

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION: EDITED

DELEGATE: Merranie Strauss

Application Name: Eastern Yugambah People
Names of Applicants: Wesley Aird, Ian Levinge, Eileen Williams, Rudy Sandy
Region: Queensland NNTT No: QC01/2
Date Application Made: 25 January 2001 Federal Court No: Q6002/01

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

DECISION

The application IS NOT ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993* (Cth).

(Insert delegate name)

(Insert date of decision)
Date of Decision

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

Brief history of the application

The application was filed in the Federal Court on 25 January 2001. A Notice of Motion to amend the application was filed in the Federal Court on 23 November 2001. The Court granted leave to amend at a hearing on 4 April 2002. The Court ordered that the application be amended in accordance with the proposed amended application filed 23 November 2001.

The amended application amends the written description without changing the outer boundary of the claim area. The amended application provides additional affidavits to support the native title rights and interests claimed. The names of the applicants, the claim group description and the native title rights and interests claimed were not amended.

The application area is overlapped by two Kombumerri applications QC96/69 and QC98/24. These applications are not registered on the Register of Native Title Claims.

Information considered when making the decision

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

- The Registration Test File, Eastern Yugambah People, QC01/2 (RTF01/2)
- The Registration Test Compliance File for overlapping application, Kombumerri #1, QC96/69 Parts A, B, C (RTF96/69)
- The Registration Test Compliance File for overlapping application, Kombumerri #2, QC98/24 (RTF98/24)
- The Registration Test Compliance File
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The Native Title Register;
- The Register of Indigenous Land Use Agreements

The Tribunal received some additional material adverse to the Eastern Yugambah People's application, in particular, a number of documents from Kombumerri people objecting to the registration of the Eastern Yugambah claim. This adverse material goes to the issue of authorisation. These documents comprise:

- letter from (name deleted - I) to (name deleted - F) of the Tribunal dated 14 February 2001, attaching four pages containing names of objectors;
- letter from (name deleted - R) and a number of signatories to (F) of the Tribunal dated 15 February 2001 objecting to Eastern Yugambah claim (received by Tribunal 19 February 2001);
- letter from (name deleted - J) to (F) received 19 February 2001, objecting to Eastern Yugambah claim;

National Native Title Tribunal

- letter from (name deleted - DD) to (F) dated 20 February 2001, objecting to Eastern Yugambeh claim;
- letter from (name deleted - K) and (name deleted - L) to (F), received 20 February 2001, objecting to Eastern Yugambeh claim;
- letter from (name deleted – CC) to (F) received 21 February 2001, objecting to Eastern Yugambeh claim;
- letter from 11 signatories to (F) received 23 February 2001, objecting to Eastern Yugambeh claim;
- letter from 3 signatories to (F) received 23 February 2001, objecting to Eastern Yugambeh claim;
- letter from (name deleted - EE) to (F) received 26 February 2001, objecting to Eastern Yugambeh claim; and
- letter from (name deleted - Q) “To Whom it Concerns” dated 17 October 2001 disagreeing with the Eastern Yugambeh claim.

Through (name deleted - A) and (name deleted - B), a barrister who was providing legal support to the applicants, I gave the applicants the opportunity to comment on this adverse material. (A) and (B) provided further information. I also provided (name deleted - H), the Kombumerri applicant, with the opportunity to comment on authorization material submitted by the applicants. I outline the steps I took to provide procedural fairness to the Eastern Yugambeh and Kombumerri applicants in my reasons in relation to authorisation under s190C(4).

I have not considered any information and materials which form part of the Tribunal’s mediation records in relation to the Eastern Yugambeh Peoples’ application or the Kombumerri Peoples’ applications. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislation and “the Act” refer to the *Native Title Act* 1993 (Cth) unless otherwise specified. All references to “the application” refer to the application as amended by the Federal Court on 4 April 2002 unless otherwise specified.

A. Procedural Conditions

s.190C(2)

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

Details required in section 61

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

Schedule A of the application provides a detailed description of the native title claim group, in terms of descendants of a set of eight apical ancestors. There is no information before me that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

Two applications overlap with the area of this application, Kombumerri #1 QC96/69 and Kombumerri #2 QC98/24. Having considered all the information before me, I conclude that these applications are made on behalf of some of the people who are also included in the Eastern Yugambah claim group, namely the descendants of (name deleted - XX), also known as (name deleted - X). Refer to my reasons in relation to authorisation, s190C4(b). The Kombumerri applications do not identify any people who may hold native title in the area who are not included in the Eastern Yugambah application.

Result: Requirements met

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

Reasons relating to this sub-condition

The names of the applicants are listed at Part A and the address for service for all the applicants is provided at Part B of the application. The applicants are (A), (name deleted - C), (name deleted - D) and (name deleted - E).

Result: Requirements met

s.61(4) The application must name the persons in the native title claim group who authorise the application or otherwise describe the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition

The application (Part A) states that the Eastern Yugambah People authorise the application according to Eastern Yugambah tradition and custom. The Eastern

Yugambeh People are described in Schedule A as the descendants of eight named apical ancestors.

The description of the native title claim group is sufficient for it to be ascertained whether any particular person is a member of the claim group. I have reached this view for the reasons I give in relation to s190B3.

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

s61(5)(a)

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

s 61(5)(b)

As required under s 61(5)(b), the application was filed in the Federal Court.

s61(5)(c)

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

s61(5)(d)

As required by s 61(5)(d) the application is accompanied by the prescribed documents, being:

- affidavits as prescribed by s 62(1)(a), and
- maps, as prescribed by s 62(1)(b).

I refer to my reasons for decision in relation to s62(1)(a) and (b) below. I note that s190C(2) only requires me to consider details, other information and documents required by s 61 and s 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

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

Each of the four applicants has sworn a standard form affidavit in support of the amended application. (A), (C) and (E) swore their affidavits on 28 September 2001. (D) swore her standard form affidavit on 29 September 2001. These affidavits address the requirements of the s62(1)(a)(i) to (iv) inclusive.

In their standard form affidavits each deponent refers to another affidavit they have sworn in relation to the requirement in s62(1)(a)(v) that the applicants state the basis on which they are authorised to make the application. These are the affidavits provided in Attachment R to the original application filed 25 January 2001. These affidavits describe the traditional decision-making process through which the applicants were authorised. (A) swore his Attachment R affidavit on 6 December 2000, (E) on 14 December 2000, (D) on 8 January 2001 and (C) on 10 January 2001.

Competent witnesses (a Justice of the Peace or Solicitor) have witnessed these eight affidavits.

I am satisfied that the Attachment R affidavits sworn between 6 December 2000 and 10 January 2001 provide a statement of the basis on which the applicants were authorised. I reach this conclusion noting the nature and limited extent of the changes made to the application on 4 April 2002.

I am satisfied that the standard form affidavits sworn by the applicants in September 2001 meet the requirements of s62(1)(a)(i) to (iv) inclusive. I am satisfied that the combination of the standard form affidavits sworn in September 2001 and the Attachment R affidavits sworn between 6 December 2000 and 10 January 2001 satisfy the requirements of s62(1)(a)(v).

Result: Requirements met

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

Comment on details provided

In Schedule M the applicants refer to the affidavit of (name deleted - N) and others in Schedule F. Schedule F refers to the affidavits of (N) sworn 8 January 2001, (name deleted - QQ) sworn 25 August 2001, (name deleted - M) sworn 27 September 2001 and (E) sworn 28 September 2001.

In her affidavit sworn 8 January 2001, (N) refers to her traditional physical connection with particular parts of the claim area (paragraphs 2, 10, 12 and 15).

National Native Title Tribunal

In his affidavit sworn 28 September 2001, (E) refers to his traditional physical connection with the country (paragraphs 7, 8, 15 and 16).

Result: Requirements met

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

This subsection requires the applicants to provide information that enables the area covered by the application to be identified.

I am satisfied that the map and external boundary description of the area covered by the application is adequate for the reasons I give in relation to s190B(2).

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

This subsection requires the applicants to provide information that enables the areas within the external boundary that are not claimed to be identified.

Schedule B states that the rights and interests claimed are subject to State and Commonwealth laws and other valid acts of adverse dominion. It states that the application excludes a number of types of areas, such as dedicated roads, areas of valid freehold and scheduled interests. Schedule B refers to Attachment B for “explanation and geospatial data.”

Attachment B comprises a more details list of the areas within the external boundary that are excluded from the application and a detailed description of the external boundary, by reference to numerous coordinates and geographical features.

There is slight inconsistency between the types of areas excluded by Schedule B and those excluded by Attachment B. For example, dedicated roads and dedicated road reserves are excluded in Schedule B but not Attachment B; Schedule B excludes valid grants of freehold, whereas Attachment B excludes freehold interests. Attachment B states that areas affected by sections 47, 47A and 47B are not excluded.

I am satisfied however that the applicants intend to exclude the areas excluded through the combination of Schedule B and Attachment B.

Later in these reasons I consider whether I am satisfied that the requirements of the s190B(2) have been met, that is whether I am satisfied that the information is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

A map showing the external boundaries of the claim area is provided as Attachment C to the application.

I am satisfied that the map provided by the applicants identifies the external boundary of the claim area, for the reasons I give in relation to s190B(2).

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

In Schedule D of the application, the applicants state that “it has not been possible to carry out a tenure history search on lots the subject of this application.”

The requirements of s62(2)(c) could be read widely to require the applicants to include all searches conducted by any person or body. However, I am of the view that the more reasonable interpretation is that the applicants must only give details of searches of which they are aware. This section does not require that searches be carried out.

Result: Requirements met

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

Reasons relating to this sub-condition

The native title rights and interests claimed by the applicants are described at Schedule E of the application. In accordance with s62(2)(d), the rights and interests claimed do 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 common law. I refer to the rights and interests claimed in more detail in my reasons for decision in relation to s190B4.

Result: Requirements met

s. 62(2)(e) *The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*
(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and
(ii) there exist traditional laws and customs that give rise to the claimed native title; and
(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

62(2)(e)(i) I am satisfied that the applicants have provided a general description of the factual basis on which it is asserted that the native title claim group have, and the predecessors of those persons had, an association with the claim area.

Material by way of factual basis is set out in the affidavits of (N), (M), (E) and (QQ) filed with the application. I refer to the factual basis material in more detail in my reasons for decision in relation to s190B5(a) in which I conclude that I am satisfied that there is a sufficient factual basis to support this assertion.

Result: Requirements met

62(2)(e)(ii) I am satisfied that the applicants have provided a general description of the factual basis to support the assertion that there exist traditional laws and customs that give rise to the claimed native title.

The material setting out the factual basis is provided in the affidavits of (N), (M), (E) and (QQ) filed with the application.

I refer to the factual basis material in more detail in my reasons in relation to s190B5(b). In those reasons I conclude that I am satisfied that the applicants have provided a sufficient factual basis to support the assertion.

Result: Requirements met

62(2)(e)(iii) I am satisfied that the applicants have provided a general description of the factual basis on which it is asserted that the native title claim group have continued to hold the native title in accordance with the traditional laws and customs that give rise to the claimed native title.

The material which provides the factual basis is in the affidavits of (N), (M) and (E) filed with the application.

I refer to my reason in relation to s190B(5)(c) in which I find that there is a sufficient factual basis to support the assertion that the native title claim group have continued to hold the native title in accordance with the traditional laws and customs that give rise to the claimed native title.

