National Native Title Tribunal

Registration test decision

Application name	Kullilli People
Name of applicant	Paola Smith, Maxine Gooda, Peter White, Ronny Watson, Eric Hood
State/territory/region	Queensland
NNTT file no.	QC09/1
Federal Court of Australia file no.	QUD80/09
Date application made	23 March 2009
Date application last amended	23 August 2011
Name of delegate	Carissa Kok

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

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

Date of decision: 19 October 2011

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Carissa Kok

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 a delegate of the Native Title Registrar (Registrar), for the decision to accept the amended QC09/1—Kullilli People—QUD80/09 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) (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 Kullilli People claimant application was first made on 23 March 2009 (the original application). That application was accepted for registration under s. 190A on 17 April 2009 and has remained on the Register of Native Title Claims (RNTC) since that day.

On 23 August 2011, an amended application was filed in the Federal Court of Australia (the Court), pursuant to leave granted on 12 August 2011. The Registrar of the Court gave a copy of the amended Kullilli People application to the Registrar on 23 August 2011 pursuant to s. 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act. Accordingly, it is the amended Kullilli People application that is before me, and that I refer to hereafter as 'the application'.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim and Attachment A sets out my reasons.

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.

I have carefully read and considered all of the information before me in the amended application and am satisfied that the only effect of the amendments to the application is:

- a change to the native title claim group description by the addition of six apical ancestors to the description in Schedule A; and
- the provision of new s. 203BE certification.

As I discuss below in relation to the 'Procedural fairness steps', no additional or adverse material has been received in relation to the registration of the application. In my view, as there have been no other changes made to the application on 23 August 2011 since the original application was filed on 23 March 2011, I have decided to take the following course in these reasons:

- Adopt the reasoning and decision of the previous delegate who accepted the original application for registration on 17 April 2009, for the merit conditions at ss. 190B(2) and (4) to

(7). With regard to these conditions of the registration test, I have read and considered the previous delegate's statement of reasons in 'Reasons for decision: Kullilli People QUD80/09 (QC09/1), 17 April 2009', and have formed the view that I agree with the relevant assessments, reasoning and conclusions of the previous delegate.

- Provide new, full reasons in relation to the requirements of the conditions in ss. 190C(4) and 190B(3) as the amendments to the application made on 23 August 2011 relate specifically to the test at these conditions.
- Consider the application against each of the procedural conditions afresh to ensure that it contains all of the details, information and accompanying documents required by s. 190C(2). I also address the requirements of s. 190C(3) with regard to the present status of the application as it was filed on 23 August 2011.
- I have also decided to provide new reasons in relation to the conditions under ss. 190B(8) and (9).

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

Information considered when making the decision

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

I have considered the information in the following documents:

- QC09/1 application and accompanying documents (original Form 1 filed on 23 March 2009 and amended Form 1 filed on 23 August 2011);
- an overlap analysis and geospatial assessment of the application area undertaken by the Tribunal's Geospatial Services unit on 8 September 2011 (the geospatial assessment); and
- Reasons for decision: Kullilli People QUD80/09 (QC09/1), 17 April 2009.

I have also had regard to the documents contained in the QC09/1 case management/delegates files (reference 2011/02192). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4)—*Attorney General of Northern Territory v Doepel* [2003] FCA 1384 *(Doepel)* at [16].

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

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 ss. 94K and 94L of the Act).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31].

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

On 1 September 2011, the Tribunal wrote to the applicant and the State of Queensland (the State) to confirm that the registration test would be applied to the application. The applicant and State were also given the opportunity to provide to the Registrar any additional information or submissions in relation to the registration of the application.

On 9 September 2011, the Tribunal received a letter dated 7 September 2011 from the legal representative for the applicant. That correspondence outlined a further research report that would be available to the Registrar for consideration, should it be identified that additional information of that kind may be required.

On 12 September 2011, the Tribunal responded to the applicant's legal representative, stating that as I had formed the preliminary view that there was sufficient material before me, no additional information would be required.

As no adverse or additional material was submitted in relation to the application, neither I nor other officers of the Tribunal were required to undertake any further steps in relation to procedural fairness obligations.

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)—*Doepel* at [16] and also at [35]–[39].

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the 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.

I consider below whether the application and accompanying affidavit/other documents meet the relevant requirements of ss. 61 and 62:

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 I discuss above, I am of the view that the Registrar's task under s. 190C(2), when examining s. 61(1), is procedural only and limited to a consideration of whether the application sets out the native title claim group in the terms required by s. 61(1). It is only if the description of the native title claim group in the application indicated that not all persons in the native title group were

included, or that it was in fact a subgroup of the native title group, that the requirements of s. 190C(2) would not be met and the claim cannot be accepted for registration—*Doepel* at [36].

A description of the native title claim group is found in Schedule A of the application as extracted in my reasons at the condition of s. 190B(3) below.

I am satisfied that the description in Schedule A is sufficient for the purposes of s. 190C(2). There is nothing on the face of it or elsewhere in the application to indicate that not all persons in the native title claim group are included or that it is a subgroup of the native title claim group. I am therefore satisfied that the requirements of this section are met.

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

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

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

The names of the five persons who comprise the applicant and their address for service are provided at pages 2 and 15 of the application respectively.

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

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

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

A description of the native title claim group is provided in Schedule A.

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

> The application must be accompanied by an affidavit sworn by the applicant that:
>
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
>
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
>
> (iii) the applicant believes all of the statements made in the application are true, and
>
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
>
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

The application is accompanied by five affidavits by the five persons comprising the applicant. Each of these affidavits was filed with the original application on 23 March 2009 and contains the requisite statements and details under ss. 62(1)(a)(i) to (v).

I note that no new s. 62(1)(a) affidavits were filed with the application before me. However, s. 62(1), insofar as it relates to the accompanying affidavits, deals with the position at the point of the original filing of the application—*Drury v Western Australia* [2000] FCA 132 at [11]. As such, I am of the view that s. 62 does not require the filing of new affidavits for every amendment.

I note also that the application names one of the persons comprising the applicant as 'Ronny Watson' and the affidavit provided is made by Ronald Watson. I am satisfied that both names refer to one and the same person.

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) because it 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).

The application provides a written description and map identifying the area covered by the application (Attachments B and C) and a written description of any areas within the external boundaries that are not covered by the application (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).

A map of the application area is provided at Attachment C.

Searches: s. 62(2)(c)

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

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

At Schedule D, it is stated 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).

A description of the claimed native title rights and interests is found in Schedule E. I do not consider that the description merely consists of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
>
> (1) the native title claim group have, and the predecessors of those persons had, an association with the area, and
>
> (2) there exist traditional laws and customs that give rise to the claimed native title, and
>
> (3) 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).

A general description of the factual basis is provided, primarily at Attachments F and M.

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).

A list of activities carried out by the claim group in the application area is found at Schedule G.

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

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

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

The applicant states at Schedule H that there are no overlapping applications.

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).

The applicant states at Schedule HA that it is not aware of any notices of this kind.

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

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

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

Schedule I contains details of s. 29 notices previously given.

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).

A search of the application area against the RNTC shows that there were no overlapping applications on the RNTC when the current application before me was made on 23 August 2011.

