National Native Title Tribunal

Registration test decision

Application name	Northern Cape York Group #1
Name of applicant	Larry Woosup, Asai Pablo, Charles Woosup, Walter Moses, Anzac McDonnell, Francis Brisbane, Meun Lifu, George Pausa and Bernard Charlie
State/territory/region	Queensland
NNTT file no.	QC11/2
Federal Court of Australia file no.	QUD157/2011
Date application made	30 June 2011
Date application last amended	2 February 2012

Name of delegate Stephen Rivers-McCombs

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

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

Date of decision: 1 March 2012

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Stephen Rivers-McCombs

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

Reasons for decision

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Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the amended Northern Cape York Group #1 claimant application to the Native Title Registrar (the Registrar) on 13 February 2012 pursuant to s. 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

As the application had not been accept for registration prior to its amendment, and because the Court has not made an order in relation to the claim under s. 87A, 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.

I note that, on 27 June 2011, the applicant's representative was provided with a preliminary assessment, which I prepared, of a draft version of the application. Following a series of short deferrals in response to requests for extensions of time from the applicant's representative, I also prepared a preliminary assessment of the filed application. This took into account additional material submitted on behalf of the applicant on 29 August 2011 and was given to the applicant's representative on 10 October 2011. On this date, the applicant's representative was also informed that I would endeavour to apply the registration test on 16 November 2011. I subsequently decided to again defer registration testing following advice from the applicant's representative regarding the planned amendment of the application.

Registration test

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

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

Information considered when making the decision

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

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

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

- the affidavit of [Anthropologist – name deleted] - (sworn on 27 June 2011), which was filed in the Court on 30 June 2011;
- the document titled 'Submission on behalf of the Applicant, Northern Cape York #1', which the applicant's representative submitted to the Registrar on 29 August 2011;
- a series of affidavits sworn by claim group members and filed with the Court in relation to previous proceedings, which the applicant's representative submitted to the Registrar on 14 February 2012 (these affidavits are listed below, in my reasons regarding s. 190B(5));
- the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 16 February 2012 (GeoTrack: 2012/0276); and
- the results of my own searches against the Tribunal's mapping database.

I note that I was also the delegate who considered the Northern Cape York Group #2 application (QUD156/2011; QC11/3) against the conditions of the registration test on 16 December 2011. The information in the Northern Cape York Group #2 application is not, in my view, relevant to my assessment of the current application. However, the information contained in the two (2) applications is similar in some respects. Therefore, while I have considered each of the applications separately, I have adopted matching or similar reasons where there is no significant difference between the information provided in the two (2) applications.

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

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

Procedural fairness steps

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

- On 5 July 2011, the Case Manager handling the matter provided a copy of the original application and accompanying documents to the State of Queensland (the State) and advised the State of its ability to provide submissions in relation to claim.
- On 30 August 2011, the State was provided with a copy of the additional material provided by the applicant to the Registrar and was advised of its ability to submit comments regarding that material.
- By email dated 13 February 2012, the Case Manager sent the State a copy of the amended application. The accompanying letter advised the State that I intended to take into account the affidavit of [Anthropologist – name deleted] - and the document titled 'Submission on behalf of the Applicant, Northern Cape York #1', which had been provided to the State prior to the amendment of the application. The letter also advised the State of its ability to provide submissions in relation to the claim.
- On 22 February 2012 the Case Manager provided the State with a copy of the additional affidavits submitted to the Registrar by the applicant's representative on 14 February 2012. The accompanying letter requested that the State provide any comments on the material by 28 February 2012.

As at the date of this decision, the Registrar has not received any submissions from the State, either in relation to the original application or the amended 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. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

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

Native title claim group: s. 61(1)

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

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

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

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

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

I am satisfied that the application contains the information required by s. 61(1) with respect to the persons who comprise the applicant. The application sets out the names of those persons and—in Part A, Schedule R and the s. 62(1)(a) affidavits—contains statements to the effect that they are members of the native title claim group and are jointly authorised to make this application by all of the other claim group members.

A description of the native title claim group is found at Attachment A and is set out fully below, in relation to the s. 190B(3) assessment. The description defines the claim group as comprising the descendants of named apical ancestors. There is nothing on the face of this description, or elsewhere in the application, which indicates that the application has been made by a subgroup of the native title claim group or has otherwise not been made on behalf of all of the group's members.

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

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

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

The application contains all details and other information required by s. 61(3)—see Part B of the Form 1.

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)—see Attachment A.

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and

(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

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

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

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

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

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

> The Native Title Claim Group authorised the other people making up the Applicant and I to make this application, to deal with matters arising in relation to it and to represent all the people in the native title claim group at meetings of the native title claim group, held in Injinoo on 11, 12 and 13 April 2011 in accordance with the traditional laws and customs of the native title claim group—at [5].

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

This information does not contain a great degree of detail in relation to the decision-making process used to authorise the applicant at the claim group meetings. However, the information does give an indication of how the process worked, while also identifying which of the two (2) s. 251B processes was used. Having considered the terms of the Act in light of the explanatory memorandum that accompanied the 2007 amendments, I am satisfied that this level of detail is sufficient for the purposes of s. 62(1)(a). In this regard, I also note that s. 190C(2) is concerned with procedural matters and that the information provided for the purposes of s. 62(1)(a) does need to satisfy me that the applicant is, in fact, properly authorised—see *Doepel* at [74].

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

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

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

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

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

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

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

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

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

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

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

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

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

Searches: s. 62(2)(c)

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

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

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

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

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

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

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

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

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

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

I note that it is not enough to merely recite the assertions described in s. 62(2)(e) and that a 'general description' of the factual basis is required to meet the condition—*Queensland v Hutchison* [2001] FCA 416 at [17] to [23]. However, the description can be something less than the information needed to satisfy the requirements of s. 190B(5)—*Wulgurukaba People #1 v State of Queensland* [2002] FCA 1555 at [19]; see also *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 at [90] and [92].

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

In addition, Schedule F includes statements to the effect that the claim group acknowledge and observe traditional laws and customs, which are based on the laws and customs of the community that was in occupation of the claim area at sovereignty. Examples of these laws and customs, which the claim group is said to still practice and which relate to the lands and waters of the claim area, are then listed in Schedule M. Because it is implied, in my view, that these laws and customs are rooted in those of the relevant pre-sovereignty society, this information relates to both subparagraph (i) and subparagraphs (ii) and (iii) of s. 62(2)(e). I note also that Schedule G

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

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

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

Activities: s. 62(2)(f)

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

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

At Schedule H, the applicant states that it is not aware of 'any other applications made in relation to the whole or a part of the area covered by the application that seek a determination of native title or a determination of compensation in relation to native title'.

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

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

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

The applicant states at Schedule HA that it is not aware of any notifications under s. 24MD(6B)(c) that relate to any part of the claim area.

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

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

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

Schedule I contains the details of a number of s. 29 notices that have been given and which relate to the claim area. I note that, at the time of this decision, all of the notices identified have expired.

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).

I (as the Registrar's delegate) only need to be satisfied that there are no common members between the claim group for the current application and the claim group for a second application if paragraphs (a) to (c) of s. 190C(3) apply to that other claim—*Western Australia v Strickland* [2000] FCA 652 at [9].

In considering the current application, I have had regard to a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 16 February 2012 (GeoTrack: 2012/0276) (the geospatial report). The geospatial report concludes that, as at the date of the assessment, '[n]o applications as per the Register of Native Title Claims and Schedule of Applications—Federal Court fall within the external boundary of this amended application'. I have also conducted my own overlap analysis of the application area using the Tribunal's mapping database. This confirmed the findings of the geospatial report. Therefore, the information before me indicates that there is no previous application to which s. 190C(3)(a) to (c) might apply. As a result, I do not, in my view, need to consider the requirements of s. 190C(3) further.

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

Subsection 190C(4)
Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

> 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.

Schedule R indicates that the applicant is authorised by the other members of the claim group, rather than certified under s. 190C(4)(a). I have, therefore, assessed the application against the requirements of ss. 190C(4)(b) and 190C(5). For the reasons set out below, I am satisfied that the requirements of those provisions are met. I first outline my reasons regarding s. 190C(5) before turning to s. 190C(4)(b).

The application must contain the information described in s. 190C(5)

Section 190C(5)(a) requires that the application include a statement to the effect that the requirements of s. 190C(4)(b) have been met. Section 190C(5)(b) then provides that the application must briefly set out the grounds on which the Registrar or her delegate should consider that the requirements contained in s. 190C(4)(b) have been satisfied.

