National Native Title Tribunal

Registration test decision

Application name	Bularnu Waluwarra & Wangkayujuru People[1]
Name of applicant	Elizabeth Dempsey, Marlene Speechley, Charles Page, David Riley, Mavis Sarmardin and Thelma Parker
State/territory/region	Queensland
NNTT file no.	QC2013/001
Federal Court of Australia file no.	QUD6115/1998
Date application made	06/02/1997
Date application last amended	14 January 2013
Name of delegate	Susan Walsh

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

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

Date of decision: 10 July 2013

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Susan Walsh

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 12 October 2012 and made pursuant to s. 99 of the Act.

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1 I note that although the name allocated to the claim within the Tribunal's databases refers to the title 'People' for the native title claim group described in the application, it is clear from information within the application (e.g. schedule A) that the native title claim group are identified and know themselves as the 'Bularnu Waluwarra & Wangkayujuru Peoples'.

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the Bularnu Waluwarra & Wangkayujuru (BWW) 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 two formerly separate applications by the BWW Peoples are currently entered on the Register of Native Title claims having last been accepted for registration by the Registrar in 2009.

On 14 January 2013, an amended application was filed in the Court pursuant to a Federal Court order dated 21 December 2012 which gave the applicant leave to combine native title determination application QUD6115/1998 with native title determination application QUD6006/2002 and to further amend the application by reducing the area covered.

The Registrar of Federal Court gave a copy of the amended and combined BWW application to the Native Title Registrar (the Registrar) on 14 January 2013 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(1) of the Act.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim for the following reasons:

- subsection 190A(1A) does not apply as the application was not amended because an order was made under s. 87A by the Federal Court; and
- subsection 190A(6A) does not apply because an effect of the amendment, namely, to combine the two native title determination applications of the BWW People (QUD6115/1998 and QUD6006/2002) falls outside the exceptions to undertaking a full registration test set out in subparagraphs 190A(6A)(d)(i) to (v).

Therefore, my consideration of the claim in the application is governed by subparagraphs 190A(6) and (6B). Under s. 190A(6A) I must accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. The effect of s. 190A(6B) is that I must not accept the claim for registration if it does not satisfy all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

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

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C.

Information considered when making the decision

Pursuant to s. 190A(3), I have considered information contained in the amended application filed on 14 January 2013 and also in a series of additional documents provided separately by the applicant's legal representative, Queensland South Native Title Services (QSNTS), to the Registrar on 22 March 2013, in support of the merit conditions outlined in subsections 190B(5), (6) and (7).

Procedural fairness steps

I understand the law to provide that the State of Queensland (State) is aggrieved by a decision to accept the claim for registration and that the statute has not excluded a common law entitlement to be afforded an opportunity to be heard in relation to the application and to also comment on information that is before me, separately to that which is found in or which accompanied the application.[2] On 25 June 2013, the State informed the case manager assigned to assist the Registrar that it would not be commenting before my decision and did not wish to be provided with an opportunity to consider the applicant's additional information.

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 (*NT v 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

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[2] See *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [21] to [38] (Carr J) (*WA v Registrar*).

matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

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

Native title claim group: s. 61(1)

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

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

NT v Doepel is authority that I am not required to look beyond the application, nor am I entitled to undertake a merit assessment to determine if I am satisfied whether the native title claim group described in the application before me is the correct native title claim group—at [35] to [37], [39] and [47]. That said, in seeking to verify that an application contains all the details and information required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group' as that term is defined in s. 61(1)—*NT v Doepel* at [35] to [37].

Schedule A of the application contains a description of the persons in the native title claim group and I refer to my reasons above at s. 190B(3) for a transcription of that description.

I have considered what is said in the application on this topic and, in my view, there is nothing on the face of the application to indicate that the described native title claim group is part only of, or does not include all, of the persons in the 'native title claim group', as defined in 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).

These details are provided on the first and final pages 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).

