National Native Title Tribunal

Registration test decision

Application name	Gomeroi People
Name of applicant	Patricia Margaret Boney, Norman McGrady, Susan Smith, Michael Anderson, William Robinson, Raymond Welsh, Richard Green, Greg Griffiths, Elaine Binge, Alfred Priestley, Leslie Woodbridge, Craig Trindall, Burrul Galigabali, Bob Weatherall, Elizabeth Allan, Ray Tighe, Anthony Munro, Madeline McGrady and Jason Wilson
State/territory/region	New South Wales
NNTT file no.	NC11/6
Federal Court of Australia file no.	NSD2308/2011
Date application made	20 December 2011
Date of decision	**20 January 2012**
Name of delegate	Heidi Evans

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

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

Date of reasons: 27 January 2012

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Heidi Evans

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

Reasons for decision

Table of contents

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 Gomeroi People claimant application to the Native Title Registrar (the Registrar) on 21 December 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 20 December 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

As the application is affected by a s. 29 notice, with the notice period ending on 22 January 2012, I have made my best endeavours to test the application by this date.

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 following is a list of the information I have considered in making my decision:

- Gomeroi People native title claimant application (NC11/6; NSD2308/11);
- Geospatial assessment and overlap analysis (GeoTrack: 2011/2317);
- Copy of Section 29 notice for Aston Coal Mining Lease Application No 404;
- Email to the case manager from the State dated Wednesday 11 January 2011 confirming the State's decision not to provide submissions in relation to the Gomeroi People application;
- Submission from *[name removed]* and *[name removed]* of the Plains Clans of the Wonnarua People dated 22 December 2011;
- Letter from case manager to State dated 23 December 2011 informing State of adverse submissions received from *[name removed]* and *[name removed];*
- Email from case manager dated 23 December 2011, providing details of a conversation with the State (also held Friday 23 December 2011) in which the State confirmed it did not wish to make comment in response to the submissions received from *[name removed]* and *[name removed];*
- Letter from case manager to applicant dated 23 December 2011 informing the applicant of the submissions received from *[name removed]* and *[name removed],* and that the State had been provided with an opportunity to comment.

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

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

Procedural fairness steps

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

In accordance with s. 66(2), on 21 December 2011, the case manager sent a letter to the State notifying them of and providing a copy of the application, and inviting the State to provide any comments or submissions on the application by 10 January 2012. In accordance with s. 66(3), the relevant Representative Body for the application area, NTSCORP Limited (NTSCORP), was also advised of the Tribunal's receipt of the application.

On 22 December 2012, the case manager received an email from *[name removed]* and *[name removed]* of the Plains Clans of the Wonnarua People, opposing the registration of the Gomeroi

People application on the grounds that the application area fell within the traditional boundaries of the Wonnarua People.

On 23 December 2012 I directed the case manager to respond to *[name removed]* and *[name removed]* email stating that the Tribunal had received their submission and that it would be passed to the delegate. On the same day, I directed the case manager to send a letter to the State, advising the State that certain adverse material had been received and seeking the State's agreement to confidentiality conditions prior to them being provided with a copy of the material.

In a phone conversation between the case manager and a representative of the State held Friday 23 December 2011, the State confirmed that it did not intend to make submissions in relation to the Gomeroi People application and for that reason, did not wish to view or make submissions in relation to the adverse material.

On the same day, I directed the case manager to write to the applicant, informing the applicant that certain adverse material had been received in relation to the application, however, that the delegate was of the preliminary view that the application would be accepted for registration and that the material would not affect the outcome of the delegate's decision. The applicant was also advised that the State had been provided with a copy of the adverse material and the opportunity to comment.

In an email dated Wednesday 11 January 2012, the State confirmed that it would not be providing any submissions on the Gomeroi People application. On the same day, the case manager emailed the applicant to inform them that the State had not provided submissions and that the delegate was proceeding to make the decision by 20 January 2012, in accordance with the s. 29 notice affecting the application.

Procedural and other conditions: s. 190C

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

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

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

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

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Section 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).

Whilst s. 61(1) requires some consideration of the native title claim group description, the case of *Doepel* makes it clear that such a consideration does not involve any form of merit assessment as to whether the group described is in fact the correct native title claim group, and that it is only

where it appears on the face of the application itself that the claim group described is a subgroup of, or does not include all of the persons within the 'native title claim group', that the application might not comply – *Doepel* at [36] to [37].

Schedule A of the application provides that the applicant makes the application on behalf of the Gomeroi native title claim group, and that the native title claim group is comprised of all the descendants of a list of 114 apical ancestors. Schedule A also states that descendants include persons who are descendants by adoption according to traditional law and custom. Attachment A contains a description of an objective test by which adoption according to Gomeroi traditional law and custom can be determined.

Following a consideration of the material provided for the purposes of s. 61(1), I am of the opinion that there is nothing on the face of the application that suggests it has not been made by all of the persons within the Gomeroi native title claim group, or that certain persons within that group have been excluded.

Subsequently, I am satisfied that the application contains all of the details and other information required by s. 61(1).

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

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

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

Those 19 persons comprising the applicant are listed immediately above Part A of the application. The address for service of the applicant's representative is provided at Part B of the application.

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

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

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

Section 61(4) requires information as to identification of the members of the native title claim group. I note that the task of the delegate at this condition is restricted to ensuring the information is contained in the application, and the provisions do not permit the delegate to reach any satisfaction as to the correctness of the information describing the persons in the native title claim group – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [34] (*Wakaman*).

My task at s. 61(4) for the purposes of s. 190C(2) does not require any consideration of the clarity of the native title claim group description, merely a consideration of whether a description is provided – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. I am of the view that the former task is reserved for the corresponding merit condition at s. 190B(3).

Schedule A of the application contains a description of the native title claim group (reproduced in full in my reasons at s. 190B(3)), as prescribed by s. 61(4)(b). Further clarification of this

description is provided at Attachment A. I am satisfied that this description meets the requirements of s. 61(4) for the purposes of s. 190C(2).

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

The application must be accompanied by an affidavit sworn by the applicant that:

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and

(ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and

(iii) the applicant believes all of the statements made in the application are true, and

(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

Affidavits sworn by each of the 19 persons jointly comprising the applicant accompany the application. Each of these affidavits contains the same six [6] paragraphs. I am satisfied that each of the affidavits contains the statements required by ss. 62(1)(a)(i) to (v).

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).

Schedule B of the application refers to Attachment B, which is titled 'Description of the area covered by the application' and which contains a written description of the external boundaries of the land and waters covered by the application. Those areas not covered by the application are provided at part (B) of Schedule B of the application, which contains a list of general exclusions.

I am satisfied that the application contains the information required by s. 62(2)(a).

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).

Schedule C of the application refers to Attachment C, which contains a map of the external boundaries of the area covered by the application. This map has been prepared by the Tribunal's Geospatial Services and is dated 9 December 2011.

I am satisfied that the application contains the information required by s. 62(2)(b).

Searches: s. 62(2)(c)

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

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

Schedule D of the application contains a statement that no searches have been carried out by the applicant.

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

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

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

Schedule E of the application refers to Attachment E and the affidavits of Joseph Robert Trindall, William Robinson, Jason Wilson, Ray Tighe, Leslie Woodbridge, Vaughan Livermore, Craig Trindall, Don Edrich Murray, Reginald John Talbot, Robert Lance Sutherland and Alfred Priestley at Attachment F, as containing information pertaining to the native title rights and interests claimed.

Attachment E contains a description of the specific native title rights and interests claimed in relation to the area covered by the application. I am satisfied that this description is more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, 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 pertaining to a general description of the factual basis of the claim. Schedule F refers to Attachment F and the affidavits of Joseph Robert Trindall, William Robinson, Jason Wilson, Ray Tighe, Leslie Woodbridge, Vaughan Livermore, Craig Trindall, Don Edrich Murray, Reginald John Talbot, Robert Lance Sutherland and Alfred

Priestley, also included within Attachment F, as containing information relevant to the requirement of s. 62(2)(e).

I am satisfied that the application contains the details and information required by s. 62(2)(e).

Activities: s. 62(2)(f)

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

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

The activities carried out by members of the native title claim group on the land and waters covered by the application area are listed at Schedule G.

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

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

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

Information regarding other applications is provided at Schedule H of the application. Schedule H states that the applicant is aware of four [4] previous applications to the Federal Court in relation to part of the area covered by the current application. Further details of these applications are included at Schedule H.

