National Native Title Tribunal

Registration test decision-edited

Application name	Gold Coast Native Title Group
Name of applicant	Mr Ian Levinge, Ms Eileen Williams, Mr Kevin Slabb, Ms Jacqueline McDonald, Mr Bernie Williams, Mr Wesley Aird, Mr Earl Sandy
State/territory/region	Queensland
NNTT file no.	QC06/10
Federal Court of Australia file no.	QUD346/06
Date application made	5 September 2006
Date application last amended	13 May 2010

Name of delegate Susan Walsh

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 190C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 23 September 2010

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Susan Walsh

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 2 August 2010 and made pursuant to s. 99 of the Act.

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Introduction

This document sets out my reasons for the decision, as the delegate for the Native Title Registrar (the Registrar), to accept the Gold Coast Native Title Group application (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.

Overview

The application was originally filed in the Federal Court on 5 September 2006. A delegate of the Registrar considered the claim in the application pursuant to s. 190A on 18 February 2008 and decided that it must not be accepted for registration. The delegate decided that the claim did not satisfy all of the conditions in s. 190B, although it did satisfy the conditions in s. 190C.

On 13 May 2010, the Federal Court granted leave to amend the application. The Court provided a copy of the amended application to the Registrar on 14 May 2010 pursuant to s. 64(4) of the Act, thereby triggering the Registrar's duty to consider the claim made in the amended application under s. 190A of the Act.

The application area lies south of Brisbane and covers much of the region known as the Gold Coast. The application falls predominantly within the State of Queensland, although a small area extends into New South Wales.

I informed both state governments that the claim in the amended application would be considered for registration and offered them an opportunity to make a submission before my decision, in accordance with the decision in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [21] to [38] that a state government is entitled to this kind of procedural fairness. Neither government has provided any submissions.

As the application before me has been amended, it is first necessary to consider if either of ss. 190A(1A) or (6A) apply to the claim in the amended application. I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim because:

- the granting leave of leave by the Federal Court to amend the application was not made pursuant to s. 87A, and thus the circumstance described in s. 190A(1A) does not arise.
- section 190A(6A) does not apply as the original application was not accepted for registration (see subparagraph 190A(6A)(b)).

I note that the amended application now provides an expanded description of how a person is a member of the claim group via adoption (schedule A) and also contains a greatly expanded general description of the factual basis for the assertion that the claimed native title rights and interests exist and for the three particular assertions in s. 62(2)(e) (schedule F). The expanded general description is found in an anthropological report in attachment T of the amended application. Another change is that the applicant is now represented by the Principal Legal Officer of Queensland South Native Title Services Ltd, in whose representative body area the

application predominantly lies. Other minor changes to the details required by s. 62 are found in the amended application.

As neither ss. 190A(1A) or (6A) apply, my consideration of the application is governed by ss. 190A(6) and (6B), the combined effect of which is that I may only accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. Section 190B sets out conditions that test particular merits of the claim detailed in the application, as required by ss. 61 and 62. Section 190C(2) requires that I must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. In my reasons below I consider the s. 190C(2)requirements first, in order to assess whether the application contains the requisite information and documents before turning to the remaining parts of s. 190C(3) and (4) and to questions regarding the merit of that material for the purposes of s. 190B.

Information considered

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 have considered the information in the amended application (including the attachment affidavits and other documents at the end of the application). I have also considered the documents contained in the Tribunal's QC06/10 case management/delegates files (references 2010/01129 and 2008/01097) as at the date of this decision. I have particularly considered all of the documents before the delegate when the application first underwent the registration test on 18 February 2008. These documents are itemised in the delegate's statement of reasons at pp. 17–19 and in attachment B to that statement of reasons.

I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4) (see *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) at [16]).

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.
- undertaking 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. 94D(4) of the Act. Further, mediation is private as between the parties and is also generally confidential: (see also ss. 94K and 94L).

Procedural and other conditions: 190C

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, I understand that the condition in s. 190C(2) is of a procedural kind and 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. Section 190C(2) does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Doepel* at [16] and also at [35]–[39].

I turn to each of the various parts of ss. 61 and 62 which relevantly prescribe that the application must contain certain details and other information or that the application must be accompanied by any affidavit or other document:

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.

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

Section 190C(2) is framed in a way that 'directs attention to the contents of the application and the supporting affidavits'. Thus, I have confined my assessment of this requirement to the details and information contained in the application itself. I am not required to look beyond the application nor undertake any form of merit assessment of the material to determine if I am satisfied whether 'in reality' the native title claim group described is the correct native title claim group—*Doepel* at [35], [37] and [39].

That said, in seeking to verify that an application contains all the details and information required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group'—*Doepel* at [35]. In light of the decision in *Doepel*, I have confined my consideration to the information contained in the application itself about the identity of the native title claim group. This is found in schedule A which identifies that the native title claim group are the descendants of the apical ancestors named in that schedule. The text of schedule A is replicated in my reasons below at s. 190B(3).

There is nothing on the face of the application before me to indicate a problem of the kind discussed by Mansfield J in *Doepel*. I have thus formed the view that the application contains the details required by s. 190C(2) in relation to s. 61(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.

The application contains all details and other information required by s. 61(3). These details are found on pp. 2 and 15 of the Form 1 respectively.

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 to 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.

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

I refer to my reasons above in relation to s. 61(1). It follows in my view that the application contains the details required by the related provisions of s. 61(4). These details are found in schedule A. Whether or not I am satisfied that the description is sufficiently clear, so that it can be ascertained whether any particular person is a person in the native title claim group, is the task when considering the relevant merit condition of the registration test in subsection 190B(3)—see *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 at [31]–[32] (*Gudjala 2007*).

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) 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) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) 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) stating the basis on which the applicant is authorised as mentioned in (iv).

The application is accompanied by the affidavit/s required by s. 62(1)(a). Each of the seven persons comprising the applicant has made an affidavit that was filed with the original application on 5 September 2006 addressing the matters required by subparagraphs 62(1)(a)(i) to (v). These are the affidavits found in attachment R.1 of the application.

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 contains all details and other information required by s. 62(1)(b), namely the details specified in ss. 62(2)(a) to (h), as identified in the reasons that now follow.

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.

The application contains all details and other information required by s. 62(2)(a). A written description of the areas covered/areas within those boundaries not covered by the application is found in attachment B and schedule B respectively.

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).

The application contains all details and other information required by s. 62(2)(b). A map showing the boundaries of the area covered by the application is provided in attachment C of the application.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out 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.

The application contains all details and other information required by s. 62(2)(c). Schedule D states that no searches of the relevant kind have been carried out.

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and 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.

The application contains all details and other information required by. 62(2)(d). Attachment E provides a description of the claimed native title rights and interests and it does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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.

The application contains all details and other information required by s. 62(2)(e). These details are found in attachments F and T of the application.

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.

The application contains all details and other information required by s. 62(2)(f). These details are found in schedule G of the application

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.

The application contains all details and other information required by s. 62(2)(g). The applicant states in schedule H that it is unaware of any overlapping applications.

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.

The application contains all details and other information required by s. 62(2)(h). The applicant states in schedule H that it is unaware of any s. 29 notices.

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.

The application satisfies the condition of s. 190C(3). There are no applications that cover the area of the current application and as such no requirement to consider the issue of common members.

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.

Note: The word ***authorise*** is defined in section 251B.

The application satisfies the condition of s. 190C(4). The application has not been certified and does not meet the requirements of s. 190C(4)(a). Section 190C(5) provides that if the application has not been certified, the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

a) includes a statement to the effect that the requirement set out in paragraph 4(b) has been met; and
b) briefly sets out the grounds on which the Registrar should consider that it has been met.

The application contains the information required by s. 190C(5) in attachment R.1 (this attachment contains the s. 62(1)(a) affidavits by the seven persons comprising the applicant) and attachment R.2 (this attachment contains an affidavit by claim group member, [**Person 1 – name deleted**], dated 22 August 2006, setting out and providing documentary evidence of the actions taken to authorise the applicant).

