enables the extent and location of the external boundary depicted on that map to be ascertained, when read with the written description thereof in A6 of the application.

I am therefore satisfied that the information and maps contained in the application are sufficient for it to be said with reasonable certainty the claim area is located. The use of geographic coordinates for certain sections of the external boundary, together with identification along the external boundary of certain island and marine features, when read with the detailed coordinates on Map 7377 identify the location of the external boundary with reasonable certainty.

For the reasons outlined above I am satisfied that the physical description of the external boundaries meets the requirements of s62(2)(a)(i) and the map of the external boundaries meets the requirements of s62(2)(b).

Internal Boundaries

The internal boundaries are described at:

- A6 of the 23/9/98 application where it is stated that the claimed area does not include land, which has been, or is currently freehold land (other than DOGIT land).
- Schedule B of the 30/8/00 application where it is stated that Naghir Island (Lot 20 on Plan TS228), Peenacar Islet (Lot 18 on Plan USL 36708), Pinnacle Reef (Lot 21 on Plan USL36712), Mokanab Islet (Lot 26 on Plan TS233) and Tika Reef (Lot 20 on Plan USL36712) are excluded from the claim area;

- Schedule B of the 25/10/00 application where it is stated that a number of named islands/islets and *'such other islands as are situated within the Australian Territorial sea boundaries which surround the aforementioned islands'*

Exclusion of Freehold Land

I am satisfied that the exclusion of freehold land, other than DOGIT land, enables the boundaries of such areas within the claim area to be ascertained with reasonable certainty. 'Freehold land' and 'DOGIT land' are clearly defined legal concepts that enable the internal boundaries of the application area to be adequately identified. This may require 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 applicant.

In the event that the tenure information is obtained, it is possible to identify the areas within the external boundaries of the claim area that are excluded.

Exclusions identified in the 30/8/00 application

The island/land masses identified in the 30/8/00 application have been described with the name by which the area is known and the lot/plan references by which they are known. There is also a map in attachment C of the application that clearly depicts each of the excluded island/land mass by name and the lot/plan reference.

The State of Queensland's lot/plan references are used to identify the excluded areas. The areas may therefore be located from the State's land identification and tenure record system with reasonable certainty. I am satisfied that the written description of the excluded areas by referencing them to the State's public record system is a sufficient identification of the areas. The map in attachment C also usefully locates the areas so excluded.

Exclusions identified in the 25/10/00 application

The information in relation to the areas excluded in the 25/10/00 application appears in schedule B (written description) and attachment C (map showing the areas).

I am satisfied that the areas described by lot/plan reference can be identified with reasonable certainty. Lot/plan references have been allocated to land on the 10 named islands/islets identified in the written description and to the islands that surround the 10 named islands/islets. The map in attachment C also depicts each area that has been allocated a lot/plan reference. As stated above, these areas may be located from the State's land identification and tenure record system with reasonable certainty. I am satisfied that the written description of the excluded areas by referencing them to the State's public record system is a sufficient identification of the areas.

The information provided in the 25/10/00 application also enables all of the land/waters on the 10 named islands/islets to be identified with reasonable certainty. Schedule B describes by name 10 islands/islets that are excluded from the claim area. In each case it is stated that land on the island/islet (described by lot/plan reference) is also excluded. I have taken the description of land on the island/islet to mean land above high water mark since this is the legally defined meaning of the word 'island'. (See Butterworths Australian Legal Dictionary at p639, Convention on the Law of the Sea 1982, art 10(1))

For the reasons outlined above I am satisfied that the physical description of the internal boundaries meets the requirements of s62 (2)(a)(ii).

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

To meet this condition of the registration test, I must be satisfied as to either s190B3(a) or (b).

The applicants have elected not to name all of the persons in the native title claim group. I am therefor required to consider the requirements of s.190B(3)(b).