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.

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

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

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

Mansfield J states in *Doepel* that the Registrar's function in assessing the limb of s. 190C(4)(a) is simply 'to be satisfied about the fact of certification by an appropriate representative body'—at [78]. In line with *Doepel*, my task at s. 190C(4) is not to inquire about the fact of authorisation but is limited to ensuring that:

- the certifying body has power under Part 11 to make the certification; and
- the certification complies with s. 203BE(4)—*Doepel* at [80] and [81].

Is Queensland South Native Title Services (QSNTS) empowered to certify the application?

I note that Schedule R which refers to Attachment R, states erroneously that there is 'no change' to the attached certification since the filing of the original application. I accept that this is an oversight as the amended application provides a new certificate at Attachment R. This certificate by QSNTS is made pursuant to ss. 203BE and 203FEA and is signed by its Chief Executive Officer (CEO) on 3 August 2011. The certificate confirms that QSNTS is a body funded under s. 203FE(1) for the purpose of performing the functions of a representative body. I am not otherwise aware that this is not the case.

Section 190C(4)(a) states that an application must be certified by each representative body that could certify the application. In accordance with s. 203BE(1)(a), a representative body can certify an application for a determination of native title where that application relates to areas of land or waters wholly or partly within the area, for which the body is a representative body. I am satisfied that the application has been certified by all the representative bodies that could so certify, based on the following information:

- Schedule K of the application (which provides for details about the name of each representative body for the application area) states that QSNTS 'is a body funded under s. 203FE … to perform the functions of a representative body'; and
- the geospatial assessment which confirms that only one representative body area overlaps the application area—that representative body being QSNTS.

Satisfaction of s. 203BE(4)

I turn now to consider whether the certificate by QSNTS contains the information required by Part 11, with specific regard to s. 203BE(4). It is not for me to examine matters relating to the basis on which the certification was made, including the sufficiency or legitimacy of the reasons why the certifying body holds the opinions it does—*Doepel* at [80] and [81] and *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 *(Wakaman)* at [31] and [32].

In accordance with s. 203BE(4), I am of the view that the certificate provided at Attachment R must contain certain information and opinions. Section 203BE(4) is set out below:

> (4) A certification of an application for a determination of native title by a representative body must:
>
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
> (b) briefly set out the body's reasons for being of that opinion; and

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

The requirements of ss. 203BE(2)(a) and (b) are:

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

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

Paragraphs 2 and 3 of the certificate provide statements that QSNTS is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met. I am thus satisfied that the certification complies with s. 203BE(4)(a). Pursuant to s. 203BE(4)(b), paragraph 4 of the certificate contains brief reasons as to why QSNTS holds these opinions. I note again that s. 190C(4)(a) does not require me to 'look behind' these reasons or to question the merits of the certification—*Doepel* at [80] and [81] and *Wakaman* [31] and [32]. Accordingly, I consider that the reasons provided in the certificate meet the requirements of s. 203BE(4)(b).

With regard to s. 203BE(4)(c), it is my view that this requirement is not applicable. The certificate provides the statement that the CEO is satisfied that the application does not overlap with another application. My search of the Tribunal mapping database confirms this.

Conclusion

It is my view that QSNTS is the only body that could provide the requisite certification, and that the certification satisfies the requirements of s. 203BE(4). The condition in s. 190C(4)(a) is met.

Merit conditions: s. 190B

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

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

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

The following extracted reasons for decision in relation to this condition were given in the previous delegate's statement of reasons when she considered the original application for registration on 17 April 2009. I refer to that statement of reasons hereafter as 'the previous registration decision'.

> The written description of the external boundary and the map showing it are, in my view, sufficiently and reasonably clear to locate the area covered by the application on the earth's surface. The written description uses metes and bounds, references to the Queensland/New South Wales state border, geographic coordinate points, adjoining native title claimant application boundaries and also to rivers, creeks, the ridge line of the Grey Range and to a number of towns and lakes. It specifically states that the application excludes any area covered by four adjoining native title claimant applications. The A3 copy of the map in attachment C depicts the external boundary with a bold outline. The map contains details of underlying land tenure, adjoining native title applications, some geographic features and towns. It also has a north point, scale bar, coordinate grid and locality map. The information identifies the source, currency and datum notes for the description and mapping. The geospatial report expresses the opinion that the description and map are consistent and identify the application area with reasonable certainty.
>
> Having regard to the comprehensive identification of the external boundary in attachment B and the clarity of the mapping of this external boundary on the map in attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.
>
> A written description of the internal boundaries is found in schedule B. This is a generic description that excludes from the application any areas that is or has been covered by the acts described in s. 23B of the Act. It is stated that if the provisions of ss. 23B(9)–(10) or ss. 47, 47A or 47B apply to any such areas, then the areas so described are in fact covered by the application. It is finally stated that the application does not include areas where native title has otherwise been extinguished.
>
> A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In these circumstances, I find the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

> For these reasons, I am satisfied that the information and map in the application required by sections 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 areas of land or waters and the requirements of s. 190B(2) are therefore met—the previous registration decision at pp. 14–15 .

I note that the previous delegate had regard to a geospatial assessment made by the Tribunal's Geospatial Services (Geospatial) on 1 April 2009, which found that description and map were consistent and identified the application area with reasonable certainty. I have had regard to the geospatial assessment of 8 September 2011 on the written description and map provided in the application. That assessment found that the area covered by the application has not been amended or reduced and does not include any areas which have not been previously claimed in the original application. I agree with this assessment.

I have considered the information and map provided to identify the application area, to which no amendments have been made since the filing of the original application. I have considered the above quoted previous registration decision and agree with the conclusions reached by the previous delegate in respect of this condition. Therefore, for the same reasons given in the previous registration decision, I am satisfied the condition in s. 190B(2) is met.

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).

Mansfield J stated in *Doepel* that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

It follows that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—*Doepel* at [37].

I have confined my consideration to the information contained in the application—*Doepel* at [16].

The application contains an amended description of the native title claim group at Schedule A. The amendment is the addition of the names of six new apical ancestors to the description provided in the original application, as follows:

> The native title claim group … on whose behalf the claim is made is the Kullilli People.
>
> The Kullilli People are the biological descendants of the following people:

> [A list of names for 32 apical ancestors—the new names added in the amended application are listed at 27–32.]

As the application does not name the persons in the native title claim group, I must be satisfied that the requirements of s. 190B(3)(b) are met.

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 Carr J stated that the test under s. 190B(3)(b) is whether the group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group, i.e. by a set of rules or principles. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or her delegate to determine whether or not the description is sufficiently clear and the matter is largely one of degree with a substantial factual element—at [25] to [27].

In accordance with the 'rule' of the description at Schedule A, I understand that membership of the claim group comprises persons who are the biological descendants of any of the listed apical ancestors. In my view, the apical ancestors are clearly identified by name, including with reference to some alternative names for some ancestors or the names of their spouses. One ancestor is identified also as being the husband of another named ancestor.

