National Native Title Tribunal

Registration test decision

Application name	Butchulla Land and Sea Claim #2
Name of applicant	Cepha Roma, Peter Martin, Sandra Page, Lurline Lillian Burke, Jan Williams, Kate Doolan, Annette Broome, Shereene Currie and Joan Brown
State/territory/region	Queensland
NNTT file no.	QC09/5
Federal Court of Australia file no.	QUD2008/09
Date application made	27 November 2009
Date application last amended	3 June 2010
Name of delegate	Cobey Taggart

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 30 June 2010

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Cobey Taggart

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated** 16 November 2009 and made **pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Butchulla Land and Sea Claim #2 claimant application to the Registrar on 30 November 2009 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

While the application was being considered under s. 190A of the Act, the application was amended on 3 June 2010, with leave having previously been granted. The Court provided the Registrar with a copy of this amended application on 3 June 2010. This amendment had the sole effect of amending the certificate included at Schedule R of the application.

Given that the claimant application was made on 27 November 2009, amended on 3 June 2010 as outlined above, and no registration decisions have been made in relation to the claim made in the application, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the application.

Therefore, in accordance with s. 190A(6) I must accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C of the Act. This is commonly referred to as the registration test.

I confirm that it is the claim in the amended application filed on 3 June 2010 that I now consider for registration pursuant to s. 190A.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

In making this decision I have had regard to the application and the other documents filed by the applicant with the application. I have also had regard to documents contained in the Tribunal's Case Management/Delegates file QC09/5 (also known as 2009/02556). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I note that I have particularly considered:

- a letter dated 24 February 2010 from the State of Queensland in relation to the certification of the application;
- the following communications to the Tribunal from **Person 1**:
- email dated 1 April 2010 to the Tribunal case manager;
- email dated 4 April 2010 to the Tribunal case manager;
- email dated 13 April 2010 to the Tribunal case manager;
- email and two accompanying attachments, dated 14 April 2010 to the Tribunal case manager;
- email dated 15 April 2010 to the Tribunal case manager;
- email dated 2 May 2010 to the Tribunal case manager;
- various documents received by mail on 19 May 2010 by the Tribunal case manager; and
- undated letter with enclosed materials to the Tribunal case manager, received on 24 May 2010.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have not considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on material adverse to their interests that is before the decision-maker.

The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed are as follows:

- Letter, dated 2 December 2009, from the Tribunal case manager (the case manager) to the State of Queensland with a copy of the application and the documents filed by the applicant with the application. The letter invited the State to provide any submission or comment it wished to make in relation to the application on or by 16 December 2009;
- Letter, dated 8 December 2009, from the case manager to the applicant confirming the Tribunal had received a copy of the application, and accompanying documents, from the Court and that the application will be registration tested;
- Letter, dated 15 February 2010, from the case manager to the State of Queensland providing a copy of the certificate made by Queensland South Native Title Services (QSNTS) dated 11 February 2010 under Part 11 of the Act (the certificate). The letter invited the State to provide any submission or comment it wished to make in relation to the certificate;
- Letter, dated 25 February 2010, from the case manager to the applicant providing a copy of the State's submissions dated 24 February 2010 in relation to the QSNTS certificate dated 11 February 2010;
- Letter, dated 5 May 2010, from the case manager to the applicant providing a copy of information provided by a third party, **Person 1**, relating to the Butchulla Land and Sea Claim #2 native title determination application. The letter provided an opportunity for the applicant to make any comment to **Person 1's** information;
- Letter, dated 10 May, from the case manager to the applicant informing the applicant that the Registrar had received a copy of the amended application from Court and would proceed to test the application by 9 July 2010;
- Letter, dated 10 May 2010, from the case manager to the State of Queensland informing the State that the Registrar had received a copy of the amended application from the Court and would proceed to test the application by 9 July 2010. This letter provided an opportunity for the State to provide any material or comment for the delegate's consideration.

I note that the applicant has *not* been provided with a copy or summary, of the information received by the case manager from **Person 1** on 19 and 24 May 2010. I rely on the principles of procedural fairness I have outlined above and *Kioa v West* (1985) 159 CLR 550, in particular the decision of Brennan J (where his Honour was in the majority):

> A person whose interests are likely to be affected by an exercise of power *must be given an opportunity to deal with relevant matters adverse to his interests* which the repository of the power proposes to take into account in deciding upon its exercise … The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. (emphasis added)—at p. 628)

I also refer to Brennan J's decision in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-1986) 162 CLR 24 (*Peko-Wallsend*):

> [I]t would be futile and against common sense to require a decision-maker to delay the making of a decision to inquire into further information supplied ex-parte by one party if he concludes that, on the assumption that the information is true, it will not tip the balance against the making of a decision contrary to the interests of the party presenting it—at p.61.

The correspondence of 19 and 24 May 2010 repeated assertions made in the materials which were provided to the applicant, via QSNTS, and provided further information in support of those assertions. This further information was averred by general description in **Person 1's** earlier correspondence, which was provided to the applicant. While the applicant has not had an opportunity to see the communications provided on 19 and 24 May 2010, the applicant has had an opportunity to consider and comment upon the assertions made by **Person 1** within, inter alia, the communications of 19 and 24 May 2010.

It is also my view that even if **Person 1's** assertions are true, they do not raise matters which can affect my consideration of whether the claim made in the application meets the requirements of the registration test. This particular view is set out in greater detail below as it relates to certain registration test conditions.

Having regard to these principles and the matters I have outlined above, I consider that the requirements of procedural fairness have been met.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate 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.

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons below.

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Northern Territory of Australia v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]). In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application.

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

Result

The application **contains** all details and other information required by s. 61(1).

Reasons

As I have noted above, s. 190C(2) largely directs my considerations to procedural or administrative matters. For the purposes of s. 61(1) my task is limited to considering only whether the information is contained within the application. I am not required, except in limited circumstances, to consider the merits of the information. Broadly, these circumstances are concerned with the exclusion of a person/s from the native title claim group description, who, *on the face of the application*, are otherwise part of the 'native title claim group'—*Doepel* at [36] and [37].

A description of the native title claim group is found at Schedule A of the application and provides:

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Butchulla People.
>
> The Butchulla People are the biological descendants of the following people:
>
> 1. Person 2;
> 2. Person 3;
> 3. Person 4;
> 4. Person 5;
> 5. Person 6;
> 6. Person 7;
> 7. Person 8;
> 8. Person 9;
> 9. Person 10;
> 10. Person 11;
> 11. Person 12
> 12. Person 13;
> 13. Person 14;
> 14. Person 15

I am satisfied that the application contains the information required by s. 61(1). There is no indication on the face of the application that there are persons excluded from the native title claim group. For these reasons I am satisfied that the requirements of s. 61(1) are met.

Consideration of Ms. McIntosh's information

As I have indicated above, I have considered a number of communications from **Person 1**. **Person 1's** communications raise a number of matters, some of which do not relate to the current application and have not been considered by me.

One matter relating to the application concerns the correctness of the native title claim group description. **Person 1**asserts that **Persons16**[1], and other members of the **Persons 17** are not Butchulla ancestors but rather members of separate groups or communities. Both **Persons 16** are named, along with their **Person 15**, within the Butchulla native title claim group description.

While **Person 1's** information relates to the claim group description and its correctness I am unable to consider **Person 1's** information for the purposes of s. 61(1). As I have outlined above, I am confined to considering information within the application for the purposes of s. 61(1). As Mansfield J found in *Doepel*:

> [Section] 190C(2) … does not require the Registrar to undertake some form of merit assessment of the material to determine whether [s]he is satisfied that the native title claim group as described is in reality the correct native title claim group … —at [37].

It is clear that **Person 1** has expended a signficant amount of effort and provided much personal information regarding her ancestors and family. However, having regard to *Doepel*, I cannot inquire or consider whether the claim group description is correct. As such, I am unable to have regard to or consider **Person 1's** information in this particular instance as it would necessarily involve me going beyond the application and also considering whether the claim group as described is the correct native title claim group.

This, of course, does not suggest that **Person 1's** concerns or beliefs are without foundation or otherwise that **Person 1** is unable to ventilate these matters in an appropriate forum. It is simply that I do not have the discretion or power to consider them. I express no view as to the correctness or otherwise of the assertions made by **Person 1**.

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

Result

The application **contains** all details and other information required by s. 61(3).

Reasons

The application names the persons who together comprise the applicant at page 2 of the application. The address for service is provided at page 14 of the application.

Native title claim group named/described: s. 61(4)

> A native title determination application that persons in a native title claim group authorise the applicant too make must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

[1] **Person 1** refers to **Person 18**, while the application refers to **Person 18**. In my view it is clear that **Person 1** is referring to the same person named in the application. For consistency I shall use **Person 18** in setting out **Person 1's** information.

Result

The application **contains** all details and other information required by s. 61(4).

Reasons

A description of the persons in the native title claim group can be found at Schedule A of the application (see above at s. 61(1) for an extract of this description). This is all that is required by an application for the purposes of s. 61(4). For these reasons I am satisfied that the requirements of s. 61(4) are met.

*Consideration of **Person 1's** information*

I refer to my reasons at s. 61(1) as they relate to **Person 1 's** information regarding the correctness of the native title claim group description. I repeat and rely on those reasons here.

Native title claim in prescribed form and contains prescribed information/documents: s. 61(5)

A native title determination application must:

(a) be in the prescribed form; and

(b) be filed in the Federal Court; and

(c) contain such information in relation to the matters sought to be determined as is prescribed; and

(d) be accompanied by any prescribed documents and any prescribed fee

Result

The application meets the requirements of s. 61(5).

Reasons

I am satisfied that the application contains such information as is prescribed by the Act and associated regulations.

In my view, ss. 61(5)(a) and (b) do not require my consideration. The scope of my task, in relation to s. 61, is prescribed by s. 190C(2), and requires only that I be satisfied 'that the application *contains* all details and other information' (emphasis added).

The conditions at s. 61(5)(a) and (b), in my view, pertain to matters which are wider than the consideration required by s. 190C(2). It is a matter for the Court to be satisfied that the application is in the prescribed form and is filed. Accordingly I do not test either sub-paragraph (a) or (b).

To the extent that s. 61(5)(d) is concerned with prescribed fees, it is again my view that this is a matter for the Court or otherwise is something beyond my function at s. 190C(2).