The application contains a description of the persons in the native title claim group at A5 of the 23/9/98 application :

- 1. For the purposes of this application, the Mualgal peoples comprise men, women and children of Torres Strait Islander descent ('the Native Title Claim Group') each of whom:*
 - (a) have, and the predecessors of those persons had, an association with the claimed area;*
 - (b) acknowledge the traditional laws, and observe the customs of the Mualgal people; and*
 - (c) continue to hold native title in accordance with those traditional laws and customs.*
- 2. More specifically, the Native Title Claim Group comprises:*
 - (a) the persons who are the descendants of the apical Mualgal ancestors at the date of sovereignty in 1872, including the Samukie and Tuku, Babun, Kupad, Nawarie Goba, Maga, Anu Namai, Maiamaia, Gai, Nakau, Iaka/Aiaka and Dadu, Waina and Jack Moa and Koia family groups; and*
 - (b) such other persons whom the descendants of the Samukie and Tuku, Babun, Kupad, Nawarie Goba, Maga, Anu Namai, Maiamaia, Gai, Nakau, Iaka/Aiaka and Dadu, Waina and Jack Moa and Koia family groups regard as being members of the Native Title Claim Group.*

Section 190B3 does not require me to be able to identify every person who belongs to the native title claim group. However, the application must describe the persons in the native title claim group sufficiently clearly so that it can be objectively ascertained whether any particular person is one of those persons (see also reasons at s61(4)(b) above).

In my view there are two problems with the native title group description provided in this application. Firstly, the criteria of descent from *'the apical Mualgal ancestors at the date of sovereignty in 1872'* is uncertain because all the ancestors are not named, nor is there a stated means of ascertaining who those persons might be. Secondly, and in the absence of a complete list of apical ancestors, the description of the claim group does not set out any criteria or define a

process which is to be applied by the named ancestor family groups where by a person may come to be regarded as being a member of the native title group.

Without a clearly defined criteria and process whereby a person who is outside the named family descent groups may be regarded as a member of the group I am unable to be satisfied that the requirements of s61(4)(b) have been met.

Result: Requirements not 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

I am required to be satisfied that the native title rights and interests detailed in Schedule E of the application can be readily identified.

The description of the native title rights and interests claimed must not merely consist of a statement to the effect that the native title rights and interests are “all native title interests that may exist, or that have not been extinguished at law”[see s62(2)(d) of the Act].

The description contained in A9 of the application of the claimed the native title rights and interests is in these terms:

1. *The Native Title Claim Group are entitled to the exclusive possession, occupation, use and enjoyment of the claimed area ("the native title rights and interests") in accordance with valid State and Commonwealth laws.*
2. *The nature and extent of the native title rights and interests include rights and interests, in accordance with custom and tradition, to:-*
 - (a) *Have access to and use of the natural resources of the claimed area including the right to:-*
 - (i) *maintain and use the claimed area;*
 - (ii) *conserve the natural resources of the claimed area;*
 - (iii) *safeguard the natural resources of the claimed area for the benefit of the native title holders;*
 - (iv) *manage the claimed area for the benefit of the native title holders;*
 - (v) *use the natural resources of the claimed area for social, cultural, economic, religious, spiritual, customary and traditional purposes.*
 - (b) *Determine access rights in relation to entry to the claimed area by others including the right to grant, deny, or impose conditions in relation to, that entry to the claimed area,*
 - (c) *Determine use rights in relation to activities which may be carried out by others on the claimed area including the right to grant, deny, or impose conditions in relation to, those activities which may be carried out on the claimed area.*
 - (d) *Exercise and carry out economic life (including by way of barter) on the claimed area including to hunt, fish and carry out activities on the claimed area, including the creation, growing, production or harvesting of natural resources.*
 - (e) *Discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claimed area including to:*

