National Native Title Tribunal

Registration test decision

Application name	Northern Cape York Group #2
Name of applicant	Maryanne Coconut, Grace John, Malcolm Callope, Charles Budby, Gabriel Mairu, Florence Hector, Ivy Gordon, Andrea Toby, Maurice Woodley, Victoria Kennedy, Celia Fletcher, Agnes Mark, Alma Day, Harriet Flinders, Florence Luff, Neville Motton, Rhonda Parry, Allison Sailor, Raymond AhMat, Linda McLachlan and Michelle Kostecki (nee AhMat)
State/territory/region	Queensland
NNTT file no.	QC11/3
Federal Court of Australia file no.	QUD156/2011
Date application made	1 July 2011
Date of decision	**16 December 2011**
Name of delegate	Stephen Rivers-McCombs

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

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

Date of reasons: 19 December 2011

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Stephen Rivers-McCombs

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an **instrument of delegation dated** 24 August 2011 and made **pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Northern Cape York Group #2 claimant application to the Native Title Registrar (the Registrar) on 1 July 2011 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 1 July 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

I originally set down 9 September 2011 as the date for registration testing. Following a request for an extension of time from the applicant's representative on 5 August 2011, I decided to defer the application of the registration test until 23 September 2011. I again deferred the testing date until 30 September 2011 in response to a request for a further extension from the applicant's representative on 15 August 2011.

On 29 September 2011, the case manager with carriage of this matter advised the applicant's representative that the test date would be deferred until 16 November 2011 and that I would be providing a preliminary assessment of the application. On 10 October 2011, the case manager provided the applicant's representative with a copy of the preliminary assessment.

On 10 November 2011, the applicant's representative requested a further extension of time to enable them to provide additional material in support of the application. I granted the request and the applicant was informed on 14 November 2011.

Registration test

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

Pursuant to ss. 190A(6) and (6B), the claim in the 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.

Information considered when making the decision

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

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

In reaching my decision, I have considered the information contained in the Form 1 for the Northern Cape York Group #2 application. I have also taken into account:

- The document titled 'Submission on behalf of the Applicant, Northern Cape York #2', which the applicant's representative submitted to the Registrar on 29 August 2011.
- Further material submitted by the applicant's representative on 24 November 2011, namely:
    - a collection of affidavits sworn in 2002 and submitted to the Court in relation to two (2) previous native title determination applications; and
    - a copy of an email dated 24 November 2011 from **[Anthropologist 1 – name deleted]**.
- The geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 7 July 2011 (GeoTrack: 2011/1147).
- The results of my own searches against the Tribunal's mapping database, the Tribunal's case management database and the Register of Native Title Claims.

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 of the Act. Further, mediation is private as between the parties and is also generally confidential – see ss. 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. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication – *Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I, and other officers of the Tribunal, have undertaken to ensure procedural fairness is observed are as follows:

- On 5 July 2011, the Tribunal provided a copy of the application and accompanying documents to the State of Queensland (State) and advised the State of its ability to provide submissions in relation to the application.
- On 30 August 2011, the State was provided with a copy of the additional material submitted by the applicant to the Registrar on 29 August 2011. The State was advised of its ability to submit comments regarding that material.
- On 25 November 2011, the Tribunal provided the State with a copy of the additional material submitted to the Registrar by the applicant on 24 November 2011, and the State was advised of its ability to submit comments regarding that material.

As at the date of this decision, the Registrar has not received any submissions in relation to the claimant application from the State.

Procedural and other conditions: s. 190C

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

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

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

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural 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] to [39]. In other words, does the application contain the prescribed details and other information?

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

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

Native title claim group: s. 61(1)

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

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

I understand that, as discussed above, my only concern at this stage is whether the application sets out the information referred to in s. 61(1) – *Doepel* at [16] and [35] to [36]. I may not look beyond the information contained in the application, nor am I required to undertake any form of

merit assessment (except in the limited way outlined below) to determine whether or not the native title claim group described in the application 'is in reality the correct native title group' – *Doepel* at [37] and [39]. I understand that I consider the adequacy of any claim group description provided in the application in my assessment under s. 190B(3) and that I consider whether the applicant has been properly authorised in my assessment under s. 190C(4). I have, therefore, not turned my mind to those matters at this point.

I do, however, note that I may not be satisfied that the information referred to in s. 61(1) is contained in the application if, on its face, it appears that the application has not been made on behalf of '*all* members of the native title claim group' – *Doepel* at [35] (emphasis added).

The application contains the details required by s. 61(1) in relation to the applicant persons. The Form 1 sets out the names of each of the persons who jointly comprise the applicant. The affidavits sworn by each of the applicant persons contain statements to the effect that the deponents are members of the native title claim group and are jointly authorised by the other members of the claim group to make the application on their behalf.

A description of the native title claim group is found in Attachment A of the application, as set out below in my reasons for s. 190B(3). The description defines the claim group as comprising those persons who are descended from named apical ancestors. There is nothing on the face of this description, or elsewhere in the application, which indicates that the application has been made by a subgroup of the native title claim group or has otherwise not been made on behalf of all of the group's members.

For the above reasons, I am satisfied that the application contains the information required by s. 61(1).

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

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

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

The name and address for service of the persons who comprise the applicant is provided 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 application contains all details and other information required by s. 61(4).

A description of the native title claim group is contained in Attachment A.

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

The application is accompanied by dated and witnessed affidavits sworn by each of the persons who comprise the applicant. The statements required by s. 62(1)(a)(i) to (iv) are contained in paragraphs 1 to 4 of the affidavits.

The wording of subparagraph 62(1)(a)(v) was amended by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth) (*Technical Amendments Act*). Prior to the amendment, the provision had required only that an applicant's affidavit state 'the basis on which the applicant is authorised as mentioned in subparagraph (iv)'. I am not aware of any case law that has considered the level of detail required by the new wording of subparagraph (v). However, the explanatory memorandum for the *Technical Amendments Act* does give some context for the current form of s. 62(1)(a)(v). The explanatory memorandum describes the motive behind the new wording in the following way:

> 1.223 Some affidavits accompanying applications provide little or no information setting out the basis of authorisation, for example, merely setting out the date the authorisation meeting was held. This limits the utility of requiring the applicant to state the basis on which the applicant is authorised.
>
> 1.224 [The Bill] would amend subparagraph 62(1)(a)(v) to provide that the applicant must include a statement in the affidavit accompanying the application 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. This should include indicating whether the decision-making process complied with paragraph 251[B](a) or 251[B](b).

In my view, these comments indicate that the legislature was primarily concerned to ensure, through the enactment of the new subparagraph (v), that applicants' affidavits set out details of the authorisation process in a way that identifies whether the process used was of the kind described by paragraph 251B(a) or by paragraph 251B(b).

The persons who jointly comprise the applicant each state in their affidavits that:

> The Native Title Claim Group authorised the other people making up the Applicant and I to make this application, to deal with matters arising in relation to it and to represent all the people in the native title claim group at a meeting of the native title claim group, in accordance with a traditional process – at [5].

I understand from this statement that the applicant persons claim to be authorised through the use of a traditional decision making process and that the process involved claim group members meeting and deciding, together, on who to authorise as the applicant. In my view, it is implied that the traditional process referred to was one mandated by the group's traditional law and custom and, therefore, of the kind contemplated by s. 251B(a). Given that, the affidavits contain the information which the legislature was, in my view, most concerned to ensure is provided.

I do note that the nature of the traditional decision making process is referred to only in a general way, as one involving a meeting of claim group members. Nonetheless, I am satisfied that the affidavits comply with the requirements of s. 62(1)(a)(v). This is both because the affidavits identify the type of s. 251B process used and because the applicant persons swear the truth of the information contained elsewhere in the application, which includes, at Attachment R, some further detail regarding the authorisation process.

I am, therefore, satisfied that the application contains the information required by s. 62(1)(a).

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

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

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

A written description of the external boundary of the area is contained in Attachment B1. The areas within that external boundary which are not covered by the application are described in Attachment B.

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

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

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

A map showing the boundaries of the area covered by the application is provided in Attachment C.

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

Attachment D contains details and results of searches undertaken by, and on behalf of, the claim group to determine the existence of any non-native title rights and interests in relation to the land and waters of the application area.

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

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

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

Attachment E contains a description of the native title rights and interests claimed in relation to land and waters covered by the claim area. This consists of more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

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

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

I note that it is not enough to merely recite the assertions contained in s. 62(2)(e) and that a 'general description' of the factual basis is required to meet the condition imposed by s. 62(2)(e) – *Queensland v Hutchison* [2001] FCA 416 at [17] to [23]. However, the description can be something less than the information needed to satisfy the requirements of s. 190B(5) – *Wulgurukaba People #1 v State of Queensland* [2002] FCA 1555 at [19]; see also *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 at [92].

Schedule F provides a very brief description of the factual basis on which it is asserted that the claimed native title rights and interests exist. It does, however, include statements to the effect that the claim group is descendant from the community that was present on the claim area at the time that the Crown asserted sovereignty over its lands and waters. In my opinion, some indication of who belonged to that community is then given by the claim group description at Attachment A, which lists the apical ancestors of the current claim group. I infer that the persons who comprised those earlier communities either included those apical ancestors, or were their descendants or antecedents.