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

In Schedule G of the application the applicants state that the members of the native title claim group have continued to carry on the following activities consistent with the native title rights and interests claimed:

- claimants care for country in the claim area and remain custodians of the significant sites in this country;
- Eastern Yugambah children and young people are taken to country to learn about their culture and history; and
- the claim group lives on and visits this country regularly. Many claimants still live on country and make their livings from country.

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

In Schedule H of the application the applicants list two overlapping applications of which they are aware:

- Kombumerri People #1 (QC96/69); and
- Kombumerri People #2 (QC98/24).

The Tribunal's Schedule of all applications filed confirms this information. The Tribunal's Schedule also shows that a non-claimant application was filed by Norva Investments Proprietary Limited (NN01/6) on 27 March 2001 in relation to a part of the claim area that falls within New South Wales.

The non-claimant application was filed after the Eastern Yugambeh application was filed on 25 January 2001. It appears the applicants omitted to amend Schedule H in their proposed amended application filed 23 November 2001 to refer to the non-claimant application.

I am satisfied that the applicants have sufficiently met the requirements of this subsection.

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

In Schedule I of the application the applicants state that there are no s29 notices issued as yet over the area claimed.

Result: Requirements met

For the reasons outlined above, I consider that the application **passes** the conditions contained in s.190C(2).

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

In Schedule H of the application the applicants state that two applications overlap the current application:

- QC96/69 Kombumerri People #1; and
- QC98/24 Kombumerri People #2.

A search of the Tribunal's databases reveals that Kombumerri #1 (QC96/69) was lodged on 25 June 1996. Kombumerri #2 (QC98/24) was lodged on 28 April 1998. Both applications were registered on the Register of Native Title Claims under the Act as it was before 30 September 1998. On 8 November 1999 the Registrar's delegate found that neither application met the registration conditions required by sections 190A, 190B and 190C of the Act. The applications were removed from the Register of Native Title Claims on 8 November 1999.

The Eastern Yugambah application was filed on 25 January 2001. On this date there were no previous overlapping applications on the Register of Native Title Claims. Therefore, for the purposes of this condition, I do not need to consider whether there are any claimants common to the Eastern Yugambah application and the Kombumerri applications.

Accordingly, the application complies with the provisions of s190C(3).

Result: Requirements met

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

Certification and authorisation:

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

- (a) the application has been certified under section 203BE, or has been certified under the former 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 by the relevant representative Aboriginal/Torres Strait Islander body. Therefore s190C4(a) is not relevant.

I am not satisfied that the applicants have been authorised by the members of the claim group as required by s190C(4)(b) and s251B. I provide my reasons in the attached *Reasons in relation to authorisation*.

The application **fails** the condition.

Result: Requirements not met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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

Reasons for the Decision

External boundary - written description and map

Schedule B of the application refers to Attachment B. Attachment B is a revised area description and was filed in the Federal Court with the proposed amended application filed 23 November 2001.

Attachment B comprises a detailed written description, with coordinates, of the claim area. The description defines the boundary by coordinates and geographical features such as river, creeks, inlets, islands, a number of landforms and man-made structures and borders such as the Queensland-New South Wales state border, bridges and roads. The Tribunal's Geospatial Unit prepared the revised area description (dated 12 November 2001) and accompanying map.

The map filed with the amended application was prepared by the Tribunal's Geospatial Unit and is dated 1 November 2001.

The map is clear. It is coloured, with a reasonably fine line for the external boundary. The coastline is clearly marked on the map, as are a number of features referred to in the written description, such as rivers, towns, islands, inlets and coastal points. The map includes coordinates and a scale bar.

I am satisfied that the map and description together provide reasonable certainty as to the external boundary of the claim area. The map and land description, when read together, are sufficiently detailed and clear. They are consistent.

Internal boundaries

The applicants have excluded types of areas in Schedule B and Attachment B by way of a formula that excludes a range of tenure classes from the claim area.

Schedule B states that the rights and interests claimed are subject to State and Commonwealth laws and other valid acts of adverse dominion. It states that the application excludes a number of types of areas, such as dedicated roads, areas of valid

freehold and scheduled interests. Schedule B refers to Attachment B for “explanation and geospatial data.”

Attachment B comprises a more details list of the areas within the external boundary that are excluded from the application and a detailed description of the external boundary, by reference to numerous coordinates and geographical features.

There is slight inconsistency between the types of areas excluded by Schedule B and those excluded by Attachment B. For example, dedicated roads and dedicated road reserves are excluded in Schedule B but not Attachment B; Schedule B excludes valid grants of freehold, whereas Attachment B excludes freehold interests. Attachment B states that areas affected by sections 47, 47A and 47B are not excluded. However, I am satisfied that the applicants intend to exclude the areas excluded through the combination of Schedule B and Attachment B.

Attachment B provides for the following exclusions from the claim area:

2. *Subject to clauses 4 and 5, the area covered by the application excludes any land or waters covered by:*
 - (i) *a scheduled interest;*
 - (ii) *a freehold estate;*
 - (iii) *a commercial lease that is neither an agricultural lease nor a pastoral lease;*
 - (iv) *an exclusive agricultural lease or an exclusive pastoral lease;*
 - (v) *a residential lease;*
 - (vi) *a community purpose lease;*
 - (vii) *a lease dissected from a mining lease and referred to in section 23B(2)(vii) of the Native Title Act 1993 (Cth);*
 - (viii) *any lease (other than a mining lease) that confers a right to exclusive possession over particular lands or waters;*

which was validly granted or vested on or before 23 December 1996.

3. *Subject to clauses 4 and 5, the area covered by the application excludes any area covered by the valid construction or establishment of any public work, where the establishment of the public work commenced on or before 23 December 1998¹.*
4. *Where the act specified in clauses 2 and 3 falls within the provisions of:*
 - (i) *section 23B(9) – exclusion of acts benefiting Aboriginal peoples or Torres Strait Islanders;*
 - (ii) *section 23B(9A) – establishment of a national park or state park;*
 - (iii) *section 23B(9B) - Acts where legislation provides for non-extinguishment;*

¹ I note the reference to “... on or before 23 December 1998”. I assume that the applicants intend to refer to the definition of a previous exclusive possession act in s23B(7) of the Native Title Act, and take this to read “... on or before 23 December 1996”. This date is correct in the information in Schedule B of the application, which repeats much of the information at Attachment B.

- (iv) section 23B(9C) – exclusion of Crown to Crown grants; or
- (v) section 23B(10) – exclusion by regulation.

The area covered by the act is not excluded from the application.

5. Where an act referred to in clauses 2 and 3 covers land or waters referred to in –

- (ii) section 47 – pastoral leases held by or on behalf of as trustee for any of the members of the native title claim group;
- (iii) section 47A – reserves etc covered by claimant applications; or
- (iv) section 47B – vacant Crown land covered by claimant applications;

the area covered by the act is not excluded from the application.

In my view, the description of areas excluded by class can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. 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 applicants.

I have taken into account Justice Nicholson's comments in *Daniels and Ors v The State of Western Australia* (WAG6017 of 1996), on 21 May 1999. Justice Nicholson said:

These requirements (in s62(2)(a)(i)(ii)) are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be satisfactory compliance with the statutory requirement.

It is unlikely that the State would be able to identify, by parcel, all the parcels which the applicants intend to exclude through the class exclusions detailed in Attachment B. Although the State may be able to do this over time, it is not reasonable to expect the applicants or the State to have identified all parcels affected by the class exclusions.

Accordingly, I consider that the combination of the areas in Schedule B and Attachment B provides a reasonable level of certainty in regard to whether native title rights and interests are claimed in relation to particular areas of land or waters within the external boundaries of the area the subject of the application. I am satisfied that the class exclusions detailed in Schedule B and Attachment B are reasonable and satisfactory to comply with the statutory requirement.

The application **passes** the condition.

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

A list of names of persons in the claim group is not provided in the application. Therefore s190B(3)(a) does not apply. The applicants are entitled to provide a claim group description that meets the requirements of s190B(3)(b).

S190B(3)(b) requires the Registrar to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. The native title claim group is described at Schedule A of the application as:

The Eastern Yugambah people being the descendants of :

(name deleted - KK),,

(name deleted - JJ),

(XX),

(name deleted - II)

(4 other names deleted)

The known apical ancestors of the group

I am satisfied that the descendants of the named ancestors could be identified with reasonable inquiry, thereby identifying the members of the native title claim group. Conversely, reasonable inquiry would establish whether any particular individual is a descendant of one of the apical ancestors. Whether a person is a descendant is an objective test.

I am satisfied that the claim group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is not sufficient for the applicants to merely state that these native title rights and interests are ‘all native title interests that may exist, or that have not been extinguished at law’.

Schedule E of the application appears to set out eight principal rights. Two of these (the second and sixth principal rights) have subordinate rights. The principal rights are not numbered. For easy reference I have numbered the principal rights 1 to 8 (see my reasons below in relation to this condition). Numbers 1 and 6 both relate to access to, and use and enjoyment of, the area and its natural resources.

Schedule J contains a draft of the order sought by the applicants. This draft order contains information similar to that presented in Schedule E, but the arrangement of the native title rights and interests, and subordinate native title rights and interests, is different. Schedule J is consistent with Schedule E.

The terms of the final order will depend on the wording agreed by the parties and/or the wording of the Court’s final order.

For the purposes of applying the registration test I will address the wording and order of the native title rights sought set out in Schedule E. It is sufficient for me to note that the order sought in Schedule J is consistent with the wording in Schedule E.

The claim is subject to a number of qualifications:

- the native title rights and interests claimed are “subject to the valid laws of the State and Commonwealth generally and to any other valid acts of adverse dominion” (Schedule E);
- in the case of some of the parcels in this application “their rights co-exist with the holders of other rights and interests in the land. That is to say they do not claim exclusive possession” (Schedule E);
- the applicants do not claim ownership of any minerals, petroleum or gas wholly owned by the Crown (Schedule P); and
- the applicants do not claim exclusive possession of any offshore place (Schedule Q).

I have numbered the rights and interests claimed in Schedule E as follows:

National Native Title Tribunal

1. *The Eastern Yugambeh people are entitled to use, enjoyment and occupation of their lands, seas, reefs and waters, in the case of some of the parcels in this application their rights co-exist with the holders of other rights and interests in the land. That is to say they do not claim exclusive possession.*
2. *Discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to and concerning the native title land, reefs and seas including to:*
 - (i) *preserve sites of significance to the native title holders and other Aboriginal people on the native title land, reefs and seas;*
 - (ii) *determine, give effect to, pass on and expand the knowledge and appreciation of their culture and tradition;*
 - (iii) *regard the native title land, reefs and seas as part of the inalienable attachment of the native title holders to the native title land, reefs and seas and ensure that the use of the native title land is consistent with that attachment;*
 - (iv) *maintain the cosmological relationship, beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the native title land, reefs and seas and special and sacred sites, to ensure the continued vitality of culture and the well being of the native titleholders.*
 - (v) *inherit, dispose of or confer native title rights and interests in relation to the native title land, reefs and seas on others in accordance with custom and tradition;*
 - (vi) *determine who are the native title holders;*
 - (vii) *resolve disputes in relation to the native title land, reefs and seas.*
3. *Establish residences on the native title lands.*
4. *Determine use rights in relation to activities which may be carried out by others on the native title land, reefs and seas including the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title lands and waters.*
5. *Exercise and carry out economic life (including by way of barter) on the native title land, reefs and seas including to hunt, fish and carry out activities on the native title land, including the creation, growing, production or harvesting of natural resources.*
6. *Have access to and use of the natural resources of the native title land, reefs and seas including the right to:*
 - (i) *maintain and use the native title land, reefs and seas;*
 - (ii) *conserve the natural resources of the native title land, reefs and seas;*
 - (iii) *safeguard the natural resources of the native title land, reefs and seas for the benefit of native title holders*
7. *Manage the native title land, reefs and seas for the benefit of the native titleholders.*
8. *Use the natural resources of the native title land, reefs and seas for social, cultural economic religious, spiritual customary and traditional purposes.*

I am satisfied that this description, as required by s62(2)(d), is sufficient to allow the native title rights and interests claimed to be readily identified.

