National Native Title Tribunal

REGISTRATION TEST
REASONS FOR DECISION
Edited Reasons for Publication on NNTT Website

DELEGATE:	Monica Khouri

Application Name:	Tagalaka People		
Names of Applicants:	***[applicant names deleted]***		
Region:	Far North Queensland	NNTT No.:	QC98/43
Date Application Made:	29/09/1998	Federal Court No.:	QG6109/98

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

DECISION

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

Monica Khouri

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

31st August , 2000
Date of Decision

Brief History of the Application

The original application was lodged with the Tribunal on 29 September 1998.

A notice of motion to amend, together with an amended application was filed in the Federal Court on 2nd February 2000. On 14th February 2000 Deputy District Registrar Robson of the Federal Court in Brisbane granted leave to the applicants to amend the application.

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.
- 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;
- Amended application filed in Federal Court on 02/02/2000, including the documents, maps and affidavits at attachments B, C, D, F, M and R of that amended application;
- Letter from North Queensland Land Council Aboriginal Corporation (NQLCAC) (the applicants' legal representative) dated 30/06/2000;
- Affidavit by ***[deponent name deleted]*** sworn 28/06/2000;
- Affidavit by ***[deponent name deleted]*** sworn 28/06/2000.

Copies of the letter and two affidavits provided directly by the applicants for my consideration in the application of the registration test in QC98/43 have 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 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 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. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court. For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-condition

The applicants have provided affidavits variously made on 19, 20 and 24 January 2000 (see attachment R of the application). The affidavits are all competently witnessed. I am satisfied that the affidavits satisfactorily address the matters required by s.62(1)(a)(i)-(v) at paras. 1 to 6 of each affidavit.

I note that one of the applicants is referred to in the application as "***[name deleted]***". A "[***name deleted]***" has made the requisite s62(1)(a) affidavit. I note the statement in schedule T of the application that this discrepancy arises from a spelling error and that ***[name deleted]*** are one and the same person.

The statement required for the purposes of s62(1)(a)(v) is found at paragraphs 5 and 6 of each affidavit. Seven of the twelve applicants refer to a first meeting of the Tagalaka People on 15 December 1997 at which they were authorised to make the application and to deal with matters arising in relation to it. Of these seven people, all but one also refer to a second meeting on 19 January 2000 at which they were authorised to make the amended application and to deal with matters arising in relation to it. The remaining five applicants, not so authorised at the meeting on 15 December 1997, refer to the meeting of 19 January 2000 as the basis on which they were so authorised. This leaves one applicant, ***[applicant name deleted]***, who deposes to the meeting of 15 December 1997 as being the basis of his authorisation, but does not refer to the meeting of 19 January 2000 in his affidavit.

I am of the view that this is not an omission that leads me to find that the requirements of s62(1)(a)(i) are not met. All s62(1)(a)(v) requires is that the affidavit must state the basis on which the applicant is so authorised. Whether or not the statement (and other information that may be provided by the applicants to the Registrar directly) evidences that the applicant is authorised as required by the Act, is an issue for consideration under s190C(4)(b), not s62(1)(a)(v).

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 F and M, 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 provided by the applicant 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 "Relevant title search details are provided and labelled as "Attachment D"". Copies of title searches conducted by the applicant are found at attachment D. There is no information on the Tribunal files to indicate that the applicant has conducted searches other than those disclosed in Attachment D.

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. 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 Schedule F of the application and in the anthropologist's registration test report at attachment F and the affidavits by members of the native title claim group at attachment M of the application. It is my view that this information amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e)(i).

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 Schedule F of the application and in the anthropologist's registration test report at attachment F and the affidavits by members of the native title claim group at attachment M of the application. It is my view that this information amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e)(ii).

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 Schedule F of the application and in the in the anthropologist's registration test report at attachment F and the affidavits by members of the native title claim group at attachment M of the application. It is my view that this information amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e)(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 general details of the activities which the native title claim group carries out in relation to the area claimed at schedule G of the application. It is my view that 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 states "as far as the Applicants are aware there are no native title determination applications entered on the Register of Native Title Claims covering any parts of the claim area". A search of the Tribunal's geospatial data confirms that there are no 'overlapping' applications. 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

The application at Schedule I states that "No notices have been issued pursuant to section 29 . . ."

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

Section 190C3 requires me to be satisfied that any person who is a member of the Tagalaka native title claim group (as defined in this native title determination application - "the Tagalaka 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 Tagalaka 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 Tagalaka 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 Full Court (FC) in *State of Western Australia v Strickland* [2000] FCA 191 ("Strickland's case") considered the effect of s190C3 and found that the phrase in s190C3(b) "*when the current application was made"* (in this case the Tagalaka application) means the date that the application was originally lodged with or made to the Registrar.

The Tagalaka application was lodged with the Registrar on 29 September 1998 and this is therefore the date it was "made" for the purposes of s190C3(b).