Affidavits in prescribed form: s. 62(1)(a)

The application must be accompanied by an affidavit sworn by the applicant:

(i) that the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and

(ii) that the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
(iii) that the applicant believes all of the statements made in the application are true, and
(iv) that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

Result

The application **is** accompanied by the affidavit required by s. 62(1)(a).

Reasons

In considering whether an application satisfies this requirement, I am required to only consider whether the information is present within the affidavit(s) and not whether that information is correct—*Doepel* at [73]. For the purposes of s. 62(1)(a) an affidavit need do no more than address the specific matters set out within that section, even if briefly, in order for me to be satisfied that the application can be said to be accompanied by a compliant affidavit—*Doepel* at [87].

The application, as provided to the Tribunal by the Court, was accompanied by affidavits from each of the persons comprising the applicant. I am therefore satisfied that the affidavits accompany the application.

Five of the nine affidavits were affirmed on 3 October 2009. The affidavits of **Person 19** and **Person 20** were affirmed on 9 October 2009. The affidavits of **Person 21** and **Person 22** were deposed on 10 and 22 October 2009 respectively. I am satisfied that each of the affidavits are signed by the deponent and competently witnessed.

Each of the nine affidavits are in the same terms and I am satisfied that each deposes to the matters required by s. 62(1)(a)(i) to (iv). Relevantly the affidavits provide:

> 3. I believe that the native title rights and interests claimed by the Butchulla People have not been extinguished in relation to any part of the area covered by the application.
>
> 4. I believe that none of the area covered by this application is also covered by an approved determination of native title.
>
> …
>
> 9. I have been authorised by the agreed and adopted decision-making process of the claim group to make this Application and to deal with all matters arising in relation to it.
>
> 10. I believe that all the statements made in this application are true.

As required by s. 62(1)(a)(v), the applicant has provided details of the process of decision making complied with in authorising the applicant to make the application and to deal with matter arising in relation to it. At [5] to [8] the affidavits depose that on 9 and 10 May 2009 members of the Butchulla people attended an authorisation meeting at Hervey Bay, which had been organised by QSNTS. The resolutions, or outcomes, of this meeting are annexed to the affidavits.

Each deponent states in their affidavit to the effect that, at the authorisation meeting, a decision-making process was agreed to and adopted by members of the claim group where decisions were to be made by majority vote of the attendees at the meeting. It is also deposed that the meeting was attended by Butchulla people who are acknowledged as such and respected by other

members of the Butchulla claim group to make decisions on their behalf. As a result of decisions made under this process, the persons comprising the applicant were authorised to make this application and deal with all matters arising in relation to it.

For the above reasons I am satisfied that the application is accompanied by affidavits deposed by each person comprising the applicant with the information required by s. 62(1)(a).

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application **does contain** all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

Information about the boundaries of the area: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

Result

The application **contains** all details and other information required by s. 62(2)(a).

Reasons

Attachment B of the application contains a written description of the area covered by the application. Schedule B, at page 4, of the application contains a written description of the areas within the area identified at Attachment B, which are **not** covered by the application.

I note that the issue of whether this description 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 is considered under s. 190B(2).

Map of external boundaries of the area: s. 62(2)(b)

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **contains** all details and other information required by s. 62(2)(b).

Reasons

Attachment C of the application contains a map which shows the boundaries of the area mentioned in s. 62(2)(a)(i), found within Attachment B of the application.

I note that the issue of whether this map 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 is considered under s. 190B(2).

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result

The application **contains** all details and other information required by s. 62(2)(c).

Reasons

Schedule D to the application states:

> 'No searches have been carried out by the current applicant'

I note that this statement is silent as to whether any searches have been undertaken on behalf of the applicant, for the native title claim group. However, the application does not otherwise indicate that any searches have been undertaken on behalf of the applicant and I infer that the statement at Schedule D is intended to convey that no searches have been carried out by *or on behalf of* the applicant, for the native title claim group.

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

> The application must contain a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Result

The application **contains** all details and other information required by. 62(2)(d).

Reasons

Schedule E of the application contains a description of the native title rights and interests claimed in relation to particular land and waters.

I am satisfied that this description is not merely a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or have not been extinguished, at law.

Description of factual basis: s. 62(2)(e)

> The application must contain 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.

Result

The application **contains** all details and other information required by s. 62(2)(e).

Reasons

As the wording of this section suggests, an applicant is required by this section to provide a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist, with particular emphasis on the various matters set out within s. 62(2(e).

In *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala #2 FC*) the Full Court considered the requirement that the application must contain a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist and for the three particular assertions in subparagraphs (i)-(iii). In that instance the Court found:

> [I]t is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true … the applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim … [o]f course the general description must...be something more than assertions at a high level of generality.'—*Gudjala #2 FC* at [92].

Where an application merely provides formulaic statements which are broadly a replication of s. 62(2)(e), it is unlikely that such statements would provide sufficient detail—*State of Queensland v Hutchison* (2001) 108 FCR 575; [2001] FCA 416 (*Hutchison*)—at [17] and [18].

Attachment F to the application provides a description of the factual basis on which it is asserted that the claimed native title rights and interests exist. This is a lengthy description of 30 pages, and is therefore not reproducible in my reasons.

This description addresses the specific requirements of ss. 62(2)(e)(i)-(iii). I am satisfied that this description is not merely a recitation, or formulaic statement, of these requirements. I note that whether the factual basis provided is sufficient to support the assertion will be considered in accordance with s. 190B(5).

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application **contains** all details and other information required by s. 62(2)(f).

Reasons

Schedule G and Attachments F and M of the application provide details of the activities currently carried out by the native title claim group in relation to the land and waters which comprise the application area.

Other applications: s. 62(2)(g)

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

Result

The application **contains** all details and other information required by s. 62(2)(g).

Reasons

Schedule H of the application notes that the following native title determination applications cover part of the present application area:

QUD 6140/1998—Butchulla People; and

QUD 16/2006—Butchulla Land and Sea Claim

There is no information within the application to indicate that the applicant is aware of other native title determination applications which cover all or part of the present application area.

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

Result

The application contains all details and other information required by s. 62(2)(ga).

Reasons

Schedule HA of the application notes that the applicant 'is not aware of any notifications given in accordance with paragraph 24MD(6B)(c) of the Act'. I accept that this statement is made in reference to the application area.

Section 29 notices: s. 62(2)(h)

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application **contains** all details and other information required by s. 62(2)(h).

Reasons

Schedule I of the application states '[a]s at 27 November 2009, the Applicant is not aware of any current section 29 or equivalent notices that fall within the external boundary of this application'.

Subsection 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate 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) 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 the previous application being considered for registration under s. 190A.

Result

The application **satisfies** the condition of s. 190C(3).

Reason

My obligation here is to consider whether there are claim group members in common between the application I am testing (the 'current application') and '*any* previous application' as set out under s. 190C(3). The current application will not meet this condition if there are any previous overlapping applications that meet all three criteria in ss. 190C(3)(a), (b) and (c)—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland*)—at [9].

As noted above, Schedule H of the application identifies QUD 6140/1998—Butchulla People and QUD 16/2006—Butchulla Land and Sea Claim as applications to the Federal Court of which the applicant is aware, that had been made in relation to the whole or a part of the area covered by the application that sought a determination of native title.

Pursuant to s. 190C(3)(a), the question is whether 'any previous application *covered* the whole or part of the area *covered* by the current application'? The answer to that question, cast as it is in the past tense, is 'yes'. Based on the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 17 December 2009 (GeoTrack 2009/2355), to which I have had regard, QUD 6140/1998—Butchulla People and QUD 16/2006—Butchulla Land and Sea Claim were previous applications that each covered part of the area covered by the current application.

Pursuant to s. 190C(3)(b), the question is whether there was an entry on the Register 'relating to' QUD 6140/1998—Butchulla People and/or QUD 16/2006—Butchulla Land and Sea Claim 'when the current application was made', i.e. when the current application was made to the Court: see *Strickland*—at [45] and [46]. GeoTrack 2009/2355 indicates that, when the current application was made on 27 November 2009, there was an entry relating to QUD 6140/1998—Butchulla People *and* QUD 16/2006—Butchulla Land and Sea Claim on the Register. On that basis, I am satisfied that the answer to the question posed by s. 190C(b) is 'yes, there *was* an entry relating to QUD 6140/1998—Butchulla People *and* QUD 16/2006—Butchulla Land and Sea Claim on the Register when the current claim was made'.

Pursuant to 190C(3)(c), the question is whether the entry in relation to QUD 6140/1998—Butchulla People or QUD 16/2006—Butchulla Land and Sea Claim was 'made, or not removed, as a result of consideration of' that application 'under section 190A'? A search of the Registrar's records indicates that the answer to that question is 'yes, the entry was "not removed" as a result of consideration under s. 190A': see *Strickland*—at [56]. In other words, the records reveal that an entry in relation to QUD 6140/1998—Butchulla People was on the Register when the registration test was introduced in 1998 and, when subsequently considered under s. 190A, it met all of the conditions of the test and so remained registered, i.e. the entry on the Register was 'not removed'

as a result of that consideration. The records also reveal that an entry in relation to QUD 16/2006—Butchulla Land and Sea Claim was placed on the Register on 7 March 2007 and was only removed on 15 February 2010 as a result of the discontinuance of the application, i.e. the entry on the Register was not removed as a result of consideration under s. 190A.

Therefore, prima facie, all three criteria in ss. 190C(3)(a), (b) and (c) are met in the current application and so I must inquire as to whether there are any members of the native title claim group for the current application who were members of the native title claim group for the previous application.

The claim group description in the current application names apical ancestors who were also identified within the claim group description for QUD 6140/1998—Butchulla People. In both the current and previous application, where a person is a descendant of one or more of those apical ancestors, that individual is a member of each native title claim group. I am therefore satisfied that there are members of the native title claim group for the current application who *were* members of the native title claim group for the previous application. The same situation arises in relation to QUD16/2006—Butchulla Land and Sea Claim—(with certain explicit exceptions to specified descendants) however the apical ancestors in common with the current application differ slightly between each of the previous applications.