These details are found in Schedule A and I undertake an assessment of the sufficiency of the description in my reasons below for the related merit condition of s. 190B(3).

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).

See the affidavits by the six persons comprising the applicant which accompany the application filed on 14 January 2013 and which contain all of the statements identified above, including the setting out of the details of the process of decision-making complied with in authorising the applicant.

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

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

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

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

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

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

The application contains all details and other information required by s. 62(2)(a) , being a description of the areas covered in Attachment B and a description of the areas within the external boundaries not covered by the application within Schedule B.

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

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

The application contains all details and other information required by s. 62(2)(b) , being a map showing the boundaries of the area in 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 no additional searches have been carried out by the applicant.

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

The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and

interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

The application contains all details and other information required by. 62(2)(d), being a description of the claimed native title rights and interests in Schedule E that is not merely a statement to the effect that the claimed native title are all native title rights and interests that may exist or have not been extinguished at law.

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

The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:

(i) the native title claim group have, and the predecessors of those persons had, an association with the area, and

(ii) there exist traditional laws and customs that give rise to the claimed native title, and

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

The application contains all details and other information required by s. 62(2)(e) being a general description of the factual basis in Attachment F

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) being a list of activities carried out by the native title claim group in 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) in schedule H which states that there are no such applications.

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

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

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

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). The details of the relevant notices are provided in Attachment I.

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

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

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

I have considered an analysis of the application area by the Tribunal's Geospatial section dated 2 February 2013 (Geospatial report), against the Register of Native Title Claims, to identify whether or not there are any previously registered applications affecting that area at the time the current application was made, which states that there are no overlapping applications, registered or otherwise over the area.

As there are no previously registered overlapping applications in the sense required by s. 190C(3) and it is not necessary for me to consider whether there are members in common.

Subsection 190C(4)
Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by the one representative body that could certify the application, as set out in the reasons that now follow.

Attachment R of the application contains the signed certification of the application by QSNTS. I note that there are in fact two certifications provided in Attachment R and these relate to the formerly separate BWW native title determination applications, QUD6115/1998 and QUD6006/2002.

The certifications states at the outset that QSNTS is a body funded under s. 203FE(1) to perform the functions of a recognised representative A/TSI body and he has been delegated by QSNTS the function to certify the application. The Geospatial report dated 2 February 2013 shows that the area of land and waters covered by the application falls entirely inside the QSNTS representative body region.

In light of the express statement to this effect in the certification and my own knowledge that QSNTS is in receipt of funding to perform the certification functions in a region known generally as the QSNTS region, I am satisfied that QSNTS is empowered to undertaken the certification function in that region. The information in the Geospatial report satisfies me that QSNTS is the only representative body that could certify the application under Part 11.

For the certification to satisfy the requirements of s. 190C(4)(a) it must comply with the provisions of s. 203BE(4)(a) to (c). I am satisfied that the certification in Attachment R does so comply, for the reasons that follow.

Section 203BE(4)(a)

It is my view that the certification complies with s. 203BE(4)(a) as it makes the statements required by that section—QSNTS states its opinion at [2] and [3] respectively that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Section 203BE(4)(b)

It is my view that the certification complies with s. 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion at paragraphs [4](a) to (d).

In my view s. 190C(4)(a) does not require me to 'look behind' these reasons or to question the merits of the representative body's certification— *NT v Doepel* at [78], [80] and [81] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31] and [32].

Section 203BE(4)(c)

Section 203BE(4)(c) requires the QSNTS to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)'. I refer to my reasons at s. 190C(3) above which establishes that there are no overlapping applications, hence this requirement is not applicable.

Summary of decision

It follows that I am satisfied that the application has been certified pursuant to Part 11 because the certification by QSNTS complies with the relevant provisions of Part 11 at s. 203BE(4).

Merit conditions: s. 190B

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

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

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

The information required by s. 62(2)(a) is 'information, whether by physical description or otherwise, that enables the boundaries of: (i) the area covered by the application; and (ii) any areas within those boundaries that are not covered by the application to be identified.' The map required by s. 62(2)(b) is 'a map showing the boundaries of the area mentioned in subparagraph (a)(i)' of s. 62(2).