The Full Court in *Strickland's case* also considered when the *"consideration of the previous application under s190A"* referred to in s190C3(c) occurs. The Full Court found that for "old Act" previous applications entered on the Register prior to the making of the current application, the previous application must still be on the Register, as a result of being tested under s190A, at the time that the Registrar applies the registration test to the current application (in this case, the Tagalaka application).

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

1. there were no applications entered on the Register when this application was lodged with the Tribunal on 29/09/98; and
2. there are no applications that have been made since 29/09/98 that covers any part of the area covered by this application.

To conclude, there are no applications made either before or after 29/09/98 that overlap with the area of the Tagalaka application. Therefore the section has no application to this claim.

Result: Requirements met

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

Certification and authorisation:

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

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

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

Note: s.190C(5) – Evidence of authorisation:
If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

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

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

Reasons for the Decision

The application has not been certified pursuant to s. 190C(4)(a).

I must be satisfied therefore that each 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). Evidence of authorisation pursuant to s190C4(b) is required because the requirements of s190C4(a) have not been met.

There are two limbs to s190C4(b):

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

The first limb

The applicants have provided the following affidavits pursuant to s62(1)(a):

1. Affidavit by ***[deponent name deleted]*** made 20/1/00;
2. Affidavit by ***[deponent name deleted]*** made 19/1/00;
3. Affidavit by ***[deponent name deleted]*** made 19/1/00;
4. Affidavit by ***[deponent name deleted]*** made 20/1/00;
5. Affidavit by ***[deponent name deleted]*** made 19/1/00;
6. Affidavit by ***[deponent name deleted]*** made 24/1/00;
7. Affidavit by ***[deponent name deleted]*** made 19/1/00;
8. Affidavit by ***[deponent name deleted]*** made 19/1/00;
9. Affidavit by ***[deponent name deleted]*** made 19/1/00;
10. Affidavit by ***[deponent name deleted]*** made 19/1/00;
11. Affidavit by ***[deponent name deleted]*** made 19/1/00;
12. Affidavit by ***[deponent name deleted]*** made 19/1/00.

In these affidavits, all of the 12 applicants swear to the fact that the applicants consist of Tagalaka elders and representatives of families within the Tagalaka group (para. 6 of each affidavit respectively).

In further affidavits (refer to attachment M) the applicants, ***[four applicant names deleted]*** each state at para. 1 that they are a senior member of the Tagalaka Peoples.

I accept, on the basis of what is outlined above, that all of the named applicants are members of the native title claim group, as required by the first limb of s190C4(b). I am satisfied, that the requirements of the first limb of s190B4(b) are met.

The second limb

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.

At part A(2) of the application there is a statement in the following terms:
"The applicants are holder of native title rights and interests in the claim area and are authorised by the Tagalaka people under their traditional laws and customs to make the amended application on behalf of the native title claim group. The applicants are also authorised by the native title claim group to deal with matters arising in relation to the application. The grounds for this assertion are set out in the affidavits of the applicants named above. The affidavits is provided and labelled as "Attachment R"".

Further, at schedule R of the application, is this statement about authorisation of the claim:
"The requirements of s.190C(4)(b) of the Act have been met. The grounds on which the requirements have been met are that on the 19 January 2000 members of the native title claim group attended a meeting in Normanton. The purpose of the meeting was to discuss the application on Tagalaka country. The meeting was held in accordance with tradition and custom. At the meeting members of the claim group:
(a) authorised the applicants to make the amended application; and
(b) *authorised the applicants, in accordance with tradition and custom, to deal with matters arising in relation to the application on behalf of the native title claim group.*

These statements are elaborated upon in the authorisation affidavits by all of the applicants at Attachment "R" of the application (and in two further documents, described below, provided to me as additional information, for the purposes of this requirement of the registration test).

At para. 4 of each affidavit in attachment R it is stated that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it. At paragraph 5 of each affidavit the basis on which he/she is authorised is stated. It is also stated at paragraph 6 of each affidavit that the applicants consist of Tagalaka elders and representatives of families within the Tagalaka group.

7 of the 12 applicants refer in their affidavits to a meeting of the native title claim group in Croydon on 15 December 1997, attended by members of the native title claim group and organised by the regional Land Council. The 7 applicants state that at this meeting he/she was authorised to be one of the applicants, to make the application and to deal with matters arising in relation to it, in accordance with a traditional decision making process that is followed at meetings by the Tagalaka when native title issues are discussed. It is stated that this traditional decision making process involves:

- Tagalaka people having an opportunity to have their say, but the elders and senior members of the group having the final say; and

- Tagalaka people then indicating whether they agree with a decision by a show of hands

All of the 12 applicants provide information about a second meeting of the native title claim group in Normanton on 19 January 2000, attended by members of the native title claim group and organised by the regional Land Council. For 11 of the applicants, this information appears in their affidavits at attachment R. The remaining applicant, ***[applicant name deleted]***, provides this information in a document provided to me by the applicants' legal representative as additional information.

