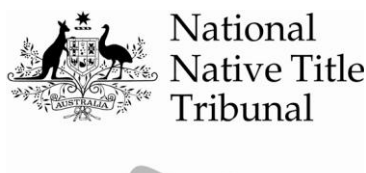

Registration test decision

Application name	Yugara/YUgarapul People
Name of applicant	Mr. Desmond Sandy, Mrs. Ruth James, Ms. Pearl Sandy
State/territory/region	Queensland
NNTT file no.	QC11/8
Federal Court of Australia file no.	QUD586/2011
Date application made	7 December 2011
Date application last amended	16 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 do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 10 May 2012

____

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

Table of contents

Introduction 4
Application overview 4
Registration test 4
Information considered when making the decision 4
Procedural fairness steps 5
Procedural and other conditions: s. 190C 6
Subsection 190C(2) Information etc. required by ss. 61 and 62 6
Native title claim group: s. 61(1) 6
Name and address for service: s. 61(3) 7
Native title claim group named/described: s. 61(4) 7
Affidavits in prescribed form: s. 62(1)(a) 7
Application contains details required by s. 62(2): s. 62(1)(b) 8
Information about the boundaries of the area: s. 62(2)(a) 8
Map of external boundaries of the area: s. 62(2)(b) 8
Searches: s. 62(2)(c) 8
Description of native title rights and interests: s. 62(2)(d) 8
Description of factual basis: s. 62(2)(e) 9
Activities: s. 62(2)(f) 10
Other applications: s. 62(2)(g) 10
Section 24MD(6B)(c) notices: s. 62(2)(ga) 10
Section 29 notices: s. 62(2)(h) 10
Subsection 190C(3) No common claimants in previous overlapping applications 10
Subsection 190C(4) Authorisation/certification 12
Merit conditions: s. 190B 20
Subsection 190B(2) Identification of area subject to native title 20
Subsection 190B(3) Identification of the native title claim group 21
Subsection 190B(4) Native title rights and interests identifiable 22
Subsection 190B(5) Factual basis for claimed native title 23
Reasons for s. 190B(5)(a) 25
Reasons for s. 190B(5)(b) 27
Reasons for s. 190B(5)(c) 30
Subsection 190B(6) Prima facie case 31
Subsection 190B(7) Traditional physical connection 31
Subsection 190B(8) No failure to comply with s. 61A 32
Reasons for s. 61A(1) 33
Reasons for s. 61A(2) 33

Reasons for s. 61A(3) 33
Subsection 190B(9) No extinguishment etc. of claimed native title 33
Reasons for s. 190B(9)(a) 34
Reasons for s. 190B(9)(b) 34
Result for s. 190B(9)(c) 34
Attachment A Summary of registration test result 35

Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to not 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 Yugara/YUgarapul People claimant application to the Native Title Registrar (the Registrar) on 21 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.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. Subsection 190A(1A) does not apply because the application has not been amended by the Court under s. 87A. Subsection 190A(6A) cannot apply because the previous version of the application was not accepted for registration under s. 190A(6).

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

The application was originally made on 7 December 2011. In a decision dated 31 January 2012, I, as the Registrar's delegate, found that the application did not meet the requirements for registration under s. 190A. Pursuant to Court orders made on 15 December 2011 and 7 February 2012, an amended version of the application was filed in the Court on 16 February 2012. This amended application is the subject of this decision.

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 s. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not 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 making this decision, I have had regard to the application and the accompanying documents. I have also had regard to the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 24 February 2012 (the geospatial report), and to the results of my own searches against the Register of Native Title Claims and the Tribunal's mapping database.

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 set out below.

The case manager with carriage of this matter wrote to the State of Queensland (the State) on 28 February 2012 advising that the Tribunal had received the amended application from the Court. The letter noted that, in the Tribunal's understanding, the State already held a copy of the amended application. It asked that the State contact the Tribunal if that understanding was incorrect. A copy of the Tribunal's application summary was enclosed with the letter.

On 5 March 2012, the case manager wrote to the State advising of my view that neither subsection 190A(1A) nor (6A) applied to the application and that it would need to be considered against the conditions of the full registration test. The letter requested that the State provided any comments it might have in this regard by 19 March 2012. As at the date of this decision, no comments or submissions have been received from the State.

Procedural and other conditions: s. 190C

Subsection 190C(2)

Information etc. required by ss. 61 and 62

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

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

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

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

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

Native title claim group: s. 61(1)

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

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

As 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 undertake any form of merit

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

I do note, however, that 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).

The application contains the details required by s. 61(1) in relation to the persons who comprise the applicant. The Form 1 sets out the names of each of the persons who jointly comprise the applicant. The affidavits sworn by each of the applicant persons contain statements to the effect that the deponents are members of the native title claim group and are jointly authorised by the other members of the claim group to make the application on their behalf.

A description of the native title claim group is found at Schedule A of the application (this is set out in full in relation to s. 190B(3), below). The description defines the claim group as comprising those persons who are descended from 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).

The applicant's address for service is provided at 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 Schedule A.

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

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

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

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

The amended application is accompanied by fresh affidavits sworn, on 15 February 2012, by each of the three persons who jointly comprise the applicant. I am satisfied that each of the affidavits contains the statements and details required by subparagraphs (i) to (v) of 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 s. 62(2)(a) to (h), as identified in the reasons below.

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

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

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

Attachment B contains a written description of the external boundaries of the application area. Schedule B identifies, through the use of general exclusion clauses, the areas within those boundaries that are not covered by the claim.

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)—see 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).

Schedule D states that the applicant has not conducted any such searches.

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 list of the native title rights and interests claimed. It consists of more than a statement to the effect that the rights and interests are all those that may exist or have not been extinguished.

