National Native Title Tribunal

Registration test decision

Application name	Numbahjing Clan within the Bundjalung Nation
Name of applicant	Susan Anderson and Douglas Anderson
State/territory/region	New South Wales
NNTT file no.	NC08/2
Federal Court of Australia file no.	NSD1844/2008
Date application made	26 November 2008
Date application last amended	9 March 2011 pursuant to leave granted by the Federal Court on 17 February 2011
Date of Decision	25 August 2011
Name of delegate	Nadja Mack

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)(the Act).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A.

For the purposes of s. 190D(1)(b), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of Reasons: 5 September 2011

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Nadja Mack

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D under an instrument of delegation dated 24 August 2011 and made pursuant to s. 99.

Reasons for decision

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Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision not to accept the Numbahjing Clan within the Bundjalung Nation application (the amended application) for registration pursuant to s. 190A of the Act.

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

Application overview

The original application (original application) was made on 26 November 2008. The Registrar of the Federal Court of Australia (the Court) gave a copy of the amended application to the Registrar on 9 March 2011 pursuant to s. 64(4) which has triggered the Registrar's duty to consider the claim made in the amended application under s. 190A.

As the amended application has not been amended pursuant to an order of the Court under s. 87A, and has not previously been registered since it was first made, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. Therefore, as the Registrar was given the amended application under s. 64(4), in accordance with s. 190A(1), I must consider the claim made in the amended application. I may only accept the amended application for registration if it satisfies all of the conditions in ss. 190B and 190C—this is the combined effect of ss. 190A(6) and (6B). This is commonly referred to as the registration test.

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

I conclude that pursuant to ss. 190A(6) and (6B), the claim in the amended application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

This is the third native title claimant application brought by the Numbahjing Clan within the Bundjalung Nation. A first application made in 2001 was dismissed by consent on 25 May 2004. The second application made in 2007 was discontinued by consent on 31 October 2008. The third application (referred to in these reasons as the original application) was filed on 26 November 2008. In February 2009, after a preliminary assessment of the original application against the requirements for registration by a Delegate, the applicants foreshadowed amendments to the original application, but these were not permitted by the Court at that time. On 25 May 2009, the Delegate decided that the original application did not satisfy the conditions of the registration test. The Applicant initiated two concurrent processes for review of this decision (a judicial review under s. 5 of the *Administrative Decision (Judicial Review)* Act 1977 (Cth) and s. 38B of the *Judiciary Act 1903* (Cth) and a review under s 190F(1)).Both review proceedings were discontinued by consent on 25 March 2010. The Applicant filed a notice of motion seeking leave to amend the

original application on 14 July 2010. Leave was granted by the Court on 17 February 2011 and the amended application was filed on 9 March 2011.

Information considered when making the decision

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

I 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]).

Attachment B to these reasons lists all documents and other information that I have considered in coming to my decision about whether or not to accept the application for registration. I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have not considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' - see s. 94D. Further, mediation is private as between the parties and is also generally confidential: see also 94K and 94L.

Procedural fairness steps

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

On 9 March 2011, the Tribunal advised the State that the registration test would be applied to the amended application inviting submissions by 20 April 2011.

The State provided submissions on 6 May 2011 which rely, in part, on its submissions dated 1 April 2009 made in relation to the original application. The State's submissions were provided to the Applicant for comment on 9 May 2011.

In response, on 23 May 2011 the Applicant submitted documents it relied on in the (since discontinued) application for review of the decision by the delegate of 25 May 2009 not to register the original application:

- Outline of Submissions, dated 8 January 2010
- Submissions in Reply [to the State's submissions of 29 January 2010], dated 30 September 2010.

The submissions were provided to the State on 25 May 2011 for comment. On 30 May 2011 the State provided its submissions dated 29 January 2010 (submitted for the purposes of the review proceedings).

The Applicant was advised of this fact on 31 May 2011 and given a further opportunity to address the State's further submissions. On 10 June 2011 the Applicant submitted that the Federal Court's judgment in Anderson *on behalf of the Numbahjing Clan within the Bundjalung Nation v NSW Minister for Lands* [2011] FCA 114 of 17 February 2011 was relevant to the Delegate's consideration.

Procedural and other conditions: s. 190C

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

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

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

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

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirement of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Also, subsection 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

My consideration of each of the particular parts of ss. 61 and 62 (which require the application to contain details/other information or to be accompanied by an affidavit or other documents) is detailed below.

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

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). If the description of the native title claim group indicates that not all

persons in the native title claim group have been included, or that it is in fact a subgroup of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I could not accept the claim for registration—*Doepel* at [36].

I am not required to go beyond the material contained in the application and in particular I am not required to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group as described is in reality the correct native title claim group—*Doepel* at [37].

The description of the native title claim group, the Numbahjing Clan within the Bundjalung Nation, is set out in Schedule A of the application. Schedule A, describes the Numbahjing Clan within the Bundjalung Nation as follows:

1. The native title claim group is made up of those members of the Bundjalung People who, according to traditional laws acknowledged and customs observed:

a) connect with the area described in schedule B [...] through biological descent from John Jack Cook born in the mid 1850's and died in 1961 and;

b) have a communal native title in the application area, from which rights and interests derive.

2. The claimants, by definition, are comprised of all the persons descended from the apical ancestor of John Jack Cook

Social Organisation

3. The Numbahjing are a clan group recognised with the Bundjalung Nation
4. The native title claim group made up of those persons who by bloodline are the patrilineal or matrilineal descendants of John Jack Cook c1855—1961.
5. The rule of adoption within the Numbahjing is that rights, responsibilities and decisions about country and carry out business for Native Title are to those members who have direct biological descent from the Apical Ancestor
6. The Numbahjing Clan that make up the Native Title Claim Group are the direct descendants of John Jack Cook—the Applicants mothers father the apical Bundjalung ancestor identified and recorded upon the arrival of the colonists

There is nothing on the face of the application which leads me to conclude that the above description indicates that not all persons in the native title group have been included, or that it is in fact a subgroup of the native title claim group.

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

The name and address for service of the Applicant is found in Part B of the application.

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

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

The application contains a description of the persons in the native title claim group at Schedule A. In accordance with *Doepel*, I consider whether the description is sufficiently clear so that it can be ascertained whether any particular person is one of those persons, under the corresponding merit condition in s. 190B(3).

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 approved determination of native title, 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) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

Section 62(1)(a) provides that an application must be accompanied by an affidavit sworn/affirmed by the Applicant in relation to the matters specified in subparagraphs (i)—(v).

The amended application is accompanied by two s. 62(1)(a) affidavits from the persons jointly comprising the Applicant, Mr Douglas Anderson and Ms Susan Anderson. Both their affidavits are dated 25 November 2008.

I note that neither of the affidavits attests to the place where the deponent swore to/affirmed the affidavit. This issue may go to the question of whether the affidavits have been competently witnessed. I have, however, decided to leave aside this irregularity, given that the affidavits have been accepted by the Court when filed in their current form.

I am satisfied that Ms Anderson's affidavit sufficiently addresses the matters required by s. 62(1)(a)(i)—(v).

Mr Anderson's s. 62(1)(a) affidavit addresses the matters required by s. 62(1)(a)(i)—(iv) but does not set out details of the process of decision-making complied with as required by s. 62(1)(a)(v). I note that in paragraph 3 of his affidavit Mr Anderson states that he has 'read the affidavit deposed by my sister' and 'confirm[s] the matters that she has stated concerning the Numbahjing Clan as being true and accurate', this statement is not sufficient to address the requirements of s. 62(1)(a)(v). Whilst it is possible in the circumstances to infer that 'the affidavit deposed by my sister' is Ms Anderson's affidavit of 25 November 2008, it would not , in my view, be appropriate for the delegate to regard the non-specific reference to 'matters that she has stated concerning the Numbahjing Clan' as an outline, by Mr Anderson, of the details of the process of decision-making required by s. 62(1)(a)(v).

This was brought to the attention of the Applicant in April 2009 when the registration test was applied to the original application and in response, the Applicant filed an additional affidavit by Mr Anderson on 27 April 2009. In the additional affidavit, dated 16 March 2009, an outline of the

decision-making process is provided which is sufficient to satisfy the requirement of s. 61(1)(a)(v). I note in relation to this affidavit that it was not attached to the amended application. As it remains part of the Court's file for this matter, in my view, it is to be regarded as accompanying the application and as such to be taken into consideration by me when assessing the amended application against this requirement of the registration test.

For the above reasons I am of the view that the application meets all of the requirements of s. 62(1)(a).

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

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

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

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

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

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

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

Schedule B of the application refers to Attachment B, which contains a description of the external boundaries of the area covered by the application. Schedule B also provides a description of those areas within the external boundaries which are not covered by the application.

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

Schedule C refers to Attachment C, which is a map showing the application area and its boundaries.

Searches: s. 62(2)(c)

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

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

Schedule D states that 'the applicants submit that tenure history is held by the NSW minister' which I take to mean that no searches have been carried out by the Applicant. There is no information before me to indicate that the Applicant has made any searches of the kind described in this section.

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

Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

I assess the adequacy of the description in the corresponding merit condition at s. 190B(4) below.

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

Schedule F provides a general description of the rights and interests claimed and the factual basis for the assertions set out in s. 62(2)(e).

Further information is contained in Schedule G, the s. 62(1)(a) affidavits, Ms Anderson and Mr Anderson's additional affidavits of 9 July 2010 and the affidavits of *[name removed]* and *[name removed]*, both dated 16 November 2009.

The description does more than recite the particular assertions and, in my view, meets the requirements of a general description of the factual basis for the assertions identified in this section.

I assess the adequacy of the description in the corresponding merit condition at s. 190B(5) below.

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

Schedule G sets out details of activities currently carried out by the native title claim group in relation to the area claimed. Further information is contained in Schedules F and M and in the affidavits that accompany 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 amended application **contains** all details and other information required by s. 62(2)(g).

Schedule H sets out that 'the applicants are not aware of any application seeking determination of Native Title over any part of the claim area'.

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

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

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

Schedule HA states that 'the applicants are not aware of any notifications pursuant to s. 24MD(6B)(c) of the NTA to the whole or part of the area'. There is no information before me to indicate that the Applicant is aware of any notifications of the kind described in this section.

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

Schedule I states that 'currently there are no current s. 29 Notices known to the Applicant in the determination area'. There is no information before me to indicate that the Applicant is aware of any notifications of the kind described in this section.

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

The Tribunal's Geospatial Services conducted a'Geospatial Assessment and Overlap Analysis' of the area covered by the application (the 'geospatial report') dated 21 March 2011. The report

confirms that there are no other applications that cover part or all of the area covered by this application. I have undertaken a further search (ISpatial assessment) on 25 August 2011 which confirms this search result at the time of making this decision.

As there are no overlapping applications I need not consider the issue of common membership.