The document signed by ***[applicant name deleted]*** is expressed to be an affidavit, is signed on each of its three pages by ***[applicant name deleted]*** as deponent and is dated 28 June 2000. However, it may be technically deficient as an affidavit, as the person who witnessed its execution, has not signed the second of the three pages. This technical deficiency does not, in my view, affect its probative value on the issues I am considering under this section, particularly in light of the absence of any information that contradicts the material in the document. In fact the information in the document is supported by the sworn testimony of the other eleven applicants as to what took place at the meeting on 19 January 2000.

In relation to the second meeting on 19 January 2000, it is stated by the applicants that members of the native title group attended a meeting in Normanton organised by the regional Land Council. It is stated that at this second meeting it was decided that each of the applicants is authorised or again authorised to make the amended or new application that amends the original application and to deal with matters arising in relation to it. It is further stated that the process of decision making at this meeting was in accordance with Tagalaka traditional laws and customs, being the same traditional decision making process that was outlined and observed at the first authorisation meeting on 15 December 2000.

In a further affidavit made on 29 June 2000 the applicant ***[applicant name deleted]*** states that:

- she was present at the January 19, 2000 meeting when the Tagalaka people confirmed the authority of the applicants named in the amended application;
- the January meeting was to authorise the making of a new native title application to amend the original application and to deal with matters arising in relation to it;
- apart from herself, the other Tagalaka people authorised at the January meeting to make the native title application were . . . [she then names the remaining 11 applicants];
- the process of authorisation by the native title group is in accordance with the Tagalaka peoples' traditional decision making process.

The Act, at s251B, recognises that applicants may be authorised using a decision making process that is either:

(a) under traditional laws and customs of the group that must be observed in authorising things of this kind; or
(b) agreed to and adopted by the native title claim group.

The application at A(2) and schedule R, the s62(1) affidavits and other information provided to me directly by the applicants illustrate that the claim group has utilised a traditional decision-making process, in line with s251B(a), to authorise the applicants to make the application and to deal with matters arising in relation to it.

On the basis of the statements in the application, as elaborated upon in the affidavits at attachment R and in the two documents provided to me as additional information, I am satisfied that the

second limb of s190C4(b) is satisfied in 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.

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

- the statements at part A, section 2 and schedule R of the application, elaborated upon in the affidavits referred to above in attachment R constitute the requisite statement under s190C5(a);
- the application and attached affidavits (as referred to above) adequately set out the grounds on which I should consider that s190C4(b) has been met.

The application **passes** this condition of the registration test.

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

Schedule B, Attachment B and the maps in Attachment C of the application describes the areas the subject of the application.

External Boundaries

Written Description

The claim area consists of numerous discrete parcels of land itemised in attachment B of the application. Attachment B is in the form of a spreadsheet and runs to three pages. I note the advice from the applicants' legal representatives (NQLCAC letter dated 30/06/2000) that although the numbering of the pages of attachment B indicates the existence of a 9 page document, there are only three pages.

Each parcel is described in attachment B, and the external boundaries for the parcel are then depicted on one of the maps at attachment C.

Attachment B is in the form of a table. At its commencement, the attachment lists each parcel of land claimed in the application by reference to an identifying code (namely, T1, T11, T13, T18, T19, T20, T23, T24, T26). It then identifies the parcels claimed by reference to the lot and plan numbers, parish code and tenure reference allocated to each parcel in Queensland, according to the Queensland State Government's land tenure record system.

In general, details of known land parcels are available on the public record and are sufficient to uniquely identify the location of the parcels claimed in this application. Further, as each lot/plan description is unique for all time (and tenure references form part of the State's historical records) the reference to a lot, plan and tenure description is unambiguous and provides the means by which it is possible to locate the boundary of the area on the earth's surface. I am satisfied therefore that in respect of the claimed parcels of land, the use of the state's unique reference details, enables the external boundaries to be ascertained with reasonable certainty.

Map

At attachment C of the application there are 7 maps. There is a claim locality map (A4), 5 maps (A4) illustrating the external boundaries of the parcels claimed in the application, and a large A0 size cadastral map of the Croydon zone.

Each parcel included in the application is depicted on one or more of the five A4 maps in attachment C.

The five A4 maps illustrate the external boundaries of the claimed parcels in fine black ink. The lot/plan references for each parcel is shown on the map and this enables the reader to ascertain the location of the claimed parcels. Major roads and some geographic information (ie. creeks and mountain names) are drawn on the maps. The boundaries of the Croydon zone are drawn in black ink (refer map A.6.3).

The large A0 size map is of the Croydon zone (refer map A.6.7). It is stated on this map that all land within the Croydon zone is excluded from the claim. It is stated on this map that the area within the Croydon zone is *"defined by the general township of Croydon within the following boundary streets [streets then named]"*. Each of the named boundary streets is depicted on this map, and the boundary is further illustrated by a black line, that corresponds to the detail on the map at A.6.3.