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

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

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

The applicant has provided information regarding a s. 24MD(6B)(c) notice of which the applicant is aware. The notice dated 30 June 2011 has been issued by Ausgrid and affects land within the application area. A copy of the notice is provided at Attachment HA 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 of the application contains information regarding a s. 29 notice of which the applicant is aware, affecting part of the area covered by the application. The notice dated 1 September 2011 has been issued by Industry and Investment NSW and relates to the proposed grant of a mining lease to Aston Coal Pty Ltd. A copy of the notice is provided at Attachment I 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).

In undertaking the task at s. 190C(3), I note that it is only where another application meets all of the criteria in subsections (a), (b) and (c) that I am required to consider the issue of common claimants – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

The geospatial assessment (GeoTrack: 2011/2317) prepared by the Tribunal's Geospatial Services and dated 12 January 2012 (geospatial assessment) identifies that there are no claimant applications which overlap the current application. Subsequently, I am not required to consider further the issue of common claimants.

The 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.

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

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

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise

the person or persons to make the application and to deal with the matters in accordance with that process; or

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

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(b) are met.

I note that Part (1) of Schedule R of the application states that the application is not certified, and subsequently, the relevant condition for my consideration is s. 190C(4)(b).

Where an application has not been certified, s. 190C(5) prescribes certain other information that must be contained within the application. Whilst an application may meet the requirements of s. 190C(5), I note that this alone is not enough to allow me to reach the level of satisfaction prescribed by s. 190C(4)(b). The relationship between ss. 190C(4)(b) and 190C(5) was described in the following way in *Doepel*:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). The interactions of s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given – at [78].

The requirements of s. 190C(5)

I have first turned my mind to consider whether the application contains the information prescribed by s. 190C(5). Part (2) of Schedule R of the application contains the following paragraphs:

(a) The individuals who jointly comprise the applicant are members of the Native Title Claim Group and were authorised to make the application and deal with all matters arising in relation to it at a meeting of the Gomeroi People Native Title Claim Group held on 24 and 25 June 2011 at Tamworth.

(b) The grounds upon which the Registrar should consider this statement to be correct are:

    (i) The meeting held on 24 and 25 June 2011 at Tamworth followed a process of consultation with members of the Native Title Claim Group by officers of NTSCORP Limited and by Native Title Claim Group Members themselves.

(ii) Notice of the meeting held on 24 and 25 June 2011 at Tamworth was provided to members of the Native Title Claim Group by correspondence, fax and telephone contact by officers of NTSCORP Limited and communicated between claim group members. Public notice was also given through advertisements placed by NTSCORP Limited in the Koori Mail and in the North West Magazine, a local regional publication.

(iii) The process of authorisation further described in Attachment R and in the affidavits of *[name removed]* and each of the persons who comprise the Applicant, which are annexed to Attachment R and marked 'R(1)', 'R(2)', 'R(3)', 'R(4)', 'R(5)', 'R(6)', 'R(7)', 'R(8)', 'R(9)', 'R(10)', 'R(11)', 'R(12)', 'R(13)', 'R(14)', 'R(15)', 'R(16)', 'R(17)', 'R(18)', 'R(19)' and 'R(20)'.

Similarly, each of the affidavits sworn by those persons comprising the applicant that accompany the application provide details pertaining to the authorisation of the applicant, and the grounds upon which it can be considered that statements to the effect of s. 190C(4)(b) are correct. Subsequently I am of the view that the application meets the requirements of ss. 190C(5)(a) and 190C(5)(b).

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

There are essentially two elements to the condition at s. 190C(4)(b). Firstly, that the applicant is a member of the native title claim group, and secondly, that the applicant 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.

In considering the requirement at s. 190C(4)(b), I am of the view that I am to be satisfied of the fact of authorisation by all members of the native title claim group – *Doepel* at [78]. I am also of the view that the authorisation material before me is to address the definition of authorise provided in s. 251B, as indicated by the note following s. 190C(4)(b).

The level of satisfaction required by the condition at s. 190C(4)(b) was discussed by the Court in the case of *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*). French J found that whilst a detailed explanation of the process of decision-making by which authorisation has taken place may not be required, authorisation is a 'matter of considerable importance and fundamental to the legitimacy of native title determination applications'. For that reason, His Honour held that it is 'not a condition to be met by formulaic statements in or in support of applications' – at [57]. On appeal, the Full Court approved these comments and French J's decision in relation to authorisation – *Strickland FC* [2000] FCA 652 at [77] to [79].

The applicant's authorisation material

As demonstrated in the excerpt above, Schedule R of the application contains information pertaining to the authorisation of the applicant, and the process employed to undertake authorisation. Schedule R refers to material provided at Attachment R, including affidavits sworn by each of those persons jointly comprising the applicant.

Attachment R contains the following:

- Attachment R(1) – affidavit of *[name removed]* sworn at Redfern on 19 December 2011;
  - Annexure SD1 – copies of notices published in the Koori Mail (1 June 2011) and the North West Magazine (6 June 2011);
  - Annexure SD2 – copy of the notice sent to persons who had previously advised NTSCORP that they assert native title rights and interests in the application area;

- Attachments R(2) to R(20) – affidavits sworn by each of the persons jointly comprising the applicant, each containing the same 16 paragraphs.

Whether the applicant is a member of the native title claim group

In addition to the authorisation material at Attachment R of the application, I note that each of the affidavits sworn by those persons jointly comprising the applicant for the purpose of s. 62(1) also contains information pertaining to authorisation. Paragraph (a) of each of those affidavits includes a statement that the person is a member of the native title claim group, and then states the specific apical ancestor/s by which that person can be determined to be a member of the group. Based on this material, and in relying upon the assertion in the accompanying affidavits that the statements contained in the application are true, I am satisfied that each of those persons jointly comprising the applicant can be identified as a member of the native title claim group, as described in Schedule A.

Whether the applicant is authorised to make the application

In turning to consider the second element of the requirement at s. 190C(4)(b), I note that there are a number of factors that are of relevance, as indicated by the case law dealing with authorisation.

While it is not necessary that *all* of the persons in the native title claim group are in attendance at an authorisation meeting, I note that authorisation by an agreed and adopted process may require that every reasonable opportunity is extended to group members to attend the meeting and participate in the decision-making process – *Lawson on behalf of the 'Pooncarie' Barkandji People v Minister for Land & Water Conservation NSW* (*Lawson*) at [25]; See also *Wharton on behalf of the Kooma People v State of Queensland* [2003] FCA 790 (*Wharton*) at [34].

The meeting held on 24 and 25 June 2011 for the purpose of considering and authorising the filing of a native title determination application over the application area by the Gomeroi People was in my view relatively well notified. A meeting notice was published in the Koori Mail and in the North West Magazine, both of which *[name removed]* asserts in his affidavit circulate in the application area. These notices appeared at least two weeks prior to the meeting taking place, and advises those wishing to attend that assistance in the form of travel and accommodation costs is available from NTSCORP. Notices were also mailed to all of those persons who had previously advised NTSCORP that they hold native title rights and interests in the application area.

While the notice does not list the apical ancestors by which the native title claim group is defined, each notice contains a clear map of the proposed boundaries of the application area, marking out key towns and regional centres. An NTSCORP anthropologist familiar with the application and the native title claim group description was in attendance at the meeting, as were various other NTSCORP staff members. These staff members reviewed attendance sheets taken at the meeting and agreed that the main Gomeroi families were represented in those who attended the meeting. I also note that in the course of the meeting, one of the first issues discussed was whether the persons in attendance were sufficiently representative of the persons holding native title rights and interests in the application area, and that a resolution was unanimously passed following this

that those in attendance were sufficiently representative of Gomeroi People – see the affidavit of *[name removed]* marked Attachment R(1) at [21] to [24].

The affidavit of *[name removed]* at Attachment R(1) including annexures relating to notification of the authorisation meeting, provides that the meeting was to be held at the All Seasons Towers Tamworth, however due to an unexpected number of people advising NTSCORP of their attendance at short notice, the meeting was relocated to the Tamworth Regional Entertainment Centre. The final number of persons in attendance at the meeting is estimated by *[name removed]* to be at least 200. The affidavits sworn by each of those persons comprising the applicant, at Attachments R(2) to R(20) provide the same estimate.