In relation to the condition of s. 190C(5)(a), I note that Schedule R states that '[t]he applicant is entitled to make the Application as the persons authorised by the native title claim group to make the Native Title Determination Application'. This statement does not refer to whether the applicant is a member of the native title claim group. However, the persons comprising the applicant each state in their affidavits, which accompanied the Form 1, that they are claim group members—at [4]. These affidavits form part of the application. Therefore, I am satisfied that, when Schedule R is read together with the accompanying affidavits, the application contains a statement to the effect that the condition of s. 190C(4)(b) has been met.

With respect to the requirements of s. 190C(5)(b), I refer to the comments of French J (as he was then) in *Strickland v Native Title Registrar* [1999] FCA 1530. There, his Honour observed that '[t]he insertion of the word "briefly" at the beginning of [paragraph] 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained'—at [57]; approved by the Full Court in *Western Australia v Strickland* [2000] FCA 652 at [77] to [78].

Schedule R contains a statement to the effect that the applicant was authorised by the other members of the claim group at claim group meetings held in Injinoo on 11, 12 and 13 April 2011. Further, it is said that the process used was 'in accordance with [the claim group's] traditional laws and customs'. This information is reasonably general in nature and does not provide much detail of the decision-making process used to authorise the applicant. Nonetheless, having considered the statements at Schedule R in light of the terms of s. 190C(5)(b) and the comments of French J, I am satisfied that the application contains the necessary information; namely, that it briefly sets out the grounds on which the Registrar or her delegate should consider that the requirements of s. 190C(4)(b) have been met.

For the above reasons, I am satisfied that the application contains the information required by s. 190C(5). I note, however, that an application which passes the threshold test at s. 190C(5) will not necessarily meet the requirements of s. 190C(4)(b). This is because s. 190C(4)(b) requires me, as the Registrar's delegate, to be satisfied that the applicant persons have, in fact, been properly authorised in accordance with one of the processes described in s. 251B (discussed below)—see *Doepel* at [78]; *Evans v Native Title Registrar* [2004] FCA 1070 at [53]. Below, I set out my reasons in relation to the two conditions of s. 190C(4)(b), which are that the applicant must be:

- a member of the native title claim group; and
- authorised to make the application, and to deal with matters arising in relation to it, by all the other members of the claim group.

First limb of s. 190(4)(b)—the applicant is a member of the native title claim group

The application is accompanied by affidavits affirmed by each of the persons who comprise the applicant. In their affidavits, each of these persons affirms that they are a claim group member—at [4]. There is no information before me which suggests that those statements are incorrect or untrue. I am, therefore, satisfied that the first limb of the test at s. 190C(4)(b) is met.

Second limb of s. 190C(4)(b)—the applicant is authorised to make the application by all the other persons in the native title claim group

The second requirement of s. 190C(4)(b) is that the persons who comprise the applicant are authorised to make the application, and to deal with matters arising in relation to it, by all the other members of the native title claim group.

What it means to be 'authorised', for the purposes of s. 190C(4)(b), is set out in s. 251B. According to s. 251B(a), all the persons in a claim group will have authorised the applicant to make the application, and to deal with matters arising in relation to it, if:

- the claim group has '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'; and
- the applicant persons have been authorised in accordance with that traditionally mandated decision-making process.

Section 251B(b) provides an alternative means of authorisation where the group has no applicable traditional decision-making process.

As noted above, Schedule R states that the applicant is authorised in accordance with the claim group's traditional laws and customs. I infer from this that the applicant is said to be authorised in accordance with a traditionally mandated process. I have, therefore, considered the authorisation material provided against the requirements of s. 251B(a).

Apart from brief statements in Schedule R and the applicant persons' affidavits, the applicant's authorisation material is contained in the affidavit of [Anthropologist – name deleted] - (affirmed 27 June 2011). This was filed with the Court in relation to the application, prior to its amendment.

Below, I set out the relevant information from [Anthropologist – name deleted] -'s affidavit. I then outline why I have formed the view that the application satisfies the conditions imposed by ss. 190(4)(b) and 251B(a).

The information before me

[Anthropologist – name deleted] - states in his affidavit that he has been contracted by the Cape York Land Council (the CYLC) to undertake anthropological research in the region of the North Cape York Peninsula since March 2010. As part of his work for the CYLC, [Anthropologist – name deleted] - has provided advice regarding the composition of the native title claim group. He has also advised the CYLC in respect of the group's traditionally mandated decision-making process and the steps needed to implement it for the purpose of authorising the applicant to make the current application.

[Anthropologist – name deleted] - identifies in his affidavit that the claim group is made up three (3) 'descent-based groupings', or '"clans" or "tribes" in the vernacular of Aboriginal people of northern Cape York Peninsula'—at [15]. [Anthropologist – name deleted] - notes, however, that in his view the three (3) descent-based groupings 'constitute part of a single society' and that they 'are within the same cultural bloc'—at [16] and [20]. Later in his affidavit, [Anthropologist – name deleted] - also refers to decisions being made 'in accordance with [each descent-based group's] traditional laws and customs *and the laws and customs of the region*'—at [73] and [77] (emphasis added). I am, therefore, satisfied that the claim group, as a whole, has a shared system of law and custom, which provides a mandated process for authorising individuals to make a native title determination application (NTDA).

[Anthropologist – name deleted] -'s affidavit does not, in the abstract, set out the full set of requirements that must be complied with for a person to be authorised under the claim group's traditionally mandated process. The only reference to that effect is [Anthropologist – name deleted] - 's statement that '[o]ne of the salient features of the laws and customs of the region is that each [descent-based] group speak only for their own country and not that of other groups'—at [69]. Nonetheless, the affidavit does contain more detail with regard to the practical steps taken to authorise the applicant. In doing so, [Anthropologist – name deleted] - provides a basis from which the requirements of the traditional process can be identified.

In particular, [Anthropologist – name deleted] - deposes that the applicant persons were authorised to make the application at three (3) meetings, one for each of the three (3) descent-based groups. As [Anthropologist – name deleted] - explains in his affidavit: 'The decision to schedule separate authorisation meetings for the Angkamuthi Seven River, Atambaya and Gudang Yadhaigana groups follow[ed] advice that I provided about the nature of the laws and customs of the region' regarding the ability of each group to speak only for their own country—at [69]. The three (3) meetings were each held in the town of Injinoo. They were held 'with the Angkamuthi Seven River group on 13 April 2011, the Atambaya group on 12 April 2011 and the Gudang Yadhaigana on 11 April 2011'—at [68].

With respect to how claim group members were notified of the meetings, [Anthropologist – name deleted] - states his belief that 'notices advising of the purpose of the meeting and the logistical details were sent on or about Thursday, 24 March 2011 to the persons on the mailing list of NCY#1 [Northern Cape York Group #1] claimants as checked and verified by me'—at [70]. Further, [Anthropologist – name deleted] - deposes: 'A week prior to the scheduled meetings I

was advised by [Project Support Officer – name deleted] -, CYLC Project Support Officer that she attended in person in the [northern peninsula area] and took notices to the family groups identified in my research and provided briefings on the upcoming meetings'—at [70].

[Anthropologist – name deleted] - comments that the mailing list used to notify members of the claim group was checked against his 'updated research'—at [70]. This research is described at paragraph [56] of the affidavit, where [Anthropologist – name deleted] - states: 'During the period March 2010 and 10 April 2011 I conducted 92 days of field and desktop research (a substantial portion of which was field based research in the [northern peninsula area]) involving members of the Gudang Yadhaigana, Atambaya and Angkamuthi Seven River groups'. My understanding is that this research also included investigation of the claim group's traditional decision-making processes—see the affidavit of [Anthropologist – name deleted] - at [13].

In addition, I note that [Anthropologist – name deleted] - attended four (4) workshop meetings with claim group members on 8, 9 and 25 February 2011. According to [Anthropologist – name deleted] -'s affidavit, the meetings were either attended by 'significant persons' from the descent-based groupings or by persons who were otherwise 'representative of the [grouping's] families'—at [59], [61] and [64]. These attendees heard the results of [Anthropologist – name deleted] -'s research into the composition of the claim group. [Anthropologist – name deleted] - deposes that they supported the continuation of his research and gave their 'in-principle support' for the making of the Northern Cape York Group #1 claimant application—at [59], [61] and [64]. I infer from this that the persons who attended the February meetings were content with [Anthropologist – name deleted] -'s characterisation of the claim group's composition.

