National Native Title Tribunal

Registration test decision

Application name	Wulli Wulli People #2
Name of applicant	Robert Clancy, Elizabeth Law, Erica Gyemore, Brian Clancy, Elizabeth Blucher, Ashley Saltner, Christine Bosworth, Jennifer Wragge, Julieanne Eisemann, Marva Green
State/territory/region	Queensland
NNTT file no.	QC11/5
Federal Court of Australia file no.	QUD311/11
Date application made	23 September 2011
Date of decision	16 December 2011
Name of delegate	Heidi Evans

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: 22 December 2011

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Heidi Evans

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 Wulli Wulli People #2 claimant application to the Native Title Registrar (the Registrar) on 27 September 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 23 September 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 190B and 190C of the Act. This is commonly referred to as the registration test.

The current application covers an area previously the subject of the Djaku-nde and Jangerie Jangerie Peoples application, Federal Court number QUD6009/00 (DJJ Peoples). The area covered by the current application is also adjacent to a previous application brought by the Wulli Wulli People, Federal Court number QUD6006/00 (Wulli Wulli People). At a meeting held in April 2006, the native title claimants for the Wulli Wulli People application and the DJJ Peoples application agreed to the combining of their claims and the subsequent making of a new application. Both the Wulli Wulli People application and the DJJ Peoples application had been accepted for registration in 2001 and at that time appeared on the Register.

In July 2010, Collier J made orders to bring the parties' agreement into effect, specifically that the applicants for the Wulli Wulli People and DJJ Peoples applications call an authorisation meeting to combine the claims and lodge a new claim. Failure to adhere to the Court order led to the applicants for both claims being issued with a 'show cause' notice, requiring them to demonstrate to the Court why their applications should not be dismissed. Only the Wulli Wulli People application survived the show cause notice, and Collier J ordered that the DJJ Peoples application be dismissed on 27 July 2011.

Following the dismissal of the DJJ Peoples application and its subsequent removal from the Register, the applicants for both the DJJ Peoples and the Wulli Wulli People applications undertook to lodge, and have accepted for registration, a new claim, Wulli Wulli People #2, covering the area previously subject of the DJJ Peoples application. In accordance with the agreement by the applicants in 2006 to join their claims, the parties intend to combine both the

Wulli Wulli People application and the current application for the purposes of a Court determination of native title rights and interests over the larger combined area.[1]

I am now required to consider the Wulli Wulli People #2 application for the purposes of registration, pursuant to s. 190A(1).

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 be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

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

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

In reaching my decision, I have had regard to the following information:

- Information contained within the Wulli Wulli People #2 (QC11/5; QUD311/11) application and the accompanying s. 62 affidavits;
- Documents contained in the Tribunal's QC11/5 case management/delegate's file up to the date of this decision, including:
    - GeoTrack 2011/1788;
    - Section 66 letters sent by the Tribunal case manager to:
        - (i) State of Queensland;
        - (ii) the applicant;
        - (iii) the Representative Body, Queensland South Native Title Services (QSNTS).

[1] See Annexure marked 'MSE2' to the affidavit of Margarita Susanna Escartin affirmed 22 September 2011, [p. 10] Attachment R.

- Email from case manager dated 5 October 2011, containing details of s. 29 notices affecting the application;
- Email from the State, dated 11 October 2011, confirming that the State will not be making any comment/submissions regarding the application;
- Email from QSNTS dated 13 October 2011 to case manager regarding the proposed filing of a competing and overlapping claim by the Wakka Wakka claim group;
- Email correspondence dated 28 October 2011 and 3 November 2011 between case manager and QSNTS, regarding an intention by QSNTS to submit adverse material;
- Email correspondence dated 4 November 2011 and 9 November 2011 between case manager and delegate, confirming details of phone conversations with QSNTS regarding adverse material to be submitted by QSNTS;
- Email from case manager to QSNTS dated 10 November 2011 informing QSNTS that any material to be considered by the delegate must be prvoided by Friday 18 November 2011;
- Letter from QSNTS dated 17 November 2011 outlining a number of objections to the material contained in the Wulli Wull People #2 application;
- Email from case manager to delegate dated 22 November 2011, regarding a conversation of the same date with QSNTS in which QSNTS indicated an intention to submit further adverse material;
- Letter from case manager to QSNTS dated 23 November 2011, advising of a new proposed decision date of 16 December 2011, requiring any further material to be submitted by 1 December 2011;
- Email from case manager to applicant dated 25 November 2011, advising of a new proposed decision date of 16 December 2011;
- Letter from case manager to State dated 5 December 2011, requesting the State to sign confidentiality conditions regarding the provision and use of adverse material submitted by QSNTS;
- Letter from State to case manager dated 5 December 2011, providing signed copy of confidentiality conditions;
- Email from State to case manager dated 8 December 2011, informing case manager that the State will not be making submissions regarding the material provided by QSNTS, and that the State has no objections to the registration of the Wulli Wulli People #2 application.

- Decision of Collier J in *West on behalf of the Djaku-nde and Jangerie Jangerie Peoples v State of Queensland* [2011] FCA 840 (27 July 2011);
- Claimant application summary of Wakka Wakka People #3 QC11/10;
- Claimant application summary of Wulli Wulli People QC00/7.

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'. Further, mediation is private as between the parties and is also generally confidential (see also 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].

On 27 September 2011 the case manager with carriage of the application, in accordance with s. 66(2A), sent a letter to the representative body for the area, Queensland South Native Title Services (QSNTS), providing them with a copy of the application.

On 30 September 2011 in accordance with s. 66(2), the case manager sent a letter to the State, providing a copy of the application and inviting the State to make submissions or comments on the application, to be provided to the Tribunal by 14 October 2011.

On 11 October 2011 an email was received by the case manager from the State, providing that the State would not be making any submissions or comments on the application.

On 28 October 2011 QSNTS contacted the Tribunal and stated that QSNTS intended to provide material regarding the registration of the Wulli Wulli People #2 application. The case manager sent an email to the Principal Legal Officer of QSNTS, confirming the details of this conversation, and informing QSNTS that a delegate of the Registrar would be making a decision whether to accept the application on or before 25 November 2011.

On 3 November 2011 the case manager had further correspondence with QSNTS regarding their intention to submit material going to the registration of the Wulli Wulli People #2 application. I then formed the view that this correspondence had given rise to a legitimate expectation held by QSNTS that I would refrain from making a decision until they had provided the proposed material.

On 10 November 2011 I directed the case manager to send an email to QSNTS informing them that as the application was s. 29 affected and strict timeframes therefore applied to the application of the registration test, any additional material to be provided must be done so by 18 November 2011, and that such material would be provided to the applicant for comment, in accordance with the requirements of procedural fairness.

On 17 November 2011 a letter was received from QSNTS, presenting a number of objections to the material contained in the Wulli Wulli People #2 application. Upon considering the nature and

substance of this material, I formed the view that it did not adversely affect or impact my preliminary view that the application should be registered. For this reason, the material was not provided to the applicant, as I did not consider that an opportunity to comment in relation to the material was necessary in light of this view.

On 22 November 2011 QSNTS contacted the case manager to inform the case manager of their intention to submit further adverse material to the Wulli Wulli People #2 application, including material relevant to a competing and overlapping claim by the Wakka Wakka native title claim group. In response, on 23 November 2011 I caused the case manager to send a letter to QSNTS, informing them of a new proposed decision date of on or about 16 December 2011, and in accordance with this new timeframe to stipulate that any further adverse material was to be received by the Registrar by Thursday 1 December 2011. QSNTS did not provide any further material within this time.

On Friday 25 November an email was sent to the applicant, informing the applicant that the registration test decision date had been rescheduled for on or about 16 December 2011.

Whilst I did not consider that the material submitted by QSNTS to have any impact on the outcome of my decision, as my preliminary view was that the application should be accepted for registration, I considered the State to be aggrieved by a decision to register the application (see *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [21] to [38]).

Subsequently, on 5 December 2011 a letter was sent by the case manager to the State advising that a submission had been received from QSNTS and that as my preliminary view was that the application should be accepted for registration, the State were being provided with an opportunity to comment on the submission. As a matter of course, confidentiality conditions were imposed on the State's use of the material.

Also on 5 December 2011 the case manager sent a letter to the applicant, informing the applicant that a submission had been received from QSNTS and that in accordance with the requirements of procedural fairness the submission had been provided to the State for comment. The applicant was informed that the submission did not adversely affect my preliminary view that the application should be accepted for registration, however in the event that the State responded to the QSNTS submission with any material of an adverse nature regarding the registration of the Wulli Wulli People #2 application, the applicant would be provided with a copy and a reasonable opportunity to respond.

On 6 December 2011 having received the signed confidentiality conditions from the State regarding its use of the material, the submission from QSNTS was provided to the State, along with a letter stipulating that the State had until COB Friday 9 December 2011 to respond with any comments.

On 8 December 2011 the State emailed the case manager advising that the State would not be making submissions in relation to the material provided by QSNTS, and subsequently, that the State had no objection to the registration of the Wulli Wulli People #2 application.

This is the total of the steps taken by the Tribunal and its officers in ensuring the requirements of procedural fairness are met in relation to the registration of the Wulli Wulli People #2 application.