Subsection 190C(4) Authorisation/certification

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

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

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

The application is not certified. Therefore the requirements of s. 190C(4)(a) do not apply and I must consider whether I am satisfied that the requirements of s. 190C(4)(b) are met.

Section 190C(4)(b) sets out that the Registrar must be satisfied that:

- the Applicant is a member of the native title claim group; and
- is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Section 190C(5) adds that the Registrar can only be satisfied that the condition in s. 190C(4) has been met in circumstances where an application has not been certified, if the application:

- includes a statement to the effect that the requirement set out in paragraph (4)(b) of s. 190C has been met; and
- briefly sets out the grounds on which the Registrar should consider that it has been met.

Are the requirements of s. 190C(5) met?

The application contains the relevant statements and briefly sets out the relevant grounds in Schedule R and in the Applicant's s. 62(1)(a) affidavits. I am therefore satisfied that the requirements of s. 190C(5) have been met.

Are the requirements of s. 190C(4)(b) met?

The first requirement of this section is that the Applicant is a member of the native title claim group. The persons jointly comprising the Applicant state in their s. 62(1)(a) affidavits that they are 'an Elder of the Numbahjing Clan'. On the basis of this information I am satisfied that both Mr and Ms Anderson are members of the native title claim group.

In relation to the second requirement that the Applicant is authorised to make and deal with the application, I note that the term 'authorise' as used in s. 190C(4)(b) is defined in s. 251B. That is, an

Applicant's authority from the rest of the native title claim group to make the application and deal with related matters must be given in one of two ways:

- in accordance with a process of decision-making that must be complied with under the traditional laws and customs of the persons in the native title claim group; or
- where there is no such process, by a process agreed to and adopted by the group.

There is a long line of authority that an agreed and adopted process can only be used where there is no traditional process mandated for authorising 'things of that kind' (i.e. authorising an Applicant to make a native title determination application)—see for example *Evans v Native Title Registrar* [2004] 1070 at [7] and [52].

Doepel at [78] is authority that s. 190C(4)(b) 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given'.

I note that I am not confined to the statements in the application and in the s. 62(1)(a) affidavits when deciding whether or not s. 190C(4)(b) is satisfied. I may also have regard to other material provided by the applicant or otherwise available in relation to the authorisation of the Applicant—see *Strickland v Native Title Registrar* (1999) FCA 1530 at [57].

In summary, the test under s. 190C(4)(b) requires me to ascertain from the material before me whether the claim group has a mandated traditional decision-making process and if f this is the case, whether this mandated process was followed. If there is no mandated process that must be complied with, then I must consider whether the persons in the native title claim group agreed to and adopted a decision-making process and that they then followed it in authorising the Applicant.

Does the claim group have a mandated traditional decision making process?

Information before the delegate

Part A (2) of the application, Schedule R and Ms and Mr Anderson's s. 62(1)(a) affidavits of November 2008 and March 2009 provide authorisation information not only in relation to the current application but also regarding (what is referred to as) the 'original' application (that made in 2007) . I note that in my view the information before me is contradictory as it variously refers to a traditionally mandated decision-making process (as envisaged under s. 251(B)(a)) and an agreed to and adopted process under s. 251(b)(b). I will discuss this in detail below.

Part A (2) of the application

Part A (2) states that the 'Applicants by traditional lore and custom within the Bundjalung nation have authority to make this application over the determination area. The Applicants pursuant to s. 251B(a) of the NTA 1993 engaged in a process of decision making derived from those traditional lores and customs'.

Schedule R

Schedule R has not been amended and states that '[t]his Application has been authorised pursuant to section 251B(a))', i.e. a traditionally mandated process. However, Schedule R also includes the statement that at the 13 October 2008 meeting a decision-making process in relation to the filing of

this application was '*adopted* [my emphasis] by the Claim group under s. 251B(a)'. I note that the adoption of a process is envisaged under s. 251B(b) in circumstances were groups do not have a traditionally mandated decision-making process that must be complied with.

Schedule R further explains that four meetings for the purposes of authorisation have been held between 2006 and 2008 in relation to native title determination applications made by the Numbahjing Clan, including the original application. This information is relevant as it puts the statements in relation to the authorisation of the Applicant into context:

- In relation to meetings held on 3 June and 20 October 2006 it is stated that 'by a consensus decision-making process based on Traditional Lore and Custom the Applicants were authorised to make an original application for a Native Title determination'—at [4].
- A further meeting was held on 4 February 2008 'to amend the Application following the outcome of the registration test—[5].
- On 13 October 2008 it was decided to discontinue the original application and file a new claim [the original application]. Schedule R states that '[t]his meeting sets out and clarifies the decision-making process adopted by the Claim group under s. 251B(a)... for the authorisation of the Applicants and the making of the Claim'.

Attachment R 4—Minutes of authorisation meeting held on 13 October 2008

This document sets out the motions passed at the meeting and takes the form meeting minutes. Under '4. Process of Decision Making', the decision-making process used at the authorisation meeting of 4 June 2006 is summarised. At that meeting it is said that a process was adopted under which 'the participants at the meeting had the power and authority by Tradition [sic] Custom and Law to authorise the making of the Native Title Claim'. It is further said that 'this authorisation was to be made pursuant to s251B by a process agreed by the Native Title Claim Group that incorporates a Western style decision making recognising Traditional Custom and Law as the foundation' and that the process is one where decisions are to be made by consensus.

Following on from this summary, it is stated that a motion was passed 'incorporating the agreed motion from the original authorisation meeting [of 4 June 2006] with the following':

> We recognise and observe under our Traditional Customs and Law passed down to us that decisions to do with land and waters by The Old People was [sic] made by agreement of those Senior Family members and Elders who have authority through their bloodline connection and knowledge. In contemporary terms we have utilised this as a process so that our decisions are reached by a consensus of the members who make up the Numbahjing Clan.
> Therefore, for the purposes of the registration test we formally move to adopt a consensus model to authorise the making of this Native Title Claim. The model agreed upon is that where there is dissent in reaching a decision that the issues are further discussed to reach agreement. Consensus is still reached if there is no dissent and a person abstains. If no consensus can be reached and there is still dissent following further discussions, a decision can be reached by a voting majority of 80%. to 20% if by consensus the matter can be put to a vote. The authorisation process so adopted for the purposes to make the Application is under s 251B(a) of the Native Title Act that is we are adopting the process recognised by us by our Tradition Customs and Lore that needs to be complied with in relation to land matters albeit in a contemporary setting.

The above is noted to have been 'agreed without dissent'.

Affidavits of Ms Anderson (R 2) and Mr Anderson (dated 16 March 2009)

Ms Anderson and Mr Anderson both state that the decision making process for authorising an Applicant is traditionally mandated, whilst also referring to a process that has been *adopted* by the claim group.

In her affidavit of November 2008 (R 2) Ms Anderson relevantly deposes that:

> Decision-making on law and land matters by the Numbajing is reached through consensus of the recognised Elders and senior family members who make up the clan group—at [9].
>
> This tradition was handed down to us from our Grandfather to my mother, uncles and aunts. To provide clarity for the purposes of the Application and comply with s. 251B(a) of the Native Title Act a consensus model was adopted at the two authorisation meetings for the authorisation of the original claim. At those meetings all decisions were reached by a consensus without dissent and this was recorded in the minutes—at [10].
>
> A decision was made to make a new application following some mapping advice from the Tribunal in relation to the mapping and description of the area under claim by the original application. An authorisation meeting was called for 13 October 2008 'to make a new Application which would provide certainty to overcome the mapping problem'—at [11] to [13].
>
> In reference to the 13 October 2008 meeting, '[a]t that meeting the consensus model based on our tradition and custom on land matters which needs to be complied with was adopted from the previous meetings as described above and adopted along with a motion which further clarified the decision making process utilised'. Reference is made to the minutes of that meeting, attached to Schedule R—at [14].
>
> Of the four Native Title meetings held in the making of the original application, the proposed amendment and the current application all decisions were reached by consensus of the whole group without dissent—at [15].

In his March 2009 affidavit Mr Anderson relevantly deposes the following:

> Under our Traditional Lore and Custom decisions on land matters within our Numbajing [sic] clan that must be complied with are reached by agreement of the Elders and senior family members who make up the clan group'—at [8].
>
> This tradition was handed down to us from my grandfather to my mother, uncles and aunts. At our Native Title meetings that tradition that must be complied with was utilised in our decision making process to authorise the making of the Application—at [9].
>
> The decision-making process utilised was carried out in compliance with s. 251B(a)— at [10].
>
> To provide clarity for the purpose of the registration test our decision making process was outlined in a statement in which we agreed was a consensus model adopted at the two authorisation meetings for the making of the original claim. At those meetings all decisions were reached by a consensus without dissent and this was recorded in the minutes—at [11].
>
> In reference to the 13 October 2008 meeting, that the consensus model based on our tradition and custom on land matters which needs to be complied [sic] was further elaborated along with a motion which further clarified the decision making process utilised—at [15].

Applicant's submission of 22 April 2009

The Applicant made this submission to the delegate in the context of the application of the registration test to the original application. The Applicant submitted in relation to the apparent inconsistencies in the description of the decision-making process used (set out above) that:

> The adoption of the description in the minutes is to be read that it was agreed that this is the application of that Traditional Custom and Law [a consensus model of decision making in relation to dealing with matters to do with land] as handed down and adopted into the minutes of the meeting. It was so described to assist the delegate to understand the processes that were being adhered too [sic] for the purpose of the Registration Test. It was not to be read as a process that was adopted into the minutes as the process of decision making where no traditional custom of law exists per s 251A(b) [sic] of the NTA—paragraph 2.

Consideration

I have some concerns about the apparent contradictions contained in the in the authorisation material and the overall lack of precision in the statements used to describe the decision-making process. The documents state that a traditional decision-making process is mandated and was used and reference is consistently made to s. 251(B)(a) and to the existence of traditional laws and customs under which the decision to authorise the applicant was made. However, reference is also made in the same documents to the 'adoption' of the decision-making process which would imply a process pursuant to s. 251B(b). There is also contradictory information in relation to who has to make decisions with references being made to Elders and senior members of the claim group on the one hand and the wider Numbahjing Clan claim group on the other.

Nonetheless, having regard to the information that is before me in relation to the decision-making process as a whole, I have decided on balance and after some deliberation, that the decision-making process described by the native title claim group is one mandated by traditional law and custom with decisions to be made by Elders and senior members of the claim group. Based on the clarification provided in the April 2009, I am prepared to accept that the use of the word 'adoption' in the statements to describe the decision-making process was to formalise and clarify only, rather than to be understood in the sense required by s. 251(B)(b). The process was 'adopted' at the meeting in order to distinguish it from the process used in June 2006 for the authorisation of the first application (which was declared by the Delegate as being unclear when the registration test was applied to this application in August 2007). It appears that there may have also been a belated realisation that under s. 251B an agreed and adopted process can only be used where there is no traditional decision-making process mandated.