[name removed] affidavit states that attendees were advised of the change in venue the evening prior to the meeting through announcements made at each of the accommodation venues where the attendees were staying. The affidavits sworn by each of those persons comprising the applicant also testify to receiving notice of the change upon their arrival at their accommodation. On both the advertised days of the meeting, NTSCORP staff remained at the All Seasons Towers Tamworth to advise any other attendees of the change, and to direct them to the Tamworth Regional Entertainment Centre.

There is nothing within the material before me that suggests claim group identification is problematic or uncertain in the current application, or that those in attendance disputed particular persons partaking in the authorisation meeting. The meeting was widely notified, both personally and publicly, the attendees and NTSCORP staff were satisfied that those present represented the members of the native title claim group, food and accommodation costs were covered or subsidised by NTSCORP for interested persons to enable their participation, and a significantly large number of claim group members attended. It follows that I am satisfied that all members of the native title claim group described in Schedule A have been extended the opportunity to attend the authorisation meeting held in Tamworth on 24 and 25 June 2011, and participate in the decision-making process for the authorisation of the Gomeroi People application.

In addressing the definition of 'authorise' at s. 251B, the provision makes it clear that an agreed and adopted process of decision-making can only be employed for the purposes of authorisation where no traditional decision-making process exists for making decisions of such a kind. The affidavit of *[name removed]* states that this issue was raised at the authorisation meeting on 25 June 2011, and that following some discussion a resolution was passed confirming that there is no particular process of decision-making under traditional laws and customs that must be adhered to by the Gomeroi People. The affidavits of those persons jointly comprising the applicant also state that a resolution that no traditional decision-making process exists was passed in the early stages of the meeting, as described by *[name removed].* An agreed and adopted process was then employed by the passing of a subsequent resolution.

The process agreed to and adopted by the claim group at the meeting on 24 and 25 June 2011 is set out in the affidavits at Attachment R. Paragraph seven [7] of each of the affidavits describes the process as adopted by resolution as follows:

Accordingly, Gomeroi People adopt the following process of decision making for the purposes of the native title claim:

1. the decision to be made will be put in the form of a clearly worded written motion;
2. the motion will be read out to the meeting;
3. the motion must be moved and seconded by members of the group before it is decided on;
4. the decision will then be made by the group by a show of hands;
5. a decision of the majority in relation to the motion shall be a decision of the meeting.

Each of the deponents then states that all of the decisions at the meeting on 24 and 25 June 2011 were made using this agreed to and adopted method of decision making. *[name removed]* also attests to this resolution being passed in his affidavit at paragraph [26].

In addition to these statements, I am of the view that the conduct of the parties, as described in *[name removed]* affidavit indicates that majority decision making was the agreed process by which the claim group authorised the making of the application by the relevant 19 persons and that this is sufficient for the purposes of s. 251B – *Noble v Mundraby* [2005] FCAFC 212 at [18].

There is reference to some resolutions being passed unanimously, however for other resolutions no mention is made of the percentage of those in favour and those against. I note, however, that there is no requirement for unanimous decision-making and that where no traditional decision-making process exists, s. 251B does not mandate any particular alternative process, only that it is one agreed to by all members of the claim group – *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 (*Fesl*) at [71].

The information contained in *[name removed]* affidavit, which is subsequently supported by statements made in the affidavits of those nineteen [19] persons comprising the applicant at Attachments R(2) to R(20), indicates that all those in attendance agreed that no decision-making process under traditional law and custom was found to exist for the making of decisions regarding the authorisation of a native title claim. The material also demonstrates that an agreed and adopted process was employed by the resolution of those in attendance.

While I am not restricted to the material contained in the application itself, I note that nothing before me indicates that there was any dispute or disagreement with the process employed for the authorisation of the Gomeroi People native title determination application. For that reason, I am of the view that the process employed for the decision to authorise the Gomeroi People application complied with s. 251B.

Consequently, I am satisfied that the applicant is a member of the native title claim group and is authorised to make the application and deal with matters arising in relation to it, by all other persons in the native title claim group. The application meets the requirements of s. 190C(4)(b) and s. 190C(5).

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 undertaking the task at s. 190B(2), it is to the information provided in the application specifically for the purposes of ss. 62(2)(a) and (b) to which I am to turn my mind.

The written description of the application area provided for the purposes of s. 62(2)(a) appears at Schedule B and Attachment B of the application. Schedule B describes the application area as comprising all the land and waters within the external boundaries described in Attachment B and depicted in the map at Attachment C. Schedule B also contains a list of general exclusions, or areas not covered by the application.

I note that describing those areas not covered by the application by way of general exclusions clauses, where the wording of the relevant provisions of the Act is adopted, is one method which has been accepted by the Court as satisfying the assessment of the written description at s. 190B(2) – See for example *Strickland v Native Title Registrar* [1999] FCA 1530 at [50] to [55].

Attachment B contains a metes and bounds description of the external boundary of the application, referencing the Queensland/New South Wales State border, geographic coordinates referenced to the Geocentric Datum of Australia 1994 (GDA94), watercourses, roads reserve boundaries, cadastral boundaries and contours.

Schedule C refers to Attachment C, which contains a colour map titled 'Native Title Determination Application Gomeroi People', produced by the National Native Title Tribunal, dated 9 December 2011. The map includes:

- the application area depicted as a bold dark blue outline;
- topographic image as a background;
- major localities shown and labelled;
- scalebar, northpoint, coordinate grid, legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

The geospatial assessment has identified one typographical error within the description, involving an erroneous statement of a particular direction. Despite the error, the geospatial assessment concludes that the description and the map are consistent and identify the application area with reasonable certainty. I accept that the error identified is of a minor nature and does not create any uncertainty as to the area covered by the application, particularly as the correct direction is shown on the map in Attachment C.

Subsequently I am satisfied that the information contained in the application provided pursuant to ss. 62(2)(a) and (b) allows it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The application meets the requirements 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).

In undertaking the task at s. 190B(3), I note that it is to the terms of the application itself that I am required to turn my mind. The focus of the condition at s. 190B(3) is not on the correctness of the native title claim group, but whether the description allows for 'the reliable identification' of all persons in the native title claim group – *Doepel* at [16] and [51].

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

> The Gomeroi people are the native title claim group on whose behalf the applicant makes this application. The native title claim group comprises all the descendants of the following apical ancestors:
>
> [*list of 114 named persons, including the place of birth and year of birth for each named person*]
>
> Descendants include persons who are descendants by adoption according to traditional law and custom.

Schedule A then refers to further information attached and marked 'A'. Attachment A contains the following information:

> Adoption into the Gomeroi people is acknowledged and practiced in accordance with Gomeroi traditional law and custom.
>
> If an objective test for adoption is required, it can be tested for by the following features based upon Gomeroi traditional laws and customs:
>
> - Has the adopted individual been raised from childhood by a member of the Gomeroi native title claim group?
> - Has the adopted individual, since childhood, identified himself or herself as a member of the Gomeroi native title claim group?
> - Has the adopted individual, since childhood, been identified by other members of the Gomeroi native title claim group as a member of the Gomeroi native title claim group?
> - Has the adopted individual, since childhood, been atttributed the same rights and interests as other members of the Gomeroi native title claim group, by members of the Gomeroi native title claim group?

- Has the adopted individual demonstrated a consistent and active involvement in the Gomeroi native title claim group since childhood, comparable with the consistent and active involvement of non-adopted members of the Gomeroi native title claim group?

As the members of the native title claim group have not been individually named, I note that it is s. 190B(3)(b) that contains the relevant condition. That provision requires a sufficiently clear description of the persons in the native title claim group so that it can be ascertained whether any particular person is in that group.

Describing a native title claim group by way of reference to named apical ancestors is one method that has previously been accepted by the Court as satisfying the condition at s. 190B(3) – see *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [27] to [34]. Biological descent is generally accepted as being objective means by which claim group members can be ascertained.

I note that the addition of descent by adoption does add a measure of uncertainty to the claim group description, however I am of the opinion that the applicant has sufficiently addressed this, in providing a clear and specific objective test by which adopted descendants can be determined.

Subsequently, the fact that the application of the conditions by which claim group members are identified may require some factual inquiry does not, in my view, prevent the description from satisfying the test at s. 190B(3) – *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) at [63] to [69]. In addition to this, I note Carr J's comments in *WA v NTR*, where His honour adopted the reasoning of French J in *Strickland* (at [55]), that registration test conditions were not to be elevated to the impossible – at [67]. In providing not only the full name of each apical ancestor, but also the date and place of their birth, and the rules by which descent (including by adoption) can be ascertained I am satisfied that sufficient clarity is achieved.