However, QUD 6140/1998—Butchulla People was discontinued by order of the Court on 9 February 2010. A geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services (GeoTrack: 2010/1038) confirmed that, as at 17 June 2010, no registered claimant applications covered any part of the area covered by the current application. Further, my search of the Register on 16 June 2010 for QUD 6140/1998—Butchulla People and QUD 16/2006—Butchulla Land and Sea Claim revealed that there was no longer an entry on the Register in relation to either of those applications. The Registrar's records indicate that the entry recording QUD 6140/1998—Butchulla People was removed from the Register on 10 February 2010. The Registrar's records further indicate that the entry recording QUD 16/2006—Butchulla Land and Sea Claim was removed on 15 February 2010. I understand that each application was removed following notice of the discontinuance of the application being given to the Registrar pursuant to s. 189A. As a result, each of the 'previous applications' were not removed from the Register as a result of consideration under s. 190A of the Act but as a result of an order of the Court.

Construction of s. 190C(3)

If I give s. 190C(3) its ordinary grammatical meaning, it seems I must consider whether there are members of the current application's claim group who are, or were, members of the native title claim group for *any* previous application, even one that has been discontinued and is no longer entered on the Register. As noted above, this reading of s. 190C(3) leads to a conclusion that I cannot be satisfied that 'no person' in the current application '*was* a member of the native title claim group for any previous application' in the circumstances described by ss. 190C(3)(a), (b) and (c).

However, this construction does not appear to reflect the intention behind the provision. I am not aware of any judicial authority on this point. I understand the purpose of s. 190C(3) to be to prevent multiple claimant applications with claim group members in common being registered (thereby obtaining the right to negotiate under the Act) over the same areas *at the same time*.

In order to determine the proper application of s. 190C(3) in these circumstances, I intend to refer to the Explanatory Memorandum to the Native Title Amendment Bill 2007 (EM). In doing so, I rely on s. 15AB(1)(b)(ii) of the *Acts Interpretation* which provides that, subject to s. 15AB(3):

> [I]n the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material … to *determine the meaning of the provision* when … the *ordinary meaning conveyed* by the text of the provision taking into account *its context in the Act* and the *purpose or object underlying the Act* leads to *a result* that is … *unreasonable*.[2]

'Unreasonable' in the context of s. 15AB(1)(b)(ii) is not a term of art. It bears its ordinary English meaning. According to the Macquarie Dictionary, 3rd ed), that is (in this context): '2. not guided by reason or good sense … 4. Not based on or in accordance with reason or sound judgment'.

The EM discusses what became s. 190C(3) as follows:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application or amended application is a member of the claim group for a registered claim which was made before the claim under consideration, *which is overlapped by the claim under consideration* [emphasis added] and which itself has passed the registration test ***[subsection 190C(3)]*** [original emphasis]
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and *encourages consolidation of such multiple claims into one application*— Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth).

In this case, giving s. 190C(3) its ordinary grammatical meaning would lead to an unreasonable result, i.e. the claim must not be accepted for registration in circumstances where there is no registered overlapping application at the time of testing.

If I am wrong in relying on s. 15AB(1)(b)(ii) to provide grounds to consider what is said in the EM about the purpose of s. 190C(3), then I note that, at common law, extrinsic material such as the EM can 'undoubtedly' be referred to 'for the purpose of identifying the mischief to which legislation is directed' which, in this case, was to reduce the number of registered overlapping applications with common claim group members: see *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523; [2003] FCAFC 91—at [26]. The EM speaks in the present tense, i.e. 'a registered claim which was made before the claim under consideration, *which is overlapped by the claim under consideration*'. This supports the view that the 'mischief' at which s. 190C(3) was directed was a case where the 'previous application' was still on foot and registered and so the ordinary grammatical meaning should not be preferred.

For these reasons, I am satisfied that, since QUD 6140/1998—Butchulla People and QUD 16/2006—Butchulla Land and Sea Claim are no longer on foot and there is no entry in relation to either of them on the Register, s. 190C(3) is met.

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[2] The extrinsic material to which reference may be had includes the EM—see s 15AB(2)(e). In determining whether to give consideration to the EM, or in considering the weight to be given to it, I have had regard to the matters noted in s. 15AB(3). Neither of the matters lead me to conclude that I should not have regard to the EM or that I should not give what is said in the relevant paragraphs due weight. I also note that the construction of s. 190C(3) suggested by the EM is 'reasonably open' on the words of s. 190C(3)—see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, 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.

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

Result

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

Reasons

Introduction

As I have indicated above, the application was amended on 3 June 2010. The amendment made to the application was in relation to a written certificate of QSNTS dated '27th day of 2009', which formed Attachment R to the pre-amended application. The effect of the amended application was to amend the certificate in the following ways:

- The certificate is now dated '27th day of November 2009';
- Brief statements relating to the steps taken by the certifying body in dealing with the overlapping application QUD 16/2006 and have been included, as required by s. 203BE(4)(c); and
- Further information as to the reasons why the certifying body holds the opinions set out at s. 203BE(2)(a) and (b) has been included.

There is some factual history relating to my consideration of the application and the requirements of s. 190C(4). I set this history out below, prior to outlining my reasons as to why I am satisfied that the requirements of s. 190C(4)(a) have been met.

Prior to the application being amended, the applicant provided the Registrar with a copy of a new certificate of the application, dated 11 February 2010. The certificate dated 11 February 2010 was not filed in the Court nor was any amendment made to the application.

The State was provided with a copy of the certificate dated 11 February 2010 and invited to provide any submissions or comments as a matter of procedural fairness.

On 24 February 2010, the State provided written submissions asserting that the application did not satisfy the requirements of s. 190C(4). The State's submissions related to both the certificate dated 11 February 2010 and the certificate at Attachment R of the application in its form prior to amendment.

Broadly, the State submitted that the applicant could not rely on the certificate dated 11 February 2010 because the application had not been amended. Rather, the certificate within the (pre-amended) application was required to be considered for the purposes of s. 190C(4).

The State submitted that the certificate dated '27th day of 2009' did not meet the requirements of s. 190C(4) because:

- it did not set out what the representative body had done to meet the requirements of s. 203BE(3) as required by s. 203BE(4)(c)[3]; and
- it did not comply with s. 203BE(4)(b) because it did not set out the certifying body's reasons for being of the opinion that section 203BE(2)(a) had been complied with. The State repeated this submission in relation to the certificate dated 11 February 2010.

The amendment of the application to provide further details within the certificate, in my view, addresses the State's submission that I could only consider the certificate which was within the application, such that it is not necessary for me to consider it further.

As to the State's submission regarding whether ss. 203BE(4)(b) and (c) are satisfied, these are matters which I am required to consider as part of my task for s. 190C(4)(a). My consideration of paragraphs (b) and (c) below addresses the State's submissions in this regard.

As I have stated, it is the amended application (including the certificate contained within it) that I must have regard to. There may be some question as to whether, notwithstanding the amended application, I am required by s. 190A(3)(a) to have regard to the certificate dated 11 February 2010 as a document provided by the applicant in support of the claim. In my view, even if I am required to consider the certificate dated 11 February 2010, nothing turns on, or flows from, that consideration.

To my mind it is entirely clear that the applicant and certifying body intend to rely on the certificate as it appears in the amended application. They have taken a number of steps to ensure that it is that certificate which is before the Court and consequentially one which is provided to the Registrar for consideration in the registration test. Accordingly, it would seem a reasonable conclusion to consider that reliance is no longer placed on the certificate dated 11 February 2010. I consider that the intention of a certifying body in such a context is an appropriate consideration for me to have regard to—see *Wakaman People #2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 (*Wakaman People #2*)—at [33]. I approach my consideration of s. 190C(4)(a) on this basis.

Satisfaction of s. 190C(4)(a)

Is the certification made by all representative bodies that could have certified the application?

The certificate is titled 'Certification of Native Title Determination Application Butchulla Land and Sea Claim #2' and states in the opening paragraph:

[3] This information was provided in the certificate dated 4 February 2010.

> I, **Person 23**, Principal Legal Officer of [QSNTS] … have been delegated the function given to QSNTS under the Act to certify the Native Title Determination Application, **Butchulla Land and Sea Claim #2** ("this Application") … (emphasis added)

Under s.190C(4)(a) an application, to be duly certified, must be certified by each representative Aboriginal/Torres Strait Islander body (representative body) that could certify the application in performing its functions' under Part 11 of the NTA.

I have had regard to the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 17 December 2009 (reference number GeoTrack 2009/2355). It identifies QSNTS as a relevant organisation whose area covers all of the application area. QSNTS is the only body of that kind so identified for the application area.

Schedule K of the application states that QSNTS is a body funded under s. 203FE of the Act to perform the functions of a representative body. Further, the certification is said to be given in accordance with s. 203BE and s. 203FEA of the Act and is executed by **Person 23**, Principal Legal Officer of QSNTS. The certification notes that QSNTS is a body funded under s. 203FE(1) of the Act 'for the purpose of performing the functions of a representative body'.

I note that bodies funded under s. 203FE to perform the functions of a native title representative body can be enabled to perform all of the functions of a representative body or *some* of those functions—s.203FE(1). As QSNTS is a body funded under s.203FE, I must be satisfied it is funded to perform the certification function.

As noted earlier, Schedule K of the application states QSNTS is a body funded to perform the functions of a representative body. The truth of this information is sworn to by each of the persons who jointly comprise the applicant, with their affidavits as required by s. 62(1)(a) of the Act. **Person 23** has also confirmed, through the certification, that QSNTS is funded to perform the functions of a representative body. In my view these statements are clear and unambiguous. 'The functions of a representative body' include certification under s.203BE.

For these reasons, I am satisfied that QSNTS is funded to perform the functions of a representative body, including certification, and is the only relevant organisation which covers the application area.

In that case, s. 203FEA(1) provides (among other things) that a body funded under s. 203FE(1) to perform a function (in this case, the certification function) in respect of a particular area has the same obligations and powers in relation to the performance of that function as a representative body would have in relation to that function. Further, pursuant to s. 203FEA(2), a third party such as the Registrar's delegate has the same obligations and powers in relation to QSNTS as the delegate would have if the certification function had been performed by a representative body.

As a result, for the purposes of s. 190C(4)(a), this application has been certified by QSNTS, which in this case is the only body that could do so. Therefore, my task is confined to considering whether the requirements for certification at Part 11 of the Act have been met and **not** matters relating to the basis on which the certification was provided, including the sufficiency or legitimacy of the reasons why QSNTS holds the opinions it does: see *Doepel*—at [80]; *Wakaman #2*—at [32].