In addition, Schedule F includes statements to the effect that the claim group acknowledge and observe traditional laws and customs, which are based on the laws and customs of the community that was in occupation of the claim area at sovereignty. Examples of these laws and customs, which the claim group is said to still practice and which relate to the lands and waters of the claim area, are then listed in Schedule M. Because it is implied, in my view, that these laws and customs are rooted in those of the relevant pre-sovereignty society, this information relates to both subparagraph (i) and subparagraphs (ii) and (iii). I note also that Schedule G lists examples

of other activities that claim group members are said to currently undertake on the claim area. This goes to the assertion described in subparagraph (i).

The information just described is brief and at a high level of generality. In my view, however, it contains details that go beyond the assertions in subparagraphs (i) to (iii). The information, in my opinion, amounts to a 'general description' of the factual basis for the purposes of s. 190C(2) with respect to s. 62(2)(e). In this regard, I note again that s. 190C(2) is focused on procedural matters, and that it is s. 190B(5) which requires the Registrar or her delegate to 'address the quality of the asserted factual basis' supporting the claimed native title rights and interests – see *Doepel* at [16] to [17].

For the reasons given, I am satisfied that the application contains the information required by s. 62(2)(e).

Activities: s. 62(2)(f)

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

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

Schedule G contains a non-exhaustive list detailing activities currently carried out by the claim group in relation to the area claimed.

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

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

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

The applicant states in Schedule H that there are no other applications in relation to 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 application contains all details and other information required by s. 62(2)(ga).

Schedule HA contains a statement to the effect that the applicant is not aware of any notifications under s. 24MD(6B)(c) that relate to the whole or part of the claim area.

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

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

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

Schedule I provides that the applicant is not aware of any notifications under s. 29 (or under a corresponding provision of law of a state of territory) that have been given and that relate to the whole or part of the claim area.

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

The requirement that I be satisfied in the terms set out in s. 190C(3) is only triggered if the previous application meets all of the criteria contained in s. 190C(3)(a) to (c) – *Western Australia v Strickland* [2000] FCA 652 at [9].

In considering whether paragraphs (a) to (c) of s. 190C(3) apply, I have had regard to a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 7 July 2011 (GeoTrack: 2011/1147) (geospatial report), and to later searches of my own (discussed below). The geospatial report identifies two (2) applications that overlapped part of the area covered by the current application and that were on the Register of Native Title Claims (the Register) when the current application was made. The two (2) applications identified were the Thanakwithi People application (QUD6014/00; QC00/15) and the Mapoon People application (QUD6010/02; QC02/9).

In the period since the geospatial report was prepared, I have been provided with copies of the notices of discontinuance filed in the Court in relation to the Thanakwithi People and Mapoon People applications, respectively. I have also conducted my own searches against the Register and against the Tribunal's case management database. Those searches confirmed that the Mapoon and Thanakwithi applications have been discontinued and that they are no longer on the Register.

Ultimately, I am satisfied that, because there is no current overlap between the application now being considered and any other application that was on the Register when the current application was made, the conditions in paragraphs 190C(3)(a) to (c) do not apply. However, I do note that those paragraphs speak in the past tense and that they might therefore appear to capture the Mapoon People and Thanakwithi People applications if applied according to their literal terms. I have not applied paragraphs (a) to (c) in accordance with, what might appear to be, their literal meaning because I have formed the view that to do so would be contrary to the purpose of s. 190C(3).

I have reached my view regarding the proper approach to s. 190C(3)(a) to (c) in light of the explanatory memorandum that accompanied the Native Title Amendment Bill 1997. With respect to what became s. 190C(3), the explanatory memorandum said that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application or amended application *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test. (Emphasis added.)
>
> ...
>
> 35.38 ... The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

I understand from the use of the present tense in paragraph 29.25, and from the statement in paragraph 35.38, that s. 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied. It is not achieved by preventing the registration of a claim in the present situation, namely where the overlapping claims, though active and on the Register when the current application was made, are withdrawn before the current application is tested. In fact, by inhibiting the registration of the later application, such an outcome could well thwart the intention to encourage the consolidation of overlapping claims.

Given my conclusion that s. 190C(3)(a) to (c) are intended only to capture previous applications that are on the Register when the registration test is applied, those provisions do not, in my view, apply to the Mapoon and Thanakwithi People applications. The requirement that I be satisfied that the claim groups for each of those applications do not have members in common with the current application's claim group is, therefore, not triggered.

For the reasons given, the application **satisfies** the condition of s. 190C(3).

Subsection 190C(4)
Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
>
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
>
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

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

Attachment R contains a certificate from the Cape York Land Council Aboriginal Corporation (CYLC), which is signed by the CYLC's Chief Executive Officer, **[Name deleted]**, and dated 30 June 2011.

I deal first with whether the CYLC is the only representative body that must provide a certificate. I then outline why I am satisfied that the CYLC's certificate meets the requirements of Part 11 of the Act.

Certified by each representative body that could certify the application

The certificate states that:

> The area of the land and waters of the NCY #2 [Northern Cape York Group #2] claim is in the Cooktown representative body area. CYLC is the representative body recognised under section 203AD(1) of the *Native Title Act 1993* (Cth) (NTA) for the Cooktown area[.]

The geospatial report prepared by the Tribunal's Geospatial Services (referred to above) also identifies that the area covered by the application falls entirely within the region for which the CYLC is responsible. I have conducted my own search against the Tribunal's mapping database and I am satisfied that there is no other representative Aboriginal/Torres Strait Islander body that could have also certified the application.

Certified under Part 11

The relevant provisions in Part 11 are contained in s. 203BE. I note that the certificate found at Attachment R of the application meets the requirement of s. 203BE(1)(a), namely that the certificate must be in writing.

The relevant provisions of s. 203BE(4) require that a certificate issued by a representative body:

(a) include a statement to the effect that the body is of the opinion that:

- all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group; and

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

The certificate provided by the CYLC contains the statements required by s. 203BE(4)(a). It then includes the following statements:

> CYLC engaged **[Anthropologist 1 – name deleted]** from July 2010 to:
> a) review existing ethnographic material for the NCY #2 claim area;
> b) do field work with relevant traditional owner groups;
> c) to advise on the reformulation of then overlapping NTDA's (which have since been discontinued) within the NCY #2 claim area; and
> d) advise CYLC on the composition of the NTCG [native title claim group] for the NCY #2 clam area.

[Anthropologist 1 – name deleted] did:

1. 60 days of desktop work and field work between July 2010 and April 2011;
2. advised CYLC on the composition of the NCY #2 NTCG;
3. met, along with CYLC, with the NCY #2 NTCG on 16, 17, 18 and 19 May and 7 June 2011 where the description of the NCY #2 NTCG was reviewed and accepted, and the NCY #2 claim authorised in accordance with traditional law and custom; and
4. advised CYLC that the NCY #2 claim was authorised pursuant to section 251B(a) of the NTA.

In my view, these statements briefly set out the CYLC's reasons for holding the opinions referred to in s. 203BE(4)(a). I am, therefore, satisfied that the requirements for a valid certification under s. 203BE(4) are met.

Objection to the process undertaken by the CYLC

On 23 September 2011, the Tribunal received an objection to the registration of the Northern Cape York Group #2 application. The objection alleged that the process used by the CYLC to satisfy itself of authorisation was inadequate. In particular, the letter of objection stated that:

- the objector and her immediate family, who are said to belong to the claim group, were not provided with a copy of the notice for the meeting held on 17 May 2011;
- the notice, which was provided to other group members, was unclear as to what the purpose of the meeting was, and that it did not identify the apical ancestors who have been used to describe the claim group;
- the period of time between the notice being sent out and the meeting being held was insufficient;
- the attendance at the meeting was inadequate, and that the process of the meeting was improper; and
- the three (3) applicant persons who were said to have been chosen at the meeting do not represent the Yupungathi part of the claim group.

Having considered those objections in light of both the terms of the Act and the relevant case law, I have formed the view that I cannot take them into account. In coming to this view, I have placed particular weight on Mansfield J's reasons in *Doepel*. In that case, his Honour observed that 's. 190C(4)(a) does *not* require the Registrar to consider the correctness of the certification by the representative body, but only its compliance with the requirements of s. 203BE' – at [82] (emphasis added). His Honour explained the rationale for the limited nature of the assessment under s. 190C(4)(a) as follows:

> Section 203BE(4) requires the certification to include a statement to the effect that the representative body is of the opinion that the requirements of [subsections] (2)(a) and (b) are met and to briefly set out the reasons for the representative body holding that opinion. ... The alternative provided for in s. 190C(4)(b), and the nature of the obligations of the representative body under s. 203BE, indicate in my view that in the one case the responsibility for addressing the requirements of s. 251B (to the extent they must be addressed when considering whether to accept an application for registration) rests in substance with the representative body, and in the other case with the Registrar. Section 203BE(2) provides emphatically that the representative body 'must not' provide its certificate

> unless it is of the opinion that all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it. *In my judgment, [s.] 190C(4)(a) does not leave some residual obligation upon the Registrar, once satisfied of the matters to which s. 190C(4)(a) expressly refers, to revisit the certification of the representative body* – at [81] (emphasis added).

In my view, it is clear both from Mansfield J's comments, and from the terms of ss. 190C(4)(a) and 203BE, that it is not the role of the Registrar or her delegate to look behind the certification provided by the relevant representative body. As a result, I am not able to take the above objection into account.

Decision

For the reasons set out above, I am **satisfied** that the condition of s. 190C(4)(a) is met.