In relation to what happened at the three (3) meetings convened by the CYLC on 11, 12 and 13 April 2011 [Anthropologist – name deleted] - deposes as follows:

> 71. Each of the authorisation meetings were attended by [Solicitor 1 – name deleted] - and [Solicitor 2 – name deleted] -, both solicitors employed by CYLC and CYLC Project Support Officer, [Project Support Officer – name deleted] -. The authorisation meetings each followed the same or substantially the same draft agenda, presentation and format.
>
> 72. On Monday 11 April 2011 I attended a meeting at Injinoo of Gudang Yadhaigana people to consider authorisation of the NCY#1 NTD[A]. The following people identifying as Gudang Yadhaigana participated at the meeting: -
>
> [Claim Group Member 1 – name deleted] -, Meun Lifu, [Claim Group Member 2 – name deleted] -, [Claim Group Member 3 – name deleted] -, [Claim Group Member 4 – name deleted] -, [Claim Group Member 5 – name deleted] -, Bernard Charlie, [Claim Group Member 6 – name deleted] -, [Claim Group Member 7 – name deleted] -, [Claim Group Member 8 – name deleted] - , [Claim Group Member 9 – name deleted] -, [Claim Group Member 10 - name deleted] -, [Claim Group Member 11 – name deleted] -, [Claim Group Member 12 – name deleted] - and George Pausa
>
> 73. In my opinion the meeting was attended by a sufficiently representative group for a binding decision to be made on behalf of the Gudang Yadhaigana group in accordance with their traditional laws and customs and the laws and customs of the region.
>
> 74. While at times the meeting involved spirited discussions (generally not involving matters directly relevant to the authorisation of an NTDA) a unanimous position was reached by the attendees at the meeting to authorise Meun Lifu, George Pausa and Bernard Charlie as applicants for a joint claim by the Angkamuthi Seven River, Atambaya and Gudang

Yadhaigana people over the area of the NCY#1 NTDA and to confirm whichever applicants the Atambaya and Angkamuthi Seven River groups put forward.

75. The meeting proceeded on the basis that the applicants, or so many of them as were willing and able to act, would act jointly with the applicant put forward by the Atambaya and Angkamuthi Seven River groups. The applicants made it clear that while they were representing the NCY#1 NTDA claimant group as [a] whole, they understood that under the traditional laws and customs of the region individuals and local groups were entitled to speak only for their particular tracts of country.

The following paragraphs of [Anthropologist – name deleted] -'s affidavit then describe, in the same form, the meetings that were held with persons from the Atambaya group on 12 April and the Angkamuthi Seven River group on 13 April 2011. Specifically, [Anthropologist – name deleted] -:

- identifies those individuals who attended the meetings;
- deposes that, in his opinion, the attendance was sufficiently representative for the meeting to make a decision on behalf of the descent-based group, in accordance with the claim group's traditional law and custom;
- identifies those persons who the attendees authorised to be the applicant persons from their group;
- states that the attendees confirmed their acceptance of the applicant persons put forward by the other two (2) descent-based groups;
- notes that those decisions were unanimous; and
- comments that '[t]he meeting proceeded on the basis that the applicants, or so many of them as were willing and able to act, would act jointly with the applicants selected by the [other descent-based] groups. The applicants made it clear that while they were representing the NCY#1 NTDA claimant group as [a] whole, they understood that under the traditional laws and customs of the region individuals and local groups were entitled to speak only for their particular tracts of country'—at [79] and [84].

My approach to the second limb of the s. 190C(4)(b) assessment

Section 251B gives the word 'all' in s. 190C(4)(b) 'a more limited meaning than it might otherwise have'—*Lawson v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) at [25]; see also *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 at [48]. With respect to the current application, I am not concerned with whether literally every member of the native title claim group authorised the applicant to make the application. Instead, my focus is on whether the applicant persons were authorised in accordance with the process mandated by the claim group's traditional law and custom.

In undertaking my consideration of the applicant's authorisation material, I have had regard to the decision of O'Loughlin J in *Ward v Northern Territory* [2002] FCA 171 (*Ward*). In my view, his Honour's reasons provide some guidance as to the kinds of matters which the available information may need to address in order to satisfy me that the applicant persons have been

properly authorised by a meeting, or meetings, of claim group members. In *Ward*, his Honour held that the available material must, at least in substance, address the following questions:

> Who convened [the meeting] and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?—at [24] to [25].

In relation to the questions that concern the notification of, and attendance at, the clam group meetings, I have also had regard to the decision of Stone J in *Lawson*, a case in which authorisation was said to have stemmed from a meeting of the wider claim group. In *Lawson*, her Honour held that, although authorisation was not required from every individual member of the native title claim group, it was important that claim group members were 'given every reasonable opportunity to participate in the decision-making process'—at [25].

I am aware that the decisions in *Ward* and *Lawson* related to proceedings to replace an applicant under s. 66B. Further, I note that *Lawson* was immediately concerned with whether the requirements of s. 251B(b) had been met, rather than whether a traditionally mandated process had been properly complied with. Nonetheless, it is, in my view, appropriate to draw on the decisions in *Ward* and *Lawson* in assessing the current application. In relation to the relevance of Stone J's decision in *Lawson*, I observe that [Anthropologist – name deleted] - 's affidavit indicates that the traditional process used by the current claim group involved decisions being made at a series of meetings, which were each open to all members of the relevant subgroup. I believe that it is therefore appropriate to inquire as to whether claim group members were afforded every reasonable opportunity to attend and to participate in the decision-making process.

Given that the authorisation process was conducted through the use of meetings, I also believe that it is appropriate to turn my mind to the questions posed in *Ward*. However, I do note Stone J's observation that in doing so one should take a 'practical approach' and should be careful not to scrutinise the available material in an 'overly technical or pedantic way'—*Lawson* at [28]. I also remind myself that I am, in the end, concerned with whether the persons who comprise the applicant are authorised in accordance with their group's traditionally mandated process, not with whether the questions identified in *Ward* have each been specifically addressed.

Consideration

Ultimately, I am satisfied that the applicant is authorised to make the current application in accordance with the claim group's traditionally mandated decision-making process.

I have formed the view that the affidavit of [Anthropologist – name deleted] - sufficiently addresses the substance of the questions posed by O'Loughlin J in *Ward*. First, I note that it appears from [Anthropologist – name deleted] -'s affidavit that the CYLC was responsible for organising the meetings held with claim group members on 11, 12 and 13 April 2011. I infer from this that the CYLC staff who attended the meetings were also responsible for running them. Given the extent of [Anthropologist – name deleted] -'s research regarding the claim group's

traditional law and custom, I am satisfied that this was appropriate and was not inconsistent with the group's traditionally mandated process.

With respect to how the CYLC notified the April meetings, I note that I have not been provided with detailed information regarding the content of the notices sent out by the CYLC or of the verbal briefings provided by the CYLC Project Support Officer. However, there is no information before me which might indicate that the notices did not inform the recipients of the purpose of the meeting and advise of its logistical details, as [Anthropologist – name deleted] - has deposed. I am also satisfied that, given the CYLC's apparent awareness of the need to provide claim group members with that information, the personal briefings given by the Project Support Officer were similarly informative. Further, I note that the CYLC notified the April meetings using a mailing list developed from the results of [Anthropologist – name deleted] -'s seemingly in-depth research into the composition of the claim group. In this regard, I mention as well that claim group members appear to have been informed of the results of this research and to have been content with them. Given these factors, I am satisfied that the every reasonable opportunity was afforded to claim group members to attend the April meetings and to participate in the authorisation process.

I note that the material before me does not expressly deal with the number or identity of group members who must, under the group's traditional process, attend a meeting before a binding decision can be made. The material is also silent as to the proportion of claim group members that did, in fact, attend the April meetings. Nevertheless, I have formed the view that I am satisfied that the authorisation of the applicant at the April meetings was done in accordance with the claim group's traditionally mandated process. I have formed this view on the basis of three (3) factors:

- [Anthropologist – name deleted] -'s apparently close understanding of the claim group's composition and its traditional decision-making processes, which I consider adds particular weight to his sworn opinion that there was sufficient attendance at the April meetings;
- the efforts of the CYLC to ensure that members of the claim group were given every reasonable opportunity to attend the April meetings; and
- the fact that the decisions to appoint the applicant persons were made by consensus at those meetings.