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

To be satisfied that there is a sufficient factual basis to support the applicants' assertion that they hold the native title rights and interests claimed, I must be satisfied that the applicants have provided sufficient material to describe the factual basis which supports the three elements in (a), (b) and (c).

I have considered the four affidavits filed in support of the application. These are the affidavits of (N) (sworn 8 January 2001), (QQ) (sworn 25 August 2001), (M) (sworn 27 September 2001) and (E) (sworn 28 September 2001).

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

I must be satisfied that there is a sufficient factual basis to support the assertion that the native title claim group has, and the predecessors of those persons had, an association with the area.

Each deponent identifies the apical ancestor through whom they take their identity as part of the Eastern Yugambeh People.

(N) identifies her great grand mother as (XX). Her mother and grand mother taught her traditional ways of gathering food and bush medicines on Yugambeh country (paragraphs 5, 7 and 11 of her affidavit). When she was growing up she used to attend ceremonies and large gatherings of Eastern Yugambeh People on country and her aunties used to tell her about large gatherings on country (paragraph 15).

(M) is the great grand son of (XX) (paragraph 3 of his affidavit). His predecessors taught him fishing and how to gather bush medicines from Yugambeh country (paragraph 6, 7 and 8) and one of his uncles taught him how to make spears for hunting from natural resources (paragraph 6). His mother and older relatives told him about special sites on Yugambeh country. He still visits these places (paragraph 15).

(E) is the great great grand son of (JJ) (paragraph 3 of his affidavit). He used to go hunting and collecting bush tucker with his grandmother on Yugambeh country (paragraph 7). His father and uncles taught him how to catch fish and crabs in the traditional way and his grandmother took him to the beach to catch periwinkles (paragraph 8). His father, uncles and aunties taught him how to gather bush tucker in the traditional way (paragraph 9). His uncles and grandmother used to tell him stories about animals on Yugambeh country (paragraph 11). His grandmother, uncles and older relatives told him about special sites within the claim area and (E) still visits these places and cares for them (paragraph 16).

(QQ) is the great great grand daughter of (JJ) and (II), two of the apical ancestors (paragraphs 6, 8 and 9 of her affidavit). She deposes that her uncle told her stories about animals belonging to Yugambeh country. He taught her what fish she could and could not take from Yugambeh country, according to Yugambeh custom (paragraph 12).

This evidence sets out a communal interaction with the claim area going back through the generations. The deponents spent time with and learnt from a number of older relatives, moving around on country and learning about traditional practices such as hunting, gathering bush tucker and bush medicines, visiting special sites and sharing traditional stories connected with the country.

I find there is sufficient factual basis to support the assertion.

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

This subsection requires me to be satisfied that there is a sufficient factual basis to support the assertion that there are traditional laws and customs which the group observes and that those laws and customs give rise to the native title rights and interests claimed.

The applicants claim the native title rights and interests set out earlier in my reasons in relation to s190B(4). These rights and interests include the right to preserve rights of significance to the native title holders; to pass on and expand the knowledge and appreciation of the culture and tradition; to establish residences on the native title land; to access and carry out economic life on the land, including to hunt, fish and harvest natural resources; and to use the natural resources of the land, including for social, cultural, spiritual and traditional purposes.

In their affidavits, (N), (QQ), (M) and (E) refer to traditional practices, stories and language relating to the claim area passed on through the generations. These activities and cultural concepts are reflected in the native title rights and interest claimed.

I refer to my reasons in relation to s190B(5)(a), where I have set out the evidence of traditional food gathering and bush medicine practices passed on through the generations.

I have also referred to ancestors passing on information and stories about special sites and communal gatherings on country to the younger members of the group.

I am satisfied that these practices are derived from the traditional laws acknowledged by the predecessors and passed on and acknowledged by the current members of the native title claim group.

In her affidavit (N) refers to the traditional practice of sharing dugong catches (paragraph 10) and being taught custom and tradition by the older women, including stories about the rules of relationships and marriage (paragraph 13).

(M) refers to the Yugambeh people using their own language (paragraph 11) and the traditional practice of sharing stories about ancestors because they are significant and important senior members of the family (paragraph 17).

(E) deposes that he and his relatives speak Yugambeh language, taught to him by “the old people” (paragraph 10), and says that his ancestors told him traditional stories about animals roaming across Yugambeh country (paragraph 11). His uncles and grandmother taught him traditional dances, ceremonies and songs which are still performed today by (E) and his relatives (paragraph 14). (E) and his relatives still share stories about the ancestors because, according to Yugambeh tradition, they are “Leaders and Clevermen” (paragraph 18).

This evidence provides the factual basis for the continued existence of traditional laws and customs. These are the traditional laws and customs reflected in the native title rights and interests claimed.

I find there is sufficient factual basis to support this assertion.

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

This subsection requires that I be satisfied that there is a sufficient factual basis to support the assertion that the traditional native title claim group has continued to hold the native title in accordance with the traditional laws and customs which derive from the native title claimed.

In my reasons in relation to s190B5(a) and s190B5(b) I say why I am satisfied that there is a sufficient factual basis to support the propositions that traditional laws and customs exist, have been passed on by the predecessors and are observed by the current members of the native title claim group. The evidence that I have canvassed sets out a number of aspects of native title which have been passed on and are now observed by the native title claim group. These include: traditional food gathering, food sharing and bush medicine practices; traditional stories about the Yugambeh People’s association with the area and the importance of special sites on Yugambeh country which the living members of the group still visit and care for.

The dominant theme is the importance of traditional beliefs, information and knowledge being passed on by the ancestors to the living members of the group. The four deponents, as living members of the group, continue to observe these traditional beliefs and practices and continue to apply the knowledge that has been passed on.

In Schedule G the applicants state that:

- the claimants care for country in the claim area and remain custodians of the significant sites in the country; and
- Eastern Yugambeh children and young people are taken to country to learn about their culture and history.

The applicants have provided sufficient evidence to support a claim that the native title claim group continues to hold native title in accordance with their 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 whether, *prima facie*, at least some of the native title rights and interests claimed can be established.

Schedule E lists the native title rights and interests claimed by the applicants. In my reasons in relation to s190B4 I have numbered what appear to me to be the eight principal rights. The rights numbered 2 and 6 have subordinate rights. In my reasons under s190B4 I also refer to the qualifications placed on those rights, as stated in Schedules E, J, P and Q.

In considering this condition against the native title rights and interests listed in Schedule E, I have had regard to the affidavits of (N) (sworn 8 January 2001), (QQ) (sworn 25 August 2001), (M) (sworn 27 September 2001) and (E) (sworn 28 September 2001) all of which have been filed in the Federal Court.

These affidavits provide sufficient material and information to satisfy me, *prima facie*, that at least some of the native title rights and interests claimed by the applicants can be established.

Below I provide my findings and reasons in relation to each of the eight principal rights.

1. *The Eastern Yugambah people are entitled to use, enjoyment and occupation of their lands, seas, reefs and waters, in the case of some of the parcels in this application their rights co-exist with the holders of other rights and interests in the land. That is to say they do not claim exclusive possession.*

This is similar to the right which I have numbered 6:

6. *Have access to and use of the natural resources of the native title land, reefs and seas including the right to:*
 - (iv) *maintain and use the native title land, reefs and seas;*
 - (v) *conserve the natural resources of the native title land, reefs and seas;*
 - (vi) *safeguard the natural resources of the native title land, reefs and seas for the benefit of native title holders*

I will consider these rights together.

I am satisfied that there is evidence to establish that the Eastern Yugambah People are entitled use, enjoy and occupy the claim area (subject to other valid rights and interests) including to access to use the natural resources of the area. I am satisfied

that they have, as part of their native title rights and interests, the right to maintain the area and conserve and safeguard its natural resources, for the benefit of the native title holders.

I refer to my summary of the affidavit evidence in my reasons in relation to s190B(5)(a) and (b). There I have referred to the evidence of traditional beliefs and practices in relation to gathering and sharing food, gathering bush medicines, visiting sites on country and holding traditional gatherings on country.

(N) deposes that she learnt from her grandmother how to harvest yams and replant small ones so that there would be more next season (paragraph 7). She refers to her grandmother's practice of planting goomburra (Queensland nuts) as her grandmother walked across country (paragraph 8).

In his affidavit (M) recalls stories about his grandmother planting macadamia nut trees whilst walking across country (paragraph 12).

In her affidavit (QQ) refers to the snake and crocodile story and how the snake watched while she and her relatives fished; if they took more fish or crabs than they needed, the big crocodile would come and take their food. She refers to the rule about only taking from the sea what was needed for a meal (paragraph 12).

Established.

2. *Discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to and concerning the native title land, reefs and seas.*

(i) *preserve sites of significance to the native title holders and other Aboriginal people on the native title land, reefs and seas;*

In his affidavit (E) deposes that he and his relatives continue to visit and care for significant sites in the claim area (paragraph 16).

In Schedule G, which is supported by the affidavits of the four named applicants, the applicants state that claimants care for country in the claim area and remain custodians of the significant sites in this country.

Established.

(ii) *determine, give effect to, pass on and expand the knowledge and appreciation of their culture and tradition.*

In *State of Western Australia v Ward* [2000] FCA 191 it was found that the common law only recognises and protects native title rights and interests that involve physical presence on the land, and activities on the land associated with traditional social and cultural practices. Although the Court recognised that the

relationship of indigenous people with their traditional lands is of a spiritual nature, it found that the common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land. The majority did not recognise a right to maintain, protect and prevent the misuse of cultural knowledge of the native title holders associated with the determination area.

The affidavit evidence supports a contention that although the knowledge and appreciation of culture and tradition is an intellectual aspect of native title, it is given its meaning and expression through interacting with the land in physical ways.

However, in view of the Full Federal Court's decision in *Ward* not to make a determination in respect of such a right; it would not be appropriate to confer a right to negotiate through the registration of a right which was not determined by the Full Federal Court.

Not established.

(iii) *regard the native title land, reefs and seas as part of the inalienable attachment of the native title holders to the native title land, reefs and seas and ensure that the use of the native title land is consistent with that attachment.*

The first part of this right refers to an attitude and state of awareness – regarding the native title land and waters in a certain way. This is an intellectual attribute and is not capable of being registered, for the reasons I have outlined in relation to the right 2(ii) above.