I am satisfied that the certification contains the necessary information and opinions as required by s. 203BE(4), which provides:

(4) A certification of an application for a determination of native title by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and

(b) briefly set out the body's reasons for being of that opinion; and

(c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The requirements of paragraphs (2)(a) and (b) are:

(2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Satisfaction of s. 203BE(4)(a)

The certificate at [2] and [3] states that QSNTS holds the opinions required by s. 203BE(2)(a) and (b). The certificate expresses these opinions in the same terms as ss. 203BE(2)(a) and (b).

Satisfaction of s. 203BE(4)(b)

While I have considered the certificate within the amended application, it is my view that the State's submission relating to s. 203BE(4)(b) remains a relevant and appropriate matter for me to have regard to. I set out below the substance of the State's submission as it related to the certificate in the pre-amended application and the certificate dated 11 February 2010.

The certification is also defective in that it fails to address section 203BE(4)(b) by failing to:

(i) set out "the body's reasons for being of that opinion" (ie that section 203BE(2)(a) has been complied with);

(ii) adduce facts to support its opinion:

'Authorise' has a defined statutory meaning. It is set forth in section 251B of the NTA. No detail is provided as to:

(a) whether there is a process of decision making that, under traditional laws and customs, must be complied with, to authorise things of that kind;

(b) whether that process of decision making has been followed in this case;

(c) the way the decision making process was followed; or

(d) where there is no such process, whether the process of decision making was agreed to and adopted, by the persons in the native title claim group;

(e) whether the agreed and adopted process, has been followed in this case;

(f) the way the agreed and adopted decision making process was followed.

Section 251B and the certificate

I am not persuaded that a certificate is required to provide information in a manner asserted by the State's submission [5]. That is, a representative body is not, in my view, required to provide information as to the basis or manner by which a native title claim group is asserted to have authorised an application, having regard to s. 251B.

Paragraph 203BE(4)(b) requires only that a relevant certificate 'briefly set out [a] body's reasons for being' of the opinions set out at s. 203BE(2). While the note at s. 203BE(2) does refer to s. 251B, there is nothing prescribed within s. 203BE or s. 190C(4)(a) which directs a representative body to provide information regarding the matters set out at s. 251B *within* its certificate.

I note that for the purposes of s. 62(1)(a), an applicant is specifically required to set out details of the process of decision making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. This requirement appears to be directed towards the matters considered by the State's submission [5] and more broadly s. 251B. In my view, it is notable that there is not a similar mandatory requirement for the purposes of a representative body certifying an application.

As Mansfield J stated in *Doepel*:

> Section 203BE(2) provides emphatically that the representative body "must not" provide its certificate unless it is of the opinion that all persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it. In my judgment, section 190C(4)(a) does not leave some residual obligation upon the Registrar, once satisfied of the matters to which s. 190C(4)(a) expressly refers, to revisit the certification of the representative body—at [81].

My task under s. 190C(4)(a) is limited to being satisfied about the fact of certification by an appropriate representative body and *not* the fact of authorisation by all members of the claim group—*Doepel* at [78]).

It is, of course, open to a representative body to include some or all of this information within its certificate. However, having regard to the absence of a positive requirement to address s. 251B *within* a certificate and the comments of Mansfield J in *Doepel*, it is my view that I could not consider the requirements of s. 203BE had not been satisfied merely because s. 251B was not specifically addressed.

There is one further matter of which I consider I must also be satisfied. While I am required only to consider whether QSNTS has provided *its* reasons for being of the opinions at s. 203BE(2), it is my view that, as matter of logic, I must be satisfied that there is some factual or logical connection between the reasons provided and the relevant opinion. That is, where a representative body's provided reasons in no way related to the relevant opinions, it is likely that this would not satisfy s. 203BE(4)(b).

Reasons provided by QSNTS in the certificate

At [4] of the certificate, QSNTS provides the reasons why it holds the relevant opinions. Broadly, these reasons refer to an authorisation meeting in Hervey Bay held on 9 and 10 May 2010, said to be well attended, and to steps taken to inform people of this meeting. This meeting was notified through advertisements in the Fraser Coast Chronicle, Courier Mail and Koori mail and is described in the certificate as a public notice. In addition to these advertisements, QSNTS

provided all Butchulla people, whose address was known to QSNTS, with written notice of this meeting.

The certificate, at [4], states that through the holding of the authorisation meeting, QSNTS was satisfied that all persons in the native title claim group have authorised the applicant to make the application and deal with matters arising in relation to it and that all reasonable efforts have been made, from the commissioning and production of **Person 24's** report and the processes followed at the authorisation meeting, to ensure that this application describes or otherwise identifies all the other persons in the native title claim group.

It may be considered that the reasons provided in the certificate are limited. Nonetheless, they are clearly the reasons provided by QSNTS as to why *it* is of the opinions required by s. 203BE(2) and the requirement is only to 'briefly' set out those reasons. There is also, in my view, a relevant connection between the reasons provided and the opinions required. This is all that is required of a representative body for the purposes of s. 190C(4)(a).

For the above reasons, I am satisfied that the certificate meets the requirements of s. 203BE(4)(b).

Satisfaction of s. 203BE(4)(c)

At [5] the certificate sets out what QSNTS did to meet the requirements of s. 203BE(3), as they are required to be set out by s. 203BE(4)(c).

I rely on my summary, provided above, as to the scope of my task at s. 190C(4)(a) being limited to considering whether required information is provided in the certificate. As this information is provided within the certificate I am satisfied that the certificate meets the requirements of s. 203BE(4)(c).

For the above reasons, I am satisfied that the certificate contains the required information and relates to the present application. As this is the scope of my task at s. 190C(4)(a), I am satisfied that s.190C(4) has been met.

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

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

Information regarding external and internal boundaries: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:
>
> (i) the area covered by the application, and
>
> (ii) any areas within those boundaries that are not covered by the application.

Map of external boundaries: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **satisfies** the condition of s. 190B(2).

Reasons

Schedule B part (a) of the application refers to Attachment B which provides a lengthy series of geographic coordinates and metes and bounds to describe the external boundary of the application area. Attachment B notes that the geographic coordinates are referenced to the Geographic Datum of Australia 1994 (GDA94) in decimal degrees and that these were provided by the Tribunal's Geospatial Services.

This description excludes from the application area all land and waters within native title determination application QUD6021/01, Port Curtis Coral Coast (QC01/29), and the land and waters of Fraser Island which are above the High Water Mark.

Schedule B, part (b), lists general classes of activities and non-native title rights and interests. Where any land or waters within the external boundary of the application are burdened by these rights or interests, those land and waters are excluded from the application.

I note the decision of *Daniel for the Ngaluma People and Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*) which considered whether a 'description of a class or formula character of an area of exclusion' could be a sufficient description for the purposes of s.62(2)(e). In *Daniel* the Court found that a description in this manner could be satisfactory in circumstances where an applicant had no tenure information with which to provide a fuller or more comprehensive description—at [32].

As I have previously noted, Schedule D states that no searches have been undertaken by (or on behalf of) the applicant (for the native title claim group). There is no information within the application, or otherwise available to me, which suggests that this is not the case.

Schedule C refers to Attachment C. Attachment C is an A4 monochrome copy of a colour map titled 'Native Title Determination Application Butchulla Land and Sea Claim #2' with the following features:

- the application area depicted by a black outline with a stippled (or dotted) fill;
- background topographic image;
- scalebar, northpoint, legend and coordinate grid;
- notes relating to the source and date the map was produced.

In considering whether the application satisfies the requirements of s. 190B(2) I have had regard to the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 17 June 2010 (reference number GeoTrack 2010/1038).

The assessment and overlap analysis confirm that the description and map are consistent and identify the application area with reasonable certainty. No amendment has been made to the application since the preparation of this analysis. As such, I accept the findings made within the assessment and overlap analysis.

For these reasons I am satisfied that the information within the application, outlined above, is sufficient to meet the requirements of s.190B(2).

Subsection 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.

Result

The application **satisfies** the condition of s. 190B(3).

Reasons

Schedule A of the application describes the persons within the native title claim group as being the biological descendants of fifteen (15) named persons. This description has been extracted above in my consideration of s. 61(1).

As the application does not name all persons in the native title claim group it is necessary to consider whether s. 190B(3)(b) is satisfied.

In considering whether a claim group description is sufficiently clear for the purposes of s. 190B(3)(b) it is not necessary that the description alone, without any factual inquiry, be capable of allowing for it to be ascertained whether any particular person is in that group—see *Western Australia v Native Title Registrar and Ors* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)—at [67].

However, I must be satisfied that the claim group description itself, without elaboration (as distinct from factual inquiry), is capable of allowing for it to be objectively determined whether any particular person is within the claim group, as a matter of fact: see *WA v NTR*—at [67]; *Colbung v the State of Western Australia* [2003] FCA 774—at [41].

The relevant consideration for s. 190B(3) is **not** so wide as to permit me to consider whether the claim group description is correct or accurate, or whether 'there is a cogent explanation of the basis upon which [the members] qualify for such identification': see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala #2*)—at [33]; *Doepel*—at [47].

That is, I am not permitted to inquire into the accuracy of the claim group description for the purposes of s. 190B(3). I refer to my reasons above, at s. 61(1), as to why I am unable to consider **Person 1's** information regarding the **Person 28** ancestors as it relates to the correctness of the claim group description. I rely on those reasons here also.

The claim group description provides that the members of the claim group are the biological descendants of any one of fifteen persons (apical ancestors). The apical ancestors are variously named or identified as a parent of a known Butchulla person.

I am satisfied that, for the purposes of s. 190B(3), this claim group description provides a clear basis or set of rules or principles by which it can be objectively determined whether a particular individual is a member of the claim group. That is, it can be objectively determined whether any

individual is a biological descendant of at least one of the apical ancestors. It is reasonably likely that at least in some instances some factual inquiry would be required to determine a person's biological connection, if any, to an apical ancestor.

I note that Dowsett J recently said in *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 that it tends to be assumed that biological descent is:

> [A]n ascertainable fact, capable of being known with certainty. However, in the absence of DNA or other scientific evidence, it is more likely to be a matter of belief or opinion, necessitating a determination as to whose belief or opinion is relevant—at [83].

However, I am satisfied that the rules or principles by which a person is a member of the claim group are clear and enable it to be ascertained whether a particular individual is in that group. As French J said in *Strickland v Native Title Registrar* [1999] FCA 1530: 'The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible'—at [55].