Was the traditional decision-making process followed?

Having ascertained that a mandated traditional decision-making process exists, I must be satisfied whether this process was followed to authorise the Applicant to make and deal with the application.

Under this process asserted to have been used by the native title claim group, decisions on land matters are to be reached through consensus of the Elders and senior family members who make up the claim group.

Ms Anderson's affidavit of November 2008 sets out in detail her considerable efforts to notify members of the claim group of the authorisation meeting of 13 October 2008. She states that

> I have been able to contact and inform all Bundjalung families who identify as part of the Numbahjing clan to attend the meeting either by the advertisement in the Koori Mail [which appeared on 8 October 2008], pamphlet to households, personal phone calls and by word of mouth—at [23].

Ms Anderson also deposes that

> attendances or apologies sent to the Authorisation meeting was made by all the Senior members of the Numbahjing Clan or there [sic] representations who under our Traditions and Lore handed down to us are able to authorise my brother and myself to be the Applicants for the Claim Group to make the Application—at [24].

The meeting minutes (R 4) state that 22 persons attended the meeting, including two observers and the claimants' representative. Five persons are listed in the minutes as apologies. The minutes further state that decisions made at the meeting were 'agreed without dissent'.

There is no information before me that identifies the Elders and senior members of the claim group by name and as such I cannot ascertain by assessing the attendance list whether they attended the meeting. In the absence of evidence to the contrary, however, I accept Ms Anderson's statement that they either attended the meeting in person or sent a representative.

I note in this regard Stone J's comment in Lawson v Minister for Land and Water Conservation for the State *of New South Wales (*2002) FCA 1517 at [28] that

> [i]n an ideal situation one might wish for more precise identification of the Claim Group members and information on what proportion of the membership actually attended the meeting. I do not think, however, that the Act requires decisions of native title groups to be scrutinised in an overly technical or pedantic way.

In *Lawson,* Stone J considered the authorisation information of a claim group described by descent from a number of apical ancestors. Although the group did not have a mandated traditional decision-making process like in the matter before me, I am of the view that the following comments are relevant for my consideration:

> It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process—at [25].
> Given that [there was a] well-attended meeting [that] was appropriately advertised and that there was no dissent from any of the resolutions that were passed, it can safely be assumed that the resolutions approved by [sic] meeting have been approved by the Claim Group—at [27].

I accept that the authorisation meeting for this application was well advertised and that steps were taken to give notice to all people who might wish to attend the meeting. Also, all persons, who under the traditional decision-making process are to make decisions for the group in relation to the authorisation of the applicant, namely the Elders and senior members of the group, were made aware of the meeting— see paragraphs [23] and [24] of Mrs Anderson's affidavit.

I note that at least one of the persons listed as an apology in the meeting minutes is identified as an Elder, namely *[name removed].* As noted in Mrs Anderson's affidavit at paragraph 21, *[name removed]* 'arranged for *[name removed]* to attend [the meeting]' as '*[name removed]* although *[removed]* attended the previous meeting on the 4th of February had to send apologies as *[removed]*

was on dialysis'. I note from the meeting minutes that *[name removed]* attended the meeting and given that all decisions were made without dissent it appears that, on behalf of *[name removed]*, *[removed]* agreed with or consented to the decisions made at the meeting. In the absence of evidence to the contrary, I am prepared to accept that the traditional decision-making process allows for representatives of Elders and senior claim members, chosen by those Elders and senior claim members, to participate on their behalf in the group's traditional decision-making process.

There is no information before me to indicate that there are Elders or senior members or indeed other group members who opposed or did not participate in the decision-making process to authorise the Applicant.

On the basis of the information before me I accept that the traditional decision-making process of the claim group was followed.

State's submission

The State in its 6 May 2011 submissions states that it relies on its 1 April 2009 submissions and also notes that there has been no further evidence submitted since 2008 in connection with authorisation. I now summarise and address the State's submissions in relation to the authorisation of the Applicant which have not already been addressed in my consideration above:

The State submits that 'the uncertainties regarding the composition of the native title claim group described in 190B(3) means that it is not possible to determine with any certainty whether the Application is appropriately authorised'. I address the issue of claim group description under s. 190B(3) below and note that I am of the view that the group is described sufficiently clearly to enable identification of any particular person in the claim group. I also refer to Stone J's comment in *Lawson* at [28], quoted above.

The State further submits that it is unclear on the information provided whether the applicant has been authorised by all persons who may hold native title in the claim area. I note that s. 190C(4) requires me to be satisfied that the applicant has been authorised to bring the application by all the other persons in the native title claim group and in my view, there is no information before me to suggest that the claim group as defined in the application is not sufficiently inclusive or that authorisation has flowed from something less than the native title claim group as defined in accordance with s. 61(1).

In relation to the submission that no further evidence has been submitted by the Applicant since 2008 in connection with authorisation (which I note is incorrect in light of the applicant's 22 April 2009 submissions which includes Mr Anderson's affidavit of March 2009 addressing the authorisation process). I note Justice French's judgement in *Drury v Western Australia* (2000) 97 FCR 169; [2000] FCA 132 that an amended application does not require a fresh affidavit from the Applicant because in the court's view s. 62(1)(a) 'is dealing with the position at the point of filing the application. It is not, in my opinion, intended to cover amendment of applications' —at [11].

For the reasons outlined above I am satisfied that the persons jointly comprising the Applicant, Mr and Ms Anderson, who are both members of the native title claim group, 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.

Merit conditions: s. 190B

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

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

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

Area covered by the application

Schedule B refers to Attachment B.

Attachment B contains a metes and bounds description referencing both, the high and low water marks, geographic coordinates, cadastral boundaries, topographic features and native title determination application boundaries. Included are notes relating to the source, currency and datum of data used to prepare the description.

Attachment B specifically excludes any area subject to native title determination applications

- NSD6010/98 Byron Bay Bundjalung People #1 (NC95/1)
- NSD6034/98 Bandjalang People #1 (NC96/16)
- NSD6107/98 Bandjalang People #2 (NC98/19)
- NSD6019/01 Widjabul Aboriginal People (NC01/7)
- NSD6020/01 Byron Bay Bundjalung People #3 (NC01/8)

Schedule B lists general exclusions.

Map

Schedule C refers to Attachment C.

Attachment C is a monochrome copy of an A3 colour map entitled "Native Title Determination Application Numbahjing Clan within the Bundjalung Nation" produced by Geospatial Services, NNTT, dated 12 November 2008 and includes:

- The amended application area depicted by a thick dark blue outline and light blue shade;
- Surrounding native title determination application shown and labelled;
- Greyscale topographic image as a background;
- Scalebar, north point, coordinate grid; and
- Notes relating to the source, currency and datum of data used to prepare the map.

Geospatial Services' assessment

The geospatial assessment of 21 March 2011 identifies a minor issue within the above description (as did the assessment undertaken in relation to the original application of 5 December 2008):

On page 1 there is a reference to 'Longitude 29.012574° South' which should read 'Latitude 29.012574° South'. This issue was also identified in relation to the original application.

The geospatial assessment is that, notwithstanding this minor error, the description and map are consistent and identify the application area with reasonable certainty.

Consideration

I agree with the above assessment.

In respect of the general exclusions used to describe those areas which are not included in the application, I note that 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 so fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686—at [32]. 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. In fact, the Applicant implicitly states in Schedule D that no searches have been undertaken to identify non-native title rights and interests in the application area. In these circumstances, I find the written description in Schedule B of the areas not covered by the application is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

State's submission

The State in its submission of 6 May 2011 states that it relies on its submission of 1 April 2009 in relation to this requirement of the registration test. I now summarise and address the State's submissions in relation to the claim area description which have not already been addressed in my consideration above:

- The reference to a '8 km buffer from the mean low water mark' in Attachment C is said to be unclear, as it is neither 'evident nor clear from any supporting material what the "buffer" is or what purpose or function it fulfils';
- The depiction of the external boundary in Attachment C is said to be unclear; and
- Schedule C of the application erroneously makes reference to an 'amended application'.

The claim area extends 'due east to a point 8 kilometres seaward of the mean low water mark of the coastline of mainland Australia' (Attachment B, page 4). Reference to this area as a 'buffer' would appear to be simply a shorthand method of describing the south westerly direction of the boundary keeping the 8 kilometres distance from the coastline. In my view the reference to this term does not render the description and depiction of the sea area on Attachment C unclear.

In relation to the depiction of the claim area boundaries I note that, as stated above, Attachment C is a monochrome copy of a colour map. I have been advised by the Tribunal case manager for this matter that attached to the original application was a colour copy of the same map (the amended application makes no amendments to the claim area). The colour copy clearly depicts the external boundary of the claim area with a dark blue, solid line. In parts, this solid line is overlayed with solid or broken lines in different colours depicting the boundaries of neighbouring applications. I note that it is unfortunate that a monochrome copy of the claim area map was filed resulting in potential confusion about the external boundary; however, this is not a matter that renders the map insufficient.

I note that the State's submission in relation to the 'erroneous' reference to an 'amended application' in Schedule C clearly does not apply to this amended application and whilst not stated expressly by the State, I assume that the State no longer relies on this submission.

In light of the above I am satisfied that the information and the map 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.

Subsection 190B(3)
Identification of the native title claim group

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met.

Mansfield J in *Doepel* stated at [16] that the requirements of s. 190B(3) 'do not appear to go beyond consideration of the terms of the application'. Mansfield J further stated at [51] that 'the focus [of s. 190B(3)] is whether the application enables the reliable identification of the persons in the native title claim group'. The focus of the delegate's tasks under this part of the registration test is not 'upon the correctness of the description' but 'upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—see *Doepel* at [37].

Kiefel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) FCA 1198 at [34] notes similarly that the section 'does not require or permit the Registrar to be satisfied about the correctness of these matters'. What is required is 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group'. Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) (not contested on appeal in *Gudjala FC*) likewise followed a similar approach at [33] when His Honour said that s. 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification'.

Further, Carr J in State of Western Australia v Native Title Registrar (1999) 95 FCR 93 found:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently—at [67].

The application does not name the persons in the native title claim group but contains a description of it in Schedule A at paragraphs 1 to 6, which I have quoted above at s. 61(1). I note that the remainder of Schedule A, paragraphs 7 to 11, sets out information about the claim area, physical connection of the ancestors and particulars of traditional laws and customs which are not relevant to my assessment under this requirement of the registration test.

Also, relevant to the issue of adoption, referred to at paragraph 5 of Schedule A, Ms Anderson's affidavit of 25 November 2008 notes the following:

> In regards to adoption it was my grand father who was able to ensure marriages took place and provide land for the survivors of the horrific massacres at Evans Head, Patches Beach, East Ballina and other areas on the coast. At the same time our traditional lore and custom passed down to us as I was told was that ownership and rights could only be inherited through biological descent—at [59].