I consider that there is nothing within the description before me that prevents the 'reliable identification' of the claim group and the ability to ascertain whether any particular person is in that group.

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

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

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

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

In relation to the task at s. 190B(4), Mansfield J in *Doepel*, approved the delegate's approach when he determined 'the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning' – at [99]. Similarly, the description provided in accordance with s. 62(2)(d) was found to require that the rights and interests claimed were native title rights and interests as defined by s. 223.

I note that the wording of s. 190B(4) indicates that its requirements must be met by what is in the application itself. The description of the native title rights and interests claimed in the application appears at Schedule E and Attachment E of the application.

Schedule E refers to Attachment E and the affidavits of Joseph Robert Trindall, William Robinson, Jason Wilson, Ray Tighe, Leslie Woodbridge, Vaughan Livermore, Craig Trindall, Don Edrich Murray, Reginald John Talbot, Robert Lance Sutherland and Alfred Priestley attached to Attachment F and marked 'F(1)', 'F(2)', 'F(3)', 'F(4)', 'F(5)', 'F(6)', 'F(7)', 'F(8)', 'F(9)', 'F(10)' and 'F(11)' as relevant material for the purpose of Schedule E.

Attachment E appears as follows:

1. Where exclusive native title can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238 and/or ss. 47, 47A and 47B apply), the Gomeroi People as defined in Schedule A of this application, claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales.
2. Where exclusive native title cannot be recognised, the Gomeroi People as defined in Schedule A of this application, claim the following non-exclusive rights and interests including the right to conduct activities necessary to give effect to them

    (a) the right to access the application area;

    (b) the right to use and enjoy the application area;

    (c) the right to move about the application area;

    (d) the right to camp on the application area;

    (e) the right to erect shelters and other structures on the application area;

    (f) the right to live being to enter and remain on the application area;

    (g) the right to hold meetings on the application area;

    (h) the right to hunt on the application area;

    (i) the right to fish in the application area;

    (j) the right to have access to and use the natural water resources of the application area;

    (k) the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments);

    (l) the right to manage natural resources including the right to carbon;

    (m) the right to share and exchange natural resources derived from the land and waters within the application area;

(n) the right to participate in cultural and spiritual activities on the application area;

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

(p) the right to conduct ceremonies and rituals on the application area;

(q) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;

(r) the right to speak for and make non-exclusive decisions about the application area in accordance with traditional laws and customs;

(s) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and

(t) the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

3. The native title rights and interests referred to in paragraph 2 do not confer possession, occupation, use or enjoyment of the lands and waters of the application area to the exclusion of all others.

4. The native title rights and interests are subject to and exercisable in accordance with:

(a) the laws of the State of New South Wales and the Commonwealth of Australia including the common law;

(b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of New South Wales; and

(c) the traditional laws and customs of the Gomeroi People for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

While I have had reference to those affidavits referred to in Schedule E, and consider them relevant in establishing a factual basis to the native title claim group's claim to the particular native title rights and interests referred to in Attachment E, as stated above it is the description required by s. 62(2)(d) that is the subject of the test at s. 190B(4), and for that reason, it is primarily to the description of the claimed native title rights and interests at Attachment E that I have turned my mind.

I am of the view that a broad claim to exclusive possession such as that contained in paragraph 1 of Attachment E does not offend the condition of s. 190B(4) – *Strickland* at [60], and I note that this right is confined only to those areas within the application area where there has been no prior extinguishment of exclusive native title. Mansfield J in *Doepel* commented that it was open to the delegate to read the full description of claimed native title rights and interests, including any stated qualifications or restrictions so that 'properly understood there was no inherent or explicit contradiction' – at [123].

In undertaking the task at s. 190B(4), I have also turned my mind to the definition of native title rights and interests in s. 223(1). While I do not consider it my role at this condition of the registration test to assess whether those rights and interests claimed in the application meet that definition (this I have considered in my reasons at s. 190B(6)), I am of the view that the rights and interests listed in Attachment E can be understood as native title rights and interests with reference to that definition.

In relation to those non-exclusive rights and interests claimed, I find that there is some uncertainty surrounding the clarity and meaning with which certain rights and interests have been phrased. Regardless, I consider that the specific examination of each of those distinct rights and interests and the information contained within the application to support them, is reserved for the task at s. 190B(6) and have addressed these issues in my reasoning at that condition. Similarly, I am of the view that this measure of uncertainty is not enough to prevent me from being satisfied that the description as a whole, when read in conjunction with the stated qualifications at paragraphs 3 and 4 of Attachment E, is sufficient for the purposes of s. 190B(4).

The application meets the requirements of 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.

The task at s. 190B(5)

In undertaking the task at s. 190B(5), I am of the view that there is a correlation that exists between the requirements of s. 62(2)(e) and s. 190B(5), such that an application and accompanying affidavit/s which 'fully and comprehensively' addresses all the matters in s. 62 could provide sufficient information to enable the Registrar to be satisfied of all the matters referred to in s. 190B' – *Gudjala FC* at [90]. Regardless of this correlation, I note that I am not restricted to the information contained within the application in reaching the required level of satisfaction at s. 190B(5) – *Doepel* at [16].

The case of *Doepel* discussed in some detail the role of the delegate at s. 190B(5). Mansfield J held that the delegate is to determine 'whether the asserted facts can support the claimed conclusions'

and that 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' – at [17].

The nature of the information required to satisfy the condition at s. 190B(5) must be in 'sufficient detail to enable a genuine assessment', and be 'more than assertions at a high level of generality' – *Gudjala FC* at [92]. With this requirement for a genuine assessment in mind, I am of the view that the factual basis material must have relevance to the particular native title claimed, by the particular native title claim group over the particular land and waters of the application area – *Gudjala 2007* at [39].

The applicant's factual basis material

Schedule F refers to the material provided by the applicant for the purposes of s. 190B(5). Schedule F refers to Attachment F and the affidavits of ten named claim group members, marked F(1) to F(11) as containing information relevant to the general description of the factual basis on which it is asserted the claimed native title rights and interests exist, required by s. 62(2)(e).

I note that I have also considered the information contained in Schedules A and G of the application as relevant to the condition at s. 190B(5) and have had regard to this information in undertaking the task at s. 190B(5).

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

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

In reaching the required level of satisfaction at s. 190B(5) that the applicant's factual basis material is sufficient to support the claimed native title, I note that it is the matters set out in the particular assertions of s. 190B(5) that I am to focus my attention on – *Doepel* at [130].

Subsection (a) of s. 190B(5) requires that the applicant's factual basis material address the assertion that the native title claim group have, and their predecessors had, an association with the area covered by the application. In determining what sort of information might be appropriate for the purposes of this requirement, the findings of Dowsett J in *Gudjala 2007* not criticised by the Full Court on appeal provides some guidance, and indicates that factual basis material going to the following may be necessary:

- whether the claim group as a whole presently has an association with the area, although it may not be required that all members at all times have such an association;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

The case of *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) also provides guidance as to the requirement at s. 190B(5)(a). French J's comments suggest that broad statements about the claim group's association with the application area, where there is a lack of information regarding the nature of the connection and a lack of information pertaining to the geographical entirety of the application area may not be sufficient to meet the condition – at [25] to [26].

The applicant's factual basis material – Section 190B(5)(a)

Schedule A of the application contains a description of the native title claim group, in accordance with s. 190B(3)(b). This description is by way of reference to a list of 114 apical ancestors, whose descendants comprise the Gomeroi People. Following the name of each apical ancestor is their date of birth and place of birth. Whilst some of this information has not been provided for all apical ancestors listed, these persons are in the minority.

I have accessed the Tribunal's geospatial data, and noted the location of each of the places named. The geospatial data reveals that all of the places of birth listed in Schedule A (more than thirty locations) fall well within the external boundary of the application area. One location is situated on the border of the application area.

The dates of birth shown in Schedule A range from 1807 as the earliest birth date to 1892 as the most recent birth date of an apical ancestor. I have no information before me regarding the dates of European settlement of the application area. Whilst the assertion of British sovereignty is historically and legally noted as 26 January 1788, I consider that European settlement or first-contact in the application area, due to its geographical distance from the site of the initial settlement, is likely to have occurred at a slightly later date, and for that reason at least some of those apical ancestors named at Schedule A can be presumed to have been part of any 'society' in existence at the time 'effective sovereignty' occurred asserted by the native title claim group.