Merit conditions: s. 190B

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

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

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

The description of the external boundaries of the claim area is included in the application at Attachment B1 and is titled 'Description of External Boundary'. The description is a metes and bounds description, prepared by the Tribunal's Geospatial Services, which makes reference to topographic features and land parcels. General exclusions of areas within the external boundaries of the claim area are listed in Attachment B.

A colour map of the claim area, titled 'Northern Cape York No. 2' and dated 4 April 2011, is found at Attachment C. This map was also prepared by the Tribunal's Geospatial Services. It includes:

- the application area depicted by a bold dark grey line;
- thematically mapped non freehold land tenure;
- major topographic features; and
- scalebar, north point, and notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar or her delegate to be satisfied that this is the case, the written description and the map should be sufficiently consistent with each other.

In determining whether the boundary description provided in Attachment B1 and the map in Attachment C are sufficient for the purpose of s. 190B(2), I have had regard to the geospatial report provided by the Tribunal's Geospatial Services (referred to above in relation to s. 190(C)(3)). The geospatial report concludes that the description and map are consistent and that they identify the application area with reasonable certainty. Having considered the description contained in Attachment B1 and the map in Attachment C, I agree with that assessment.

I note that Attachment B lists only general exclusions and does not refer to specific tenures. However, in my view, the exclusions are described in a way that provides an objective means by which the areas excluded from the application area can be accurately identified.

Therefore, I am **satisfied** that the application meets the requirement of s. 190B(2).

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

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

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

A description of the native title claim group is found in Attachment A. It provides that:

> The native title group in relation to the Claim Area is made up of all persons descended from the following apical ancestors:
>
> **[Names deleted]**
>
> **Limited purpose of the description**
> The above description of the native title claim group is provided solely to comply with requirements for registration of the application in accordance with the provisions of the *Native Title Act 1993* (Cth).
>
> The Applicant notes that the way the Court will be asked to describe the native title holders when making a determination of native title will not necessarily be precisely reflected in the above description of the native title claim group.

Because the application does not name each of the claim group members individually, I have considered it against the requirements of s. 190B(3)(b). That provision requires that the persons in the claim group be described with sufficient clarity to enable one to ascertain whether or not a particular person is a member of that group.

I understand that the focus of s. 190B(3) is 'not upon the correctness of the [claim group] description', but upon 'whether the application enables reliable identification of the persons in the native title claim group' – *Doepel* at [37] and [51]. In this regard, I note the comment of Carr J in *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 that such a description must contain 'a set of rules or principles' which can be used to determine the claim group membership of any particular person – at [25]. In my view, a claim group description must, in that way, provide an objective basis on which to assess a person's claim group membership. I note also that rules or principles that require a difficult factual inquiry do not prevent a description from being sufficiently clear – *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67].

My understanding of the claim group description at Attachment A is that the claim group includes all persons who are descendant from any of the named ancestors. Although it may require an extensive factual inquiry to determine whether a person is descendant from one of the apical ancestors, the description provides a clear and objective basis on which to determine whether a person is a member of the claim group. Given that, the claim group description is, in my view, a sufficiently clear description for the purposes of s. 190B(3).

The section of the claim group description that is headed 'Limited purpose of the description' is not, in my opinion, relevant to the task at s. 190B(3). As noted, that task directs my attention to

whether or not the description provided is sufficiently clear. The clarity of that description is not affected by the fact that the claim group might be described differently in another context.

For the above reasons, I am **satisfied** that the condition of s. 190B(3) is met.

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

Doepel is authority for the proposition that, at s. 190B(4), the Registrar or her delegate must be satisfied that the native title rights and interests claimed are identifiable in the sense that they 'are understandable and have meaning' – at [99]. I note that I have not, at this point, turned my mind to whether or not the rights and interests claimed are native title rights and interests as defined in s. 223(1). In my view, that assessment is part of considering whether the native title rights and interests claimed can be established, prima facie. I have, therefore, considered that question in relation to s. 190B(6).

A description of the native title rights and interests claimed is found at Attachment E. It provides that:

> A description of the native title rights and interests in relation to the part of the Claim Area that is:
>
> - part of the Comalco ILUA (Western Cape Communities Co-existence Agreement) (National Native Title Tribunal File No: QIA2001/002),
>
> is as follows:
>
> 1. The native title rights and interests claimed in relation to the land and waters referred to above, other than in relation to Water and subject to paragraphs 3, 4 and 5, are non-exclusive rights to:
>
> a. live on the claim area, to camp, erect shelters and other structures;
>
> b. access, be present on, move about in and on and use the claim area;
>
> c. take and use the Natural Resources of the Determination Area for the purpose of satisfying the personal, domestic or non-commercial communal needs of the members of the native title claim group;
>
> d. maintain and protect from harm by lawful means sites and places of significance in the claim area;
>
> e. conduct social, religious, cultural, spiritual and ceremonial activities on the claim area;
>
> f. hunt and gather in, on and from the claim area for the purpose of satisfying the personal, domestic or non-commercial communal needs of the members of the native title claim group,
>
> and the right to inherit and succeed to the native title rights and interests.
>
> 2. Subject to paragraphs 3, 4 and 5, the native title rights and interests claimed in relation to Water covered by the Application are non-exclusive rights to:

a. hunt and fish in or on, and gather from Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title claim group; and

b. take, use and enjoy Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title claim group.

3. The native title rights and interests are and the native title is subject to and exercisable in accordance with:

a. the traditional laws acknowledged and customs observed by the native title claim group;

b. the laws of the Commonwealth and the State of Queensland.

4. The native title rights and interests claimed in the Application do not confer on the native title claim group possession, occupation, use and enjoyment of the claim area to the exclusion of all others.

5. The native title rights and interests claimed in the Application are not claimed by the native title claim group in relation to any part of the claim area where native title has been validly extinguished by operation of the Laws of the Commonwealth and the State of Queensland.

6. The words and expressions used in paragraphs 1 to 5 above have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth) except for the following defined expressions:

"**Animal**" and "**Plant**" have the meanings given to them in the *Nature Conservation Act 1992* (Qld);

"**Determination Area**" means the land and waters within that part of the Claim Area that is part of the Western Cape Communities Co-existence Agreement (ILUA) (National Native Title Tribunal File No: QIA2001/002);

"**Fish**" has the meaning given to it in the *Fisheries Act 1994* (Qld);

"**Laws of the Commonwealth and the State of Queensland**" means the common law and the laws of the Commonwealth of Australia and the State of Queensland, and includes legislation, regulations, statutory instruments, local planning instruments and local laws;

"**Minerals**" has the meaning given to it in the *Mineral Resources Act 1989* (Qld)

"**Natural Resources**" means:

a) any Plant and Animal, including Fish and bird life found on, or in, the lands and waters of the Determination Area from time to time;

b) flints, clays, ochres, stones and soils found on or below the surface of the Determination Area,

but does not include

c) Minerals or Petroleum;

"**Petroleum**" has the meaning given to it in the *Petroleum Act 1923* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld);

"**Tidal Water**" has the meaning given to it in the *Land Act 1994* (Qld);

"**Water**" means water as defined in the *Water Act 2000* (Qld) and Tidal Water.

A description of the native title rights and interests in relation to the balance of the Claim Area are as follows:

1. In relation to the exclusive areas, the native title rights and interests that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, possession, occupation, use and enjoyment to the exclusion of all others.

2. In relation to the non-exclusive areas, the native title rights and interests of the native title holders that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, non-exclusive rights to use and enjoy those areas being:

a) the right to travel over, to move about, and to have access to those areas;

b) the right to hunt and to fish on the land and waters of those areas;

c) the right to gather and to use the natural resources of those areas such as food, medicinal plants, timber, stone and resin;

d) the right to take and to use the natural water on those areas;

e) the right to live, to camp and for that purpose to erect shelters and other structures on those areas;

f) the right to light fires on those areas for domestic purposes, but not for the clearance of vegetation;

g) the right to conduct and to participate in the following activities on those areas:

i. cultural activities;

ii. cultural practices relating to birth and death, including burial rites;

iii. ceremonies;

iv. meetings; and

v. teaching the physical and spiritual attributes of sites and places on those areas that are of significance under their traditional laws and customs.

h) the right to maintain and to protect sites and places on those areas that are of significance under their traditional laws and customs;

i) the right to share or exchange subsistence and other traditional resources obtained on or from those areas;

j) the right to be accompanied on to those areas by persons who, though not native title holders, are:

i. people required by traditional law and custom for the performance of ceremonies or cultural activities on the areas;

ii. people who have rights in relation to the areas according to the traditional laws and customs acknowledged by the native title claim group members; and

iii. people required by the native title holders to assist in, observe, or record traditional activities on the areas;

k) the right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof.

These native title rights and interests do not confer on the native title holder's possession, occupation, use and enjoyment of the non-exclusive areas, to the exclusion of all others.

> The native title rights and interests are subject to and exercisable in accordance with the valid laws of Queensland and the Commonwealth of Australia.

In my view, the rights and interests claimed in respect of the area covered by the Comalco ILUA (Western Cape Communities Co-existence Agreement), and in relation to the 'exclusive' and 'non-exclusive' areas, are readily identifiable in the sense that they are described in a way that is understandable and has meaning.