As the application does not name the persons in the native title claim group, I must consider if, pursuant to s. 190B(3)(b), the description in Schedule A is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

In my view the relevant paragraphs of the description are capable of being read 'as part of one discrete passage, and in such a way as to secure consistency between them', as has been identified by Dowsett J in *Gudjala 2007*[1] as the appropriate approach. Considered together with Ms Anderson's affidavit, the description can be interpreted as essentially describing the claim group as those persons who are the biological descendants of the group's apical ancestor, Mr John Jack Cook. I come to this conclusion for the following reasons:

- The applicant's submission of 22 April 2009, which does not form part of the application but which I can have regard to under s. 190A(3)(a) when interpreting a description that is open to differing interpretations, states,
  > [t]o clarify and try to put beyond any doubt the identification of the Numbahjing Clan Group is made up of those persons who are descended by direct bloodline from John Jack Cook. Unless they are of bloodline descent either through his sons or daughters they are not part of the Native Title Group—at [1].
- I note that paragraph 5 of the description refers to 'the rule of adoption'. In my view the statement in this paragraph is poorly drafted but can be interpreted as confirming that membership to the group cannot be obtained by adoption and only descendants of the apical ancestor are members of the claim group. That this is likely to be the case is corroborated by the statement in Ms Anderson's affidavit at paragraph [59], quoted above.

I am therefore satisfied that in describing the claim group as the 'biological descendants' of a certain named ancestor there is a sufficiently reliable and objective means by which to ascertain a person's membership of the group. It may be that some factual inquiry may be required to ascertain how members of the claim group are descended from the named ancestor, but that would not mean that the group had not been sufficiently described.

State's submission

The State in its submission of 6 May 2011 states that it relies on its submission of 1 April 2009 in relation to this requirement of the registration test. I now summarise and address the State's submissions in relation to the claim group description where they have not already been addressed in my consideration above:

- The State submits that the fact that paragraph 2 of Schedule A states that 'the claimants, by definition, are comprised of all the persons descended from the apical ancestor of John Jack Cook' without such definition being set out in the application, results in a lack of sufficient clarity as to who makes up the claim group. I disagree with this assessment. As noted above, reading the application as part of one discrete passage, it becomes clear that the group is

[1] This aspect of Dowsett J's decision was not contested on appeal to the Full Court in *Gudjala FC.*

defined by descent from Mr John Jack Cook. The words 'by definition', in my view, is not a qualifier to the description;

- The State submits that the application lacks an explanation as to why only descendants of Mr Cook constitute the native title claim group 'to the exclusion of any other family', noting that the 'possibility of membership of the Numbahjing Clan by anyone else is unclear and uncertain'. In my view this lack of explanation is not fatal to the description. I refer to Dowsett J's observation in *Gudjala 2007* at [33] (and not contested on appeal in *Gudjala FC*), that s. 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification'.
- The State submits that no reference is made to the survivors of a massacre in the 1850s at Evans Head in the native title claim group description, said to have been picked up by Mr Cook when he travelled the country as a young man. The application is indeed silent on this matter. It is however, as noted above, I am not required to be satisfied about the correctness of the claim group description.
- The State submits that there is uncertainty in relation to the factual basis of Numbahjing history, noting that clarification is required in regards to the alleged involvement of Mr Cook in the massacres of the 1850s 'where he is said to have had a leadership role some 110 years prior to his death'. In my view, the factual basis of Numbahjing history is not relevant to the inquiry under s. 190B(3). I will, however, consider the substance of this submission below, at my assessment under s. 190B(5).
- The State submits that conflicting information is provided in relation to the descent lines from Mr Cook with reference being made in Part A to matrilineal descent and in Schedule A to matrilineal and patrilineal descent. As noted by the State, Part A describes the descent lines of the two persons who jointly constitute the Applicant. In my view, the fact that they trace their descent through a matrilineal descent line as opposed to other members of the group who can be patrilineal or matrilineal descendants of the apical ancestors, does not render the claim group description unclear or uncertain.

For the above reasons I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

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

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

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

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. The description must be understandable and have meaning—*Doepel* at [91], [92], [95], [98] to [101] and [123].

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

1. The native title rights and interests claimed in relation to the land and waters covered by the application in the determination area are the rights to:
a) own, freely access, possess, occupy, control the access of others, speak for, use and enjoy;
b) to use and enjoy resources including but not limited to:
i) hunt, fish, gather and collect food from the land and waters;
ii) take items from the land and waters such as timber, stones, resins, shells and to make such things including shelter, tools and hunting implements;
iii) manage animals, plants, minerals and all natural material resources;
c) trade, control the use and enjoyment of others and receive a portion of any resources taken by others;
d) conduct and perform ceremonies, maintain and protect traditional and sacred sites, control misuse of cultural knowledge, to be the keepers and custodians of The Bundjalung language as spoken by the Numbahjing
e) have access to the land and waters for the purpose of satisfying the rights identified in the preceding subparagraphs.
f) teach and transmit the language and knowledge of traditional custom and lore to future generations;
g) practice healing, bury the dead; and
h) the full right under traditional custom and lore to protect and control all items within the environment of the claim area including trees, vegetation, rocks, water courses, forests, wetlands, escarpments, mountains, items of cultural heritage, subsoil and airspace.

2. Subject to paragraph 3, the native title rights and interests specified in paragraph 1 confer possession, occupation, use and enjoyment of the land and waters covered by the application on the native title claim group to the exclusion of all others.

3. If the area covered by the application or a part of the area covered by the application is or was the subject of a 'Previous Non-Exclusive Possession Act' as defined by section 23F of the Native Title Act 1993 (Cth), the native title rights and interests claimed are not claimed to the exclusion of all others for that area.

4. The applicants make no admissions that any act of extinguishment or impairment of Native Title has occurred over any particular land and waters covered by the Determination Area.

5. The Applicants assert that the Bundjalung People have never ceded any sovereign interest in the land and waters of the determination area to the crown, the state of NSW and/or the Commonwealth of Australia.

I find this description clear and understandable. I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified for the purposes of s. 190B(4).

State's submission

The State in its submission of 6 May 2011 states that it relies on its submission of 1 April 2009 in relation to this requirement of the registration test. I now summarise and address the State's submissions in relation to the description of the native title rights and interests claimed (where they have not already been addressed in my consideration above):

The State submits that 'it is uncertain how these asserted rights as set out in paragraph 1(a) to (h) in Schedule E indicate any connection with the Claim Area and how such rights could be recognised by the common law of Australia'. The State notes the example of the claimed 'right to trade, control the use and enjoyment of others and receive a portion of any resources taken by others' in relation to which the State says it is difficult to establish:

- the traditional laws and customs that support this right;
- how this alleged right would relate to or have a connection with the Claim Area; and
- how it could be recognised by the common law of Australia.

The State adds that the same could be said about the remainder of the rights claimed in paragraph 1 with the exception of the right to hunt, fish and gather.

In this regard, my inquiry under s. 190B(4) is limited to the matters outlined in my introductory comments above. An assessment of whether the rights and interests can be *established*, prima facie, as 'native title rights and interests' as defined in s. 223 is made under s. 190B(6). This inquiry involves an assessment as to whether the traditional laws and customs of the group support the claimed rights and interests.

For the above reasons I am satisfied that the description of all the native title rights and interests claimed is sufficient to allow them to be readily identified.

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support two of the particularised assertions in s. 190B(5), as set out in my reasons below.

Section 190B(5) requires that I 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 assertions set out in the three paragraphs for s. 190B(5).

Law in relation to the requirements of s. 190B(5)

The Registrar is not confined to the information contained in the application when considering the requirements of this section: *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [62] (*Strickland*); approved on appeal by the Full Court in *Western Australia v Strickland* (2000) 99

FCR 33; [2000] FCA 652 at [88]—[89]; *Martin v Native Title Registrar* [2001] FCA 16 at [23] (French J); *Queensland v Hutchison* (2001) 108 FCR 575; [2001] FCA 416 at [25] and *Doepel* at [16].

The Full Court in *Gudjala People #2 v Native Title Registrar* (2008) FCR 317; [2008] FCAFC 157 (*Gudjala FC*) observed at [90] to [92] that there is a correlation between the requirements of ss. 62(2)(e) and 190B(5) in that s. 62 prescribes the information to be contained in an application in relation to the factual basis and s. 190A provides for an assessment by the Registrar of that information, with a view to deciding whether it should be accepted for registration. The Full Court concluded at [90] that the statutory scheme in ss. 62 and 190A contemplates that an application and accompanying affidavit which 'fully and comprehensively' addresses all the matters in s. 62, could 'provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B'.

Gudjala FC allowed an appeal against the decision of Dowsett J in *Gudjala 2007* that the Gudjala native title determination application did not satisfy the requirements of s. 190B(5) on the basis that Dowsett J 'applied to his consideration of the application a more onerous standard than the NTA requires'—at [7]. The matter was remitted back to Dowsett J who reconsidered the application against the conditions in ss. 190B(5), (6) and (7) in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 on 23 December 2009 (*Gudjala 2009*).

I am not required, as the Registrar's delegate, 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'—*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 to be 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 FC* at [83] to [85].

The Full Court also said at *Gudjala FC* [92] that a general description of the factual basis under s. 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and [is] something more than assertions at a high level of generality' could, when read with the applicant's affidavit swearing to the truth of the matters in the application, satisfy the Registrar in relation to the corresponding merit condition in s. 190B(5).

I refer also to the following comments from *Gudjala FC*:

- 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 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] that if the Registrar were 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', that would be erroneous.

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the factual basis materials that are before me as if they were evidence furnished in support of the claim. My task is not to criticise or refuse to accept as true what is stated in the application and the additional information, but to

consider the sufficiency of the factual basis material to fully and comprehensively address the relevant matters set out in s. 190B(5). My assessment is limited to whether the asserted facts in the application and supporting material can support the claimed conclusions set out in subparagraphs (a) to (c) of s. 190B(5).

In *Gudjala FC* at [68] to [72] and [77], the Full Court considered the analysis by Dowsett J in *Gudjala 2007* as to what must be addressed when providing a sufficient factual basis for the assertions in s. 190B(5). There is nothing in the reasons to indicate that the Full Court considered Dowsett J to have erred in this respect. It is therefore my view that in assessing whether the asserted facts are sufficient to support the assertions in s. 190B(5)(a) to (c), I must consider the decision in *Gudjala 2007* where it was not expressly criticised by the Full Court.

I am of the view that the most recent *Gudjala 2009* decision does not appear to detract or depart from the general principles enunciated in either of the *Gudjala 2007* decision or the *Gudjala FC* decision as to the requirements of s. 190B(5).

