National Native Title Tribunal

Registration test decision

Application name	Kooma People #4
Name of applicant	Ms Grace Weatherall, Ms Cheryl Buchanan, Mr Bill Chapman, Mr Clarence Collis, Ms Annette Daisy, Mr Brett Leavy, Ms Rosemary Lucas, Mr Angus Mitchell, Mr Jack Nelson, Mr Mick Speedy
State/territory/region	Queensland
NNTT file no.	QC11/7
Federal Court of Australia file no.	QUD504/11
Date application made	18 November 2011
Date of Decision	2 April 2012
Name of delegate	Lisa Jowett

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

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

Date of Reasons: 16 April 2012

Lisa Jowett

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

Reasons for decision

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Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Kooma People #4 claimant application to the Native Title Registrar (the Registrar) on 23 November 2011 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 18 November 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

A native title determination application by the Kooma people was first made in 1996. Two Kooma applications have been made in that time, both of which were discontinued on 23 March 2010. The area covered by this current Kooma People #4 application is located in central south Queensland and extends in the south to the New South Wales border.

Registration test

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

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

Information considered when making the decision

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

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions

of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

The information and documents that I have considered in reaching my decision are as follows:

1. The application and its attachments as filed in the Federal Court on 18 November 2011.
2. The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis' (the 'geospatial report') of 2 April 2012, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent.
3. Kooma Native Title Claim Preliminary Anthropological Report, **[Anthropologist 1 – Name Deleted]**, May 2008 (as referenced at Attachment F and M).
4. Kooma #3 amended application (QUD6013/02) and its attachments as filed in the Federal Court on 18 June 2008.

I note that on 24 November 2011, the Tribunal wrote to both the applicant and the State to advise that they could provide further information/submissions in relation to the amended application to the Tribunal for the delegate's consideration. No further information or submissions were received.

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

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

Procedural and other conditions: s. 190C

Subsection 190C(2)

Information etc. required by ss. 61 and 62

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

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

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

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

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

Native title claim group: s. 61(1)

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

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

The nature of the task at 190C(2) is limited to a consideration of whether the application sets out the native title claim group in the terms required by s. 61(1)—*Doepel* at [36] and as such, the task does not require me to look beyond the contents of the application itself—*Doepel* at [37] and [39].

In assessing the current application and whether it contains the details and information required by s. 61(1), it is not my concern that the native title claim group is the correct native title claim group, but that the claim 'on its face, is brought on behalf of all members of the native title group'—*Doepel* at [35] and [37].

Part A of the application contains the information regarding persons authorised to make this application, listing the names of the applicants, and providing details regarding their authorisation by the native title claim group.

Schedule A of the application provides the following description of those persons comprising the native title claim group:

> The application is brought on behalf of Aboriginal people whose members identify as Kooma People, who are descended from the following ancestors:
>
> Descendants of Maggie of Bendena
> Descendants of Kitty of Bollon
> Descendants of Sarah of Fernlee
> Descendants of Mary Button of Murra Murra
> Descendants of Susan Mitchell
> Descendants of Annie Murray
> Descendants of Julia Powell
> Descendants of Lucy Sheridan

There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the native title group, or that it is a subgroup of the native title claim group.

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

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

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

Part B of the application states on page 13 the name and address for service of the persons who are the applicant.

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).

Schedule A provides a description of the persons in the group.

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 affidavits from each of the 10 persons who comprise the applicant. The affidavits are signed by each deponent and witnessed and make all the statements required of this section.

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

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

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

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

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

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

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

Attachment B of the application contains a description of the external boundaries of the area covered by the application. Schedule B includes a description of those areas not covered by the area of the application.

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

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

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

Attachment C of the application contains a map of the application area.

Searches: s. 62(2)(c)

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

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

Schedule D contains the statement that the applicant has not carried out any tenure searches in relation to the area of the application.

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

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

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

A description of the native title rights and interests claimed in relation to the area covered by the application is contained in Schedule E. This description (included as an excerpt within my reasoning at s. 190B(4)) consists of more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that may not have been extinguished, at law

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

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

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

Schedule F of the application contains information comprising a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and addresses the criteria set out in subsections 62(2)(e)(i) to (iii).

In assessing the information provided for the purposes of s. 62(2)(e), I am mindful that the applicant is only required to provide a general description of the factual basis of the claim and to provide evidence in the affidavits that the applicant believes the statements in that general description are true. Whilst that description must be more than 'assertions at a high level of generality', any 'genuine assessment' of the information contained in Schedule F is reserved for consideration at s. 190B(5)—*Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

I am of the view that the information contained in the application at Attachment F and M satisfies the requirements of a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist. Each of the affidavits sworn by those persons jointly comprising the applicant asserts that the applicant believes all statements made in the application are true.

The application therefore satisfies s. 62(2)(e) for the purposes of s. 190C(2).

Activities: s. 62(2)(f)

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

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

Schedule G of the application lists activities which the native title claim group currently carry out on and in relation to the area of the application.

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

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

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

Schedule H contains the statement that the applicant is not aware of any other native title determination applications made in relation to the area of the application.

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

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

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

Schedule HA contains the statement that the applicant is not aware of any such notifications made in relation to the area of the application.

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 the statement that as of 18 November 2011, an analysis of the notices made under s. 29 indicates no such notices fall within the external boundary of the area of the application.

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

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

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application'.

The geospatial report of 2 April 2012 identifies that no native title determination applications fall within the external boundaries of the current application.

As the Kooma People #4 application is not overlapped by any other applications in the sense discussed in s. 190C(3)(a) to (c), there is no requirement that I consider the issue of common claim group membership.

I am therefore satisfied that the current application meets the requirements of s. 190C(3).