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

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

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

The requirements of s. 62(2)(e) have been explained by the Full Federal Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala (Full Court)*). According to the Court:

> 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—at [92].

Schedule F contains the information intended to address the condition of s. 62(2)(e) (this is set out below, in my reasons regarding s. 190B(5)). This information is fairly general in its nature. However, it is, in my opinion, sufficient to satisfy the requirements of s. 62(2)(e). At this stage I am concerned only with whether the application contains the necessary information; I am not required to undertake any qualitative assessment of that information. That is the task at s. 190B(5)—see *Doepel* at [16] to [17].

Schedule F contains 'examples of facts' that support the assertion described at subparagraph (i) of s. 62(2)(e). These include, for instance, the identification of a particular place within the claim area, with which one of the claim group's apical ancestors is said to have been associated. In relation to subparagraphs (ii) and (iii), the information identifies, in a general way, the kinds of laws and customs observed and recognised by the claim group, and provides some information in relation to why they should be seen as having been continuously recognised since sovereignty. In my view, this kind of information offers a sufficient level of detail to enable a genuine assessment at later stages of the registration test.

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).

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

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

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

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

Schedule H contains the details of an application named *Connie Isaacs on behalf of the Turrbal People v State of Queensland* (QUD6196/98) (the Turrbal People application).

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

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

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

Schedule HA states that the applicant is not aware of any such notices.

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 one s. 29 notice, which was notified in 2001.

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 **does not satisfy** the condition of s. 190C(3).

As noted above, Schedule H identifies the Turrbal People application as one which overlaps the current Yugara/YUgarapul People claim (the current application). This overlap is confirmed both by the geospatial report of 24 February 2012 (referred to above in the introduction to these reasons) and by my own overlap analysis conducted using the Tribunal's mapping database. The extract for the Turrbal People application on the Register of Native Title Claims (the Register) shows that it has been on the Register since 13 May 1998. A registration test decision dated 15 January 2009 shows that the most recently amended version of the application was accepted for registration, by a delegate of the Registrar, pursuant to s. 190A.

The above information shows that the Turrbal People application:

- overlaps the current application;
- was on the Register when the current application was made; and
- was accepted for registration pursuant to s. 190A.

Paragraphs (a) to (c) of s. 190C(3) therefore apply to the Turrbal People application. As a result, I must, under s. 190C(3), be satisfied that the claim group for the current application does not share any members with the claim group for the previous Turrbal People application.

The claim group description set out in the Register extract for the Turrbal People application states that the group is 'comprised of [Person 1 – Name Deleted] and her biological descendants, being the only known descendants of the Turrbal man known as the "Duke of York"'. The claim group description found at Schedule A of the current application defines the claim group as including the descendants of an apical ancestor also named the 'Duke of York'. Given the geographical proximity of the two claims, this, in itself, indicates, in my opinion, that the two claims are likely to share a common ancestor and, therefore, to have members in common.

This is confirmed by Schedule O of the current application, which contains the following statement:

> This application and the application known as Connie Isaacs on behalf of the Turrbal People v State of Queensland (QUD6196 of 1998) both contain the apical ancestor known as the 'Duke of York'. Those members of the Native Title Claim Group descended from 'Duke of York' are therefore also members of the Turrbal People as described in QUD6196 of 1998.

In light of this information, I cannot, in my view, be satisfied that the two claim groups do not have members in common.

The application does not meet 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.

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

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

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

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

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

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

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

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

Because the application has not been certified, I must be satisfied both that the application contains the information required by s. 190C(5) and that the application complies with the condition of s. 190C(4)(b). I note that an application which passes the threshold test in s. 190C(5) will not necessarily meet the requirements of s. 190C(4)(b). This is because, under s. 190C(4)(b), the available material must satisfy me that the applicant is, in fact, authorised in accordance with one of the processes described in s. 251B—see *Doepel* at [78]; *Evans v Native Title Registrar* [2004] FCA 1070 at [53].

Does the application contain the information required by s. 190C(5)?

Under s. 190C(5), the application must:

- include a statement to the effect that the requirements of s. 190C(4)(b) have been met; and
- briefly set out the grounds on which the Registrar or her delegate should consider that that is, in fact, the case.

Schedule R refers to the affidavits of the persons comprising the applicant for the statement required by the first condition. In their respective affidavits, each of the applicant persons states that they are a member of the claim group and that they are 'authorised by the persons in the native title claim group to make the Application and to deal with matters arising in relation to it'—at [1] to [2]. I am satisfied this meets the first requirement of s. 190C(5).

In relation to the second requirement of s. 190C(5), Schedule R refers to the information contained in Attachment R. This information is discussed in some detail below. At this point, I note simply that I am satisfied that it briefly sets out the grounds on which the Registrar or her delegate should consider that the applicant is authorised in accordance with s. 190C(4)(b).

The application contains the information required by s. 190C(5).

Does the application satisfy the condition of s. 190C(4)(b)?

Section 190C(4)(b) has two requirements. The first is that the persons comprising the applicant must be members of the native title claim group. The second is that the Registrar or her delegate must be satisfied that those persons are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it.

In each of their affidavits, the persons comprising the applicant depose that they are members of the native title claim group and identify the ancestors through which they claim membership—at [1]. There is no information before me which might suggest that those statements are untrue or incorrect. I am, therefore, satisfied that the persons who comprise the applicant are each members of the claim group.

I set out my reasons in relation to the second limb of s. 190C(4)(b) below.

The applicant's authorisation material

Notification of the authorisation meeting held on 23 October 2011

Attachment R and the applicant persons' affidavits contain essentially the same information with regard to the process used to authorise the applicant. They identify a claim group meeting held on 23 October 2011 in Inala, a suburb of Brisbane just outside the claim area's southern boundary, as the meeting which authorised the applicant. According to the applicant's material, '[t]he process of notification and advertisement of the Authorisation Meeting ... [was conducted] over a period of several months'—Attachment R at [2]/applicant affidavits at [7]. This notification process, I note, involved the advertisement of other claim group meetings held in the lead up to the authorisation meeting ultimately conducted on 23 October 2011.