Finally, in relation to how I approach the task, I note that *Doepel* is authority that I should analyse 'the information available to address, and make findings about, the particular matters to which s. 190B(5) refers'—at [130]. I refer also to the comments of Mansfield J at [132] that it is correct for the Registrar to focus primarily upon the particular requirements of s. 190B(5), as this is the way in which the Act draws the Registrar's attention to the task at hand. If the factual basis supports the three assertions in subparagraphs (a) to (c), then the requirements of the section overall are likely to be met. I therefore address the three assertions before concluding whether overall the requirements of the section are met.

Information considered

In my consideration I am not confined to the information contained in the application. The information before me in relation to the asserted factual basis on which the claimed rights and interests exist is found primarily in the application in Schedule F. Further relevant information is found in Schedules A (native title claim group), G (details of activities) and M (details of traditional physical connection). Information is also found in the affidavits that accompany the application.

I have also had regard to information contained in the Applicant's submissions. In particular I note that the Applicant's Submissions of 30 September 2010 sets out at paragraphs [25] to [29] in summary form the asserted factual basis with reference to particular sections of the amended application where the information is contained. I have reproduced the summary in the table below using the submissions' subheadings.

Pre-sovereignty society and the law and custom a) the Numbahjing Clan ('NC') existed pre-sovereignty b) the NC were possessed of, acknowledged and observed their laws and customs pre-sovereignty c) the laws and customs of the NC were those that supported the rights and interests claimed and therefore related to the claim area	Schedule F, paragraph [2]
Continuity of Society from Generation to Generation a) the NC has been and continues to be present on the claimed	Schedule F, paragraphs [2], [9] and [17]

lands and waters since time immemorial b) successive generations of the NC have continued to reside on Numbahjing lands and waters and acknowledge and observe Numbahjing laws and customs	
Possession by Succeeding Generations of the Traditional Law and Custom a) successive generations of the NC have continued to reside on Numbahjing lands and waters and acknowledge and observe Numbahjing laws and customs b) the NC have passed from generation to generation knowledge and responsibility relating to the stories sites and placed of importance to the Numbahjing c) John Jack Cook survived a massacre and with other Numbahjing people lived in a community at Cabbage Tree Island d) the laws and customs were transmitted to the Applicants by the John Jack Cook and the Applicants have transmitted their knowledge to succeeding generations of Numbahjing People.	Schedule F, paragraph [17] and Affidavit by Susan Anderson of 25 November 2008 at paragraphs [25] to [28], [39] to [40], [56] and [62]
Present Day Society a) by the traditional laws and customs the NC have been able to survive and continue to practice their traditions b) the NC has flourished through the marriage of the sons and daughters of John Jack Cook c) the present day NC possess knowledge and responsibility relating to the stories sites and places of importance to the NC d) the NC have grown strong because of the laws and customs passed down to them e) the NC observe laws and customs passed down to them in relation to group membership, site visitation and protection, transmission of knowledge, hunting, fishing and gathering, landholding.	Affidavit of Susan Anderson of 25 November 2008 at paragraphs [61], [62], [63] and Schedule F at paragraph [17]

Paragraphs [30] to [35] of the 30 September 2010 submissions also set out details specific to the three assertions of s. 190B(5)(a), (b) and (c) which I summarise in my reasons below under the relevant subsections.

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

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

Section 190B(5)(a) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group have, and its predecessors had, an association with the application area.

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;

- 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 [96].

Information considered

For this particular assertion, the Applicant provides the following factual basis in the application (the truth of which is affirmed by the two persons comprising the applicant in their accompanying s. 62(1)(a) affidavits):

Statements in paragraphs [1] to [12] in Schedule F:

> General
> 1. The Numbahjing People represented by The Applicants are the Traditional Owners against the whole world to the land and waters subject to this application.
> 2. The Sovereign Rights and Native Title interests described in schedule E, through Traditional Lore and Customs have been asserted, possessed, exercised, acknowledged and observed by the Numbahjing since when humans were first created and walked the land. and
> (a) at the time when purported sovereignty was asserted by the Crown
> (b) at the time of contact with non-Aboriginal people.
> 3. The traditional connection of the Applicants within the claim area, and native title rights and interests, were inherited from their ancestors in accordance with traditional laws and customs.
> 4. The Numbahjing continue to acknowledge the traditional laws, observe customs, speak the language, possess and exercise their traditional rights and interests over the land and waters within The Bundjalung Nation (including the area claimed).
>
> Historical, Archaeological and Site Information
> 5. In accordance with traditional laws and customs, the area claimed has been regarded as belonging to the Numbajing people from the time the suns rays first fell upon the Earth.
> 6. The area claimed is a part of a larger area of land and waters owned and continually occupied by the members of the The Bundjalung Nation.
> 10. The Claim Group have retained a continual traditional connection both to the area claimed and to the greater Bundjalung Nation generally. The traditional connection of the Numbahjing to the area claimed is shown both by matters relating directly to it, and by matters relating to the Greater Bundjalung Country.
> 11. There are a number of sites of significance within the area claimed, some of which have been recorded and/or registered under the National Parks and Wildlife Service Act.
> 12. Material evidence of the physical connection by the ancestors of the Numbahjing people illustrated by the presence of archaeological evidence of from both pre-contact and post-contact Aboriginal habitation. The evidence includes occupation, ceremonial and burial sites, artefacts and shell middens.

In addition, paragraph [17] of Schedule F under the heading 'Details of Connection of the Numbahjing Clan to their lands and waters', relevantly states that:

> The Numbahjing Clan were possessed of rights and interests, stories, sites and places which related specifically to or exist in or upon Numbahjing lands and waters and were thereby connected to those lands and waters.
> John Jack Cook was a Numbahjing man.

> John Jack Cook and other unknown Numbahjing people survived early invasion of their lands and waters and maintained their existence as a society living according to law and custom.
> The successive generations of the Numbahjing Clan have continued to reside on Numbahjing lands and waters and acknowledge and observe Numbahjing laws and customs.
> The Numbahjing Clan have passed from generation to generation knowledge and responsibility relating to stories, sites and places of importance to the Numbahjing Clan.
> The present day Numbahjing Clan area possessed of knowledge and responsibility relating to stories, sites and places of importance to the Numbahjing Clan.

Schedule M relevantly states that:

> The Numbahjing have maintained a traditional physical connection with the land and waters covered by the Application. The Numbahjing were connected to the lands and waters of the claim area by their occupation, belief systems, traditional laws and customs...
> There has been since sovereignty a Numbahjing society united by law and custom which has maintained its connection with the lands and waters, acknowledged and observed by Numbahjing laws and customs...
> In the present day the Applicants and members of the Native Title Claim Group live, hunt, fish, gather, travel through, camp, practice medicine, transmit knowledge, perform ceremonies, protect sites along with carrying out other activities and business within the claim area and adjacent Bundjalung Country as set out in Schedule F and G to this Amended Application.
> The Applicants were born at Cabbage Tree Island where they have raised their children and grand children.

Ms Anderson in her affidavits also provides relevant information. Below are relevant examples:

Affidavit of November 2008

> Our Community has held a continuous connection to country despite massacres, dispossession and assimilation policies— at [25].
> Our Grandfather John Jack Cook was one of the few Aboriginals to have survived a horrific massacre that took place around Evans Head in the 1850's—at [26].
> When I was a young girl my Grandfather sat down and told me the circumstances of how he survived the massacre. He said to me that when they came upon the family his mother told him and his sister to dive into the river. As he began to swim down river he said he saw *[removed]* being shot on the shoreline—at [27].
> Grandfather was later found by a policeman who took him to Cabbage Tree Island for safety. That is how the Community on Cabbage Tree Island was first founded in the 19th century—at [28].
> My Grandfather and all our uncles except *[name removed]* were initiated men into the Bundjalung ceremonial life and lore...—at [32].
> The Country and the sea covered by the Application is where our people have camped, hunted, fished, gathered and participated in ceremonies since the time when we Bundjalung were created—at [34].
> The area claimed as shown on the map Attachment C and outlined in the description in Attachment B depicts that part of the Bundjalung Nation which we associate as our country since when Aboriginal people first walked the land—at [38].

Affidavit of July 2010

> Our heartland extends along North Creek (East Ballina) where here are huge midden sites, Angels Beach which contain old camps and burials right down the Richmond River in South Ballina, Patches Beach and Boundary Creek. Inland from Cabbage Tree Island to Bagotville are

> many sites and traditional hunting areas where we were taught to hunt and which we still utilise—at [23].
> As Numbahjing, I and others in the Community have maintained our physical connection to our country... I was born on Cabbage Tree Island, as was my mother and have lived there all my life—at [24].

Further relevant information is contained in Mr Anderson's affidavit of July 2010:

> Within our claim area we still recognise these bora rings [which as a young man he was not allowed to visit] which are located at Patches Beach, South Ballina, the old Southern Cross School and at North Angles Beach. Also at Boundary Creek is a Bora Ring where there is a burial of a man and a woman who were speared because they broke the law, as she was promised to another man. This occurred before the coming of the Europeans—at [7].
> The Old People would move across the country, Papa Cook travelled from Evans Head for ceremony, out to Wyralla and North to Suffolk Park which is a Womens site were he got married to my grand mother—at [17].
> It was passed to me and it is my understanding that we Bundjalung are made up of many different tribes or family clans each with it's own area and name. We are still part of Bundjalung. We would trade and share our hunting and arrange marriages. It is the possession of this knowledge that we recognise each others boundaries and where we overlap, we have shared arrangements. These go back generations from before the Europeans came and are still understood today despite the encroachment into our society by colonisation. We call this respect and through that we have been able to survive as a continuous social group where other Aboriginal people have been broken and lost their way—at [20].
> It is important to understand despite the policies of assimilation and the horrific massacres that have occurred, that we Bundjalung and particularly us Numbahjing Clan have never left our country we were born here, our Old People walked this country and we adhere to those traditions and laws that were passed down to us in the way we live and conduct ourselves as a community. This remains unchanged and these things we pass onto our future generations as we were taught ourselves—at [21].

Schedule G sets out examples of the current activities conducted by the claim group which demonstrate an association. Examples are also included in the affidavits of *[name removed]* and *[name removed]* dated 16 November 2009 and the affidavits of the Applicant.

In relation to the requirement of s. 190B(5)(a) the Submission of 30 September 2010 states that:

- there are ample asserted facts to do with the **association of the claim group** with the claim area. Reference is made to the affidavits of the Applicant and *[name removed]*.
- the **association of the predecessors of the claim group** is expressed 'in the assertion of facts in relation to John Jack Cook's presence on the country in the early period following European contact, his self-identification to the Applicant as a member of the Numbahjing and the transmission of laws and customs relating to the lands and waters of the Numbahjing Clan by reference of what was taught by the 'old people'. This is a reference to the Applicant's predecessors and as it is asserted as being Numbahjing law and custom is either directly relevant or can be inferred to be relevant to the claimed lands and waters.