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)— *Northern Territory v Doepel* [2003] FCA 1384 (*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).

As noted above, my role in considering the current application against the requirements of s. 61(1) for the purposes of s. 190C(2), is a procedural one only, and seeks to ensure that a claim, 'on its face, is brought on behalf of all members of the native title claim group' – *Doepel* at [35].

Mansfield J in *Doepel* held that the delegate was merely to consider whether the application sets out the native title claim group in the terms required by s. 61, and that it was only where the description indicated that not all persons in the group were included, or that the description was in fact a subgroup of the native title claim group, that the application would fail to meet the condition of s. 190C(2) – at [35] and [36]. I note that the task at s. 190C(2) does not require me to look beyond the information provided in the application – *Doepel* at [16].

Schedule A of the application provides the description of the native title claim group.

There is nothing within the description that suggests that not all persons within the native title claim group have been included, therefore I am satisfied that the description meets the requirements of s. 61(1) for the purpose of s. 190C(2).

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).

Part B of the application contains the address for service of the applicant. Those ten named persons jointly comprising the applicant are listed immediately above Part A 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).

In undertaking the task at s. 61(4) for the purposes of s. 190C(2), I note that the provision does not require me to be satisfied of the correctness of the information in the application describing the persons in the native title claim group – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]. The requirement is not whether the description is sufficiently clear, but merely that a description is provided – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. An assessment of the merits of the description is, in my view, to be undertaken at the corresponding condition of s. 190B(3).

I am satisfied, for the purposes of s. 190C(2), that the application contains the description of the native title claim group as required by s. 61(4).

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 affidavits required by s. 62(1)(a).

Affidavits sworn by those ten named persons jointly comprising the applicant accompany the application. Each of the affidavits provided contains the same 6 paragraphs or assertions. I am satisfied that the information within the affidavits contains the statements prescribed by subsections (i) to (v) of s. 62(1)(a), and therefore that the application meets the requirments of s. 62(1)(a) for the purposes of s. 190C(2).

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).

Attachment B to Schedule B of the application contains a written description of the external boundary of the area of land and waters covered by the application. Attachment B also provides that the application does not include the land and waters subject of the native title determination applications, QC00/7—Wulli Wulli People—QUD6006/00 (Wulli Wulli People), and QC97/55—Iman People 2—QUD6162/98 (Iman People 2). General exclusions are listed in Schedule 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).

Attachment C to Schedule C of the application contains a map showing the boundaries of the area covered by the application.

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).

Schedule D of the application states that no searches have been carried out by the applicant.

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

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

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

Schedule E contains a description of the native title rights and interests claimed by the applicant in relation to the land and waters covered by the application. It is 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.

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).

In providing the general description of the factual basis on which it is asserted the native title rights and interests exist, Schedule F of the application refers to Attachment F. Attachment F is titled, 'Native Title Application: Anthropologists Report', produced by Dr Fiona Powell, and dated 19 September 2011.

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 of the application contains details of the activities currently carried out by the native title claim group in relation to the land and waters subject of the application.

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

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

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

Schedule H of the application provides that there are no existing native title determinations in respect of the claim area. Whilst Schedule H refers only to determinations of native title, and does not make reference to claimant applications, I note that the applicant is only required to give

details of those applications of which it is aware. Based on the information contained in Schedule H, I have assumed that there are no applications of which the applicant is aware.

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 of the application states that the applicant is unaware of any notifications under paragraph 24MD(6B)(c).

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).

Attachment I to Schedule I of the application is a Memorandum prepared by the Tribunal's Geospatial Services, titled 'Proposed Wulli Wulli People #2 Geospatial overlap analysis'. The analysis provides that thirty-eight (38) s. 29 notices, as notified to the Tribunal, fall within the external boundary of the application as at 5 September 2011.

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).

In undertaking the task at s. 190C(3), I note that the requirement for me to be satisfied that there are no common claimants only arises where another application meets all of the three criteria in subsections (a), (b) and (c) of s. 190C(3) and can subsequently be defined as a 'previous application' – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

Schedule H of the application states that there are no existing native title determinations in respect of the claim area. The written description of the application area, at Attachment B to

Schedule B of the application, specifically excludes from the application area the two native title determination applications of Wulli Wulli People and Iman People 2.

The Tribunal's Geospatial Services has produced a Geospatial assessment and overlap analysis (GeoTrack: 2011/1788) (geospatial assessment) for the current application, dated 5 October 2011. The assessment states that no applications as per the Register of Native Title Claims or Schedule of Applications – Federal Court fall within the external boundary of the application.

I note that material submitted to the Registrar by QSNTS (See letter from QSNTS dated 17 November 2011) and to which I have had regard, asserts that the current application overlaps with the previous Wakka Wakka People #2 application, and that three of the named apical ancestors for that application are also apical ancestors for the current application. The Wakka Wakka People #2 application was dismissed, however, by Dowsett J on 3 December 2009, and for that reason it does not meet the requirement of subsection (b) that a previous application for the purposes of s. 190C(3) must appear on the Register at the time the current application is made.

I also note that on 12 December 2011, a new application was filed in the Federal Court by the Wakka Wakka People (Wakka Wakka People #3 – QUD621/2011; QC11/10). A copy of the application was provided to the Tribunal on the same day.

A claimant application summary obtained from the Tribunal's case management system shows that certain apical ancestors named in the current application also appear in the description of the native title claim group for the Wakka Wakka People #3 application. As discussed above, the issue of common claimants arises only where the overlapping application appeared on the Register when the current application was made. This is not the case here, and for this reason I have not considered the competing Wakka Wakka claims any further.

Based on this information, I have formed the view that there are no overlapping applications covering the whole or part of the land and waters covered by the current application that appeared on the Register when the current application was made. Consequently, I am satisfied that the application satsifies the condition of s. 190C(3) and that no person included in the native title claim group for the current application is a member of the native title claim group for a previous application.

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.

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

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:
(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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)(b) are met.

Schedule R provides that the application has not been certified by QSNTS, the relevant Representative Body for the area covered by the application. Subsequently, it is the requirements of s. 190C(4)(b) to which I must turn my mind. In reaching the level of satisfaction necessary at s. 190C(4)(b), I am also to ensure the application contains the information required by s. 190C(5).

The requirements of s. 190C(5)

I have firstly considered whether the application contains the information required by s. 190C(5), and note that whilst there may be compliance with this condition, it does not necessarily follow that the information provided regarding authorisation will be sufficient to allow me to reach the level of satisfaction required by s. 190C(4)(b). As held by Mansfield J in *Doepel*, 'the interactions between s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' – at [78].

The applicant's authorisation material is contained in Schedule R, Attachment R to Schedule R, and in the affidavits accompanying the application required by s. 62(1)(a). I am of the view that I am able to accept all of the statements contained in the application as true – *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [91] to [92].

In relation to authorisation, the affidavits accompanying the application from each of those persons jointly comprising the applicant all state the following:

5. I am authorised by all of the persons in the native title claim group to make this application and to deal with matters arising in relation to it.

6. I am authorised by all persons in the native title claim group to make this application and to deal with matters arising in relation to it in accordance with a decision-making process involving simple

majority decisions by show of hands and approved by those members at a meeting held in Mundubbera on 13 June 2011, as set out in Schedule R of this application.

Schedule R of the application states:

(a) The persons who constitute the applicant are members of the claim group and are authorised to make this application and deal with matters in relation to it by all the other persons in the claim group.

(b) The applicant is authorised to make the application in accordance with a decision-making process agreed to and adopted by the persons in the claim group there being no decision-making process mandated by the laws and customs of the claim group for authorising things of this kind. The applicant was appointed at a meeting specially convened for the purpose which was attended by members of the claim group. Further details are provided in the affidavit of Margarita Susanna Escartin contained in ATTACHMENT "R".

I am satisfied that the information contained in the application meets the requirements of s. 190C(5). I note the comment of French J in *Strickland*, that 'the insertion of the word "briefly" at the beginning of [s. 190C(5)(b)] suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained' – at [57]. The application contains a statement to the effect that the requirement set out in s. 190C(4)(b) has been met, and briefly sets out the grounds on which I am able to consider that it has been met.

The requirements of s. 190C(4)(b)

I now turn to consider the requirements imposed by s. 190C(4)(b). The role of the delegate in being satisfied of the fact of authorisation was discussed in *Strickland*, where French J held that authorisation 'is a matter of considerable importance and fundamental to the legitimacy of native title determinations', and that 'it is not a condition to be met by formulaic statements in or in support of applications' – at [57].

In reaching the required level of satisfaction at s. 190C(4)(b), there are two issues to which I must turn my mind. Firstly, whether the applicant is a member of the native title claim group, and secondly, whether the applicant has been authorised by all members of the native title claim group to make the application and to deal with matters arising in relation to it. As held by the Court in *Doepel*, I am to be 'satisfied of the fact of authorisation' – at [78]. The note in the legisation following the provision of s. 190C(4)(b), indicates that the applicant's authorisation material is also to address the definition of 'authorise' provided in s. 251B.