In my view, the description provides an objective point of reference as a starting point for an inquiry, being the list of identified apical ancestors from whom claim group members must be descended. Thus, it is my view that with the assistance of a factual inquiry, it would be possible at any time to ascertain who is a member of the native title claim group. The point that a factual inquiry may be required does not mean that the claim group has not been sufficiently described, as was stated by Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially—at [67].

Accordingly, it is my view that the description in Schedule A provides sufficient details such that it would be possible to ascertain whether any particular person meets the 'rule' for membership of the claim group. I am satisfied that the application meets the requirements of subparagraph 190B(3)(b) such that the condition of s. 190B(3) is met.

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

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

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

The following reasons for decision in relation to this condition were given in the previous registration decision:

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

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

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 Kullilli People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
2. Over areas where a claim to exclusive possession cannot be recognised, the Kullilli People claim the following rights and interests:
   (a) the right to access the application area;
   (b) the right to camp on the application area;
   (c) the right to erect shelters on the application area;
   (d) the right to exist on the application area;
   (e) the right to move about the application area;
   (f) the right to hold meetings on the application area;
   (g) the right to hunt on the application area;
   (h) the right to fish on the application area;
   (i) the right to use the natural water resources of the application area including the beds and banks of watercourses;
   (j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
   (k) the right to conduct ceremony on the application area;
   (l) the right to participate in cultural activities on the application area;
   (m) the right to maintain places of importance under traditional laws, customs and practices in the application area;
   (n) the right to protect places of importance under traditional laws, customs and practices in the application area;
   (o) the right to conduct burials on the application area;
   (p) the right to speak for and make non-exclusive decisions about the application area;
   (q) the right to cultivate and harvest native flora according to traditional laws and customs
3. The native title rights and interests are subject to:
   (a) The valid laws of the State of Queensland and the Commonwealth of Australia; and
   (b) The rights conferred under those laws.

It is my view that the description of the claimed native title rights and interests is clear and [can be] easily understood. Accordingly the requirements of this section are met—the previous registration decision at pp. 16–17.

I have read and considered the material in Schedule E of the application before me, to which no amendment has been made since the filing of the original application. I have considered the above quoted previous registration decision in the context of the description contained at Schedule E and agree with the conclusions reached by the previous delegate in respect of this condition. Therefore, for the same reasons given by the previous delegate, I am satisfied that the

description contained in the application as required by s. 62(2)(d) is sufficient to allow the claimed native title rights and interests to be readily identified. The condition in s. 190B(4) is met.

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

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

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

The following comments in relation to this condition were given in the previous registration decision:

> *Registrar's task at s. 190B(5)*
>
> I am not, as the Registrar's delegate, to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Doepel* at [17]. Although I am required 'to address the quality of the asserted factual basis', I must assume that what is asserted is true, and assuming it is true, the task is whether I am satisfied that 'the asserted facts can support the claimed conclusions'—*Doepel* at [17]. This assessment of the task at s. 190B(5) from *Doepel* was recently approved by a Full Court (French, Moore and Lindgren JJ) in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [83]–[85].
>
> The Full Court in *Gudjala FC* commented that a sufficient factual basis for the assertions in s. 190B(5) must 'be in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and must be something 'more than assertions at a high level of generality'—at [92]. The Full Court also said that providing a sufficient factual basis does not require the applicant to 'provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim'—at [92]. The Full Court concluded that the applicant is 'not required to provide evidence that proves directly or by inference the facts necessary to establish the claim'.
>
> The Full Court indicated at [93] of *Gudjala FC* that if the Registrar were to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim', that would be erroneous.
>
> Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the material as if it were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the application and the supporting evidentiary affidavits in relation to the factual basis (apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5)).

My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out in subparagraphs (a) to (c) of s. 190B(5).

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

Information before me in relation to the factual basis

The application refers me to the contents of attachment F for a general description of the factual basis. This appears to be a report or an excerpt of a report by the anthropologist retained by QSNTS to research and report on the claim in this application, **[Anthropologist 1 – name deleted]**—see annexure 'A' and the reference to '**[Anthropologist 1 – name deleted]** 2008 Kullili Native Title Claim Application Schedule F (Form 1) and Schedule M Report for QSNTS'. Further information in relation to the factual basis is provided in schedule A (description of the native title claim group). Attachment M provides details of traditional physical connection by members of the native title claim group with areas covered by the application. I note that much of the information in attachment M replicates that found in attachment F and also appears to have been authored by **[Anthropologist 1 – name deleted]**.

Each of the persons comprising the applicant states in their s. 62(1)(a) affidavit that they believe all of the statements made in the application are true.

Further material relevant to the factual basis is found in an affidavit by **[Anthropologist 1 – name deleted]** which was filed with the application on 23 March 2009. **[Anthropologist 1 – name deleted]**'s affidavit provides details of his anthropological qualifications and expertise at [1]–[4] of his affidavit. He states at [5] that he has conducted 'extensive anthropological research in relation to south-west Queensland' where the claim is situated and at [6] that he has been 'working and maintaining contact with Kullilli families over the last eight years'.

[Anthropologist 1 – name deleted] states that he provided a preliminary or pre-connection report on the Kullilli People to QSNTS in July 2006 for 'the purpose of satisfying the State's guidelines for negotiation of a consent determination'—at [6] and [8]. **[Anthropologist 1 – name deleted]** states at [8] that in his July 2006 report he was 'able to make some preliminary observations about the society of Kullilli People and their connection of *(sic)* the land and waters subject to this claim.'

[Anthropologist 1 – name deleted] also provided recommendations to QSNTS 'regarding appropriate boundaries for the current Kullilli application'—at [7]. **[Anthropologist 1 – name deleted]** states at [7] that although the boundary described in the application and presented to the authorisation meeting on 10 May 2008 'is not strictly in accordance with my recommendations I would not regard the difference as significant, and say that the appropriate boundary is not less than that claimed' in the map as referred to in paragraph 11 of my affidavit'. Although the map refered to in [11] of the affidavit and copied at annexure A bears a date that is later than the date of the authorisation meeting, I am prepared to accept that the meeting considered a map which showed a boundary along the lines of that depicted on this map, as this seems to be the effect of **[Anthropologist 1 – name deleted]**'s sworn affidavit evidence at [11]. There is nothing in any of the information before me to suggest that a map showing different boundaries was considered by those at the meeting.

[Anthropologist 1 – name deleted] states in [9] that since July 2006 he has 'been involved in additional research in and around country being claimed by the Kullilli people' and that his 'current views on the society of the Kullilli People and their connection of the land and waters subject to the claim' have not changed. These views are found in [13] of the affidavit. **[Anthropologist 1 – name deleted]** does stipulate at [13] that his affidavit has been prepared for the purposes of securing registration of the application and it 'is preliminary in the sense that additional research would be required for the presentation of a connection report to the state or for preparation for a hearing on trial'. In my view, this is entirely acceptable for the purposes of s. 190B(5), noting the comments of the Full Court in *Gudjala FC* at [92] quoted above—the previous registration decision at pp. 18–20.