I am satisfied that the material before me provides a sufficient factual basis to support the assertion that the *claim group as a whole* has an association with the claim area. The above quoted affidavits not only set out the deponents' association with the claim area (with particular references to specific areas within the claim area) but also their wider families' association, therefore allowing

me to make the inference that not only the deponents but the claim group as a whole have and had an association with the claim area as a whole.

After some deliberation, I am also satisfied that the totality of the material before me is sufficient to support an assertion that the *predecessors* of the claim group *since sovereignty* have had such an association. The reasons for my decision are as follows:

- The material provides relevant information regarding John Jack Cook's association with the claim area *following the Evans Head massacre which is said to have taken place in the 1850s* - see Ms Anderson's affidavit of November 2008 at paragraph [26]. I am satisfied that Mr Cook, the claim group's apical ancestor, and his descendants had, and continue to have, an association with the claim area from this period onwards.
- The fact that Mr Cook was present on country following the Evans Head massacre does not of itself lead to the conclusion that he and his ancestors must have had an association with the claim area *at the time of, and prior to this period of, first European contact*, as it is appears to be submitted by the Applicant. I note that Mr Cook is said to have been brought to Cabbage Tree Island (which is located within the claim area) by a policemen following 'a horrific massacre that took place around Evans Head in the 1850's'—see Ms Anderson's affidavit of November 2008 at paragraph [26]. Mr Cook is said to have purchased the Island and to have established a community there—Ms Anderson's affidavit of November 2008 at paragraphs [28] and [30]. No information is provided in the application in relation to Mr Cook's association with the claim area prior to him being taken to Cabbage Tree Island. Did he and his family and the other Numbahjing Clan members live in the claim area before the massacres? Or did they live elsewhere but had a spiritual association with the claim area? I note that Evans Head is not located within the claim area. In my view the statement that Mr Cook identified himself as a Numbahjing Clan member and transmitted laws and customs which he described as traditional and those of the old people by itself does also not amount to a factual basis for the assertion that the claim group's predecessors at sovereignty had an association with the claim area.
- Whilst there is some disagreement about Mr Cook's birth date[2], it is clear that he was born in the late 1840s or early to mid 1850s and as such, information about his association with the claim area would go some way to addressing the requirements of s. 190B(5)(a). I note in this regard that the application is also silent on the association of Mr Cook's parents and grandparents[3] with the claim area and there is also no information about the association of other Numbahjing Clan members who were alive at the time Mr Cook was born but who fell victim to the Evans Head massacres.
- I also note that, in my view, some of the information and material in relation to the Numbahjing People's association with the claim area *at sovereignty* amounts to 'assertions at a high level of generality' only and without further information and by itself does not establish a sufficient factual basis. For example, Schedule A at [9] states that 'material evidence of the

[2] Schedule A states that Mr Cook, who died in 1961, was born in the 1850s and elsewhere also states he was born in 1855; *[name removed]* in *[removed]* affidavit notes that she believes that her grandfather lived to the age of 113 and such would have been born in 1848; *[name removed]* also states that *[removed]* grandfather's birth date is unknown and 'others put his age at less'

[3] The genealogies attached to the application as Attachment A set out members of the claim group with Mr Cook at the apex of each of the family trees.

physical connection by the ancestors of the Numbahjing people [is] illustrated by the presence of archaeological evidence of from both pre-contact and post-contact Aboriginal habitation'. Without further information that links the evidence of 'pre-contact and post-contact Aboriginal habitation' to members of the Numbahjing Clan, the statement itself says little about the association of the claim group's ancestors with the claim area since sovereignty.

- However, the application relevantly sets out, and as noted above, I am to assume that the facts asserted are true, information about the association of the Numbahjing Clan with the claim area at and following sovereignty. The association is explained as that of a clan group which forms part of a wider Bundjalung Nation. Mr Cook is said to have identified himself as a member of the Numbahjing Clan and as such a member of the wider Bundjalung Nation. Mr Cook is also said to have been an initiated man 'into the Bundjalung ceremonial life and lore'—see Ms Anderson's November 2008 affidavit at paragraph [32]. In my view this implies that at least some members of the Bundjalung Nation recognised and accepted Mr Cook as a member of the Bundjalung Nation.
- Based on the totality of the material before me I have formed the view that the information is sufficient to support the assertion that the Numbahjing Clan has been associated with the claim area since sovereignty. I note that I have formed this view as I am only to consider the quality of the applicant's asserted factual basis for the claimed rights and interests in the sense of ensuring that, if they are ultimately found by a Court to be established, they can support the existence of the claimed native title. My task is to come to a view about whether or not the asserted facts can support the claimed conclusions. 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.

In summary, I have formed the view that there is sufficient information about the association that the native title claim group presently has with the application area, and that of their predecessors, and I am therefore satisfied that a sufficient factual basis has been provided to support the assertion in s. 190B(5)(a).

State's submissions

May 2011 submissions

As noted above, the State's May 2011 submissions note that the State relies on its April 2009 submissions in relation to the original application. In addition, the State submits that the requirements of s. 190B(5)(a) (as well as those of the sub-paragraphs in (b) and (c)) have not been met, noting that there are only minor differences between the original application (which did not satisfy this requirement) and this amended application. In response to this submission I refer to my reasons above, that in my view the totality of the material before me is sufficient to met the requirements of s. 190B(5)(a).

April 2009 submissions

In summary, the State submitted the following in relation to the original application:

- No evidence is provided for the assertion that the Numbahjing Clan's connection to the claim area has existed since 'humans were first created and walked the land' and since 'the sun's rays first fell upon the Earth'. I have set out the requirements of the registration test under s.

190B(5)(a) above. There is no requirement to provide evidence in support of these particular assertions under s. 190B(5)(a).

- The claim group's 'connection' to the claim area is not readily identifiable given the lack of certainty in the dates and the historical aspects of the claim group: The November 2008 affidavits by the Applicant do not provide any evidence in relation to the ancestors of Mr Cook and whether they lived in the area and whether they observed traditional rights and interests there. No information is given in relation to the time frame on or around 1788. The earliest time reference made is to the 1850s to a place that is not part of the claim area (Evans Head). As noted above, I agree with the State's submission that there is no information about Mr Cook's ancestors and their observance of traditional laws and customs. I note, however, that whether or not the ancestors of Mr Cook observed traditional rights and interests in the claim area is not the focus of my assessment under s. 190B(5)(a). I note also that the application makes reference to the 1850s not only in relation to the Evans Head massacres but also in relation to Mr Cook's probable birth date. In relation to the period between 1788 and the 1850s I note my findings above.
- While the statements contained in the November 2008 affidavits substantiate an association of the Applicant to the claim area, it is questionable whether the native title claim group have established any association of their predecessors to the claim area. As noted above, the amended application contains further information in support of the assertions set out in s. 190B(5)(a). As also noted above, I have relied on the additional material in my assessment and formed the view that the totality of the information provided by the Applicant amounts to a factual basis which is sufficient to support the assertion that the predecessors of the claim group had an association with the claim area.

I am therefore satisfied, based on the material before me, that the factual basis provided is sufficient to support the assertion described in s. 190B(5)(a).

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

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

Section 190B(5)(b) requires me to be satisfied that there exist traditional laws acknowledged and customs observed by the claim group that give rise to the claimed native title rights and interests.

The language of the assertion in subparagraph (b) nearly mirrors that found in s. 223(1)(a) which is part of the definition for the term 'native title rights and interests'. In my view, the factual basis for this assertion must address the 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 Community v Victoria*

(2002) 214 CLR 422 (*Yorta Yorta*) and in the subsequent Full Court decisions 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, an indigenous society in the area, observing identifiable laws and customs'—at [96].

The following is a brief synopsis of my understanding of the case law which has developed around the requirement in s. 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.[4]

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 relevant traditional laws and customs 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:

- the laws and customs currently observed and that have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society, at the time of sovereignty or at least the time of European settlement, of people living according to a system of identifiable laws and customs, having a normative content—at [65] and see also at [66] and [81];
- the link between the claim group described in the application and the area covered by the application, a process which may involve, in the case of a claim group defined using an apical

[4] 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.

ancestry model, '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 recognises and adheres to those laws and customs—at [36];
- 'in some cases it will be possible to identify a group's continuous post-sovereignty history in such detail that one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since. It would similarly be possible, in those circumstances, to infer that the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as the pre-sovereignty laws and customs'—at [30].
- 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—at [22].

In summary, 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 first European contact/settlement. Once identified, it follows that the factual basis must discuss 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 at sovereignty.

Information considered

1. The pre-sovereignty society—the Bundjalung Nation

Schedule A relevantly states that the Numbahjing are a clan group recognised within the Bundjalung Nation—at [3]. Schedule A further explains that:

> [t]he area claimed is a part of a larger area of land and waters owned and occupied by the members of The Bundjalung Nation unbroken by the assertion of purported sovereignty by the Crown. The Bundjalung People represented by the Native Title Claim Group have retained a continual traditional connection both to the area claimed and to the greater Bundjalung Nation generally. The traditional connection of the Numbahjing to the area claimed is shown both by matters relating directly to it, and by matters relating to the Greater Bundjalung Country— at [7].

Schedule F describes that:

> The Sovereign Rights and Native Title interests described in schedule E, through Traditional Lore and Customs have been asserted, possessed, exercised, acknowledged and observed by the Numbahjing since when humans were first created and walked the land. and
> (a) at the time when purported sovereignty was asserted by the Crown
> (b) at the time of contact with non-Aboriginal people—at [2].

> At the time of the first European Incursions into their country there existed in respect of the broad region encompassing the Clarence, Richmond, Wilson and Tweed River valleys and in the area presently known as the coast and hinterland of North Eastern NSW and Southern Queensland, a number of Bundjalung dialect language clans who made up the Bundjalung nation—at [7].
> Each dialect clan within the Bundjalung Nation is a discrete land holding unit having rights of possession, use and enjoyment of the lands and waters, and resources in and upon the land and the adjacent seas—at [8].
> There existed in respect of the claim area a dialect clan group known then and now, as the Numbahjing hereinafter referred to as the Numbahjing Clan—at [9].

Ms Anderson's affidavits make the following relevant statements:

Affidavit of November 2008

> My Grandfather and all our uncles except *[name removed]* were initiated men into the Bundjalung ceremonial life and lore...—at [32].