I note that the parcels identified in attachment B as "T1" comprise a reserve described as Lot 952 on Plan C3591 (R59), but that there is a section of that reserve located within the Croydon Zone. This area of Lot 952 on Plan C3591 is identified in attachment B as being *"within Croydon"* and comprising an area of 4 hectares. On the A0 map of the Croydon zone, a parcel of land described on the map as "952 C3591 RE" is shown within the boundaries of the Croydon zone. It is confirmed by the Tribunal's Geospatial Mapping and Analysis Branch ("Geospatial") that this is part of Lot 952 on Plan C3591 within the Croydon zone that is excluded from the claim area.

Finally, I note that Geospatial have raised one further issue in respect of the description and mapping of the claim boundaries. The issue is summarised below and concerns parcel "T1 952 C3591 Reserve", depicted on the map described as A.6.3.

- this parcel is part of the Reserve making up Lot 952 on Plan C3591;
- it is referred to in the description at attachment B as being included in the claim area;
- it is also depicted on map A.6.3 – but has not been shaded in the manner that other included parcels are shaded on this map;
- is it intended that this parcel be excluded from the claim area?

I am satisfied that the parcel in question is included in the claim area for the following reasons:

- the parcel in question is located outside the Croydon zone (refer map A.6.3);
- it is stated in attachment B that the claimed areas of Lot 952 on C3591 comprise a total area of 3040ha less a 4ha area within Croydon, making a total claim area of 3036ha;
- the information on the map of the Croydon zone (map A.6.7) indicates that Lot 952 on C3591 has a total area of 3040ha (refer to the sections depicting sections of that reserve outside the boundaries of the zone, and also to the section within the Croydon zone);
- attachment B makes it clear that the only part of Lot 952 on C3591 that is to be excluded is that area which is located within the Croydon zone (being an area of 4ha.);
- Geospatial have identified the part of Lot 952 on C3591 with an area of 4ha. that is located within the Croydon zone . This information corresponds to the detail on the map at attachment C of the Croydon zone (map A.6.7) relating to the section of Lot 952 on C3591 that is within the Croydon zone.

In conclusion, it is evident from the information in the application that all of Lot 952 on Plan C3591 is included in the claim less the 4ha area located within the Croydon zone.

My Conclusion in relation to the Written Description and Maps of the External Boundaries

I am satisfied that the technical description given to the claim area in attachment B, coupled with the location of the claim area on the maps at attachment C, enable the external boundaries of the claim area to be identified with reasonable certainty.

I make this finding bearing in mind the:

- use by the applicants of the State's unique identifying references for all of the parcels claimed in the application (which information is restated on the maps provided of those areas). These references may be relied upon by members of the public as accurately locating and describing the land area when dealing with it;
- depiction on the maps in attachment C of the parcels so claimed.

It follows that I am satisfied that the physical description of the external boundaries meets the requirements of s62 (2)(a)(i).

Internal Boundaries

The internal boundaries are described at Schedule B and attachment B by way of a class exclusion (refer schedule B) and the exclusion of the specific parcels of land (refer attachment B). The internal boundaries of areas excluded by class exclusion are described in this way:

1. at paras. B and C, there is a formula that excludes a variety of tenure classes from the claim area. The definition of the excluded tenure is drawn directly from s23B of the Act.
2. at para. E it is stated that where the act defined in paras B and C falls within the provisions of s23B(9), (9A), (9B), (9C) & (10), the area covered by the Act is not excluded from the application.
3. there is a general statement at para. D of schedule B that the application excludes any land or waters where the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is to be disregarded under s47(2), 47A(2) or 47B(2) pursuant to s190B(9)(c).

In determining whether this information complies with the requirements of 190B(2) in relation to s62(2)(a)(ii), that is, whether 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 area claimed, I have considered that I must be "satisfied" on the balance of probabilities; that the provisions of s109 of the Native Title Act require the Tribunal to be fair, just economical, informal, and prompt, and it is appropriate that I perform my obligations in a similar manner and, as a general principle, the provisions relating to compliance with s 190A should be read beneficially.

In addition, I have turned my mind to some of the practical realities associated with tenure information and to what is reasonable in that context, including:

- the volume of tenure information associated with the claim area;
- the length of time needed to obtain and check all the relevant tenure;
- the cost to applicants of obtaining such tenure information;
- the inherent uncertainty in the reliability of tenure without full inquiry into the validity of grants and full details of all historical tenure;
- The fact that full details of all historical tenure are not easily obtainable.

Notwithstanding this, it is my view that sufficient information is provided in relation to the areas excluded from the area claimed to allow the specific "parcels" of land to be identified. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicant.

With respect to the information in attachment B identifying known parcels of land that are excluded from the claim area, I am satisfied that the parcels so excluded can be identified and located with reasonable certainty. I make this decision because the excluded parcels are described in attachment B with the State's official lot and plan reference. As details of known land parcels are available on the public record, this is sufficient to identify the location of the parcels listed in Attachment B as being excluded from the claim on the surface of the earth with reasonable certainty.

Conclusion

I am satisfied that the information and maps provided by the applicants, read in conjunction with the exclusions specified by the applicants, are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular areas.

I am further satisfied that the information and maps submitted with the application meet the requirements of s.62 in that the external and internal boundaries of each of the areas the subject of the claim can be identified with reasonable certainty.