Subsection 190B(4)
Native title rights and interests identifiable

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

Result

The application **satisfies** the condition of s. 190B(4).

Reasons

In considering whether the description of the claimed native title rights and interests is sufficient to allow the native title rights and interests to be readily identified I must be satisfied that they are understandable and have meaning—see *Doepel* at [99].

I understand that my task under s. 190B(4) is not to consider whether the claimed native title rights and interests are established or 'made out' within a particular application, but rather whether they are understandable and otherwise have meaning. The former query is the task at s. 190B(6).

Schedule E of the application contains the description of the claimed native title rights and interests, and provides:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238, ss47, 47A or 47B apply), the Butchulla People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
2. Over areas where a claim to exclusive possession cannot be recognised, the Butchulla People claim the following rights and interests – the right:
    a) to hunt and fish in the area covered by the application in line with traditional laws and customs;
    b) to access and move about on the land and waters;

c) to gather and use natural products on the land;

d) to hold meetings on the area covered by the application;

e) to conduct burials on the area covered by the application;

f) to live on the area covered by the application;

g) to establish residence on the area covered by the application area;

h) to erect shelters and other structures on the area covered by the application;

i) to manufacture materials, artefacts, objects and other products from resources in the area covered by the application;

j) to dispose of cultural resources taken from, and manufactured items derived from the area covered by the application, by customary trade, exchange or gift with other Aboriginal people;

k) to engage in production, customary trade and other customary economic activities on the lands as they relate to other Aboriginal people with respect to indigenous cultural resources;

l) to use the area covered by the application for ceremonial, cultural, social, customary, religious and traditional purposes;

m) to move about the area covered by the application;

n) to camp on the area covered by the application; and

o) to gather and use natural products (including food, timber, medicinal plants, stone, ochre and resin) from the area covered by the application, in line with traditional laws and customs.

3. The native title rights and interests are subject to:

a) the valid laws of the State of Queensland and the Commonwealth of Australia and

b) the rights conferred under those laws.

I am satisfied that the claimed native title rights and interests are readily identifiable for the purposes of s. 190B(4). That is, they are understandable and have meaning.

Subsection 190B(5)
Factual basis for claimed native title

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, and

(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 interest, and

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

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

The scope and purpose of my task at s. 190B(5) is summarised by Mansfield J in *Doepel* at [17] (as approved in *Gudjala #2 FC* below):

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the "factual basis on which it is asserted" that the claimed native title rights and interests exist "is sufficient to support the assertion". That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [83].

Further, it is necessary for the Registrar to be satisfied that the factual basis supports the assertion that 'the identified claim group (and not some other group) hold the rights and interests claimed (and not some other rights and interests)': *Gudjala #2*—at [39].[4] I note that where an application discloses a sufficient factual basis in support of the specified matters set out in ss. 190B(5)(a)-(c), this will generally be sufficient for the purposes of satisfying s. 190B(5): *Doepel*—at [130] and [132].

In considering whether the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertions in s. 190B(5), I am able to consider material and information beyond the application: *Doepel*—at [16]; *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*)—at [23].

I have had regard to a report by **Person 24**, consultant anthropologist (**Person 24's** report), which was undertaken in relation to the present application and the Butchulla Land and Sea Claim #2 native title determination application. The **Person 24's** report was filed at the same time as the application, although it was not annexed or attached to the application.

I have also had regard to an affidavit affirmed 18 November 2009 by **Person 25**, a Butchulla person, which was filed within the proceedings and provided by the Court to the Registrar. I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

I have considered the communications of **Person 1**, insofar as they are relevant to the application. As with my consideration of **Person 1's** information for the purposes of ss. 61(1), 61(4) and s. 190B(3), I am not persuaded that **Person 1's** information can, of itself, impact on my consideration of whether the application satisfies the requirements of s. 190B(5). I have provided my detailed reasons for this below, having first considered each of the three requirements of ss. 190B(5)(a), (b) and (c).

Reasons for s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

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[4] This was not criticised by the Full Court in *Gudjala #2 FC*

My task under this paragraph requires me to be satisfied that there is a factual basis which is sufficient to support the assertion that the whole native title claim group has an association with the application area and that the predecessors of the whole native title claim group had that association over the application area over the period since European settlement: see *Gudjala #2*— at [52].[5]

In considering what is meant by the term association, it is my view that the nature of a claim group's association with the application area is to be understood by having regard to the application itself (*Martin* at [26]). That is, association does not mandate a physical presence or association, but rather is to be understood by having regard to the information within the application and any relevant additional material. Notwithstanding this, it is clear that something more than broad or general statements are needed before the requirements of s. 190B(5)(a) will be satisfied: *Martin*—at [26].

Summary of the factual basis provided to support the assertion that the claim group have, and their predecessors had, an association with the claim area

Attachment F and the **Person 24** report outline various archaeological activities undertaken on the coast of Fraser Island since the 1970s. While Fraser Island, above the High Water Mark, is not within the claim area, it is said that it is within the traditional 'country' of Butchulla people. The application asserts that observations and conclusions of these archaeological investigations provide baseline data and carbon datings for significant sites and implements found within the current application area.

The application states that various archaeological investigations establish:

- the presence and occupation of Aboriginal people on Woody Island, the Great Sandy Strait and Hervey Bay Marine Park areas, the adjoining coastline on the mainland from Burrum Heads in the north as far south as Double Point, extending inland to Mt Bauple, downstream of the Mary River to Maryborough, and northward to include Howard and the Burrum River; and
- that the Aboriginal occupants of this area had a heavy reliance on marine resources.

The **Person 24** report provides information that the term Butchulla or one of its variants (Badjela, Badtala, Baltelas, Batala, Batellas, Batjala, Batyala, Buchellar, Buchowlar, Butchowla and Patyala) has been consistently used over a period of approximately 140 years, since 1842, to refer to the traditional Aboriginal language of the application area as well as its occupants. Table 1 of the **Person 24** report provides a summary of 'the Aboriginal terms/names recorded in the ethno-historical literature that were used to identify the traditional Aboriginal occupants of the claim area'.

Information is provided within the application that 'Fraser Islanders', which is said to refer to Butchulla people, engaged in a seasonal migration pattern spending winter months on Fraser Island and summer months on mainland Australia.

The application provides information regarding sigificant cultural sites within the application area. This includes a rock in the sea of Fraser Island which was 'known as the home of the "little man" who has power over things of the sea'. There is also information regarding Butchulla

[5] This was not criticised by the Full Court in *Gudjala #2 FC*

people continuing to protect sites of significance and Butchulla country more broadly in the application area.

Information is provided regarding Butchulla people's association with the application area by reference to their ability to exclude or limit the access of non-Butchulla people to the application area. The **Person 24** report cites earlier anthropological works which state that there was "direct evidence … demonstrating that the act of trespass, onto 'tribal' territory by non 'tribal' members, was a common and major source of inter'tribal' conflict". **Person 24** opines that this demonstrates that Butchulla was a significant group for the purpose of holding land within the application area. Further historical sources are provided by **Person 24**, which describe that members of 'tribal' groups would wait until they were invited into camps which were outside their 'tribal territory'.

Interactions between early settlers in the Maryborough area, which is within the application area, and Aboriginal people occupying that area were hostile and involved 'persistent attacks' by Aboriginal occupants of newly-settled areas. Information is provided in the application that during this period, the Aboriginal occupants would travel between the mainland and Fraser Island either to avoid violent engagements with the Native Police or otherwise to use Fraser Island as a 'natural fortress'.

The **Person 24** report, at pages 38-55 (inclusive), provides an outline of the association of each apical ancestor with the application area, and the ongoing association of a number of their descendants with the area. Pages 7-11 of Attachment F also provides an outline of the association of some of the identified apical ancestors, and their descendants with the application area. These outlines specify the presence of claim group members of varying generational levels throughout Fraser Island, the islands in the Great Sandy Strait between Fraser Island and Urangan on the mainland, Hervey Bay, Urangan, Pialba, and Tiaro. Other than Fraser Island, these areas are within the claim area.

The **Person 24** report states that the present day members of the claim group are commonly identified by reference to named families, who in turn are descent groups of the identified apical ancestors. These families are identified as including: **Person 26, Person 27, Person 28, Person 29, Person 30,Person 31, Person 32, Person 33, Person 34, Person 35, Person 36, Person 37, Person 38, Person 39 and Person 40.** The application provides information about members of these families and their association with the claim area.

Such information includes families who reside within the application area and information of claim group members accessing various locations within the claim area for varying purposes, including fishing, hunting, camping, collecting 'bush tucker' and providing access to non-Butchulla people wishing to take natural resources from the application area.

Information is also provided about numerous generational levels of claim group members passing on stories, songs and dances to younger Butchulla people. The breadth of this information includes named applicants receiving these stories, songs and dances and in turn passing them on to Butchulla people who now teach Butchulla children these stories, songs and dances today. These stories, songs and dances are said to be similar or comparable with title deeds to the land and waters of Butchulla country, including the claim area.

In his affidavit, **Person 25** deposes a number of matters, including:

- That he had been told by his 'Nanna', who had been told by her father, that **Person 25s'** traditional country is all of Fraser Island, all Hervey Bay, up to Burrum River, right around to Maryborough, all around to Tiaro, Rainbow Beach and right near Cooloola (at [16]);
- That **Person 25s'** uncles would take him and other Butchulla boys to Round and Woody Islands, which they would access by rowing there, and hunt for various animals (at [23]);
- That **Person 25s'** son is fluent in Butchulla language and dances at a cultural centre at Scrub Hill as well as teaching Butchulla children these dances (at [44]).

I am satisfied that the applicant has provided a sufficient factual basis, outlined above, to support the assertion that the claim group have, and their predecessors had, an association with the claim area.

Reasons for s. 190B(5)(b)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

The term 'traditional' was considered in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

Yorta Yorta provides that for a law or custom to be traditional it must satisfy four broad criteria:

- The law or custom must have been passed from generation to generation of a society, usually by word of mouth or common practice—at [46];
- The acknowledgment and observance of the law or custom must have continued substantially uninterrupted since sovereignty—at [87];
- The origins of the content of the law or custom concerned is to be found in the normative rules of the relevant society which existed before the assertion of sovereignty by the Crown—at [46];
- The normative system which existed before the assertion of sovereignty must have had a continuous existence and vitality since sovereignty—at [47].