Affidavit of July 2010

> *In deposing* this affidavit I am aware of comments by the delegate in relation of the Numbahjing to the wider Bundjalung nation. My knowledge passed to me recognises the wider Bundjalung nation, being made up of a number of clan groups. Each being their own discreet land holding unit with their own particular traditions and laws but within the wider Bundjalung having similar language and social organisation. Within Bundjalung there is a recognition that we differ from those tribal groups outside such as Dhangatti and Kamilaroi particularly in language and social organisation. Bundjalung social organisation has been recognised by the NNTT by registration of our neighbouring clans such as the Bandjalang and Arakwal—at [25] and [26].

Mr Anderson in his July 2010 affidavit makes the relevant statement that:

> The Bundjalung are made up of many different tribes or family clans each with their own area and name. We are still part of Bundjalung. We would trade and share our hunting and arrange marriages. It is the possession of this knowledge that we recognise each others boundaries and where we overlap, we have shared arrangements—at [20].

2. Traditional laws and customs

Schedule F states that the Numbahjing Clan have continuously observed and acknowledged the laws and customs of the pre-sovereignty society, the Bundjalung Nation:

> The traditional connection of the Applicants within the claim area, and native title rights and interests, were inherited from their ancestors in accordance with traditional laws and customs—at [3].
> The Numbahjing continue to acknowledge the traditional laws, observe customs, speak the language, possess and exercise their traditional rights and interests over the land and waters within The Bundjalung Nation (including the area claimed)-at [4].
> In accordance with traditional laws and customs, the area claimed has been regarded as belonging to the Numbahjing people 'from the time the suns rays first fell upon the Earth'. The area claimed is part of a larger area of land and waters owned and continually occupied by the members of the Bundjalung Nation-at [5] and [6].

There existed in respect of the claim area a dialect clan group known then and now, as the Numbahjing hereinafter referred to as the Numbahjing Clan—at [9].
The successive generations of the Numbahjing Clan have continued to reside on Numbahjing lands and waters and acknowledge and observe Numbahjing laws and customs—at [17].

In addition, Schedule F, under the heading 'Particulars of Traditional Laws and Customs' sets out the following:

13. The Numbahjing Clan were possessed of, observed and acknowledged traditional laws and customs which provided for:
- Exclusive possession over land and waters of the claim area and the seas adjacent to the claim area
- Rights to exclusively posses, use and enjoy all resources in and upon the lands and waters
- Rights to control the use and enjoyment of the land and waters by others
- Regulation of group membership.

14. These include a common kinship system, observance of common laws relating to land tenure, and traditional usage of land and waters.

15. **The kinship system includes recognition of:**
- common ancestors and interdependent familial ties which determine traditional rights and customs regarding land and waters; group and individual responsibilities towards land and waters;
- acceptance of common pattern of descent;
- sanctions and prohibitions relating to relationships, access to land and waters and custodianship;
- individual or group connection to land and waters;
- affiliation on a group and individual basis, with totemic beings which relate to land/waters and law;
- participation in, and responsibility for, ceremony;
- recognition of individuals' connection to land and waters through their place of
- conception, place of birth, their mother's place of birth, and their father's place of birth;
- transmission of traditional knowledge from our generation to the next.

16. **Common laws relating to land tenure include:**
- fulfilment of spiritual obligations with regard to the land and waters;
- the observation of restrictions imposed by gender, age and ritual experience;
- the observation of restrictions imposed by the presence of sites of significance on the land and waters
- the observance of restrictions imposed by the presence of Dreamings on the land and waters.

As noted above, under the heading of 'Details of the Continuity of the Numbahjing society and their laws and customs' Schedule F also relevantly states:

John Jack Cook was a Numbahjing man.
John Jack Cook and other unknown Numbahjing people survived early invasion of their lands and waters and maintained their existence as a society living according to law and custom.
The successive generations of the Numbahjing Clan have continued to reside on Numbahjing lands and waters and acknowledge and observe Numbahjing laws and customs.
The Numbahjing Clan have passed from generation to generation knowledge and responsibility relating to stories, sites and places of importance to the Numbahjing Clan.
The present day Numbahjing Clan area possessed of knowledge and responsibility relating to stories, sites and places of importance to the Numbahjing Clan—at [17].

Ms Anderson's affidavits make the following relevant statements:

Affidavit of November 2008

> One of the significant ways we hold traditional knowledge and able to hand it down is through dreams and visions. It is through dreaming and visitations that I am guided by the Spirit of my Grandfather. This sacred gift is one of the main strengths in which the Numbahjing Clan have been able to maintain an unbroken connection to those customs and lores—at [35] and [37].
> Our connection to the claim area has been handed own to us in accordance with the Traditional customs and laws of the Bundjalung Nation - at [39].
> We acknowledge and recognise those laws passed down to us by continuing to observe the customs, speak the language and exercise our traditional rights and interests over the lands and waters of the claim area —at [40].
> In exercising the rights outlined in Schedules G and M our community have maintained the practices of our Traditional Bundjalung roots handed down to us. Despite discriminatory laws, regulations and policies including massacre, child removal and family dispersion we have survived intact to be able to continue these activities—affidavit of November 2008 at [41] to [43].

Affidavit of July 2010

> Under our Traditional customs and laws the Numbahjing have rights and responsibilities over the land and waters in the claim area —at [9].
> The rights have been passed down from our ancestors and embody the same traditional custom and law which we acknowledge and observe today and continue to pass down to our children and grand children. These Traditions and customs are communal in nature —at [10] and [11].
> In relation to the protection of sites ... the customs such as who may go to a site... what may occur there and the authority to speak for a site are matters that are observed and understood within the community. This knowledge comes from our Old People and the way they conducted their business. This has been passed down through the generations unbroken to the present day —at [12] and [13].
> We are who we are by the same traditional customs and law which were in place before our land was invaded. Each of our Uncles, Aunts and my Mother were able to keep our society intact and as a community we have maintained the traditional social norms that existed prior to the European—at [15] and [19].
> Although today we may live on the settlement in houses we still hold those same social traditions that our Old People practiced—at [16].

Mr Anderson makes the following relevant statements in his July 2010 affidavit:

> It was passed to me and it is my understanding that we Bundjalung are made up of many different tribes or family clans each with it's own area and name. We are still part of Bundjalung. We would trade and share our hunting and arrange marriages. It is the possession of this knowledge that we recognise each others boundaries and where we overlap, we have shared arrangements. These go back generations from before the Europeans came and are still understood today despite the encroachment into our society by colonisation. We call this respect and through that we have been able to survive as a continuous social group where other Aboriginal people have been broken and lost their way—at [20].
> It is important to understand despite the policies of assimilation and the horrific massacres that have occurred, that we Bundjalung and particularly us Numbahjing Clan have never left our country we were born here, our Old People walked this country and we adhere to those traditions and laws that were passed down to us in the way we live and conduct ourselves as a community. This remains unchanged and these things we pass onto our future generations as we were taught ourselves—at [21].

3. Activities by the Numbahjing Clan on the claim area

A significant amount of information regarding activities said to be in exercise of traditional laws and customs are set out in the affidavits attached to the amended application. For example Ms Anderson's November 2008 affidavit relevantly states that:

> hunting and fishing activities by the claimants are undertaken in accordance with laws and customs, for example there exist hunting and fishing places within the claim area that can (and will) only be accessed by women; pipis are hunted in the traditional manner as taught by 'our mothers and aunts'—at [46] and [47];
> laws and customs in relation to funerals, providing for a set mourning period and associated behavioural rules, are continued to be observed by the claimants—at [51] to [54]; and
> traditional laws and customs, which determine group membership by biological descent, are continued to be observed—at [59].

Mr Anderson's November 2008 affidavit relevantly states that there exist traditional methods of hunting and fishing that were taught to him and which he continuous to observe including 'which foods we are allowed to take and eat and those we were not allowed to have'—at [12].

The Applicant's submission of 30 September 2010 relevantly states that the Numbahjing Clan members are said to observe laws and customs passed down to them in relation to group membership, site visitation and protection, transmission of knowledge, hunting, fishing and gathering, landholding—at paragraph [29].

Consideration

I have formed the view that there is insufficient information before me about the Bundjalung Nation (the society operating in the application area at the time of sovereignty and of which the Numbahjing Clan is a part) and the traditional laws and customs which were acknowledged and observed by this society before sovereignty. There is also insufficient information which would enable me to infer a link between the claim group and the relevant pre-sovereignty society, being the Bundjalung Nation.

My reasons for this view are as follows:

Bundjalung Nation and its laws and customs at sovereignty

- The limited information provided by the Applicant, which I have quoted above, is in generalised terms only and to a large degree consists of assertions about the existence of a continuous society and the existence (and acknowledgement and observance) of traditional laws and customs rather than a factual basis that would enable a genuine assessment of the amended application, as required by s. 190B(5)(b).
- In *Gudjala 2009*, as detailed above, Dowsett J outlined possible instances where an inference of continuity may be available, such as where a group's continuous post-sovereignty history is given in such detail that 'one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since'—at [30]. In this instance, the Numbahjing Clan's post-sovereignty history is given in scant detail, beginning in the 1850s. In

my view, in light of the scarcity of the information before me, an inference of continuity is not available.

- In response to the statement in Ms Anderson's affidavit of July 2010 at paragraph [26] that other clan groups who are said to also form part of the Bundjalung Nation have been registered on the Tribunal's Register of Native Title Claims, I note that whilst this may indicate that the Bundjalung Nation is a society that has continued in existence in a substantially uninterrupted form since sovereignty to the present day, without further information specific to this application, the fact of other registered applications alone does not provide a sufficient factual basis in support of this assertion.
- As noted above, my task under s. 190B(5)(b) is to determine whether I am satisfied that the asserted facts can support the claimed conclusions. Without having sufficient information about the pre-sovereignty Bundjalung society and its traditional laws and customs and the connection between the native title claim group and that society, it follows that I cannot be satisfied that the following claims made in the application are supported:
    - the Bundjalung Nation has continued to exist in substantially uninterrupted form since sovereignty or first European contact to the present day; and
    - the Numbahjing Clan within the Bundajalung Nation acknowledges and observes traditional laws and customs that are rooted in the traditional laws and customs of a pre-sovereignty society.
- I note the following comment by Dowsett J in *Gudjala 2009* in support of this view:

> In assessing the adequacy of a general description of the factual basis of the claim, one 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. In my view it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim—at [29].