Although my view is that the application contains the information required by s. 190C(5), it is still necessary for me to consider the substantive condition in s. 190C(4)(b). I refer to this from *Doepel* at [78]: 'the interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.' I am not limited to the information in the application or accompanying s. 62(1)(a) affidavits when considering this condition—see *Strickland v Native Title Registrar* (1999) 168 ALR 242 at pp. 259-60, approved on appeal to the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [78].

Many documents were provided to the first delegate when the application first underwent the registration test on 18 February 2008. I too have considered the information in these documents. I have not received any material additional to that which was before the first delegate, apart from the anthropological report in attachment T of the amended application.

There are two limbs to my consideration of s. 190C(4)(b):

1. I must consider if I am satisfied that the applicant is a member of the native title claim group;
2. I must consider if I am satisfied that the applicant 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.

The seven persons jointly comprising the applicant are Ian Levinge, Eileen Williams, Kevin Slabb, Jacqueline McDonald, Bernie Williams, Wesley Aird and Earl Sandy. For the following reasons, I am satisfied that they are all members of the native title claim group and thus satisfy the first limb of s. 190C(4)(b):

- According to the schedule A description of the native title claim group, a person is a member of the native title claim group if they are the biological descendants of the twelve apical ancestors named in schedule A or if they have been adopted by the apical ancestors, by the biological descendants of the ancestors or are the biological descendants of the adopted persons.
- The twelve apical ancestors named in schedule A are Joseph Blow, Coolum, George Drumley (Darramlee), Sarah Drumley (Warri), Jackey Jackey (Bilin Bilin), Mark Jackey, Harry Jackey, Nellie Jackey, John Alexander Sandy (Bungaree), Kitty Sandy (Yelganun), Slab, Kipper Tommy Andrews.
- The main body of the anthropological report in attachment T specifically identifies that three of the seven applicant persons are all members of the native title claim group:
    - [**Applicant 4 – name deleted**] traces descent back to the married apical ancestor couple, [**Ancestor 5 – name deleted**] and [**Ancestor 8 – name deleted**], through her mother's father's mother's mother [126]. [**Applicant 4 – name deleted**] also claims descent back to

- [**Applicant 6 – name deleted**] traces descent back to [**Ancestor 5 – name deleted**] and [**Ancestor 8 – name deleted**] through his mother's father's mother's mother [126]. I note also the information on [131] of the report that the [**Family 8 – name deleted**] family are amongst the descendants of the married ancestral couple [**Ancestor 3 – name deleted**] and [**Ancestor 4 – name deleted**].
- [**Applicant 3 – name deleted**] is a descendant of the apical ancestor [**Ancestor 11 – name deleted**] [133].

- I cannot find any specific references within the main body of the anthropological report to [**Applicant 1 – name deleted**], [**Applicant 2 – name deleted**], [**Applicant 5 – name deleted**] and [**Applicant 7 – name deleted**]. However, I see that these individuals share surnames with a number of families identified in the report as being descended from the apical ancestors:
  - The [**Family 12 – name deleted**] family is identified as being descended from [**Ancestor 9 – name deleted**] [137].
  - The [**Family 13 – name deleted**] family is identified as being descended from [**Ancestor 10 – name deleted**] [132].
  - The [**Family 14 – name deleted**] is identified as being descended from [**Ancestor 3 – name deleted**] and [**Ancestor 4 – name deleted**] [131].
- I refer also to the statement in paragraph 17 of the affidavit by [**Person 1 – name deleted**] in attachment R.2. [**Person 1 – name deleted**] states that a management committee for the Eastern Yugambeh[1] distribute information and notices to all identified adult members of the native title claim group, whose names are kept on a mailing list. A version of the mailing list and another list of 'corresponding members', both dated 29 May 2006, is found in attachment 2 of [**Person 1 – name deleted**]'s affidavit. All seven applicant persons are identified on these lists.

On the basis of what is said in the anthropological report and in [**Person 1 – name deleted**]'s affidavit, I am satisfied that the seven persons comprising the applicant are members of the native title claim group.

The second limb of s. 190C(4)(b) requires me to be satisfied that these seven persons are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group. Section 251B defines what it means for all the persons in the native title claim group to authorise an applicant to make and deal with a native title application—the relevant persons authorise an applicant if:

(a) where there is a process of decision–making that, under the traditional laws and customs of the native title claim group, must be complied with, the persons in the native title claim group authorise the applicant, in accordance with that process; or

(b) where there is no traditionally mandated decision–making process, the native title claim group authorise the applicant in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group.

I understand that the references in ss. 190C(4)(b) and 251B to <u>all</u> the persons in the native title claim group being required to authorise an applicant is not to be interpreted literally.

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[1] Schedule A of the application identifies that the native title claim group are also known by this name.

Nonetheless it is necessary, in my view, to have a general understanding of the persons who are asserted to belong to the native title claim group from whom authorisation must flow, in considering whether I am satisfied that the applicant is authorised by that group.

I have turned firstly to the schedule A description of the native title claim group to gain some understanding of its current membership. Schedule A states that the native title claim group on whose behalf the application is made is the Gold Coast Native Title Group (also known by the inclusive label, the Eastern Yugambeh). The group are more particularly described as the descendants (biological and adopted) of twelve apical ancestors. Schedule R of the application refers to evidence of the group's membership in genealogies that are found in appendix 1 of an anthropological report. The anthropological report has been added to attachment T of the application as a result of its most recent amendment in May 2010.

The new information in the anthropological report confirms that the persons in the native title claim group are the known descendants of nine of the twelve identified apical ancestors, with the following seven ancestral lines at the apex of each genealogy: [**Ancestor 1 – name deleted**], [**Ancestor 2 – name deleted**], [**Ancestor 3 – name deleted**] and [**Ancestor 4 – name deleted**] (a married couple), [**Ancestor 5 – name deleted**] and [**Ancestor 8 – name deleted**] (a married couple), [**Ancestor 9 – name deleted**], [**Ancestor 10 – name deleted**] and [**Ancestor 11 – name deleted**]. The information in the anthropological report confirms that three ancestors named in schedule A ([**Ancestor 6 – name deleted**], [**Ancestor 7 – name deleted**] and [**Ancestor 12 – name deleted**]) do not have any known descendants.

The Eastern Yugambeh identity of the native title claim group is discussed at the start of [**Person 1 – name deleted**]'s attachment R.2 affidavit. I have identified from my search of Tribunal records that, as stated by [**Person 1 – name deleted**], the current application is the second native title application by a similarly constituted native title claim group, the first being the Eastern Yugambeh People application (QUD6002/01). [**Person 1 – name deleted**] discusses this application in her affidavit and says that the new Gold Coast application is by essentially the same native title claim group (paragraph 8).

The first Eastern Yugambeh application failed the authorisation condition of the registration test and was discontinued in July 2002. The reasons for that decision reveal that certain persons within that group disputed the Eastern Yugambeh applicant's authority. These persons identified themselves as the Kombumerri and also defined themselves as descendants of [**Ancestor 13 – name deleted**] who was a daughter of [**Ancestor 4 – name deleted**]. [**Ancestor 4 – name deleted**] is the same person as the Gold Coast apical ancestor, [**Ancestor 4 – name deleted**].

Some of these descendants of [**Ancestor 13 – name deleted**]appear to assert native title on the basis of their membership of the Kombumerri clan estate within the wider Eastern Yugambeh language group over a significant yet still smaller mainland area (bounded by the Coomera River in the north) to that covered by each of the Gold Coast and Eastern Yugambeh applications (both of which extend as far north as the mouth of the Logan River). I note that some of the persons objecting to the Gold Coast applicant's authority and who opposed the Eastern Yugambeh application were supporters of the Kombumerri People (QUD6082/98) and Kombumerri People#2 (QUD6194/98) native title applications. Both Kombumerri applications failed the authorisation condition of the registration test in 1999 and were also discontinued in July 2002.