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 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.

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

An alternative form of description is provided for under s.190B(3)(b), which states that the application must otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The following description is set out in Schedule A of the application:

Identity of the native title claim group

The native title claim group is known to itself and all neighbouring Aboriginal groups as the Tagalaka. The group 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 areas late last century, and in various written sources since. More information is provided in the Registration Test Report by ***[anthropologist name deleted]*** *and labelled at "Attachment F".*

Membership of the Group

The current membership of the group is primarily identified by the principle of cognatic descent (descent traced through either one's father or one's mother). Descent is traced from a limited set of persons recognised in the regional Aboriginal community as associated with the Tagalaka identity, including the claim areas, soon after European occupation. By these descent principles, the current membership of the Tagalaka consists of those persons who are descendents of the following Tagalaka antecedents.

[antecedent names deleted (8)]

Adoption

The membership of some of these descent groups includes adopted persons. Adoption is in accordance with Tagalaka traditional laws and customs.

In the first place, the actual incidence of it among the claimants is very low. That is, it is not an open ended or casual affair, and concerns very few of the claimants. Secondly, adoption arises by similar means and has much the same meaning and status as it does in the general Australian community. If an objective test for adoption is required, it can be tested for the following features based upon practice under the laws and customs of the claimants and wider North Queensland region:

1. *Has the person been taken at the time of being a child into one of the Tagalaka descent groups by an adult, who raised the child as one of their own? This is commonly referred to by the claimants as "growing up" that person. The child is often a step child of the adopting adult, and often the child's biological parentage is within the claimant group in any case, but not necessarily so.*
2. *During the time the child was growing up, did he/she come to identify as a member of that family, and were they commonly identified as such by the other members?*
3. *Were they given the same rights within the family as other members? If so, this would be expected to flow on to rights in land as well, since kin relations and relations in connection to country share a common structure to a great degree. For example, when one refers to "my mother['s] land" the relationship to that land is seen as of a similar order to, and derived from, one's relationship to one's mother.*
4. *As the child matured, did they become recognised as a member of the adopting adult's descent group and as Tagalaka by a significant number of the other descent groups (especially those most closely related to the family involved), and eventually by a majority of the senior people of the wider Tagalaka community?*
5. *Has the adopted person closely associated with the claimant community throughout their life, and held an active association with, knowledge of, etc. the traditional country of the claimant community, comparable to that of the rest of the claimant community, and prior to the native title application.*

In addition "adoption" as used here is not what is meant in cases where a child has been "grown up" by her/his grandparents or other close biological kin.

Importantly, cases of adoption do not alter the fact that descent is the primary basis of the claimant group's constitution and that of its component descent groups, nor complicate significantly the identification of either the descent group into which a child is adopted, nor the larger Tagalaka identity.

Family Groups (or Descent Groups) Descended from Named Ancestors

The descendants of named ancestors could be identified on inquiry and as a descendant, could then be ascertained as part of the native title claim group.

I am therefore satisfied that this limb of the description constitutes an objective means of verifying the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group.

Adoption

The description of adoption and how one may become a member of the group as an adopted person includes 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, it is 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 the readily identified.

Reasons for the Decision

Under this limb, I must 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 at Schedule E of the application, describes the native title rights and interests as:

1. *The native title rights and interests do not confer possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others because the native title rights and interests held by them or their predecessors:*
   - *(a) are and have been subject to:*
     - *(i) the valid laws of the State of Queensland and the Commonwealth of Australia (past and present);*
     - *(ii) the rights (past and present) conferred upon persons pursuant to the laws of the Commonwealth and the State of Queensland;*
     - *(iii) any valid rights and interest conferred upon native title holders, or subject of an agreement made under the Native Title Act 1993 (Cth), or by the principles of Aboriginal law and custom.*
   - *(b) have been diminished or modified over time such that they are not exclusive as against all others. To avoid doubt, to the extent that the native title rights and interests were ever exclusive, the character of exclusivity has been extinguished.*

2. *The right to have access to, and use of natural resources of the claim area including the right to:*
   - *(i) maintain and use the claim area;*
   - *(ii) conserve the natural resources of the claimed area;*
   - *(iii) safeguard the claimed area and 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 claimed area and the natural resources of the claimed area for social, cultural, economic, religious, spiritual, customary and traditional purposes;*

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

preserve sites of significance to the native title holders and other Aboriginal people on the claimed area;

conduct secular ritual and cultural activities on the claimed areas;

conduct burials on the claimed areas;

determine, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition;

regard the claimed areas as part of the inalienable affiliation of the native title holder to the claimed areas;

maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claimed area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the native title holders;

inherit or dispose of native title rights and interests in relation to the claimed area in accordance with custom and tradition;

determine who are the native title holders and determine amongst them the connections of particular individuals and sub-groups to specific portions of the claimed area (such determinations being made by reference to multiple criteria eg. descent, birth/conception sites, succession practices and indigenous subdivisions of the land);

resolve disputes between the native title holders and other Aboriginal persons in relation to the claimed area;

E. Construct and maintain structures for the purpose of exercising the native title.

3. *Any other native title rights and interests are derived from those native title rights and interests listed in clause 2 above.*

The particularised description is qualified by a paragraph in Schedule F of the application, which states:

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

I consider the claimed rights and interests listed to be clearly and readily identifiable. Whilst clause 3 is a "catch-all" phrase with no specific particularity, it does refer back to clause 2 and in essence is a subset of rights and interests derived from the primary listed rights and interests in clause 2 . That is sufficient to meet the requirements of this section.