Specifically, the authorisation meeting was preceded by claim group meetings held in Inala on 11 September 2011, 1 October 2011 and 15 October 2011. These meetings were advertised by

notices published in advance in the *Courier Mail* and *Beaudesert Times*, and on the *Koori Mail* website. The notices indicated that the meetings related to the planned authorisation of applicants for native title claims to be brought by the Yugara/YUgarapul and Yugambeh peoples. Generally, the notices used to advertise the meetings held on 1 and 15 October 2011 identified the apical ancestors of those groups, or referred readers to where that information was available. It was also, I note, clear from the advertisement published on the *Koori Mail* website for the 15 October 2011 meeting that two separate claims (over different areas) were, by that time, being proposed: one to be brought by the Yugara/YUgarapul people alone and another to be brought by the Yugara/YUgarapul and Yugambeh peoples together.

The authorisation meeting eventually held on 23 October 2011 was notified by way of public notice published on the *Koori Mail* website from 17 October 2011 until the day of the meeting. The notice was headed 'Yugara/YUgarapul & Yugambeh Peoples: Native Title Authorisation Meetings'. Like the notice for the 15 October 2011 meeting, it stated that the meeting was concerned with the authorisation of two claims: the current Yugara/YUgarapul People claim and another claim to be brought by the Yugara/YUgarapul together with Yugambeh people. The apical ancestors used to describe the two claim groups were listed separately for each of the proposed applications. The ancestors listed in relation to the Yugara/YUgarapul People claim (the amended application before me) were as follows:

> Bilin/Bilinha/King Jackey Jackey/Kawae-Kawae (and 3 wives Nellie, Mary and Sarah; brother in law Minnippi Rawlins); Gariballie/Kerwalli/King Sandy; Alexander/John Bungaree/King Sandy and Paimba/Mary Ann Mitchell; William Mitchell; Lizzie Sandy/Brown; Kitty (Yelganun); Dakiyakka/Duke of York & daughter Kitty

There are two differences between this list of apical ancestors and that provided at Schedule A of the application. The first is that it includes the name 'Kitty (Yelganun)', which does not feature in the application's claim group description. The second is that it does not include the name 'Naewin/Sarah', which is listed in the claim group description at Schedule A.

Process followed at the authorisation meeting

A copy of the meeting attendance sheet, and of the meeting's agenda and minutes, are attached to the application. The attendance sheet records that 29 people attended the meeting and that a further individual entered a proxy vote. The attendees can be divided into three groups:

- Nineteen of the attendees are identified as being descended from at least one of the ancestors who have been used to describe the Yugara/YUgarapul claim group.
- Six of the attendees (including the person who entered the proxy vote) are said to be associated only with ancestors who were identified in the meeting notice as being the ancestors for the Yugara/YUgarapul and Yugambeh Peoples claim. I assume that these persons are Yugambeh people.
- Four individuals who attended the meeting are described as 'visitors'. I take this to mean that they are not members of either the Yugara/YUgarapul People or Yugara/YUgarapul and Yugambeh Peoples claim groups.

The meeting minutes record that a resolution was passed in relation to 'Decision Making for the Native Title Authorisation meeting'. This is said to have involved the reading out of the terms of

a laminated card headed 'Decision Making', which had been placed on the 'registration desk' for people to read as they entered the meeting. A copy of this document has been provided along with the minutes. It contains the following:

> The persons present at this meeting:
>
> (a) Accept that those in attendance rightfully assert right[s] and interests in the area of the map distributed at this meeting and marked **Yugara/YUgarapul and Yugambeh Peoples** [emphasis in original], being an area substantially corresponding to the external boundaries of the Yugara/YUgarapul and Yugambeh Peoples and have a right to participate in the decision making processes of this meeting;
>
> (b) Confirm there is no particular process of decision making that, under their traditional laws and customs, must be complied with in relation to matters pertaining to the authorising of any proposed native title claim;
>
> (c) Acknowledge that the process of decision making they have agreed to and adopted in relation to decisions pertaining to the authorising of a proposed claim is by **majority decision of family clan groups present by show of hands from families descendants under their apical ancestors within the claimant group** [emphasis in original]; and
>
> (d) Confirm that spouses and visitors are welcome to observe this meeting but not allowed to speak or participate in the decision-making.

In relation to the Yugara/YUgarapul People claim, the minutes record that it was unanimously resolved to:

- follow the decision-making process outlined above; and
- authorise Mr. Desmond Sandy, Mrs. Ruth James and Ms. Pearl Sandy as the persons jointly comprising the applicant for a claim brought:
  - on behalf of the claim group as described at Schedule A of the application;
  - over the current application area; and
  - under the name 'Yugara/YUgarapul People'.

Consideration of the applicant's authorisation material

What it means to be 'authorised' for the purposes of s. 190C(4)(b) is set out in s. 251B. Section 251B allows claim groups to authorise an applicant by using one of two types of decision-making process. The first form of decision-making process is one that is sourced in the claim group's traditional law and custom. This kind of process must be used if, under that law and custom, it is the mandated process for making decisions such as authorising an applicant to make a native title claim—s. 251B(a). The second kind of process is available only where there is no traditionally mandated method. Under s. 251B(b), this process must be one in which:

> ... the persons in the native title claim group ... authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making *agreed to and adopted* ... by the persons in the native title claim group ... in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind. (Emphasis added.)