I understand the reference to 'exclusive areas' in the above description to refer to those parts of the claim area (not covered by the Comalco ILUA) over which the applicant is able to establish a right to exclusive possession, occupation, use and enjoyment. The reference to 'non-exclusive areas', then, refers to areas where the applicant cannot establish the existence of that right. Although the specific areas covered by the exclusive and non-exclusive rights will need to be determined at some point in the future, my view is that that does not prevent the rights claimed from being understandable or having meaning.

I am therefore **satisfied** that the condition of s. 190B(4) is met.

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

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

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

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision. Before doing so, however, I set out how I have approached the task at s. 190B(5) generally.

The task at s. 190B(5)

As Mansfield J explained in *Doepel*, the task at s. 190B(5) is limited:

> It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; *but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests*. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. *The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts* – at [17] (emphasis added); approved

by the Full Federal Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [83] to [85].

Although mindful that I may not look behind the facts asserted in the applicant's material, those facts must contain sufficient detail to properly support the assertions particularised in paragraphs (a) to (c) of s. 190B(5). In this respect, I have had regard to the comments of the Full Federal Court in *Gudjala FC*. There, the Court highlighted the link between the requirements of ss. 62(2)(e) and 190B(5). Their Honours then outlined the requirements of s. 190B(5) in the following way:

> The fact that the detail specified by s 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be *in sufficient detail to enable a genuine assessment of the application* by the Registrar under s 190A and related sections, and be *something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based* – at [92] (emphasis added).

I note that, at this point, the Court also made similar comments to those of Mansfield J in *Doepel*, namely that 'the applicant is not required 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. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim' – at [92].

In light of *Doepel* and *Gudjala FC*, I have assessed the material provided in support of the application on the basis that the facts asserted in it are true; I have not assessed the quality of the evidence that might lie behind those asserted facts. In considering whether the asserted factual basis is sufficient to support the particular conclusions outlined in s. 190B(5), I have also been careful not to require more than a general description of the factual basis of the claim. However, I have required that it be in sufficient detail to enable a genuine assessment under s. 190B(5) and that it consist of more than merely assertions at a high level of generality. I also note that, although the wording of s. 62(2)(e) informs the standard set by s. 190B(5), an application which has met the requirement of s. 62(2)(e) will not necessarily pass at s. 190B(5). As the Full Court commented in *Gudjala FC*, an application may fail at later stages of the registration test if the material required by s. 62 is not furnished 'fully and comprehensively' – at [90].

With respect to the level of factual detail needed to meet the requirements of s. 190B(5), I note that, in addition to the Court's comments in *Gudjala FC*, I have also had regard to the decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). In particular, I note that in *Gudjala 2009* Dowsett J cautioned that, in assessing the adequacy of a description of the factual basis of a claim, the Registrar or her delegate 'must be careful not to treat, as a description of the factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof' – at [29]. Further, I note that in *Gudjala 2007* his Honour held that s. 190B(5) requires 'that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' – at [39].

In my view, these comments from Dowsett J are consistent with, and reinforce, the Full Court's characterisation of s. 190B(5) as requiring more than general, high level assertions. The asserted

factual basis must contain a certain level of particularity: the factual material must contain details that can be understood as having relevance to the particular native title claimed by the particular group over the particular area covered by the application.

I note that I am aware that the Full Court in *Gudjala FC* allowed an appeal against Dowsett J's decision in *Gudjala 2007*. However, their Honours' reasons do not appear to contain any criticism of Dowsett J's characterisation of the requirements of s. 190B(5), which his Honour applied again, after the matter was sent back, in *Gudjala 2009*. I therefore feel that it is appropriate to have regard to Dowsett J's analysis of the requirements of s. 190B(5).

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).

The requirements of s. 190B(5)(a)

With respect to the assertion contained in paragraph (a) of s. 190B(5), Dowsett J has held that the factual material must be sufficient to support the assertions:

- 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; and
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – *Gudjala 2007* at [52].

Consistent with my earlier comments regarding the requirements of s. 190B(5) generally, I also note that, in considering whether the asserted factual basis sufficiently demonstrates both that present and past association, I am not obliged to accept 'very broad statements' that, for instance, have no 'geographical particularity' – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26].

Below, I set out the reasons for why I have formed the view that the applicant's factual basis information is sufficient to support both limbs of the s. 190B(5)(a) assertion. I deal first with the material that is relevant to the asserted association of the claim group's predecessors with the claim area. I then turn to the asserted association of the current claim group.

First limb of the s. 190B(5)(a) assertion – that the claim group's predecessors have been associated with the claim area

In Schedule F of the Form 1 it is asserted that:

> b. the native title claim group has ancestral connections to (or otherwise has as its predecessors) the community that was present on and connected to the land and waters of the onshore places of the claim area at the time that those places became part of the colony of New South Wales, ie on 27 January 1788;
>
> c. the native title claim group has ancestral connections to (or otherwise has as its predecessors) the community that was present on and connected to the land and waters of the offshore places of the claim area at the time that the Commonwealth extended its sovereignty over those places, on or after 1 January 1901[.]

In my view, these statements are at such a high level of generality that they do little more than restate the s. 190B(5)(a) assertion, so far as it relates to the claim group's predecessors. Moreover, I

note that the claim area does not contain any offshore places (which, roughly speaking, are those places that are more than three (3) nautical miles off the Queensland coast). Paragraph C, therefore, does not relate to the particular area covered by the current application.

The applicant's representative has, however, provided additional material that relates to the factual basis supporting the assertion described in s. 190B(5)(a). The additional material takes the form of:

- a document titled 'Submission on behalf of the Applicant, Northern Cape York #2' (the applicant's submission);
- an email dated 24 November 2011, authored by **[Anthropologist 1 – name deleted]**, a consultant anthropologist commissioned by the CYLC to undertake research regarding the current application; and
- seventeen (17) affidavits sworn in March 2002 and filed in relation to previous proceedings regarding the application area and an area on its southern boundary. The majority of these affidavits appear to be by claim group members or, possibly, their recently deceased predecessors. However, I note that it is not clear to me how one deponent, **[Deponent 1 – name deleted]**, is either related to the claim group or how the information contained in her affidavit is relevant to the claim group, including their association with the application area and that of their predecessors. Also, while their surnames indicate that they may be related to the claim group, the affidavits of [**Deponent 2 – name deleted]** and **[Deponent 3 – name deleted]** do not contain, in my view, any information relevant to the current application.

[Anthropologist 1's – name deleted], email describes the claim group as comprising those persons who belong to the following land holding groups: Yupungathi; Tjungundji; Taepadhighi; Mpakwithi; Thanakwithi; and Anathangayth. This includes identifying which of the apical ancestors referred to in Attachment A belonged to which of those six (6) groups. Moreover, **[Anthropologist 1 – name deleted]**, either identifies the date of birth for each of those ancestors or provides details that indicate an approximate birth date. This information shows that the claim group has ancestors who belonged to each of the six (6) groups just noted. It further shows that each of those ancestors was born at some point between the early-to-mid-1800s (**[Ancestor 1 – name deleted]**) and 1914 (**[Ancestor 2 – name deleted]**).

In relation to the association of the claim group's predecessors with the application area, the email of **[Anthropologist 1 – name deleted]**, and the applicant's submission then set out fairly similar information. In particular, the two documents identify the parts of the claim area that the six (6) groups noted above have been, and continue to be, associated with, both physically and under the laws and customs of the people of northwest Cape York. The documents do this mainly with reference to ethnographic accounts published between 1903 and 1981, although the applicant's submission also refers to some works produced in the late-1800s. In summary, the documents identify the:

- Yupungathi as being associated with a part of the application area's northwest coast, namely an area which stretches 40 km south of Janie Creek;
- Tjungundji as being associated with an area lying between Cullen Point in the north, Batavia Landing in the southeast and the mouth of Janie Creek in the southwest;

- Taepadhighi as being associated with the area between the Wenlock and Ducie Rivers, in the northeast of the claim area;
- Mpakwithi as being associated with the area between the Wenlock River and Tentpole Creek, which sits, roughly, in the centre of the application area;
- Thanakwithi as being associated with the area that has the west coast of the claim area as its western boundary, the northern coast of Albatross Bay as its south boundary, and Tentpole Creek and Pennefather River as its eastern and northern boundaries, respectively; and
- Anathangayth as being associated with the southeast portion of the claim area – the region bounded by the Mission River, Myall Creek, Cox Creek and the Wenlock River.

Elsewhere in his email, **[Anthropologist 1 – name deleted]** states that:

> At the end of the 19th century the groups had full possession of the claim area (Meston 1896: 2-4) (Shanahan 1896: 31) with little sustained or systematic impact from settlers (Meston 1896: 2). The local Aboriginal folk were effectively pleasing themselves on their land.
>
> Given the relative lateness of 'effective sovereignty', that is the arrival of European settlement it is reasonable to infer that the predecessors of the claimants at the end of the 19th century, were the same people that occupied the area at actual sovereignty.
>
> ...
>
> The claimants trace descent from a known set of Aboriginal persons who were indigenous occupants of the claim area at the time of white settlement. Early genealogies and mission records attest that the majority of the known apical ancestors predate the permanent arrival of European settlers. These persons are in turn descendant from Yupungathi, Tjungundji, Taepadhighi, Mpakwithi, Thanakwithi and Anathangayth forebears whose occupation of the claim area extends back beyond the arrival of the first Europeans.