I need only be satisfied pursuant to s190B4 that at least one of the rights and interests sought is sufficiently described for it to be readily identified. As I am satisfied that all of the rights listed can be readily identified the application meets the requirements of this section and s62(2)d.

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 applicants' 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 Schedule F of the application, the anthropologist's registration test report at attachment F and the affidavits of ***[deponent names deleted (3)]***, members of the native title claim group who on the basis of their affidavits it is clear 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:

- ***[deponent name deleted]***, paras 5-6, 11, 13-24
- ***[deponent name deleted]***, paras 4-11, 13-14
- ***[deponent name deleted]***, paras 4-5, 7-14

<u>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.</u>

This subsection requires me to be satisfied that traditional laws and customs are 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 F and the affidavits of ***[deponent names deleted (3)]***, members of the native title claim group who 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:

- ***[deponent name deleted]***, paras 1, 4, 6, 8-9, 11, 13, 15-16, 18-24

- ***[deponent name deleted]***, paras 4-11, 13-14
- ***[deponent name deleted]***, paras 4, 5, 7-14

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 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.

The rights and interests claimed in Schedule E of the application (see my reasons under s190B4 for a description of the claimed rights and interests) are qualified in these terms (refer commencement of Schedule E):

"1. The native title rights and interests do not confer possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others because the native title rights and interests held by them or their predecessors:

(a) are and have been subject to:

(i) the valid laws of the State of Queensland and the Commonwealth of Australia (past and present);

(ii) the rights (past and present) conferred upon persons pursuant to the laws of the Commonwealth and the State of Queensland;

(iii) any valid rights and interest conferred upon native title holders, or subject of an agreement made under the Native Title Act 1993 (Cth), or by the principles of Aboriginal law and custom.

(b) have been diminished or modified over time such that they are not exclusive as against all others. To avoid doubt, to the extent that the native title rights and interests were ever exclusive, the character of exclusivity has been extinguished."

The rights and interests claimed in Schedule E of the application are further qualified in Schedule F as follows:

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

The qualifications at the commencement of schedule E establish that the applicants claim only non-exclusive rights and interests.

The evidence I have found to be probative in making my decision with regard to this section is the information (including affidavits and an anthropological report) contained in and attached to the application. The content of the relevant parts of this material is outlined in my reasons for decision at s.190B5. In these reasons, I may only detail one reference to such rights in the material before me, despite the existence of other references that I could have drawn on.

The rights and interests claimed in the application are:
2. The right to have access to, and use of natural resources of the claim area including the right to:

- *(i) maintain and use the claim area;*
- *(ii) conserve the natural resources of the claimed area;*
- *(iii) safeguard the claimed area and 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 claimed area and the natural resources of the claimed area for social, cultural, economic, religious, spiritual, customary and traditional purposes;*

and more particularly to:

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

  preserve sites of significance to the native title holders and other Aboriginal people on the claimed area;

  conduct secular ritual and cultural activities on the claimed areas;

  conduct burials on the claimed areas;

  determine, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition;

  regard the claimed areas as part of the inalienable affiliation of the native title holder to the claimed areas;

  maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claimed area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the native title holders;

inherit or dispose of native title rights and interests in relation to the claimed area in accordance with custom and tradition;

determine who are the native title holders and determine amongst them the connections of particular individuals and sub-groups to specific portions of the claimed area (such determinations being made by reference to multiple criteria eg. descent, birth/conception sites, succession practices and indigenous subdivisions of the land);

resolve disputes between the native title holders and other Aboriginal persons in relation to the claimed area;

E. Construct and maintain structures for the purpose of exercising the native title.

3. Any other native title rights and interests are derived from those native title rights and interests listed in clause 2 above.

I will now consider each of the claimed rights and interests.

1. *The right to have access to and use of natural resources of the claim area:*

The deponents of the affidavits and the information at attachments G and F (the latter having been prepared by the anthropologist ***[name deleted]***) refers to members of the group:

- living and working on the claim land,
- visiting places on the claim land,
- observing Tagalaka traditions and customs on the claim land,
- hunting, fishing and gathering on the land,
- management responsibilities over the land eg. site protection and mapping, burn offs,
- being responsible to look after the land,
- the existence of special places on Tagalaka land (including a ***[details of special place deleted to protect confidentiality of the information]*** (para. 22, ***[deponent name deleted]***))

Based on this information, the following native title rights and interests, under the umbrella of the right to have access to and use of natural resources of the claim area are either established or not established prima facie:

(i) maintain and use the claim area;

(ii) conserve the natural resources of the claimed area;

(iii) safeguard the claimed area and 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;

All Established – within the limits of that recognised by the common law. The general qualifications to this claim satisfy me that rights are not claimed where these are not recognised at law.