The applicant's authorisation material

The primary component of the applicant's authorisation material appears at Attachment R to Schedule R of the application. I note that Attachment R comprises the following documents:

1. Affidavit of Margarita Susanna Escartin, consultant and proprietor of Red Cliff Project Consultants (engaged by the applicant to make arrangements for and ensure execution of the authorisation meeting for the current application), in support of the application sworn 22 September 2011.
2. Annexure 'MSE1' (to the above affidavit), being a copy of newspaper advertisements notifying the authorisation meeting.
3. Annexure 'MSE2', being a copy of the authorisation meeting notice dated 20 May 2011.

4. Annexure 'MSE3', being a copy of the list of persons comprising the DJJ Peoples and Wulli Wulli People native title claim groups, as provided by Elizabeth Law (one of those persons comprising the applicant) from a relevant database.
5. Annexure 'MSE4', being a chronology of events prepared by Ms Escartin, from April 2006 to June 2011.
6. Annexure 'MSE5', being a copy of the attendance sheets completed at the authorisation meeting.
7. Annexure 'MSE6', being a copy of the authorisation meeting minutes, taken by Ms Escartin during the course of the meeting.

In satisfying myself that the applicant is a member of the native title claim group, I have had regard to various information provided within the application, in addition to the assertion made in each of the affidavits required by s. 62(1)(a), that the person named is a member of the native title claim group.

Firstly, I note that each of those persons jointly named as the applicant appears in the list of names contained in the database extract marked Annexure 'MSE3' in Schedule R, being those persons identified as members of both the previous DJJ Peoples claim group and the Wulli Wulli People claim group. Secondly, the authorisation meeting attendance sheets show that those ten persons comprising the applicant were present at the meeting held on 13 June 2011. The minutes taken at the meeting marked 'MSE6' within Attachment R (the meeting minutes) demonstrate that those ten persons comprising the applicant were nominated and selected at the meeting by all persons present (Resolution 4, paragraph [49] of the meeting minutes). Finally, I note that there were no challenges or objections to those persons selected.

Based on this information, I am satisfied that the applicant is a member of the native title claim group for the purposes of s. 190C(4)(b).

I now turn to consider whether the applicant is authorised to make the application, and to deal with matters arising in relation to it, by all members of the native title claim group.

I am of the view that for authorisation to be effective, the applicant must have complied with a process of decision-making envisaged by s. 251B. The application contains information that speaks specifically to the decision-making process adopted by the claim group for the current application. In her affidavit sworn 22 September 2011, Ms Escartin states:

> 13. I have attended approximately three (3) authorisation meetings for ILUAs that cover the proposed claim area, for the DJJ claim and for the adjacent Wulli Wulli claim. In my experience, specifically relating to how decisions have been made at past authorisation meetings by people asserting native title rights and interests in the claim area, the decision-making process adopted at the authorisation meeting on 13 June 2011 for the proposed claim was consistent with the decision-making process adopted at various authorisation meetings that I have previously attended.

Resolution 2 of the authorisation meeting, recorded in the meeting minutes, provides that those persons present at the meeting:

> (a) Subject to (b), accept that those in attendance rightfully assert rights and interests in the area of the map displayed at this meeting and marked A, being an area substantially corresponding to the external boundaries of the current Djaku-nde & Jangerie Jangerie Peoples Native Title

> Determination Application (QUD6009/2000) and have a right to participate in the decision-making processes of this meeting;
>
> (b) confirm there is no particular process of decision-making that, under their traditional laws and customs, must be complied with in relation to matters pertaining to the authorising of any proposed new claim;
>
> (c) acknowledge that the process of decision-making they have agreed to and adopted in relation to decisions pertaining to the authorising of a proposed new claim is by majority decision show of hands; and
>
> (d) confirm that spouses and visitors, identified by white wristbands, are welcome to observe this meeting but not allowed to speak or participate in the decision-making.

This resolution was passed unanimously by those present, with no person challenging the adoption of the said process for the remaining resolutions regarding the authorisation of the claim.

A reasonable opportunity to participate in the decision-making process

I note that material submitted to the Registrar by QSNTS (See letter dated 17 November 2011) asserts not only that certain apical ancestors named in the current application have been incorrectly identified as Wulli Wulli People, but also that no person claiming descent from any of those three persons attended the authorisation meeting for, or otherwise supported the authorisation of, the Wulli Wulli People #2 application.

The case law surrounding authorisation has pointed to the importance that all members of the native title claim group, whilst not necessarily required to be present at an authorisation meeting, are at the very least afforded with a reasonable opportunity to participate in the process – See for example *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 at [25].

The applicant's authorisation material reveals that a notice, naming each of the apical ancestors by which the native title claim group is defined, was sent to all of those persons listed in a database containing the names of those persons identified as being members of both the DJJ Peoples and the Wulli Wulli People claim groups. Meeting notices were also placed in the Central and North Burnett Times, the South Burnett Times and the Koori Mail. The notice appearing in these papers states that those persons requiring assistance with travel and accommodation in order to attend the meeting should phone a certain number to register their interest, and presumably to discuss how assistance might be provided.

Attendance sheets taken at the meeting indicate that a total of 64 persons attended the meeting. Attendees provided evidence of their membership of the claim group by naming the ancestor from which they identify as being descended. All of those persons were signed into the meeting by an anthropologist with considerable research experience in the application area and regarding the relevant claim groups.

I note that QSNTS assert that no person claiming descent from any of the three contested apical ancestors attended the meeting. In my consideration of the attendance sheets at Attachment R, I have also observed that no descendants of certain other named apical ancestors were in attendance at the meeting. Regardless, the focus of the requirement at s. 190C(4)(b) is, as stated above, whether each of those persons comprising the native title claim group as defined are given reasonable opportunity to participate in the decision-making process.

The applicant's authorisation material overall indicates that considerable time and effort went into providing notification of the meeting held on 13 June 2011 to all known members of the native title claim group, including published notices and notices sent to persons listed in a database held by a member of the proposed claim group.

From the information before me, I am unable to discern whether that database contains the names of descendants of the contested apical ancestors. However, for the reasons that follow, I consider it unnecessary to investigate this issue further.

The notice regarding the authorisation meeting appeared in a total of 3 newspapers circulating in the application area, copies of which have been included at Attachment R. Each notice lists all of the named apical ancestors, including those contested ancestors, such that I am of the opinion that the descendants of those ancestors were provided with reasonable notice that the authorisation meeting was to take place, that they were invited to attend and that financial assistance was available in order to make their attendance possible. The DJJ and the Wulli Wulli claims have been on foot for a number of years and the authorisation of a new proposed claim was an anticipated event. Subsequently, I am not persuaded that the descendants of those contested ancestors were not afforded a reasonable opportunity to participate in the decision-making process.

Who must authorise the applicant to make the application and to deal with matters arising in relation to it?

In being satisfied of the fact of authorisation, the information from QSNTS may go to the issue of the composition of the native title group. The Court dealt with the interaction between the native title claim group, described in the application in accordance with s. 61(1), and the requirement in s. 190C(4)(b) that it is these persons who must authorise the applicant, in the case of *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*).

In my view, *Risk* can be distinguished from the situation before me for a number of reasons, most notably, that the native title claim group as described in that application was one family of eight persons claiming to be members of the Danggalaba Clan, but that the delegate had before her certain information which indicated that that family were not the only members of that Clan.

O'Loughlin J stated in relation to the delegate's conclusion at s. 190C(4):

> The delegate stated in page 3 of her reasons that she was satisifed that "the persons in the native title claim group are described sufficiently clearly" but that statement overlooked the prior need to satisfy herself that those eight people properly constituted a native title claim group. A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group... at [60]
>
> The tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group. If, as could perhaps occur in some circumstances, the group was a family of eight, then the delegate would proceed to consider all remaining tests. But when, as here, it was apparent to the delegate (as appears from the language of her reasons) that the family of eight was not the group – but, at the most, only part of the group – it became possible to accept the application for registration – Also at [60].
>
> In my opinion there were two discernable errors in the delegate's reasons. First she assumed, without inquiring, that the family of eight was a native title claim group. Secondly, she accepted a claim for registration by a group of people who were, self evidently, part only a larger group (the

> Danggalaba Clan) when there was no evidence of authorisation by, or identification of, the other members of the Danggalaba Clan – at [61].
>
> The authorisation must come from all the persons who hold the common or group rights and interests – at [62].

The material provided by QSNTS is, in my view, of little relevance to my task at s. 190C(4). The letter merely asserts that certain apical ancestors are Wakka Wakka People, rather than Wulli Wulli People as they have been identified in the application before me. I note that there is no indication by QSNTS that the native title claim group described is in fact a subset of a larger native title claim group, or that certain members of the group were excluded or not provided with the reasonable opportunity to participate in the decision-making process. As I have set out above, I am of the view that the information before me indicates that all members of the native title claim group were, in fact, afforded a reasonable opportunity to participate in the authorisation meeting.

As noted by Mansfield J in the case of *Doepel*:

> It is only if [certain] other persons or clan groups are in fact members of the native title claim group, but have been excluded from it, that the application might not comply with s 61. If they are members of a competing claim group, for example, with a claim to an area which overlaps the claim area, s 61 does not require them to be included as part of the native title claim group.
>
> [T]he Registrar's function under s 190A is to determine whether the requirements of ss. 190B and 190C are satisfied according to their terms, rather than generally to consider the accuracy of the information in the application... The second reading speech does not indicate a legislative intention that the Registrar should embark upon some general fact finding exercise, balancing and weighing conflicting evidence, to determine whether to accept a claim for registration – at [46] and [47].