According to both Attachment R and the minutes of the meeting, the attendees at the authorisation meeting confirmed, unanimously, that there was no traditionally mandated decision-making process under the law and custom of the Yugara/YUgarapul people. The material also states that the process used was one agreed to and adopted by the attendees. I have, therefore, assessed the applicant's authorisation material against the requirements of s. 251B(b).

In relation to the situation where an applicant is said to have been authorised by way of an agreed to and adopted decision-making process, Stone J has held that the word 'all' in s. 190C(4)(b) must be given 'a more limited meaning than it might otherwise have'. What is required, according to her Honour, is not that literally all the members of the native title claim group have authorised the applicant, but that 'a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process'—*Lawson v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) at [25]. Where an applicant is said to have been authorised at a meeting of claim group members, the process used to notify that meeting is, therefore, of fundamental importance.

The notification process undertaken is also significant in considering whether I, as the Registrar's delegate, can be satisfied that the decision to authorise the applicant was made by the claim group on whose behalf the application is brought. In this respect, I refer to French J's (as his Honour then was) decision in *Bolton v Western Australia* [2004] FCA 760 (*Bolton*). Although this case related to the replacement of applicants pursuant to s. 66B, it nonetheless sheds light on the requirements of s. 251B(b), which are equally relevant to both s. 66B and s. 190C(4)(b). In *Bolton*, French J found that the evidence was insufficient to show that decisions to authorise the replacement of the existing applicants for a series of claims were made solely by the relevant claim group members. This was for two reasons. The first was that the public notice used to advertise the series of authorisation meetings did not define the relevant claim groups except by reference to the generic titles of the claimant applications. The second was that there was no evidence which demonstrated the claim group membership of those who attended the meetings—*Bolton* at [45].

When I applied the registration test to the current application prior to its amendment, I understood from the applicant's information that the authorisation meeting of 23 October 2011 had been advertised in the *Courier Mail*, another 'local paper' (which I now understand was a reference to the *Beaudesert Times*) and on the *Koori Mail* website for the month leading up to the meeting. On that basis, I was satisfied that the claim group's members had been given a reasonable opportunity to see the notice. However, because of the inconsistencies between the claim group description in the advertisement and the one used in the application, I ultimately found that, on the information before me, I could not be satisfied:

- that claim group members descended from the ancestor Naewin/Sarah (whose name was included in the claim group description at Schedule A but excluded from the meeting notice) were given a reasonable opportunity to attend the meeting; or
- that, because of the unexplained inclusion of the name 'Kitty (Yelganun)' in the meeting notice, the persons who participated in the decision-making process were all members of the native title claim group—see registration test decision dated 31 January 2012 at 17 to 18.

The information now provided on the applicant's behalf is different from that previously before me in three respects:

- it shows that the authorisation meeting held on 23 October 2011 was advertised only on the *Koori Mail* website, and only for a period of six days prior to the meeting being held;
- the applicant's representative has submitted the record of attendance at the meeting, which shows that each of the 19 members of the Yugara/YUgarapul people who attended are descended from ancestors listed in the claim group description used in the application (none of the attendees identified themselves as a descendant of Kitty (Yelganun)); and
- the notices published on the *Koori Mail* website for the purposes of advertising previous claim group meetings did include the name of the apical ancestor Naewin/Sarah.

In my view, the record of attendance at the authorisation meeting alleviates my previous concern in relation to whether or not descendants of the ancestor Kitty (Yelganun) participated in the decision-making process. The question then is whether the notification process leading up to the authorisation meeting gave claim group members, including any who might associate themselves only with the ancestor Naewin/Sarah, a reasonable opportunity to attend the meeting.

Having considered the information before me, I have formed the view that I am satisfied that the members of the native title claim group were given a reasonable opportunity to attend the authorisation meeting held on 23 October 2011. Although the meeting itself was only advertised for a limited period, and only on the *Koori Mail* website, the applicant's material gives the impression that it was preceded by a reasonably extensive period of consultation with claim group members. These meetings, and the process used to advertise them, would, in my opinion, have been sufficient to put members of the Yugara/YUgarapul community on notice that meetings regarding a proposed claim, and the authorisation of an applicant, were being organised, and that details could be found on the *Koori Mail* website. In my view, this inference is supported by the fact that the number of people who attended the eventual authorisation meeting was similar to the numbers who attended the meeting held on 11 September 2011 and who voted on resolutions at the 15 October 2011 meeting.

I have also formed the view that the process leading up to the authorisation meeting would have overcome any issues created by the absence of the name 'Naewin/Sarah' in the list of apical ancestors contained in the notice for that meeting. The notices used to advertise the meeting held on 11 September 2011 referred simply to the 'Yugara, Yugambeh & YUgarapul People', without any further definition. This, in my opinion, would have indicated that all people identifying themselves as Yugara/YUgarapul or Yugambeh were invited. The name 'Naewin/Sarah' was then included in the claim group definition used in the *Koori Mail* notice for the meeting held on 15 October 2011. It also appears that the name was included in the notice used to publicise the 1 October 2011 meeting (although the crucial part of the copy provided by the applicant is obscured). These two notices were published on the *Koori Mail* website for periods of 13 and 23 days, respectively. The advertisement for the 1 October 2011 meeting that was published in the *Courier Mail* on 14 September 2011 also referred readers to the *Koori Mail* website for the list of apical ancestors.

Any claim group members who might associate with the group only through their link to Naewin/Sarah would have had a reasonable opportunity to see these earlier notices, which

seemed to identify them as members of the proposed Yugara/YUgarapul claim group. In this context, the absence of the name 'Naewin/Sarah' in the advertisement for the authorisation meeting would, in my opinion, have appeared simply as an oversight. The notice also contained the contact details of two of the individuals who now comprise the applicant who, I assume, could have confirmed this. That the absence of Naewin/Sarah's name is unlikely to have had any significant impact on the efficacy of the notice would seem to be reinforced by the attendance figures referred to above.