The second part of this right is a right to ensure that the use of the native title land is consistent with the inalienable attachment of the attachment of the native title holders. The right involves taking action in respect of the land to protect the native title holders' interest in the land. This right involves sufficient physical interaction with the land to be capable of being registered. It is similar to a claim for the right to control access to and use of native title land.

Although I find that the second limb of this right is capable of being registered, I am not satisfied that there is *prima facie* evidence to establish this right.

In her affidavit (N) states that she is active in preserving recognition of the Eastern Yugambah People in their attachment to country on the Gold Coast and refers to annual gatherings at their traditional bora ground for commemoration ceremonies (paragraph 16). However, neither (N) nor the other deponents provide specific information about who in the claim group have responsibility for ensuring the use of the native title land is consistent with the attachment of native title holders, and how this is put into effect. The affidavits refer to traditional interactions with the

claim area in general and traditional practices being passed down through the generations, but do not say who has responsibility for the proper management of the native title.

Not established.

- (iv) *maintain the cosmological relationship, beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the native title land, reefs and seas and special and sacred sites, to ensure the continued vitality of culture and the well being of the native title holders.*

In her affidavit (N) states that she is active in preserving recognition of the Eastern Yugambah People in their attachment to country and refers to annual gatherings for commemoration ceremonies (paragraph 16). In his affidavit (E) deposes that his grandmother, uncles and older relatives told him about special sites that are visited and cared for within the claim area, and that he and his relatives still visit these places and care for them (paragraph 16).

However, I am not satisfied that the affidavits provide sufficient information about the traditional customs and beliefs which define and give responsibility for custodianship. I do not have enough evidence about who is responsible for “appropriate custodianship”, what this means in practice and who has responsibility for maintaining the vitality of the culture.

Not established.

- (v) *inherit, dispose of or confer native title rights and interests in relation to the native title land, reefs and seas on others in accordance with custom and tradition.*

The majority view in *Ward* was that only interests which refer to the physical enjoyment of native title rights and interests by practical exercise on the land can be registered. This right is not a right involving particular physical interaction with the land and therefore is not a registrable right.

If I am wrong and this right is of the kind that can be registered, I find that I do not have sufficient evidence to satisfy me, *prima facie*, that this right exists.

The affidavits refer to the traditional practices that have been passed down through the generations and the various traditional ways in which the deponents, as current members of the group, interact with the claim area. There is a strong theme of older people, including predecessors, teaching younger people and there are some references to the deponents’ older relatives telling them stories about their ancestors. The deponents also refer to the apical ancestors from whom they take their identity.

However, I am not satisfied that the evidence provide sufficient information about the processes by which native title rights and interests are conferred on others in accordance with custom and tradition and how native title holders may dispose of native title rights and interests.

Not established.

(vi) *determine who are the native title holders.*

I find that this is not a native title right which can be registered following the decision in *Ward*.

If I am wrong and it is a right of a type which can be registered, I find that I do not have sufficient evidence to satisfy me, *prima facie*, that there is a native title right to determine who the native title holders are. I refer to my reason in relation to (ii) above which asserts a right to confer native title rights and interests.

Not established.

(vii) *resolve disputes in relation to the native title land, reefs and seas.*

I find that this is not a registrable right following the decision in *Ward*. The asserted right is very general and I am not satisfied that it is sufficiently related to physical activities on or interaction with the land, as contemplated by *Ward*.

If I am wrong, and this right is of a type that can be registered, I am not satisfied that, *prima facie*, it has been established. The applicants' affidavits referred to in Schedule R, provided in relation to authorisation, refer to how the Eastern Yugambeh native title claim group makes decisions in relation to land business in general, but do not refer specifically to how disputes are resolved in accordance with their custom and tradition. The other affidavits filed in support of the application do not refer to dispute resolution.

Not established.

3. *Establish residences on the native title lands.*

This is a natural incident of the rights and interests numbered 1 and 6 which involve the use, enjoyment and occupation of the land and waters in the claim area. I have found that the rights to access, use, enjoy and occupy the lands and waters are *prima facie* established.

In her affidavit (N) deposes that her family built their house using bush materials on the Nerang River (paragraph 12). The Nerang River is in the claim area. In his affidavit (E) refers to building and living in shelters within Yugambeh country that is within the claim area (paragraph 15).

Established.

4. *Determine use rights in relation to activities which may be carried out by others on the native title land, reefs and seas including the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title lands and waters.*

The applicants do not claim exclusive possession. Their claim is for use, enjoyment and occupation subject to the valid rights of others. The applicants have claimed the benefit of s47B for any areas of Unallocated State Land within the claim area. The current and historical tenures within the claim area are not known, but it is possible that there are some areas of USL within the claim area and for which any prior extinguishment must be disregarded under s47B.

It is possible that the applicants could establish a right to exclusive possession in relation to some part of the claim area. Under the principles in *Ward*, the right can be claimed in respect of areas within the claim area in relation to which the native title holders may establish exclusive possession.

However, the affidavits do not provide any information to support a native title right to determine the use rights of others.

Not established.

5. *Exercise and carry out economic life (including by way of barter) on the native title land, reefs and seas including to hunt, fish and carry out activities on the native title land, including the creation, growing, production or harvesting of natural resources.*

In her affidavit (N) refers to a range of economic activities carried out in the claim area, including gathering bloodworms as bait for fishing, cultivating yams and Queensland nuts, hunting, fishing, collecting bush medicines and felling timber to construct dwellings (paragraphs 5 to 12). (M) refers to fishing, gathering bush tucker and hunting (paragraphs 6 to 10) planting macadamia nut trees (paragraph 12) and making spears and shields for hunting from the trees on country (paragraph 6).

(E) refers to making bush medicines, hunting, gathering bush tucker and fishing (paragraphs 6 to 9, 13).

The exercise of these rights follows from the right to use, enjoy and occupy the country and to use the nature resources (rights 1 and 6 above). Although I do not have evidence of a traditional right to barter, I find that this reasonably fits within the right to use the natural resources of the land. The applicants have claimed the rights to the use, enjoyment and occupation of the area and to use the natural resources subject to other validly existing rights. Barter can therefore be

undertaken as part of using the natural resources, subject to the valid rights of others.

Established.

6. *Have access to and use of natural resources.*

See reasons above in relation to 1.

Established.

7. *Manage the native title land, reefs and seas for the benefit of the native titleholders.*

In her affidavit (N) refers to traditional land management practices in relation to the cultivation of yams and Queensland nuts (paragraphs 7 and 8). In his affidavit (E) refers to his older relatives and him visiting special sites within the claim area and caring for them (paragraph 16).

In Schedule G the applicants state that they care for country in the claim area and remain custodians of the significant sites in this country.

Established.

8. *Use the natural resources of the native title land, reefs and seas for social, cultural economic, religious, spiritual customary and traditional purposes.*

This is similar to the right numbered 5. The evidence provided to support right number 5 also supports this right. In addition, (N) refers to the traditional communal activity of sharing dugong catches (paragraph 10).

Established.

Conclusion

I find that the native title rights which I have numbered 1, 2(i), 3, 5, 6, 7 and 8 are *prima facie* made out. It is open to the applicants, under s190(3A) of the NTA, to provide further information to seek to establish additional rights and interests to the *prima facie* satisfaction of the delegate.

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

This section requires me to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

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

For the reasons given at s190B(5), I am satisfied that there exist traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

There is evidence that at least one member of the native title claim group currently has or previously had a traditional physical connection with part of the land or waters covered by the application.

I refer to the evidence I have canvassed in relation to s190B(5)(a).

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 am satisfied that the application meets the requirements of this section.

s61A(1) – Native Title Determination

A search of the Native Title Register conducted on 19 November 2001 has revealed that there is no approved determination of native title in relation to the area claimed in this application.

s61A(2) – Previous Exclusive Possession Acts

Attachment B of the application excludes classes of interests/tenures. For the reasons provided above at s190B2 these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded and include all previous exclusive possession acts.

The exclusion clauses meets the requirement of this subsection.

s61A(3) – Previous Non-Exclusive Possession Acts

Attachment B of the application does not specifically state that the application does not include a claim for exclusive possession over previous non-exclusive possession act areas as defined under s23F of the Act, save where the Act and/or common law allows such a claim to be part of a native title determination application.

However, in Schedule E the applicants state that “in the case of some of the parcels in this application, their [the Eastern Yugambah people’s] rights co-exist with the holders of other rights and interests in the land. That is to say they do not claim exclusive possession.”

I am satisfied that the applicants do not claim exclusive possession of areas covered by previous non-exclusive possession acts.

s61A(4) – s47, 47A, 47B

The applicants claim the benefit of ss47, 47A and 47B in Attachment B of the application.

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 applicants' express statements with respect to the provisions of that section are sufficient to meet the requirements of s190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of sections 47, 47A and 47B is a matter to be settled at a later time.

Conclusion

The application and accompanying documents do not disclose and it is not otherwise apparent that because of s61A 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

In Schedule Q the applicants state that they do not claim ownership of minerals, petroleum or gas 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

In Schedule P the applicants state that they do not claim exclusive possession of any offshore place.

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 and accompanying documents do not disclose, nor am I otherwise aware, that the application contravenes the criteria set out in s190B(9)(c).

National Native Title Tribunal

A search of the Register of Indigenous Land Use Agreements indicated that no native title rights in the claim area have been extinguished by agreement.

Result: Requirements met

End of Document

**Eastern Yugambeh People QC01/2
Attachment to reasons for Registration decision 16 April 2002 - edited**

Reasons in relation to authorisation (s190C4(b) *Native Title Act*)

The authorisation issue

The application is overlapped by two applications filed by the Kombumerri People. Both Kombumerri applications were filed before the Eastern Yugambeh application.

The Eastern Yugambeh and Kombumerri applicants agree that they have a common apical ancestor, (name deleted - XX), also known as (name deleted - X). From the information I have (which I outline below) I conclude that the Kombumerri People are a subgroup of the Eastern Yugambeh People. The Eastern Yugambeh and Kombumerri applicants do not dispute this.

Some of the Kombumerri people have objected to the registration of the Eastern Yugambeh application on the basis that they do not authorise it. The Kombumerri People have also objected as a group, through the sole Kombumerri applicant.

The issue is whether the Eastern Yugambeh application meets the authorisation requirements of the Native Title Act despite these objections.

Filing and amendment of the application

This application was filed in the Federal Court on 25 January 2001. A proposed amended application was filed in the Federal Court on 23 November 2001.

On 4 April 2002 the Federal Court ordered that the application be amended in accordance with the proposed amended application filed 23 November 2001.

Overlapping applications, Kombumerri #1 and Kombumerri #2

Two portions of the Eastern Yugambeh claim area are overlapped by two separate Kombumerri applications, Kombumerri #1 (QC96/69) and Kombumerri #2 (QC98/24), lodged with the Tribunal in 1996 and 1998 respectively.

Kombumerri #1 is by far the larger claim area. The area of overlap is significant. Within its external boundary, without taking into account any areas excluded, the Eastern Yugambeh claim covers an area of land of around 1630 square kilometres. Kombumerri #1 covers an area of land and sea of approximately 3577 square kilometres, without taking into account any excluded areas. Kombumerri #1 overlaps approximately 895 square kilometres of the area of Eastern Yugambeh, which is over half of the Eastern Yugambeh area.