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

The following consideration and conclusions were stated in the previous registration decision:

> I am **satisfied** that the factual basis provided is sufficient to support the assertion that the native title claim group have, and their predecessors had, an association with the application area.
>
> I see from the map in attachment C showing the external boundaries of the application area that it encloses a large area of south-western Queensland from its border with New South Wales to the northern reaches of the Grey Range. The Bulloo River intersects the application area from the south-western reaches to the north-eastern reaches of the application area. Bulloo Downs station is a large pastoral holding in the south-eastern reaches of the application area. Thargomindah town and station is located centrally in the east of the application area and Noccundra is located centrally on the western boundary. The map identifies that the Kullilli application area is bounded by four neighbouring native title claims—Wongkumara People (QUD52/08) to the west, Boonthamurra People (QUD435/06) to the north-west, Mardigan People (QUD26/07) to the north-east and Budjiti People (QUD53/07) to the south-east.
>
> **[Anthropologist 1 – name deleted]** states in [13A] that there was a normative society of Kullilli people at the time of sovereignty and European occupation of the area. He states that the Kullilli apical ancestors listed in schedule A 'were present and resident in the area and living as part of that normative society at about the time of European settlement of Kullilli traditional lands'. European settlement of the area is identified in attachment F as having occurred in the 1860s (on pp. 1–2). I see from the map in attachment C of the application that the places identified as having a connection with the Kullilli at the time of European settlement (Bulloo River, Bulloo Downs station, Thargomindah station and Thargomindah town) are all covered by the application.
>
> Attachment F refers to early ethnographic material identifying that the country around the Bulloo/ Thargomindah region is the traditional country of the Kullilli—see Mathews (1905) who located the Kullilli 'east of the Wonkamurra on the Bulloo Downs. North is Boonthamurra.' Reference is also made to correspondence to Mathews on 21 September 1898 from Acting Sergeant M Daley to the effect that the Thargomindah 'tribe' is called 'Callillie' (this would appear to be a variant spelling of 'Kullilli'). This information about the boundaries of the Kullilli at or shortly after European settlement generally supports the boundaries covered by the Kullilli application, noting that it abuts but does not overlap any of the neighbouring native title claims.

Attachment F identifies on pp. 2–3 that most of the Kullilli apical ancestors were born on Kullilli country. Attachment M states (p. 2) states that these ancestors remained on country and were able to work on pastoral stations following European settlement:

- **[Persons 2, 3 and 4 – names deleted]** were born on Dynevor Downs (located to the east of Thargomindah outside of the application area, but proximate to it);
- **[Persons 5, 6, 7, 8 and 9 – names deleted]** were born on Norley (a station located centrally in the eastern reaches of the application area);
- **[Persons 10, 11, 12, 13, 14, 15 and 16 - names deleted]** were born on Thargomindah (within the application area);
- **[Persons 17, 18, 19, 20, 21, 22, 23, 24 and 25 – names deleted]** with Bulloo Downs (within the application area).

[Anthropologist 1 – name deleted] states in [13B]–[13C] that the descendants of the Kullilli apical ancestors have continued to conduct themselves as part of a Kullilli normative society with each successive generation continuing to identify as Kullilli and continuing the same or substantially similar traditions and customs. At [16] **[Anthropologist 1 – name deleted]** points out that individuals born in the 1920s were growing up with elders who themselves were born and grew up in an entirely pre-European traditional society. **[Anthropologist 1 – name deleted]** refers to the life histories of two families who were never removed from country—at [13B].

At [13C] **[Anthropologist 1 – name deleted]** states that other Kullilli families 'also occupy regularly Kullilli country from nearby residential centres such as Bourke, Thargomindah, Quilpie and Cunnamulla and further afield'. There is also information in **[Anthropologist 1 – name deleted]**'s affidavit and attachment F describing how Kullilli people who were taken from their country to Aboriginal reserves were able to maintain their identity and knowledge of the traditional laws and customs of their forebears—see **[Anthropologist 1 – name deleted]** [13A], [16]; attachment F, p. 3. Attachment F refers to the discussion in Tennent–Kelly (1935:471–2) of 'the lively Kullilli society on Cherbourg' including the 'persistence of belief in totems, supernatural entities and the links that these cultural aspects had to country'. **[Anthropologist 1 – name deleted]** states in [13C] that virtually all families visit country for hunting, fishing and camping, including to teach younger generations about country and to inspect sites significant to their particular family. Numerous specific examples of current association by particular members of the native title claim group with the application area are provided throughout attachment F.

[Anthropologist 1 – name deleted] states his opinion at [15] that the claim group as a whole has a continuous association with the claim area.

Having regard to all of this information I am **satisfied** that the factual basis provided is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area. There is sufficient and detailed information in **[Anthropologist 1 – name deleted]**'s affidavit and in attachment F to support the assertion—the previous registration decision at pp. 20–21.

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

The following consideration and conclusions were stated in the previous registration decision:

> I am **satisfied** that the factual basis provided is sufficient to support the assertion that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

In my view, the assertion in s. 190B(5)(b), and that found in s. 190B(5)(c), needs to be understood in light of the definition of 'native title' or 'native title rights and interests' in s. 223(1) of the Act, and particularly the elements of that definition in subparagraph (a):

> (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group, or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;

It is also my view that the usage in ss. 190B(5)(b) and (c) of terminology similar to that found in s. 223(1)(a) in turn requires a consideration of the decision by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*) of what is meant by the term 'traditional' in the context of s. 223(1)(a). In my view this is supported by the decision at first instance in *Gudjala v Native Title Registrar* [2007] FCA 1167 [*(Gudjala 2007)*] which comprehensively summarised the principles enunciated in *Yorta Yorta* at [26] and then sought to apply them to the factual basis provided in the Gudjala application, an approach which was not criticised or overturned by the Full Court in *Gudjala FC*.

The High Court in *Yorta Yorta* held that:

> "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

The High Court also had this to say about the meaning of the term 'traditional laws and customs' in s. 223(1)(a) at [46]–[47]:

> First, it conveys an understanding of the age of the traditions: 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. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.

In light of these passages from *Yorta Yorta*, I am of the view that the factual basis for s. 190B(5)(b) must describe how the laws acknowledged and customs observed by the native title claim group are rooted in the traditional laws and customs of a society that was in existence at the time of European settlement of the area covered by the application. I note my view here that the second element of what is meant by the term 'traditional laws acknowledged, and the traditional customs observed' in s. 223(1)(a) discussed at [47] of *Yorta Yorta* is referrable to the assertion in s. 190B(5)(c), namely, that the factual basis must support an assertion that the

group have continued to hold the native title in accordance with those traditional laws and customs.

In my view, *Gudjala FC* confirms that the factual basis for the assertion in s. 190B(5)(b) must identify the society that is asserted to have existed at least at the time of European settlement, and from which the group's current traditional laws and customs are derived. I refer to the comments of the Full Court at [96] that there was material in the Gudjala application which 'contained several statements which, together, would have provided material upon which a decision-maker could be satisfied that there was, in 1850–1860, an indigenous society in the claim area observing identifiable laws and customs'. The Court held at [96] that 'this question and others [are ones] that s. 190B requires must be addressed'.