I note that the principal effect of the amendment of the application by leave of the Federal Court dated 21 December 2012 is to combine the area of land and waters covered by the two formerly separate native title determination applications by the BWW People and to reduce the area so covered by the newly combined native title determination application. I note that the area covered by the application lies in the west of Queensland, south-west of Mount Isa and adjoining the Northern Territory border.

I note the following in relation to the information provided in Schedule B and Attachments B and C of the application as to the area of land and waters covered by the application:

- Attachment C provides a map of the external boundary within which native title rights and interests are claimed in relation to particular land and waters. The map contains the following note: 'To determine areas subject to claim within the external boundary, reference to the application description is necessary.'
- The written description of the external boundary shown on the map is found in Part 2 of Attachment B (the external boundary).
- It is clear however, from what is said in Part 1 of Attachment B, that the application only covers the particular cadastral land parcels or part land parcels and the one road itemised in Part 1 of Attachment B to the extent that these parcels and the road falls within the external boundary described in Part 2 of Attachment B and shown on the map.
- Part 1 of Attachment B stipulates that the application covers all of the waters within the external boundary described in Part 2, including but not limited to the five watercourses named in Attachment B, Part 1.
- There is a note within Attachment B that the application does not cover any land or waters not previously claimed (I infer that this is a reference to the area subject to the formerly separate BWW claims, QUD6115/1998 and QUD6006/2002). Further, it is stated within Attachment B that the application does not cover any areas covered by native title determination applications QUD579/05 (Kalkadoon People 4, as determined on 12/12/11), QUD6025/99 (Pitta Pitta, as determined on 28/8/12) and QUD243/09 (Indjalandji-Dhidhanu, as accepted for registration on 27/11/09).

I am satisfied that the information in Schedule B and Attachment B and the map in Attachment C respectively are sufficient for it be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters for the following reasons:

- The map provides a clear delineation of the external boundary within which the itemised land parcels and the road are located. This clear visualisation of the external boundary is supported by a scalebar, northpoint, location diagram and coordinate grid with notes relating to the source, currency and datum of data used to prepare the map.
- The visualisation of the external boundary is further supported by the written description within Part 2 of Attachment B which comprehensively describes that boundary using metes and bounds, references to cadastral land parcels, the QUD579/04 determination boundary, local road reserves, rivers and creeks and geographic coordinates.
- The particular land parcels and the road are all itemised in Part 1 of Attachment B using the 'lot on plan' reference for the land parcels or part land parcels encompassed by the application. The 'lot on plan' references are based on the State's cadastral and property identification system. Each parcel or part parcel covered by the application is shown on the map in Attachment C.

Any other areas that are not covered by the application are described in Schedule B, which generally excludes categories of land and waters, having regard to the provisions of s. 23B of the Act. It is my view that this provides a sufficiently certain and objective mechanism to identify areas which are not covered by the application, having regard to the statement by the applicant in Schedule D that no additional searches of have been carried out by the applicant, which I have inferred to mean that although there have been searches to identify the particular land parcels and the road itemised in Part 1 of Attachment B, the applicant has not undertaken a tenure analysis or history search to ascertain whether there are previous exclusive possession acts or other extinguishing acts in relation to any of the land parcels, road or waters covered by the application.[3]

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 application does not name the persons in the native title claim group; rather it provides a description in schedule A, such that it is necessary to consider the claim against the requirements of subparagraph (b).

The description from Schedule A states:

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[3] See *Daniel for the Ngaluma People v Western Australia* [1999] FCA 686 at [29] to [38].