Three of the four persons comprising the Eastern Yugambeh applicant, are part of the Gold Coast applicant – [**Applicant 1 – name deleted**], [**Applicant 6 – name deleted**] and [**Applicant 2 – name deleted**]. The Eastern Yugambeh and Gold Coast applications cover the same area. The native title claim group description in each application is similar, the substantive difference being the addition of four apical ancestors to the Gold Coast claim group description – [**Ancestor 2 – name deleted**], [**Ancestor 10 – name deleted**], [**Ancestor 6 – name deleted**] and [**Ancestor 7 – name deleted**]. It is [**Person 1 – name deleted**]'s evidence that the addition of these ancestral lines was an outcome of regional information sessions conducted in March 2006 during the authorisation process for the new Gold Coast application (paragraph 22, Person 1, 22 August 2006, attachment R.2 of the application). It is not clear why [**Ancestor 6 – name deleted**] and [**Ancestor 7 – name deleted**] were added, noting the conclusion in the anthropological report that they do not have any known descendants.

The persons who disputed the authority of the Eastern Yugambeh applicant also dispute the authority of the Gold Coast applicant. Additionally, it appears that some persons who may have supported the Eastern Yugambeh application (e.g. [**Person 2 – name deleted**]) now oppose the Gold Coast application. In this context, understanding the overall membership of the Gold Coast native title claim group is a relevant consideration in light of the applicant's case that a decision must be made by consensus and that consensus can be achieved in the face of objections (I discuss this in more detail below).

I note that the previous delegate who considered the Gold Coast application in February 2008 referred to affidavit evidence provided by [**Applicant 6 – name deleted**] in 2001 for the Eastern Yugambeh application, indicating that the Gold Coast claim group may have comprised up to 1000 members. It does not seem to me, when I consider the more recent evidence from [**Person 1 – name deleted**] and in the genealogies, that the group is nearly that large.

I refer to information in [**Person 1 – name deleted**]'s attachment R.2 affidavit attaching a mailing list in attachment 2 of that affidavit which she says lists 'all identified adult members of the native title claim group' (paragraph 17; footnote 7). It appears from [**Person 1 – name deleted**]'s affidavit that the known adult members of the group, as at 29 May 2006, totalled 328 persons, as shown on the mailing list in attachment 2 to her affidavit. In turn, the genealogies in appendix 1 of the anthropological report do not appear to name quite so many people as the mailing list and indicate a membership in the order of 200 persons.

Notwithstanding the discrepancy in numbers between the genealogies and the mailing list, there appears to me to be a sufficient correlation between the two sets of documents to give an overall picture of the current membership of the native title claim group. I have formed the view that the native title claim group are divided into or represented along current family lines and that these persons are the known descendants of the seven ancestral lines identified in the anthropological report and genealogies. Although I cannot with certainty know how many persons are in the native title claim group, as the information about this is somewhat conflicting, it appears to me that there are numerous current families who have been identified as the known descendants of the seven ancestral lines.

As I have noted, the applicant's authority is disputed. This opposition emanated from a number of sources both during the authorisation process that took place in the first half of 2006 and after the application was first filed in the Federal Court in September 2006. A number of individuals,

claiming to be the descendants of two of the seven ancestral lines ([**Ancestor 5 – name deleted**] and [**Ancestor 4 – name deleted**]), wrote to the Registrar expressing their opposition to the native title claim.

I understand that these individuals principally belong to the [**Family 1 – name deleted**], [**Family 2 – name deleted**], [**Family 3 – name deleted**], [**Family 4 – name deleted**], [**Family 5 – name deleted**] and [**Family 6 – name deleted**] families. I understand also that at least some of these persons supported the old Kombumerri native title claims ([**Family 6 – name deleted**] and [**Family 5 – name deleted**]) although others may have supported the Eastern Yugambeh application ([**Family 1 – name deleted**]).

It appears that these 'objectors', for want of a better word, are principally connected to [**Ancestor 13 – name deleted**], who is the daughter and second of two known offspring of the ancestral couple, [**Ancestor 3 – name deleted**] and [**Ancestor 4 – name deleted**]. I understand that they may also be descended from the ancestral couple, [**Ancestor 5 – name deleted**] and [**Ancestor 8 – name deleted**]. These persons would appear therefore to be a part of the asserted Gold Coast native title claim group.

I have formed the view that the following best summarises the reasons for the opposition to the application by the objecting families:

- Any Eastern Yugambeh native title claim should extend west of the Coomera River to the area around Beaudesert and the head of the Logan River so as to encompass the entirety of 'the Eastern Yugambeh language region' (a map showing that area and the clan estates inside that area is attached to a letter from [**Person 5 – name deleted**] dated 18 December 2006). The argument is that the Gold Coast application does not extend sufficiently west and is therefore not sufficiently inclusive of all of Eastern Yugambeh traditional country.
- A decision such as extending authority for an Eastern Yugambeh native title claim must have the approval of the Elders of the Eastern Yugambeh people and this has not been obtained, except from a select few.
- There is evidence that Elders must approve decisions of this nature in the first Eastern Yugambeh application, including in the affidavits by the persons who comprised that applicant, some of whom are part of the Gold Coast native title applicant ([**Applicant 6 – name deleted**], [**Applicant 1 – name deleted**] and [**Applicant 2 – name deleted**]).
- The authorisation process described in the Gold Coast application does not comply with the traditional laws and customs that have always been known to senior Eastern Yugambeh people. These laws and customs require that very important decisions are ultimately made by the Elders.
- They regard themselves as Elders, in the sense that they are from families who are the oldest living generation of those persons descended from the Eastern Yugambeh ancestors. For instance, [**Person 3 – name deleted**], [**Person 4 – name deleted**], [**Person 2 – name deleted**] and [**Person 5 – name deleted**] are grandchildren of [**Ancestor 13 – name deleted**] and amongst the eldest descendants alive from that line. They tried to discuss their concerns in the earlier stages of the application process but found that they were being ignored.
- They feel that the Eastern Yugambeh management committee has developed a series of mailing lists over time that may exaggerate the numbers in the native title claim group.

- They dispute the inclusion within the native title claim group of persons who are descended from ancestors that they argue are from areas outside of Eastern Yugambeh country (specifically, [**Ancestor 2 – name deleted**] and [**Ancestor 10 – name deleted**]).

I note that the concerns of persons who supported the Kombumerri native title claims are along similar lines but are in some respects a little different. Their position is best summarised in correspondence from [**Person 3 – name deleted**] dated 16 December 2006, namely, native title in the Gold Coast region would be best represented by smaller estate/clan based claims (one of which would be their Kombumerri clan estate) rather than a wider regional language-based claim by the Eastern Yugambeh as a whole. They too say that they do not authorise the applicant and object to an asserted authorisation process which did not sufficiently consult with, and obtain the agreement of, their Elders.

The applicant contends in response to the adverse information that:

- These persons represent a small proportion of the overall membership of the native title claim group, being a faction within the descendants of [**Ancestor 4 – name deleted**] who are descended from [**Ancestor 13 – name deleted**]. Other descendants of [**Ancestor 4 – name deleted**] and [**Ancestor 13 – name deleted**], including the [**Family 7 – name deleted**] and [**Family 8 – name deleted**] families, support the new application;
- The group's traditionally mandated decision–making process allows some dissent, provided the family groups overall are extended every reasonable opportunity to participate in an authorisation process which achieves an overall consensus, despite the dissent from these relatively few family groups.
- The views of Elders are considered, however the traditionally mandated decision–making process requires consensus from the family groups overall; not from the Elders.
- The application was supported by the rest of [**Ancestor 13 – name deleted**]'s descendants and also supported by the other family groups who participated in the authorisation process over the course of the first half of 2006.

It is necessary that I consider the content of the applicant's asserted traditionally mandated decision–making process and whether I am satisfied that the applicant is authorised in accordance with that process, despite this dissent from within the native title claim group.

A critical feature of the applicant's case is that the persons required to participate in the authorisation process are constituted along family lines or family groups, and it is these lines or groups within the wider native title claim group, who need to reach a decision to authorise an applicant on their behalf.

It is the applicant's case that its traditionally mandated decision–making process has the following features:

- decision–making is inclusive of all members of the community;
- decisions take place in family groups comprising the descendants of the apical ancestors;
- all family groups must be informed of, and have an opportunity to participate in, the decision–making process;
- representatives are selected, or authorised, from within each family group to speak for that group;

- representatives are usually particular elders, or heads of families. Selection can however depend on the level of knowledge of, or involvement in, an issue that a person is recognised by their family to have;
- the views of elders are always considered and taken into account;
- a consensus, as arrived at by a meeting of the family representatives, marks the binding decision of the native title claim group;
- 'consensus' is defined as the general agreement of the representatives. Put another way, consensus can be achieved over objections.