- (i) preserve sites of significance to the native title holders and other Torres Strait Islander people on the claimed area;
 - (ii) determine, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition;
 - (iii) regard the claimed area as part of the inalienable affiliation of the native title holder to the claimed area and ensure that the use of the claimed area is consistent with that affiliation;
 - (iv) maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claimed area and special and sacred sites located on it, to ensure the continued vitality of the culture, and the well-being of the native title holders;
 - (v) inherit, dispose of or confer native title rights and interests in relation to the claimed area on others in accordance with custom and tradition;
 - (vi) determine who are the native title holders;
 - (vii) resolve disputes in relation to the claimed area; and
 - (viii) bury the members of the Native Title Claim Group in accordance with tradition and custom.
- (f) Establish residences on the claimed area.
3. The Native Title Claim Group currently carries on a number of activities on the claimed area pursuant to the native title rights and interests asserted,
4. In relation to the native title rights and interests asserted:-
- (a) they do not operate exclusive of the Crown's valid ownership of any minerals, petroleum or gas;
 - (b) any rights and interests asserted in off shore places are not exclusive rights and interests; and
 - (c) the rights and interests asserted have not otherwise been extinguished."

I am satisfied that rights and interests described in A9 are clearly and readily identifiable.

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

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the applicant' assertion about the existence of the native title rights and interests listed at Schedule E of this application.

(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 paras. A5 and A13 of the application and to the applicant's affidavit (16/9/98). It is asserted at A5 and A13 that the Mualgal people have, and their predecessors had an association with the claimed area. It is asserted at A5 of the application that the native title claim group are descended from the apical Mualgal ancestors at the date of sovereignty in 1872.

The applicant is a senior elder and member of the native title claim group (A5 and para. 1 of his affidavit). I accept that he is an authoritative source of information in relation to the issues raised by s190B5. The applicant states at para. 2 of his affidavit that he resides and has always resided on Moa Island and in so doing has maintained his physical connection with the claim area. The applicant describes a number of ways in which the claim group has maintained their continuous and unbroken connection to the claim area, this includes the maintenance of the clan system of kinship, knowledge and preservation of sacred sites and the continuing practice of culture and traditions.

I am accordingly satisfied that the claim group have an association with the claim area and are descended (in accordance with Mualgal traditional laws and customs) from Mualgal people who also had an association with the claim area.

(b) existence of traditional laws acknowledged by, and traditional customs observed by, the native title claim group and (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The applicant's affidavit contains a description of a system of traditional laws and customs that continue to be observed by the native title claim group that gives rise to the claim to native title rights and interests. These include:

- the maintenance of the clan system of identity;
- knowledge and preservation of sacred sites;
- the continuing practice of culture and tradition;
- the making of decisions in relation to the application and authorisation of the applicant in accordance with tradition and custom.

In my view it is also relevant to my consideration of the requirements of s190B5 that that the native title claim group has successfully obtained a Federal Court consent determination of native title over a large portion of the island at the centre of the claim area (Moa Island).

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 s190B6 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 s190B5. I will draw on the conclusions I made under that section in my consideration of s190B6.

1. *The Native Title Claim Group are entitled to the exclusive possession, occupation, use and enjoyment of the claimed area (‘the native title rights and interests’) in accordance with valid State and Commonwealth laws.*

Established – the affidavit by the applicant (16/9/98) establishes that he and other members of the claim group continue to exercise native title rights and interests on the claim area. There is evidence that they:

- reside on the claim area
- use the land
- maintain the kinship structures of their clans
- have knowledge of and engage in preservation of sacred sites
- continue to practice their culture and traditions, including the use of traditional laws and customs to authorise the applicant to make the application and to deal with matters arising in relation to it.

2. *The nature and extent of the native title rights and interests include rights and interests, in accordance with custom and tradition, to:*

(a) Have access to and use of the natural resources of the claimed area including the right to:

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

Established – within the limits of that recognised by the common law.

I am satisfied on the basis of the applicant’s affidavit (16/9/98) that the primary or core rights of possession, occupation, use and enjoyment are established. It therefore follows that access to and use of the natural resources of the claimed area is also established.

In this regard, the general qualifications that the rights claimed are in accordance with ‘*valid State and Commonwealth laws*’ and ‘*custom and tradition*’ satisfy me that rights are not claimed where these are not recognised at law.

- (b) *Determine access rights in relation to entry to the claimed area by others including the right to grant, deny, or impose conditions in relation to, that entry to the claimed area.*

Established - within the limits of that recognised by the common law.