Subsection 190C(4) Authorisation/certification

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

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

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

The nature of the task at s. 190C(4)(a)

Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires of me is that I be 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78], which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s. 203BE—*Doepel* at [80] and [81].

Pursuant to s. 203BE(4), a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of s. 203BE(2)(a) and (b) have been met;
- briefly set out the body's reasons for being of that opinion; and
- where applicable, briefly set out what the representative body has done to meet the requirements of subsection 203BE(3) in relation to any overlapping applications.

Pursuant to s. 203BE(2), a 'representative body must not certify ... an application for a determination of native title unless it is of the opinion that':

- all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- 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.

Identification of the representative body

The Tribunal's geospatial assessment of 24 November 2011 confirms that Queensland South Native Title Services Ltd (QSNTS) is the only representative body for the whole of the area covered by the application. Therefore QSNTS is the only body that could certify the application under s. 203BE.

Attachment R is the certification of this application by QSNTS which has been signed by the Chief Executive Officer of QSNTS on 15 November 2011. It states that the CEO has been delegated the function given to QSNTS, being a body funded under s. 203FE(1), to certify the Kooma People #4 application.

The requirements of s. 203BE

To be satisfied about 'the fact of certification', the certification must meet the requirements of s. 203BE, namely s. 203BE(4)(a) to (c)—*Doepel* at [78].

For the purposes of s. 203BE(4)(a), the certification includes a statement at paragraph 4 that the CEO is of the opinion that the requirements of paragraphs 203BE(2)(a) and (b) have been met.

For the purposes of s. 203BE(4)(b), the certification briefly sets out at paragraphs 4a to d the reasons for the CEO being of that opinion, namely:

- the authorisation process involved extensive public notification in 4 media publications, correspondence to members of the claim group, and placement of notices at public locations in Cunnamulla;
- that authorisation of the applicant to make the application and deal with matters arising in relation to it occurred at a meeting held in Cunnamulla on 12 December 2010 which was well attended with meeting records held by QSNTS; and
- as a result of this process, the CEO is satisfied that all the persons in the native title claim group authorised the applicant and all reasonable efforts have been made to ensure the application describes or identifies all the other persons in the group.

The statements made in the certificate, as summarised above, address the basis upon which the CEO for QSNTS holds the opinion that the requirements of s. 203BE(2)(a) and (b) have been met.

For the purposes of s. 203BE(4)(c), the representative body must set out how it has met the requirements of s. 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to

minimise the number of overlapping applications. The certification does not provide any statement in relation to any other applications that wholly or partly cover the area of this application. In my view, as there are no other applications that do in fact cover the area of the Kooma People #4 application (confirmed by the geospatial report) there is no requirement for the certificate to address this requirement.

My decision

For the above reasons, I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s. 190C(4)(a).

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).

In assessing the current application against s. 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss. 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. Whilst I may have regard to information beyond the application where clarification is necessary, it is to the terms of the application itself that I am primarily to direct my attention in reaching the required level of satisfaction—*Doepel* at [16] and [122].

The technical description of the area of the application (as filed 18 November 2011) contained a typographical error to a longitude co-ordinate on page 3 of 4 of Attachment B. The page was replaced by Court uplift 9 March 2012. The geospatial report of 2 April 2012 is based on the technical description of the area of the application after the uplift.

Schedule B of the application provides:

- Attachment B containing the description of the external boundary and the area covered by the application; and
- A description of the areas within those boundaries that are not covered by the application.

Attachment B is entitled "Attachment B – Area of land and waters covered by the application" and contains a metes and bounds description of an external boundary of the application area, entitled "Kooma People #4 – Native title Determination Application", referencing topographic features and coordinate points in latitude and longitude, referencing Geodetic Datum of Australia 1994 (GDA94) and shown to six decimal places. The description specifically includes Lot 3 on Plan UL33, 'formerly part of native title determination application QUD6031/98 Kooma People (QC96/16) as discontinued 22/03/2010' and specifically excludes any area subject to QUD6027/01 Gunggari People 2 (QC01/28) as accepted for registration 17/09/2008.

Those areas not covered by the application are described in Schedule B by a list of general exclusions at paragraphs 1 to 6.

Attachment C is labelled "Attachment C – A map showing the external boundaries of the claim area" and includes a colour copy of a A3 colour map entitled "Kooma #4"; prepared by QSNTS (dated 10 November 2011) and includes:

- The application area depicted in a bold blue outline and stippled filled;
- Topographic background;
- Scalebar, northpoint, location diagram; and

- Notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application describing the areas covered by the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar to be satisfied, it is my view that the written description and map should be sufficiently consistent with each other and the reader should be able to discern the location of the area covered by the application on the surface of the earth with reasonable certainty.

The geospatial report, being a geospatial assessment and overlap analysis, confirms that the description and map are consistent and identify the application area with reasonable certainty.

Having regard to the identification of the external boundary in Schedule B and the map showing the external boundary, 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.

The specific exclusions to the area of the application are clearly identifiable, and while the written description at Schedule B contains some general exclusions, they are sufficient to offer an objective mechanism by which to identify those areas that fall within the categories described.

Based on the information provided in both the written description of the application area at Schedule B and Attachment B, and the map in Attachment C, I agree with the geospatial assessment and am satisfied that it can 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).

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).

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains a description, and it is therefore necessary to consider whether the application satisfies the requirements of s. 190B(3)(b).