In light of the above, I am of the view that the material provided by QSNTS has limited effect on the outcome of my reasoning for the purposes of s. 190C(4)(b), and subsequently I am satisfied that the application meets the requirement of that condition.

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 information required by ss. 62(2)(a) and (b) is provided at Schedule B, Attachment B to Schedule B, and Attachment C to Schedule C of the application. In undertaking the task at s. 190B(2), I must be satisfied that the information and the map are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to particular land and waters. I note that in reaching the required level of satisfaction, it is primarily the information contained in the application that I am to have regard to – *Doepel* at [16].

A written description of the application area is provided at Attachment B to Schedule B, and titled 'Area of Land and Waters Covered by the Application'. Attachment B contains a metes and bounds description, prepared by the Tribunal's Geospatial Services dated 8 September 2011, and making reference to:

- topographic features;
- land parcels;
- local government boundaries;
- coordinate lists; and
- other native title determination applications.

The written description at Attachment B specifically excludes native title determination applications, Wulli Wulli People and Iman People 2.

Attachment C to Schedule C of the application contains a colour copy of a map titled 'Wulli Wulli People #2' prepared by the Tribunal's Geospatial Services and dated 8 September 2011. The map includes:

- the application area surrounded by a bold dark blue line and dark blue stipple;
- thematically mapped non freehold land tenure;
- major roads and localities;
- native title determination applications; and
- scalebar, northpoint, and notes relating to the source, currency and datum of data used to prepare the map.

The areas not covered by the application, in addition to the excluded native title determination application areas referred to in the written description, are provided at Schedule B, and expressed as a list of general exclusions. This approach to describing areas not covered by the application has been accepted by the Court on a number of occasions as sufficient for the purposes of s.

190B(2) – See for example *Western Australia v Strickland* [2002] FCA 652 (*Strickland FC*) at [23] and [26]; *Queensland v Hutchison* [2001] FCA 416 (*Hutchison*) at [28] to [35].

The geospatial assessment prepared by the Tribunal's Geospatial Services concluded that the description and the map are consistent and identify the application area with reasonable certainty. I too, am of the view that the information and map required by ss. 62(2)(a) and (b) contained in the application are sufficient for it to be said with reasonable certainty whether rights and interests are claimed in relation to particular land or waters.

The application satisfies the condition 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).

Section 190B(3) prescribes two methods by which the claim group can be identified. As the description in the application at Schedule A is one by which group members are identified not by being named, but by reference to certain conditions so as to ascertain those persons who are and are not part of the native title claim group, it is subsection (b) of s. 190B(3) that applies.

The task of the delegate at s. 190B(3)(b) was discussed by Mansfield J in *Doepel*, where he stated that 'the focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group.' Mansfield J also held that the focus of the test was not upon the correctness of the description, but upon its adequacy in allowing for group members to be ascertained – at [51] and [37]. This approach was confirmed by the Court in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [34] and *Gudjala 2007* at [33].

The description of the native title claim group at Schedule A of the application appears as follows:

> The claim group are persons:
>
> 1. who are recognised by other members of the claim group as being descended (which may include by adoption) from a deceased person who they recognise as having been a member of the aboriginal land holding group for the application area depicted in ATTACHMENT "C" ("an apical ancestor"); and
> 2. who identifies himself or herself as being a descendant of an apical ancestor.
>
> It is accepted that adoption may take place and where adoption has occurred it confers upon the adoptee the right to identify as a member of the claim group.
>
> The following deceased persons are recognised as having been apical ancestors from whom claim group members are descended:
>
> Bojimba & Narrygn
> Ginalene, the mother of Ernest Pope

Tilly, the mother of Harry Blucher
Grace, the mother of Fanny Joyce
Jack, the father of Jack Hornet
Thomas Clancy
Jessie Fuller
Maria, the mother of Isabella Hooper
Amy, the wife of John Bond
Billy and Selena, parents of Jacob
King Billy & Maria of Boondooma
Billy McKenzie
Romeo (King of Auburn)
Maggie West
Jackanapes
Jinnie, the mother of Ranji Logan
Mary Ann, the mother of Maggie McLean
Rosie Ah Sue
John Serico
Mergwin Button
Kitty of Boondooma
Maggie Hart
MiMi

The description of the native title claim group before me contains two conditions by which group members are able to be identified. The first is that a person must be recognised by other group members as being a descendant of one of 20 named apical ancestor individuals, or three apical ancestor couples. The second condition is that the person must self-identify as a descendant of one of those named apical ancestors/ancestor couples.

Describing a claim goup by reference to named apical ancestors is one method that has generally been accepted by the Court as satisfying the requirement of s. 190B(3)(b) – See *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) at [67]. I note, however, that whilst descent from an apical ancestor may form the basis of the claim group description in the application before me, the fact of descent alone is not enough to confirm group membership. What is required in addition to descent, is that other members of the claim group *recognise* the particular person as being a descendant of a named apical ancestor *and* that the person themself identifies as a descendant of one of those ancestors.

Elements of recognition and self-identification comprised part of the claim group description dealt with by the Court in *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 (*Ward*). In that case, the ancestors of the group had not been named and the Court held that it was open to the delegate to find that she was not satisfied for the purposes of s. 190B(3)(b). The delegate also had concerns regarding the lack of factual basis material pertaining to the traditional laws and customs relevant to the claim group description criteria – at [11] to [28].

Similarly, a description based on self-identification without a set of rules or principles so as to explain the operation of the description was commented upon unfavourably by Kiefel J by way of obiter in *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198. Her Honour stated:

> The registration process is concerned with the clarity of the description of persons making up a claim group, so that it may be determined whether a person is a member of it. A requirement of self identification would not appear to meet such an objective and might be thought to provide grounds for refusal of registration... At a practical level it cannot be known whether descendants will or will not identify with the group – at [38].

In considering the requirement of s. 190B(3) I note that there are considerable complexities and issues involved in determining those persons comprising the native title claim group for particular land and waters. Dowsett J, in *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*), whilst not specifically addressing s. 190B(3), provided comment on the nature of these complexities in the context of the claim group's composition. His Honour stated:

> For the purposes of the Native Title Act, it is the claim group which must determine its own composition... The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to the substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs – at [256].

In considering the description of the claim group at Schedule A, I am of the view that it is the clarity of that description upon which I am to focus. Following on from Dowsett J's comments in *Aplin* above, I note that a description whereby the claim group attempts to 'arrogate to itself' the right to determine those persons comprising the group is likely to be problematic and, in my opinion, lead to a lack of clarity in that description. His Honour suggests that recognition by other members of the group may only be an appropriate criteria where it is exercised in accordance with traditional laws and customs.

In addition to the description at Schedule A, the application contains considerable factual basis material which speaks to the traditional laws and customs held by the claim group relating to the criteria by which group members are ascertained. I have also considered this material in reaching my decision at s. 190B(3)(b). The material clearly supports the fact of descent from a named apical ancestor as the basis of group membership, as shown in the following statements provided by various claimants:

> Grandfather's country – it's Redbank, where he's born, and the Dawson – He knew the Dawson – I go on my grandfather – Ernest [Pope] – he's a Wulli Wulli person – I know grandfather Ernest was a Wulli Wulli because he used to tell stories, and sang blackfellow songs – He (grandfather) told me about Gyranda Mountain and sing that song; and Mum [Person 1] did too. I learnt about that Dawson country myself – I've worked all over it. Who else belongs to that area? – depends on their parents – where they come from – if they belong to that land – they'd be Wulli too. To claim this is your country – you have to belong to the land! You have to really belong – been born and bred as they say! Look – white people can come along and say they know all about that country or they can learn about it – but they don't really belong there – they came from somewhere else. You have to belong there, to claim the land. Look – my father [Person 2] is a Wakka but my mother [Person 1], a daughter of Ernest and [Person 3] is a Wulli – I claim through her – at [para 104].

And also:

> You have to be descended from an ancestor that comes from this country. I pass them [these rights and interests] to my children – through the bloodline. We know who the ancestors are because our

> old people told us who they were. My Granny always told us her grandparents Bojimba and Narrygn were buried on Narragin [Narayen] Mountain – at [para 128].

And also:

> I have rights and interests in this area because I belong to this area and I know I belong to this area because I have the connections, as my mother is from that [Application] area. I know from seeing how my mother connected to that area – I knew that she was part of that land, that country – that she belonged to that area. My children have these rights and interests too, because they are my children and they are the ancestors of the future – at [para 128].

The above statements demonstrate that claimants have a strong understanding of their country and those who hold rights in relation to that country. They also demonstrate that self-identification, including the ability to identify through either the mother's or father's bloodline, is a criteria by which members of the native title claim group are able to be ascertained. The use of the word 'and' in the description at Schedule A makes it clear that both the criteria of recognition and the criteria of self-identification must be found to apply in order for a person to fall within the claim group description. It is my view that the combined application of both criteria, where descent from one or more of the named apical ancestors underlies the operation of each, is able to rectify any lack of clarity that may result from the operation of either on its own, and that with some factual inquiry, those persons comprising the group are able to be ascertained.