This explanation of the process is found in a document titled 'Work Update 9 June 2006' at attachment 8 of [**Person 1 – name deleted**]'s affidavit dated 22 August 2006, in attachment R.2 of the application.

The seven persons comprising the applicant have all made s. 62(1)(a) affidavits (attachment R.1 of the application) in which they state that they are authorised by the rest of the persons in the native title claim group to make the application and to deal with matters arising in relation to it. They all state, in identical terms, that:

> 4. I am 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. The basis for that authority is as follows:
>
> i. Since late 2000 the Gold Coast Native Title Group has worked towards achieving a registered application for native title determination.
>
> ii. The lodgement of a native title determination application has been discussed widely within the Gold Coast Native Title Group since late 2000. These discussions have taken place in family group contexts, as well as in larger meetings of the community.
>
> iii. On 10 February 2006 an Eastern Yugambeh Management Committee meeting took place at which the beginning of a process for formally authorising the lodgement of the Gold Coast Native Title application was proposed.
>
> iv. A series of seven regional community forums was held throughout March 2006 in various locations. A large community forum was held on 20 May 2006. The purpose of these meetings was to ensure the Gold Coast Native Title Group was informed of the proposed application, that members had an opportunity to express their views in relation to it, and ultimately to authorise the lodgement of this application.
>
> v. On 24 May 2006 the representatives, including heads, of families comprising the Gold Coast Native Title Group met to confirm that this application was authorised. Four people, Eileen Williams, Wesley Aird, Jacqueline McDonald and Ian Levinge were authorised as named applicants.
>
> vi. On 28 June 2006 three additional applicants, Bernie Williams, Kevin Slabb and Earl Sandy, whose names were suggested at the 24 May meeting, were duly authorised by the representatives, including heads, of families comprising the Gold Coast Native Title Group.
>
> vii. The application was discussed within family groups throughout the stages noted in (iv) through (vi) (above).
>
> 5. The process of decision-making outlined in paragraph 4 (above) is in accordance with the traditional laws and customs of the Gold Coast Native Title Group.

I am of the view that the evidence of the seven applicant persons is to the effect that the native title claim group followed a traditionally mandated decision–making process with an essential feature that requires participation of the various family groups that make up the native title claim group in the authorisation decision, albeit the decision may ultimately be made by

representatives of the various family groups at an appropriate meeting or meetings. It is implicit, if not express, in their affidavits, that the representatives or heads of families making the decision would only do so if they have first gained the approval of their families to go ahead with the decision.

The applicants do not talk in their affidavits about a decision being reached by consensus, although they do state that authorisation was confirmed at meetings on 24 May 2006 and 28 June 2006, which were attended by the representatives or heads of the family groups. The applicants do not provide any information in their s. 62(1)(a) affidavits about the identity of the family groups said to comprise the native title claim group and who needed to participate in the authorisation process.

The applicant relies on two affidavits by claim group member, [**Person 1 – name deleted**], to support their claim that they are authorised as a result of the family groups achieving a consensus decision in the period February to June 2006. I understand that [**Person 1 – name deleted**] is an active member of a management committee established in 2001 to research, facilitate and prosecute the native title and cultural heritage claims of the Eastern Yugambeh people. The first of her affidavits is dated 22 August 2006 and is found in attachment R.2 of the application. The second is dated 20 March 2007 and was provided separately to the Registrar when the application first underwent the registration test after it was filed in September 2006.

I have not found it easy to identify the actual family groups who, it is asserted, are required to participate in the authorisation process. It seems to me that this is an essential part of the applicant's claim that they are authorised despite the dissent or opposition from the four previously identified family groups claiming descent from [**Ancestor 13 – name deleted**]. There is a rather bewildering array of documents and footnotes within [**Person 1 – name deleted**]'s two affidavits that have made this a difficult consideration.

In a document titled 'Work Update 9 June 2006' found in attachment 8 of [**Person 1 – name deleted**]'s first affidavit there is the statement that the families represented at the confirmation of authorisation meeting on 24 May 2006, were descendants of 17 individuals: [**Individuals listed – names deleted]**.

[**Person 1 – name deleted**]'s second affidavit identified an 18th person whose descendants participated in the authorisation process, [**Person 12 – names deleted]** (see attachment H to [**Person 1 – name deleted**]'s second affidavit).

Having regard to this information it initially appeared to me to be the applicant's case that these 18 individuals are at the apex of the current family groups within the native title claim group who must participate in the authorisation process. The genealogies in appendix 1 of the anthropological report confirm that these 18 individuals are either children or grandchildren of the seven apical ancestral lines. In other words, it appeared to me initially that there may be a total of 18 family groups who needed to participate in the authorisation process. This caused me some concern because the genealogies appended to the anthropological report indicate that such an identification of the necessary family groups is disproportionately weighted against the family group with [**Ancestor 13 – name deleted**] at its apex. I refer to the following points:

- The ancestral couple [**Ancestor 5 – name deleted**] and [**Ancestor 8 – name deleted**] had one child, [**Ancestor 14 – name deleted**], who in turn is the parent of many children, eight of

whom are at the apex of the family groupings identified in [**Person 1 – name deleted**]'s affidavits.

- [**Ancestor 13 – name deleted**] who was the child of the ancestral couple, [**Ancestor 3 – name deleted**] and [**Ancestor 4 – name deleted**], and who similarly bore a large number of children to [**Ancestor 14 – name deleted**], yet her descendants are represented in only one of the potential family groupings identified in the work update.
- The descendants of [**Ancestor 5 – name deleted**]/ [**Ancestor 8 – name deleted**] and [**Ancestor 9 – name deleted**] had seven and five family groups respectively at the authorisation process; yet the ancestral line of [**Ancestor 3 – name deleted**] and [**Ancestor 4 – name deleted**] only had two family lines at the authorisation process, one of which was [**Ancestor 13 – name deleted**].
- It appears to me that the descendants of [**Ancestor 3 – name deleted**] and [**Ancestor 4 – name deleted**] represent a significant faction within the native title claim group.
- The genealogies show that at least two of the persons named in [**Person 1 – name deleted**]'s attachment 8 (the work update) may not have any surviving descendants – these are [**Ancestor 15 – name deleted**] and [**Ancestor 16 – name deleted**]. A third person, [**Ancestor 17 – name deleted**], does have living descendants (the [**Family 9 – name deleted**] and [**Family 10 – name deleted**] families) yet these names do not appear on the mailing lists of known adult members of the claim group provided in [**Person 1 – name deleted**]'s first affidavit.
- There appear to be descendants represented in more than one family grouping, thus potentially giving them a greater 'voice' than others. This arises because of marriages between some of the 18 persons identified by [**Person 1 – name deleted**]: [**Marriage 1 – name deleted**]; [**Marriage 2 – name deleted**]; [**Marriage 3 – name deleted**]. It also arises because of marriages in succeeding generations: [**Marriage 4 – name deleted**]; [**Marriage 5 – name deleted**]; [**Marriage 6 – name deleted**]; [**Marriage 7 – name deleted**]; [**Marriage 8 – name deleted**].

However, I have come to the view that when the applicant says that the family groups who make up the native title claim group must participate in the authorisation process, they are not talking about 18 groups which have certain children and grandchildren of the group's apical ancestors at their apex. I have come to the view that they are talking about the group's current families who in turn are descended from these 18 persons or such of them as have known descendants.

I reach this decision because the weight of the information in the applicant's documentation of the authorisation process indicates that the persons involved were required to, and so identified, themselves with reference to their current family names, rather than as part of a distinct family group headed by one of the 18 individuals in the two generations after the apical ancestors. These documents all describe or identify the persons involved in the authorisation process by reference to their current family names such as [**Families listed – names deleted**]. I refer to information from the following documents:

- the mailing lists in attachment 2 of [**Person 1 – name deleted**]'s first affidavit identify the entries by reference to the apical ancestors or family names, not the 18 potential family groupings found in the work update in attachment 8 of her affidavit;
- the attendance lists and confirmatory letters in attachments B and D of [**Person 1 – name deleted**]'s second affidavit for the community forum on 20 May 2006 identify the attendees by reference to the various current family names I have referred to above;

- the anthropological report also talks consistently of the current families descended from the seven ancestral lines in terms that generally match the names found in the genealogies and in the documentation of the authorisation process within [**Person 1 – name deleted**]'s affidavits.