Subsequently, I take the information contained at Schedule A as factual basis material going to the association between the apical ancestors of the native title claim group and the application area, around the time of European settlement of the application area and shortly thereafter.

Attachment F of the application consists of general statements that address and provide information relevant to each of the assertions in subsections (a), (b) and (c) of s. 190B(5). These statements also refer to the affidavits at Attachments F(1) to F(11) as illustrating the applicants' and their predecessors' association with the application area.

Each of the affidavits at Attachment F contains information identifying the deponent as a descendant of at least one, often a number of those apical ancestors named in Schedule A. In considering the apical ancestors from who deponents have descended referred to in the affidavits, there are thirty [30] apical ancestors named that also appear at Schedule A. Subsequently I am of the view that the deponents are representative of a relatively broad portion of the native title claim group and that the information contained within their affidavits can be taken to be illustrative of associations between the whole of the group and the application area.

Almost all of the deponents were born in locations within the application area and still reside in the application area. Even where some deponents left the application area due to career or education opportunities, all the deponents chose to return to the application area and most ensured they frequently visited the application area. *[text removed]*
I am of the opinion that there is factual basis material that goes towards the geographical entirety of the application area. The place names referred to throughout the affidavit material indicates that the deponents are from, have lived on and travelled across a broad range of locations within the application area. Travel within the application area occurs for various reasons, including to visit relatives and/or important sites, to fish and hunt or for ceremonial reasons. *[text removed]*

.

[text removed] There is also factual basis material that I am of the view indicates a thorough knowledge by claim group members of the boundaries of the Gomeroi application area. *[text removed][text removed]*

[text removed] [text removed][21].

*[text removed]*It is my view that the material contained in the affidavits also demonstrates a thorough knowledge of important cultural and sacred sites, and a strongly-held value in having those areas protected. This suggests a significant spiritual element to the association between the claim group members and the application area. *[text removed]*

*[text removed]*And also:

[text removed]– at [9].

Various statements made by deponents go towards the assertion addressing s. 190B(5)(a) in Attachment F of the application that 'according to traditional laws and customs observed, the Gomeroi People are the owners of the land and waters in the application area'. *[text removed]*

[text removed][text removed][text removed] Joseph Robert Trindall and many of the other deponents are of an elderly age, and able to directly trace their descent from the apical ancestors listed in the claim group description at Schedule A. Subsequently the predecessors of the native title claim group can be shown to be the apical ancestors in Schedule A. I am of the view that this fact, supported by the statements made throughout the affidavits, shows that any association asserted is an association between the claim group and the application area today, that has been ongoing and has continued on from the predecessors of the claim group, who include certain persons who can be identified as apical ancestors in Schedule A.

Adverse material

On 22 December 2011, the case manager for the current application received an email from Mr *[name removed]* and *[name removed]* of the Plains Clans of the Wonnarua People. This email was to advise the Tribunal that the Gomeroi People claim fell well within the traditional boundaries of the Plains Clans of the Wonnarua Peoples, and expressly stated the Plains Clans of the Wonnarua People's objection to the claim being registered.

While I accept that there is disagreement between the Gomeroi People and the Plains Clans of the Wonnarua People over the correct native title claim group for part of the land and waters of the current application, I am of the view that it is not the delegate's role to embark on any fact finding exercise. This has been made clear in a number of decisions of the Court.

In the case of *Doepel*, as referred to above, Mansfield J made the following comment in relation to the delegate's role at s. 190B(5):

> 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].

The Full Court discussed the same issue in the case of *Gudjala FC*, where it held that:

> But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim – at [92].

On this basis, I have not considered the issue raised by *[name removed]* and *[name removed]* of the Plains Clans of the Wonnarua People any further, and consider the disagreement regarding the correct claim group for the part of the application area discussed to be a matter for the Court.

In conclusion, I find the applicant's factual basis material to be sufficient in supporting the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area. In my opinion, the material is of a thorough and geographically-broad nature and provides numerous detailed examples of the physical, spiritual and cultural association held by members of the claim group and their predecessors with the land and waters of the application area, which can be taken as illustrative of the association held by the group as a whole with the area.

The application meets the requirements of s. 190B(5)(a).

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

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

The wording of s. 190B(5)(b) and its use of similar terms to that found in s. 223(1)(a), containing the definition of 'native title rights and interests', in my view requires me to turn my mind to the case law dealing with that definition. Dowsett J took this approach in *Gudjala 2007* and summarised the principles of the leading authority on the meaning of 'traditional' laws and customs enunciated by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) – *Gudjala 2007* at [26]. In *Yorta Yorta* the High Court made the following findings:

- the origins of the content of the law or custom are to be found in the normative rules of a society that existed before the assertion of sovereignty – at [46];
- ''traditional' refers to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty' – at [86];
- the acknowledgement and observance of those laws and customs must have continued 'substantially uninterrupted' – at [87].

Dowsett J's decision in *Gudjala 2007* went some way to outline the kind of material that the applicant must provide in order to meet the condition of s. 190B(5)(b). This aspect of the decision was not overturned by the Full Court on appeal. Drawing on the *Yorta Yorta* decision, in *Gudjala 2007* Dowsett J pointed to the following information as required to address the assertion:

- the laws and customs have their source in a pre-sovereignty society and have been observed since that time by a continuing society – at [63];
- there was, at sovereignty, a society defined by recognition of identifiable laws and customs – at [65] and [66];
- there is a link between the claim group described in the application, and the area covered by the application – at [66].

The Full Court's reasons in *Gudjala FC* similarly suggest that there may be a need for the applicant's factual basis material to identify the society in existence at the time of European settlement from which the laws and customs are claimed to derive – at [96].

The applicant's factual basis material – Section 190B(5)(b)

Attachment F of the application contains a number of general statements which address the assertion at s. 190B(5)(b), that there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group. These statements refer to matters such as the Gomeroi kinship system, the transmission of laws and customs by the intergenerational transfer of knowledge, and the relationship between traditional laws and customs and tenure in the land and waters. The information provided in the affidavits at Attachments F(1) to F(11) of the application are stated as illustrating how those laws and customs 'are demonstrated on a daily basis in the lives, activities, ceremonies, rituals and practices of members of the Native Title Claim Group'.

Schedule G of the application lists the activities carried out by the Gomeroi People on their traditional lands. I have considered the information contained in Schedule G as relevant material for the purposes of s. 190B(5)(b).

The system of laws and customs acknowledged and observed by the members of the native title claim group is spoken of by a number of the deponents as specific to the Gomeroi nation. *[text removed]*

> *[text removed][text removed]*– at [14] to [16].

[text removed] The Gomeroi nation is described as being a traditionally nomadic group, who travelled throughout the whole of the application area. *[text removed]*

This nomadic nature of the Gomeroi people resulted in certain laws and customs specifically relating to visiting other communities and localities within the application area, and the correct behaviour to employ when doing so. *[text removed] [text removed]*

> *[text removed]* – at [69] to [70].

Various statements made by deponents, in my view, indicate that these laws and customs continue to be acknowledged and observed today. *[text removed]*

[text removed] A shared spiritual connection to the land and waters of the application area, including knowledge of stories of spiritual beings and their relationships with and to the landscape, in my view, is demonstrated by various statements made in the affidavits at Attachment F by members of the claim group. For example, the story of the rainbow serpent is one that features in a number of affidavits. *[text removed]*

[text removed][text removed]

Each of the deponents speaks of these stories being passed down to them from their predecessors. From the applicant's factual basis material, the passing on of Gomeroi cultural knowledge is central to the system of laws and customs acknowledged and observed by the claim group members. This practice is referred to by all of the deponents in their affidavits at Attachment F, and there appears to be a specific system of rules and practices relating to how knowledge is transferred. I am of the view that the material also demonstrates a strong maintenance of such rules and practices regarding the transfer of knowledge.