[Anthropologist 1 – name deleted] states his view in [13A] that the society observed when the area was first settled in the 1860s was a 'semi nomadic hunting/gathering society that dwelt on the lands around an area at least as large as the area' shown on the map annexed at 'B' of his affidavit (this is the area covered by the application). He states his view that the society was comprised of sub-groups making a decentralised social structure, coming together for special events and major land issues'. **[Anthropologist 1 – name deleted]** identifies two Kullilli persons who told to Tindale in the 1930s about their Kullilli traditional law and custom relating to kinship, including moieties and totem, and the bounds of Kullilli country told. He also names two Kullilli elders who in more recent times left taped records of their knowledge of Kullilli culture.

At [13B], **[Anthropologist 1 – name deleted]** states that the descendants of the group's apical ancestors have 'continued to conduct themselves as part of that normative society with each successive generation continuing to identify as Kullilli People and continuing traditions and customs of the original apical ancestors with modification having regard to changing circumstances'. **[Anthropologist 1 – name deleted]** states in [16] that the continuous association of the group with the application area is based on traditional laws and customs.

At [18] **[Anthropologist 1 – name deleted]** states that the apical ancestors 'were part of a very strong Kullilli society, which, after a short period of frontier violence, received well and greatly assisted the settlement of the first pastoralists in the area'. This happened in the 1860s. **[Anthropologist 1 – name deleted]** comments that 'published and unpublished records comment that Kullilli individuals and their families formed a well structure *(sic)* society.'

At [19] he states:

> Kullilli society had a complex system of traditional laws and customs which included large corroborees, ceremonial sites, arranged marriages, daily hunting and gathering, and taking leave from stockman employment to go on lengthy walkabouts before returning to their employment as stockmen.

[Anthropologist 1 – name deleted] notes that this is documented in the literature and in oral histories from both Kullilli and pastoralists. He asserts that there are also government records at the Queensland state archives which provide ample evidence of a continuous presence of Kullilli individuals and families in the area.

[Anthropologist 1 – name deleted] refers at [20] to the process of traditional arranged marriage, saying that this is a 'powerful indicator of a group of individuals being a society'. He says that there are many documented examples of these among the descendants of the apical ancestors. He notes that traditionally arranged marriages were made to ensure that individuals belong to the proper moiety and totem. He notes that the last known arranged marriage within the Kullilli occurred as late as 1945.

This information from **[Anthropologist 1 – name deleted]** supports an assertion that there was a Kullilli society in the earlyto-mid *(sic)* 20th century observing traditional laws and customs which were rooted in the traditional laws and customs of a society that was in existence at the time of European settlement of the area covered by the application. Attachment F (pp.4–7) provides details of the anthropological and historical documents which reported and commented on the traditional system or Aboriginal society that operated in south-western Queensland at and after European settlement. These documents discuss traditional laws and customs relating to patrilocal residence and moeity systems that allocated totems to the four subclasses within that system via matrilineal inheritence. These moiety systems also determined social practices of marriage and relationships with other family members. Totemic allocations governed allocations of resources and and also becomes a spiritual link to country.

On p. 6 of attachment F is the statement:

> The current Kullilli group are aware of these systems and still identify with their subclass and totem affiliations through a cognatic system of descent (traced through either the mother and/or father) and the rights and interests in land that are linked to these kinship affiliations.

It is stated that Kullilli initiation cermonies continued until the last one on country in 1927 and this shows how Kullilli people 'retained cultural aspects despite European settlement'. Attachment F also states that 'Kullilli people have continued to hunt, fish, gather plants and camp in the claim area in accordance with the traditional laws and customs of the Kullilli.'

In relation to the continuation of that society and its continued observation of traditional law and custom rooted in pre-sovereignty society, **[Anthropologist 1 – name deleted]** states in [22] that from his research:

> I am able to say that the Aboriginal society which existed at sovereignty is in general terms the same society today, with substantially the same traditional laws and customs as those which are observed by members of the contemporary claim group.

He elaborates on this point in [23] saying that the Kullilli community 'is a vibrant dynamic society, which embraces its history and traditions' and 'has survived European settlement with its laws and customs substantially intact. He provides the following evidence for this:

- Kullilli people 'value and appreciate their identity and revere where they come from and what unites them as a people.' They know where their traditional country lies and 'uniformly understand how a particular person is entitled to assert Kullilli identity'.
- Hunting, fishing and foraging in the area is widely practised, as are traditional methods and customs as to how these things are practised.
- Kullilli society have a widespread knowledge of the location and importance of significant sites with the claim area, and widespread observance of rules about avoiding sites, caring for sites, or following rituals before entering specific sites.
- Cultural knowledge has been passed down orally from one generation to the next without interruption since sovereignty.
- There is a clear correspondence between the knowledge of culture and significant sites and seniority of individuals within Kullilli society.
- There are clear indications of a process of inheritance of knowledge and awareness of significant sites.

There are some indications in the material that the laws and customs now acknowledged and observed by the native title claim group have undergone some change from those observed by

the society at the time of European settlement. For example, arranged marriages are no longer practised, the last having occurred in the 1940s (**[Anthropologist 1 – name deleted]** [20]). Schedule A indicates that the group now observe cognatic descent to establish group membership, rather than the complex system of moieties and subclasses, totemic affiliations via matrilineal inheritance and social marriage practices described in attachment F. Attachment F (p.6) states that the current group 'are aware of these systems and still identify with their subclass and totem affiliations through a cognatic system of descent (traced through either the mother and/or father) and the rights and interests in that are linked to these kinship affiliations'. Whether there has been a permissable adaptation of the traditional laws and customs of the pre-sovereingty society may well be an issue at the trial.

I am **satisfied** that the totality of the information I have considered provides a sufficient factual basis for the assertion that there exist traditional laws and customs that give rise to the claim to native title rights and interests—the previous registration decision at pp. 21–25.

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

The following consideration and conclusions were stated in the previous registration decision:

I am **satisfied** that the factual basis provided is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

In my view, the issue at s. 190B(5)(c) is whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way, this being the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: compare this with *Yorta Yorta* at [47] and also at [87].

The application asserts that the current native title claim group observe the traditional laws and customs of a pre-sovereignty society as did their apical ancestors, who are identified as having belonged to that society after European settlement of the region. The application provides a factual basis that generally describes the inter-generational transmission of laws and customs relating to their Kullilli identity and the bounds of their country, including laws and customs relating to descent (with some change or adaptation), totemic affiliations, hunting fishing and foraging, knowledge of special sites and the customs to be observed when entering sites on country.

I have noted above that the material indicates some change or adaptation to the descent rules governing acquisition by group members of rights and interests in their country. It seems likely that these changes result from the impact of European settlement on the Kullilli, discussed in both attachment F and **[Anthropologist 1 – name deleted]**'s affidavit.

I note that a Full Court recently commented in *Griffiths v Northern Territory* [2007] FCFCA 178 that changes to descent rules that govern acquisition of rights and interests by group members is a 'vexed' question, namely, whether such a change 'necessarily has the consequence that the rights and interests are not possessed under the traditional laws acknowledged, and the traditional customs observed, by the relevant Aboriginal peoples (see s 223 of the NT Act)'. In that case the Full Court found no error by the trial judge in accepting evidence that 'the underpinning normative system has not changed'—at [141].