Schedule A of the application contains the following description of the persons in the native title claim group:

> The application is brought on behalf of Aboriginal people whose members identify as Kooma People, who are descended from the following ancestors:
>
> Descendants of Maggie of Bendena
> Descendants of Kitty of Bollon
> Descendants of Sarah of Fernlee
> Descendants of Mary Button of Murra Murra

Descendants of Susan Mitchell
Descendants of Annie Murray
Descendants of Julia Powell
Descendants of Lucy Sheridan

I note the comments of Mansfield J in *Doepel* at [51] and [37] respectively that the focus of s. 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group; and
- not on 'the correctness of the description . . . but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained'.

Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group – it being the case that they must descend from one of the named ancestors.

I am satisfied that the native title claim group has been sufficiently described.

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).

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s. 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner.

Schedule E of the application contains the description of native title rights and interests claimed in relation to the application area, as required by s. 62(2)(d). The description includes a qualification to which the claimed rights and interests are subject. The rights and interests claimed are described as follows:

> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238 or ss47, 47A or 47B apply),

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

2. Over areas where a claim to exclusive possession cannot be recognised, the claim group claims the non-exclusive right to:
(a) access, live, camp, erect shelters, exist, move and be present on the application area;
(b) take, use, share and exchange Traditional Natural Resources for personal domestic and non-commercial, communal purposes;
(c) conduct burial rites;
(d) conduct ceremonies;
(e) hold meetings;
(f) participate in cultural activities;
(g) teach on the area about the physical and spiritual attributes of the area;
(h) speak for and make non-exclusive decisions;
(i) maintain and protect places of importance under traditional laws and areas of significance to the native title holders under their traditional laws and customs from physical harm;
(j) light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;
(k) hunt;
(l) fish;
(m) gather the natural products (including food, medical plants, timber, stone, ochre and resin) according to traditional laws and customs;
(n) cultivate and harvest native flora according to traditional laws and customs;
(o) be accompanied into the claim area by non-claim group members being people required:
    i. by traditional law and custom for the performance of ceremonies or cultural activities; and
    ii. to assist in observing and recording traditional activities on the claim area; and
(p) in relation to water, take and use:
    i. Traditional Natural Resources from the water source for personal, domestic and non-commercial purposes;
    ii. for personal, domestic and non-commercial, communal purposes; and
    iii. Use the natural water resources of the application area including the beds and banks of the watercources.

3. For the purposes of 2 above:
"Live" means to reside and for that purpose erect shelters and temporary structures but does not include a right to construct permanent structures;
"Traditional Natural Resource" means:
    i. "animals" as defined in the *Nature Conservation Act 1992* (Qld);
    ii. "plants" as defined in the *Nature Conservation Act 1992* (Qld);
    iii. "charcoal, shells and resin"; and
    iv. "clay, soil, sand, ochre, gravel or rock" on or below the surface.
"Water" means water as defined in the *Water Act 2000* (Qld);

In reading the rights and interests listed in Schedule E, together with and subject to the qualifications provided, I am of the view that the native title rights and interests claimed can be 'properly understood', and that there is 'no inherent or explicit contradiction' in the description which prevents me from reaching the level of satisfaction required by s. 190B(4)—*Doepel* at [123].

I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified, as required by s. 190B(4).

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

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

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

For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s. 190B(5). In *Doepel*, Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

In my consideration of the factual basis for the claim made in this application, I am guided by principles outlined in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*):

- traditional laws and customs are ones that a society passes on from one generation to another;
- laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- traditional laws or customs are derived from a body of norms or normative system that existed before sovereignty;
- rights and interests are rooted in pre-sovereignty traditional laws and customs; and
- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

That these principles from *Yorta Yorta* guide consideration of the condition in s. 190B(5) was discussed by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)—at [26]. I note that the review of that decision by the Full Court in *Gudjala # 2 v*

Native Title Registrar [2008] FCAFC 157 (*Gudjala FC*) did not criticise this approach. I also note that the later decision by Dowsett J in *Gudjala #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) again points to the *Yorta Yorta* principles as guiding the Registrar's consideration of the condition in s. 190B(5).

The test in s. 190A involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests exist. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with the area of the application as that is a judicial enquiry.

The principal material in the application that goes to the factual basis of the claim is found at Attachment F and M. The material covers pre-sovereignty association with the claim area, pre-sovereignty country and community, and contemporary community and association with the claim area, including information on the traditional laws and customs of the Kooma People, speaking for and making decisions about country and the rights and interests claimed in the application.

Each of the affidavits of the persons who comprise the applicant includes brief statements in relation to their identity as a Kooma person and their association with the area of the application.

My consideration has also been assisted by the preliminary anthropological report provided by the applicant in support of the now discontinued Kooma #3 application—*Kooma Native Title Claim Preliminary Anthropological Report,* ***[Anthropologist 1 – Name Deleted]****, May 2008* (the **[Anthropologist 1 – Name Deleted]** report). I have relied on the preliminary findings and observations of this report as the claim group in that application was descended from the same persons used to describe the claim group in the Kooma #4 application (the exception being the addition of two further apical ancestors). The **[Anthropologist 1 – Name Deleted]** report has in part based its findings in relation to the Kooma people on a review of previous research, anthropological and connection material, identified throughout as **[Anthropologist 2 – Name Deleted]** (2000), **[Anthropologist 3 – Name Deleted]** (2003) and **[Anthropologist 4 – Name Deleted]** (2006)[1].

Below I consider each of the three assertions set out in the three paragraphs of s. 190B(5) and I refer only to those statements in the material before me that are pointedly relevant to each of the assertions.

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

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

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[1] **[Anthropologist 4 – Name Deleted]**. (2006) Preliminary Anthropological Report on Kooma Traditional Owners and Overlap Between Kooma #3 and Gunggari #2 Native Title Claims.
[Anthropologist 2 – Name Deleted]. (2000) Kooma Native Title Connection Report.
[Anthropologist 3 – Name Deleted]. (2003) Preliminary Anthropological Report on Kooma #3 Native Title Application.