Seen in this light, the opposition of the [**Family 1 – name deleted**], [**Family 2 – name deleted**], [**Family 3 – name deleted**], [**Family 4 – name deleted**], [**Family 6 – name deleted**]and [**Family 5 – name deleted**] families is a smaller proportion of the current families that overall comprise the native title claim group.

It appears to me that there is a traditionally mandated decision–making process which requires a consensus decision by the current family groups overall and that this process could withstand dissent. In coming to this view, I prefer the evidence in the sworn affidavits from the applicant and [**Person 1 – name deleted**] to the effect that this is the traditionally mandated decision–making process. In my view, this has greater probative value than the information from those who oppose the claim to the effect that decisions require the approval of the Elders.

I acknowledge that included amongst the objectors are persons who belong to the oldest living generation of the native title claim group and that they evince strong cultural and physical ties to areas covered by this application. I also acknowledge that they exhibit strong ties to an Eastern Yugambeh identity or to a smaller clan/estate identity potentially at odds with the native title rights and interests claimed in this application. I have no doubt that their issues are significant and may well require adjudication by the Court in the determination of this native title application.

However, at this administrative decision–making level, I feel that the applicant has done enough to show that the decision–making processes of the native title claim group do not require the approval overall of Elders within the native title claim group.

It is difficult to be sure that there are earlier affidavits by some of the persons who are part of the Gold Coast applicant (**[Applicant 6 – name deleted], [Applicant 2 – name deleted]** and **[Applicant 1 – name deleted]**) in the first Eastern Yugambeh application saying that decisions are made under a traditionally mandated system requiring the Elders with the strongest physical connection to their land to reach consensus decisions. The Gold Coast applicant may well have to give evidence about this at the trial; however at this administrative level, I have decided that their most recently sworn affidavit evidence is sufficient to show that their traditionally mandated decision–making process is not dependent on Elders making binding decisions, but has the features I have outlined in these reasons and principally requires family groups within the wider native title claim group to make consensus decisions, which decisions can withstand dissent.

It remains for me to consider if the applicant followed its decision–making processes. I am satisfied that this has occurred. The evidence provided by the applicant shows that the proposed Gold Coast native title application was the subject of considerable and widespread consultation and discussion amongst the wider membership of the native title claim group over the course of March to June 2006. There were public forums in a number of regional locations during the course of March 2006 and then on 20 May 2006. The evidence of [**Person 1 – name deleted**] is that the objectors were also individually informed and offered an opportunity to participate in the authorisation process.

The evidence is to the effect that the various family groups discussed the proposed application and that their representatives then attended two meetings, on 24 May and 28 June 2006, to confirm that the application was supported by the various family groups and that the seven applicant persons have their authority to act as the applicant for the new application. The evidence is that the family groups considered the objections that had been made during the authorisation process, but nonetheless decided that they wished to proceed with the application.

It follows that I am satisfied that the requirements of s. 190C(4) are met as a result of the authorisation process conducted by the applicant in the first half of 2006, as set out in the applicant's authorisation affidavits in attachments R.1 and R.2 of the application.

Merit conditions: 190B

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.

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

Section 190B(2) requires that the information in the application describing the areas covered by the application 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. The information required to be contained in the application is that described in ss. 62(2)(a) and (b), namely:

(a) information, whether by physical description or otherwise, that enables the boundaries of:
   (i) the area covered by the application ; and
   (ii) any areas within those boundaries that are not covered by the application to be identified;

(b) a map showing the external boundary of the application area.

The application contains a written description of the internal and external boundaries in schedule B and attachment B respectively. A map showing the external boundary is found in attachment C of the application.

The written description in attachment B consists of details of metes and bounds travelled by the external boundary making reference to state and local government borders, topographic features and geographic coordinates (latitude and longitude) in decimal degrees, based on the Geocentric Datum of Australia (GDA94). This information can be verified against the map in attachment C, which depicts these features and also contains a coordinate grid. The map is a colour A3 map which clearly shows the external boundary as a bold blue outline. The map also contains a topographic image background, scale bar, north point and locality map. Finally, the map contains notes relating to the source, currency and datum used to prepare it. I note that the map was prepared by the Tribunal's Geospatial Services (Geospatial). In an assessment dated 2 June 2010, Geospatial express the opinion that the description and map are consistent and identify the application area with reasonable certainty. Geospatial identify one small error with one of the coordinates—coordinate Latitude 28.11063 South should read Latitude 28.110063 South. In my

view, this is clearly a typographical error and does not affect the overall certainty of the description of areas covered by the application for the purposes of s. 190B(2).

Having regard to the comprehensive identification of the external boundary in attachment B and the clarity of the mapping of the application area in attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

A written description of the areas within the external boundary that are not covered by the application (i.e. the internal boundary) is found in schedule B. This is a generic description that excludes from the application area any land covered by a range of grants or acts, including freehold and the acts described in s. 23B of the Native Title Act . It is then stated that if ss. 47, 47A or 47B apply to any such areas such that extinguishment must otherwise be disregarded, then the areas so described are, in fact, covered by the application. It is finally stated that the application does not include areas where native title has otherwise been extinguished.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of a tenure history or other information such that a more comprehensive description of these areas would be required to meet the requirements of the section. The applicant expressly states in schedule D that it has not made any searches of non–native title interests. In these circumstances, I find that the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless, it is reasonable to expect that the task can be done on the basis of the information in schedule B.

For these reasons, I am satisfied that the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters, and the requirements of s. 190B(2) are therefore met.

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.

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

The description of the native title claim group uses an 'apical ancestor model', where the members of the native title claim group are identified as the descendants (biological and adopted) of twelve named apical ancestors (three of whom appear as one ancestral line). As the description does not name the persons in the native title claim group, it is therefore necessary to consider the application against the requirements in subparagraph 190B(3)(b).

At [37] of *Doepel*, Mansfield J stated that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of [sic] any particular person in the identified native title claim group can be ascertained'. A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3): *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64] (*Western Australia v Native Title Registrar*).

The description of the persons in native title claim group is in the following terms:

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Gold Coast Native Title Group (also known by the inclusive label, the 'Eastern Yugambeh').
> The Gold Coast Native Title Group comprises all of:
> (a) the biological descendants of the following named apical ancestors:
> (i) Joseph Blow;
> (ii) Coolum;
> (iii) George Drumley (Darramlee);
> (iv) Sarah Drumley (Warri);
> (v) Jackey Jackey (Bilin Bilin), Mark Jackey, Harry Jackey;
> (vi) Nellie Jackey;
> (vii) John Alexander Sandy (Bungaree);
> (viii) Kitty Sandy (Yelganun);
> (ix) Slab;
> (x) Kipper Tommy Andrews;
> (b) the persons adopted by the named apical ancestors listed in (i) to (x) under paragraph (a) above in accordance with the law and custom;
> (c) the persons adopted by the biological descendants of the named apical ancestors listed in (i) to (x) under paragraph (a) above in accordance with law and custom;
> (d) the biological descendants of the adopted persons referred to in paragraphs (b) and (c) above in accordance with law and custom.

The description does require a further factual inquiry to establish if any particular person is in the group due to the requirement that a person claiming membership must show that they are a biological descendant of one or more of the apical ancestors or have been adopted, as described in paragraphs (b), (c) and (d) of the description.

However, it is my view that the description is clearly within the bounds of that considered by Carr J in *Western Australia v Native Title Registrar*. I am provided with a starting point, that is, the names of the apical ancestors, and from there it is possible, with a further factual inquiry, to work out who is descended (via biological or adopted descent) from such persons. I note that the most recent amendment of the application clarifies how adoption works for the native title claim group in terms that, in my view, enables an inquiry of the kind discussed in *Western Australia v Native Title Registrar*.