The use of the word 'traditional' in s. 190B(5)(b) requires me to consider whether the laws and customs set out within an application can be said to be traditional within the meaning explained by *Yorta Yorta* (*Gudjala #2*—at [63] and [65]. Such consideration being limited to whether the provided factual basis is sufficient to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group that give rise to the claim to native title rights and interests.

Pre-sovereignty society

The relevant pre-sovereignty society is identified as the Butchulla society. As outlined above, the **Person 24's** report provides a number of historical sources which indicate that the term Butchulla (or one of its variants) has been used consistently since 1842, to refer to Aboriginal persons of Fraser Island and the application area.

Further, the application contains a number of archaeological sources which identifies the presence of Aboriginal people within the application area for as much as 5500 years and ethno-

historical sources which record the presence of Aboriginal people within the application area prior to European contact. I have summarised the general content of these sources above.

The application asserts that sustained European contact (first contact) occurred around the mid-nineteenth century. The application is directed towards the time of first contact in providing a factual basis which supports the assertion that there was a Butchulla society within the application area at sovereignty. I infer that the applicant is inviting an inference that the circumstances as at the time of first contact were probably the same as the circumstances at the acquisition of sovereignty in 1788. In my view, it is open to me to make such an inference: *Gudjala #2*—at [30]; *Gudjala #2 FC*—at [96][6]; *Gudjala #2* [2009]—at [30] to [32].

The **Person 24** report provides a number of sources which use terms other than Butchulla in relation to persons within the application area. Of these additional terms, the majority bear the suffix burra/bura/bora/barah/burah/bara/barra. **Person 24** opines that these terms refer to residential regional groupings, usually consisting of a small number of extended families who were all members of Butchulla society.

The term Butchulla is said to encapsulate these residential groupings and was used to refer to the language, territory and 'tribe' of the 'traditional Aboriginal occupants of the claim area'. It is said that the Butchulla people were distinctive from other named groups in the region. Such distinction could be seen in the form of a distinct name, language or dialect, unique forms of cicatrisation on both males and females and the placing of a white stick/s in the nasal septum.

The **Person 24** report provides details on the decision-making processes used by Butchulla people, at or around the time of first contact. These processes were broadly the domain of senior males and females, 'whose authority was heavily circumscribed by [a] complex system of classificatory descent'. An example of this is provided where alliances were formed between families through the promising of an infant female as the bride to the son of another family. Such marriages were nonetheless required to conform to certain rules, which included ensuring marriage between people of different 'sections' or matrimoiety.

The decision-making method employed by Butchulla people at the time of first contact involved a consultative process where no one person or persons had decision making authority. Rather, decisions were made by consultation between senior members of Butchulla who had also consulted with members of their family. The **Person 24** report also notes that engagement with the land and waters subject to the application was in the context of groups, rather than as individuals. That is, land and its resources were held and enjoyed communally.

Membership to Butchulla society

Membership to this society was open to children whose parent was a member of Butchulla. There are conflicting accounts referred to in the **Person 24** report, as to whether membership was traditionally patrifilial, matrifilial or filial (that is birth into the group by either parent). **Person 24** concludes that the available material supports an assertion that membership, at or prior to the

[6] The Full Court did not criticise Dowsett J's approach at first instance, in this regard, and appears to have adopted a similar approach in its consideration. The particular reference to which I have referred in the Full Court's decision, in my view, indicates that the Full Court approached satisfaction of s. 190B(5) in a similar fashion to Dowsett J.

time of first contact, was open to persons whose mother *or* father was Butchulla. **Person 24** provides, *inter alia,* the example of **Person 41** and **Person 42** to support this:

- **Person 41** was identified as a Butchulla woman and the wife of apical ancestor **Person 9**. **Person 41** was born in 1867 and is recorded as having a Butchulla mother and a non-aboriginal father.
- **Person 42** is described as a Butchulla man and the son of **Person 43**, daughter of apical ancestors **Person 7** and **Person 8**. **Person 42's** father is recorded as **Person 44**, an Aboriginal man from the Babinda area. **Person 43** was born in c.1888. It is not indicated when **Person 42** was born.

According to **Person 24**, these examples indicate that at or around the time of first contact, membership to Butchulla society was open to persons whose mother, but not father, was Butchulla. The application also provides a factual basis which supports the assertion that membership was open to persons whose father was a member of Butchulla society.

The application provides a sufficient factual basis which supports the assertion that this law has been passed down between Butchulla generations and has been acknowledged substantially uninterrupted since first contact. The various outlines of the apical ancestors, and their descendants, (referred to above) sufficiently support the assertion that recruitment to Butchulla society has substantially been determined by birth since first contact to the present day. There is nothing to indicate that membership has been open to any person not a biological issue of a Butchulla person.

As is clear from the claim group description at Schedule A of the application, the claim group members today continue to acknowledge this rule of membership. Membership to the claim group is restricted to persons descended from one of the named apical ancestors. The affidavit of **Person 25** supports this. **Person 25** deposes that to be a Butchulla person it is necessary to 'have a blood line to country, that is, you are descended from a Butchulla ancestor' (at [16]).

Totems

Totems are said to be an important feature of Butchulla society which operate to establish social and cultural bonds between Butchulla people. As well as this, a person's totem was seen to have a continuing role upon their death. Written accounts, provided in the application, provided information on the presence of totems within Butchulla society. One account, written in 1904 by **Person 45**, the husband of **Person 46** (whose mother is an apical ancestor), outlines the belief by Butchulla people that they possessed two spirits. According to **Person 45**, upon death it was believed that one of these spirits entered the person's other 'self'—their totem. **Person 45** also states that a person did not consume their totem as it would have been sacrilege.

The **Person 24's** report provides the account of **Person 47**, who observed and recorded information regarding the Butchulla people. **Person 47** had spent a number of years at Burnett, on mainland Australia, within the general vicinity of the claim area, in the late 1860s and observed Kabi and Butchulla people. **Person 47's** account, published in 1910, records that totemic descent groups were present in traditional society and present at the time of his observation.

Reference is also made to the unpublished writings of **Person 48** from 1935. **Person 48** was an anthropologist who conducted fieldwork at Cherbourg in the 1930s. Cherbourg is outside of the application area but was a location where Butchulla people were moved to. These writings detail

various sites and beliefs of significance to Butchulla people. These include a rock in the sea off Fraser Island which was known as the home of the 'little man' who has power over things of the sea and a belief in 'Biral', a 'supreme being'. **Person 24** refers to these as totemic matters.

According to **Person 24**, **Person 47's** description of Butchulla totems, outlined above, is consistent with that of **Person 49**. According to **Person 49** a person was prohibited from eating their own totem. **Person 49** also explains that while others who were not affiliated with that particular totem could eat it, they may seek the permission of a person affiliated with that totem before doing so. **Person 49** also describes that once an individual became aware their totem was breeding, they would ask the 'headman' to 'instruct all the camp that these animals must not be killed for food until such time as their babies were able to care for themselves'. **Person 24** opines that rather than a strict edict, this was more likely acknowledged as a form of respect for another's totem.

In 1964, **Person 50**, grandson of apical ancestor **Person 10**, wrote of the significance of totems to Butchulla people. This account reports that a person's totem, or Eurie, is given to them at birth and is considered a second self. A person must take care not to kill another person's Eurie while in their presence, without seeking their permission first.

Person 51, a named applicant, and great-granddaughter of **Person 6**, was interviewed by **Person 24. Person 51** recounted an occasion from when she was a young child and her father brought an eel home that he had caught while fishing. **Person 51's** mother insisted that the eel be immediately taken outside and buried and told her daughter that she was not allowed to touch eels.

Person 52, the nephew of named applicant **Person 53**, is said to have received his totem 'some time ago' and intended on returning to Fraser Island in September 2009 so that he could introduce his son to country and 'the old people' and so that his son could receive his totem.

The process of children receiving their totemic names continues today in the form of 'naming ceremonies'. In a ceremony occurring in 2008, approximately 40 Butchulla children were taken to Fraser Island by senior Butchulla women. The children were then faced to all parts of the Island so that the 'old people' could meet them and they were given their totemic name.

Protecting country

Protection of country is part of Butchulla law and custom and imposes obligations on Butchulla people to ensure that their country, particularly certain areas of cultural significance, is maintained. These sites of significance are often the location of activities of ancestral beings which are celebrated by the claim group. These sites demarcate the interests of Butchulla people within their traditional country from neighbouring groups. The obligation to protect 'country' also extends to, or includes, the resources and animals on Butchulla country.

There are a number of cultural sites within the claim area which are significant areas for Butchulla people and are treated with circumspection. **Person 50**, a member of the **Person 40** family, wrote in 1967 of the Butchulla cultural hero 'Yindingie' and two sites within Butchulla country, one of which is within the application area, which is associated with Yindingie.

Sacred sites at Moon Point and Lake Wabby, on the west coast of Fraser Island, are known as the site for the Rainbow Serpent. The **Person 24's** report cites historical writings from the late nineteenth and early twentieth century which detail the presence of sacred sites relating to

ancestral spirits, including the Rainbow Serpent, who was celebrated at areas including Lake Wobi (which I infer is a variant of Lake Wabby).

The application provides information as to how Butchulla people have protected, and continue to protect, sites and resources within the claim area. Since the 1970s, Butchulla people have engaged with archaeologists, in areas both within and outside of the application area, including participation in the 1975 Fitzgerald Inquiry into sandmining on Fraser Island, in order to ensure the protection of sites and areas of significance from intrusion and damage. **Person 54**, now deceased, testified at the Fitzgerald Inquiry that Lake Wabby was also the site of a bora ring, which was sacred and an area for 'men's business'. The presence and sacredness of this site was attested to by other Butchulla witnesses at the Inquiry.

Person 25's affidavit provides details of certain areas of land and waters being sacred to Butchulla people, including sites to be avoided by women and sites to be avoided by men (at [35] and [38]).

One instance of how protection and acknowledgment of these sites continues today is the participation by Butchulla people in a range of committees, including the Fraser Island Indigenous Advisory Committee, which advises government on matters of significance to Butchulla people in relation to Fraser Island. **Person 55**, a member of the **Person 40** family, was commissioned by the Queensland Department of Environment and Heritage to report on sites of significance to Butchulla people in the Great Sandy Region.

The need to protect waterways on Fraser Island is important as they are the 'lifeblood of the Butchulla' people. Historically it was the entire group's responsibility to keep waterways clear of debris and to also place dead trees within creeks as a food source for larvae. Today, Butchulla people want to see fishing become more regulated with marine animals being given greater protection.