A number of elderly claimants explain how they received knowledge from their parents, grandparents, and other family members. *[text removed]*

*[text removed]*All of the deponents speak of how they continue to pass knowledge of Gomeroi law and custom onto their children and the extreme importance they place on doing this. In this way, holding this knowledge is suggested as being connected to Gomeroi identity. *[text removed]*

[text removed]

*[text removed]*A strong respect for elders within the claim group, and the knowledge that they possess is something that is discussed in almost all of the affidavits of the claimants. The factual basis material suggests that all of the deponents have an understanding of the role and status of elders within the Gomeroi people, and that whilst there may be certain members of the younger generation of the group that have chosen not to uphold this respect, the general consensus amongst older deponents is that it is still a strong element within Gomeroi culture, and in my view, the statements made by younger deponents supports this consensus.

*[text removed] [text removed]*There are a number of further elements of the system of laws and customs acknowledged and observed by the native title claim group that are referred to in the affidavits at Attachment F, and that are reflected in the list of activities currently carried out by members of the claim group on the land and waters of the application area described in Schedule G. Such elements include:

- totem relationships and rules surrounding the observation of totems – see for example Attachment F(11) at [18] ;
- knowledge of and respect for sacred sites, including burial grounds, initiation sites, rock art sites – see for example Attachment F(6) at [59] to [61] and [67];

- methods of hunting, gathering and cooking and the observation of seasonal and totemic restrictions/patterns – see for example Attachment F(4) at [20] to [22], [26] and [28];
- laws regarding marriage – see for example Attachment F(4) at [62];
- rules and practices involved in burials – see for example Attachment F(4) at [31] to [32] and Attachment F(11) at [37] to [38];
- the use of traditional bush medicine, as still used presently by claim group members – see for example Attachment F(7) at [18] to [19] and Attachment F(6) at [15] to [16]; and
- respect for, and connection to nature and the land and waters of the application area – see for example Attachment F(11) at [27] and Attachment F(10) at [7] to [8].

Based on the above, it is my opinion that the applicant has provided a significant amount of factual basis material that relates directly to the system of laws and customs that is currently acknowledged and observed by the Gomeroi people, and that was acknowledged and observed by their predecessors. The range of ages and generations of the deponents of the affidavits at Attachment F and their individual depictions of that system indicates that there have been some changes to the ways in which certain laws and customs are maintained. Despite this, there is nothing within the material that indicates that the Gomeroi system of laws and customs it is not a system that has had a 'continuous existence and vitality since sovereignty' – *Yorta Yorta* at [47].

The wealth of knowledge possessed by the elderly deponents in particular regarding the traditional laws and customs acknowledged and observed by their predecessors (including at least one of the apical ancestors named in Schedule A), as members of the Gomeroi nation in my view illustrates a strong cultural society that has existed since pre-sovereignty times.

Similarly, I am of the view that the spiritual creation stories of the landscape of the application area that have been passed down through the intergenerational transfer of knowledge to the deponents indicates that they and their predecessors are persons who have a strong spiritual and cultural connection to the specific land and waters of the application area that identifies and unites them as part of that Gomeroi nation.

Subsequently, I am satisfied that the factual basis material supports the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests subject of the application.

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

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

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

The assertion at s. 190B(5)(c), that the native title claim group have continued to hold native title in accordance with traditional laws and customs is in my view, closely linked to the assertion at s. 190B(5)(b), which seeks to demonstrate the system of laws and customs according to which the group claim native title. Similarly, where the factual basis material does not support the assertion at s. 190B(5)(b), it follows that the material cannot satisfy the assertion at s. 190B(5)(c) – *Martin* at [29].

Dowsett J in *Gudjala 2007*, when considering the requirements of this condition, suggested that the applicant's factual basis material would have to establish both that there was a society in existence at sovereignty that observed identifiable laws and customs that have been traditionally passed down to the current claim group, and that there has been a continuity in the observance of these laws and customs, going back to sovereignty – at [82]. This latter requirement equates with the second element of 'traditional laws and customs' as set out in *Yorta Yorta*, and in my view involves some consideration of the extent to which those laws and customs have changed over time since European settlement.

The applicant's factual basis material – Section 190B(5)(c)

Many of the deponents of the affidavits at Attachment F of the application speak of the way things are currently carried out as a continuation of past activities or practices. The factual basis material suggests that ever since European settlement of the application area, the claim group members and their predecessors have sought to balance their traditional way of life against the white society and lifestyle that was imposed on them. *[text removed]*

[text removed]

Various statements made by the claim group members in their affidavits indicate that the way certain activities or customs are carried out today is unchanged from the way in which their predecessors and those ancestors before them undertook such practices. Similarly, the spiritual beliefs and cultural knowledge possessed by the deponents is expressly stated as having come from their parents, grandparents and great-grandparents as a continuing flow of information.

[text removed][text removed]

There are numerous statements within the factual basis material in the affidavits at Attachment F that in my view indicate that claim group members have not only naturally continued to observe and acknowledge laws and customs that their predecessors upheld, but have actively sought to maintain 'traditional' ways of doing things and to pass this knowledge down to younger generations.

[text removed]– at [15].

*[text removed]*In contrast to the above, however, the deponents also speak of certain changes to the traditional ways and the ways in which white man's society has impacted or influenced their own lifestyles. *[text removed]*

*[text removed]*Based on the above, whilst I note that there has been some change in the lifestyles of the Gomeroi claim group members, I am satisfied that there has been continuity in the observance and acknowledgement of laws and customs that were upheld by their predecessors, back to the time of European settlement of the area. The fact that the system of laws and customs currently observed and acknowledged is one that is rooted in a pre-sovereignty system of laws and customs I have already discussed in my reasons at s. 190B(5)(b). I do not consider, from the factual basis material before me, that there has been any substantial interruption in the acknowledgement and observance of the laws and customs described.

Consequently, I am satisfied that the factual basis material supports the assertion at s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

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

My role at s. 190B(6) involves a consideration of each of those individual native title rights and interests that have been claimed by the Gomeroi People, and whether the information before me supports the existence, in accordance with Gomeroi traditional law and custom, of those rights and interests, prima facie. I note that it is not, however, my role to determine disputed questions of fact or law surrounding those rights and interests – *Doepel* at [135].

In determining the meaning to be applied to the phrase 'prima facie', the High Court has previously held that it is the ordinary meaning of the phrase that is to be applied, and that that ordinary meaning is: 'at first sight; on the face of it; as appears at first sight without investigation' – *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2 at [615] to [616], [652]. This was subsequently approved in *Doepel*, where Mansfield J held that, 'if on its face a claim is arguable... it should be accepted on a prima facie basis' – at [135].

With reference to the definition of native title rights and interests at s. 223(1), I am of the view that the native title rights and interests claimed must be shown to exist under traditional law and custom, be of the nature of rights and interests that are in relation to land and waters, and be rights and interests capable of being recognised at law – see *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) at [57] to [61] and [64].

The applicant's factual basis material – Section 190B(6)

The list of native title rights and interests claimed by the group appear at Attachment E to Schedule E of the application. I have considered each of these rights and interests individually below in considering whether the factual basis material before me is able to establish the right or interest.

<u>The exclusive right to possession, occupation, use and enjoyment of the application area</u>

As stated above at s. 190B(4), a claim to an exclusive right to possession, occupation, use and enjoyment of the application area has been upheld by the Court – *Strickland* at [60]. Similarly, in *Ward HC*, the High Court acknowledged that an applicant's factual basis material could establish such a right – at [51].

The nature of this exclusive right was further explored in *Ward HC*, where the Court held that:

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

The material required to establish exclusive native title rights vested in a native title claim group was also considered in *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths FC*), where the Full Court commented:

> [T]he question whether the native title right of a given native title claim group includes the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructary or proprietary. It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom – at [71].

The Full Court also considered that what was required was that an applicant show that, according to their traditional laws and customs they are able to 'exclude from their country people not of their community' – at [127].

There is in my view, material within the affidavits at Attachment F that is of the nature described by these authorities. I note the stated qualification at Attachment E following the list of native title rights and interests claimed, that the rights and interests claimed are done so subject to the laws of the State and the Commonwealth, and subject to any right or interests conferred upon persons pursuant to those laws. Subsequently, where any exclusive or non-exclusive interest has previously been granted, a right to exclusive possession will not be recognisable.

Information within the affidavits that I have considered relevant in establishing the right is that pertaining to the claimant's right to control access to the application area in accordance with their traditional laws and customs, including the claimant's ability to 'speak for country', and laws and customs regarding the need for others to seek permission of the claim group members to enter and/or use the application area.