In my view, this last factor is important because it indicates that those in attendance agreed that the process used complied with the requirements of the one mandated by the claim group's traditional law and custom.

Authority to make the amended application

I note that the authorisation process discussed above was carried out in preparation for the lodgement of the original application, rather than the amended application currently falling for consideration. With respect to the authority of an applicant to amend a claimant application, French J has said:

> Section 62A expressly provides that in the case of a claimant application, the applicant may deal with all matters arising under the ... [the Act] in relation to the application. In my opinion such

matters include the amendment of the application from time to time—*Drury v Western Australia* [2000] FCA 132 at [12].

This is not to say that an applicant will always have the authority to amend an application as it sees fit. A claim group may, for example, impose restrictions on the amendments which an applicant is authorised to make. However, any such qualifications must be apparent from the express or implied terms of the decision to authorise the applicant—see *Champion v Western Australia* [2009] FCA 1141 at [9] to [13].

The information before me does not indicate that the applicant's authority is subject to any express or implied qualifications, which would prevent the applicant from amending the application in the way it has. The amendments made to the original application are limited to minor, technical changes to the Form 1 and to a relatively small reduction in the claim area. I am satisfied that the original authority granted to the applicant encompasses the ability to make these amendments.

Outcome

For the reasons given above, I am **satisfied** that the persons who jointly comprise the applicant are authorised to make the application in accordance with the claim group's traditionally mandated process. Therefore, the requirements of s. 190C(4) are met.

Merit conditions: s. 190B

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

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

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

The description of the external boundaries of the claim area is included in the application at Attachment B1 and is titled 'Description of External Boundary'. It is a metes and bounds description, which makes reference to:

- topographic features;
- land parcels;
- the high water mark; and
- coordinate points (referencing the Geocentric Datum of Australia 1994).

Attachment B1 also includes notes relating to the source, currency and datum of data used to prepare the description. The attachment explicitly excludes from the claim area any land or waters covered by the Ankamuthi People native title determination application (QUD6158/98). Attachment B identifies the places within the claim area's boundary which are excluded from the application.

A colour map of the claim area, titled 'Northern Cape York No. 1', is found at Attachment C. The map was prepared by the Tribunal's Geospatial Services and is dated 9 August 2011. It includes:

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

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

In determining whether the written description and map of the claim area are sufficient for the purposes of s. 190B(2), I have had regard to the geospatial report prepared by the Tribunal's Geospatial Services (referred to above in relation to s. 190(C)(3)). The geospatial report concludes that '[t]he description and map are consistent and identify the application area with reasonable certainty'. I have examined the description contained in Attachment B1 and the map at

Attachment C and I agree with that assessment. Attachment B1 provides a detailed and clear description of the claim area's external boundary. The constituent parts of that description are, in my view, also readily identifiable on the map provided.

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

For the reasons given, I am **satisfied** that the condition of s. 190B(2) is met.

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

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

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

The native title claim group is described in Attachment A in the following terms:

> The native title group is made up of all persons descended by birth or adoption from the following apical ancestors:
>
> Peter (Pahding) Pablo;
> Ware;
> Annie Deacon;
> Wymarra Outaiakindi;
> Bob Ugea;
> Thompson;
> Bob Corega;
> Annie Jimmy;
> Mary Arake;
> Mathew (Charlie) Gelapa;
> Annie Blanco;
> Ela / Illa;
> Oralie Kun;
> Woonduinagrun and Tariba;
> Mamoose Outaiakindi;
> Oikantu also known as Jimmy (father of Anderson Matauri);
> Tua;
> Woompua and Kitty;
> Dolly Jipsit;
> Charlotte Wilson Ware;
> Mary McDonnell and Jack Snake (parents of Jimmy Brisbane);
> Ourindia and Emara McDonnell Charcoal (Willy and Louisa Charcoal are the grandchildren of this couple);
> Ralph Coconut;

Nataki, Charlie and wives: Atea and Mary Anne McDonnell/Wandangu Heberru;
McDonnell (Willy), Atunmu/Wantanu/Billie Morgan (Moreton)/ Willy Tom/ Willy MacDonald & his wife, Oitutu/Aitapuu and wife, Annie Mipa McDonnell;
Charlie Otomo McDonnell and his wife, Agemo (parents of Charlie Woolhead (Pascoe));
McDonnell, Aligator Wondorognu/Wondoronio and wives Woorunukudi/Arinkudi
Mutunaimangu, Kitty and Mary Brown;
Wargo (father of Kitty McDonnell, Jacko, and Frank Doyle);
Clara and Jimmy McDonnell;
Epidin and Eteman (Parents of Doris Harry);
Kaio (wife of Stephen Mandai Doyle);
Sambo Wooleye, father of Simon and Sarah Peter;
Lizzie, mother of Ruby Ware (nee Thompson), Kirty, Big Lena and Nazareth;
Woobumu and Inmare;
Bullock (father of Mamoose Pitt whose wife was Rosie/Lena Braidley);
Charlie Mamoose, the father of Silas, Larry, Johnny and Harry Mamoose;
Lizzie and Lily, the wives of Charlie;
Toby Seven River, father of Jack Toby;
Charlie Asai;
George Stephen;
Mammus/Mamoos/Mark/Mamoose plus his siblings Peter, Charlotte, Kilda, and Elizabeth;
Charlie Maganu, husband of Sarah McDonnell;
Polly, wife of Ropeyarn, (Charlie/Wautaba);
Maryanne Stephen/Rene Deemal

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

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

My understanding of the claim group description in Attachment A is that the group includes all persons who are descended, either by birth or adoption, from any of the named ancestors. Although the rule's application may require an extensive factual inquiry in some circumstances, the rule provides a clear and objective basis on which to determine whether a person is a member of the claim group. Given that, the claim group description is, in my opinion, a sufficiently clear description for the purposes of s. 190B(3).

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

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

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

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

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

The description of the native title rights and interests claimed by the current applicant is found at Attachment E, which provides:

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

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

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

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

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

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

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

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

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

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

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

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

"**Natural Resources**" means:

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

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

but does not include

c) Minerals or Petroleum;

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

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

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

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

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

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

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

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

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

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

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

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

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

i. cultural activities;

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

iii. ceremonies;

iv. meetings; and

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

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

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

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

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

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

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

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

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

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

In my view, the rights and interests claimed in respect of the area covered by the Comalco ILUA (Western Cape Communities Co-existence Agreement) (the Comalco ILUA), and in relation to the

'exclusive' and 'non-exclusive' areas, are readily identifiable in the sense that they are described in a way that is understandable and has meaning.

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

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

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

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

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

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

The task at s. 190B(5)

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

> It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. *The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts*—at [17] (emphasis added); approved by the Full Federal Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [83] to [85].

Although mindful that I may not look behind the facts asserted in the applicant's material, those facts must contain sufficient detail to properly support the assertions particularised in paragraphs

(a) to (c) of s. 190B(5). In this respect, I have had regard to the comments of the Full Federal Court in *Gudjala FC*. There, the Court highlighted the link between ss. 62 and 190B:

> It is tolerably clear that what the assessment [under s. 190A] entails is informed by what is required of an applicant to commence an application. ... Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s. 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit—at [90].

The Court then outlined the requirements of s. 62(2)(e), which corresponds to the merit condition of s. 190B(5), in the following way:

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

In light of these statements from the Full Court, I have been careful not to require more than a general description of the factual basis of the claim. I note, however, that, although the wording of s. 62(2)(e) informs the standard set by s. 190B(5), an application which has met the requirement of s. 62(2)(e) will not necessarily pass at s. 190B(5). As the Court commented in *Gudjala FC*, an application may fail at the merit conditions of the registration test if the material required by s. 62 is not furnished 'fully and comprehensively'—at [90].

With respect to the level of factual detail needed to meet the requirements of s. 190B(5), I have also had regard to the decisions of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). In particular, I note that in those decisions Dowsett J:

- cautioned that the Registrar (or her delegate) 'must be careful not to treat, as a description of the factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof'—*Gudjala 2009* at [29]; and
- held that s. 190B(5) requires 'that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala 2007* at [39].

In my view, these comments from Dowsett J underscore the need for an applicant's factual basis material to contain a certain level of particularity: it must contain details which can be understood as applying, or having relevance, to the particular native title claimed by the particular group over the particular area covered by the application.