It follows that I am satisfied that the description of the native title claim group is sufficiently clear so that it can be ascertained whether any particular person is in the group.

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.

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

My view is that for a description to meet the requirements of this section, it must describe what is claimed in a clear and easily understood manner: *Doepel* at [91] to [92], [95], [98] to [101], [123]. Any assessment of whether the rights can be prima facie established as 'native title rights and interests', as that phrase is defined in s. 223, will be discussed in relation to the requirement in s. 190B(6).

Attachment E contains the following description of the claimed native title rights and interests:

1. The following non-exclusive rights and interests are claimed, jointly and severally:
   a. The right to be present on, use and enjoy the application area.
   b. The right to inherit and succeed to the native title rights and interests.
   c. The right to make use of the application area by:
      i. hunting, fishing and gathering on, in or from the application area for non-commercial purposes;
      ii. conducting ceremonies and meetings on the application area;
      iii. being buried on, and burying native title holders on, the application area;
      iv. maintaining springs and wells in the application area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;
      v. taking, using and enjoying the natural resources (Other than minerals wholly owned by the Crown, and petroleum. "Minerals" has the meaning attributed to it in the Mineral Resources Act 1989 (Qld) as in force at the date of this application. "Petroleum" has the meaning attributed to it in the Petroleum Act 1923 (Qld) as in force at the date of this application) found on or within the application area, for non-commercial purposes;
      vi. maintaining and protecting by lawful means places of importance and areas of significance to the native title holders;
      vii. protecting the land, waters and natural resources 1 of the application area by taking steps to prevent acts which are not carried out in the exercise of statutory rights or any common law rights and which may cause damage, spoliation or destruction of the land, waters and/or natural resources of the application area;
      viii. using and enjoying the application area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the native title holders.
   d. An interest in the management and use of the application area and its natural resources.

   The exercise of these rights and interests is in accordance with the traditional laws acknowledged and traditional customs observed by the applicants.

2. The rights and interests in paragraph 1 (above) are claimed to the extent that the exercise of them is consistent with the rights and interests below:
   a. With respect to those parts of the application area, other than land or waters to which s47A of the *Native Title Act 1993* ("NTA") applies, which are, or have been, the subject of a

previous "non-exclusive possession act" within the meaning of s23F NTA, the applicants claim the native title rights and interests set out above subject to the rights and interests created in the "non-exclusive possession act" which are not inconsistent with the rights and interests claimed and, in the case of rights granted which are inconsistent with the rights and interests claimed, subject to any suspension or regulation of the native title rights and interests which those inconsistent rights and interests cause.

b. With respect to those parts of the application area, other than land or waters to which s47A NTA applies, which are, or have been, the subject of:

i. a Category B intermediate period act within the meaning of s232C NTA; or

ii. a Category C intermediate period act within the meaning of s232D NTA; or

iii. a Category D intermediate period act within the meaning of s232E NTA,

the applicants claim the native title rights and interests set out above subject to the rights and interests created in the "non-exclusive possession act" which are not inconsistent with the rights and interests claimed and, in the case of rights granted which are inconsistent with the rights and interests claimed, subject to any suspension or regulation of the native title rights and interests which those inconsistent rights and interests cause.

c. With respect to those parts of the application area, other than land or waters to which s47A NTA applies, which are, or have been, the subject of:

i. a Category B past act within the meaning of s230 NTA; or

ii. a Category C past act within the meaning of s231 NTA; or

iii. a Category D past act within the meaning of s232 NTA,

the applicants claim the native title rights and interests set out above subject to the rights and interests created in the "non-exclusive possession act" which are not inconsistent with the rights and interests claimed and, in the case of rights granted which are inconsistent with the rights and interests claimed, subject to any suspension or regulation of the native title rights and interests which those inconsistent rights and interests cause.

I find the description of the rights and interests to be clear and understandable and I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

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).

My consideration of the application against s. 190B(5) does not involve testing 'whether the asserted facts will or may be proved at the hearing, or [assessing] the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Doepel* at [17]. Although I am required 'to address the quality of the asserted factual basis' I must assume that what is asserted is true, and assuming it is true, the task is whether I am satisfied that 'the asserted facts can

support the claimed conclusions'—*Doepel* at [17]. This assessment of the task at s. 190B(5) from *Doepel* was approved in *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (French, Moore and Lindgren JJ) (*Gudjala FC*) at [82]–[83], an appeal from the decision by Dowsett J in *Gudjala 2007*.

The Full Court in *Gudjala FC* commented that a sufficient factual basis for the assertions in s. 190B(5) must 'be in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and must be something 'more than assertions at a high level of generality'—at [92]. The Full Court also said that providing a sufficient factual basis does not require the applicant to 'provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim'—at [92]. The Full Court concluded that the applicant is 'not required to provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92].

The Full Court indicated at [93] of *Gudjala FC* that it would be wrong for the Registrar to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim'.

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the material as if it were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the application and the accompanying documents in relation to the factual basis, apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out s. 190B(5).

Gudjala FC at [68] to [72] and [77] considers the analysis by Dowsett J in *Gudjala 2007* of the elements a sufficient factual basis must address to meet the requirements of s. 190B(5). There is nothing to indicate that the Full Court considered Dowsett J to have erred. It appears that Dowsett J, although mindful of the Full Court's direction on how to treat the factual basis materials, applied the same principles to his analysis of that factual basis, when he again considered the Gudjala People #2 application against the registration test in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [18] to [77]. In my view, comments by Dowsett J in *Gudjala 2009* about what a sufficient factual basis must address are similarly relevant to the Registrar when undertaking the task at s. 190B(5).

I refer to the comment by Dowsett J in *Gudjala 2009* that the Registrar, in performing the task at s. 190B(5), must 'be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof'—*Gudjala 2009* at [29].

It would not, according to Dowsett J in *Gudjala 2009*, be sufficient for an applicant to simply assert that the claim group's laws and customs are traditional because they derive from a pre-sovereignty society of which they are descendant. That would merely be a restatement of the claim without any factual basis; 'there must at least be an outline of the facts upon which the applicant relies'—at [29].

In my view, the applicant must describe the basis upon which the claimed native title rights and interests are alleged to exist:

> This is clearly a reference to the existence of rights vested in the claim group. Thus, it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to

support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—*Gudjala 2007* at [39].

I note that there are a number of persons within the asserted native title claim group who oppose the anthropological or evidentiary foundations for this new native title claim, including the composition of the asserted native title group, the asserted claim boundaries and the identity of at least two of the seven ancestral lines. I have discussed this information in more detail in my reasons above for the authorisation condition.

I note also that there is an objection from an indigenous family who assert native title to the south of and potentially within the southern reaches of the application area ([**Family 11 – name deleted**]). QSNTS also provided adverse information on behalf of the Quandamooka People to the effect that the application area extended too far north into South Stradbroke Island, but withdrew their objection before the first registration test decision.

Having regard to this case law about the nature of the task for the Registrar at s. 190B(5), it is my view that disputed issues of fact, such as these, are not the province of my consideration for this and the related conditions at ss. 190B(6) and (7). It seems to me that it is not my task to supplant the Court's role. What is required is to consider the quality of the applicant's asserted factual basis for the 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: *Doepel* at [17]; approved in *Gudjala FC* at [82]–[83].

In other words, the role is to determine whether the asserted facts can support the claimed conclusions; but it 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. I am of the view that disputed issues relating to the area over which a native title determination should be made or the identity of the native title holders are issues for the trial and it is not appropriate that I consider them here.

It is in relation to the requirements of s. 190B(5) that the application has undergone a significant amendment. Schedule F (the place within the application for a general description of the factual basis) now relies principally on an anthropological report dated March 2010, by an anthropologist, [**Anthropologist 1 – name deleted**], to Queensland South Native Title Services Ltd, a full copy of which is provided in attachment T of the application. This is a weighty document—78 pages in length with a large number of references (see the list at the end of the report) and an appendix with genealogies depicting the seven ancestral lines for the native title claim group.