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. While it is not necessary for the factual basis to support an assertion that *all* members of the native title claim group have an association with the area *all* of the time, it is necessary to show that the claim group *as a whole* has an association with the area—*Gudjala 2007* at [51] and [52].

The **[Anthropologist 1 – Name Deleted]** report's preliminary opinion and finding is that the apical ancestors that describe the current claim group are those that constituted an indigenous society inhabiting the claim area at or about the time of sovereignty and the Kooma people would have comprised of a number of small, largely autonomous groups within a wider social structure (page 4). The report finds that the historical record and early ethnological observations confirm the named ancestors were amongst the earliest recorded Kooma people and a review of this evidence confirms that 'the area claimed was occupied in the first contact sense by the Kooma' (page 7).

The information at Attachment F and M relating to the pre-sovereignty society of the Kooma People notes that explorers navigated the region in and around the claim area from 1847 which was followed by sustained European settlement from the 1860s (para 2). It is asserted that Aboriginal people associated with the claim area at the time of first contact, between the 1850s and 1870s, and comprised of interconnected but distinct groups interacting for cultural and social purposes (para 5).

The material asserts that the current native title claim group comprises the descendents of acknowledged Kooma apical ancestors who were born on and are firmly associated with the claim area (paras 11 to 18). Each of the persons in the applicant group can identify their descent from one of the named apical ancestors:

- Susan Mitchell (1850-1944) from Nebine Creek, SW Queensland—descendents Grace Weatherall and Angus Mitchell
- Lucy Sheridan b. 1850 on the Nebine—descendents Clarence Collis and Jack Nelson
- Mary Button of Murra Murra approximately 1845-1935—descendent Mick Speedy
- Maggie of Bendena b. 1848 at Bendena Station—descendent Cheryl Buchanan
- Kitty of Bollon b. 1859 at Bollon—descendent Brett Leavy
- Annie Murray (b. circa 1820s) full blood Kooma woman—descendent Bill Chapman
- Julia Powell (died 1930s) born on Bendena Station—descendent Rosie Lucas
- Sarah of Fernlee—descendent Annette Daisy

The current claim group identifies as Kooma and asserts its traditional ownership of the 'country between the Warrego River and the Lower Balonne River and centred on the Nebine Creek, in particular the lower Nebine' – an area which includes Murra Murra Station and Bendee Downs Station (para 19). Attachment F and M includes various references that evidence the association of the claim group's predecessors to the area:

- descendents of the apical ancestor Susan Mitchell have been born on Bendena Station (within the claim area on the Nebine Creek) (para 20);
- archaeological and historical records identify Aboriginal occupation of the area, with archaeological finds on Murra Murra and Bendee Downs Stations (para 37);
- Kooma country is broadly recognised by the wider regional groups (para 7);

- the external boundary of the claim area is supported by oral testimony of Kooma elders and ethno-historical literature (para 8).

Association with the pastoral industry since its establishment in the 1860s allowed people to visit sites and camps of significance and maintain a close relationship with their traditional lands (para 20). Attachment F and M contains references to current claim group members and their association with the claim area through their work and residence on the pastoral stations on and adjacent to the claim area – **[Claimant 1 – Name Deleted]** started work in the 1960s, **[Claimant 2 – Name Deleted]** in the 1980s (paras 41-42).

Murra Murra and Bendee Stations are now leased from the Indigenous Land Corporation by the Kooma Traditional Owners Association. Members of the claim group live and work on these stations and they are now included in the area of the Kooma application. This allows unrestricted access to the claim area, the country of these stations being both historically and traditionally important as many ancestors lived and worked on or near these stations (para 43).

All of the affidavits affirmed by the persons comprising the applicant detail their descent from ancestors and their association with certain areas within the claim area, for example:

- **[Claimant 2 – Name Deleted]** – his grandmother was born on the Nebine Creek at Clifton Station and raised her family on stations in the claim area; he has worked droving on these stations and continues to work alongside his uncle on Murra Murra and Bendee Stations;
- **[Claimant 1 – Name Deleted]** – his grandmother was born on Kooma country and he was raised with other relatives by his grandmother at Goodooga on the southern border of Kooma country; he worked with his father on the pastoral stations in the claim area and learnt about country and places in this time; his visiting and travelling throughout the claim area has ensured his knowledge of the sites of the old people, including burial sites, groves, fishing traps, scarred trees;
- **[Claimant 3 – Name Deleted]** – was born in the south west corner of Kooma country, his mother was born in Dirranbandi in the 1920s and he has lived and worked most of his life on Kooma country alongside his family;
- **[Claimant 4 – Name Deleted]** – grew up listening to the stories of her grandmother who lived on the Nebine Creek, an important place for Kooma people, and fishing on the river near Bollon.

The link between the current claim group and its predecessors can be found in the material before me. The information supports the claim group's connection to the land and waters of the application area which clearly has its origins in the preceding generations' association with the area. This is sufficient for me to be satisfied that the native title claim group has, and its predecessors had, an association with the area.

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

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

This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

Justice Dowsett considered the requirements of s. 190B(5) when he addressed the adequacy of the factual basis underlying an applicant's claim in *Gudjala 2009*. He makes statements about the assessment of the adequacy of a general description of the factual basis of the claim at [29], which in summary means that:

- assertions should not merely restate the claim, and
- there must be at least an outline of the facts of the case.