> The members of the native title claim group on whose behalf the application is made are all the descendants of the following apical ancestors including those who have been adopted in accordance with traditional law and custom:
> Charlie Toby and Jinny;
> Jack Wilde;
> Nellie Lynch;
> Georg (Snr) Catchinda;
> Derby Daylight;
> Pipalkarinya.
>
> NB: The claim group members prefer to name the claim as being on behalf of Bularnu, Waluwarra and Wangkayujuru peoples rather than the former generic reference to them as Waluwarra/Georgina River Peoples.

In my view, descent from named ancestors provides the requisite clarity required by s. 190B(3), as does a statement that the native title claim group includes persons who have been adopted in accordance with traditional law and custom. A similar description was found to be acceptable by Carr J at [63] to [69] of *WA v Registrar*. The application, in my view, describes the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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).

My view is that for a description to meet the requirements of s. 190B(4), it must describe what is claimed in a clear and easily understood manner—see *NT v Doepel* at [91] to [92], [95], [98] to [101] and [123].

The application provides a description of the claimed native title rights and interests in Schedule E in the following terms:

1. Over areas where a claim to exclusive possession can be recognised (such as where there has been no prior extinguishment of native title or where s.238, including where ss 47, 47A or 47B apply) the Balarnu, Waluwarra and Wangkayujuru Peoples claim the right to possess, occupy, use and enjoy the land and waters of the application area against the whole world, pursuant to the traditional laws and customs of the claim group.
2. Over areas where a claim to exclusive possession cannot be recognised, the following rights and interests are claimed:
    (a) the right to access the application area
    (b) the right to camp on the application area
    (c) the right to erect shelters on the application area
    (d) the right to live on the application area
    (e) the right to move about on the application area
    (f) the right to hold meetings on the application area

(g) the right to hunt on the application area
(h) the right to fish on the application area
(i) the right to cook on the application area
(j) the right to have access to and use the natural water resources of the application area
(k) the right to gather and use the natural products of the application area (including: food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs
(l) the right to conduct ceremony on the application area
(m) the right to participate in cultural activities on the application area
(n) the right to maintain and protect places of importance under traditional laws, customs and practices on the application area
(o) the right to conduct burials on the application area
(p) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs
(q) the right to make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders
(r) the right to transmit the cultural heritage of the native title claim group including the knowledge of particular sites;
(s) the right to take and use, share and exchange the traditional resources of the application area.

3. The native title rights are subject to:
   (a) the valid laws of the States of Queensland and the Commonwealth of Australia;
   (b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Queensland.

I find this description clear and understandable and it follows, in my view, that the description is sufficient to allow the native title rights and interests claimed to be readily identified for the purposes of s. 190B(4).

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

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

(a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
(c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

This condition requires me to 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.' Section 190B(5) provides further that:

> 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 interests; and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The leading case on the nature of the Registrar's task at s. 190B(5) is the decision by Mansfield J in *NT v Doepel*, who said the following:

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

This was approved by the Full Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 [2008] FCAFC 157 at [83] to [85] (*Gudjala 2008*), who also had this to say about the requirements of s. 62(2)(e) (which calls for the applicant to provide a general description of the factual basis within the application form) and how this feeds into what will amount to a sufficient factual basis under s. 190B(5):

> 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. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92]. (Underlining added)

The Full Court indicated at [93] of *Gudjala 2008* that it would be wrong for the Registrar to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim'.

Following *NT v Doepel* and *Gudjala 2008*, I therefore do not evaluate the applicant's asserted factual basis as if it were evidence furnished in support of the claim, nor do I criticise or refuse to

accept what is stated in the application and other material that is before me in relation to the factual basis, apart from its sufficiency to address the relevant matters in s. 190B(5). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out in s. 190B(5).

The Full Court in *Gudjala 2008* considers the analysis by Dowsett J in *Gudjala 2007* of the elements a sufficient factual basis must address to meet the particular assertions in s. 190B(5).[4] There is nothing to indicate that the Full Court considered Dowsett J to have erred in this analysis. It appears that Dowsett J, although mindful of the Full Court's direction on how to treat the factual basis materials, applied the same principles when he again considered, at [18] to [77] of *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*), what a sufficient factual basis must address. In my view, the principles enunciated in *Gudjala 2009* are similarly relevant to the Registrar when undertaking the task at s. 190B(5).