I note that I am aware that the Full Court in *Gudjala FC* allowed an appeal against Dowsett J's decision in *Gudjala 2007*. However, their Honours' reasons do not appear to contain any criticism

of Dowsett J's characterisation of the requirements of s. 190B(5), which his Honour applied again, after the matter was sent back, in *Gudjala 2009*. Therefore, it is, in my view, appropriate to have regard to Dowsett J's analysis of the requirements of s. 190B(5).

The information before me

In addition to the information contained in the Form 1, the applicant's representative has also provided me (as the Registrar's delegate) with additional factual material in the form of:

- a document titled 'Submission on behalf of the Applicant, Northern Cape York #1' (the applicant's submission);
- the affidavit of [Anthropologist – name deleted] - (referred to above in relation to s. 190C(4)); and
- a series of affidavits sworn by claim group members and filed in the Court in relation to claimant applications made previously in relation to parts of the current claim area.

The affidavits are respectively affirmed by:

- [Deponent 1 – name deleted] - (b. 1963) (on 8 March 2002);
- [Applicant 1 – name deleted] - (b. 1975) (on 3 September 2007);
- [Deponent 2 – name deleted] - (b. 1957) (on 18 August 2008);
- [Deponent 3 – name deleted] - (b. 1956) (on 12 August 2008);
- [Deponent 4 – name deleted] - (b. 1935) (on 31 August 2007);
- [Applicant 2 – name deleted] - (b. 1943) (the author of three (3) affidavits, affirmed on 3 September 2007, 26 August 2008 and 2 October 2010 respectively); and
- [Applicant 3 – name deleted] - (b. 1959) (the author of two (2) affidavits, affirmed on 21 August 2008 and 2 October 2010 respectively).

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

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

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

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

- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times; and
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty—*Gudjala 2007* at [52].

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

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

Schedule F of the Form 1 contains the following statements in respect of the association between the claim group's predecessors and the application area:

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

In relation to the association of the claim group with the area covered by the application, Schedules F, G and M of the Form 1 contain assertions to the effect that the claim group are associated with the claim area through the practice of laws and customs, or other activities, which involve:

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

In my view, the statements contained in the Form 1—as they relate to the past and present association of the claim group and its predecessors with the claim area—do not contain the level of particularity needed to satisfy the condition imposed by s. 190B(5)(a). Moreover, I note that the claim area does not contain any offshore places (which, roughly speaking, are those places that are more than three (3) nautical miles off the Queensland coast). Paragraph C of Schedule F, therefore, does not relate to the particular area covered by the current application. However, the necessary level of particularity is provided in the additional material submitted by the applicant's representative.

With respect to the association of claim group members and their predecessors with the claim area, the applicant's submission makes the following points:

- The three (3) descent-based groups referred to above in my consideration of s. 190C(4)(b) identify as the traditional owners of the claim area. The groups are, namely, Gudang Yadhaykenu,[1] Atambaya and Angkamuthi Seven River.

[1] Spelt Yadhaigana in Dr. Redmond's affidavit.

- There was 'little sustained or systematic impact from settlers' before the beginning of the 1900s. As a result, the predecessors of those three (3) groups of traditional owners still occupied the claim area at that time. I also note that Attachment D to the application contains information of further relevance in this regard. It sets out the results of searches undertaken to determine the existence of non-native title rights and interests in the land and waters of the application area. In my view, the results indicate that European settlement in and around the application area may not have occurred on any significant scale until well into the first half of the 1900s.
- Ethnographic works from 1848 recorded the Angkamuthi Seven River as being in possession of part of the claim area. In the mid-1860s, the group were observed living along the north-west coast of Cape York Peninsula and, in 1891, an encounter with group members just south of the Skardon River (and just outside the boundary of the amended claim area) was reported.
- The Atambaya group are referred to as 'inland people'. Records produced in the period between the late-1800s and the 1930s locate their country as extending from near the Wenlock River in the south, to the McDonnell Telegraph Station in the north and then west to the mouth of the Skardon River. This encompasses the south-central portion of the application area, including 'Areas 2 and 3' near the Ducie River.
- The Gudang Yadhaykenu were recorded in the mid-to-late-1800s as comprising two groups who, between them, occupied the northern tip of Cape York as well as areas to the south-west of the tip and in the east, south of Newcastle Bay. This covers the northern and eastern portion of the claim area, in addition to part of its western coast.
- Those three (3) groups are the land holding groups in the claim area under a system of distribution derived 'from the acts of extra-human ancestral beings from the Dreaming'.

Elsewhere in the submission, it is stated that:

- Aboriginal tribes were recorded as traversing, camping and residing on the claim area in the mid-to-late-1890s and that the claim group continue to undertake those activities.
- Authors in the 1930s described groups hunting, fishing and gathering resources within the claim area 'at different times of the year, ranging from extended nomadic hunting and gathering, followed by semi-permanent camps and house-type dwellings at different locations depending on the season'. In the same way, claim group members continue 'to hunt and fish in and on and gather from the land for personal, domestic and non-commercial purposes'.
- Claim group members continue to maintain and protect spiritually significant sites on the claim area, in addition to monitoring and regulating access to the area in accordance with traditional law and custom.

The applicant's submission also mentions four (4) individual members of the claim group who are said to undertake various traditional activities on the claim area. The one reference to a geographical location in the claim area is to [Deponent 1 – name deleted] - travelling to Newcastle Bay to hunt for dugong and turtle.

More detail regarding the association of individual group members, and their families and predecessors, with the claim area is contained in the additional affidavits submitted on behalf of the applicant. The affidavit of [Applicant 3 – name deleted] - (affirmed 21 August 2008) provides an example of the sorts of details contained in these affidavits. [Applicant 3 – name deleted] - states that he was born on Thursday Island and that he identifies as a member of the Gudang part of the Gudang Yadhaykenu, but that he is also as a member of the Atambaya. He goes on to say:

> 2. ... My mother is [Claim Group Member 13 – name deleted] - and she is a Gudang lady born on Gudang country at Red Island Point. Her parents were [Ancestor 1 – name deleted] - and [Ancestor 2 – name deleted] -. [Ancestor 1 – name deleted] - was a Gudang lady born at Cairncross[.] ... [Ancestor 1 – name deleted] - had four brothers who were all from Gudang country. [Ancestor 1 – name deleted] -'s parents were both Gudang people.
>
> 3. I grew up in Seisia, called Red Island Point back in those days, and I remember Mum talking to me there and telling me that she was born there and that she grew up there and that that was Gudang land, and Gudang sea country looking out at all of the water around us from there.
>
> 4. My mother planted the big tree that is still there at Seisia[.] ... This tree reminds me of how much a part of Gudang country my family is.
>
> ...
>
> 6. When I was about 15 I used to camp all the time at Somerset with [Ancestor 3 – name deleted] - who was the caretaker for the place up there. [Ancestor 3 – name deleted] - told me all the language names for the islands ... off Somerset. He used to dive there for trochus and crayfish[.] ... [Ancestor 3 – name deleted] - was Gudang and his grandmother was Gudang.
>
> ...
>
> 8. My cousin brother [Claim Group Member 14 – name deleted] - and I used to camp at Ussher Point with [Ancestor 3 – name deleted] -. My brother used to dive right off there for trochus. This was about 20 years ago before our father died. ... I have four daughters and two sons. They all grew up in Cairns but from when they were little I used to take them back up to the tip for football or a tombstone opening and to show them what is their grandmother's land, and the tree that their grandma planted. I have talked a lot to the kids about sea country, explaining to them where they come from. I have told my children that it is good fishing and turtle hunting on Gudang country, and that them and their children can live off that country because it belongs to us and is our country of our grand parents and big parents.

Of the places mentioned by [Applicant 3 – name deleted] -, Thursday Island and Cairncross are islands that lie off the coast of the claim area. Seisia is a town in the northern part of the application area and Somerset and Ussher Point are respectively located at the northern tip and on the east coast of the claim area. I note that the area covered by the application does not strictly include the areas of sea referred to by [Applicant 3 - name deleted] -. However, it does include the land which adjoins the 'sea country' of the Gudang Yadhaykenu and from which it is accessed. With respect to the extent of Gudang Yadhaykenu country, I also note that [Applicant 2 - name deleted] - states that it has always run 'north of the Olive River in the middle of Temple Bay to the [t]ip of Cape York Peninsula'—affidavit of 2 October 2010 at [3]. This is consistent with the information in the applicant's submission, but also clarifies that the Gudang Yadhaykenu are said to be associated with an area of country that stretches down the entire eastern coast of the claim area and beyond its southern boundary.