In Dowsett J's view, there is a requirement for factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters (at [29]). Therefore, in accordance with the case law, the factual basis for the claim is required to address whether or not the relevant traditional laws and customs have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. In *Gudjala 2007,* which was not criticised by the Full Court in *Gudjala FC*—at [71], [72] and [96], Dowsett J considered that the factual basis materials for this assertion must demonstrate:

- that the laws and customs currently observed by the claim group have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- a link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

The **[Anthropologist 1 – Name Deleted]** report sets out information on the traditional laws and customs of the Kooma people and the nature of the pre-sovereignty society from which they originated. It precedes this information by outlining the research of **[Anthropologist 2 – Name Deleted]** (2000), **[Anthropologist 3 – Name Deleted]** (2003) and **[Anthropologist 4 – Name Deleted]** (2006) in relation to the likely social structure of the Kooma pre-sovereignty society, including:

- the society consisted of small, largely autonomous groups organised for the purposes of subsistence living, hunting and gathering over vast tracts of semi-arid land with few permanent water sources;
- rights to use and occupy the traditional lands were derived through descent;
- an authority structure was vested in the elders of family groups;
- gatherings of the groups occurred at certain times of the year for Bora ceremonies, to make decisions for the collective and to resolve disputes;
- it is likely that individual members of the pre-sovereignty society assumed ceremonial and spiritual cultural responsibilities related to specific sites or places.

The report says that 'pre-contact Kooma society was organised by reference to a section system' that structured people's relationships with each other by birth, and regulated matters such as 'access to marriage partners and corporate rights and rights and obligations pertaining to ceremony' (page 7). The acceptance and recognition of senior elders authorised 'to determine and adjudicate all matters requiring adherence to existing laws and customs' was a particular mechanism of the pre-sovereignty society. These elders would have had specialist knowledge and were the appropriate persons to make decisions for and speak on behalf of the traditional society.

The report asserts that membership of the current claim group is based on rules that appear to be consistent with the traditional precepts and elements of the pre-sovereignty society. For example, it is still universally observed and acknowledged by contemporary claim group members that to be a member of the Kooma group one must:

- trace descent from a known Kooma person,
- choose to identify as Kooma,
- have a life history that is supportive of identifying as Kooma, for example, be born, and grow up, on Kooma country, have knowledge of sites and the particularities of places and be socially close to other Kooma people, and
- be accepted by other senior Kooma people.

These rules for membership are and have been the 'basis for group identity upon which in turn the exercise of traditional rights in lands are based' (at page 9).

The **[Anthropologist 1 – Name Deleted]** report states that the current claimants can demonstrate the operation of cultural mechanisms and normative laws which enable them to properly make the claim to this country as Kooma people (page 7). For example, the persons who jointly comprise the applicant are 'a subset of senior society members, who became authorised ... to represent the entire claim group ... and it is appropriate that these persons make decisions for and speak on behalf of claimants' (page 10). All these persons attest to how they have received their knowledge of country through their predecessors and their long and continuous association with Kooma country.

> The laws and customs of the traditional Kooma society have been passed on and observed by successive generations through the process of retaining members of society who hold authority over appropriate conduct, including hunting, interpretation and transmission of mythological knowledge, knowledge of saved sites and appropriate conduct at them and appropriate social conduct in Kooma society, **[Claimant 5 – Name Deleted]** was representative of the people I interviewed when he effectively noted that his grandfather's mother (who he knew as a child) was herself a young child when traditional social life was ubiquitous, largely outside European view and interference. Accordingly, his ancestors and family have an un-interrupted history of living on their country, learning their traditional knowledge and practicing their traditions in relation to hunting, art forms, and ceremonial life—at page 12.

Attachment F and M sets out the traditional laws and customs of the Kooma People that give rise to the claimed native title rights and interests. It contains the general assertion:

> Members of the Kooma claim group hold rights, responsibilities and interests in relation to land within the claim areas under traditional laws and customs. Such traditional laws and customs have been passed by [sic] traditional teaching through generations preceding the present generations of persons who comprise the claim group. The laws and customs of the Koom people give rise to the claimant [sic] native title which has been continuously held by the Kooma people. Those Kooma people continue to acknowledge and observe traditional laws and customs—at [23].

Under these traditional laws and customs acknowledged and observed by the claim group, Kooma people own all the land and waters in the claim area through descent and holding knowledge transmitted from ancestors (at [25]). They thereby have a responsibility for the care and use of Kooma country inherited from their predecessors and through the transmission of

knowledge (at 40). Traditional laws and customs are asserted to have been transmitted through the generations and to exist in relation to:

- decision-making power about Kooma country and how it is accessed and used, which lies with the senior members of the Kooma group; rules and protocols are in place and are said to be broken when a person goes against the view of senior members or disregards their 'elders' (evidenced by the fact that a senior member of each family group comprises the applicant)—[24];
- acknowledgement of senior knowledge and authority relating to traditional laws and customs, with all important decisions made by or in concert with the senior members—[29] to [31];
- use of natural resources in the area – hunting, fishing and collection of resources are regulated; there are certain places where it is not appropriate to gather resources, hunt or fish; avoidance of areas at certain times of the day or night; avoidance rules in relation to eating and hunting totemic animals—[51] to [53];
- the proper harvesting and medicinal qualities of the native species—[54];
- practises and customs in relation to burying the dead—[60] to [63];
- access to country and the following of particular protocols and the regulation of restricted areas—[65] to [66]; and
- an obligation to ensure the well-being of the land, maintaining and protecting the land, respecting the land and its spirits and ancestors who have passed away—[67] to[68].

The affidavits provide some brief statements by each of the persons comprising the applicant, demonstrating the above traditional laws and customs:

- stating that their ancestors were born and lived on Kooma country, and that they were told by significant elders that they are Kooma;
- identifying people of recent preceding generations and their knowledge of stories, sites and places of significance;
- identifying the stations on Kooma country on which they and their parents and grandparents have worked and resided on; and
- stating their continuing connection to Kooma country and the form this takes, for example involvement in heritage protection, projects on Murra Murra and Bendee Stations, passing on Kooma traditions and customs.