Kombumerri #1 was lodged on 25 June 1996 and Kombumerri #2 on 28 April 1998. The applicant in each case is (name deleted - H) “on behalf of all those Aboriginal people who identify as and are recognised as Kombumerri People, and their descendants.” On 8 November 1999 the Registrar’s delegate found that these applications did not satisfy the requirements of the registration test. They were removed from the Register of Native Title Claims, having been registered under the Act as it was before 30 September 1998.

I am aware that there have been discussions between the Eastern Yugambah and Kombumerri applicants in an effort to resolve the overlaps. However, the Kombumerri applications remain on foot and have not been amended since assessed for registration on 8 November 1999.

Authorisation provisions in the Native Title Act

Subsection 190C(4) provides that, if an application is not certified by a representative body for the area, the Registrar must be satisfied that:

(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 other persons in the native title claim group.

Under s190C(5) applications not certified by a representative body must:

- (a) include a statement to the effect that the requirements in para 4(b) have been met; and*
- (b) briefly set out the grounds on which the Registrar should consider that it has been met.*

Section 251B requires that the members of the group authorise the application as required by s190C(4):

- (a) through a traditional decision-making process; or
- (b) through a process agreed to and adopted by the members of the group especially for the application.

The Eastern Yugambah applicants say that this application has been authorised through a traditional decision-making process, rather than a special process adopted for this application.

The Act provides that where a traditional decision-making process is used:

s251B *... all the persons in a native title claim group or compensation claim group **authorise** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:*

(a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind – the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process...

The application and accompanying affidavits

The application is made by four applicants on behalf of the Eastern Yugambeh People; (Name deleted - A), (name deleted - C), (name deleted - D) and (name deleted - E).

The application states that the applicants are entitled to make the application as:

The Eastern Yugambeh People have authorised this application according to Eastern Yugambeh tradition and custom.

The native title claim group is described in the application as:

*The Eastern Yugambeh people being the descendants of:
(name deleted – KK), (name deleted – JJ), (XX), (name deleted – II), (3 other names deleted)*

The known apical ancestors of the group.

Documents submitted to the Tribunal in relation to authorisation

The Eastern Yugambeh applicants have submitted a number of documents to support their assertions that the application was properly authorised. I have received and considered:

- affidavits of (A), (E) and (C) sworn 28 September 2001 in relation to formal requirements in s62(1)(a);
- affidavit of (D) sworn 29 September 2001 in relation to formal requirements in s62(1)(a);
- affidavit of (A) sworn 6 December 2000 in relation to authorisation;
- affidavit of (C) sworn 10 January 2001 in relation to authorisation;
- affidavit of (E) sworn 14 December 2000 in relation to authorisation;
- affidavit of (D) sworn 8 January 2001 in relation to authorisation;
- copy letter 22 January 2001, (A) to several Eastern Yugambeh people regarding a meeting on 3 February 2001;
- email (A) to (name deleted - F), Tribunal 23 January 2001 regarding advertisements in newspapers;
- copy letter to (name deleted - H) 5 February 2001 regarding newspaper item on 3 February 2001;
- copy letter (A) to (name deleted - B) 19 April 2001;

National Native Title Tribunal

- email (B) to (name deleted - G), Tribunal 23 August 2001 regarding (X)/(XX);
- letter (A) to (G) 25 October 2001;
- letter (A) to (G) 28 November 2001;
- letter (A) to (G) 29 November 2001;
- letter (A) to (G) 6 December 2001;
- letter (B) to (G) 6 December 2001;
- letter (A) to me 30 January 2002;
- Attachment to letter from (A) to Tribunal President 18 February 2002; and
- affidavit of (A) sworn 28 February 2002.

On 29 November 2001 I gave the Eastern Yugambah applicants my detailed written preliminary assessment in relation to authorisation. (A) made comments in relation to authorisation in his communications listed above dated 6 December 2001, 30 January 2002, 18 February 2002 and 28 February 2002. (B) also made submissions in relation to authorisation in his letter dated 6 December 2001.

I provided additional comments on authorisation in my letters to (A) and (B) dated 18 January 2002 and my letter to (A) dated 31 January 2002.

(H) and other Kombumerri people also provided the Tribunal with documents and submissions in relation to authorisation. I have received and considered the following documents submitted by Kombumerri people:

- letter of objection to the Eastern Yugambah claim from (name deleted - I) dated 14 February 2001, attaching 23 signatures dated 13 February 2001;
- letter of objection to the Eastern Yugambah claim showing 11 signatures, each dated 14 February 2001;
- letter of objection to the Eastern Yugambah claim from (name deleted - J) dated 16 February 2001;
- letter of objection to the Eastern Yugambah claim from (name deleted - K) and (name deleted - L) dated 16 February 2001;
- hand written objection to “(name deleted - O)s overlapping claim” from (name deleted - R) showing 6 signatures dated 17 February 2001;
- letter of objection to the Eastern Yugambah claim signed by (name deleted – Z) and (name deleted – AA) (18 February 2001) and (name deleted – BB) (19 February 2001);
- letter of objection to the Eastern Yugambah claim signed by (name deleted – CC) dated 19 February 2001;
- letter of objection to the Eastern Yugambah claim from (name deleted – DD) dated 20 February 2001;
- letter of objection to the Eastern Yugambah claim signed by (name deleted – EE) dated 22 February 2001;
- hand written letter “To whom it concerns” signed by (name deleted – Q) dated 17 October 2001, disagreeing with the Eastern Yugambah claim;

- undated letter to me from (H) signed “on behalf of Kombumerri”, received by the Tribunal 29 January 2002;
- undated “Objection” addressed to me from (H), received by Tribunal 29 January 2002; and
- affidavit sworn by (H) 30 January 2002.

Documents from Kombumerri files

I have also considered some documents from the Kombumerri files in so far as they are relevant to the issue of authorisation.

I have received and considered:

- a copy of the proposed amended application QC96/69 on behalf of the Kombumerri People, received by the Tribunal 30 July 1999, and containing proposed amended claim group description;
- the proposed amended claim group description for Kombumerri application QC98/24, in similar terms to proposed amended claim group description for QC96/69; and
- part of a publication entitled “The Kombumerri – A Portrait” provided to the Tribunal by the Kombumerri applicant in relation to the Kombumerri applications.

Procedural fairness

(G), the Tribunal’s registration test officer for this application, sent copies of the statements of objection to (B), a barrister who was providing legal support to the applicants, inviting the Eastern Yugambah applicants to comment.

On 21 February 2001 (G) sent (B) copies of:

- (I)’s letter dated 14 February 2001 attaching 23 signatures;
- letter from (name deleted - R) dated 17 February 2001;
- letter of objection from (K) and (L) dated 16 February 2001;
- letter of objection from (J) dated 16 February 2001;
- letter of objection from (CC) dated 19 February 2001; and
- letter of objection from (DD) dated 20 February 2001.

On 5 March 2001 (G) sent (B) copies of:

- letter of objection from (name deleted - FF) and others dated 14 February 2001 showing 11 signatures;
- letter of objection from (Z), (AA) and (BB) signed 18 and 19 February 2001; and
- letter of objection from (EE) dated 22 February 2001.

The Tribunal received comments in response in the copy of the letter from (A) to (B) dated 19 April 2001.

On 16 August 2001 (G) wrote to (B) inviting him to comment on the draft amended claim group description of the Kombumerri claim group and whether the apical ancestor in the Eastern Yugambeh application (XX) is the same as the (X) referred to in the proposed amended description of the Kombumerri claim group.

On 23 October 2001 (G) invited (B) to comment on the letter of disagreement from (name deleted - Q) of the Kombumerri People dated 17 October 2001.

(B) commented in his email to (G) dated 23 August 2001 and (A) commented in his letters to (G) dated 25 October, 28 November and 29 November 2001.

In response to my preliminary assessment dated 29 November 2001, (A) and (B) provided further information and submissions in their respective letters dated 6 December 2001.

On 18 January 2002, I wrote to (A) and (B) addressing the matters they had raised in their letters dated 6 December 2001 and invited (A) to present any further information in affidavit form. (A) wrote to me on 30 January 2002 in relation to matters relevant to authorisation. I responded on 31 January 2002 and repeated my suggestion that (A) provide further information in affidavit form.

(A) provided further information and submissions in his Attachment to his letter to the President dated 18 February 2002 and in his affidavit sworn 28 February 2001 (which should read 28 February 2002).

On 16 August 2001 (G) wrote to the Queensland South Representative Body, which was assisting the Kombumerri People. (G) advised that it appeared that the Eastern Yugambeh and Kombumerri claim groups had a common ancestor, (XX) or (X). (G) also enclosed an extract from the publication "The Kombumerri – A Portrait". (G) also sent a copy of (A)'s letter to (B) dated 19 April 2001, commenting on the various statements of objection to the Eastern Yugambeh application by Kombumerri people.

Neither the Queensland South Representative Body nor (H) responded to this particular invitation to comment.

On 18 January 2002 I wrote to (H). I told him that I had told the Eastern Yugambeh applicants that I was not satisfied that the Eastern Yugambeh application was properly authorised. I sent (H) copies of the letters from (A) and (B), both dated 6 December 2001, inviting him to comment. I also suggested to (H) that he provide sworn evidence.

(H) responded by forwarding to me his personal Objection and the letter from him on behalf of the Kombumerri, both undated but received by the Tribunal on 29 January 2002. I also received a copy of an affidavit sworn by (H) on 30 January 2002.

I provided (A) and his legal representative (name deleted –GG) with copies of (H)'s Objection and letter (both received by the Tribunal on 29 January 2002) and affidavit sworn 30 January 2002. I invited (A) to comment.

By way of further submissions on authorisation, I received the letter from (A) to the President dated 18 February 2002, with the 20 page Attachment, and (A)'s affidavit sworn 28 February 2002.

Details of material relevant to authorisation

The four Eastern Yugambeh applicants have sworn standard form affidavits that meet the formal requirements of s62(1)(a)(iv) and (v). (A), (E) and (C) swore their affidavits on 28 September 2001 and (D) swore hers on 29 September 2001.

Schedule R of the prescribed form requires the applicants to set out the grounds on which the Registrar should consider that the application has been authorised by all members of the claim group. Schedule R states "Affidavits of applicants in Attachment R". There was no Attachment R to the proposed amended application filed 23 November 2001, but affidavits sworn by the applicants were attached to the initial application filed 25 January 2001 as Attachment R.

(A) swore his Schedule R affidavit on 6 December 2000, (C) on 10 January 2001, (D) on 8 January 2001 and (E) on 14 December 2000. The four affidavits are in similar terms. Each applicant identifies the apical ancestor through whom he or she takes his/her identity and deposes that he/she has been authorised according to a traditional decision-making process.

Each applicant describes the authorisation process in this way:

6. *In the latter part of (the year 2000) I attended a number of informal meetings of the EASTERN YUGAMBEH PEOPLES in Beenleigh/Gold Coast/Brisbane area and have kept myself informed about other meetings. Many EASTERN YUGAMBEH PEOPLE attended these informal meetings of our community where we discussed our native title land business. These were not formal meetings they were informal get togethers and meetings.*
7. *We all pretty much live round Beenleigh and the Gold Coast and when we meet and discuss land matters amongst ourselves often without having to hold formal style meetings.*
8. *At these meetings the EASTERN YUGAMBEH PEOPLE and Elders discussed land business.*
9. *When the EASTERN YUGAMBEH PEOPLES want to make decisions about land business there is a decision making process that we must comply with under tradition and custom. This process involves discussion amongst Elders and talks*

with other members of the EASTERN YUGAMBEH community. This process results in a consensus being reached amongst the Elders who live on and maintain attachment and connection to EASTERN YUGAMBEH country that binds all members of the EASTERN YUGAMBEH PEOPLE. This process also binds EASTERN YUGAMBEH PEOPLES who have been removed and have not been able to maintain their physical connection with country.