The applicant's submission contains similar statements regarding the timing of European settlement in northern Cape York. The statements suggest that settlement may have started as early as the beginning of the 20th century. In my view, however, the results of the claim group's searches to determine the existence of non-native title rights in the region indicate that European settlement in the area did not begin on any significant scale until, at least, some point well into the first half of the 20th century – see Attachment D.

The affidavits provided by the applicant's representative support, with more detailed discussion, the points made generally in **[Anthropologist 1 – name deleted]**, email and the applicant's submission. The deponents do not include members of all of the six (6) groups that are said to be associated with the claim area. But there are affidavits sworn by persons who identify, or appear to identify, as Tjungundji, Yupungathi, Thanakwithi and Anathangayth. Moreover, some family relationship with members of the other two (2) groups is also apparent.[1] I infer that the individual and family histories described in these affidavits serve as examples for the history and experiences of the wider claim group.

[1] **[Deponent 4 – name deleted],** for example, states that her uncle was a Tjungundji elder. According to the email of **[Anthropologist 1 – name deleted]**, **[Deponent 4's – name deleted]** surname also indicates that she has some connection to the Mpakwithi.

The deponents were born between 1915 and 1952. The majority of the affidavits discuss the association of the deponents' parents and grandparents with certain parts of the claim area. They, therefore, in my view, speak to associations that would appear to predate the arrival of European settlement. Also, the information regarding those areas of association is consistent with the tribal boundaries described generally by **[Anthropologist 1 – name deleted]**, and in the applicant's submission. For example:

- **[Deponent 5 – name deleted]** (b. 1915) states that her grandfather was **[Ancestor 3 – name deleted]** (b. c. 1875), the apical ancestor for the Anathangayth group. She identifies Myall Creek as her grandfather's place, as well as the place of her brothers and herself. She notes that she was raised there with her brothers until they were moved to a mission school – at [2].
- **[Deponent 6 – name deleted]** (b. 1933), a Yupungathi man, describes his grandfather living in 'a big camp with all the tribe' on or near the Pennefather River – at [5]. He also mentions how the **[Predecessor 1 – name deleted]** Spring by the Pennefather River was named after his grandfather, and how he has been told by his father and other old people that '[a]ll the country from the south side of Janie Creek back to Pennefather, and down to Kamberapayni ... is all our [Yupungathi] country' – at [15]; see also [27].
- **[Deponent 7 – name deleted]** (b. 1943), a Tjungundji woman, recalls her grandmother telling her that her great grandfather had a camp at Cullen Point, where **[Deponent 7 – name deleted]** grew up. She also describes her parents and her grandmother teaching her that all of the land north of Janie Creek was Tjungundji land.

In relation to the claim group's more recent predecessors, I note that the Tjungundji and Yupungathi deponents describe their families being forced to move away from the claim area in 1963 and 1964, when the mission at Mapoon was closed down – for these dates see the affidavit of **[Deponent 8 – name deleted]** at [19]. It appears from the affidavits that the majority of those families then moved back to Mapoon and reasserted their physical presence in the north-western part of the claim area in the 1990s. During the period of physical absence from claim area, the affidavits show that the Tjungundji and Yupungathi people maintained a spiritual association with the claim area and a sense that, through their ancestors and under their law and custom, the lands and waters of the north-western part of the area remained theirs. For example, **[Deponent 8 – name deleted]** states that:

> We came back to Mapoon in 1993. We heard that people were moving back to old Mapoon. That's how we made up our mind to come back. This [is] my birth home where I was and reared up. This is my home. You can wander away far and wide but when the mind gets you for your home you go straight back. Really we came back because our roots are here. Our grandparents are the roots and we're the branches. This is where our roots are – at [25].

Similarly, **[Deponent 7 – name deleted]**, in her affidavit, recalls: 'I decided that I should come back to Mapoon where I was born and this is where I know it is my tribal area and I should come here and live' – at [11].

In my view, the information described shows that there is a sufficient factual basis to support the assertion that the claim group's predecessors were associated with the application area over the period since sovereignty. The tribal boundaries outlined in the applicant's submission and **[Anthropologist 1's – name deleted]** email, and confirmed by the information contained in the

affidavits, show that the claim group's predecessors were associated with, broadly, the whole of the claim area. Moreover, the information contained in the affidavits, and the other two (2) documents, indicates that that association was already established when European settlers began to arrive in the region. From there, I agree with **[Anthropologist 1 – name deleted]** that it is reasonable to infer that the claim group's predecessors had been associated with the application area since the Crown's assertion of sovereignty.

Second limb of the s. 190B(5)(a) assertion – that the claim group is associated with the claim area

Schedules F, G and M of the Form 1 contain statements to the effect that the claim group is associated with the claim area through the practice of laws and customs, or other activities, which involve:

- residing and being present on the claim area;
- entering and travelling across the claim area;
- conducting social, religious, cultural, spiritual and economic activities on the claim area;
- hunting, fishing, collecting and otherwise using or conserving the claim area's resources;
- camping on the claim area;
- visiting and protecting sites of significance on the claim area; and
- inheriting and succeeding to the native title rights and interests that relate to the lands and waters of the area covered by the application.

The applicant's submission contains additional assertions that claim group members continue to share and exchange resources from the claim area, light fires on the claim area for domestic purposes and monitor and regulate access to parts of the claim area. The submission also states that the 'claim group have continued to visit the claim area in connection with asserting their native title rights and interests and as a way to keep in touch with country'. It then lists a number of claim members who are said to 'continue to visit places within the claim area to variously hunt and fish and perform other traditional activities'. I note, further, that **[Anthropologist 1 – name deleted]** states in his email that claim group members continue to identify with the six (6) land holding groups identified above.

The affidavits provided offer additional detail in relation to the general assertions contained in the other documents. As noted earlier, the affidavits of Tjungundji and Yupungathi people describe the deponents and their families physically moving back to live in Mapoon, in addition to them maintaining a sense of spiritual and historical association with their tribal areas. Two of those deponents, **[Deponent 7 – name deleted]** and **[Deponent 9 – name deleted]**, are referred to in the applicant's submission as persons who continue to visit places in the claim area to hunt and fish and perform traditional activities. This is supported by their affidavits, where they describe learning how to hunt and fish on the claim area, in addition to elders teaching them about locations where activities are prohibited or access restricted – see **[Deponent 9's – name deleted]**, affidavit at [2] and [8]; **[Deponent 7's – name deleted]**, affidavit at [4] to [5]. In relation to this last point, I note that **[Deponent 7's – name deleted]** affidavit indicates that she continues to monitor access to locations such as Dog Reef, which sits just off the west coast of the claim area – at [5]. I

understand that this is an example of the activity of monitoring and regulating access, which is referred to in a general sense in the applicant's submission.

I infer that other claim group members continue to practice the sorts of physical activities mentioned above, as well as maintaining a sense of spiritual and historical association with their tribal areas. In this regard, I note that **[Deponent 10 – name deleted]**, a Tjungundji woman living at Mapoon Outstation when she swore her affidavit, states:

> I still go out today onto the reef, and collect oysters for my great grand children. I still go out fishing, and collecting yams, and panja, and turtle, and ducks, and geese, and wild pigs. **[Claim Group Member 1 – name deleted]** my grandson, goes to the swamp and picks his own panja' – at [20].

Also of relevance to the continuing association of the claim group with the application area, in my view, are the significant number of comments by the deponents that deal with knowledge of traditional land holding areas and activities being passed down to younger generations. **[Deponent 7 – name deleted]**, for example, states that:

> My children and grandchildren know about their grandfather **[Ancestor 4 – name deleted]** and great grandfather **[Ancestor 5 – name deleted]**, because I told them. I wanted them to know, because for history, it must go down from generation to generation and they wanted to know how we became traditional owners of Mapoon and I had to tell them the whole story – at [12].

Likewise, **[Deponent 11 – name deleted]**, a Yupungathi woman, explains in her affidavit:

> Its [*sic*] best we take our younger ones, show them, learn them the country, so they can pick up from there when we are gone, because we are not going to live here forever. ... So they can hand it down to their kids[.] ... **[Deponent 9's – name deleted]** father used to sit and talk to my children, even my mother sat and talked to them, they share that yarn around to one another to tell what old people used to do – [21].

In my opinion, the apparent commitment of the claim group's elders to ensuring that this sort of traditional knowledge is disseminated to younger members indicates that the claim group, as a whole, must have a sense of historical and spiritual association with the claim area. Moreover, I note that all of the deponents, and their families, were living in or near the claim area when their affidavits were sworn in 2002. I infer that those families are, on the whole, still living in the region and, therefore, also continuing to have a physical association with the application area of the kind described by **[Deponent 10 – name deleted]**. This type of material, in my view, shows that there is a sufficient factual basis to support the assertion that the claim group is associated with the claim area.

Combined result for s. 190B(5)(a)

For the reasons set out above, I am **satisfied** that the applicant's factual basis material is sufficient to support the assertion described in s. 190B(5)(a).

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

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

The requirements of s. 190B(5)(b)

Section 190B(5)(b) requires that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed, by the claim group that give rise to the claim to native title rights and interests. The wording of s. 190B(5)(b) is, I note, almost identical to that of paragraph (a) of the definition of 'native title rights and interests' found in s. 223(1). As the approach of Dowsett J in *Gudjala 2007* demonstrates, it is necessary to apply s. 190B(5)(b) in light of the case law regarding s. 223(1)(a). In this respect, the High Court's decision in *Yorta Yorta Community v Victoria* [2002] HCA 58 (*Yorta Yorta*), and it's discussion of the meaning of the word 'traditional', is of particular importance – see *Gudjala 2007* at [26] and [62] to [66].