Consideration

The factual material in relation to the application provides some information on Aboriginal society as it existed at the time of sovereignty in and around the vicinity of the claim area. The information in both the **[Anthropologist 1 – Name Deleted]** report and Attachment F and M largely pertains to the traditional laws and customs acknowledged and observed by the contemporary claim group. However, the material directs me to the basis on which these traditional laws and customs are rooted in or derived from the pre-sovereignty Kooma society. In my view it is reasonable to draw an inference from the material that a Kooma society existed prior to and at the time of British sovereignty in and adjacent to the current claim area.

The ethnographic research and historical records cited in the material also invite an inference that there has been continuous existence of the laws and customs of the Kooma society from the time before and at sovereignty in southern Queensland and in particular since first European contact

(purported to be 1847). The material asserts and the affidavits illustrate (albeit briefly) how the claim group has handed down its laws and customs from generation to generation, in the sense defined in *Yorta Yorta*. There is clearly a continuing exercise of rights and interests by the claim group, the practice of which has been passed down to them by preceding generations. There is sufficient information that demonstrates and illustrates aspects of Kooma traditional law and custom, in respect of the area of the application, by relaying information pertaining to family and ancestors, rules in relation to land and belonging to the area, hunting, fishing and foraging, accessing and protecting country and the passing on of traditional and cultural knowledge.

The affidavits and factual material contain information to provide the link between the named apical ancestors and the area covered by the application and identifies those predecessors of the native title claim group who, at the time of European settlement, acknowledged and observed the laws and customs of Kooma society. The birth dates of the apical ancestors (predominantly in the mid 1800s) show they were born within the time period which saw the beginning of sustained European settlement of the area – between 1847 and the 1860s[2]. This is, in my view, along with what is said about their association with the area of the Kooma application, sufficient, for an 'inference of continuity' that the society in which they existed was the same as that which prevailed before and at sovereignty. In this sense I refer to *Gudjala 2009*:

> . . . Sufficient may be known of circumstances before, or shortly after, first European contact (assuming that event occurred after the date of assertion of British sovereignty) to permit an inference that the claim group is a modern manifestation of a pre-sovereignty society, and that its laws and customs have been derived from that earlier society. Such an inference may be available notwithstanding the absence of any recorded history of the society and the way in which it has continued since the earlier "snapshot" of the society—at [31].
> . . . the necessary link between the pre-European contact society and its laws and customs, and the claim group and its laws and customs, may be inferred primarily from continuity, without necessarily resorting to a close examination of the societies and their laws and customs. The evidence of actual events will demonstrate continuity. Even if the history commences shortly after first European contact, it may be reasonable to assume that such a stable society was unlikely to have arisen in the period between contact and the commencement of historical records—at [32].

In my view, the application and additional material provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

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

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

This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Continued acknowledgement and observance of traditional law and custom has been possible because the members of the claim group and their predecessors have continued to live, work and travel through the area covered by the application. They have continued to observe and

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[2] asserted in Attached F and M at paragraph 2

acknowledge their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their country (the area of the application).

Disruptions to the claim group's continuity of association with the area of Kooma country, caused essentially for reasons of dispossession created by European settlement appears to have been mitigated by:

- Kooma people maintaining contact with their country through work on the various pastoral stations located within and adjacent to the current claim area; people travelled, worked and resided in the towns and camps close to and within the current claim area—**[Claimant 2 – Name Deleted]** [10]; **[Claimant 1 – Name Deleted]** [11], **[Claimant 3 – Name Deleted]** [9];
- laws and customs relating to country, important sites and ceremonies, stories, hunting and gathering, fishing and bush tucker were passed down by significant people to the younger generations and continue to be passed on today—**[Claimant 4 – Name Deleted]** [12].

It is clear from the material before me that the laws and customs of the Kooma people have been passed from generation to generation and continue to be acknowledged and observed today among the current generations of the claim group. For example, at Attachment F and M:

- The claim group's generational association with the pastoral stations has allowed a transmission of rights, responsibilities and knowledge 'to maintain the integrity of the land'—at [22].
- Kooma people use gatherings on the stations to facilitate transmission of knowledge and customs to younger generations—at [22].
- Working and residing on their traditional lands enabled Kooma people to visit sites and camps of significance, thereby maintaining a close relationship to their country—at [41].
- The purchase of the Murra Murra and Bendee stations (located in the 'heart of Kooma country') has allowed Kooma people unhindered access to their country—at [43].

The material provides support for the contention in the **[Anthropologist 1 – Name Deleted]** report of 'the universal acceptance and observance' by the claim group of 'some or all of the inherited laws and customs of the pre-sovereignty society'. In particular, that descent from a Kooma apical ancestor is 'the discernible origin of all inherited laws and customs', the 'source of authority' and the 'source of dissemination of knowledge and succession of rights and interests' (page 10).

There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Subsection 190B(6)
Prima facie case

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

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

Under s. 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s. 190B(6):

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

As mentioned above in relation to the requirements of s. 190B(5), the registration test involves an administrative decision and is not a trial or hearing of a determination of native title pursuant to s. 225. Therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are capable of being established, prima facie.

I note that, in my view, as set out above at s. 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

Exclusive Rights

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 or ss47, 47A or 47B apply), the Kooma People claim the right to possess, occupy, use and enjoy the land and traditional waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

Not Established

The majority decision of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward HC*) considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*) the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

> . . . 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*—at [71] (*emphasis added).*

The Full Court stressed 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—at [127] (*emphasis added)*.