10. *In November 2000, after a series of informal EASTERN YUGAMBEH Peoples and Elders meetings we reached a consensus to proceed with a native title application.*
11. *I am authorised by the EASTERN YUGAMBEH PEOPLES, through our traditional decision-making process that must be complied with, to swear this affidavit and to put forward the application we propose.*
12. *I am authorised by the EASTERN YUGAMBEH PEOPLES to do what is necessary to achieve a determination of Native Title over EASTERN YUGAMBEH country for the EASTERN YUGAMBEH People.*
13. *All the facts and circumstances deposed to in this my affidavit are within my own knowledge, except those which are deposed to from information only, and the means of my knowledge and sources of my information appear on this my affidavit.*

In these affidavits the applicants assert a traditional decision-making process which involves:

- informal discussions amongst Eastern Yugambeh people;
- talks between Elders and other members of the Eastern Yugambeh community;
- discussions amongst Elders;
- a resultant consensus amongst the Elders who live on and maintain attachment and connection to Eastern Yugambeh country; and
- all members of the Eastern Yugambeh People, including those who have not been able to maintain their physical connection with country, being bound by the consensus reached by the Elders.

On 23 January 2001 (A) advised the Tribunal's case manager for this application at the time, (F), that on 22 January he had sent a letter to about 100 people in the Eastern Yugambeh community. He provided a copy of the letter. I do not have details of the addressees. The letter of 22 January 2001 states that all descendants of the eight named apical ancestors "are invited to become a part of a new native title application." (XX) was one of the named apical ancestors.

(A) wrote further in his letter dated 22 January 2001:

If you are a descendant of one of these ancestors you may wish to identify as part of the claimant group. This is an inclusive application and we don't want to leave anyone out of the process.

The new application incorporates the claimant group and the geographic area that were claimed under the two existing applications. Because the old applications were never authorised, no time has been lost by lodging the new application.

With regard to the existing applications, there have been considerable problems, namely that they are limited in both membership and geographic area ... It is anticipated and hoped these two applications will be withdrawn.

A proper management structure is essential, and a committee has been established to represent each branch of the descendent group. It is anticipated that very quickly the committee will be able to deal with the many issues that face the native title claimant group. The family groups will instruct the committee on what is important to them and therefore how to manage native title.

To progress the new application, a meeting is being held on 3rd February 2001 commencing at 10.00am....

The reference to “the two existing applications” appears to be a reference to the two Kombumerri applications filed in 1996 and 1998.

On 23 January 2001 (A) also advised (F) that he had placed advertisements in Gold Coast, Beaudesert and Tweed Heads newspapers as well as the Courier Mail.

In his letter to (B) dated 19 April 2001, (A) refers to a meeting with (name deleted - S) and (name deleted – HH) at the Tribunal offices on 14 December 2000, a meeting at the Federal Court with (S) on 12 January 2001 and then a number of events after the initial application was filed on 25 January 2001. The events listed by (A) after 25 January 2001 include a meeting on 3 February 2001 “to confirm the authorisation process”, mediation meetings and dates on which community letters were sent to members of the claimant group including the (H)and (P) families.

In his letter dated 19 April 2001 (A) also refers to the need for a united application with increased membership and boundaries, that the (H)/(P) families could be represented in the Eastern Yugambeh management committee and that the Kombumerri claims are based on a single apical ancestor whereas the Eastern Yugambeh application is based on eight apical ancestors.

(X)/(XX), the common apical ancestor

The applicants and others who have filed affidavits in support of the Eastern Yugambeh application have confirmed their membership of the Eastern Yugambeh group in their affidavits by referring to their ancestors as follows:

- (A) is the great, great grandson of (X) (affidavit 6 December 2001);
- (C) is also the great, great grandson of (X) (affidavit 10 January 2001);
- (D) is the great, great grand daughter of (II) and (JJ) (affidavit sworn 8 January 2001);
- (E) is the great grandson of (KK); his grandmother was (name deleted – LL) and she was the grand daughter of (JJ); his Uncle is (name deleted –MM), who was the son of (name deleted –NN), who was the son of (name deleted – OO) (affidavit 14 December 2001);
- (name deleted -N) is the great grand daughter of (XX), the grand daughter of (name deleted - P) ((XX)'s daughter) and the daughter of (name deleted – RR)(affidavit 8 January 2001);
- (name deleted - M) is the great grandson of (XX) and the grandson of (P) ((XX)'s daughter); his Uncle is (name deleted - Y) and (XX)'s son was called (name deleted - V) (it is not clear whether (Y) is (XX)'s son (V)) (affidavit 27 September 2001);
- (name deleted –QQ) is the great, great grand daughter of (II) and (JJ), the great grand daughter of (name deleted – SS) and the grand daughter of (name deleted – TT) (affidavit sworn 25 August 2001).

The surnames (P), (C) and (D) appear amongst the names of the Kombumerri people who have objected to the Eastern Yugambeh application.

Before the Eastern Yugambeh People's application was filed on 25 January 2001 the Kombumerri applicants were considering amending their claim group description. Amended applications were prepared but, not filed in the Federal Court. The proposed amendments confirm that the Kombumerri applicants consider their claim group has ancestors in common with the Eastern Yugambeh claim group ((X) and her daughter, (P)).

(X) is referred to in the proposed amended Kombumerri claim group description and in a publication entitled "The Kombumerri – A Portrait", an extract of which was attached to a draft amended Kombumerri application.

As at 15 November 1999 in Kombumerri #1 (QC96/69) and 14 June 2000 in Kombumerri #2 (QC98/24), the proposed amended Kombumerri claim group description stated in each case:

This application is made on behalf of the descendants of (P) (whose mother was (X) – English name deleted) and (name deleted – UU) – who are known as the Kombumerri family clan.

(6 names deleted), and in turn their descendants – in particular all those descendants of (names of 6 couples deleted) are descendants of the Kombumerri family clan and are included in the claim group.

In his email to (G) dated 23 August 2001 (B) confirmed that the Eastern Yugambeh people consider (XX) to be the same person as (X). In his letter to the Tribunal dated 29 November 2001 (A) states:

It is true that some of the descendants of (XX) are part of the so-called Kombumerri group...

In the Attachment to his letter to the President dated 18 February 2002, (A) stated:

The inescapable fact remains that by descent, the (H)/(P) families are a subset (and not an independent subset) of the Eastern Yugambeh ...

The Kombumerri is a subset of the Eastern Yugambeh through descent from (P) (pages 15 and 17 respectively of (A)'s Attachment).

Information/submissions provided by (A) in his letter dated 6 December 2001

(A) made a number of points in relation to authorisation, including:

- *throughout year 2000 and more so later in the year, there was significant discussion between family groups and across the language group of the correct group composition, boundary and other aspects of the Eastern Yugambeh application (and (A) refers to formal meetings in September 2000 and on 7 October, 2 December and 14 December 2000);*
- *in addition to the above mentioned formal meetings there were hundreds of informal meetings, phone calls, opportunistic meetings and other mechanisms by which the Eastern Yugambeh people's network operates;*
- *the petitioners (or "objectors" – my addition) were afforded many opportunities for comment and to the same extent as all other members of the language group;*
- *at no stage did the petitioners raise any substantive counter argument to the Eastern Yugambeh application;*
- *the petitioners made no attempt to discuss with other Eastern Yugambeh families or family groups their concerns (which to date remain unstated);*
- *the Eastern Yugambeh authorisation process included the (H)/(P) families in discussions and they had and have access to any and all information that was and is available to all other members of the group;*
- *the petitioners chose to exclude themselves from the authorisation process;*
- *according to Eastern Yugambeh tradition and customary law the group is able (to) achieve consensus over objections, in order to progress group land business;*
- *according to Eastern Yugambeh tradition and custom, matters of contention are discussed firstly within the group. The petitioners did not follow this protocol;*
- *according to Eastern Yugambeh tradition and custom the views of Elders inform the group's decisions but do not dictate;*

- *the (H)/(P) families comprise a small proportion of the overall group descended from (P);*
- *the petitions of the two or three heads of the (H)/(P) families are not given weight more significant than any other families of the claimant group descended from (XX) and the many other named apical ancestors;*
- *at present there are between one thousand and two thousand Eastern Yugambeh people. The exact figure is not known. However, formal research and informal approaches are ongoing to identify all descendants of the Eastern Yugambeh apical ancestors;*
- *the traditional process used to authorise the application is not a democratic process;*
- *the so called objectors through their actions have displayed an apparent “abandonment” of traditional law and custom and from a traditional perspective jeopardised their rights to be recognised as members of the Eastern Yugambeh group; and*
- *according to Eastern Yugambeh tradition and custom, and mindful of the overall size of the group and the number of family groups, the views of a handful of Elders representing two or three family groups do not amount to a right to object to authorisation.*

(A) says further in his letter of 6 December 2001 that the names and signatures of a number of petitioners appear to be in the same handwriting and that the objections do not adequately identify each individual making an “objection”. I invited (A) to elaborate on this when I wrote to him on 18 January 2002, but I did not receive any further comments on this point.

(A) also lists a number of features of meetings according to traditional law and custom, such as that:

- *meetings take place in informal and formal settings;*
- *meetings to discuss Eastern Yugambeh business can occur at any number of the gatherings that occur either socially or work related ostensibly for some other primary reason;*
- *these meetings can occur at any time when members of the same family group or across family groups within the Eastern Yugambeh group get together;*
- *the authorisation process takes place through numerous discussions and then collective feedback from individuals acting as Heads of family groups representing descendants of each apical ancestor;*
- *as an example, Elders appropriately authorised as family representatives who speak for descendants of (XX) include (N), (name deleted – VV), (name deleted – WW), (name deleted – PP). Each of these strongly support the Eastern Yugambeh application;*
- *each of the other groups according to apical ancestor have a corresponding individual or group of individuals that act as Heads of families;*
- *the individuals acting as Heads of family groups representing descendants of each apical ancestor were consulted throughout the year 2000 in relation to the Eastern Yugambeh application;*