According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

- it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice' – at [46];
- the origins of the content of the law or custom concerned can be found in the normative rules of a society which existed before the assertion of sovereignty by the Crown – at [46];
- that normative system has had a 'continuous existence and vitality since sovereignty' – at [47]; and
- the relevant society's descendents have acknowledged the laws and observed the customs, which that normative system gives rise to, since sovereignty and without substantial interruption – at [87].

In this context, the term 'society' is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs' – *Yorta Yorta* at [49].

In my view, I must therefore be satisfied that there is a sufficient factual basis:

- to identify the relevant society – being a group united by the acknowledgement and observance of a body of law and custom – which existed before, or at the time of, sovereignty and from which the claim group is descended;
- to support the assertion that the laws acknowledged and customs observed by the claim group derive from that society's normative system; and
- to support the assertion that the laws and customs, which derive from that normative system, have been acknowledged and observed without substantial interruption since sovereignty, having been passed down through the generations to the claim group.

In addition, the factual basis must show how the traditional laws and customs of the group give rise to the claim to native title rights and interests – *Gudjala 2007* at [39]. This, however, need only be in a general sense because the assessment of whether the factual material is sufficient to support each of the specific rights or interests claimed is the task undertaken at s. 190B(6) – *Doepel* at [126] to [127].

The factual material supporting the s. 190B(5)(b) assertion

Schedule F of the Form 1 contains high level statements to the effect that:

- the claim group has ancestral connections to the community that was present on and connected to the claim area and sovereignty;

- the claim group 'is a community or group'; and
- claim group members acknowledge and observe laws and customs, and that those laws and customs are based on the laws and customs of the community that existed at sovereignty.

Schedule M then contains the assertion that the claim group maintains a traditional association with the claim area, including by practicing the traditional physical activities noted above in relation to the second limb of s. 190B(5)(a).

More detailed information in support of the s. 190B(5)(b) assertion is contained in the applicant's submission, **[Anthropologist 1's – name deleted]** email and the affidavits referred to above.

Under the heading that corresponds to s. 190B(5)(b), the applicant's submission states:

> The basis for the distribution of land among Aboriginal groups in Cape York Peninsula derives from the acts of extra-human ancestral beings from the Dreaming (Sutton and Rigsby 1982: 157). Stories were attributed to particular parts of the land and languages installed from which contemporary land holding groups take their names (Rigsby 1995:25). The six languages prominent in the claim area (Yupangathi, Tjungundji, Taepadhigi, Mpakwithi, Thanakwithi and Anathangayth) each stems [*sic*] from a single language family known as the Northern Pama Sub Group (Sutton 1976). Sharp mapped these language groups within the 'Type IV Tjondandji' totemic category. [**[Anthropologist 1's – name deleted]** email refers to Sharp's mapping being produced in 1939.]

The remainder of the submission goes on to:

- state that Aboriginal people living in Cape York today identify themselves at varying levels of inclusiveness, which are briefly listed;
- say that the groups who have lived in the claim area have always shared a 'belief in the establishment of laws and customs by travelling ancestral beings', citing a 1938 work by Sharp in support;
- state that the claim group shares a system of kinship and marriage with other groups in the regional community, citing works from 1889 and 1896 in support;
- briefly outline the nature of the rules around societal status in the groups associated with the claim area; and
- state that responsibility for ceremonial life between those groups is shared.

As mentioned earlier, the applicant's submission also refers to various activities that are said to be conducted under traditional law and custom. To this end, the submission briefly describes each activity, cites (in most cases) sources produced between 1896 and the 1930s in order to show that the activity was practiced by the claim group's predecessors, and then asserts that the activity is still so practiced. Also as noted above, a number of claim group members are then listed and it is asserted that they 'continue to visit places within the claim area to variously hunt and fish and perform other traditional activities'.

[Anthropologist 1's – name deleted] email contains two (2) pieces of information that relate to the laws and customs of the claim group's predecessors, and to those of the claim group. First, **[Anthropologist 1 – name deleted]** cites the following passage from Sharp (1939):

> Throughout the area the patrilineal totems of the maternal kinship lineage are distinguished from own totems and are known by the kinship terms for mother's father[.] ... In similar fashion, two other sets of totems are distinguished, those of the father's mother's line and those of the mother's mother's line[.] ... [T]ypical historical rites, including initiations, are held throughout the area and reproduce the activities of the mythical ancestors. An initiation of the Tjongandji and Yop'ngadi [spelt Tjungundji and Yupungathi in these reasons] ... centres about anthropomorphic ancestors Tjiveri and Enryungo.

Second, **[Anthropologist 1 – name deleted]** comments that, based on his own research:

> Traditional laws and customs observed by the claimants today include and are not limited to sharing:
>
> 1. A common form of marriage preference. A number of contemporary informants interviewed (e.g. **[Claim Group Member 2 – name deleted], [Applicant 1 – name deleted], [Applicant 2 – name deleted], [Applicant 3 – name deleted]**) were able to enunciate correct marriage rules and point to examples of adherence to them. **[Claim Group Member 3 – name deleted]** (Mapoon – 7th October 2010) offered the exemplary comment, that in 'early days, Aboriginal woman had to marry next-door groups, not your own, first you look at your neighbours and then they have to agree and make a promise, **[Predecessor 2 – name deleted]** had to marry **[Predecessor 3 – name deleted]** under a promise'.
> 2. Responsibility for ceremony and burial grounds.
> 3. Prohibitions on eating certain foods at certain times of a person's life cycle or the annual cycle.
> 4. The acknowledgement of dangerous places. This belief is relevant to the regulation of rights and interests in land because potentially dangerous spiritual forces in the landscape are commonly seen as being benign to those whom are seen to belong to a particular locale but dangerous to strangers, thereby privileging the role of those with accrued traditional knowledge about such places.
> 5. Regional dispute resolution processes.
> 6. A way of labelling local country groupings.

The affidavits provided to me also contain information relevant to the assertion described in s. 190B(5)(b). The deponents' descriptions of knowledge of the boundaries of the traditional land holding groups, and of their ancestors' activities, being passed down through the generations has already been discussed above in relation to s. 190B(5)(a). I note that, in addition to those comments, the affidavits also contain relevant information of the following kind:

- Deponents discuss the relationship of their tribal or land holding group with the other groups from the claim area. For example, **[Deponent 12 – name deleted]** (b. 1939), a Yupungathi woman, says that she learnt about 'the Batavia people, the Taepadhighi' when she was growing up and lists her various relations that come from that group – at [5]. **[Deponent 13 – name deleted]** (b. 1931), who describes her Tjungundji heritage, also mentions her husband's aunt teaching her stories about 'the six tribes' for the area around Mapoon – at [29].
- In relation to the above point, the deponents also describe interactions between the tribes of the claim area. For example, **[Deponent 14 – name deleted]** (b. 1932), a Yupungathi woman, talks about 'all different tribes' coming together on Christmas and on New Year's Day to dance, sing and drum – at [15]. **[Deponent 13 – name deleted]** also describes tribes from other parts of the claim area being able to hunt, and acquiring rights, in the area

around Cullen Point and Janie Creek when they began to move to the mission at Mapoon – at [13].

- Dreaming stories that have been, and continue to be, passed down are discussed. **[Deponent 7 – name deleted]**, for example, recalls her grandmother telling her the Dog Story about Dog Reef and about how that area is sacred – at [5] and [14]. **[Deponent 13 – name deleted]** talks about the Tratha (Barramundi) story being 'the main story for Old Mapoon', which explains how 'all the rivers and the big bay' were made – at [3].
- Related to the Dreaming stories, the deponents also describe how access to certain places is restricted or prohibited. **[Deponent 7 – name deleted]**, for example, notes that her grandmother taught her where she could and could not fish – at [5] and [14]. Similarly, **[Deponent 4 – name deleted]** describes her grandfather teaching her that the scrub around Myall Creek is dangerous because of the creatures that live there – at [7]. In addition, **[Deponent 15 – name deleted]** (b. 1952) talks about areas between Cullen Point and Pennefather River now being marked to show the places where the old people said that access must be restricted – at [15].
- When tribal boundaries are discussed, some deponents also make clear, in my view, that their group – as opposed to the surrounding groups – holds the ultimate rights and interests in relation to the area under law and custom. For example, **[Deponent 6 – name deleted]** refers to being taught by his father that the Yupungathi land was 'my land' – at [27]. Likewise, **[Deponent 7 – name deleted]** refers to teaching younger generations how the Tjungundji became 'the traditional owners' of Mapoon – at [12].

Consideration of the factual basis supporting the assertion described in s. 190B(5)(b)

Based on the material provided, I am **satisfied** that there is a sufficient factual basis to support the component parts of the s. 190B(5)(b) assertion.

The ethnographic material referred to by **[Anthropologist 1 – name deleted]**, and in the applicant's submission, identifies the claim group's ancestors in the early-to-mid-1900s as being a community that recognised a single normative system of law and custom, despite being divided into a number of distinct land holding groups. That this normative system existed is reinforced by the affidavit material. This indicates that the ancestors living around the turn of the century were aware of, and acknowledged, the tribal boundaries of the other groups, and that those groups regularly interacted and were closely related. Given that European settlement did not arrive in the claim area until after this time, I infer that that normative society had existed since before the Crown asserted sovereignty.