As to the process conducted at the authorisation meeting, the information provided by the applicant is sufficient to satisfy me:

- that the members of the claim group present at the meeting agreed unanimously to adopt a decision-making process whereby they would authorise an applicant by majority vote on show of hands of the family clan groups present;
- that using that process, each of the family clan group members present at the meeting unanimously authorised the applicant to make the current application, and to deal with matters arising in relation to it; and
- that those members of the Yugambeh people who were present at the meeting participated only in decisions regarding the proposed Yugara/YUgarapul and Yugambeh Peoples claim.

I note that there appears, potentially at least, to be some ambiguity on the information before me in relation to this last matter. For instance, the terms of the resolution to adopt the decision-making process used at the meeting did not make clear that the Yugara/YUgarapul People and the Yugara/YUgarapul and Yugambeh Peoples claim groups would need to authorise separately the applicants for their respective claims. Also, the meeting minutes do not explicitly address whether the voting on the authorisation of the applicant for the application currently before me was limited only to members of the Yugara/YUgarapul People claim group.

On the other hand, however, the meeting's agenda clearly stated that the meeting was intended to authorise two different applicants: one for the Yugara/YUgarapul People claim and another for a claim brought on behalf of the Yugara/YUgarapul and Yugambeh Peoples together. The notice used to advertise the meeting also showed clearly that the claim groups for those two applications were distinct (though overlapping) collections of people. Given this, and in the absence of any information to the contrary, it is, in my view, reasonable to infer that only members of the Yugara/YUgarapul People claim group voted on the resolution to appoint the applicant for that claim.

In addition to this point, I note that the information before me does not identify what proportion of the Yugara/YUgarapul People claim group attended the authorisation meeting. In this regard, I refer again to Stone J's decision in *Lawson*. There, her Honour was presented with evidence which, although indicating that the authorisation meeting had been well-attended, did not give a sense of the proportion of the claim group who were present. In finding that her Honour was nonetheless satisfied that the applicant was properly authorised, Stone J said:

> In an ideal situation one might wish for more ... information on what proportion of the membership actually attended the meeting. I do not think, however, that the Act requires decisions of native title claim groups to be scrutinised in an overly technical or pedantic way. Unless a

> practical approach is adopted to such questions the ability of indigenous groups to pursue their entitlements under the Act will be severely compromised—at [28].

For the reasons given above, I am satisfied that the members of the Yugara/YUgarapul claim group were given a reasonable opportunity to attend the authorisation meeting. That the meeting had a similar level of attendance to the preceding claim group meetings also indicates, in my view, that the authorisation meeting was relatively well-attended. Moreover, I do not have any information before me which suggests that those who attended the meeting were, in some way, insufficiently representative of the wider claim group. Bearing in mind that I should not take an overly technical or pedantic approach to these matters, it is, in my view, reasonable to conclude that the claim group was adequately represented at the meeting.

For these reasons, I am satisfied that the applicant is authorised in the sense described by s. 251B(b).

Conclusion regarding s. 190C(4)(b)

For the reasons set out above, the application meets the requirements of s. 190C(4)(b).

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).

Attachment B is titled 'Yugara/YUgarapul People – External Boundary Description' and contains a metes and bounds description of the application area. The description was prepared by the Tribunal's Geospatial Services on 19 October 2011 and references the high water mark, topographic features, water catchments, lot on plan descriptions and coordinated points (referencing the Geocentric Datum of Australia 1994 shown to six decimal places). The description excludes from the application area any land or waters subject to the Jagera People 2 native title determination application (QUD6014/03; QC03/15). A list of general exclusions is also set out at Schedule B.

Attachment C contains a colour map of the claim area, which is titled 'Yugara/YUgarapul People'. The map was prepared by the Tribunal's Geospatial Services on 19 October 2011 and includes:

- the application area depicted by a bold outline;
- Turrbal People native title determination application (QUD6196/98; QC98/26) shown and labelled;
- Jagera People 2 native title determination application (QUD6014/03; QC03/15) shown and labelled;
- 1:250k topographic background;
- scalebar, northpoint, coordinate grid and location diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

The geospatial report concludes that '[t]he description and map are consistent and identify the application area with reasonable certainty'. I have compared the written description with the map at Attachment C and am satisfied that they are reasonably consistent. I am also satisfied that they identify the location of the external boundaries of the claim area on the earth's surface with a reasonable degree of certainty.

In addition, I am satisfied that the general exclusions listed at Schedule B identify with a sufficient level of certainty those areas that fall within the external boundaries of the claim area, but which are not covered by the application. The effect of these exclusions is principally to exclude from the claim area any parts where native title has been extinguished. This is done with explicit and implicit reference to the provisions of the Act.

These kinds of general exclusions were discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686. Nicholson J held that s. 62(2)(a) (and the corresponding merit condition at s. 190B(2)) must be 'applied to the state of knowledge of an applicant as it could be expected to be at the time the application ... is made'. At this stage, his Honour observed, it may well be appropriate to use a 'class or formula approach' if, for example, the applicant had no tenure information—at [32]. The statements at Schedules D and L of the Form 1 indicate that the applicant does not hold any details regarding the tenure in the claim area. In the absence of that information, the applicant has appropriately used formulaic exclusions of the kind contemplated by Nicholson J.

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

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

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

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

The claim group is described at Schedule A of the application as follows:

> Descendants of apical ancestors:
>
> - Bilin/Bilinha/King Jackey Jackey/Kawae-Kawae (and 3 wives Nellie, Mary and Sarah; brother-in-law Minnippi Rawlins);
> - Gariballie/Kerwalli/King Sandy and Naewin/Sarah;
> - Alexander/John Bungaree/King Sandy and Paimba/Mary Ann Mitchell;
> - William Mitchell; Lizzie Sandy/Brown[; and]
> - Dakiyakka/Duke of York and daughter Kitty[.]