In my view, the approach by Dowsett J in relation to each of the particular assertions did not differ markedly to the approach which he took in *Gudjala 2007*, with the possible exception of a less stringent approach to the first assertion in s. 190B(5)(a), found to be met on the material before his Honour when considering the application a second time—*Gudjala 2009* at [79] and [80].

I note that in *Gudjala 2007* Dowsett J said that 'it was necessary 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)'—at [39]. However, it is my view that these comments need to be considered in the overall context of what else has been said on the nature of the Registrar's task and the requirements of s. 190B(5):

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala 2008* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts —*Gudjala 2008* at [92];
- the Registrar's function under s 190A is to determine whether the requirements of ss. 190B and 190C are satisfied according to their terms, rather than generally to consider the accuracy of the information in the application—*NT v Doepel* at [47];
- the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests—*NT v Doepel* at [17].

Mansfield J said at [132] of *NT v Doepel* that the Registrar did not err in his consideration of the application against the condition of s. 190B(5) by focussing on the factual basis provided for the particular assertions within paragraphs 190B(5)(a) to (c) because, '[i]f any of the particular requirements were not met, then the general requirement would not be met.'

Having regard to this, I too focus on the particular requirements of s. 190B(5).

Association with the area—s. 190B(5)(a)

I am **satisfied** that the factual basis on which it is asserted that the native title claim group have, and their predecessors had, an association with the area, is sufficient to support that assertion.

I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for this assertion needs to address:

[4] At [68] to [72], [77] and [90] to [96].

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

This analysis of what the factual basis materials must support in relation to the assertion in s. 190B(5)(a) was not criticised by the Full Court in *Gudjala 2008*—see [69] and also at [96].

The factual basis on which it is asserted that the native title claim group have, and the predecessors of those persons had, an association with the area is found in Attachment F1 and in the following statements which are also attached to the application:

- **[Claimant 1 – Name Deleted]** dated 21 August 2005
- **[Claimant 2 – Name Deleted]** dated 22 August 2005
- **[Applicant 1 – Name Deleted]** dated 22 August 2005
- **[Claimant 3 – Name Deleted]** dated 4 July 2003
- **[Claimant 4 – Name Deleted]** dated 12 June 2005

Additionally, the applicant has provided a submission dated 22 March 2013 by its legal representative (QSNTS submissions) in relation to the asserted factual basis, which is accompanied by a series of statements, affidavits and stories by members of the native title claim group and analytical tables directing me to information relevant to the assertions of this section. I note that the additional statements, affidavits and stories are subject to a direction made under s94L of the Act which prohibits their disclosure and I have thus limited my references to this material in these reasons. Suffice to say, it is my view that the overall effect of this material is to provide strong and cogent support for the ongoing association and continued observance of traditional laws and customs giving rise to the claimed native title rights and interests in relation to the application area.

The asserted factual basis in relation to the 'association' requirements of 190B(5)(a), in summary, revolves around the following facts and materials:

- Prior to 26 January 1788 (sovereignty), the BWW Peoples had rights and interests in the area covered by the application and have distinct responsibilities under traditional laws and customs for the area covered by the claim.
- Under their traditional laws, they are the right people to speak for this country, to maintain knowledge of its sites and stories and to act on its behalf in relation to events that occur in it.
- The members of the native title claim group are descendants of persons who were members of the BWW Peoples prior to and after sovereignty.[5]
- In May 2009, a connection report was provided to the State on a confidential basis as a result of the research by the anthropologist engaged to assist the applicant with their native title case.[6] The anthropologist expressed the opinion that, despite the impact of changes wrought in the area over the last 150 years, the BWW claimants are part of a society that is 'based upon or rooted in past practice and belief.'[7] I refer to the following extract from the report provided in the QSNTS submissions:

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5 This comes from Attachment F1, [1] to [3].