I note that the material provided does not indicate that the claim group continues to recognise the totemic system mentioned by Sharp in 1939, nor the practice of initiation he refers to. Nonetheless, the information contained in the affidavits, and provided by **[Anthropologist 1 – name deleted]**, strongly indicates, in my view, that the pre-sovereignty normative system continues to exist. The material shows, for example, that the system of marriage within the claim group continues to be acknowledged. Most importantly, it also shows that laws and customs regarding the boundaries of the land holding groups, in addition to those governing the use of lands and waters, have been handed down through the generations and that they are still observed and acknowledged. Therefore, in my view, the factual basis material is sufficient to

support the assertion that traditional laws acknowledged, and traditional customs observed, by the claim group exist, and that they give rise to the claim to native title rights and interests.

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

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

Paragraph 190B(5)(c) requires that the factual basis is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with the traditional laws and customs referred to in paragraph (b) – see *Martin* at [29]. In my opinion, this assertion reflects the continuity requirement contained in the *Yorta Yorta* definition of 'traditional' laws and customs. I have already, therefore, essentially considered the condition in my assessment regarding paragraph 190B(5)(b).

In undertaking my assessment of paragraph (b), I reached the conclusion that the information provided shows that knowledge of the laws and customs governing rights in the claim area's land and waters has been passed down through the generations to the claim group. Moreover, I formed the view that those laws and customs continue to be acknowledged and observed. Examples of the material on which I formed that view are outlined above.

For those reasons, I am satisfied that the factual basis is sufficient to support the s. 190B(5)(c) assertion.

Combined result for s. 190B(5)

For the reasons given above, I am **satisfied** that the factual basis provided is sufficient to meet the requirements of s. 190B(5).

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

The nature of the s. 190B(6) assessment

The standard imposed by s. 190B(6) is that of 'prima facie'. This requires only that a claim is, on its face, arguable; it does not involve the resolution of any disputed questions of law or fact – *Doepel* at [135]. The task at s. 190B(6) does, however, involve some 'weighing' of the factual material available in respect of *each* of the claimed native title rights and interests (though only 'some' need be established, prima facie) – *Doepel* at [127]. In that sense, s. 190B(6) imposes 'a more onerous test to be applied to the individual rights and interests claimed' when compared with s. 190B(5) – *Doepel* at [132].

The native title rights and interests claimed

As with s. 190B(5)(b) and (c), the reference to 'native title rights and interests' in s. 190B(6) must be understood in light of the definition of that term in s. 223(1) – see *Gudjala 2007* at [85] to [87]. As a result, I have considered whether, prima facie, the individual rights and interests claimed:

- are possessed under traditional laws acknowledged, and traditional customs observed, by the claim group;
- are rights and interests in relation to the land and waters of the claim area; and
- have not been extinguished over the whole of the claim area.

In relation to the second requirement, I note that, according to Kirby J, the question of whether the rights and interests claimed are 'in relation to' land and waters is 'the critical threshold question' for determining whether a native title right can be established under the Act – *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) at [577]. I have, therefore, examined the claimed native title rights and interests set out in Attachment E against that threshold requirement, while remembering that '[t]he words "in relation to" are words of wide import' – *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having done so, my view is that the rights and interests claimed are, prima facie, in relation to the land and waters of the claim area.

The third condition noted above is that the rights and interests claimed are not extinguished, prima facie, over the whole of the claim area. Having considered the available material, my view is that the claimed rights and interests are framed in a way that avoids any issue of extinguishment. In particular, it is clear from Attachment E that the right to exclusive possession, occupation, use and enjoyment is not claimed in relation to the area covered by the Comalco ILUA (Western Cape Communities Co-existence Agreement) or in relation to parts of the claim area where it cannot otherwise be established. I note that I have examined the register extract for the Comalco ILUA that is held on the Register of Indigenous Land Use Agreements. It does not appear to provide for the extinguishment of native title rights and interests in the part of the agreement area that overlaps the current application.

I turn now to consider whether the individual rights and interests claimed are possessed, prima facie, under traditional laws acknowledged, and traditional customs observed, by the claim group. I have, again, interpreted the term 'traditional' in the sense described in *Yorta Yorta* and set out in the earlier discussion regarding s. 190B(5)(b). In addition, I note that the following reasons should be read together with my conclusions, and the relevant material, set out in relation to s. 190B(5).

I have grouped certain rights and interests together where I consider that they are supported by the same or similar factual information. In most instances, I have considered the non-exclusive rights claimed in relation to the Comalco ILUA area together with the non-exclusive rights claimed in relation to the balance of the claim area. Where, in my view, a right claimed in relation to the Comalco ILUA area corresponds with a right claimed generally, I have noted the right regarding the Comalco ILUA area in brackets.

1. In relation to the exclusive areas, the native title rights and interests that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, possession, occupation, use and enjoyment to the exclusion of all others

In *Ward HC*, the majority of the High Court held that:

> It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others. The expression of these rights and interests in these terms reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing – at [88].

In my view, the material provided establishes, prima facie, that the claim group has a right to control access to, and speak for, the land and waters of the claim area under their traditional law and custom. For example, **[Deponent 15 – name deleted]** talks, in her affidavit, about restricting access to certain parts of the claim area in the following way:

> We have got a ranger vehicle over at Nameleta and a vehicle here [Weipa] for the rangers if they want to check it [country] out. I usually go over with them to do a safety induction and show them the 'no go' areas. There's a lot of country they can play with and certain spots where we don't like anybody going, even we don't go there, we respect the old people's wishes you know. And we've got them all marked. I done the area from Skardon [north of the claim area] down to Nameleta, and then **[Deponent 8 – name deleted]** takes over from Cullen Point and to Pennefather [inside the claim area]. I just marked out all the spots. I didn't tell them on the map where the scar tree was because they won't find it[.] ... But yeah that's one of the significant areas, it's been fenced off, that tree, it's been cordoned off, also Lunette Bog, and Big Foot Print Swamp – at [15].

In a similar vein, **[Deponent 15 – name deleted]** goes on to say:

> I learned from my grandmother about the family line and boundary for country and that kind of thing. It's part of my culture, part of life, my grandmother, my grandfather, you know if somebody else go there I'd like to have a say, they may go over there and ruin the country – at [16].

In addition, I note that **[Deponent 13 – name deleted]**, in her affidavit, tells the story of her grandfather needing to give permission to the first missionary to build in the claim area – at [6]. A number of deponents also refer to their tribal groups as 'the traditional owners' of their tribal areas and to being taught that those places were 'all mine' or 'my land' – affidavits of **[Deponent 13 – name deleted]** at [3]; **[Deponent 7 – name deleted]** at [12]; **[Deponent 6 – name deleted]** at [27]; **[Deponent 14 – name deleted]** at [10].

I consider that this information invites the inference that, under the claim group's traditional law and custom, the claim group has the right to speak for, and make decisions about, the land and waters covered by the application. The right to exclusive possession, occupation, use and enjoyment, can therefore be established, prima facie, where it has not been extinguished.

Outcome: established, prima facie.

2. In relation to the non-exclusive areas, the native title rights and interests of the native title holders that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, non-exclusive rights to use and enjoy those areas being:

a) the right to travel over, to move about, and to have access to those areas (1.b. access, be present on, move about in and on and use the claim area);

b) the right to hunt and to fish on the land and waters of those areas (1.f. hunt and gather in, on and from the claim area for the purpose of satisfying the personal, domestic or non-commercial communal needs of the members of the native title claim group; 2.a. hunt and fish in or on, and gather from the Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title claim group);

c) the right to gather and to use the natural resources of those areas such as food, medicinal plants, timber stone and resin (1.c. take and use the Natural Resources of the Determination Area for the purposes of satisfying the personal, domestic or non-commercial communal needs of the native title claim group);

i) the right to share or exchange subsistence and other traditional resources obtained on or from those areas.

The applicant's submission describes, in a general way but with reference to sources from 1910 and the 1930s, ancestors of the claim group 'travers[ing] the claim area', and hunting, fishing, and using the natural resources of the claim area. This is supported by the additional affidavits provided, which include a number of references to deponents learning how to hunt and fish in the claim area, and to gathering resources such as yams and bush medicine. With respect to the bush medicine, I note that **[Deponent 14 – name deleted]** refers to it being sold in some instances:

> **[Predecessor 4 – name deleted]** used to feed people with clay, ruah. He would come to Red Beach, and make big balls of it and he would make it nice and square, and sell it for two shilling, ten shilling, five shillings. It was like medicine – at [14].

[Deponent 14 – name deleted] then goes on to state that:

> Bennett's Vine, we used that one for sores. And free, another vine used for sores. Aunty **[Predecessor 5 – name deleted]** told me to put it on the ulcer on my leg. And there is a soapy tree for toothache, and the oak tree is for toothache too. There is a lot of bush medicine that we used such as dog fruit – at [15].

[Deponent 13's – name deleted] affidavit contains the following passage with regard to fishing and hunting generally:

> When we were growing up we didn't use fishing line, we used to fish with twine and dressmaking pins for hooks. Sometimes our old people sharpened plain wire and bent the end into a hook for us.
>
> We fished for bream, mullet, and we used to use shellmeat, what we call djulagi shell, on the beach for bait. ... We also used sand crabs or mud worms for bait. We still fish in the same place for bream and mullet today.
>
> We used to go around Cullen Point, around the beach at the back looking for turtle egg. And rindi, fresh-water turtle. We got to the swamp and catch rindi by poking it with the iron, we call it lali.