The application meets the condition at s. 190B(3)(b).

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).

The description of the native title rights and interests claimed by the applicant in relation to the land and waters of the application area are listed in Schedule E. That description appears as follows:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the claim group claims the right to possess, occupy, use and enjoy the land and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
2. Over areas where a claim to exclusive possession cannot be recognised, the claim group claims the non-exclusive right to:
   (a) live and be present on the application area;
   (b) take, use, share and exchange Traditional Natural Resources for personal, domestic and non-commercial, communal purposes;
   (c) conduct burial rights;

(d) conduct ceremonies;

(e) teach on the area about the physical and spiritual attributes of the area;

(f) maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm;

(g) light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;

(h) be accompanied into the claim area by non claim group members being people required:

(i) by traditional law and custom for the performance of ceremonies or cultural activities; and

(ii) to assist in observing and recording traditional activities on the claim area; and

(i) in relation to Water, take and use:

(i) Traditional Natural Resources from the Water for personal, domestic and non-commercial communal purposes; and

(ii) for personal, domestic and non-commercial, communal purposes.

3. For the purposes of 2. Above:

"Live" means to reside and for that purpose erect shelters and temporary structures but does not include a right to construct permanent structures;

"Traditional Natural Resource" means:

(1) "animals" as defined in the Nature Conservation Act 1992 (Qld);

(2) "plants" as defined in the Nature Conservation Act 1992 (Qld);

(3) charcoal, shells, and resin; and

(4) clay, soil sand; ochre; gravel or rock on or below the surface;

"Water" means water as defined by the Water Act 2000 (Qld);

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

a. The valid laws of the State of Queensland and the Commonwealth of Australia; and

b. The rights conferred under those laws.

I note that in undertaking the task at s. 190B(4), it is the information prescribed by s. 62(2)(d) that I am to turn my mind. Subsequently, the requirements of s. 190B(4) must be met by what is contained in the application – *Doepel* at [16]. The nature of the task at s. 190B(4) is, in my view, a straightforward one. As held by Mansfield J in *Doepel*, the test of identifiability merely requires that the rights and interests are understandable and have meaning – at [99].

Noting paragraph [1] of Schedule E above, *Strickland* is authority that a broad claim to possession, occupation, use and enjoyment as against the whole world does not offend s. 62(2)(d) or s. 190B(4) – at [60]. The right has been qualified so as to be claimed only in relation to those areas where it can, in fact, be recognised and for that reason, in my view, it is sufficiently clear.

Having reference to the definition of 'native title rights and interests' in s. 223(1), I am of the opinion that the remaining non-exclusive rights and interests claimed are understandable and have meaning. While I have had reference to the definition in s. 223(1), I do not consider it my

role at this stage of the registration test to undertake an assessment of the ability of each of the rights and interests claimed to meet that definition, and have left this assessment to the condition at s. 190B(6).

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

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

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

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

The task at s. 190B(5)

The role of the delegate at s. 190B(5) has most comprehensively been addressed by the Court in the decisions of Dowsett J in *Gudjala 2007* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*), and in the Full Court's decision in *Gudjala FC*. The Full Court described the correlation between the requirements of s. 62(2)(e) and s. 190B(5) in the following way:

> Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s. 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B...
>
> 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 [90] to [92].

In reviewing the approach of Dowsett J in *Gudjala 2007*, the Full Court found that His Honour had, in his consideration of the application, applied a 'more onerous standard than the NTA requires' (*Gudjala FC* at [7]) by incorrectly concluding that the information, contained in an anthropological report comprising the factual basis material for the application, was no more than 'opinions and conclusions rather than any alleged factual basis for such opinions and

conclusions' – *Gudjala 2007* at [52]. The Full Court did not, however, criticise Dowsett J's characterisation of what would amount to a sufficient factual basis – at [96]. Similarly, the *Gudjala 2009* decision continues to provide assistance in relation to what a sufficient factual basis must address for each of the three particular assertions at s. 190B(5).

The applicant's factual basis material is contained in Attachment F to Schedule F, and consists of a report titled, 'Native Title Application: Anthropologist's Report', prepared by Dr Fiona Powell of Terwiel-Powell Associates P/L, dated 19 September 2011(the report). The detailed and extensive report draws on research conducted by Ms Powell undertaken intermittently between 2003 and 2011 regarding the region within which the application is situated, and information extracted from the published and unpublished materials of early observers and previous researchers in the area.

I have considered each of the three assertions set out in the subparagraphs of s. 190B(5) in turn in reaching the decision that the condition has been met.

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

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

Comments made by Dowsett J in *Gudjala 2007* indicate that the assertion at s. 190B(5)(a) may require that the factual basis material address the association of the claim group as a whole with the application area (though not necessarily requiring all members to have 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.

The report provides substantial information pertaining to the association of the claim group and its predecessors to the area covered by the application, under various headings. I have summarised some of the key points as follows:

- the application area is associated with a landholding group known as the 'Wulli Wulli People', which is comprised of several locality and/or language groups including those named 'Jangerie Jangerie', 'Dakundair', and 'Willill-lee' (or variants of these names) – at [para 40 to 41];
- older claimants clearly recall these names and associate them with particular places within the application area – at [para 40];
- claimants (including elderly claimants) have a thorough knowledge of the boundaries of the application area and locality group territories within that application area, as taught to them by their parents/grandparents/predecessors – at [para 39];
- oral information given by elderly claimants descended from various apical ancestors associates those ancestors and their descendants as being of particular language and locality groups, as well as being Wulli Wulli People – at [para 31];
- it was customary for members of the language groups to combine for certain events including initiation ceremonies, dispute settlement, trade and bunya harvesting – at [para 22];
- historical records demonstrate that all 26 apical ancestors are associated with places within the application area (notwithstanding some ancestors' associations with places outside the application area), and these findings were consistent with the oral traditions of their descendants (elderly claimants), as recorded in Ms Powell's field notes – at [p. 40 to 49];

- based on estimated birth dates compiled from historical records, more than half of the apical ancestors were born prior to European settlement in the area (1849-1850), with the remainder born in the immediate post-sovereignty period (1851-1870) – at [para 100].

In my view, information contained in the report comprehensively addresses the assertion at s. 190B(5)(a), providing substantial detailed factual material pertaining to the above points from a broad range of historical sources and records, and from oral testimonies (statements of which have been provided) by a number of claimants as obtained by Ms Powell in the course of her research. Consequently, I am satisfied that the factual basis material before me is sufficient to support the assertion that the native title claim group have, and their predecessors had, an association with the area covered by the application.

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).

In being satisfied that the applicant's factual basis material supports the assertion at s. 190B(5)(b), I am of the view that my consideration requires that I have regard to the definition of 'native title rights and interests' in s. 223(1). This definition was considered in some detail in the decision of *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*), where the High Court looked at the content of 'traditional laws and customs'. The Court held that 'the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown'. The High Court also found that the nature of the rights and interests is that they must be 'rights and interests rooted in pre-sovereignty traditional laws and customs' – at [46] and [79].

Dowsett J in *Gudjala 2007* and *Gudjala 2009* also gave considerable guidance as to what was required by s. 190B(5)(b), including that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content, and that there is a link between the apical ancestors and any society existing at sovereingty – *Gudjala 2007* at [65] and [66].

The applicant's factual basis material at Attachment F again provides substantial information pertaining to the laws and customs observed and acknowledged by the claim goup and their predecessors, including those persons of a society existing prior to European settlement in the application area. I have summarised this information below:

- European settlement in the area covered by the application occurred during 1849 to 1850, when the land was taken up in pastoral runs – at [para 4];
- records of the first explorers in the area describe the ways Aboriginal people burnt country, their hunting and fishing activities, and the construction of bark huts and encampments – at [para 5];
- observations of early recorders describe the way in which south-east Queensland was inhabited by various land-holding groups whose members' lives were regulated by region-wide laws and customs that determined firstly how the population was organised into

territorial, social, political and religious units; secondly the rights and interests of those units, and thirdly, the rights and interests of those units' members – at [para 43];
- the application area was associated with several language groups, the one with the greatest longevity being Wuli-Wuli/Wulili - the claimants' predecessors commonly spoke several languages reflecting the multilingualism of groups within the application area – at [para 12 to 13];
- individual members of land-holding groups were also members of regional groupings, which recruited through matri-filiation and records indicate that the most widespread way members were recruited to land-holding groups was through parental filiation – at [para 47 to 50];
- whilst certain totems belonged to certain tribes, members of these totems were found across tribes – at [para 49];
- each group's area and its resources belonged to all members of that group, but at the same time, certain members had rights and interests in particular areas and/or resources located on the territory of that group – at [para 52];
- decision-making and authority structures included separate Bora councils for men and women and also a regional Tribal Council, which dealt with matters affecting the tribe as a whole, such as serious disputes, decisions about marriages and the readiness of young people for initiation – at [para 64];
- two of the apical ancestors within the claim group description – Romeo and Bojimba - were 'headmen' of their respective smaller socio-territorial groups; Bojimba's son Hawkwood Tommy was also a headman of the Hawkwood tribe – at [para 65];
- a focal feature of the cosmology of the pre-sovereignty society of south-east Queensland was a belief in a sacred Creator Being (*Ngiyeran* or *Ngayeran* in Wulili language), held to be responsible for establishing the society's laws and customs at some time in the distant past, and another Being, the Rainbow Serpent (*Dhakkan* or *Gauwar*) – at [para 70 to 73];
- records report that those persons inhabiting the application area participated in a region-wide ceremonial system, where ceremonies were conducted jointly, cosmological views shared, and the same burial practices adopted – at [para 76];
- intermarriages between tribal groupings were common – at [para 81];
- the harvesting of bunya trees was a major regional event, where groups from across the application area came together. This was also an occasion where other significant ceremonies such as initiations, betrothals, settlement of quarrels and trading took place – at [para 85];
- men and women of the groups within the application area were taught behavioural practices and rules during their formal training at the time of reaching adulthood, however members of pre-sovereignty land-holding groups were expected to acquire such knowledge through observation and rote learning – at [para 93];
- Aboriginal people in the application area removed bark from trees to make huts, hunted and fished using spears, made possum rugs, cooked bandicoot, snake and roots of waterlilies in campfires, used stone tools, made dilly bags from plaited reeds and drinking containers from native gourds – at [para 94].