When I applied the registration test to the application prior to its amendment, I found that the claim group description met the requirements of s. 190B(3)(b). As the description has not been amended since my decision of 31 January 2012, I adopt, for current purposes, my previous reasons. These are set out below.

The focus of s. 190B(3) is 'not upon the correctness of the [claim group] description', but upon 'whether the application enables reliable identification of the persons in the native title claim group'—*Doepel* at [37] and [51]. To enable the reliable identification of persons in the group, a description must, according to Carr J, contain 'a set of rules or principles' that define the claim group membership—*Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 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 requiring a difficult 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 at Schedule A is that the claim group includes all persons who are descended from any of the named ancestors. Although it may require an extensive factual inquiry to determine whether a person is descended from one of the apical ancestors, the description provides a clear and objective basis on which to determine whether a person is a member of the claim group. The claim group description is, in my view, a sufficiently clear description for the purposes of s. 190B(3).

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).

Attachment E sets out the native title rights and interests claimed in the following terms:

> The native title rights and interests which the applicant claims in relation to the application area are the following:
>
> 1. The right to exclusive possession, occupation and use of the land;
> 2. The right to live on the land;
> 3. The right to access land and waters in the claim area;
> 4. The right to maintain and protect sites of significance to the native title holders;
> 5. The right to conduct social, religious and cultural activities within the claim area;
> 6. The right to harvest, fish, cultivate, grow and manage plants, timber, animals, birds and fish located within the claim area;
> 7. The right to exchange plants, timber, animals, birds and fish located within the claim area with third parties for other things;
> 8. The right to make things from plants, timber and animals located within the claim area;
> 9. The right to exchange things made from plants, timber and animals located within the claim area with third parties for other things;
> 10. The right to make decisions about and to control the access to, and the use and enjoyment of, the land and waters of the claim area and the plants, timber, animals[,] birds and fish within the claim area;
> 11. The right to control access and use between the native title holders and any other Aboriginal people who recognise themselves as being governed by the traditional laws and customs acknowledged and observed by the native title holders and who seek access to, or use of, the land in the claim area in accordance with traditional law and custom;
> 12. The right to teach and pass on knowledge of the claimant group's traditional laws and customs pertaining to the area and knowledge of the places in the area;
> 13. The right to learn about and acquire knowledge concerning, the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area.

> The claimant group only claims the rights listed [in] (10) and (11) above and the right of exclusive possession, occupation, use and enjoyment in relation to:
>
> a. any areas where there has been no previous extinguishment of native title;
>
> b. any area of natural water resources and the solid land beneath the water where the water [is] found no[t] to be tidal[;]
>
> c. any areas affected by category C and D past and intermediate period acts;
>
> d. s. 47A Reserves covered by claimant applications; and/or
>
> e. s. 47B Vacant Crown Land covered by claimant applications.

As with the claim group description, this description of the rights and interests claimed has not been amended since I applied the registration test to the claim on 31 January 2012. For the purposes of this decision, I therefore adopt my previous reasons in relation to the task at s. 190B(4). These are set out below.

Doepel is authority for the proposition that, 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'—at [99]. This does not, in my view, necessarily involve consideration of whether the rights and interests claimed are native title rights and interests as defined in s. 223(1). In my opinion, that assessment is part of considering whether the native title rights and interests claimed can be established, prima facie, and is therefore a matter for consideration under s. 190B(6).

In my view, the rights and interests claimed are readily identifiable because they are described in a way that is understandable and has meaning. The application, therefore, satisfies the condition of s. 190B(4).

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

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

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not 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. My reasons regarding each of the three paragraphs are set out in turn below, following an outline of the nature of 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 (Full Court)* 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 Court in *Gudjala (Full Court)*. 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].

As already set out earlier in these reasons, the Court then described 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. However, I also note that, although the wording of s. 62(2)(e) informs the standard set by s. 190B(5), an application which satisfies the condition of s. 62(2)(e) may not pass at s. 190B(5) unless the material required by s. 62(2)(e) is furnished 'fully and comprehensively'—*Gudjala (Full Court)* 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 am aware that the Full Court in *Gudjala (Full Court)* 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*. My view, therefore, is that it is appropriate to have regard to Dowsett J's analysis of the requirements of s. 190B(5).

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

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

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

Schedule F contains the information which is intended to address the requirements of s. 190B(5). In relation to the assertion described in s. 190B(5)(a), Schedule F contains the following:

> Some examples of the facts that support the assertion that native title exists in the claim are as follows:
>
> (a) The native title claim group has, and the predecessors of those persons had, an association with the area.
>
> - Many members of the native title claim group have lived in and around the area the subject of the claim for parts or all of their lives.
> - Similarly, precursor members of the current native title claim group have lived on and around the area the subject of the claim. Members of the current native title claim group have reported that they have personal knowledge of their immediate ancestors (i.e. parents and grandparents) living on and around the claim area.
> - The named apical ancestors are known to have associations with areas in and around the claim area. For example, the named apical ancestor Bilin (also known as Jackey Jackey and Kawae Kawae) had a particular association with the area around Bulimba Creek. This creek forms part of the claim area.
> - The region in and around the claim area was first subject to widespread colonisation from approximately 1842 onwards. The apical ancestors are known to have had an association with areas on and around the claim area prior to and after this time. For example, the lifespan of the apical ancestor Bilin has been estimated to be between c. 1820 – c. 1901.
> - In his 1974 paper, 'Aboriginal Tribes of Australia', [Person 2 – Name Deleted] described the location of the group he called 'Jagara' as follows:

> 'Brisbane River from the Clevaland district inland to the Dividing Range about Gatton; north to near Esk; at Ipswich. Their language was Turubul. A term Jerongban refers to part of their country, i.e. the sandy areas between Ipswich and Brisbane. Several hordes ...' (Page 169)
>
> ['Jagara' and 'Jagarabal' are then identified as alternative names given by [Person 2 – Name Deleted] for the Yugara or 'Yackarabul' people.]