I am satisfied on the basis of the applicant's affidavit (16/9/98) that the primary or core rights of possession, occupation, use and enjoyment are established. It therefore follows that the right to determine access rights in relation to entry to the claimed area is also established.

The general qualifications to the claimed rights satisfy me that rights are not claimed where these are not recognised at law.

- (c) *Determine use rights in relation to activities which may be carried out by others on the claimed area including the right to grant, deny, or impose conditions in relation to, those activities which may be carried out on the claimed area.*

Established - within the limits of that recognised by the common law.

I am satisfied on the basis of the applicant's affidavit (16/9/98) that the primary or core rights of possession, occupation, use and enjoyment are established. It therefore follows that the right to determine use rights in relation to activities by others on the claimed area is also established.

The general qualifications to the claimed rights satisfy me that rights are not claimed where these are not recognised at law.

- (d) *Exercise and carry out economic life (including by way of barter) on the claimed area including to hunt, fish and carry out activities on the claimed area, including the creation, growing, production or harvesting of natural resources*

Established - Although the Application does not include information about the economic life of the island community I am prepared to accept on a prima facie basis that this right can be established on the evidence of the groups continued occupation and survival on the island over countless generations. The right to exercise and carry out economic life on the claim area is also supported by information contained in a *Background Briefing Paper prepared for the Tribunal President by Tamara Kamien in October 1996* and a number of published studies of Torres Strait Island communities, two that I have had particular regard to are , *Torres Strait Islands Custom and Colonialism by Jeremy Beckett* and *The Torres Strait by John Singe*

- (e) *Discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claimed area including to:*
- (i) *preserve sites of significance to the native title holders and other Torres Strait Islander people on the claimed area;*
 - (ii) *regard the claimed area as part of the inalienable affiliation of the native title holder to the claimed area and ensure that the use of the claimed area is consistent with that affiliation;*
 - (iii) *maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claimed area and*

special and sacred sites located on it, to ensure the continued vitality of the culture, and the well-being of the native title holders;

Established – In his affidavit the applicant talks of the continuous and unbroken connection of his people with the claimed area being demonstrated in several ways, including by knowledge and preservation of sacred sites and by the continuing practice of culture and traditions. I am of the view that these rights are intrinsically bound up with the group's possession, occupation, use and enjoyment of the claim area. Therefore, the rights sought cannot be divorced from actual physical use of the land and the conduct of activities on the land and do not offend the decision in *Ward's case*.

- (iv) *inherit, dispose of or confer native title rights and interests in relation to the claimed area on others in accordance with custom and tradition;*
- (v) *determine who are the native title holders;*
- (vi) *resolve disputes in relation to the claimed area;*

Established - I am satisfied on the basis of the applicant's affidavit (16/9/98) that the primary or core rights of possession, occupation, use and enjoyment are established. It therefore follows that these rights are also established. I see that the applicant talks of the group maintaining kinship structures which would also appear pertinent to the continued existence of this right and interest. I note in passing that the exercise of these rights could only relate to internal mechanisms for inheritance, resolutions of disputes, decisions as to who are the native title holders etc. and does not affect persons or entities outside the group.

- (vii) *bury the members of the Native Title Claim Group in accordance with tradition and custom*

Established – By establishing the primary or core rights of possession, occupation, use and enjoyment are established it follows that this is established also as it is extrinsically tied up with and essential to the exercise of the core or primary right.

- (f) *Establish residences on the claimed area.*

Established – By establishing the primary or core rights of possession, occupation, use and enjoyment, it follows that this is established also as it is extrinsically tied up with and essential to the exercise of the core or primary right. I note also that the applicant talks of he and others residing on the claim area.

Section 190B(6) requires that at least some of the claimed rights and interests must be established prima facie. As all of the claimed rights and interests are established, the requirements of this section are met.

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

For the reasons outlined in s190C4 and s190B5, above the affidavit by the applicant (16/9/98) satisfies me that he is a member of the native title claim group and has maintained his traditional physical connection to the claim area. Refer to my reasons under s190B5.