The applicant additionally relies on the six affidavits from members of the native title claim group within attachments F.1 to F.6 of the original application—[**Person 6 – name deleted**] (27/06/2006), [**Person 7 – name deleted**] (18/08/2006), [**Person 8 – name deleted**] (28/08/2006), [**Person 9 – name deleted**] (29/06/2006), [**Person 10 – name deleted**] (undated) and [**Person 11 – name deleted**] (23/08/2006).

Turning then to each of the particular requirements of s. 190B(5):

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

Schedule F refers me to the following sections of the anthropological report for the factual basis to support this assertion: sub-sections 2.2, 2.3, 3–6 and the genealogies in appendix 1. I am also referred to the affidavits by the six members of the native title claim group provided when the application was first filed in September 2006.

I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for this assertion needs to address:

- That the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times.
- That there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

This analysis of what the factual basis materials must support was not criticised by the Full Court in *Gudjala FC*—see [69] and also at [96]. I note that the elements discussed by Dowsett J at [52] and that referred to by the Full Court at [96] appear to refer to the assertion that there is a cohesive community of people who observe 'traditional'[2] law and custom and who are associated with the application area over the period since sovereignty, or European settlement with appropriate inferences being drawn back to sovereignty, having regard to the situation at settlement (see *Gudjala FC* at [96] and *Gudjala 2009* at [26]).

At [8] of the report the author states that when she considers the historical record as a whole, it is supportive of the assertion that the indigenous groups and families at the time of European settlement of the area (around the 1840s[3]) 'shared a dialect (though with variations) and high level of uniting social and jural interaction' and 'were united by a body of law and custom that they shared with Aboriginal groups in the broader region'. These laws and customs 'gave rise to localised rights and interests in land, which the predecessors of the current claimants held' over the application area. (These statements are found on p. 7 of the report.)

There is an extensive analysis of the relevant historical record, including the writings of European setttlers and observers in the period following settlement and the more considered research by early historians and ethnographers. The author has also examined more recent writings and anthropological research, including that undertaken by McKeown in 2001 (*The Northern Bundjalung: Native Title Holders in the Tweed River Region, Draft. Preliminary Anthropological Report)*.

The author concludes at [41] that it is difficult to conclusively determine the identity of the relevant society and the boundaries of that society in relation to the area of the Gold Coast application. She notes that there is some conflict about the appropriate name for this society, as evidenced in her summary of the relevant writings and historical record. The author concludes at [44] that despite the confusion of names, the linguistic evidence suggests that a single dialect (with regional variations) was spoken across the claim area; the Yugembah dialect. In the author's view it is commonly accepted that Yugambeh is linked to the wider Bundjalung language, citing Sharpe (*Report to FAIRA on the Linguistic Literature of the Brisbane Region*, unpublished, July

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[2] The meaning of 'traditional', as it appears in s. 223(1)(a), is the subject of the decision in Members *of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta HC*).

[3] See [109]; p. 37 of the report.

2000:19). The author states at [45] that 'Eastern Yugambeh' is identified by the claimants as a unifying identity amongst the claim group; it distinguishes them from the Yugambeh speaking neighbours to the west around Beaudesert, the Albert River basin and Logan River headwaters. It is more inclusive than the earlier 'Kombumerri'.

The author concludes at [46] that the name 'Eastern Yugambeh' reflects the recognition of a shared wider system of law and custom amongst the wider Yugambeh people and the broader Bundjalung language group. I note that this is not a view shared by those persons who provided adverse information to the Registrar when the application first underwent the registration test. The objectors appear to support a view discussed in a 1914 publication by Lane and Allen which appended a map depicting the general boundary of the Wangerriburra Tribe of the Albert River and showed a number of smaller tribes within this region, including the Kombumerri or Nerang Tribe (at [22]–[23] on pp. 11–12).

As I discuss at the commencement of these reasons, for the purposes of s. 190B(5), the applicant is obliged to put forward the facts said to support their argument about the identity of the relevant native title holders and the normative system under which their asserted native title is said to derive; I must accept that what is asserted is true, and I do. The dispute that arises on those facts is for the trial judge to resolve.

The report addresses the particular requirements of subparagraph 190B95)(a), namely, that the claim group currently has, and their predecessors had, the relevant association. In my view this is principally found at [109]–[146] of the report.

The report discusses each of the twelve apical ancestors named in schedule A, their association with the application area and the association by their descendants with the application area as a whole. The author states that there is archival evidence of the birth, death and marriage of a number of ancestors within the application area or the near vicinity at the earliest times of European settlement. There is also archival and oral evidence that a number of the ancestors were closely aligned with particular areas or the region as a whole, including attending corroborees in the latter half of the 19th century, being ordained with kingship status by the settlers, evidence of walking over country by their offspring to visit relatives, escaping the authorities to return to the area and documented evidence of descendants living on or within the fringes of the application area for most of the 20th century.

I have additionally considered the affidavits provided by the six claim group members in attachment F of the application. Each deponent discusses a lifelong and ongoing association with the application area in the context of their descent within the ancestral lines identified in the report and in the context of their Eastern Yugambeh identity.

Having regard to all of this information, I am satisfied that the factual basis provided to support the assertion that the native title claim group have and their predecessors had, an association with the area, is sufficient to support that assertion.

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

The language of the assertion in subparagraph (b) nearly mirrors that found in s. 223(1)(a). In my view, I must therefore be satisfied that the factual basis is sufficient to support an assertion that

the claimed native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' highlights that its meaning in ss. 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act.

Accordingly, as was discussed by Dowsett J in *Gudjala 2007* at [26], the factual basis provided by an applicant must pay attention to the High Court's decision in *Yorta Yorta* and in Full Court decisions since as to what is meant by rights and interests being possessed under 'traditional' laws and customs. This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC* who noted that one question, amongst others, which needs to be addressed in the factual basis materials is whether 'there was, in 1850–1860[4], an indigenous society in the area, observing identifiable laws and customs'—at [96].

The following is a brief synopsis of the case law which has developed around the requirement in 223(1)(a) that native title rights and interests must be possessed under 'traditional' laws and customs:

- For laws and customs to be 'traditional', they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty.
- A society is a body of people united in their acknowledgement and observance of laws and customs with normative content.
- The acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time.
- It is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs.
- Change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[5]

Having regard to the case law about what it means for native title to be possessed under traditional laws and customs, it is my view that a sufficient factual basis for the assertion in s. 190B(5)(b) needs to address that the traditional laws and customs giving rise to the claim to native title rights and interests have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I refer to comments by Dowsett J in *Gudjala 2007* that the factual basis materials for this assertion must address:

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[4] This being the relevant time of European settlement of the Gudjala application area.

[5] The special meaning of the word 'traditional' in s. 223(1) was first considered by the High Court in *Yorta Yorta*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta HC*, *Alyawarr FC* and *Bennell FC*.

- That the laws and customs currently observed have their source in a pre–sovereignty society and have been observed since that time by a continuing society—*Gudjala 2007* at [63];
- That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—*Gudjala 2007* at [65] and see also at [66] and [81];
- That explains the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage', although the apical ancestors need not themselves have comprised a society—at [66] and [81].

This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC* at [71]–[72] and [96].

I refer also to these additional comments by Dowsett J in the later *Gudjala 2009* decision about the requirements in s. 190B(5)(b):

- Identification of an indigenous society at sovereignty is the starting point, as it 'is impossible to identify a system of laws and customs as such without identifying the society which recognizes and adheres to those laws and customs' [36].
- There must be some link between the claim group and claim area, including the identification of a link between the apical ancestors and the relevant society, although it is not necessary that it be shown that the ancestors were members of the relevant society [40].
- Such laws and customs that exist now may not be identical to those that existed prior to sovereignty but must 'have their roots in the pre-sovereignty laws and customs' [22].

It seems that the factual basis needs to identify the relevant indigenous society operating in the application area at the time of sovereignty or, at the very least, the time of contact/settlement. Once identified, it follows that the factual basis must reveal the existence of laws and customs with a normative content that are associated with that society. In other words, the factual basis needs to discuss the relationship between the laws and customs now acknowledged and observed and those which were acknowledged and observed before sovereignty.

The application did not satisfy this particular element of s. 190B(5) in February 2008 because of the delegate's finding that the material did not disclose the identity of the relevant pre-sovereignty society and how the asserted laws and customs were derived or rooted in a pre-sovereignty normative system.