It is argued by **[Anthropologist 1 – name deleted]** and in attachment F that despite the effects of European settlement, sufficient numbers were able to remain on country, to work on

> pastoral stations and to maintain their communal identity as Kullilli People whilst living on reserves, such that the group has continued to observe the laws and customs of the pre-sovereignty society in a substantially uninterrupted way to the present day. Numerous and specific examples are provided by **[Anthropologist 1 – name deleted]** and also in attachment F of Kullilli individuals and families who, it is asserted, have continued to maintain their Kullilli identity and to observe the laws and customs of their forebears. The totality of the information in my view answers what is required by the section. In my view, the issue of whether there has been a cessation or break in the observance of traditional law and custom by a relevant society is ultimately for the trial judge to determine.
>
> I find that I am **satisfied** that the factual basis provided is sufficient to support an assertion that the native title claim group have continued to hold native title in accordance with the traditional laws and customs of a pre-sovereignty society—the previous registration decision at pp. 25–26.

Combined result for s. 190B(5)

The following conclusion was reached by the previous delegate:

> To conclude, as I am satisfied that a sufficient factual basis is provided to support the three particular assertions in s. 190B(5), it follows that overall, I am satisfied that the requirements of this section are met—the previous registration decision at p. 26.

I have read and considered the information in Attachments F and M and the affidavit by **[Anthropologist 1 – name deleted]** made on 5 March 2009. Attachments F and M, which have not been amended since the filing of the original application, have been refiled with the amended application. The **[Anthropologist 1 – name deleted]** affidavit was filed with the original application on 23 March 2009 but was not filed again with the application before me. I note, however, that it is not indicated to me by the amended application or any other information that the **[Anthropologist 1 – name deleted]** affidavit no longer forms part of the original application, or that it has been replaced by any other material provided with the amended application. Therefore, in my view, it is open to me to have regard to this affidavit accompanying the original application already filed in the Court and that forms part of the Tribunal's QC09/1 case management/delegates files (reference 2011/02192).

I have considered the above quoted reasoning and conclusions from the previous registration decision in the context of the material contained in the application before me. I concur with the conclusions reached by the previous delegate in respect of each of the three subconditions under s. 190B(5).

Regarding the inclusion of the six additional apical ancestors listed in Schedule A, I note that the composition of the native title claim group has changed since the filing of the original application. In this regard, I understand that the identification of the claim group is 'a necessary aspect in identifying the factual basis of the claim.' This follows from the requirement that the 'alleged facts' must support the claim that it is the identified group that holds the native title rights and interests in the application area—*Gudjala 2007* at [39] and [51].

To that end, it is also my view that it would be reasonable to expect that, due to the nature and realities of native title, as more research and information becomes available over time, it is possible that the composition and membership of a native title claim group may change. I note

that this is supported, in my view, by the references throughout the available factual basis (that was first provided with the original application) to 'known' Kullilli apical ancestors.

Taking into account the changes to Schedule A, in my view, the addition of the six apical ancestors to the claim group description does not affect the sufficiency of the available factual basis to support the assertions in s. 190B(5) with regard to the current native title claim group. In forming this view, I have considered the material at Attachments F and M, and the **[Anthropologist 1 – name deleted]** affidavit. While the material in some parts is framed with reference to those apical ancestors previously identified in Schedule A of the original application, it is also framed generally in relation to the body of the Kullilli people who existed at sovereignty and that continue to exist today. There is extensive information within the factual basis to support that the predecessors of the claim group comprised a normative society linked directly with the application area, including early evidence recorded about Kullilli traditional life, and also that this society of persons and their traditional laws and customs have continued into the present day—see Attachment F at pp. 2–10.

Having regard to the available materials, it is not indicated to me that the information only provides a factual basis to support the originally defined claim group's assertions under s. 190B(5). In other words, the factual basis does not appear to be only relevant to persons who are/were claim group members by descent from only those apical ancestors listed in the description at Schedule A of the original application. To the contrary, in my view, there is information that supports the notion that the *whole* Kullilli society at sovereignty *included* those apical ancestors identified in the original application, but that the society comprised a larger group of people than only those originally identified ancestors. **[Anthropologist 1 – name deleted]** makes statements clearly to this effect in his affidavit:

> 15. I am of the strong opinion that the claim group *as a whole* has a continuous association with the claim area [emphasis added].
>
> 16. ... Families who are descendants of *known* Kullilli apical ancestors ... [emphasis added].
>
> ...
>
> 18. The apical ancestors named in Paragraph 10 [list of apical ancestors referred to in Schedule A of the original application] were *part of* a very strong Kullilli society … and greatly assisted the settlement of the first pastoralists in the area. These pastoral families moved in from New South Wales from 1860 onwards ... records comment that Kullilli individuals and their families formed a well structure [sic] society [emphasis added].
>
> 19. Kullilli society *which included* the apical ancestors listed in Paragraph 10 had a complex system of traditional laws and customs, which included ... This is documented by numerous descriptions in the literature, by oral histories from both Kullilli and pastoralists witnesses. Government records ... also provide ample evidence of a continuous presence of Kullilli individuals and families in the country being claimed [emphasis added].

These above statements also support the applicant's assertions under s. 190B(5) with relevance to the identified claim group as a whole. The factual basis contained in the original application, and which has not been amended in the application before me, provides particularised support for the specific apical ancestors of the group known at the time the original application was filed. However, that does not mean that the same factual basis does not also provide sufficient support for the specific larger claim group as a whole; in which the descendants of the six additional apical ancestors are encompassed.

Furthermore, **[Anthropologist 1 – name deleted]** states in his affidavit that it is his 'opinion that Kullilli laws and customs stress that demonstration of an unbroken Kullilli descent line is a prerequisite to Kullilli membership'—at [14]. From this, I can infer that the inclusion of the additional six apical ancestors to the claim group description could have only occurred under Kullilli laws and customs if there was information to support that these six additional ancestors were Kullilli persons, from which later generations have been able to demonstrate their unbroken Kullilli descent. I note that the amended application is certified by QSNTS, and that the body's reasons for certifying the amended application include that it 'has commissioned and been provided with anthropological and genealogical research which has confirmed that the composition of the claim group should be amended ... and is supportable by evidence and properly describes all persons in the claim group'—the certificate by QSNTS, Attachment R at [4. a].

I note again the authority from *Doepel,* (referred to above in the reasoning from the previous registration decision), which states that it is not my role under s. 190B(5), to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Doepel* at [17].

I accept that the six added apical ancestors to the description in Schedule A were Kullilli people such that where the factual basis provides support for the group and its pre-sovereignty society, that information is also applicable to the six added ancestors and their descendants.

I note also, that one of the six additional apical ancestors, identified as '**[Apical Ancestor 1 – name deleted]**' in Schedule A, is referenced in Attachment F as one of the Kullilli elders who were '[p]rominent individuals' who 'remained all their lives in country'. This ancestor is referenced as '**[Apical Ancestor 1 – name deleted]** (1888–1942)' in Attachment F, and notwithstanding the difference in spelling, in my view, it would appear that these names relate to one and the same ancestor.