Claim group's link to the Bundjalung Nation at sovereignty

- While asserting that there are predecessors pre-dating the ancestor Mr Cook, who were part of the relevant pre- sovereignty society, the claimant's factual basis material only provides details that pertain to that named ancestor born in the late 1840s or 1850s. Mr Cook is said to have identified as a Numbahjing man and he (and his sons) are said to be 'initiated men into the Bundjalung ceremonial life and lore'. In my view these statements by themselves are not sufficient to infer the required link between the claim group and the Bundjalung Nation at sovereignty. Above, I have accepted that the factual basis is sufficient to support the assertion that the predecessors of the native title claim group had an association with the application area at sovereignty. That does not of itself provide the necessary link between those predecessors of the native title claim group and the society at sovereignty.
- In support of this view I refer to Dowsett J's comments in *Gudjala 2007* where he indicated the necessity, where the claim group is defined in reference to named apical ancestors, to identify within the factual basis 'some link between the apical ancestors and any society existing at sovereignty'—at [65] to [66]. This was reaffirmed by Dowsett J in *Gudjala 2009*, with his

Honour noting the obvious inadequacies in factual basis material that failed to elucidate any such connection, stating that '[b]ecause the Applicant does not demonstrate any connection between the apical ancestors and a pre-existing society and its laws and customs relating to land and waters, there is no explanation as to how current laws and customs of the claim group can be traditional'—*Gudjala 2009* at [40] and [54].

Applicant's submission

The Applicant submitted on 23 May 2011 court documents relied on in the (since discontinued) review application of the delegate's decision not to register the original application. Some of the submissions relate to the original application and as such are not relevant to the matter before me. Below I only address the submissions that relate to the amended application that have not already been addressed in my considerations above. I do not address submissions in relation to the applicable law as I have set out the law that, in my view, applies to the requirements of s. 190B(5)(b) above.

In the January 2010 document the Applicant submits at [35] to [37] that the delegate, by virtue of finding that 'the claim group was sufficiently identified and properly authorised [following a mandated traditional decision-making process], should have found that the requirements of s. 190B(5) had been met. I disagree with this submission. The requirements in relation to the identification of the claim group (s. 190(b)(3)) and the authorisation of the Applicant by the claim group (s. 190C(4)), whilst interlinked, are unrelated to the requirements s. 190B(5)(b). Accepting that the requirements have been met in the former conditions does not automatically lead to acceptance in relation to the latter condition. I have set out the requirements of s. 190B(5)(b) in detail and refer to my reasons above.

My views correspond largely with the submissions made by the State and I therefore do not summarise and address its submissions separately.

For the above reasons I am not satisfied that there is sufficient factual basis for the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

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

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta*—at [47] and [87].

Dowsett J at [82] in *Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

- 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 on to the current claim group;
- that there has been a continuity in the observance of traditional law an dcustom going back to sovereignty or at least to European settlement.

The Full Court in *Gudjala FC* at [96] agreed 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.

I refer to my reasons in relation to the requirement of s. 190B(5)(b). As I found that the application contains insufficient information that supports the assertion that the laws and customs currently observed by the claim group are derived from a society of people living according to a system of identifiable laws and customs, having a normative content and being a society that operated in relation to the application area at the time of European settlement, I can only find that there is not a sufficient factual basis to support the assertion that the group continues to hold native title in accordance with traditional laws and customs.

That an application which fails the condition at s. 190B(5)(b) must then fail the condition at s. 190B(5)(c) is supported by the decision in *Martin v Native Title Registrar* [2001] FAC 16 at [29], and *Gudjala 2009* at [82].

Applicant's submission

The Applicant submitted on 23 May 2011 (documents of 30 September 2010 at [35]) that the 'asserted facts disclose that there was no gap between the Applicants and the Apical ancestor, John Jack Cook, who was alive and living on the claim area at or about the time of initial invasion of the Numbahjing Clan's lands and waters. John Jack Cook is said to have lived for more than 100 years, and it is asserted that he directly passed on knowledge and beliefs in relation to the traditional laws and customs'.

I accept, on the basis of the information before me, that there has been continuous transmission of laws and custom between Mr Cook and the members of the claim group and from the affidavits before me I understand that current members of the claim group continue to pass on laws and customs. However, as noted above, what has not been established sufficiently is a factual basis to support the assertion that these laws and customs are traditional i.e. that their source is the pre-sovereignty Bundjalung Nation.

In my view, my findings correspond largely with the submissions made by the State and I therefore do not address the submissions separately.

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

The application **does not satisfy** the condition of s. 190B(6).

Section 190B(6) requires me to be satisfied that prima facie, at least some of the native title rights and interests claimed in the amended application can be established.

In the absence of a sufficient factual basis being provided by the Applicant to support the assertion that there currently exist traditional laws and custom (see above at s. 190B(5)(b)), it follows that I cannot be satisfied that there are rights and interests possessed under them.

Therefore, under this section, I cannot be satisfied that, prima facie, the native title rights and interests claimed in the application can be established.

That an application which fails the merit condition at s. 190B(5) must then fail the condition at s. 190B(6) is supported by the decision in *Gudjala 2009* at [84]. That there is a nexus between s. 190B(5) and s. 190B(6) can also be seen from the following comments made by Mansfield J in *Doepel*:

> Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim.
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). .. at [126] and [127]

In light of my view, it is not necessary for me to address the State's submissions which relate to the test that is to be applied under s. 190B(6).

In the interest of completeness I note that, in any event,

- the following rights and interests claimed are not 'in relation to land and waters' as required by s. 223 and as such are not native title rights and interests:
    - to control misuse of cultural knowledge, to be the keepers and custodians of the Bundjalung language as spoken by the Numbahjing in paragraph 1 (d);
    - to teach and transmit the language and knowledge of traditional custom and lore to future generations in paragraph 1(f); and
    - to practice healing in paragraph 1(g); and

- the description of the non-exclusive rights and interests claimed faces the following difficulties:
    - Paragraph 2 states that the rights claimed in paragraph 1 confer exclusive rights to the claimants, subject to paragraph 3.

- Paragraph 3 states that 'the native title rights and interests claimed are not claimed to the exclusion of all others' in relation to areas that are or used to be subject to a 'Previous Non-Exclusive Possession Act'.
- The claim in paragraphs 1(a), (c) and (h), however, to the rights to 'control the access of others' and to 'speak for' [the land and waters claimed], to 'control the use and enjoyment [of the resources of the land and waters claimed] of others' and to 'control all items within the environment of the claim area' are inherently exclusive rights, i.e. it is not possible to claim such rights as non-exclusive rights. It is not clear whether and how, in cases where paragraph 3 applies, the list in paragraph 1 is to be read down so that only those rights that can be non-exclusive rights are interpreted to be claimed.

In my view the above addresses the Applicant's submissions and I therefore do not summarise and address the submissions separately.

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application **does not satisfy** the condition of s. 190B(7).

Under s. 190B(7), I must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application. I take 'traditional physical connection' to mean a physical connection in accordance with the particular laws and customs relevant to the claim group, being 'traditional' as discussed in *Yorta Yorta* (see my discussion of this above).

The nature of the task imposed on the Registrar by s. 190B(7) was explained by Mansfield J in *Doepel* as follows:

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [12]

Given the conclusions I reached with respect to s. 190B(5)(b) that there is an absence of a sufficient factual basis being provided by the Applicant to support the assertion that there currently exist traditional laws and custom, it follows that I cannot be satisfied that a member of the claim group has or had a traditional physical connection with any part of the claim area.

That an application which fails the merit condition at s. 190B(5) must then fail the condition at s. 190B(7) is supported by the decision in *Gudjala 2009* at [84].

In light of the above, it is not necessary for me to address the State's submissions on why, it its view, the application does not satisfy the condition of s. 190B(7). In my view the above also addresses the Applicant's submissions. I therefore do not summarise and address the submissions separately.

Subsection 190B(8)
No failure to comply with s. 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-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 amended application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and

accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

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

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

The geospatial report dated 21 March 2011 and a search undertaken by myself of the Tribunal's geospatial databases on 25 August 2011 reveals that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

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

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

Schedule B, paragraph b) excludes from the application area any areas covered by previous exclusive possession acts as defined in s. 23B.

Reasons for s. 61A(3)

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

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

Schedule E, paragraph 3 confirms that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done.

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

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

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

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

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

The application at Schedule Q states that 'no claim is made by the native title claim group to ownership of minerals, petroleum or gas wholly owned by the crown'.

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

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

The application at Schedule P states that 'the Applicants make no claim to exclusive possession of any offshore place.

The State in its submissions of 6 May 2011 states that even though the amended application includes a revised Schedule P, 'the uncertainty and lack of precise description in relation to this requirement support the failure on the part of the Applicants to satisfy this requirement'. Reference is made to the State's 1 April 2009 submissions which in turn refer to the boundary description for the claim area in Attachment C and the inclusion of an 8 kilometre buffer zone from the mean low water mark. I have already dealt with the description of the claim area above at s. 190B(2) where I find that the reference to this term does not render the description and depiction of the sea area on Attachment C unclear. In my view Schedule P clearly addresses the requirements of s. 190B(9)(b).

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

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

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Numbahjing Clan within the Bundjalung Nation application**
NNTT file no.	**N08/2**
Federal Court of Australia file no.	**NSD1844/2008**
Date of registration test decision	**25 August 2011**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 61(5)		**not tested**
	re s. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**

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

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Met
s. 190B(4)		Not met
s. 190B(5)		Aggregate result: Not met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Not met
	re s. 190B(5)(c)	Not met
s. 190B(6)		Not met
s. 190B(7)(a) or (b)		Not met

Test condition	Subcondition/requirement	Result
s. 190B(8)		**Aggregate result:** **Met**
	re s. 61A(1)	**Met**
	re ss. 61A(2) and (4)	**Met**
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**

Attachment B
Documents and information considered

In relation to the original application:

- The Numbahjing Clan within the Bundjalung Nation native title determination application filed on 26 November 2008 (original application);
- Submissions from the State of New South Wales (the State) in relation to the application of the registration test, dated 1 April 2009;
- Submissions from the Applicant of 22 April 2009 in relation to the application of the registration test;
- Numbahjing Clan within the Bundjalung Nation—Reasons for Decision, 25 May 2009;

In relation to the amended application

- The Numbahjing Clan within the Bundjalung Nation native title determination application filed on 9 March 2011 (amended application);
- The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis'—GeoTrack number 2011/0421, dated 21 March 2011, being an expert analysis of the external and internal boundary descriptions and an overlap analysis against the Register of Native Title Claims (Register), Schedule of Applications, determinations, agreements and s. 29 notices and equivalent (the geospatial report);
- ISpatialView assessment undertaken on 25 August 2011;
- Submissions from the State of New South Wales (the State) in relation to the application of the registration test, dated 6 May 2011;

In relation to review of the decision of the delegate

- Applicant's Outline of Submissions, filed in the Federal Court on 8 January 2010 and submitted to the delegate on 23 May 2011;
- Submissions of the Second Respondent (the State) to the Federal Court (in support of the approach of the delegate to the task vested in the Registar under s. 190A), dated 29 January 2010, submitted to the Delegate on 30 May 2011;
- Submissions in Reply on behalf of the Applicant to the Federal Court [in response to the State's submissions of 29 January 2010], dated 30 September 2010 and submitted to the Delegate on 23 May 2011; and
- Federal Court's judgment in *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v NSW Minister for Lands* [2011] FCA 114 of 17 February 2011.

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