- *the individuals acting as Heads of family groups representing descendants of each apical ancestor all supported the Eastern Yugambeh application;*
- *prior to 25 January 2001, the named applicants satisfied themselves that each and every Head of family groups representing descendants of each apical ancestor were aware of all aspects of the proposed Eastern Yugambeh application, the application had been discussed broadly within that group and that each descendant group supported and authorised lodgement of the application;*
- *(A) quotes (Name deleted - W), a descendant of (XX), who says; “Tradition and custom dictates that Elders and/or representatives of families inform members of land business. These appropriate Elders/representatives and family members (including all names on list of objectors who are not considered appropriate Elders) were invited to discuss native title issues and the proposed Eastern Yugambeh claim on 25th November 2000”;*
- *(XX)’s descendants include descendants of her children (V), (P), (name deleted – KB), and (name deleted –LB). So there are at least 3 branches of (XX)’s descendants that are not included in the objections. From (P)s family line, those who may be seen as appropriate amongst the (M)s, the (J)s, the (C)s and some of the (K)s are on side;*
- *at very most the objectors make up only a very small percentage of the people that the claim is made on behalf of;*
- *the few elderly (H)/(P) petitioners are considered by the rest of the descendants of (XX) to be insufficiently informed to be either fully representative or to be recognised as “appropriate” persons to represent the group. Their opinions carry little influence in the decision making process for matters of significant “business” for the group and for this reason they are not within the bracket of “appropriate Elders”;*
- *in the authorisation process, the views of the representative of the descendants of (XX) are weighed up against the representative of the descendant groups of the other apical ancestors and a consensus if formed amongst the group that maybe a consensus overriding what the group considers ill-informed objections or objections not based in Eastern Yugambeh customary law and traditions;*
- *to reiterate, throughout year 2000 and more so in the later part of the year, there was significant discussion between family groups and across the language group of the correct group composition and boundary. At no stage did members (of) the (H) and (P) families raise any substantive counter argument to the development and filing of the Eastern Yugambeh application. They were afforded many opportunities for comment and to the same extent as all other members of the language group; and*
- *according to Eastern Yugambeh tradition and custom the group is not required to achieve consensus in order to progress. A consensus is reached, based upon customary law and traditions, this consensus may ignore what the appropriate Elders and heads of families consider ill-informed objections or objections not based in Eastern Yugambeh customary law and traditions.*

In my letter to (A) dated 18 January 2002 I acknowledged that the information he provided to me in his letter dated 6 December 2001 about consultations before the original application was filed on 25 January 2001 comprised new information relevant to the issues I need to consider. In that letter I raised some specific questions in relation to the authorisation issue. I said:

It would assist me to know who you say are the Eastern Yugambeh Elders. I note your comment in the last dot point in this section (top of page 4) that I should disregard “the views of a handful of elders.” Who are the Elders of the Eastern Yugambeh People who are able to authorise, despite the views of “a handful” of other Elders?

From what you say in your letter dated 6 December 2001 there does not appear to be a consensus amongst the Elders. This appears to be inconsistent with the applicants’ affidavits sworn in December 2000 and January 2001 (paragraph 9) in which each applicant says ... “This process results in a consensus being reached among the Elders who live on and maintain attachment and connection to Eastern Yugambeh country that binds all members of the Eastern Yugambeh People.”

... Your letter of 6 December contains additional information in support of authorisation, but there are still some inconsistencies in the information I have received from you and the other applicants.

The first issue for me to decide is, weighing up all the evidence I have, who appear to be the appropriate Elders according to traditional laws and customs? The second issue is whether the application can be properly authorised even if some of those Elders do not consent.

I have difficulty identifying who the appropriate Elders are. In this part of your letter (page 5) you say that individuals acting as Heads of family groups supported the Eastern Yugambeh application, yet you say at the top of page 4 that a handful of Elders have objected to authorisation. Is it the situation that not all Elders support the Eastern Yugambeh application but all Heads of family groups do? Are the objecting Elders not Heads of families?

I list below some of the critical issues for me in considering whether the requirements of s251B(a) of the Native Title Act have been met:

- *who, according to traditional laws and customs must decide on behalf of all the people in the native title claim group?*
- *the applicants in their affidavits sworn December 2001 and January 2001 say that a consensus amongst Elders binds all Eastern Yugambeh People, but there does not appear to be consensus in this case. How much agreement is necessary for “consensus” and how much disagreement can be tolerated, according to traditional laws and customs?*
- *if it is the Elders who must authorise, who are the Elders? Are the people who are the Heads of families also Elders?*
- *is (H) an Elder or a Head of family, and what is the significance if he and other senior people in his family line (through (P)) do not agree with other Elders or Heads of families?*

- *what do traditional laws and customs say should happen if Elders disagree, and some do not authorise the applicants?*

... Consensus implies there is agreement. The affidavits sworn in support of the application in December 2000 and January 2001 refer to consensus amongst Elders. They do not address any level of disagreement amongst Elders and the significance of any disagreement. Disagreement emerged later when the Tribunal received numerous objections.

... you refer to the “views of the self-named Elders” (third dot point, page 6) yet at the top of page 4 you refer to “the view of a handful of Elders”. You call the petitioners “self-named Elders” but you do not go so far as to say that none of the petitioners is an Elder or none has a right to have a say according to traditional laws and customs. Do they lose their right to have a say by disagreeing with others?

In this letter dated 18 January 2002, I also suggested that (A) provide additional information in affidavit form to assist me with my task of weighing up the evidence put forward to support the competing views of the Eastern Yugambeh People and the Kombumerri People.

(A) responded in the Attachment to his letter to the President dated 18 February 2002 and his affidavit sworn 28 February 2002.

(A)'s letter to the President 18 February 2002

In the Attachment (A) states:

The Eastern Yugambeh assert an authorisation meeting in the conventional sense is not required as Eastern Yugambeh tradition and custom survives. To not hold an authorisation meeting is entirely consistent with the provisions of s251B of the Native Title Act. The Eastern Yugambeh people assert that they have not lost their tradition and custom and therefore do not need to develop and agree on a replacement decision making process.

Prior to filing in the Federal Court there was substantial discussion of the prospective Eastern Yugambeh application, its content and implications. After extensive consultation the applicants each satisfied themselves that:

- *a proper process for community consultation was followed;*
- *the proponents contacted and adequately informed all people believed to be within the claimant group, and*
- *the authorisation process for the proposed application was valid.*

(A) refers to 17 “formal” meetings or discussions before the application was filed on 25 January 2001. These meetings were held between 21 August 2000 and 12 January 2001 inclusive. (H) attended many of these meetings.

The descriptions of the meetings mainly refer to the problems that Eastern Yugambeh applicants had with the Kombumerri applications which, according to (A), the Eastern Yugambeh considered to be incorrect and exclusive.

Most of the discussions appear to have been directed towards amending the Kombumerri application or applications to include a broader group of people. (A) states that on 16 and 17 September (H) agreed to amend his claim “to include the correct families”, namely those now included in the broader Eastern Yugambeh application.” In the list of meetings, there is no reference to a meeting on 25 November 2000 to discuss the proposed Eastern Yugambeh claim, although in his letter dated 6 December 2001 (A) quotes (W)’s reference to a meeting on 25 November 2000.

(A) says that at a meeting on 14 December 2000 (S) agreed that a “united application with increased membership and boundaries was the only way that an application would be authorised.”

(A) states that (name deleted – YY) of the then representative body for the area, FAIRA, wrote to various Kombumerri representatives proposing to “organise meetings leading to authorisation of a unified claim” and that “as it turned out, the money was never applied”.

(A) also says in the Attachment of 18 February 2002 that:

The members of the Eastern Yugambeh native title group were actively involved as the application was being considered and drafted. Hundreds, but more likely thousands of formal and informal discussions took place.

In developing the Eastern Yugambeh application members of the (H)/(P) families were involved in many informal and formal meetings ... in fact, the representatives of the rather small (H)/(P) family groups were involved in many more meetings relative to the other family groups within the Eastern Yugambeh native title group.

Every member of the native title group with an interest in the matter had an opportunity to be involved in discussions on a new application. Some chose to forgo this involvement.

Later in this Attachment document (page 7) (A) advises that if the Kombumerri applications had been managed in a representative manner and amended as agreed by (H) on numerous occasions, it is unlikely the Eastern Yugambeh application would have been lodged. (A) says that by 25 January 2001 no amendment had been made to the Kombumerri applications so the Eastern Yugambeh application was filed at the Federal Court “as a last resort”.

In the Attachment to his letter to the President dated 18 February 2002 (A) also refers to several events after the Eastern Yugambeh application was filed on 25 January 2001. These events include meetings between Eastern Yugambeh and Kombumerri representatives and mediation meetings, some of which (H) did not attend.

(A)'s affidavit sworn 28 February 2002

In this affidavit (A) says that six Kombumerri Elders named by (H) “are not sufficiently informed about Eastern Yugambeh matters of tradition and custom to be relied upon as Elders.”

He also says in a one-line paragraph:

(H)'s assertion that he represents the so-called Kombumerri People is fanciful.

(A) does not elaborate on or explain why it is “fanciful”.

(A) also refers to meetings on 2 September, 16 September and 14 December 2000 and 12 January 2001, in similar terms as those included in his Attachment of 18 February 2002. His comments on these meetings include references to discussions about “a united application” on 14 December 2000 and 12 January 2001.

(A) also deposes that the Eastern Yugambeh method of decision-making is “a consensus method mitigated and led by our appropriate Elders.”

Responses and affidavits submitted by (H)

In his undated letter to me headed “Objection to Eastern Yugambeh Native Title Claim” which the Tribunal received on 29 January 2002, (H) states that he objects to the registration of the Eastern Yugambeh application. He signed the letter “(H), Kombumerri ... personal letter.” He says that the Kombumerri Elders already had their native title claim in place and were unaware this overlapping Eastern Yugambeh application was going to be lodged. He says that the Eastern Yugambeh claim, in spirit, attempts to undermine the legitimate authority that the local traditional Elders claim they have by birthright as Saltwater people.

In his second letter to me, also undated but received by the Tribunal on 29 January 2002, (H) has signed “for and on behalf of Kombumerri”. In this letter he refers to a lack of consultation with the Kombumerri, resulting in an overlapping application being made against the wishes, and without the approval of, those who speak for the overlap areas.

(H) disagrees with Eastern Yugambeh comments that traditional Eastern Yugambeh laws and customs are not democratic or formal in nature. He says this assertion attempts to avoid the clear need for the Eastern Yugambeh to demonstrate that a fair, just and equitable processes of consultation and authorisation has occurred. He says further that

the weight and number of the Kombumerri objections should alone indicate the depth of Kombumerri concerns. (H) submits that on the face of the material that has been provided to me I cannot be satisfied that all persons having an interest in the areas covered by the Eastern Yugambeh application have been consulted, have had an opportunity to voice their opinions and have participated in a just and equitable process to approve the application.

(H) also submitted an affidavit he swore on 30 January 2002. He deposes that in accordance with traditional laws and customs, Kombumerri Elders must be consulted on all matters affecting Kombumerri country. He says that he is not aware of any Elders of the Gold Coast region being consulted on the formation of the Eastern Yugambeh application which overlaps Kombumerri country. (H) deposes that the Kombumerri People oppose the registration of the Eastern Yugambeh application, because the Kombumerri Elders were not consulted on the formation of the Eastern Yugambeh application in accordance with traditional laws and customs.

(H) further deposes that (A) attended a Kombumerri meeting on 7 October 2000. A number of motions were passed at this meeting. The motions set out the principles for decision-making for the Kombumerri People, including that each Kombumerri Family has the “right to full information” and that the Elders will be called upon for advice.

My findings

I am satisfied that the description of the Eastern Yugambeh native title claim group meets the formal requirements in s61(4) and that it describes the group sufficiently clearly, as required by s190B(3). The next question is whether I consider the applicants are appropriately authorised to make the application on behalf of the group.