(v) use the claimed area and 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. The general qualifications to this claim satisfy me that rights are not claimed where these are not recognised at law.

It is necessary to consider whether *The State of Western Australia –v- Ward [2000] FCA 191 ("Ward's case")* is authority for the proposition that this right (found at para. 2(v) of schedule E of the application) should be refused, as amounting to a right to "trade in resources in the claim area". Using the natural resources for "economic purposes" would appear to include a right to trade in the resources. In *Ward* a right to trade in natural resources was refused, although no reasons for the refusal were pronounced. However, the majority did find that the applicants had a right to use and enjoy "traditional resources". In the absence of judicial comment, it may be that this right fell foul of the 'on country' requirement of the rights test in that the trading could/may take place off country, and is therefore not a right which is capable of being registered (refer to my reasons below under the 3rd and 4th listed rights at para. D.

However, I have formed the view that the wording of the right at para. 2(v) makes it clear that this right, insofar as it relates to trade at all, relates to the trade in traditional resources on the claim area and therefore should not fall foul of *Ward's case*. In this regard, para. 2(v) talks of "*the right to use the claim area"* and its natural resources for "*social, cultural, economic, religious, spiritual, customary and traditional purposes*". I find that this means use of natural resources whilst on the claim area. The listed purposes are inclusive in the sense that the right of usage must meet all of the purposes (this is because of the use of the inclusive "and"). Therefore, the economic purpose (which would arguably include trade) must also be for a traditional purpose and would not, on the face of it, extend beyond trade in traditional resources. The evidence in the application (refer to para. 22, ***[deponent name deleted]***) in support of this right and interest does not extend this right beyond trade in traditional resources whilst on country.

It is also necessary to consider whether any of the rights listed at para.2 (i) to (v) (from schedule E of the application) relating to access to and use of the natural resources of the claim area could be interpreted to mean or include the right to receive a portion of any resources taken by others from the claim area. Such a right would not, on the authority of *Yarmirr v Northern Territory (1998/) 2 FCR 533*, be able to form part of a native title determination. As the Full Court has overturned Lee J's determination at first instance in *Ward*, Olney J's finding in the *Yarmirr* case must now be followed. However, I am of the view that none of the listed at para. 2(i) to (v) amount to the right to receive a portion of any resources taken by others from the claim area.

and more particularly to:

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

Established - within the limits of that recognised by the common law. The general qualifications to this claim satisfy me that rights are not claimed where these are not recognised at law.
The deponents all talk of growing up, living and working on traditional Tagalaka lands in which the claim area is situated. They all currently reside in ***[town name deleted to protect privacy of individuals]***, which would appear to be central to traditional Tagalaka country.

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

Established – within the limits of that recognised by the common law. The general qualifications to this claim satisfy me that rights are not claimed where these are not recognised at law.

The two rights above (from paras. A and B of schedule E of the application), amount to the right to control of the use and enjoyment of others of the resources of the claim area (see para. B) and to control access of others to the claim area (see para. A and B). Accordingly it is necessary to consider their registerability in light of *Ward's case.* In *Ward's case*, the Court declined to accept such rights of control. No reason for this was given, but it may be that the decision was based on the extinguishing effect of the underlying tenure in the areas involved. In *Ward's case* the area had been totally covered by pastoral leases, and consequently the right to control activities on the land already lay with the Lessee or the State as landlord. Following *Mabo* the rights of the lessee override the rights of native title holders. Given the underlying tenure in *Ward*, the applicants were unable to make out any rights to control activities on those areas.

However, it is clear from the Tagalaka application that the claim group only claims non-exclusive native title rights and interests. I therefore accept that the rights at paras. A and B are non-exclusive in character, given the qualification at the commencement of schedule E of the application and are therefore registrable.

Finally in relation to the right at B, it is necessary to consider whether it could be interpreted to mean or include a right to receive a portion of any resources taken by others from the claim area. As referred to above in relation to the rights at paras. 2(i) to (v), such a right would not be registered, following *Ward's case*. However, I am of the view that this right does not extend to the right to receive a portion of any resources taken by others from the claim area.

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

Established – the deponents talk of Tagalaka people hunting, fishing and gathering traditional foods on the claim land, and of the old people trading quarried stone.

As referred to above in relation to the rights at paras. 2(i) to (v), the majority in *Ward's case* refused a right to "trade in resources in the claim area". I am of the view that this right (found at para. C of schedule E of the application) is clearly grounded in being exercised or carried out on country and for traditional purposes. Note that it is to be carried out *"<u>on the claimed area</u>"*. The use of the phraseology *"exchange of natural resources"* would not, in my view, extend beyond the trade in traditional resources, if read in conjunction with the evidence produced by the applicants in support of this right. I therefore find that this is a right capable of registration pursuant to s190A as it takes place on country and relates to trade in traditional resources.