The factual material in the report contains significant detail pertaining to the society of Aboriginal people living on the application area pre and post-sovereignty from a number of sources, including the recollections of claimants regarding the lifestyle and practices of their predecessors. Details regarding the social and territorial group structures demonstrates, that whilst the

application area can be associated with a number of smaller socio-territorial and language groups, there was and is an identifiable landholding group subject of the application area, acknowledging and observing the same laws and customs for the purposes of a pre-sovereignty society.

In my consideration of the requirement of s. 190B(5)(b), and the ability of the factual basis material before me to meet that requirement, I note that I am to be satisfied, not only that a sufficient factual basis is provided about the asserted system of traditional laws and customs, but that the system described is rooted in a pre-sovereignty society acknowledging and observing those laws and customs which, it is asserted, gives rise to the native title rights and interests claimed. I am of the view that this is sufficiently addressed in statements within the report by members of the native title claim group which describe the relationship between the claimed native title and the asserted pre-sovereignty system of traditional laws and customs. I refer to the following:

> I have hunted and fished there for bush food with my family and others all my life and still eat my native foods – when my family and friends have been out – they bring some to me – out of love and respect for me. I eat porcupine, possum, kangaroo, scrub turkey, fish, turtle, emu, goanna, emu eggs, wallaby, sugarbag. We never catch more than we need. We still get our porcupines when we want one, clean and eat them. We get them along the road, as we are driving out to Piggott. I share with my family, but they have to be there to get some – at [para 152].
>
> My Auntie [Person 4] a daughter of Ernest and [Person 3] told us that for three days after the death the spirit comes back and that these visits can go on for a time – she kept a little light going all night – and we do this too – we keep a light on all night. We know that the spirit comes back to visit and we tell our children not to be afraid – at [para 155].
>
> I learnt about my country from my Auntie and my Grannie – I grew up with them – they taught us that our land provided everything for us – food, water and our spiritual connections – I was taught by my auntie and Grannie that I belonged to this land [the Application area] and to respect this knowledge and this land – we were brought up to never take more from the land than we needed and to leave the rest – so that whatever we took could make some more – like when we found a turkey nest, we'd be told to only to[*sic*] take some of the eggs and to leave the rest, so that they would hatch – I feel spiritually disconnected when I am in someone else's country – I feel really uncomfortable – and I can't talk about or for another person's country, even though I might be living in it at the moment – it's not right by our law to do this – I can only talk for my own area – I have taught my children about my country because it's their's too and I am now teaching my grandchildren so that they know where they come from – we plan to have a family camping trip there this Christmas so that we can take the grandkids and, because this will be their first time, we'll introduce them to the country – at [para 159].
>
> My husband has the right to go to my area – I expect him to go there and he knows he would feel welcomed there. We welcome spouses at our meetings. He has the greatest respect for my law and custom and he appreciates attending meetings about my tribal business and he remains respectfully silent when he attends – and he is always welcome to be present – at [para 179].
>
> When we were out hunting, if there was no water to drink, or if the water in the creek or the waterhole was muddy, my mother taught us to dig on a sandy part of the creek, about a foot down,

> until the hollow was filled with water, to get a drink. That water was clean. It's under the ground out there. I have taught this to my children. I have passed all my knowledge to my children because it means that they, like me, know how to get water and food out there. I've made sure that my children have learnt everything that I learnt as I grew up – I've ensured that they know all I know, so that they know their connection, I've even tried to teach them the language words I know, and I've shown them the plants, the anthills for signs of porcupines – all my cultural practices – at [para 192].

Based on all of the material I have reviewed in the report, I have formed the view that there is a sufficient factual basis to support that the exercise of native title rights and interests is related to the acknowledgement and observance of traditional laws and customs as held by a pre-sovereignty society. Similarly, I am of the opinion that the native title rights and interests described in the factual basis material can be understood as 'native title rights and interests' as defined in s. 223(1). This has been discussed in more detail below in my reasons for the condition in s. 190B(6).

For these reasons, I am satisfied that the applicant's factual basis material is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed, by the native title claim group and that these laws and customs give rise to the native title rights and interests claimed in the application.

The application meets the condition of s. 190B(5)(b).

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).

As provided above, the application has thoroughly addressed the requirements of ss. 190B(5)(a) and (b). French J in *Martin* held that the assertion in s. 190B(5)(c) is 'plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5)' – at [29]. Having been satisfied that the application sufficiently addresses the requirements of s. 190B(5)(a) and (b), the information which may assist me in reaching the required level of satisfaction at s. 190B(5)(c), was suggested by Dowsett J in *Gudjala 2007* as being information demonstrating that there has been a continuity in the observance of traditional law and custom going back to European settlement – at [82].

Similarly, I am of the view that the requirement of s. 190B(5)(c) can be equated with the second element of 'traditional laws and customs' as discussed in *Yorta Yorta*. The High Court held that this element required that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way – at [47] and [87].

The report specifically addresses this issue at [p. 39] under the heading 'Change of traditional laws and customs'. The report states the following:

> 96. There is no information in the available records of changes to the traditional laws and customs of the pre-sovereignty land-holding group that relate to the ownership and use of land. As mentioned above [para 51] the traditional laws and customs of the pre-sovereignty land-holding

> group included laws about the succession of others to rights and interests in the lands, waters and natural resources of the land-holding group. These laws were activated as necessitated by demographic fluctuations such as might arise through epidemics, warfare, drought and food shortages.
>
> 97. The Application area is located in a region where the Aboriginal population was diminished during the first decades of European settlement as a consequence of the 'dispersal' and 'pacification' practices deployed on behalf of and/or by the settlers. This raises the possibility that some sections of the pre-sovereingty land-holding group might have become extinct, although there is no information that this occurred. However, had it occurred, any property held by such groups or by members of such groups would have been inherited by others according to the traditional laws and customs about such matters.

The report also addresses the requirement of s. 190B(5)(c) under the heading 'Observance and acknowledgement of laws and customs of pre-sovereignty land-holding group' at [p. 52]. This information is summarised below:

- claimants state that, under their traditional laws and custom only those persons descended from apical ancestors who are recognised as belonging to the application area are entitled to speak for the area and assert rights and interests in the area – at [para 127];
- laws and customs upheld by claimants relate to maintaining land, waters and resources of the area in good condition, caring for the area's sites and protecting the area from access and use by persons who have no rights under Aboriginal law and custom to speak for the country nor to access and use natural resources of the area – at [para 127];
- claimants assert that their rights and responsibilities regarding the application area have been passed to them by their parents and older relatives within the native title claim group and that they have these rights and responsibilities by birthright, as do their children, and the descendants of their children – at [para 128];
- claimants have learnt from their parents and older relatives about significant sites in the application area, including Mount Narayen, the Auburn Falls, the Bunya Mountains, sacred waterholes, springs and caves, old campsites, ceremonial grounds, massacre sites, places of their forebears' birth and death, ancestral burial places. They were also instructed in the proper way to approach known sites of ancestral presence – at [para 130];
- claimants now impart this knowledge to their children and younger relatives – at [para 131];
- whilst transmission of traditional knowledge seems to have been informal in the past, today it occurs during accidental and planned visits to the application area – at [para 131];
- representatives from the claim group, along with representatives from the three other Traditional Owner groups recognised as having rights and interests in the area (Jarowair, Barunggam and Wakka Wakka) have formed an Elders Council, to facilitate the implementation of responsibilities for the Bunya Mountains – at [para 132].