Given the extensive material within the applicant's factual basis in relation to the Kullilli people existing as a body of persons united by the observance of traditional laws and customs at the time of European settlement, and the continuation of that society relevant to the present claim group, I am satisfied that it is sufficient to support the assertion that it is the Kullilli people who held, and continue to hold, the native title rights and interests in relation to the claim area.

I therefore agree with the reasoning extracted above from the previous registration decision that 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 the reasons above.

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, prima facie, I consider can be established, are identified in the reasons below.

The following reasons for decision in relation to this condition were given in the previous registration decision:

> The application satisfies the condition of s. 190B(6) because of my finding below that, prima facie, at least some of the claimed native title rights and interests can be established. Only those rights and interests that prima facie can be established are to be entered on the Register of Native Title Claims—see s. 186(1)(g) and the note to s. 190B(6).
>
> I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):
>
> > . . . Section 190B(6) requires some measure of the material available in support of the claim—at [126].
> >
> > On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
> >
> > . . . s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].
>
> Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:
>
> - exist under traditional law and custom in relation to any of the land or waters under claim;
> - are native title rights and interests in relation to land or waters (see chapeau to s. 223(1)); and
> - have not been extinguished over the whole of the application area.
>
> I elaborate on these three points as follows:
>
> *Right exists under traditional law and custom in relation to any of the land or waters under claim*
>
> It is my view that the definition of 'native title rights and interests' in s. 223(1) and relevant case law must guide my consideration of whether, prima facie, an individual right and interest can be established. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta* as to what it means for rights and interests to be possessed under the ***traditional*** laws acknowledged and the ***traditional*** customs observed by the native title claim group (my emphasis).
>
> It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be prima facie established the requirements of the section will be met. Only those rights and interests I consider prima facie can be established will be entered on the Register pursuant to s. 186(1)(g). An element of that task requires me to consider whether there is some material which prima facie supports the existence of the claimed rights and interests under the ***traditional*** laws and customs acknowledged and observed by the native title claim group. See the discussion above in relation to this topic at s. 190B(5).
>
> *Right is a native title right and interest in relation to land or waters*
>
> It is my view that s. 190B(6) requires that I consider whether a claimed right can in fact amount to a 'native title right and interest' as defined in s. 223(1) and settled by case law, most notably *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'. In my view, any rights that clearly fall

outside the scope of the definition of 'native title rights and interests ' in s. 223(1) prima facie cannot be established.

Right has not been extinguished over the whole of the application area

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be prima facie established, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Ward HC*.

With these principles in mind I will consider each individual right and interest described in attachment E. I intend to consider the 'exclusive' rights claimed at [1], [10] and [11] together as these rights raise particular legal issues that should be considered together. I note that the concluding paragraph of attachment E identifies that rights [1], [10] and [11] are claimed only over particular areas. It appears that the intent is to claim these rights only over areas where exclusivity has not been extinguished.

To assist the reader, I identify at the outset of each right being considered whether or not I consider that, prima facie, the claimed right can be established:

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 Kullilli People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.*

Outcome: not prima facie established.

Ward HC states:

> a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses, occupy, use and enjoy land to the exclusion of all others— at [88]. See also at [90] – [93].

Sampi v State of Western Australia [2005] FC A 777 states:

> the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [1072].

More recently, the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> . . . the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. ***It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.*** It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71]. (*emphasis added)*

The Full Court in *Griffiths* indicates at [127] that what is required to prove exclusive rights such as that claimed in this application is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Court stressed at [127] that it is also:

> important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. *(emphasis added)*

There is a reference on pp. 6–7 of attachment F to one of the Kullilli elders who 'remained adamant that dire consequences would result either in Kullilli people transgressing boundaries or visiting restricted sites or others unlawfully entering Kullilli country.' On p. 7 of attachment F is the statement that 'to this day, Kullilli people will not access another group's country to hunt or fish without proper permission.' However, I find that these statements do not prima facie establish a traditional law and custom which gives rise to a right to exclude others from the application area. The description provided in attachment F of the pre-sovereignty society and its traditional laws and customs (see pp. 4–10) does not identify as one of its rules or laws that the group may exclude Indigenous people who do not belong to their community, as discussed in *Griffiths*. I am not prepared to infer that such a law exists in the absence of clear information within the application as to its asserted operation before European settlement.

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

    a) the right to access the application area;
    b) the right to camp on the application area;
    c) the right to erect shelters on the application area;
    d) the right to exist on the application area;
    e) the right to move about the application area;
    f) the right to hold meetings on the application area;
    g) the right to hunt on the application area;
    h) the right to fish on the application area;
    i) the right to use the natural water resources of the application area including the beds and banks of watercourses;
    j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
    k) the right to conduct ceremony on the application area;
    l) the right to participate in cultural activities on the application area;

Outcome: All prima facie established

I proposed to consider all of these rights together as they relate to the group's access to and use of the area. In my view there is ample material to prima facie establish the observance of traditional law and custom giving rise to rights and interests of this nature in relation to the application area. Attachment F (p. 4) states that anthropological and historical documents show that there was a traditional Aboriginal system in operation in the area that 'involved a social tribal organisation with regulations involving descent, marriage, and totems which were heavily based in connections to certain tracts of country'. This 'strong and vibrant' traditional Kullilli society existed at the time of settlement in the 1860s and it observed laws and customs

related to 'patrilocal residence, with matrilineal inheritance of the moiety system, totemic links, food prohibitions, initiation rites and regular 'inter tribal' ceremonial gatherings, traditional trade routes, responsibility and duty of care for traditional lands.'

Numerous and specific examples are found throughout attachment F (pp. 10–29) indicating that these are rights that currently exist under the traditional laws and customs of the native title claim group, by which the group access the area, camp on it, erect shelters, exist there, move about it, hunt, fish, use its natural resources, gather its products, conduct ceremony and participate in cultural activities.

m) the right to maintain places of importance under traditional laws, customs and practices in the application area;

n) the right to protect places of importance under traditional laws, customs and practices in the application area;

Outcome: Both prima facie established.

These similar rights are discussed on pp. 29–34 of attachment F. This information, in my view, show how these rights are currently exercised under the traditional laws and customs of the Kullilli people, including those relating to assignment of totems, location of sacred sites and a duty to protect those areas, including having a spiritual responsibility to look after these places.

o) the right to conduct burials on the application area;

Outcome: Not prima facie established.

The information provided in relation to this right and interest indicates that the group buried their dead on the application area at sovereignty, this is no longer practised due to the laws of the new sovereign which make it illegal to bury outside cemeteries today. Attachment F states on p. 34 that Kullilli traditional custom still consists of having traditional smoking ceremonies and maintenance and protection of the graves of ancestors. This seems more akin to a right to conduct ceremony, than to conduct burials. I am not satisfied that this right is prima facie established

p) the right to speak for and make non-exclusive decisions about the application area;

Outcome: Not prima facie established

Based on the authorities discussed above under right [1], it is my view that a 'right to speak for country' exerts a right to control which is an integral element of the exclusive right of possession, occupation, use and enjoyment. On the basis of my finding above that the application does not prima facie establish the group's right to possess, occupy, use and enjoy the application area as against the whole world, it must follow that a 'right to speak for country' cannot be established either. It may be that the application could support, prima facie, the group's right to make non-exclusive decisions about the area, however, I am of the view that I cannot separate the rights as this would amount to an impermissable re-drafting of the application.