A significant part of the Eastern Yugambeh claim area is overlapped by the two unregistered Kombumerri applications. The Kombumerri applications were lodged before the Eastern Yugambeh application was filed.

It appears from the proposed amended Kombumerri claim group description that (name deleted – ZZ) married (name deleted – AB) and became known as (P). It appears that they had six children, (name deleted – CB), (name deleted - T), (name deleted – DB), (name deleted – EB), (name deleted – FB) and (RR). (N)’s evidence in her affidavit sworn 8 January 2001 and filed with the initial application (although not about authorisation) is consistent with this. It also appears that (T) married and became (name deleted – GB), (DB) married and became (name deleted – HB), (FB) married and became (name deleted – IB) and RR married and became (name deleted – JB).

It is clear from this information that there are a number of common family names in the Eastern Yugambeh and Kombumerri claim group descriptions, through descent from (X) (also known as (XX)).

I find that the Kombumerri group and the Eastern Yugambeh group have a common apical ancestor, (X), also known as (XX). Both groups agree that they share this common

ancestor. I find that the members of the Kombumerri group are also members of the Eastern Yugambah group, that is they are a sub-group of the Eastern Yugambah group. This has been put to me by the Eastern Yugambah applicants and not contested by the Kombumerri People.

Section 251B(a) allows for a traditional decision-making process, but it requires that “the persons in the native title claim group authorise the (applicants) to make the application and to deal with the matters *in accordance with that process*” (my emphasis). I need to consider whether I have enough evidence to satisfy me that traditional law and custom defines a process, that that process was the one which was followed, and that the process can, according to traditional law and custom, be imposed on members of the group who do not agree.

Authorisation is fundamental to an application under the Act. As Justice French said in *Strickland v Native Title Registrar* (1999) 168 ALR 242 (paragraph 58):

...(authorisation) is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications.

The situation in this case brings the Act’s authorisation requirements into sharp focus, and highlights the importance of these requirements. Who is authorised to make an application over the overlap area, and for whose benefit? Who claims to hold native title over the overlap area - the broader group, or the narrower group? What native rights and interests are asserted in the overlap area? If the broader group claims to hold native title in this area, does the narrower group claim to hold any special or different native title rights and interests in the overlap area?

The Act aims to ensure that the people for an area agree with any application made in respect of that country, before it is commenced. It is not enough to show that the members of the claim group have been invited to discuss management of the claim after the claim has been commenced.

The Act does not necessarily require that every known individual member of the group authorise the applicants to make the application. Where there is a traditional process established for decisions of this type, it is sufficient if the members of the group follow the process (s251B(a)). This would allow for representative decision-making. However, the applicants seeking registration need to satisfy the Registrar that a traditional process was followed. It is necessary to know the features of the traditional process and how that process has been applied before deciding whether members of the group have authorised the applicants in accordance with that process. It is especially important to have this level of detail where there is clearly disagreement amongst the members surrounding the commencement of the application.

Although (H) and the Kombumerri People had numerous opportunities to meet in the year 2000 to discuss ongoing issues in dispute between the two groups, the Act requires that the Eastern Yugambeh application be authorised before filing. The continuing difficulties between the Eastern Yugambeh and Kombumerri applicants are consistent with an ongoing dispute between the Eastern Yugambeh applicants and a subset of the Eastern Yugambeh group, the Kombumerri applicants.

The fact that the Eastern Yugambeh and Kombumerri People are continuing with their overlapping claims does not by itself rule out proper authorisation. The authorisation requirements may have been met at the time the Eastern Yugambeh application was filed. There may be situations where the evidence is sufficient to establish that there was a proper authorisation process, despite objections from some members of the claim group.

The thrust of the Eastern Yugambeh's applicants' submissions is that I should disregard the objections of a small number of Kombumerri People. (A) says that the appropriate traditional decision-making process has been followed, including consultation and discussions before filing, and this overrides any complaints from a few individuals.

(A) has submitted that the Eastern Yugambeh's traditional decision-making process for land business is a reasonably informal one which involves reaching consensus amongst the "appropriate Elders" on behalf of the group. (H) disagrees, saying that a more formal process of consultation and authorisation is required.

I have a number of concerns about the material before me.

The material presented by the Eastern Yugambeh applicants is inconsistent in relation to the degree of formality in the traditional process. In their affidavits filed between 6 December 2000 and 10 January 2001 the applicants, including (A), say that authorisation was achieved through a number of informal meetings in the later part of the year 2000, leading to consensus in November 2000 to proceed with the application. However, in his letter dated 6 December 2001 and the Attachment of 18 February 2002, (A) lists the dates and descriptions of several meetings between 21 August 2000 and 25 January 2001 which he describes as formal meetings.

(A)'s summaries of the various meetings do not detail how the important consensus decision was reached in November 2000. (W) (quoted in (A)'s letter of 6 December 2001) refers to a meeting on 25 November 2000 to which representatives and family members were invited to discuss native title issues and the proposed Eastern Yugambeh claim, but neither she nor (A) give details of any decision-making process or outcomes of this meeting.

There is also a lack of detail about how the consensus rule applies. The applicants depose that consensus was reached in November 2000. The Kombumerri applications had been filed in 1996 (the larger claim) and 1998. The information provided by (A) in his letter dated 6 December 2001 and the Attachment of 18 February 2002 refers to a number of meetings before November 2000 but these meetings focussed on amendments to the

Kombumerri claims “to include the correct families”. (A)’s notes of these meetings do not discuss efforts to achieve consensus about the filing of a replacement application with different applicants.

(A) submits that the Eastern Yugambeh group can reach a consensus which overrides “ill-informed objections” (letter 6 December 2001). There is no explanation about why the (H)/(P) representatives are ill-informed or considered to be “inappropriate Elders.” The Eastern Yugambeh applicants appear to conclude that the (H)/(P) representatives are ill-informed and inappropriate representatives because they have objected to the Eastern Yugambeh application.

In the Attachment (A) says that the members of the Eastern Yugambeh group were actively involved as the application was being considered and drafted and that “every member of the native title group with an interest in the matter had an opportunity to be involved in discussions on the new application.” However this is inconsistent with (A)’s letter of 6 December 2001. In that letter (A) advises that there are between 1000 and 2000 Eastern Yugambeh people, that the exact figure is not known and that research is continuing to identify all descendants of the apical ancestors.

The first formal, widely publicised invitation to members of the Eastern Yugambeh group appears to have been in the community letter dated 22 January 2001 and associated newspaper advertisements. In this letter (A) described the proposed 3 February 2001 meeting as a meeting to “confirm the authorisation process.” This approach is not consistent with the Act’s requirements that there be proper authorisation before an application is filed. The wording of this letter is also inconsistent with (A)’s assertion that “every member of the native title group ... had an opportunity to be involved in discussions on the new application.”

I note that on 8 January 2001 (YY) of FAIRA proposed organising meetings “leading to authorisation of a unified claim.” This is inconsistent with (A)’s submission that formal authorisation meetings were not required. It is also inconsistent with the comments in the applicants affidavits (sworn between 6 December 2000 and 10 January 2001) that the applicants had already been authorised. The applicants depose that they were authorised yet the authorisation meetings proposed by (YY) did not, apparently, proceed.

Whilst (A) has submitted that formality is not required, (H) has submitted traditional law and custom requires a “proper level of consultation and approval by all those who speak for the overlapped areas” (letter received 29 January 2002).

I have written statements in the form of “objections” from a number of individuals, stating they do not authorise the Eastern Yugambeh application. A number of the objectors clearly fall within both the Kombumerri and Eastern Yugambeh claim groups. Twenty-six people are clearly descendants of (X) - thirteen with the surname (H)(apparently the married name of (T)), nine with the surname (P), one (C), one (J) and two with the surname (D). There are several other surnames amongst the objectors,

although I cannot see from the other information I have how these people are related to (X).

These people say they have not been consulted about the lodgement of the Eastern Yugambeh application and do not authorise it. Further, (H) deposes in his affidavit sworn 30 January 2002 that the Kombumerri People oppose the registration of the Eastern Yugambeh claim because the Kombumerri Elders were not “consulted on the formation of the Eastern Yugambeh claim ... which overlaps Kombumerri country.”

I accept (A)’s statements that (H) attended several meetings in 2000 and had the opportunity to attend a number of other meetings in that year. I also accept that native title issues were discussed at those meetings. However, it is unclear to what extent (H) knew of the content of, or an intended filing date for, the Eastern Yugambeh application.

According to the information from (A) (letter 6 December 2001, Attachment 18 February 2002, affidavit 28 February 2002) the meetings leading up to November 2000 discussed amendments to the Kombumerri application or applications, rather than the filing of a new overlapping application. (A)’s descriptions of the meetings and the comments about who attended the meetings do not indicate that any of these meetings were called to obtain authorisation for the Eastern Yugambeh application. I do not have clear information from the Eastern Yugambeh applicants as to when their application was first contemplated and when the authorisation process began. It is possible that (H) had not been advised, prior to 25 January 2001, that a new overlapping application would be filed.

It is quite conceivable that despite discussions towards the end of 2000 about “a unified claim” over the Kombumerri claim areas, the groups could not reach agreement about who should be the applicants in the unified claim and/or how the claim group should be described and/or what the contents of the application should be.

(A) disputes (H)’s statement that Kombumerri Elders must be consulted on all matters affecting Kombumerri country. I prefer (H)’s statement on oath that, in accordance with traditional laws and customs, Kombumerri Elders must be consulted on all matters affecting Kombumerri country.

(A) says that the Kombumerri are not able to speak on behalf of the broader Eastern Yugambeh group. I find that the Kombumerri are not seeking to speak on behalf of the broader Eastern Yugambeh group. My conclusion is that the Kombumerri are asking to speak for the Kombumerri People in relation to the overlap area and would consider joining with others. I do not consider that the Kombumerri’s wish to be consulted and to have a say in relation to the area of overlap is an attempt on their part to speak on behalf of the broader Eastern Yugambeh group.

Conclusion

On balance, considering:

- the lack of detail about how the authorisation process was carried out before November 2000 and before filing in January 2001;
- that the meetings held in 2000 focussed on the problems with the Kombumerri claims instead of working through an authorisation process for a new claim;
- the lack of detail about how the traditional laws and customs were applied to find “consensus” in November 2000 when the meetings before November 2000 involving the Kombumerri people focused on amending the Kombumerri applications;
- the conflicting views of the Eastern Yugambah and Kombumerri applicants about the appropriate level of formality required for proper consultation and decision-making processes according to traditional law and custom;
- the lack of detail about why (H) and the other Kombumerri Elders are not “appropriate Elders”;
- that the most formal part of the process appears to have been a widely publicised meeting held on 3 February 2001 (after the application had been filed) to “confirm the authorisation process”, but this was after all four applicants had sworn affidavits in December 2000 and January 2001 confirming that they were authorised;
- (A)’s description of the 3 February meeting as one to confirm the authorisation process, whereas any authorisation process should have been clarified well before authorisation was obtained;
- the evidence on oath from (H) that the Kombumerri Elders were not consulted on the formation of the Eastern Yugambah claim; and
- the number of written objections from Kombumerri people, saying they were not consulted and did not agree with the Eastern Yugambah application.

I am not satisfied that the Eastern Yugambah applicants have been authorised as required by the Act to make the application.

Merranie Strauss
Delegate of the Registrar
for registration decisions

Date _____