Although primarily directed at addressing the assertion described by paragraph (c) of s. 190B(5), the following passage in Schedule F is also relevant to the association of the claim group with the application area:

> (c) The native title claim group has continued to hold the native title in accordance with [the] traditional laws and customs [described in Schedule F].
>
> Many members of the native title claim group have lived in and around the areas the subject of the claim for their entire lives. At various times throughout their lives members of the claim group have engaged in the following activities in and around the claim area, in accordance with the traditional laws and customs of the Yugara / Y[U]garapul people:
>
> - Camping and living a traditional way of life;
> - Fishing;
> - Hunting;
> - Gathering traditional resources from the claim area;
> - Teaching subsequent generations of Yugara / Y[U]garapul people about:
>   ...
>   - Significant sites within and surrounding the claim area.
>
> [Similar information is also provided at Schedule G.]

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

With respect to s. 190B(5)(a), 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 claim 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 note that, in considering whether the asserted factual basis sufficiently demonstrates this 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 at [26].

The information provided at Schedule F does not contain any geographical details in relation to the association that the claim group is said to currently have with the application area. As a result, there is not, in my view, a sufficient basis from which I could infer that the claim group has an association with the claim area described in the application. In this sense, the applicant's material lacks a crucial element of the detail needed to satisfy the first limb of the s. 190B(5)(a) assertion.

In a similar vein, Schedule F states simply that 'many members' of the claim group have, at some point in their lives, lived in and around the application area or conducted the activities listed above. In my view, this kind of statement gives no real sense of the proportion of the claim group who might be associated with the claim area. It therefore lacks the level of specificity needed to support an inference that the claim group *as a whole* currently has an association with the application area. By failing to provide that level of detail, the information, in my view, does not rise far above a restatement of the first limb of the claim described by s. 190B(5)(a). Dowsett J confirmed in *Gudjala 2009* that this kind of information would be insufficient to meet the requirements of s. 190B(5)—see [29].

The applicant's material does contain some more specific details in relation to the past association of claim group members and their predecessors with the application area. In particular, it states that the apical ancestor Bilin was associated with Bulimba Creek, and that he lived between c. 1820 and c. 1901. [Person 2 – Name Deleted]'s 1974 paper is also cited to the effect that, in his expert view, the Yugara/YUgarapul people were located in a region that includes the claim area. This, however, is the extent of the information which both pertains to the second limb of the assertion described in s. 190B(5)(a) and has any degree of specificity.

Information that is sufficient to support the proposition that a claim group's predecessors were associated with the application area at the time of European settlement in the region will, usually, invite an inference that the association had been maintained since sovereignty—see *Gudjala 2009* at [30]. In my view, however, the material before me is too limited to support an inference that the claim group and their predecessors have maintained an association with the application area since even the date of European settlement identified in Schedule F, namely c. 1842. There is, for instance, no information regarding any associations that the other twelve apical ancestors identified in the application may have had with the claim area. The statement cited from [Person 2 – Name Deleted] also does not address the time period over which the Yugara/YUgarapul people had, in his understanding, been associated with the region. In my view, this kind of information would be needed to support, sufficiently, the second limb of the s. 190B(5)(a) assertion.

For the above reasons, I am not satisfied that the applicant's factual basis material is sufficient to support the assertion that the claim group has, and their predecessors had, an association with the application area.

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

I am **not 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 material 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 almost identical to 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, 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 content of the law or custom concerned has its origins 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].

The term 'society' in this context 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 the factual basis information is sufficient:

- 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 claimed 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].

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

With respect to the assertion described in s. 190B(5)(b), Schedule F contains the following statements:

> The traditional laws and customs of the Yugara / Y[U]garapul people generate the native title rights and interests that are claimed. When examined as a whole these traditional laws and customs form a body of law that governs the way in which the Yugara/Y[U]garapul people interact with one and other [*sic*], the wider community and most relevantly their country. The traditional laws and customs of the Yugara / Y[U]garapul people dictate that they acquired their interest in the country, the subject of the claim, through descent from their ancestors who have, since time immemorial, held the same interests in the country.
>
> ...
>
> The Yugara / Y[U]garapul people have traditional laws and customs that regulate:

> - The rights of the native title claim group members to regulate access to and use of land and waters within the claim area;
> - The rights of the native title claim group members in respect of natural resources within the claim area; and
> - The appropriateness of social and cultural behavior [*sic*] of claim group members;
>
> The existence of these laws and customs is indicated by the fact that:
>
> - Contemporary observers acknowledged the existence of a body of people known variously as the Yugara / Y[U]garapul (or various derivations thereof) people at or around the time of sovereignty;
> - This body of people is known to have inhabited and conducted traditional activities on an area of land in and around the claim area; and
> - The same body of people continues to inhabit and claim interests in the claim area ...
>
> [Schedule F then contains statements regarding the continued practice of activities under the group's traditional law and custom, which have been extracted, in part, above.]