> *[text removed][text removed][text removed] [text removed]*
>
> *[text removed] [text removed][text removed]*

These statements suggest that even within the Gomeroi nation, there were smaller land-holding groups or communities and each of these communities had responsibilities attached to localities within the wider application area. There is also, in my view, material that indicates a recognition of communal rights and interests as amongst the Gomeroi People as a tribal nation, and the application area as a whole. *[text removed]*

> *[text removed]*

In my view, these statements demonstrate that territorality was a characteristic of Gomeroi traditional law and custom, in accordance with which members of the claim group were able to exercise control over the access to the application area by other Aboriginal persons. For this reason, I am satisfied that a right to exclusive possession of the application area, where recognisable subject to the common law, is prima facie established.

<u>The right to access the application area</u>

Being satisfied that the factual basis material within the application establishes a right to exclusive possession held by the native title claim group, I am similarly of the view that the factual basis material establishes a right to access the application area. The right to access is inherently linked to and in my opinion can be considered an element of, the exclusive right to possession.

<u>The right to use and enjoy the application area</u>

In the same way, I consider the right to use and enjoy the application area is also an element of an exclusive right to possession, and that having established the latter, the former flows directly on. There is again substantial material within the affidavits at Attachment F that speak of the claim group members and their predecessors using and enjoying the land and waters of the application area, including its resources, in their daily lives in accordance with their traditional laws and customs (set out under various rights below). There is also factual basis material indicating enjoyment of a spiritual nature derived by the claim group members, from being present on the land and waters of the application area.

[text removed]

*[text removed]*Subsequently, I am satisfied that the factual basis material provided by the applicant establishes a right to use and enjoy the application area.

The right to move about the application area

The right of the claim group members to move about the application area is also, in my view, an element of the exclsuive right to possession, and consequently is established by the applicant's factual basis material. In addition to this, the material speaks specifically of the nomadic nature of the claim group, and the fact that claim group members spent much of their time travelling to other locations within the application area.

[text removed] [text removed][text removed]

Based on this material, and flowing on from the establishment of a right to exclusive possession, I am satisfied that the right to move about the application area is established.

The right to camp on the application area

Various statements made by the claimants in the affidavits at Attachment F suggest that a right to camp on the application area is in accordance with their traditional laws and customs and able to be established. Whilst the right to camp on the application area is a non-exclusive right, I am of the view that as above, it can be considered an element of the exclusive right to possession, the establishment of which I am satisfied as above.

The factual basis material I consider relevant to this right includes the following statements by claim group members at Attachment F*[text removed]*

*[text removed]*Based on this information, and on the right to exclusive possession established above, I am satisfied that the right to camp on the application area is established by the applicant's factual basis material, and that it is a right in accordance with Gomeroi traditional laws and customs.

The right to erect shelters and other structures on the application area

The material that in my view is relevant to establishing a right to erect shelters and other structures on the application area is in a similar nature to that above, that indicates that the members of the native title claim group and their predecessors have and continue to camp on and reside on the application area, and erect shelters and structures for that purpose.

*[text removed]*In my view, this material supports the existence of a right to erect shelters and other structures on the application area, and subsequently I am satisfied that the right is established.

The right to live on being to enter and remain on the application area

In my view, the right to live on being to enter and remain on the application area again flows directly from the recognition of a right to exclusive possession. All of the deponents of the affidavits at Attachment F demonstrate that they and their predecessors were born on, have lived on for most of their lives, and now reside within the application area. Whilst there has been increasing movement from more traditional camps and communities to larger urban centres such as Dubbo and Inverell, the claim group members have actively sought to remain within their traditional lands of the application area.

Factual basis material including statements from various affidavits reproduced in my reasons at s. 190B(5)(a), and under the rights discussed above all go towards demonstrating that this right is established. I am satisfied that it is.

The right to hold meetings on the application area

The right to hold meetings on the application area is illustrated by statements from a number of claim group members, who refer to previous gathering sites, where claim group members congregated for various ceremonial and cultural purposes.

*[text removed]*Similarly, today, various claim group members speak of sites the location of which and knowledge regarding which they have been told by their predecessors. These sites have traditionally been used for different types of meetings, and claim group members continue to acknowledge and respect these sites as being for the purpose of similar meetings today.

*[text removed]*Statements within the affidavits also refer to meetings between claim group members and Gomeroi elders for the purpose of resolving disputes.

*[text removed]*Based on this information, I am satisfied that the applicant's factual basis material establishes the claim group's right to hold meetings on the application area.

The right to hunt on the application area

Almost all of the affidavits provided by claim group members refers to traditional hunting methods and activities that they still carry out today. In my view, the amount and substance of this material leaves no doubt as to sucha right being established by the claim group members.

[text removed]

*[text removed]*Subsequently I am satisfied that the right to hunt on the application area is established by the applicant's factual basis material, and that this is a right held by the Gomeroi People in accordance with their traditional laws and customs.

The right to fish in the application area

Just as the right to hunt is established by a large volume of material contained within the affidavits at Attachment F, the right to fish is also hevaily referenced throughout the statements made by claim group members. The material indicates that fishing is an inherent part of the identity of claim group members as Gomeroi People, and that methods and practices relating to fishing are passed down through intergenerational transfer.

*[text removed][text removed]*Subsequently, based on this material, I am satisfied that the factual basis material before me establishes the Gomeroi People's right to fish on the application area.

The right to have access to and use the natural water resources of the application area

I note that the rights and interests claimed are done so subject to both the common law and the traditional laws and customs of the Gomeroi People. For this reason, I accept that the applicant does not seek to use the natural water resources of the application for any commercial purpose.

The right to have access to and use the natural water resources of the application area, in my view, flows directly from the right to use and enjoy the application area. Specific reference to the claim group member's and their predecessors' use of the natural water resources of the application area appears in the affidavit I consider that there is also an important spiritual element to the claim group members' connection to the natural waterways and water resources within the application area*[text removed]*

Subsequently I am satisfied that the factual basis material establishes the right to have access to and use the natural water resources of the application area, in accordance with Gomeroi traditional law and custom.

<u>The right to gather and use the natural resources of the application area</u>

The deponents of the affidavits at Attachment F indicate that a wide range of natural resources found on the application area were and still are gathered and used by the claim group members. The right claimed at Attachment E refers specifically to food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments. I am of the view that the factual basis material is able to establish all of these uses/resources as obtained by the claim group members in accordance with their traditional laws and customs. The methods and times of gathering, and the preparation and use of these resources is knowledge that all deponents speak of as being taught to them by their predecessors.

The following statements in my view, are key examples of the relevant material from the affidavits at Attachment F that go to establishing the right to gather and use the natural resources of the application area:

> *[text removed]*
>
> *[text removed]* –

*[text removed]*Based on this information, and the volume of material at Attachment F going towards the claim group's right to gather and use the natural resources of the application area, I am satisfied that the right is established.

<u>The right to manage natural resources including the right to carbon</u>

Within the affidavits at Attachment F, there are a number of statements that refer to the claim group members' conserving natural resources within the application area. Deponents speak of not taking more fish and/or animals than what was necessary to feed themselves and that this practice was taught to them by their predecessors – See for example Attachment F(1) at [25] and [31]. There is also reference to fire management activities that were once undertaken by claim group members within the application area, to generate vegetation regrowth – See Attachment F(5) at [35].

Despite the inclusion of such statements within the factual basis material, I am of the view that the drafting of this right at Attachment E creates some difficulties which prevent me from being satisfied that such a right can prima facie be established. The rights at paragraph [2] of

Attachment E are framed as non-exclusive rights and interests. Despite this I consider that both the 'right to manage natural resources' and 'a right to carbon', without any further qualification, indicate elements of control and ownership that are contradictory to a non-exclusive interest.

I am also of the view that there is a lack of factual basis material that goes towards establishing that the Gomeroi People have a right to carbon in accordance with their traditional laws and customs, hence cannot be satisfied that such a right is a native title right and interest as defined by s. 223(1). Whilst I note that factual basis material going towards fire management practices carried out in accordance with traditional laws and customs may support a right to engage in carbon-reduction fire management schemes, and that this may have been the intent of the claim group, the way in which the right has been expressed does not allow me to make this assumption.

There is some indicaton from the Court that shifts and changes in traditional laws and customs may not prevent their recognition as giving rise to native title rights and interests under the Act – see *Griffiths v Northern Territory* [2006] FCA 903 (*Griffiths*) at [501]. This, however is not the issue in the present case.