I therefore cannot find that the right can be prima facie established.

q) the right to cultivate and harvest native flora according to traditional laws and customs

Outcome: Not prima facie established.

In my view the material does not support the existence of a traditional law and custom underpinning rights and interests relating to cultivating or harvesting the native flora of the area. Rather the material indicates that the society at sovereignty was a semi-nomadic

hunter/gathering society—**[Anthropologist 1 – name deleted]** [13A]. Indeed the information provided in attachment F in relation to this right at pp. 37–38 relate hunting and gathering being currently conducted by members of the native title claim group according to traditional law and custom.

Conclusion

As I consider that prima facie, some of the claimed native title rights and interests can be established, the requirements of this section are met. I direct that only those rights established prima facie are to be entered on the Register of Native Title Claims and that the entry also include details of the concluding paragraph of schedule E, namely:

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

    a) *The valid laws of the State of Queensland and the Commonwealth of Australia; and*
    b) *The rights conferred under those laws*—the previous registration decision at pp. 26–31.

I have read and considered the material in Attachment F and the affidavit by **[Anthropologist 1 – name deleted]**. Those materials have not been amended or replaced since the filing of the original application. I have considered the above quoted reasoning from the previous registration decision in the context of the material contained in the Attachment F and the **[Anthropologist 1 – name deleted]** affidavit, and concur with the conclusions reached by the previous delegate in respect of this condition.

Therefore, for the same reasons given in the previous registration decision, I direct that those rights set out above that are established, prima facie, be entered on the RNTC.

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 following reasons were given in the previous registration decision:

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

> In my view, there are numerous and specific references to current and previous members of the native title claim group throughout attachments F and M and **[Anthropologist 1 – name deleted]**'s affidavit which provides satisfactory evidence of the requisite traditional physical connection by members of the native title claim group. The material refers to members of the group accessing the areas covered by the application pursuant to their traditional laws and customs, including by hunting, foraging for food, visiting sites and observing customs when entering sites.
>
> On the basis of this material, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the land or waters covered by the application—the previous registration decision at p. 31.

I have read and considered Attachments F and M and **[Anthropologist 1 – name deleted]**'s affidavit—materials to which there have been no changes made since the filing of the original application. I have also considered the above quoted previous registration decision in respect of this condition. For the same reasons given by the previous delegate I am therefore satisfied that the condition in s. 190B(7) is met.

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 in relation to an area; and
> (b) either:
> (i) the act was an act attributable to the Commonwealth; or
> (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s. 23E in relation to the act;
>
> a claimant application must not be made that covers any of the area.
>
> (3) If:
> (a) a previous non-exclusive possession act (see s. 23F) was done in relation to an area; and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s. 23I in relation to the act;
>
> a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
>
> (4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

There are no approved determinations of native title that cover the application area—as confirmed by the geospatial assessment.

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 (PEPA), unless the circumstances described in subparagraph (4) apply.

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

Schedule B at paragraphs 1 and 2 excludes any areas covered by PEPAs from the application. I note that Schedule L asserts a claim to the benefit of ss. 47 to 47B where applicable. Section 61A(2), when read with s. 61A(4), permits a claim in these terms.

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 (PNEPA) was done, unless the circumstances described in s. 61A(4) apply.

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

Schedule B at paragraph 3 explicitly states that exclusive possession is not claimed over areas subject to any PNEPAs. I note also that Schedule E provides that exclusive possession is only claimed over areas where there has been no prior extinguishment of native title or where extinguishment is to be disregarded under the Act. I note again that Schedule L asserts a claim to the benefit of ss. 47 to 47B where applicable. Section 61A(3), when read with s. 61A(4), permits a claim in these terms.

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).

The applicant expressly states at Schedule Q that no claim is made to the ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

The application does not cover any offshore places.

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

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

The applicant expressly states at Schedule B (paragraph 6) that the application area excludes any areas where the native title rights and interests claimed have been otherwise extinguished. There is nothing before me which indicates that this is not the case.

[End of reasons]

Attachment A
Reasons for ss. 190A(1A) and 190A(6A)

Subsection 190A(1A)

Despite subsection (1), if:

(a) The Registrar is given a copy of an amended application under subsection 64(4) that amends a claim; and
(b) The application was amended because an order was made under section 87A by the Federal Court; and
(c) The Registrar has already considered the claim, as it stood before the application was amended;

The Registrar need not consider the claim made in the amended application

Subsection 190A(1A) **does not** apply to this claim.

The application has not been amended pursuant to an order under s. 87A by the Court. Therefore, s. 190A(1A) is not applicable in this case.

Subsection 190A(6A)

The Registrar must accept the claim (the **later claim**) for registration if:

(a) a claim (the earlier claim) was made in an application given to the Registrar under section 63 or subsection 64(4) (the earlier application); and
(b) the Registrar accepted the earlier claim for registration under subsection (6) of this section; and
(c) the later claim was made in an application given to the Registrar under subsection 64(4) that amends the earlier application; and
(d) the Registrar is satisfied that the only effect of the amendment is to do one or more of the following:
    (i) reduce the area of land or waters covered by the application, in circumstances where the information and map contained in the application, as amended, 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;
    (ii) remove a right or interest from those claimed in the application;
    (iii) change the name in the application of the representative body, or one of the representative bodies, recognised for the area covered by the application, in circumstances where the body's name has been changed or the body has been replaced with another representative body or a body to whom funding is made available under section 203FE;
    (iv) change the name in the application of the body to whom funding was made available under section 203FE in relation to all or part of the area covered by the application, in circumstances where the body's name has been changed or the body has been replaced by another such body or representative body;
    (v) alter the address for service of the person who is, or persons who are, the applicant.

Subsection 190A(6A) **does not** apply to this claim for the reasons given below.

As noted above in the 'Application overview', the application before me is an amended application, given to the Registrar under s. 64(4) of the Act. The amendments made to the application on 23 August 2011 amend the original application that was first made on 23 March 2009 and registered under s. 190A(6) on 17 April 2009. As the application has remained on the RNTC since it was first registered, the requirements of ss. 190A(6A)(a), (b) and (c) are met.

I must now consider whether s. 190A(6A)(d) is satisfied. That is, I must be satisfied that the only effect of the amendments is to do one or more of the things set out in ss. 190A(6A)(d)(i) to (v).

I have had regard to the application and find that two amendments have been made which give effect to changes in the application regarding:

- the description of the native title claim group; and
- the certification of the application under s. 203BE.

Therefore, I am unable to be satisfied that the only effect of the amendments is to do one or more of the things set out under s. 190A(6A)(d)(i) to (v).

It follows then that s. 190A(6A) is not applicable in this case and that the application must be considered for registration in accordance with s. 190A(1).

Attachment B
Summary of registration test result

Application name	**Kullilli People**
NNTT file no.	**QC09/1**
Federal Court of Australia file no.	**QUD80/09**
Date of registration test decision	**19 October 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**
		s. 62(2)(h)	**Met**

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

Section 190B conditions

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

Test condition	Subcondition/requirement	Result
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**