In my view, the affidavit of [Anthropologist – name deleted] - is relevant to the association of the claim group, and the claim group's ancestors, with the application area in two respects:

- First, it identifies which of the three (3) abovementioned groups the claim group's apical ancestors belonged to. This clarifies that the claim group is made up of the descendants of ancestors who, between them, belonged to all three (3) of those groups and, therefore, that the claim group includes each of those communities.
- Second, [Anthropologist – name deleted] -:
    - refers to consulting or meeting with claim group members in townships that are located in the claim area, namely Bamaga, New Mapoon, Seisia, Umagico and Injinoo—see [14], [54] to [55], [58], [60] and [64];
    - talks about conducting field research with members of the Gudang Yadhaykenu, Atambaya and Angkamuthi Seven River groups in the claim area between March 2010 and April 2011—at [56]; and
    - notes that under the laws and customs of the claim group, the Gudang Yadhaykenu, Atambaya and Angkamuthi Seven River have authority to speak for the different parts of the claim area that they are associated with—see [69].

Consideration of the material supporting the s. 190B(5)(a) assertion

I deal first with the association of the claim group's predecessors with the claim area. In a number of the additional affidavits, the deponents discuss the association that people of their parents', grandparents' and great grandparents' generations had with parts of the claim area. For example:

- [Applicant 3 - name deleted] - speaks about his mother being born and growing up in Seisia (see above).
- [Applicant 2 - name deleted] - talks about his grandfather having lived at Somerset and Injinoo, and about '[t]he old people' camping around the Jacky Jacky River—affidavit of 26 August 2008 at [3] and [22].
- [Deponent 4 – name deleted] - states that her grandmother was a Gudang woman who was born on Albany Island (which sits less than a kilometre off the north coast of the claim area). [Deponent 4 – name deleted] - also notes that her grandmother's mother was from a part of Gudang Yadhaykenu country which lies just south of the claim area, though her relationship with [Deponent 4 – name deleted] –'s great grandfather indicates that she moved north—see [3]. [Deponent 4 – name deleted] - further comments that she was born in Injinoo and that when she was growing up 'there were many old Gudang people [in Injinoo]'—at [4].

By my estimation, the predecessors mentioned by [Applicant 2 - name deleted] - and [Deponent 4 – name deleted] - would have been living in and around the claim area from as early as the mid-1800s.

Having considered the additional affidavits in light of the more general statements in the applicant's submission, I infer that the information provided by the Gudang Yadhaykenu deponents is indicative of the family histories of claim group members who identify with the Atambaya and Angkamuthi Seven River and their respective parts of the claim area. Therefore,

the information before me is, in my view, sufficient to support an inference that the claim group's predecessors were associated with the wider claim area prior to the arrival of any significant European settlement in the region. From there, I infer that the association had been maintained since at least the Crown's assertion of sovereignty.

In my opinion, the applicant's factual basis material is also sufficient to support the assertion that the claim group, and their more recent predecessors, have maintained an association with the claim area in the period since European settlement in northern Cape York. The above excerpt from [Applicant 3 - name deleted] -'s affidavit, for example, talks with some specificity about the association that he and other people of his generation have with certain places in the Gudang Yadhaykenu part of the claim area. It also speaks similarly about the association that people of his parents' generation had with those areas. Much the same type of information is also contained in the other affidavits provided by the applicant.

In addition, I note that some of the deponents describe their parents and grandparents teaching them about the extent of their group's traditional country, their authority over it and of their spiritual association with it—for example, [Deponent 1 - name deleted] (an Angkamuthi man) at [2]; [Deponent 3 – name deleted] - at [7], [9] to [10], [18] and [28]. [Applicant 3 - name deleted] -, and some of these other deponents, also talk about passing this information about country on to younger generations—see the above passage from [Applicant 3 - name deleted] -'s affidavit; [Applicant 1 - name deleted] - at [28]. In my view, this information invites the inference that, as well as maintaining physical associations with specific parts of the application area, claim group members and their recent predecessors have maintained a spiritual or cultural connection with their constituent parts of the claim area.

I note that, apart from the affidavit of [Deponent 1 – name deleted] - (which deals with his association with the claim area in fairly broad terms), the additional affidavits are focussed on the association of claim group members with the Gudang Yadhaykenu portion of the application area. However, it is, in my opinion, reasonable to infer that the affidavits give examples of the kinds of associations that the claim group as a whole have with the claim area. I believe that this inference is supported by the fact that [Anthropologist – name deleted] -:

- refers to conducting field research in the claim area with each of the land holding groups; and
- comments that the authority of each land holding group over their respective parts of the claim area continues to be recognised under the claim group's law and custom.

For the reasons given, I am **satisfied** that there is sufficient factual material to support the assertion that the claim group and their predecessors are, and have been, associated with the application area since sovereignty.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The applicant's submission and the additional affidavits give more detail in support of the assertion described in s. 190B(5)(b).

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

> The basis for the distribution of land among Aboriginal groups in Cape York Peninsula derives from the acts of extra-human ancestral beings from the Dreaming (Sutton and Rigsby 1982: 157). Stories were attributed to particular parts of the land and languages installed from which contemporary land holding groups take their names (Rigsby 1995:25). The three languages prominent in the claim area are Atam[b]aya, Angkamuthi and Yadhaykenu (Crowley 1980: 241) and each stems from a single language family known as the Northern Pama Sub Group (Sutton 1976). Sharp mapped these language groups within the 'Type II Yathaikeno' totemic category, distinguishing the category from others by its lack of named moieties and sections, a presence of patrilineal local totemic clans associated with multiple totems not ordinary tabu and the assignment of strictly tabued personal totems to individuals of both sexes after puberty chosen from the totems of the mother's clan by divination (Sharp 1938: 39).

I note that [Anthropologist – name deleted] - disagrees with Sharp's definition of the relevant cultural bloc. According to [Anthropologist – name deleted] -, the social-cultural differences between the Atambaya, Angkamuthi and Gudang Yadhaykenu and their neighbouring groups are not sufficiently significant to prevent them forming part of a larger cultural bloc—affidavit of [Anthropologist – name deleted] - at [23]. However, as the Atambaya, Angkamuthi and Gudang Yadhaykenu are all included in both descriptions of the cultural bloc, the difference in opinion does not, in my view, have any impact on the outcome of the assessment under s. 190B(5)(b). I have not, therefore, considered it further.

The remainder of the applicant's submission makes the following points:

- Aboriginal people living in Cape York today identify themselves at varying levels of inclusiveness. These levels of inclusiveness are listed and the Atambaya, Angkamuthi and Gudang Yadhaykenu are said to identify at the toponymic level.
- Groups who have lived in the claim area have always shared a 'belief in the establishment of laws and customs by travelling ancestral beings (Sharp 1938/9: 260)'.
- Keen (2004) has reported 'the establishment of law amongst [Gudang Yadhaykenu] people by creator ancestors ... and most of the claim group are familiar with the totemic system story of Kwoiyam/Kwoiam, amongst others (Brierly 1849: 206) (Haddon 1901; 155) (Laade 1967: 70)'.
- The claim group shares a system of kinship and marriage with other groups in the regional community, which is described.

- There has never been a form of chieftainship among the groups in the claim area, but rather deference by younger men to the experience of older men. Status was also conferred by religious and magical knowledge rather than age alone.
- 'In the claim area maternal totems providing hunting and collecting rights were derived by divination at puberty ceremonies (Haddon 1904: 221). Rights and interests in land are regulated by laws and customs relating to the acknowledgement of spiritually dangerous places (Roth 1903: 37)'.

The applicant's submission also includes the assertion that claim group members continue 'to determine, give effect to, pass on and expand the knowledge and appreciation of their culture and tradition.' In addition, the submission contains statements to the effect that the claim group continues to carry out the activities referred to above in relation to s. 190B(5)(a), some of which are said to be conducted in accordance with briefly mentioned laws and customs. Some brief details regarding traditional activities practiced by individual claim group members are also provided. However, more detail in relation to these kinds of practices, and the related law and custom, is given in the additional affidavits submitted by the applicant's representative. For example, the affidavits contain the following information:

- [Deponent 2 – name deleted] - describes the need to 'chuck talk' when visiting particular places on country:

  > As soon as I get somewhere on my country I am telling the ancestors and spirits that me and my family will be on country for [a] couple of days – letting them know we are there. When we would go chasing dugong when we were younger we always thought Dad was silly talking to himself and lighting cigarettes and throwing them in the water. ... That is Yadakana [Yadhaykenu] law and custom and we still do it today. Whatever our movements on the sea or the land, must 'chuck talk' when you go there otherwise something bad will happen—at [17].