Various statements provided by claimants in relation to the association with, and use of the application area (including those statements reproduced in my reasons above at s. 190B(5)(b)) also support the assertion that the native title claim group have continued to hold native title in accordance with those traditional laws and customs. Such statements include the following:

> My father's generation used to make boomerangs, spears, didgeridoos – I saw this when I was a child. Now, my family mostly use the ochre – my son uses ochre for his dance troupe, which came

> to open the Keeping Place at Cracow [in the Wulli Wulli QUD 6006/2000 area]. He asked the Elders' permission to use the ochre – at [para 150].
>
> We know our ancestors are all there in the land and if you do something wrong you'll be punished – either you or a member of your family – we believe that. We were taught to look but don't touch – must not take ancestors' things. Young so-and-so found a stone axe and he took it home. I told my brother to tell him to take it back because now anything could happen to a family member. I told him, it needs to go back – at [para 129].
>
> My Grannie [Person 5] called herself a Wulli Wulli woman and Wulli Wulli is another name for our area. Sometimes I call my country 'the Auburn', and sometimes I call it 'Coondarra' and sometimes 'Piggott' and sometimes I call it 'Wulli Wulli'. I use these names sometimes to mean places in my land and sometimes for the whole land... This is how my old people used these names too... The Auburn is our area – I know this because Auntie [Person 6], who helped rear me, told all of us this and her mother told her and told us too. Grannie [Person 5] always told us: "Don't ever forget who you are and where you come from". Grannie [Person 5] always said she was a Wulli Wulli – at [para 31].

In my view, the above information provides a sufficient factual basis to support the assertion that there has been continuity in the observance of traditional laws and customs held by a pre-sovereignty society, and also that the acknowledgement and observance of such laws and customs since that time has occurred in a substantially uninterrupted way. Consequently, I am satisfied that the applicant's factual basis material supports the assertion at s. 190B(5)(c).

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.

In considering the task to be undertaken at s. 190B(6), the meaning to be applied to the term 'prima facie' is of considerable relevance. This issue was discussed by the Court in *Doepel*, where Mansfield J held that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'. The Court accepted the meaning given to the phrase 'prima facie' in the decision of *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2, which was the ordinary meaning of the phrase, 'at first sight; on the face of it; as appears at first sight without investigation' – *Doepel* at [134] to [135].

The Court's findings in *Doepel* suggests that s. 190B(6) requires the delegate to examine the asserted factual basis material for each of the rights and interests claimed, to reach the necessary level of satisfaction that those rights and interests exist, prima facie. In my view, in being satisfied that the rights and interests claimed exist, the applicant's factual basis material must specifically address whether those rights and interests are of the nature of 'native title rights and interests' as defined in s. 223(1). That is, that the rights and interests are possessed under traditional law and

custom, that the native title claim group by those laws and customs have a connection with the land and waters of the application area, and that those rights and interests can be recognised by the common law.

I have considered each of the rights and interests claimed and the asserted factual basis material in support of those rights and interests below.

Exclusive right to possession

A claim to a right of exclusive possession, occupation, use and enjoyment as against the whole world, provided there is sufficient factual basis material to support the assertion that this right exists, can be found, prima facie, to exist – see *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) at [51]. The Court has previously recognised a right framed in the terms of 'an entitlement against the whole world to possession, occupation, use and enjoyment of the land and waters of that part [of the determination area] to the exclusion of all others' – *Ward v Western Australia* [2006] FCA 1848 (*Ward*) at para [8].

In *Ward HC,* the High Court associated an exclusive right to possession under traditional laws and customs, with the concept of speaking for country, and the need for members of the claim group's permission to be sought to access the application area. The factual basis material necessary to support a claim of exclusive possession was further considered in the decision of *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*), where the Full Court found that what was required was that the material demonstrated that under traditional law and custom (those derived from a pre-sovereignty society acknowledged and observed with a continued vitality), the group is able to effectively 'exclude from their country people not of their community' and that they are 'gatekeepers for the purpose of preventing such harm and avoiding injury to the country' – at [127].

I have considered the report submitted at Attachment F and the extent to which it supports a claim of exclusive possession. The factual basis material contains a number of statements made by claimants that support the existence of this right, for example:

> If another group wants to come out – they have to contact me – [once] the Wakkas – the mongrel things – did walk on my country but they will get punished – it's coming! The Wakkas did this and I did not know – no one stopped them – People have big fights over that! But they will get punished! Now, if I hear another Aboriginal person has been at my sites and in my area, I tell the pastoralists to lock the gate – at [para 171].

And also:

> I heard what [so-and-so] was getting up to – going to take people out walking without letting me know – told [so-and-so] off! Don't like people talking about things they know nothing about! I'm the boss for my family, my tribe – this is handed down and I'm the Elder for my family now and I know the country – I was born and raised out there – by rights there should only be one Elder to a tribe! And you have to go by that Elder – Younger people in my group should ask my permission before they go out there – that's the Aboriginal way – this is because I'm the boss and the oldest now - at [para 163].

Another example of the ability of the native title claim group to effectively exclude others was that members of the Port Curtis Coral Coast claim group recently sought and obtained the claimants' permission to visit the Auburn National Park region – at [para 171].

I am satisfied that the factual basis material establishes that a right to exclusive possession as claimed by the applicant exists, prima facie.

Non-exclusive rights

The remaining rights and interests claimed at Schedule E are of a non-exclusive nature. The report at Attachment F has addressed each of these rights individually, and provided factual basis material in support of their existence under traditional law and custom. I am satisfied that each of the non-exclusive rights and interests claimed can be found to exist, prima facie. I have briefly considered each of the rights claimed below.

Right to live and be present on the application area

A right to live and be present on the application area has previously been recognised by the Court – see for example *Griffiths*; *Ward*; *King v Northern Territory* [2007] FCA 1498 (*King*) at [para 9(e)]. The applicant's factual basis material speaks in some detail of the nature of this right claimed by the applicant according to their traditional laws and customs.

For example, the material states that the claimants regard the application area as part of their homelands, and that they and both their immediate and more distant forebears lived and camped at various places throughout the application area. Records show that large camps of bark huts and campfires set up by the claimants predecessors existed at the time of early exploration of the area.

One claimant states:

> When I was a young person we could move all over our country because we worked for the station owners, and in those days the properties were huge, now they are cut up into little blocks. And we did not need permission to move from one part to another because the pastoralists knew us and this is so even today – they know we are the Aboriginal people who belong to this region and my Grannie [Person 5] told me it was the same for her and her parents – we lived mostly in tents – we'd cut trees and make our A-frames and put calico over them – camped at Piggott, Auburn, Burnwood, Jarra, Pinedale, Coondarra, Dykehead, Glenwood, Wells Station, DiDi – at [para 139].

Subsequently, I am of the view that the applicant's factual basis material supports the existence, prima facie, of a right held by the claimants, to live and be present on the application area.

Right to take, use, share and exchange traditional natural resources

I am of the view that there is nothing contentious about this right as claimed, and that the factual basis material provided by the applicant contains various information in support of the existence of such a right, as held under the traditional laws and customs of the native title claim group. For example, the report states that since childhood the claimants have hunted, fished, harvested, collected, used and enjoyed the natural resources of the application area and continue to do so. For example, ochre is used for body paint for ceremonies, bush plants are used for medicinal purposes and kangaroo skins are used for making rugs – at [para 143, 150 to 151].

Claimants state that the gathering and use of these resources is taught to their children, in accordance with traditional laws and customs regarding certain restrictions on such use. Claimants also stated that it was customary that the predecessors of members of the native title claim group would share amongst themselves and between families those foods hunted and

gathered, and would also trade necklaces and other special objects made from natural materials including echidna quills and seeds – at [para 147, 151 to 152].

Subsequently, I am of the view that the applicant's factual basis material has established that a right to take, use, share and exchange traditional natural resources for personal, domestic and non-commercial, communal purposes exists, prima facie.

Right to conduct burial rites

A right to conduct burial rites has previously been recognised by the Court – See *Griffiths* at [para 7(f)(v)]; *King* at [para 9(g)(ii)]. The applicant's factual basis material states that traditional methods of burial included the deceased being placed in bark coffins in caves, or in trees. Claimants deceased family members are now placed in cemeteries of towns close to the application area and there are special ceremonial practices that take place in carrying out the burial of claim group members. Such practices are intimately connected to the spiritual affiliations of the claim group. The claimants also have plans to arrange for special ceremonies to bury those remains of their predecessors that have been stored at the Queensland Museum.

Based on this information, I am satisfied that the factual basis material in the report supports the existence, prima facie, of a right held by members of the claim group to conduct burial rites.

Right to conduct ceremonies

The Court has previously recognised and upheld a right to conduct ceremonies – See for example *Walker* at [para 3(b)(iii)]; *Griffiths* at [para 7(f)(ii)]. The claimants factual basis material contains various detail relating to the assertion of this right. For example, the report at Attachment F states:

> Members of the claim group regularly visit the Application area for spiritual reasons and to commune with their ancestors. They believe that their immediate and more distant forbears are in this country, watching over the country and its people. For example, one claimant told that she had recently gone into the Application area to a place known as 'Piggott', where her mother's father had died, and where she herself spent her early years in Aboriginal camps, for this purpose and to rejuvenate her spirit – at [para 157].

There is also considerable information relating to ceremonies and activities conducted by the claimants and their forebears, including initiation ceremonies, marriage ceremonies and bunya harvesting. Based on this material, I am of the opinion that the right to conduct ceremonies has been established by the applicant, prima facie.