This kind of information, in my view, gives rise to an inference that, under their traditional law and custom, the claim group has the right to be on and move about the claim area, and to use the

claim area's resources by, for example, hunting and fishing or gathering bush medicine. There is also, in my view, material to support the claimed right to share or exchange these resources (see the above reference to **[Predecessor 4 – name deleted]** selling traditional medicine sourced from the land).

Outcome: established, prima facie.

d) the right to take and use the natural water on those areas (2.b. take, use and enjoy Water for the purposes of satisfying the personal, domestic or non-commercial communal needs of the native title claim group);

e) the right to live, to camp and for that purpose to erect shelters and other structures on those areas (1.a. live on the claim area, to camp, erect shelters and other structures);

f) the right to light fires on those areas for domestic purposes, but not for the clearance of vegetation.

The information contained in the applicant's submission, **[Anthropologist 1's – name deleted]** email and in the additional affidavits provided deals with the claim group living on, and their predecessors having lived on, the claim area. I infer that this includes, and included, their use of water from the claim area and the lighting of fires for domestic purposes (though there are also some specific references to fires being lit). Further, the information suggests, in my view, that these activities are, and were, done in accordance with traditional law and customs.

As an example of the type of information before me, I note the following statement in the affidavit of **[Deponent 14 – name deleted]**:

> The old people had lovely clean old humpies, and they were very clean old people. They brushed their humpies with the long feathers of the native companion or brolga[.] ... They cut the feathers in half and, they burned the trunks to stop the green ants getting into them – at [6].

And this passage from **[Deponent 11's – name deleted]** affidavit:

> It was reported that Mapoon people had been living under grass huts. Maybe our forefathers before lived in grass huts, our great great grandparents, but we had a home, you can't say it was a luxury home but it was a home, we treasured that home because our father and uncles and brothers with their own bare hands built them, they carried timber from the bush – at [22].

Outcome: established, prima facie.

g) the right to conduct and to participate in the following activities on those areas:

i. cultural activities;

ii. cultural practices relating to birth and death, including burial rites;

iii. ceremonies;

iv. meetings; and

v. teaching the physical and spiritual attributes of sites and places on those areas that are of significance under their traditional laws and customs.

h) the right to maintain and to protect sites and places on those areas that are of significance under their traditional laws and customs;

j) the right to be accompanied on to those areas by persons who, though not native title holders, are:

i. people required by traditional law and custom for the performance of ceremonies or cultural activities on the areas;

ii. people who have rights in relation to the areas according to the traditional laws and customs acknowledged by the native title claim group members; and

iii. people required by the native title holders to assist in, observe, or record traditional activities on the areas;

k) the right to conduct activities necessary to give effect to the rights and referred to in (a) to (k).

A number of the additional affidavits refer to traditional cultural activities, such as meetings and ceremonies, being carried out on the claim area by the claim group and their predecessors. In my view, some of these references suggest that other Aboriginal groups from surrounding areas have traditionally been entitled and required to travel onto the claim area to be involved in those activities. For example, **[Deponent 14 – name deleted]** recalls that:

> The old people painted up and danced at Christmas and New Year. You'd hear them, they'll practice whatever dances they were doing, and no one was allowed near them. They were in the bush or the scrub, and all you could hear was the sticks going, and the singing and the drums or course and then on Christmas and New Years Day at night they would come out, *all different tribes* with their dances – at [15] (emphasis added).

In his affidavit, **[Deponent 6 – name deleted]** also discusses corroborees being held by the old people and talks about a similar ceremony being held in 1991 for the centenary of the mission at Mapoon – at [9]

In light of **[Deponent 8's – name deleted]** reference to 'the old cemetery' in the claim area, I infer that the cultural activities traditionally practiced by the claim group and their ancestors also include those relating to birth and death – see **[Deponent 8's – name deleted]** affidavit at [5].

In my view, information of the kind just noted suggests that the claim to the rights listed at 2. g) i. to iv. and j) is arguable.

In addition, some deponents discuss how they were taught about the location of spiritually significant sites and the need to protect them. I consider that the above quoted passage from **[Deponent 15's – name deleted]** affidavit, which I cited in relation to the claim to exclusive possession, is relevant in this regard, though I also note the following comment from **[Deponent 7 – name deleted]**:

> And she [**[Deponent 7's – name deleted]** grandmother] would take us around to Dog Reef. She said that it is our sacred area, sacred ground. ... We have never been allowed to touch Dog Reef. That is our sacred area. Other people go there now and they don't come and see us, the traditional owners, to fish there. They just go without telling us. It is a sacred area to us, to the tribes of old Mapoon – at [5].

Material of this kind, in my opinion, supports the rights claimed at 2. g) v. and h).

The right claimed at k) is supported by this information and by the material referred to above in relation to the other rights and interests claimed at 2. a) to j).

Outcome: established, prima facie.

The right to inherit and succeed to the native title rights and interests (claimed in relation to the Comalco ILUA area).

The additional affidavits contain a number references to rights and interests in the land and waters of the claim area being passed down through the generations. **[Deponent 6 – name deleted]**, for example, talks about inheriting rights in Yupungathi country through his father and grandfather – at [14] to [15].

Outcome: established, prima facie.

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

As with subsections 190B(5) and (6), the term 'traditional' in subsection 190B(7) must also be interpreted in line with the High Court's decision in *Yorta Yorta* – see the approach of Dowsett J in *Gudjala 2007* at [89]. In addition, s. 190B(7) requires that, unlike s. 190B(5), the Registrar or her delegate must 'be satisfied of a particular fact or particular facts', which 'therefore requires evidentiary material to be presented to the Registrar' or her delegate – *Doepel* at [18]. That said, however, Mansfield J has made it clear that:

> The focus is ... 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 – *Doepel* at [18].

In my above reasons regarding s. 190B(5)(b), I explained that I had formed the view that the claimant's factual basis is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the claim group that give rise to the claimed native title rights and interests. In my view, it follows that, if the applicant has provided evidentiary material showing that a claim group member has a physical connection with the application area in accordance with those laws and customs, the application will meet the requirements of s. 190B(7).

The applicant's submission identifies **[Deponent 7 – name deleted]** as a person who, it says, continues to maintain a traditional physical connection with the claim area. **[Deponent 7's – name deleted]** affidavit from 2002 contains evidentiary material that, in my view, shows that she

has had, and likely has, a traditional physical connection with the claim area. Before quoting from **[Deponent 7's – name deleted]** affidavit, I note that, in my assessment of s. 190B(7), I formed the view that native title rights to live, hunt, fish and use the natural resources of the claim area were established, prima facie, on the material before me. In her affidavit, **[Deponent 7 – name deleted]** states that:

> My parents were living where my new house is [in Mapoon]. ... We were staying with grandma at her house. I would go fishing with my grandma to Cullen Point. And she shows us how to make fishing lines. She used to make the lines to show me and my cousin, make the lines from pandanus tree. She used to pull out the middling part of it, pull it all apart and scrape it all out with a knife.
>
> And she would take us around to Dog Reed. She said that it our sacred area, sacred ground. We never used to fish there. Only Cattle Creek[.] ... She took us to Ferati. They are the only two places we weren't allowed to fish. ...
>
> While living in Weipa we still visited Mapoon. My brother **[Claim Group Member 4 - name deleted]** brought us with the big truck. ... We used to come and visit our aunty **[Claim Group Member 5 – name deleted]** and old uncle **[Claim Group Member 6 – name deleted]**, and their children, all our cousins[.] ... After that we just came for a day, day fishing, and went back through old Batavia Road. ...
>
> In 1994 ... we moved back to Mapoon. ... I decided that I should come back to Mapoon where I was born and this is where I know it is my tribal area and I should come here and live, and I'm happy to be here in Mapoon – at [4] to [5] and [10] to [11].

I am 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.

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 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).

There are no approved determinations of native title over the claim 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).

Attachment B contains words to the effect that the application excludes from the area covered by the application all land or waters which is, or was, covered by a previous exclusive possession act (except for in relation to those areas to which ss. 47, 47A or 47B apply).

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).

I understand Schedule E to contain words to the effect that the applicant does not claim the right to possession, occupation, use and enjoyment to the exclusion of others in respect of an area to which a previous non-exclusive possession act has been done (except for in relation to those areas to which ss. 47, 47A or 47B apply).

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

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

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

In Schedule Q, the applicant states that the claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown. No other part of the application indicates, and I am not otherwise aware, that this is not the case.

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

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

In Schedule P, the applicant states that the claim group does not claim exclusive possession of any offshore places. No other part of the application indicates, and I am not otherwise aware, that this is not the case.

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

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

In Attachment B, the applicant states that the area covered by the applicant excludes any land or waters where native title has otherwise been extinguished (except for in relation to those areas to which ss. 47, 47A or 47B apply). No other part of the application indicates, and I am not otherwise aware, that this is not the case.

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Northern Cape York Group #2**
NNTT file no.	**QC11/3**
Federal Court of Australia file no.	**QUD156/2011**
Date of registration test decision	**16 December 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. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**

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

Section 190B conditions

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

Test condition	Subcondition/requirement	Result
	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**