- In his affidavit of 21 August 2008, [Applicant 3 - name deleted] - talks about how '[t]he old people will rub you down with a stick to make sure that you are protected when you are out hunting', as well as how he was taught to give an offering to the group's ancestors to ensure that the catch would be good and the expedition safe—at [21] to [22].
- [Applicant 3 - name deleted] - also describes how people, including Gudang Yadhaykenu people, need to get the permission of Gudang Yadhaykenu elders if they want to hunt in the Gudang Yadhaykenu part of the claim area or in the sea off its coast. He explains how this flows from the responsibility of the Gudang Yadhaykenu to look after the area's resources and how this kind of knowledge has been passed on by old people talking to their children—at [17] and [19]. ([Deponent 1 – name deleted] - , an Angkamuthi man, speaks similarly about his tribe's obligation to protect their land and resources—at [8].)
- In his affidavit of 26 August 2008, [Applicant 2 - name deleted] - talks about how access to sacred places in the claim area is restricted and how he teaches this knowledge to his brother's children. He notes further that 'unless I take them [to those sacred places] it could be dangerous and they could get sick'—at [7].
- A number of the deponents describe how claim group members are prohibited from eating their own totem and how any breach of that rule is punished—for example, [Deponent 3 – name deleted] - at [29]; [Deponent 2 – name deleted] - at [15].

- Some deponents mention Dreaming stories that have been passed down through the generations—for example, [Applicant 3 - name deleted] - (affidavit of 2 October 2010) at [10] to [11]; [Applicant 2 - name deleted] - (affidavit of 26 August 2008) at [20].
- [Deponent 4 – name deleted] - describes briefly the system of marriage practiced under 'Native Law' in the claim area—at [4].
- [Deponent 3 – name deleted] - talks about how knowledge of law and custom is passed down between generations in the following way:

  > 18. Our Gudang law and custom is passed down at night by sitting with the family in a circle and telling stories. ... We call it the yarning circle. That's how Dad taught us about the turtle and the stingray [seasons.]
  >
  > ...
  >
  > 22. My sisters and I only know a little bit of language because we only went back to mainland Cape York and around our sea country for traditional reasons and holidays. When we went back we always had to make sure that we met up with all our tribal family ... and they would talk about Gudang culture and say: 'make sure you don't forget this new thing, always remember this'. They would tell us to tell our children the same.

- [Deponent 3 – name deleted] - also describes the importance of group members respecting elders: '[i]f that lore of respect is broken, we will say "you lost your way, how we are?"'—at [24].

In addition to making the above points, a number of the deponents also explain how the claim group's law and custom recognises, and has in the past recognised, the ultimate authority that each of the three (3) land holding groups has over their respective parts of the claim area. For example, [Deponent 3 – name deleted] - says in relation to her group's country:

> It is local knowledge around the north of Cape York ... that this country is Gudang Yadhaykenu ... country. This is our country from our father and our father's fathers, and from the people before. If someone is going to try and take something from country without asking, naturally people that own that country are going to burr up—at [9].

In his affidavit of 21 August 2008, [Applicant 3 - name deleted] - also speaks about how the claim group has continued to respect the authority of its constituent groups over their country, despite the relocation of some group members:

> All the people from around the tip come together. They all come together at Cowal Creek, but we call it Injinoo. Gudang country is in different places to the other mobs that make up the Injinoo people. ... Injinoo was just where the government put everyone together, I think before the war. ... I grew up with these people and we know each others' ways. We know how to be together in that place and still respect each others' country. This has been passed down from generation to generation. If those Injinoo people that are not Gudang go out to the east of the tip or out to those islands, right out the reef, they got to ask the Gudang elder or Yadhayk[e]nu elder if they could come on the country. Gudang and Yadhayk[e]nu are one mob of people—at [26].

Consideration of the material supporting the s. 190B(5)(b) assertion

The ethnographic material cited in the applicant's submission identifies the claim group's predecessors in the 1930s (and claim group members who were living at that time) as forming a community which recognised a single normative system of law and custom, despite being

divided into three (3) distinct land holding groups. The dates of the other ethnographic works referred to in the submission would seem to indicate further that this same normative society was in existence in the late-1800s. This is reinforced, in my view, by the affidavit material, in which deponents born in the 1950s describe how knowledge of tribal boundaries and authority in the claim area has been passed down from previous generations. Given that significant European settlement did not arrive in the claim area until some time into the first half of the 1900s, I infer that the normative society had existed since before the Crown asserted sovereignty.

In relation to the continued existence of the normative society and its laws and customs, I note that the material before me discusses specific elements of the law and custom that governs the way in which the constituent parts of the claim group relate to each other, and each other's country, and to their own sections of the claim area. The affidavits then also contain a significant amount of material which describes the practice of claim group members and their predecessors passing down knowledge of law and custom between generations. In addition, the similarity between some of the laws and customs reported in early ethnographic records, and those which the deponents discuss in their affidavits, further suggests that the claim group and their predecessors have continued to recognise the same body of law and custom. In my view, this kind of information invites the inference that the claim group continue to recognise the same normative system as their predecessors, and that the related laws and customs recognise their rights and interests in the claim area.

I note that, apart from [Deponent 1 – name deleted] -, the deponents of the additional affidavits focus on their experience as Gudang Yadhaykenu people. As I mentioned in my assessment at s. 190B(5)(a), I believe that it is reasonable to infer that those deponents provide examples of the experiences of the claim group as a whole. This, in my view, is justified particularly in light of:

- the material in the applicant's submission, which relates to the Atambaya and the Angkamuthi Seven River groups; and
- [Anthropologist – name deleted] - comments that, under the law and custom of the claim group, each land holding group continues to have the authority to speak for their own part of the claim area (see my assessment at s. 190B(5)(a), above).

For these reasons, I am **satisfied** that there is a sufficient factual basis to support the assertion described in 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).

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

In undertaking my assessment of paragraph (b), I reached the conclusion that the information provided invites the inference that knowledge of the laws and customs governing rights in the

claim area's land and waters has been passed down through the generations to the claim group. Moreover, I formed the view that the applicant's factual basis material supports the assertion that those laws and customs continue to be acknowledged and observed. Examples of the material on which I formed that view are outlined above.

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

Combined result for s. 190B(5)

For the reasons given above, I am **satisfied** that the condition of s. 190B(5) is met.

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.

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

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

The native title rights and interests claimed

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

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

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

[93]. Having done so, my view is that the rights and interests claimed are, prima facie, in relation to the land and waters of the claim area.

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

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

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

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

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

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

In my view, the material provided establishes, prima facie, that the claim group has a right to control access to, and to speak for, the land and waters of the claim area under their traditional law and custom. As noted above, [Anthropologist – name deleted] - states in his affidavit that '[o]ne of the salient features of the laws and customs of the region is that each group speak only for their own country and not that of other groups'—at [69]. That same feature of law and custom is then also discussed in a number of the affidavits affirmed by claim group members.

As discussed in relation to s. 190B(5)(b), [Deponent 3 – name deleted] - and [Applicant 3 - name deleted] - describe how the right of the land holding groups to speak for their country and to

control its use has been handed down through the generations. By way of further example, I note that the affidavit of [Applicant 1 - name deleted] - also includes the following passage. While it refers to 'sea country', I infer from the information contained in the applicant's submission, and in the other affidavits before me (including [Anthropologist – name deleted] -'s), that the comments are equally applicable to the land covered by the application area:

> 11. If someone would tell me to go away on [Yadhaykenu] sea country I would tell them, 'no this is my country, you go away'. Blackfella or whitefella. Sometime we make a joke. If another person from one of our neighbouring clans is on my country from this area, I say 'you gotta give me a permit'. It is a joke, but when I go on that person's country, he would say the same to me. It is part of the permission that we still give each other in the proper way.
>
> 12. If other blackfellas see tourists on our country, they will come and tell me, and if I see tourists on their country, I will go and tell them. Tourists come and get permission from me before coming onto our country.

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

Outcome: established, prima facie.