It is stated that all Fraser Islanders, which is a term referring to Butchulla people, were required to 'ensure continuity of food resources' in various ways. An account of **Person 48** from the 1930s records that hunting would occur in movements from west to east of the Island. **Person 25's** affidavit details that while hunting as a young boy, he would hunt porcupine but 'we would just get one or two porcupines, enough for the family. You would not want to get too many' (at [23]).

Acknowledgment and transmission of cultural and ceremonial responsibilities

The relationship, or association, of Butchulla people with their traditional country involves a cultural/religious aspect. Butchulla people possess stories, myths and legends which celebrate the activities of ancestors within the claim area and places of significance in Butchulla country (including the claim area). These stories, myths and legends celebrate the activities of ancestral beings and the locations, often referred to as 'sacred sites', of these activities and are comparable to title deeds.

Information is provided that Butchulla songs and dances which originate from mythological sources are practised today, as they were historically. **Person 24** states that these songs and dances were performed 'in the past' in the 'bora' ground and were a means by which Butchulla people affirmed and transmitted their traditional laws and customs. I understand **Person 24** to be indicating that the 'bora' ground is no longer used in performing these dances and songs. Notwithstanding this, the dances and songs continue to be practised and transmitted.

In 'welcome to country' performances by Butchulla people, dances and songs are performed as part of the welcome ceremony. These dances and songs are also used in the naming ceremonies involving Butchulla children, to which I have referred previously. The **Person 24** report explains that the performers of these dances and songs today, were taught them by Butchulla people who have now passed away.

The acknowledgment and transmission of Butchulla myths and stories is also addressed in the application. A number of examples are provided of how senior members of the claim group, including a number of the applicants, transmit these stories through art, written word and oral tradition. Information is also provided, in a number of instances, as to how these senior Butchulla people were in turn taught these stories and legends.

In his affidavit **Person 25** explains that his grandparents would not only tell him these stories but would test him, and others, 'to see how good we were and what we knew' (at [3]). **Person 25** also details that 'the old people' would tell him stories as they related to sacred sites, including information as to who could and could not go to these areas (at [35]).

I am satisfied that there is a sufficient factual basis, summarised above, which supports the assertion that the claim group acknowledge and observe traditional laws and customs which give rise to the claim to native title rights and interests.

Reasons for s. 190B(5)(c)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Section 190B(5)(c) requires a factual basis to support the assertion that the native title claim group have continued to hold native title in accordance with traditional laws and customs.

The information summarised in my reasons for ss. 190B(5)(a) and (b) supports the assertion that the native title claim group continue to hold native title in accordance with their traditional laws and customs.

Consideration of Person 1's information

As I have indicated previously, one matter raised in **Person 1's** communications concerns whether certain **Person 17** ancestors were in fact members of the Butchulla people. I have set out **Person 1's** assertions regarding this matter in my reasons at s. 61(4). I rely on that summary here.

Another matter raised by **Person 1** concerns the Butchulla people more generally and the land and waters claimed by the application. **Person 1** asserts that the Butchulla people were a family or clan from Fraser Island and were more likely to be part of the Kabi or Gubi language group rather than a distinct or separate language group. As I understand it, **Person 1** asserts that some or all of the land and waters claimed by the Butchulla people are areas where Dundjubara people, and not Butchulla people, have native title rights and interests. That is, the Butchulla people do not have native title rights and interests in the areas claimed by the application.

While **Person 1's** information relates to the association of the claim group, and its predecessors, with the claimed area and possibly by inference the traditional laws acknowledged and traditional customs observed by the claim group in the claimed area, they are not matters which can affect my consideration of s. 190B(5).

I have outlined above, the scope of my task for this specific registration test condition as it was explained in *Doepel*. As Mansfield J said, 'the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence…'—at [17].

I have outlined above, in some detail, the basis on which I am satisfied that the applicant has provided a sufficient factual basis to support each particularised assertion set out at ss. 190B(5)(a) to (c). Where (as in this case) the factual basis provided by the applicant is sufficient to support the relevant assertions, this is sufficient for the purposes of s. 190B(5). Were I to consider the factual basis the applicant has provided in the light of **Person 1's** material for the purposes of s. 190B(5), I would go beyond my role as described in *Doepel* at [17].

Subsection 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.

Result

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Reasons

My task at s. 190B(6) is to consider whether *some* of the native title rights and interests claimed can *prima facie* be established. A claim should be accepted on a prima facie basis if 'on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law': *Doepel*—at [135]. In my view, an applicant will satisfy this requirement where at least one of the claimed rights and interests is prima facie established.

I note that 'native title rights and interests' is defined at s. 223(1) of the Act, as extracted in my consideration of s.109B(4) above. In considering whether a particular right or interest is prima facie established, it is my view that I must be satisifed that the application prima facie establishes that:

a) *The right or interest exists under traditional law and custom in relation to any of the land or waters under claim*

As defined under s. 223(1)(a), a native title right or interest must be possessed under the traditional laws acknownledged and traditional customs observed by the claim group. As I have discussed in my reasons at s. 190B(5), *Yorta Yorta* offers authority on what is meant by 'traditional law and custom', and I rely on that summary here.

While I am not required to be satisfied that the claimed native title right or interest can be made out at trial, I must be satisified that there is some evidentiary material which prima facie establishes that the claimed right or interest exists under *traditional* law or custom: see *Gudjala #2*—at [86]; *Doepel*—at [126].

b) *The right or interest is in relation to land or waters*

Section 223(1) requires a native title right or interest to be in relation to land or waters. In my view, where a claimed right or interest is not one which is in relation to land or waters it could not be considered prima facie established as a native title right or interest.

c) The right or interest has not been extinguished over the whole of the application area

In my view the requirement that a native title right or interest be recognised by the common law of Australia (s. 223(1)(c)) requires me to have regard to settled law regarding extinguishment of native title rights and interests when considering whether a particular right or interest is prima facie established by an application.

For example, if there is evidence that the application is or was entirely covered by a pastoral lease, I could not (unless ss. 47-47B applies) consider exclusive rights or interests to be prima facie established, having regard to settled law regarding the extinguishing effect of pastoral leases on exclusive native title, including *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*).

I now consider whether each of the claimed native title rights and interests are, prima facie, established. Where it is reasonable to do, on the basis of similarity, I will provide my reasons for separate rights and interests together.

1. *Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238, ss47, 47A or 47B apply), the Butchulla People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.*

Result

This is prima facie established.

Reason

The nature of exclusive possession was considered by the Full Court of the Federal Court in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths*). In that instance, the Court found a claim to exclusive possession, use or occupation did not require demonstration that a native title claim group could exclude people from their country in a manner analogous to a proprietary right of exclusion. Rather the Court found that:

> 'The relationship to country is essentially a "spiritual affair" … The question of exclusivity depends upon the ability of [a native title claim group] to effectively exclude from their country people not of their origin'—at [127].

Such effective exclusion is determinable by reference to the content of traditional law and custom. In the specific facts of *Griffiths,* the Court found that the traditional laws and customs of the native title holders included spiritual sanction being visited upon unauthorised entrants to country. The Court further found that *through the relevant law and custom*, the native title holders were the 'gatekeepers' for the purposes of preventing such harm and avoiding injury to country. On this basis the Court found that exclusive possession was held by the native title holders—at [127].

The **Person 24** report provides historical sources which state that entry onto Butchulla country by neighbouring 'tribes', without permission, was comparable to trespass and was often the source of inter-group conflict. The accounts of hostilities between Butchulla people and early settlers, to which I have referred before, include an instance where 'one tribal chief had the temerity to

suggest that the theft of a few sheep was more in order of payment since the sheep were, after all, grazing on Aboriginal land'.

Further accounts are also provided of Butchulla people inviting neighbouring groups onto Fraser Island at regular times of abundance in marine resources.

Person 54 provided testimony before the Inquiry into sandmining on Fraser Island, that while people were able to access the Island for fishing and holidays, it did not mean that they could '*do just as they liked and go where they pleased*'.

In his affidavit, **Person 25** recounts an occasion when non-Butchulla people were seeking permission to take a turtle from Hervey Bay to be used in a feast. These individuals were granted permission by **Person 25** and another Butchulla individual, **Person 56**, to catch and take the turtle. These persons were accompanied by **Person 25** and **Person 56** to catch the turtle, who also received part of the meat from the turtle and its shell (at [22]).

The granting of permission by Butchulla people to non-Butchulla persons to take natural resources and the indication that entry onto Fraser Island did not permit access to all areas establishes, prima facie, exclusivity in possession, use and occupation *according to* the laws and customs of Butchulla people.

2. Over areas where a claim to exclusive possession cannot be recognised, the Butchulla People claim the following rights and interests – the right:

a) to hunt and fish in the area covered by the application in line with traditional laws and customs;

Result

This is prima facie established.

Reason

The application provides multiple examples of people hunting and fishing within the application area. I have referred to some instances of this previously, including the evidence of **Person 25**. **Person 25's** affidavit provides information regarding instances where **Person 25** and members of his family have been fishing and hunting within multiple localities within the application area.

Other information regarding the hunting and fishing practices of Butchulla people within the application area can be found at Attachment F, pp. 13 to 16.

b) to access and move about on the land and waters;

m) to move about the area covered by the application;

Result

These are prima facie established.

Reason

The application provides examples of Butchulla people accessing and moving about the application area. I rely on my reasons at s. 190B(5)(a) in considering that this native title right or interest is prima facie established. I note that this right, as with all others claimed, is subject to any valid law of the Commonwealth or Queensland, and any right which is conferred as a result of those laws.

c) to gather and use natural products on the land;

o) to gather and use natural products (including food, timber, medicinal plants, stone, ochre and resin) from the area covered by the application, in line with traditional laws and customs.

Result

These are prima facie established.

Reason

The application provides numerous examples of Butchulla people gathering and using natural resources from the application area. Such examples include the collection of various materials for use in art projects depicting Butchulla stories and the use of stone in the construction of stone tools.

The use of ochre is noted in the **Person 24** report as something used in ceremonies involving the bora ground. Medicinal plants are said to be collected. There are numerous examples of food being taken from the area through hunting, fishing and gathering products such as native honey, nuts and other plant-based materials.