Attachment F and M deals with 'speaking for and making decisions about Country' from paragraphs 27 to 34. The information describes the protocols and group structures as they relate to decision-making about access to country. Whilst there is a general assertion of ownership rights of the land holding group (at [28]) the material does not address rights to control access to land and to speak for that country. Information on 'access and regulating access' asserts that under their traditional laws and customs Kooma people have the right to access and use their country as well as to regulate the access of members of the group to their country (at [64]). However, that this is a right to exclude or regulate the access of people who are not Kooma which exists under these laws and customs is not clear. The material refers only to the protocols and responsibilities practised by Kooma people themselves when they go on country or speak for country—at [64] to [66].

None of the affidavits attest to matters relating to the right to possess, occupy, use and enjoy the land and traditional waters of the application area as against the whole world.

In my view this is not sufficient material or information to establish, prima facie, a right to exclusive possession.

Non Exclusive Rights

The application also claims the following rights and interests over areas where a claim to exclusive possession cannot be recognised:

(a) access, live, camp, erect shelters, exist, move and be present on the application area;

<u>Established</u>

These rights are evidenced in the material and the affidavits by the activities stated to be undertaken by members of the claim group, suggesting the rights exist under the traditional laws and customs of the native title claim group:

- Members of the claim group reside on or regularly visit Murra Murra and Bendee—Attachment F and M at [22].
- Kooma people have inherited the right to live on country—Attachment F and M at [40].
- Since European contact, the camps located on the fringes of townships and on the pastoral stations, including camps outside of the current claim area, allowed for people to return to and access their traditional country – at Cunamulla, St George, Dirranbandi, Bollon.
- **[Anthropologist 1 – Name Deleted]**'s report asserts that such rights 'have been observed throughout all the named claimants lives' and that 'representative examples of this include ongoing residence on pastoral leases and town camps and hunting and visitations to special places, including gravesites, community meetings held on country'—page 12 to 13.

Throughout their lives members of the Kooma native title claim group (and their predecessors) have accessed their country, taking children on trips, having holidays, attending funerals, travelling through with their parents and grandparents, visiting significant sites, hunting and fishing and gathering bush tucker, and being taught and telling the stories of Kooma country and

traditional laws and customs. In the conduct of these activities, the above claimed rights have been and continue to be exercised and possessed under the group's traditional law and custom.

I consider that these rights can be established, prima facie.

(c) conduct burial rites;

(d) conduct ceremonies;

(e) hold meetings;

(f) participate in cultural activities;

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

Established

These rights are evidenced in the material and the affidavits, suggesting the rights exist under the traditional laws and customs of the native title claim group. For example, Attachment F and M refers to:

- the Emu Festival held annually on Murra Murra Station, at which traditional knowledge is passed onto the younger generations by Kooma Elders—at [22];
- historical records and more recent knowledge of burial rites, that such rites are now modified for contemporary practice but still conducted under law and custom – smoking ceremonies for cleansing and dispelling spirits, rights and responsibilities to care for and visit burial sites of deceased relatives and ancestors—at [60] to[63];

The **[Anthropologist 1 – Name Deleted]** report asserts:

- that such rights 'have been observed throughout all the named claimants lives' and 'representative examples of this include ongoing residence on pastoral leases and town camps and hunting and visitations to special places, including gravesites, and meetings of Kooma peoples' organisation'—page 12 to 13;
- in relation to the conduct of ceremonies and burial rites, that experience and knowledge of these rights, in relation to these particular matters, is vested in senior claimants and that 'Kooma peoples have conducted burials on the application area continuously for the historic period'—page 14 to 15;
- the activities of the claim group on the Bendee and Murra Murra Stations are centred around teaching the physical and spiritual attributes of Kooma country, the traditional law and custom of the claim group—page 15.

I consider that these rights can be established, prima facie.

(h) speak for and make non-exclusive decisions;

Not Established

In my view, there is not sufficient information in the material before me in relation to a right to speak for and make non-exclusive decisions about the application area under Kooma traditional law and custom. Whilst information in Attachment F and M and the **[Anthropologist 1 – Name Deleted]** report refer to responsibilities for and obligations to country held by the members of the claim group, it is not clear on the face of the material how this translates to speaking for and making non-exclusive decisions about the application area. Similarly the affidavit material does

not illustrate or demonstrate how the group has or continues to acknowledge and observe traditional laws and customs as they relate to such a right.

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

Established

This right is evidenced in the material before me, suggesting it exists under the traditional laws and customs of the native title claim group. **[Anthropologist 1 – Name Deleted]**'s report asserts that such a right has been 'observed throughout all the named claimants lives' with 'protective practices' of places of importance undertaken at Bendee and Murra Murra Stations'—at page 14. Attachment F and M asserts that this right derives from the claim group's obligation under law and custom to ensure the well-being of the land (at [68]). Protecting and maintaining the land requires people to respect the land and its spirits and (amongst other things) translates contemporaneously into various cultural heritage and caring for country programs. The decision-making rules, outlined above, of the current group and its predecessors establish this right as one that is inherent in their traditional laws and customs.

I consider that this right can be established, prima facie.

(b) take, use, share and exchange Traditional Natural Resources for personal domestic and non-commercial, communal purposes

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

(k) hunt

(l) fish

(m) gather the natural products (including food, medical plants, timber, stone, ochre and resin) according to traditional laws and customs

Established

These rights are evidenced in the material before me, suggesting the rights exist under the traditional laws and customs of the native title claim group. Attachment F and M contains statements that assert that the right to use the land, waters and other resources of Kooma country is in accordance with traditional law and custom:

- people regularly use the resources in the claim area as they hunt game and collect bush foods, ochre, medicines and wood and go camping and fishing. Hunting, gathering, fishing, manufacture of material culture and shelters were documented by early observers and later research documented these activities as having remained strong due to continued use—at [51];
- knowledge is passed down to members of the claim group (**[Person 1 – Name Deleted]**) on the traditional usage of bush plants and medicine – sandalwood for eyes, dogwood for ears, leopardwood for infections—at[54];
- members of the claim group attest to being taught about bush plants and their use, hunting with senior Kooma men and providing food to those at the Cunamulla camp, Yumba—at [55].