In *Gudjala 2009*, Dowsett J described at some length the type of material that will usually be needed to support the assertion that the claim group holds the claimed native title pursuant to laws and customs which are 'traditional' in the *Yorta Yorta* sense. Relevantly, his Honour held that the 'enquiry is as to laws and customs acknowledged and observed by an existing claim group, laws and customs acknowledged and observed by a pre-sovereignty society and the connection between those societies and between the laws and customs, attributable to them'. His Honour then went on to say:

> ... In my view it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs in relation to land and waters. Such an assertion would merely restate the claim. There must at least be an outline of the facts of the case.
>
> In some cases it will be possible to identify a group's continuous post-sovereignty history in such detail that one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since. ...
>
> In many cases the history of a claim group will not be sufficiently well known to permit such an approach. However ... [s]ufficient may be known of circumstances before, or shortly after, first European contact ... to permit an inference that the claim group is a modern manifestation of a pre-sovereignty society, and that its laws and customs have been derived from that earlier society. ... Such a case will involve, at some point, a comparison of the earlier and later societies and their laws and customs. A case of that kind may have to address the fact that there is little or no evidence of continuity of the society since first European contact or of continuous acknowledgement and observance of its laws and customs, a problem recognized in *Yorta Yorta*—*Gudjala 2009* at [27] and [29] to [31].

Read in light of these comments from Dowsett J, it is, in my view, apparent that the factual basis material submitted by the applicant is deficient in three important respects:

- Even so far as it is currently acknowledged and observed, there is no detailed information in relation to the content of the law and custom that is said to give rise to the claimed

rights and interests in the application area. It is merely asserted that they arise from the claim group's descent from ancestors who also held those rights and interests.

- The laws and customs acknowledged and observed by the claim group's predecessors in relation to land and waters are not discussed with any degree of specificity. This is the case both in relation to the predecessors who are said to have held rights in the application area at the time of European settlement and also with respect to the claim group's more recent predecessors.
- There is almost no information regarding how the relevant laws and customs are said to have been handed down between the generations. At best, an assertion that they have been passed down is only implied by statements to the effect that the claim group continues to carry out traditional activities practiced, and to claim interests held, by their predecessors.

I note that an applicant is not required to provide more than a general description of the factual basis that supports their claim. However, as Dowsett J has said, '[t]here must at least be an outline of the facts of the case'. In my view, that requires information which provides at least some degree of detail in relation to the matters highlighted above. In the absence of that information, the applicant's factual basis material cannot provide sufficient support for the assertion described by s. 190B(5)(b).

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

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Paragraph (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). Given the linkage between the two paragraphs, the reference to 'traditional' laws and customs in paragraph (c) must also be interpreted in light of the High Court's decision in *Yorta Yorta*. As a result, a factual basis which is insufficient to support the assertion contained in s. 190B(5)(b) must also be insufficient to support the s. 190B(5)(c) assertion. For the reasons given in relation to s. 190B(5)(b), I have formed the view that the applicant's factual basis material is not sufficient to support the assertion that the claim group continues to hold the claimed native title in accordance with the traditional laws and customs referred to in Schedule F (see the passage excerpted above).

Combined result for s. 190B(5)

For the reasons given above, the application **does not satisfy** the requirements of s. 190B(5).

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 **does not satisfy** the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can be prima facie established.

The phrase 'native title rights and interests' in s. 190B(6) must be interpreted consistently with the term's definition in s. 223(1)—see *Gudjala 2007* at [85] to [87]. This, among other things, requires that the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the native title claim group. As with the assessment under s. 190B(5), s. 190B(6) therefore also involves a consideration of an applicant's factual basis material in light of the *Yorta Yorta* definition of 'traditional'. For the reasons given in relation to paragraph (b) of s. 190B(5), the information provided by the applicant is not, in my view, sufficient to support the assertion that there exist traditional laws and customs, observed and acknowledged by the claim group, which give rise to the claim to native title rights and interests. It follows that I am not satisfied that any of those rights and interests claimed can be 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 **does not satisfy** the condition of s. 190B(7).

As with subsections 190B(5) and (6), the term 'traditional' in subsection 190B(7) must be interpreted in line with the High Court's decision in *Yorta Yorta*—see *Gudjala 2007* at [89]. The information provided must, therefore, show that the connection referred to in s. 190B(7) is practiced under laws and customs rooted in the normative system of the pre-sovereignty society from which the claim group is descended. Unlike s. 190B(5), s. 190B(7) also requires that 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]. Mansfield J has made it clear, however, 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].

It follows from my views in respect of s. 190B(5) that the applicant has not, in my opinion, provided sufficient information to support an assertion that the claim group has any traditional laws and customs under which a claim group member might have a physical connection with the claim area. I note also that Schedule M of the Form 1, which is intended to contain details of a claim group member's traditional physical connection with the claim area, simply refers to Schedule F. There is no information in Schedule F, or elsewhere in the application, which is said to specifically relate to the traditional physical connection that any individual member of the claim group has with a part of the application area.

Because of the absence of the kind of information described above, the application does not satisfy the condition of s. 190B(7).

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

There have been no determinations of native title in relation to the application area.

Reasons for s. 61A(2)

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

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

Schedule B contains a series of general exclusions which are to the effect that any areas covered by an exclusive possession act are excluded from the application area.

Reasons for s. 61A(3)

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

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

Schedule B contains a statement to the effect that, subject to the provisions of ss. 47, 47A and 47B, exclusive possession is not claimed over areas where a previous non-exclusive possession act has been done.

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 (3) subconditions, as set out in the reasons below.

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

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

Schedule Q contains the statement that '[t]he Native Title Claim Group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown'. There is no information before me which indicates that this statement is incorrect.

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

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

The application does not cover any offshore place.

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

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

Schedule B provides that any land or waters where the native title rights and interests claimed have been otherwise extinguished are excluded from the application area.

[End of reasons]

Attachment A
Summary of registration test result

Application name	Yugara/YUgarapul People
NNTT file no.	QC11/8
Federal Court of Australia file no.	QUD586/2011
Date of registration test decision	10 May 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)		Not 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: Not met
	re s. 190B(5)(a)	Not met
	re s. 190B(5)(b)	Not met
	re s. 190B(5)(c)	Not met
s. 190B(6)		Not met
s. 190B(7)(a) or (b)		Not 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]