Finally in relation to this right, it is necessary to consider whether it could be interpreted to mean or include a right to receive a portion of any resources taken by others from the claim area. As referred to above such a right would not be registered, following *Ward's case*. However, I am of the view that this right does not extend to the right to receive a portion of any resources taken by others from the claim area.

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

preserve sites of significance to the native title holders and other Aboriginal people on the claimed area;

Established – The deponents all refer to places on the claim area that have special significance for their people, and having a responsibility to look after their country and their special places.

conduct secular ritual and cultural activities on the claimed areas;

Established – The evidence in schedule G is that the claim group carries out cultural heritage work on the claim area and transmits cultural knowledge to their children.

conduct burials on the claimed areas;

Established – The deponents talk of their ancestors being buried on the claim area, and of the significance of these places to the Tagalaka.

determine, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition;

regard the claimed areas as part of the inalienable affiliation of the native title holder to the claimed areas;

Not Established - I need to consider whether these two rights or interests are capable of recognition under the common law as a result of the decision in *Ward's case*. The majority in *Ward's case* held the common law does not provide for the protection or enforcement of purely religious or spiritual affiliation with land, divorced from actual physical use of the land. I am of the view that these rights or interests are not consistent with the principles in Ward's case and can not be prima face established for registration pursuant to s190A.

maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claimed area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the native title holders;

Established - The evidence of the deponents refers to the passing on of traditional laws and customs from generation to generation.

inherit or dispose of native title rights and interests in relation to the claimed area in accordance with custom and tradition;

Established - The deponents talk of Tagalaka traditional land and waters being their country; of being given traditional language and skin names and dreamings; of marrying according to custom and tradition; of giving to their own children skin names and dreamings. They talk also of the old people being the spirits of their ancestors; looking after their country and asking the spirits permission before visiting places on country. This bespeaks of a cultural tradition of "ownership"

in relation to their traditional lands, and its special places and stories, and of this being passed from generation to generation.

> *determine who are the native title holders and determine amongst them the connections of particular individuals and sub-groups to specific portions of the claimed area (such determinations being made by reference to multiple criteria eg. descent, birth/conception sites, succession practices and indigenous subdivisions of the land);*

Established - [I have interpreted 'native title holders' here to mean the persons who hold particular rights within the claim group]. The various deponents assert that they are Tagalaka through their parents, adoptive parents and other forebears, and it is from this heritage that they are recognised as having connections to country or portions of it. Further evidence of this is found in the Registration Test Report by ***[anthropologist name deleted]*** at attachment F where she describes how the group determines membership and connections to particular parts of traditional country. There appears to be no discretion to deviate from these rules thus the native title claim group is only able to determine who are the native title holders within their group in accordance with traditional law and custom.

> *resolve disputes between the native title holders and other Aboriginal persons in relation to the claimed area;*

Established – the deponents all refer to the dangers to strangers who go on their land without permission. This points to a tradition of other aboriginal persons requiring permission to enter Tagalaka lands and it then follows that if there are disputes arising from unauthorised entry, the Tagalaka have the right to resolve such disputes in accordance with custom and tradition.

E. Construct and maintain structures for the purpose of exercising the native title.

Established – The deponents all talk of living on the claim area.

3. Any other native title rights and interests that are derived from those native title rights and interests listed in clause 2 above.

Not established - due to lack of specificity. Further, there is no specific evidence to support this right, in so for as it is a subset to those detailed in clause 2 of the application.

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:

- ***[deponent name deleted]***, paras 5, 11, 13-24
- ***[deponent name deleted]***, paras 4, 6-10, 13-14
- ***[deponent name deleted]***, paras 4, 7-14

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. I refer to schedule E where it is stated:

"The native title rights and interests do not confer possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others because the native title rights and interests held by them or their predecessors:

- *(c) are and have been subject to:*
  - *(iv) the valid laws of the State of Queensland and the Commonwealth of Australia (past and present);*
  - *(v) the rights (past and present) conferred upon persons pursuant to the laws of the Commonwealth and the State of Queensland;*
  - *(vi) any valid rights and interest conferred upon native title holders, or subject of an agreement made under the Native Title Act 1993 (Cth), or by the principles of Aboriginal law and custom.*
- *(d) have been diminished or modified over time such that they are not exclusive as against all others. To avoid doubt, to the extent that the native title rights and interests were ever exclusive, the character of exclusivity has been extinguished."*

Refer also to my reasons under s190B4 and s190B6.

S61A(4) – s47, 47A, 47B

The application states at schedule that these sections do not apply to the claim area.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In the absence of a statement specified in s61A(4)(b), it is not necessary to consider this section further.

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 : *"The applicants do not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown"*.

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 F of the application it is stated that:
"In relation to the native title rights and interests asserted:
they are not exclusive rights and interests if they relate to waters in an offshore place"
At Schedule P of the application it is stated that:
"The area covered by the application does not include any offshore areas".

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

Result: Requirements met

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