Right to teach on the area about physical and spiritual attributes

The Court has previously determined that a non-exclusive right to teach on the determination area the physical and spritiual attributes of the area exists – See *Witjara* at [para 10]; and *Griffiths* at [para 7(f)(iv)]. Concerning this right, the report at Attachment F of the application contains information and statements from claimants that support its existence. For example, one claimant states:

> I learnt about my country from my Auntie and my Grannie – I grew up with them – they taught us that our land provided everything for us – food, water and our spiritual connections – I was taught by my Auntie and Grannie that I belonged to this land [the Application area] and to respect this knowledge and this land – we were brought up to never take more from the land than we needed and to leave the rest – so that whatever we took could make some more – like when we found a

> turkey nest, we'd be told to only to take some of the eggs and to leave the rest, so that they would hatch – I feel spiritually disconnected when I am in someone else's country – I feel really uncomfortable – and I can't talk about or for another person's country, even though I might be living in it at the moment – it's not right by our law to do this – I can only talk for my own area – I have taught my children about my country because it's their's too and I am now teaching my grandchildren so that they know where they come from – we plan to have a family camping trip there this Christmas so that we can take the grandkids and, because this will be their first time, we'll introduce them to the country – at [para 159].

The passing on of knowledge regarding the application area to younger generations is referred to numerous times throughout the report. Subsequently, I am satisfied that the right to teach about the physical and spiritual attributes of the application area can be established, prima facie, by the applicant's factual basis material.

Right to maintain places of importance and areas of significance

The right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and to protect those places and areas from physical harm was recognised by the Court in *Walker v Queensland* [2007] FCA 1907 (*Walker*) at [para 3(b)(vi)].

An example of the existence of this right is provided in the report relating to the claimants' belief that those who damage the various significant sites and places on the application area will be punished. In the past Telstra attempted to construct a tower on Mount Narayen, one of their most sacred places. A claimant stated in relation to this event:

> There are spirits there – and they [Telecom] got a big sign from them when they tried to put a telegraph pole on Mount Narayen – a big storm came and blew it down. My father told me never to go there in the dark – there's a ghost up there– at [para 165].

Members of the native title claim group also take part in cultural heritage surveys on the application area and contribute to its conservation and care. Certain Elders and senior claimants are asked for advice when external and non-Indigenous parties are seeking to do works in the area. As they were taught about these important places by their parents and grandparents, today the claimants take their own children out to these sites and show them the proper way to conduct themselves when approaching such places – at [para 167, 169 to 170].

Subsequently, I have formed the view that the factual basis material before me is able to establish that a right to maintain places of importance and areas of significance, as asserted by the claim group, exists, prima facie.

Right to light fires for domestic purposes

The right to light fires for domestic purposes, including cooking but not for hunting or clearing vegetation has previously been recognised by the Court – See for example *King* at [para 9(f)]; *De Rose v State of South Australia* (No 2) [2005] FCAFC 110 (*De Rose*) at [para 3(f)].

The applicant's factual basis material again speaks specifically to this right as asserted by the claimant group. The material states that:

> The oral histories of older claimants, who grew up in the application area describe how that they and their immediate and more distant forebears regularly lit fires for domestic purposes, including cooking. Claimants regard 'ashes cooking' and the use of white ant ovens as defining features of

their traditional cuisine and recall how a range of game and fish and vegetable foods were cooked – at [para 173].

I am of the opinion that for the purposes of s. 190B(6), the applicant's factual basis material has established that a non-exclusive right to light fires for domestic purposes exists, prima facie.

Right to be accompanied into the claim area by non-claim group members

In the decision of *Witjira*, the Court recognised a right held by members of the claim group to be accompanied onto the determination area by non-claimants, including those persons who were spouses of claimants or persons who were acknowledged under traditional law and custom as having rights in the application area, despite the fact that they were not descended from a named apical ancestor – at [para 9(m)].

The report at Attachment F speaks to this right and cites a number of examples which support its existence. The claimants state that under their system of law and custom, there are some persons who are required to attend the claimants' performance of ceremonies and cultural activities. These persons include spouses of claimants who are associated with neighbouring groups who, in the past, took part in the forebears region-wide ceremonies held inside and outside of the application area. It is asserted that customary practice involves claimants' spouses being invited to attend such ceremonies, and that this traditional knowledge is passed down to younger generations orally during visits to country – at [para 178 to 180].

The report also provides that there are a number of persons of Aboriginal descent who have a historical association with the area, such as through moving to the area for pastoral work, but who are not descended from the apical ancestors of the claim group. There are also persons from neighbouring groups whose forebears would have participated in region-wide ceremonies once held in the application area, and for that reason, such persons are recognised as having rights in the application area – at [para 184].

I am of the view that the applicant's factual basis material supports the existence, prima facie, of a right held by the claimants under traditional law and custom, to be accompanied onto the application area by non-claimants.

Right to take and use water and natural resources from the water

In my view, there are two components comprising this right. Firstly, the applicant claims a right to take and use water for personal, domestic and non-commercial purposes and secondly, the applicant claims a right to take and use traditional natural resources from the water. In my view, there is nothing contentious about either of these components and the factual basis material speaks to both.

The report has addressed the two components separately. In relation to the right to take water for personal, domestic and non-commercial purposes, the report provides that as their forebears did, the claimants continue to take water for these purposes. The access to and use of water specifically relates to the death of one of the more immediate forebears of the group, hence this right has special significance for some claimants. The Auburn River also has a strong significance for the claimants and is an important place in accordance with traditional law and custom. Not only did the river provide food and water for the claimants forebears, but it was also a place where claimants' predecessors lived and carried out much of their daily life and cultural activity.

Younger generations continue to be taught how to find water when travelling through the application area – at [para 190 to 192].

In relation to the second element of the right claimed, the report states that older claimants recall how they and their older family members obtained resources including fish, ducks, eels, turtles, lily bulbs and reeds from the waters of the application area. One claimant states:

> My Granny [Person 3] taught me how to fish. She taught me how to trick the fish into coming to where my line was by throwing sand or soft soil or gravel over where my line was. This would attract the fish. She also taught me how to get my line free if it was snagged – by doing this – the fish come and eventually the line gets free. We were also taught not to kill the pregnant fish – Granny always knew if the crayfish – we call them crawfish – and the jewfish were pregnant, and she and Mum would tell us to throw them back. We also caught turtle, but we children were not allowed to eat turtle – only the older people ate turtle, and only the short-necked ones– at [para 189].

I am satisfied that the applicant's factual basis material supports the existence, prima facie, of a right to take and use water, and natural resources from the water, as held by the native title claim group according to their traditional law and custom.

The application meets the requirement of s. 190B(6).

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).

The requirement imposed by s. 190B(7) was discussed by the Court in *Doepel*, where it was held that the delegate was to be 'satisfied of a particular fact or particular facts'. The focus of the delegate's task at s. 190B(7) was found to be 'upon the relationship of at least one member of the native title claim group with some part of the claim area' – at [18]. In *Gudjala 2007*, Dowsett J held that in following the approach taken by the High Court in *Yorta Yorta*, the meaning to be applied to 'traditional physical connection' was 'that the relevant connection was in accordance with the laws and customs of the group having their origin in pre-contact society' – at [89].

Schedule M of the application contains information pertaining to the traditional physical connection asserted by the applicant. Reference is made to the activities currently carried out by members of the claim group, described at Schedule G, and also to specific sections of the report at Attachment F.

As demonstrated and discussed in my reasons above at ss. 190B(5) and 190B(6), the report at Attachment F contains considerable factual basis material pertaining to the connection held by the claimants and their predecessors to the land and waters of the application area. This material speaks to the connection held by specific individuals with the application area, and demonstrates that this connection is one that is in accordance with the traditional laws and customs of the group which have their origin in a society that existed at the time of European settlement.

The application meets the requirement of s. 190B(7).

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).

In considering the requirement of s. 61A(1), I have turned my mind to information provided in the geospatial assessment, and conducted a search of the Register. The geospatial assessment states that no determinations as per the Register fall within the external boundary of the application as at 5 October 2011. Similarly, there is nothing on the Register that indicates there has been an approved determination of native title for any of the area covered by the application.

Reasons for s. 61A(2)

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

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

Schedule B of the application which contains a list of general exclusions (areas not covered by the application), provides that the application area does not include any land or waters that is or has been covered by various types of grants of exclusive possession interests and leases. These interests and leases are identical to those set out in s. 23B(2), which defines 'previous exclusive possession act'. For that reason, I am satisfied that the claimant application has not been made over an area covered by a previous exclusive possession act.

Reasons for s. 61A(3)

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

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

Schedule E of the application, describing the native title rights and interests claimed, states that a right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world is only claimed over areas where exclusive possession can be recognised, such as areas where there has been no prior extinguishment of native title, or where s. 238, ss. 47, 47A or 47B apply.

The application meets the requirements of s. 190B(8).

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

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

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

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

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

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

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

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

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

Schedule P provides that the application does not include a claim by the claim group to exclusive possession of all or part of an offshore place.

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

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

Schedule B of the application, containing a list of general exclusions of areas not covered by the application, states that the application area does not include land or waters where the native title rights and interests claimed have been otherwise extinguished.

The application meets the requirements of s. 190B(9).

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Wulli Wulli People #2**
NNTT file no.	**QC11/5**
Federal Court of Australia file no.	**QUD311/11**
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)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

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

[*End of document*]