It is my view that this deficiency has been overcome by the information in the anthropological report. It is my view that the discussion in the report, when read with the six original affidavits, provides sufficient support for the factual basis in s. 190B(5)(b).

The support provided by the anthropological report is twofold:

- it elaborates on the linkages between the current laws and customs described in the six affidavits and the traditional laws and customs of an Indigenous society in the application area at the time of European settlement of the area; and
- it speaks to the continuity of traditional law and custom since contact by the native title claim group as a whole.

The report goes into considerable detail about the available historical and concurrent record about the relevant normative system operating in the application area. The central thesis by the author is that the current claimants belong to a society that is rooted in a pre-sovereign society in South East Queensland which stretches from northern New South Wales to the Sunshine Coast and west to the Bunya Mountains. As I understand it, the author concludes that this wider regional system is the province of the broader Bundjalung language group with the Eastern Yugambeh being a sub-group of the Yugamber, who in turn fall within the Bundjalung language group.[6]

The report discusses the current membership of the group as the known descendants of the 12 persons who have been positively identified with an association to the application area in the historical record at the time of first contact and who, it is opined, must have belonged to the relevant society.[7]

The report extensively discusses the laws and customs of the relevant pre-sovereign society (at section 2.4), including those relating to land-holding and membership rights within the land-holding group, which are acquired, then as now, primarily by descent.[8]

The report provides genealogies for each of the ancestral lines for which there are known descendants in appendix 1. The report concludes that the native title claim group are the known descendants of these ancestral lines.

It is my view that the affidavits in attachment F of the application, when read with the anthropological report, also provide support for the assertion in s. 190B(5)(b) speaking as they do to the current existence of a number of interrelated persons observing the laws and customs of their antecedents going back in time to the apical ancestors and who collectively assert an Eastern Yugambeh identity over the application area.

Based on the material before me, I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed rights and interests.

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

I take the view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta*, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way: see *Yorta Yorta* at [47] and also at [87].

Gudjala 2007 indicates that this particular assertion may require the following kinds of information:

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[6] At [46] and [144]–[145].
[7] At [116]–[137] and [139]–[143].
[8] At [107].

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* at [96] appears to agree that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

The anthropological report, discussed above, identifies that the society at sovereignty was a wider regional Bundjalung society under which the Eastern Yugambeh were a subgroup with land holding rights that traverse the area of the Gold Coast application. The affidavits provide examples of how the claim group have continued to observe and acknowledge traditional laws and customs, including those that allow them to access and use the application area under the laws and customs that have been in operation in the application area since the earliest contact with European settlers.

Having regard to all of these materials, I am of the view that there is a sufficient factual basis for the assertion that the native title claim group has continued to hold the claimed native title in accordance with the traditional laws and customs identified in the anthropological report.

Conclusion

To conclude, the application satisfies the condition of s. 190B(5) overall because I am satisfied that the factual basis is sufficient to support each of the three particular assertions in s. 190B(5), as set out in my reasons above.

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.

The application satisfies the condition of s. 190B(6) as I consider that, prima facie, at least some of the claimed native title rights and interests can be established.

I refer to the following comments from *Doepel* about the nature of the test at s. 190B(6):

- It is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].
- It involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

The native title rights and interests claimed by the applicant have been reproduced in my reasons at s. 190B(4). In my view there is sufficient material to prima facie establish the observance of traditional law and custom giving rise to all but one of the rights described in attachment E. The exception is the right identified at paragraph 1(d), being 'an interest in the management and use of the application area and its natural resources.'

For the remaining rights, I note my view above at s. 190B(5) that the applicant has provided a sufficient factual basis to support the assertion that there exist traditional laws and customs aacknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests. I note that these rights are non-exclusive in character and do not assert ownership or control over others, including other indigenous persons. This appears in keeping with the relevant normative system identified in the anthropological report that the area falls within a wider regional society of which the native title claim group are a subgroup with rights and interests in the area covered by the application.

I have found many examples in the six affidavits by the members of the native title claim group in attachment F which indicate that these are rights that currently exist under the traditional laws and customs of the native title claim group, by which the group access, use and enjoy the area, including by hunting, fishing, gathering, conducting ceremonial life and maintaining and protecting special sites. That the group have a right to inherit and succeed to the claimed rights and interests is evidenced in their factual basis materials about the rules of descent from ancestral lines which govern membership of the native title claim group.

In relation to paragraph 1(d), I have not been able to find any material to support the existence of a traditional law and custom underpinning a right and interest of this nature.

The rights and interests I consider to be prima facie established are:

a. The right to be present on, use and enjoy the application area.

b. The right to inherit and succeed to the native title rights and interests.

c. The right to make use of the application area by:

i. hunting, fishing and gathering on, in or from the application area for non-commercial purposes;

ii. conducting ceremonies and meetings on the application area;

iii. being buried on, and burying native title holders on the application area;

iv. maintaining springs and wells in the application area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;

v. taking, using and enjoying the natural resources (Other than minerals wholly owned by the Crown, and petroleum. "Minerals" has the meaning attributed to it in the Mineral Resources Act 1989 (Qld) as in force at the date of this application. "Petroleum" has the meaning attributed to it in the Petroleum Act 1923 (Qld) as in force at the date of this application) found on or within the application area, for non-commercial purposes;

vi. maintaining and protecting by lawful means places of importance and areas of significance to the native title holders;

vii. protecting the land, waters and natural resources of the application area by taking steps to prevent acts which are not carried out in the exercise of statutory rights or any common law rights and which may cause damage, spoliation or destruction of the land, waters and/or natural resources of the application area;

viii. using and enjoying the application area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the native title holders.

I direct that the Register entry include the contents of the final sentence to paragraph 1 in attachment E (The exercise of these rights and interests is in accordance with the traditional laws acknowledged and traditional customs observed by the applicants.)

I also direct that the Register entry include the entirety of the qualifications and exclusions to the claimed rights and interests within paragraphs 2(a) to 2(c) of attachment E.

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.

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

I understand the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group, being traditional' as discussed in *Yorta Yorta*. I note also that [29.19] of the explanatory memorandum to the Native Title Amendment Act 1998 indicates that parliament intended that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

In my view, there are numerous and specific references to members of the native title claim group throughout the anthropological report and affidavit material which provides satisfactory evidence of the requisite traditional physical connection by members of the native title claim group. The affidavits in attachment F discuss how these members of the claim group are or have been present on and access areas covered by the application pursuant to their traditional laws and customs, including by fishing, gathering flora and seeking to protect sites. There is extensive information about various families, such as the [**Families 2 listed – names deleted**] families who have all lived in the application area or visited it extensively and the inter-generational transmission of traditional knowledge.

On the basis of this material, I am satisfied that there are numerous current members of the native title claim group (including the [**Families 2 listed – names deleted**] families) who currently have or previously had a traditional physical connection with a part of the land or waters covered by the application.

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 contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result below.

No approved determination of native title: 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.

The application meets the requirement under s. 61A(1). There are no approved determinations of native title over the application area.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which

> (a) a previous exclusive possession act (see s. 23B)) was done;
> (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 provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:

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

The application meets the requirement under s. 61A(2), as limited by s. 61A(4). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area: see schedule B.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the 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) 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 provisions as mentioned in s. 23I in relation to the act.

The application meets the requirement under s. 61A(3), as limited by s. 61A(4). The rights and interests described in attachment E do not indicate a claim to exclusive possession, occupation, use and enjoyment over the application area. I note also statements in paragraph 2(a) that exclusive possession is not claimed over areas subject to valid previous non-exclusive possession acts.

The application satisfies the condition of s. 190B(8), because it meets the requirements of s. 61A, as set out in the reasons above.

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 subcondition of s. 190B(9)(a). Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown and the native title rights and interests claimed in schedule E similarly do not reveal any such claim.

The application satisfies the subcondition of s. 190B(9)(b). The application does not extend to offshore places.

The application satisfies the subcondition of s. 190B(9)(c). The final paragraph of schedule B identifies that the application excludes land or waters where the native title rights and interests have been otherwise extinguished.

[End of reasons]