For the reasons above, I find that the right to manage natural resources including the right to carbon is not prima facie established.

<u>The right to share and exchange resources derived from the land and waters within the application area</u>

The practice of sharing resources derived from the application area among claim group members and with other groups, is referred to a number of times throughout the affidavits at Attachment F. *[text removed]*

I am satisfied that the right to share and exchange resources derived from the application area is established by the factual basis material before me, and that this is a right in accordance with the traditional laws and customs of the Gomeroi People.

<u>The right to participate in cultural and spiritual activities on the application area</u>

The deponents speak of various cultural and spiritual activities that were and still are carried out by members of the claim group and their predecessors. Such activities include corroborees, funerals, smoking ceremonies, marriage ceremonies and initiation ceremonies.

The following statements in my view go towards establishing the right of the claim group members to participating in such activities:

> *[text removed*
>
> *[text removed*
>
> *[text removed]*

The applicant's factual basis material, in my view, not only illustrates the cultural and spiritual activities participated in in the past by the predecessors of the claim group, but also illustrates that maintaining culture and associated customs is actively initiated and upheld by the claim group members today, and passed onto the younger generations. For this reason, I am satisfied that the right to participate in cultural and spiritual activities on the application area is established.

The right to conduct ceremonies and rituals on the application area

I consider that the right to conduct ceremonies and rituals on the application area is closely connected to the right established above to hold meetings on the application area. I consider that there is also a connection between the right to participate in cultural and spiritual activities on the application area. On this basis, I am of the view that the factual basis material within the application sufficiently addresses the current right.

Additionally, however, material within the affidavits at Attachment F that I have considered relevant to this right include the following statements:

[text removed]

[text removed]

Subsequently, I am satisfied that the applicant's factual basis material establishes the right to conduct ceremonies and rituals on the application area.

The right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites

There are numerous statements within the affidavits at Attachment F that highlight the importance of the intergenerational transfer of knowledge amongst the claim group members. The deponents all speak of receiving their knowledge of Gomeroi law and custom, including knowledge of sites from their predecessors and many explain the way in which they continue this transfer to their own children or nephews/nieces.

The following statements from the affidavits, in my view, go towards establishing the right:

*[text removed][text removed]*In addition to these examples, the importance of the intergenerational transfer of knowledge within the system of Gomeroi laws and customs is illustrated and discussed in my reasons above at s. 190B(5)(b). Subsequently, I am satisfied that the applicant's factual basis material establishes a right held by the Gomeroi People to transmit traditional knowledge to members of the claim group including knowledge of particular sites.

The right to speak for country

I am of the view that the final three [3] rights in the list at Attachment E can be considered together, as they relate to the exercise of similar rights and interests in relation to the application area. Those rights and interests are:

- The right to speak for and make non-exclusive decisions about the application area in accordance with traditional laws and customs;
- The right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and
- The right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

I am also of the view that these rights are all rights which seek to establish some form of control by the claim group over the land and waters of the application area and how they are used. In this way, it appears that the applicant seeks the recognition of rights in the nature of exclusive rights and interests, in areas where exclusive native title cannot be recognised (as clarified in paragraph [1] of Attachment E). The case law dealing with the tension between non-exclusive

rights expressed in an exclusive manner suggests that such rights are unlikely to be upheld by the Court. In *Ward HC*, referring to a claim to a right to control access it was held that:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead – at [52].

Similarly, in reference to the right to speak for country, the Court emphasised the exclusive nature of the right as follows:

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

The Court has, in certain cases, deviated from these conclusions reached in *Ward HC*. In *De Rose v South Australia* [2002] FCA 1342 (*De Rose*), O'Loughlin J indicated a willingness to recognise the non-exclusive right to grant and refuse access to the application area to Aboriginal persons governed by the laws and customs of the native title holders – at [553]. Similarly, in the consent decision of *Mundraby v Queensland* [2006] FCA 436 (*Mundraby*), the Court recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by Aboriginal people' bound by the laws and customs of the native title holders.

I note that there are various statements within the affidavits at Attachment F that support the claimants' right to speak for country, and that in accordance with their traditional laws and customs, permission is sought from specific landholding groups to travel to other areas within the application area. The rights as expressed in Attachment E can, however be distinguished from those supported in *De Rose* and *Mundraby*, in that their application extends beyond the claim group, to all other Aboriginal people. Both the decisions in *De Rose* and *Mundraby* acknowledge these non-exclusive rights where they are limited in their application *only* to the Aboriginal people bound by the traditional law and custom of the claim group.

I find that this is not the case here, and for that reason, am compelled to follow the reasoning of the Court in *Ward HC*. In areas where exclusive possession cannot be recognised, I am not satisfied that the non-exclusive rights listed above are prima facie established.

Subsection 190B(7)
Traditional physical connection

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

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

The use of the word 'traditional' in the provision at s. 190B(7), in my view, requires that a physical connection held by a claim group member must be considered in light of the definition of traditional adopted by the High Court in *Yorta Yorta*, and subsequently be a connection that is in accordance with the traditional laws and customs of the Gomeroi People – see *Gudjala 2007* at [89]. I am also of the view that the factual basis material before me must speak specifically to the traditional physical connection, and provide information that is able to satisfy me that such a connection exists – *Doepel* at [18]. In examining the requirements of s. 190B(7), I note that it is only the traditional physical connection of one member of the claim group to which I must turn my mind.

Schedule M refers to Attachment M and the information in the affidavits of the 11 claim group members at Attachment F as containing the relevant material for the purposes of s. 190B(7). Attachment M contains a list of the activities and practices involved in the current traditional physical connection held by members of the claim group with the application area.

Attachment F(1) is the affidavit of Joseph Robert Trindall. Mr Trindall was born in 1925 in Narrabri, within the application area. He has lived within the application area for his entire life and married a woman also from the application area. The affidavit contains numerous statements which illustrate the ongoing physical connection that Mr Trindall has had with parts of the application area, and the fact that this connection is one that is in accordance with the traditional laws and customs of the Gomeroi People. An example of this traditional connection in my view is seen in the time Mr Trindall spent with his grandmother on the application area as a child.

[text removed]

This statement in my view illustrates the physical connection with the land and waters of the application area held by Mr Trindall as a child, that is in accordance with the traditional laws and customs of the Gomeroi People. There are various other statements within the affidavit that indicate that Mr Trindall's traditional physical connection continues, as well as numerous other examples from the affidavits at Attachments F(2) to F(11) that suggest a similar connection held or previously held by those claim group members.

I am satisfied that the application meets the requirements of s. 190B(7).

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

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

Section 61A provides:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The geospatial assessment confirms that there have been no determinations of native title for any of the area covered by the application. I have also conducted a search of the National Native Title Register and find that there are no determinations recorded that cover any of the area that comprises the land and waters of 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 of the application, containing a written description of the areas covered by the application and those areas not covered by the application, states at paragraph one [1] that: 'the area covered by the application excludes any land and waters covered by past or present freehold title or by previous valid exclusive possession acts as defined by section 23B of the *Native Title Act*

1993 (Cth)'. The inclusion of this statement allows me to be satisfied that the application does not offend the provision of s. 61A(2).

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).

Attachment E, containing a description of the native title rights and interests subject of the claimant application, provides at paragraph one [1] that the Gomeroi People claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others, only where exclusive native title can be recognised. For this reason, I am satisfied that the application does not offend the provision of s. 61A(3).

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

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

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

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

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

Schedule Q of the application provides that the application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

Schedule P states that the application does not make any claim to exclusive possession of any offshore place.

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

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

There is nothing in the information before me that suggests that the native title rights and interests claimed in the application have otherwise been extinguished. I note that the claimed native title rights and interests described at Attachment E of the application are subject to stated qualifications, including that exclusive possession is only claimed over areas where exclusive native title can be recognised, and that all exclusive and non-exclusive rights and interests claimed are subject to and exercisable in accordance with the laws of the Commonwealth and State governments and the rights previously conferred upon others pursuant to those laws.

For this reason, I am satisfied that the application meets the requirement of s. 190B(9)(c).

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Gomeroi People**
NNTT file no.	**NC11/6**
Federal Court of Australia file no.	**NSD2308/2011**
Date of registration test decision	**20 January 2012**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**

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

Section 190B conditions

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

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

[*End of document*]