The **[Anthropologist 1 – Name Deleted]** report asserts that such rights 'have been observed throughout all the named claimants lives', with hunting and fishing central to family life. Claim

group members have grown up learning from their predecessors about places to hunt and fish and about the related rules that are specific to Kooma society (at page 13).

I consider that these rights can be established, prima facie.

(n) cultivate and harvest native flora according to traditional laws and customs

<u>Not Established</u>

There is no information in the material before me about the claim group's cultivation and harvesting of native flora either by way of evidence of the current exercise of the right or that the right exists under the group's traditional law and custom.

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

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

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

<u>Not Established</u>

There is no information in the material before me about the claim group's right to be accompanied by people who are not members of the claim group for the purpose of the two activities listed. Whilst there is information that goes to the vesting in senior Kooma people, under traditional law and custom, of the right to make decisions about access country, there is nothing by way of evidence of the exercise of the right or that the right does in fact exist under the group's traditional law and custom.

(p) in relation to water, take and use:

(i) traditional Natural Resources from the water source for personal, domestic and non-commercial purposes;

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

(iii) Use the natural water resources of the application area including the beds and banks of the watercources

<u>Not established</u>

Other than references made to fishing and regulating access to certain waterways, the material before me does not provide sufficient information to suggest that these rights exist under Kooma traditional law and custom. The **[Anthropologist 1 – Name Deleted]** report refers to 'obtaining water for sustenance whilst dwelling on pastoral camps and town camps and when hunting and fishing' (page 13). In my view there is not sufficient description of the laws and customs from which this right is derived or information that reveals the activities undertaken in exercise of this right by the current claim group or its predecessors.

Conclusion

I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient information to establish, prima facie, their existence. I am satisfied, having considered the information before me, that some of the rights claimed in this application can be established,

prima facie. Therefore the rights to be registered on the Register of Native Title Claims are as follows:

2. Over areas where a claim to exclusive possession cannot be recognised, the claim group claims the non-exclusive right to:
(a) access, live, camp, erect shelters, exist, move and be present on the application area;
(b) take, use, share and exchange Traditional Natural Resources for personal domestic and non-commercial, communal purposes;
(c) conduct burial rites;
(d) conduct ceremonies;
(e) hold meetings;
(f) participate in cultural activities;
(g) teach on the area about the physical and spiritual attributes of the area;
(i) maintain and protect places of importance under traditional laws and areas of significance to the native title holders under their traditional laws and customs from physical harm;
(j) light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;
(k) hunt;
(l) fish;
(m) gather the natural products (including food, medical plants, timber, stone, ochre and resin) according to traditional laws and customs.

3. For the purposes of 2 above:
"Live" means to reside and for that purpose erect shelters and temporary structures but does not include a right to construct permanent structures;
"Traditional Natural Resource" means:

i. "animals" as defined in the *Nature Conservation Act 1992* (Qld);
ii. "plants" as defined in the *Nature Conservation Act 1992* (Qld);
iii. "charcoal, shells and resin"; and
iv. "clay, soil, sand, ochre, gravel or rock" on or below the surface.

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

4. The native title rights and interests are subject to:
(a) The valid laws of the State of Queensland and the Commonwealth of Australia; and
(b) The rights conferred under those laws.

In the circumstances where I have found that a particular claimed right cannot be established, prima facie, I refer the applicant to the provisions of s. 190(3A) of the Act. The provisions are available to the applicant if there is further information which would support a decision under that section to include a right on the Register.

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

Under s. 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. In *Doepel*, Mansfield J considered the nature of the Registrar's task at s. 190B(7) which was approved by the Full Court in *Gudjala FC*:

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18].

Sufficient information is provided in the material before me to show that Kooma people have traditional physical connection with the land and waters of the application area. The material has been quoted in my consideration at both s. 190B(5) and s. 190B(6).

[Claimant 1 – Name Deleted] was raised with senior Kooma people by his grandmother on the southern border of Kooma country [10] and worked on the stations in the claim area from the age of 13—at [11]. He attests to his father having taught him about the country and places (at [11]) and that he has the knowledge of 'the sites of the old people including burial sites are [sic], groves, fishing traps, scarred trees and other places of importance'. He continues 'to travel through Kooma country and to pass on to his children and grandchildren the knowledge of his old people'—at [12].

I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
>
> Section 61A provides:
>
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
>
> (2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and
(b) either:
  (i) the act was an act attributable to the Commonwealth, or
  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

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

(3) If:
(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
  (i) the act was an act attributable to the Commonwealth, or
  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

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

(4) However, subsection(2) and (3) does not apply if:
(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

The geospatial report dated 2 April 2012 reveals that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

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

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

Schedule B at paragraphs 1 and 2 makes the relevant statements that the area covered by the application does not include any area that is or was the subject of a previous exclusive possession act.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a

previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

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

Schedule B at paragraph 3 states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts.

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

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

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

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

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

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

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

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

Schedule Q contains the statement that 'the native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown'.

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

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

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

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

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

Schedule B at paragraph 6 states that the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	Kooma People #4
NNTT file no.	QC11/7
Federal Court of Australia file no.	QUD504/2011
Date of registration test decision	2 April 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
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
s. 190B(9)		Aggregate result: Met
	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Met

[End of document]