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

As noted previously a part of the area of this application has been the subject of a consent determination of native title by the Federal Court. The determination relates to areas of land on Moa Island and was made on 12/2/99. There is no longer an application or proceeding current in relation to that determined area. A search of the National Native Title Register shows that there are no other determinations of native title over the claim area. The amended application currently being considered for registration therefore does not offend s190B8 (and the corresponding s61A(1)).

S61A(2)- Previous Exclusive Possession Acts (PEPAs)

The applicant has not excluded from the claim area the classes or types of tenure referred to in s23B of the Act, except for *'freehold land (other than DOGIT land)'*.

The details of the searches and results of searches conducted by the applicant in relation to the claim area (see A7, A8 and attachments A8.1 & A8.2) do reveal the existence of potential PEPAs over the claim area, namely:

- school buildings and landing ground for aircraft on Moa Island – may amount to PEPAs under s23B(7) as a public work;
- an area covered by a special lease to the Church Carpentaria Diocese, also on Moa Island – may amount to a PEPA pursuant to s23B(2)(c).

There are certain circumstances when native title may be claimed over a PEPA This is provided for in s61A(4) of the Act which states that, *"subsection (2) and (3) {that is, of s61A} does not apply to an application if:*

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

At A13(3) there is this statement:

'Certain special leases and other types of tenure (eg, Reserves and Deeds of Grant in Trust) either currently exist or were previously granted or created over certain parts of the claimed area. These tenures are either excluded from being previous exclusive possession acts by (the soon to commence) section 23B(9) of the Native Title Act 1993 (Cth) or alternatively, because (the soon to commence) section 47A of the Native Title Act 1993 (Cth) applies to it.'

I am of the view that in this matter, the failure to exclude the areas of land covered by the potential PEPAs referred to above is not in breach of s61A as the applicant has sought the protection of s47A, thus bringing into play the provisions of s61A(4).

In any event I see that at A9 of the application the applicants state that the claim to native title rights and interests over the claim area is *'in accordance with valid State and Commonwealth laws'*. Section 61A(2) provides that a claimant application must not be made that covers any area covered by a PEPA. This is a valid law of the Commonwealth. In my view the statement at A9 of the application is sufficient to exclude from the claim area any areas covered PEPAs, as defined in s23B.

S61A(3) – Previous Non-Exclusive Possession Acts (PNEPA)

There is no information before me to indicate that a previous non-exclusive possession act lies within the area claimed. It is stated at A13(4) of the application that *'there have been no previous non-exclusive possession acts as defined in the (soon to commence) section 23F of the Native Title Act 1993 (Cth) granted or created over the claimed area'*.

In any event, for the reasons outlined above in relation to s61A(2), I am of the view that any PNEPA may be disregarded by virtue of s61A(4), because of the statement at A13(3) that s47A applies to the application.

I also find that the above quoted statement from A9 of the application means that if there are any PNEPAs over the claim area, there is no claim of exclusivity over the PNEPA areas, by virtue of the fact that the claim to native title rights and interests over the claim area is *'in accordance with*

valid State and Commonwealth laws'. Section 61A(3), being a valid Commonwealth law, provides that an application must not be made that claims exclusive rights and interests over any areas covered by a PNEPA.

S61A(4) – s47, 47A, 47B

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In my opinion, the statement in A13 that s47A applies, needs no further investigation at s190A registration stage. Whether or not the applicant has provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47A is a matter to be settled in 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

It is stated at A9(4)(a) that in relation to the native title rights and interests asserted *'they do not operate exclusive of the Crown's valid ownership of any minerals, petroleum or gas'*.

It is also stated at A9(1) of the application that the entitlement to the claimed native title rights and interests is *'in accordance with valid State and Commonwealth laws'*.

The application satisfies the requirements. 190B(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

It is stated at A9(4)(b) of the application that *'any rights and interests asserted in off shore places are not exclusive rights and interests'*. The application satisfies 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. A search of the Register of Indigenous Land Use Agreements that there is no registered agreement over any part of the claim where native title rights and interests have been extinguished by agreement. The application satisfies the requirements of this section.

Result: Requirements met

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