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

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

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

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

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

The applicant's submission describes, in a general way but with reference to sources from 1910 and the 1930s, ancestors of the claim group 'travers[ing] the claim area'; hunting and fishing; and using and trading the natural resources of the claim area. This is supported by the additional affidavits, which include a number of references to deponents learning how to hunt and fish in the claim area, and to gathering resources such as tree bark and Sugarbag. For example, [Applicant 2 - name deleted] - says in his affidavit of 26 August 2008:

> 5. When I was growing up I spent a lot of time on the beach and out at sea with Old [Ancestor 4 – name deleted] -, [Ancestor 5 – name deleted] -, [Ancestor 6 – name deleted] -. I used to stay with them sometimes. ...
>
> 6. We used to go camping from Injinoo to places right all the way round near to Somerset, along the coast, with the old people to look for tucker, like Sugarbag and Porcupine. We also got the Mangrove Worm, from the mangroves, as well as crab, and fish, and other things from the river. My old grandmother ... taught me how to find these things.
>
> 7. My brother ... is also Gudang and has eight children. I teach them where to go on Gudang country to hunt and tell them not to go to [sacred] places where they are not supposed to be.

I also note that [Deponent 2 – name deleted] - describes how, traditionally, the Gudang Yadhaykenu would use stringybark tree (or messmate) to build canoes and the roofs of houses, and how the branch of a paw paw tree is still used to clean boats—at [27] and [32].

In addition, a number of the deponents discuss a long standing practice of trading these resources with neighbouring groups. [Deponent 4 – name deleted] -, for example, talks about how the old people would sometimes allow non-group members to use or take resources from Gudang Yadhaykenu country in exchange for other goods—at [13]. In his affidavit of 21 August 2008, [Applicant 3 - name deleted] - also says:

> I was taught that Kaurareg traded things with Gudang. There is a photo showing this from when they opened the old village in Injinoo and old [Ancestor 7 – name deleted] - —a Gudang man—is standing there with a couple of Kaurareg people behind him with their dancing gear on their head. The Kaurareg people gave [Ancestor 7 – name deleted] - the warup (drum) on that day—at [11].

In light of the other information before me (such as the affidavit of [Deponent 4 – name deleted] - and the more general statements in the applicant's submission), I infer that the activity referred to by [Applicant 3 - name deleted] - involved the trade of resources from the claim area.

In my view, information of the kind set out above invites an inference that, under their traditional law and custom, the claim group has the right to be on and move about the claim area, and to hunt, fish, gather and trade the natural resources found on the claim area's land and in its waters.

Outcome: established, prima facie.

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

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

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

The applicant's submission contains reasonably general statements (although supported by reference to ethnographic works from 1897 to 2001) which assert that the claim group and their predecessors have exercised, and continue to exercise, their right to reside and camp on the claim area, and to light fires for domestic purposes. These rights, in addition to the right to erect structures and to use the water of the claim area, are further supported by the additional affidavits.

Some deponents talk about specific camps that they and their predecessors have established in certain parts of the claim area—for example, affidavit of [Applicant 2 - name deleted] - (affirmed

26 August 2008) at [22]; [Deponent 2 – name deleted] - at [10]. [Deponent 4 – name deleted] - also specifically refers to the old people's humpies and, as noted above, [Deponent 2 – name deleted] - describes how traditionally the claim group's predecessors used trees from the claim area to build dwellings—affidavit of [Deponent 4 – name deleted] - at [6]; [Deponent 2 – name deleted] - at [27].

In relation to the use of fire and water in the claim area, I note that [Deponent 4 – name deleted] - describes learning from the old people how to make baskets for transporting water, and also that a number of other deponents mention themselves and their predecessors using fire for the preparation of food and medicines—affidavit of [Deponent 4 – name deleted] - at [6]; [Applicant 3 - name deleted] - (affirmed 21 August 2008) at [23]; [Applicant 2 - name deleted] - (affirmed 26 August 2008) at [22].

In my view, this type of information supports the proposition that the claim group's law and custom recognises their right to conduct the activities referred to at d) to f) (including 1.a. and 2.b. of the rights claimed in relation to the Comalco ILUA area).

Outcome: established, prima facie.

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

i. cultural activities;

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

iii. ceremonies;

iv. meetings; and

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

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

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

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

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

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

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

A number of the additional affidavits refer to traditional cultural activities, such as meetings and ceremonies, being carried out on the claim area by the claim group and their predecessors. In his affidavit of 3 September 2007, for instance, [Applicant 2 - name deleted] - describes being taught how to sing and dance by the old people, saying: 'When they would sing they would break matches on the table and move them around to show us where we should go and dance'—at [4]. In my view, some of these references also suggest that other Aboriginal groups from surrounding

areas have traditionally been entitled and required to travel onto the claim area to be involved in those activities. For example, in the above quote from [Applicant 3 - name deleted] -'s affidavit, he describes members of the Kaurareg People coming to an event in Injinoo wearing their dancing gear.

With respect to the right to protect spiritually significant sites in the claim area, the applicant's submission states that the claim group:

> [Continue] to maintain and protect significant sites in accordance with law and custom. Such places include those with spiritual or cosmological significance, and birth and burial sites. Members of the claim group assert that activities that disturb the ground in the claim area require clearing by traditional owners so that disturbance is avoided.

In support of this reasonably general statement, the additional affidavits include specific references to claim group members learning about spiritually dangerous places and their obligations to protect them. [Deponent 3 – name deleted] -, for example, describes one place where people are remembered to have died and where access has since been restricted. She also notes that knowledge of the place is secret and that those who do know about it need to 'chuck talk' to the spirits when they visit (see also the statement regarding 'chuck talking' from [Deponent 2 – name deleted] -, quoted above in relation to s. 190B(5)(b))—affidavit of [Deponent 3 – name deleted] - at [27].

In my view, it is reasonable to infer from the kind of information discussed above that the traditional laws and customs of the claim group recognise the right of the group's members to conduct the activities set out at g), h), j) and k).

Outcome: established, prima facie.

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

The additional affidavits contain a number of references to deponents and their families inheriting the claimed rights and interests. For example, I note that in his affidavit of 21 August 2008 [Applicant 3 - name deleted] - says: 'I have told my children ... that them and their children can live off [Gudang Yadhaykenu] country because it belongs to us and is the country of our grand parents and big parents'—at [8]. In my view, information of this kind supports the proposition that the right to inherit and succeed to the claimed native title rights and interests exists under the claim group's law and custom.

Outcome: established, prima facie.

Subsection 190B(7)
Traditional physical connection

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

(i) the Crown in any capacity, or
(ii) a statutory authority of the Crown in any capacity, or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

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

> The focus is ... a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s. 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

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

The applicant's submission identifies [Applicant 2 - name deleted] - as a person who, it says, continues to maintain a traditional physical connection with the claim area. [Applicant 2 - name deleted] -'s affidavit from 26 August 2008 provides some further evidentiary material in this regard. I note that, in my assessment at s. 190B(7), I formed the view that, on the material before me, native title rights to camp, hunt, fish and gather the natural resources of the claim area were established, prima facie. Some of the information that I referred to in support of that finding came from the affidavit of [Applicant 2 - name deleted] -. In my opinion, the same information also shows that he has had, and likely still has, a traditional physical connection with the claim area. For completeness, I reproduce [Applicant 2 - name deleted] -'s comments again:

> 5. When I was growing up I spent a lot of time on the beach and out at sea with Old [Ancestor 4 – name deleted] -, [Ancestor 5 – name deleted] -, [Ancestor 6 – name deleted] -. I used to stay with them sometimes. ...
>
> 6. We used to go camping from Injinoo to places right all the way round near to Somerset, along the coast, with the old people to look for tucker, like Sugarbag and Porcupine. We also got the Mangrove Worm, from the mangroves, as well as crab, and fish, and other things from the river. My old grandmother ... taught me how to find these things.
>
> 7. My brother ... is also Gudang and has eight children. I teach them where to go on Gudang country to hunt and tell them not to go to [sacred] places where they are not supposed to be.

On the basis of this evidence, I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with a part of the land or waters covered by the application.

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

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

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

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

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

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

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

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

Reasons for s. 61A(2)

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

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

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

Reasons for s. 61A(3)

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

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

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

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

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

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

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

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

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

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

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

The application area does not include any offshore places. Moreover, the applicant confirms at Schedule P that the claim group does not claim exclusive possession of any such places.

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

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

Attachment B excludes any land or waters where native title has otherwise been extinguished from the application area (except for in relation to those areas to which ss. 47, 47A or 47B apply).

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Northern Cape York Group #1**
NNTT file no.	**QC11/2**
Federal Court of Australia file no.	**QUD157/2011**
Date of registration test decision	**1 March 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)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

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

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

[End of document]