The application also provides information about the use of resin in the construction of canoes made from resources, including wood, found on or in the application area.

d) to hold meetings on the area covered by the application;

e) to conduct burials on the area covered by the application;

l) to use the area covered by the application for ceremonial, cultural, social, customary, religious and traditional purposes;

Result

These are prima facie established.

Reason

The application states that a meeting ground was used at Daynam Place, in the application area, where transactions regarding arranged marriages, dispute resolution and training regularly occurred. Other meetings or engagements between Butchulla people, both between themselves and with their neighbours, occurred regularly at times of great abundance in marine resources.

In his affidavit **Person 25** attests that while he was growing up, his great uncles would tell him about large gatherings of Butchulla people and other people from 'around the region' from Tweed Heads to New South Wales, gathering at Mt. Bauple for 'the big bunya nut festival' (at [39] and [41]). Mt. Bauple is within the application area.

The application also provides contemporary examples of meetings occurring within the claim area. One example is the authorisation meeting on 9–10 May 2009 attested to by each of the persons comprising the applicant in their affidavits, to which I have referred previously. This meeting occurred at Hervey Bay, which is within the application area.

The application states that a number of burial grounds have been identified at Urangan, Hervey Bay and Fraser Island. While Fraser Island is not within the application area, it is asserted within the application that it is part of Butchulla 'country'. One Butchulla person buried on Fraser Island is detailed within the application.

The application states that while contemporary burials today are circumscribed or restricted by law in terms of where people can be buried, Butchulla people nonetheless continue to assert the right to be buried on their traditional country, with their ancestors.

Information regarding ceremonial activities, including smoking of camp sites and burning of shelters, upon the death of a Butchulla person is also provided in the application.

Information is provided regarding the use of the claim area for traditional purposes include hunting, fishing and the performance of dances and songs.

I am satisfied that this information prima facie establishes the rights and interests to conduct burials, hold meetings and otherwise use the application area for ceremonial, cultural, social, customary, religious and traditional purposes.

f) to live on the area covered by the application;

g) to establish residence on the area covered by the application area;

h) to erect shelters and other structures on the area covered by the application;

n) to camp on the area covered by the application;

Result

These are prima facie established.

Reason

The application provides numerous instances of Butchulla people living within the application area. In my view, living on or establishing residence within the claim area is analogous and where there is evidence of people living in the claim area, I am satisfied that this also prima facie establishes a right to establish residence on the area.

The application also provides information of Butchulla people constructing shelters on the application area. In his affidavit **Person 25** deposes that as a young boy he would 'go bush' with other Butchulla children. During this time **Person 25** would stay in a humpy, or 'lean to' which I understand to have been a shelter which was erected (at [21] and [27]). During these times, I understand that **Person 25** was camping in the application area.

The construction of structures other than shelters is evidenced by stone fish traps in the Great Sandy Strait.

i) to manufacture materials, artefacts, objects and other products from resources in the area covered by the application;

Result

This is prima facie established.

Reason

The application provides information about Butchulla people manufacturing hand and water bags from a variety of materials, including kangaroo skin. Other objects which were manufactured include necklaces and baskets.

The use of resources from the application area to manufacture art is evidenced in the application, with both historical and contemporary instances of this occurring.

Other products which were manufactured included canoes, weapons, shelters and tools.

> *j) to dispose of cultural resources taken from, and manufactured items derived from the area covered by the application, by customary trade, exchange or gift with other Aboriginal people;*
>
> *k) to engage in production, customary trade and other customary economic activities on the lands as they relate to other Aboriginal people with respect to indigenous cultural resources;*

Result

These are **not** prima facie established.

Reason

While, of itself, the term 'cultural resources' may be considered uncertain or not readily understandable an explanation of the intended meaning of 'cultural resources' is provided in the application at Attachment F, p. 25. This explanation provides:

> The use of the term "cultural resources" and "indigenous cultural resources" under the rights asserted above [at 2(j) and 2(k)] is interchangeable. Both terms mean the same and refer to Butchulla traditional physical assets such as paintings, artworks, necklaces, baskets, boomerangs, spears and intangible resources such as stories, dancing and folklore.

In my view, this explanation of 'cultural resources' makes the rights and interests claimed at 2(j) and (k) understandable.

However, having regard to the explanation of 'cultural resources', I am not satisfied that 2(j) and (k) are rights and interests in relation to land or waters. As the above extract makes clear, the claimed rights and interests at 2(j) and (k) relate to intangible resources such as stories, dancing and folklore.

In *Ward* the High Court considered that a claimed right to 'maintain, protect and prevent the misuse of cultural knowledge', as explained by the applicant, was something more than a right or interest in relation to land or waters. In that instance, the Court found that such a right was 'an incorporeal right akin to a new species of intellectual property'—at [59].

While distinct from a right to maintain, protect and prevent the misuse of cultural knowledge, the rights and interests claimed at 2(j) and (k), are, in my view, also beyond rights and interests in relation to land or waters. With consideration to the explanation of 'cultural resources' it is clear that the applicant claims a right to:

- engage in production, customary trade and other customary economic activities on the land with respect to intangible resources, such as songs, dances and folklore; and
- to dispose of intangible resources such as songs, dances and folklore taken or manufactured from the area covered by the application, by customary trade, exchange or gift with other Aboriginal people

In my view, these rights and interests are not in relation to land or waters. Rather, they are rights and interests to deal in, and with, matters of intellectual property, notwithstanding the subject of that intellectual property may relate to land and waters. Such dealings extend to the production, trade and exchange of these intangible resources. As *Ward* makes clear, matters relating to incorporeal rights akin to intellectual property rights, are not rights and interests in relation to land and waters—at [59] and [60].

For these reasons I am not satisfied that these claimed rights or interests are prima facie established.

Subsection 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 be expected to currently 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.

Result

The application **satisfies** the condition of s. 190B(7).

Reasons

The term 'traditional physical connection' is not defined by the Act. In my view, the use of the word traditional requires me to have regard to the High Court's definition and explanation of 'traditional' in *Yorta Yorta*, to which I have referred previously.

Having regard to *Yorta Yorta*, I understand my task is to consider whether, having regard to the pre-sovereignty law and custom of the Butchulla people, at least one member of the claim group is shown to have, or had, a traditional physical connection to any part of the claim area: *Doepel*— at [18].

Attachments F and M, the **Person 25** Affidavit and the **Person 24** report all provide evidence of one or more members of the claim group having, both currently and previously, a traditional physical connection with the claim area. Numerous examples of Butchulla people accessing the claim area for camping and hunting, including fishing, purposes are provided within the application.

There are also examples of people accessing the claim area for the purpose of securing natural resources and ensuring the protection of certain significant sites within the claim area. I have variously outlined these activities within my reasons set out under s.190B(5) and (6) above.

I am satisfied the application provides evidence of a traditional physical connection by, at least, one claim group member with at least part of the claim area.

Subsection 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.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If :
   (a) a previous exclusive possession act (see s. 23B) was done, and
   (b) either:
      (i) the act was an act attributable to the Commonwealth, or
      (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s. 23E in relation to the act;
      a claimant application must not be made that covers any of the area.

(3) If:
   (a) a previous non-exclusive possession act (see s. 23F) was done, and
   (b) either:
      (i) the act was an act attributable to the Commonwealth, or
      (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s. 23I in relation to the act;
      a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) or (3) does not apply if:
   (a) the only previous exclusive possession act or previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by ss. 47, 47A or 47B to be disregarded were the application to be made, and
   (b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it.

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application **does not** offend the provisions of s. 61A(1).

I have had regard to the geospatial assessment and overlap analysis which states that the claim area, either in part or wholly, is not an area for which there is an approved determination of native title. I refer to my reasons at s. 190B(2) as to why, notwithstanding that the application was amended after this assessment was prepared, I consider that I may rely on the opinions and information within that assessment. I rely on those reasons here also. As such I accept that the claim area is not subject to an approved determination of native title.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Schedule B of the application states that the claim area excludes land and waters which are, or have been, subject to a number of interests or activities. These named activities wholly capture those activities expressed in s.23B of the Act as being activities which, in conjunction with certain other conditions, will be an exclusive possession act.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

In my view, the application **does not** offend the provisions of s. 61A(3).

Schedule B [3] states that exclusive possession is not claimed over 'areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State of Queensland'..

Subsection 190B(9)
No extinguishment etc. of claimed native title

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (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 ss. 47, 47A or 47B.

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons below.

Reasons for s. 190B(9)(a):

The application **satisfies** the subcondition of s. 190B(9)(a).

Schedule Q of the application states that 'the native title claim group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown'.

Reasons for s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

Schedule P of the application states 'the application does not include a claim by the native title claim group to exclusive possession of all or part of an offshore place'.

Result for s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

Schedule B [6] of the application states that the the area covered by the application excludes land or waters where the native title rights and interests claimed have otherwise been extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Butchulla Land and Sea Claim #2**
NNTT file no.	**QC09/5**
Federal Court of Australia file no.	**QUD288/09**
Date of registration test decision	**30 June 2010**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result: met**
	re s. 61(1)		**met**
	re s. 61(3)		**met**
	re s. 61(4)		**met**
	re s. 61(5)		**met**
	re s. 62(1)(a)		**met**
	re s. 62(1)(b)		**Aggregate result: met**
		s. 62(2)(a)	**met**
		s. 62(2)(b)	**met**
		s. 62(2)(c)	**met**
		s. 62(2)(d)	**met**
		s. 62(2)(e)	**met**
		s. 62(2)(f)	**met**
		s. 62(2)(g)	**met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(ga)	met
		s. 62(2)(h)	met
s. 190C(3)			met
s. 190C(4)			Overall result: met
	s. 190C(4)(a)		met
	s. 190C(4)(b)		N/A

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		met
s. 190B(3)		Overall result: met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	met
s. 190B(4)		met
s. 190B(5)		Aggregate result: met
	re s. 190B(5)(a)	met
	re s. 190B(5)(b)	met
	re s. 190B(5)(c)	met
s. 190B(6)		met
s. 190B(7)(a) or (b)		met
s. 190B(8)		Aggregate result: met
	re s. 61A(1)	met

Test condition	Subcondition/requirement	Result
	re ss. 61A(2) and (4)	**met**
	re ss. 61A(3) and (4)	**met**
s. 190B(9)		**Aggregate result:** **met**
	re s. 190B(9)(a)	**met**
	re s. 190B(9)(b)	**met**
	re s. 190B(9)(c)	**met**

[End of document]