6 I will not name the anthropologist in view of the assertion that the report is confidential.

7 See QSNTS submission at [16].

> It has been my consistent conclusion ... that many aspects of the claimants' society are indeed radicular. First I have shown ... that the claimants can be considered to comprise a society by reference to customary norms, relationships and commonalities which were, in all probability, in evidence at the time of sustained contact.
> Second, I have shown how the claimants identify with areas of country in which they consider themselves to exercise the rights of an owner ... Legitimation for claims to rights in country are established by reference to one or more of a number of principles that are, again in my view, radicular. These include descent from apical ancestors, spiritual imbuement that derives from and is sustained by the country in question, and the command of knowledge (sometimes expressed as narratives) of the land. This system of acquiring and sustaining rights to country is principled and rests on espousal of sets of normative values.

- The five statements within Attachment F of the application and those provided to me by QSNTS on 22 March 2013, speak to the general facts asserted in the above points in a compelling and cogent way. Each person talks about how it is that they are a member of the native title claim group, including their genealogical links to the apical ancestors named in Schedule A and about their enduring association with areas covered by the application, including their activities on that country, their knowledge of it and observance of traditional law and custom, handed down to them in a traditional manner, which has stretched across the generations until the present time.

Having regard to the information within the application and that provided separately by the applicant, I am satisfied that the factual basis provided to support the assertion that the native title claim group have and their predecessors had an association with the application area is sufficient to support that assertion.

Traditional laws and customs—s. 190B(5)(b)

For the reasons that follow, I am **satisfied** that the factual basis on which it is asserted 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 interests, is sufficient to support that assertion.

The language of the assertion in s. 190B(5)(b) nearly mirrors that found in s. 223(1)(a), which is part of the definition for the term 'native title rights and interests'. In my view, the factual basis here must address the assertion that the claimed native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' highlights that its meaning in s. 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act; hence what the High Court and other courts have decided in relation to this should inform my consideration of the sufficiency of the asserted factual basis for this particular assertion.

Accordingly, as was discussed by Dowsett J in *Gudjala 2007* at [26], the factual basis provided by an applicant must pay attention to the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta*

Yorta) and in Full Court decisions since as to what is meant by rights and interests in relation to land and waters being possessed under 'traditional' laws and customs. This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala 2008* who noted that one question, amongst others, which needs to be addressed is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—at [96].

The following is a brief synopsis of my understanding of the case law which has developed around the requirement in s. 223(1)(a) that native title rights and interests in relation to land and waters must be possessed under 'traditional' laws and customs:

- for laws and customs to be 'traditional', they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty;
- a society is a body of people united in their acknowledgement and observance of laws and customs with normative content;
- the acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time;
- it is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs;
- change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[8]

Having regard to the case law, it is my view that a sufficient factual basis for the assertion in s. 190B(5)(b) needs to address that the relevant traditional laws and customs have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I refer to comments by Dowsett J in *Gudjala 2007* that the factual basis materials for this assertion must address:

- that the laws and customs currently observed have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65] and see also at [66] and [81];
- the link between the claim group described in the application and the area covered by the application, which, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at

[8] The special meaning of the word 'traditional' in s. 223(1) was first considered by the High Court in *Yorta Yorta*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta*, *Alyawarr FC* and *Bennell FC*.

sovereignty, even if the link arose at a later stage', although the apical ancestors need not themselves have comprised a society—at [66].

This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala 2008*—at [71], [72] and [96].

I refer also to these additional comments by Dowsett J in the later *Gudjala 2009* decision about s. 190B(5)(b):

- a sufficient factual basis must address the following elements:
  - a system of laws and customs which recognizes that the relevant claim group has a connection with the land or waters in question;
  - that such laws and/or customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist; and
  - that although such current laws and customs may not be identical to those which obtained prior to sovereignty, they have their roots in the pre-sovereignty laws and customs—at [22];
- identification of an Indigenous society at sovereignty is the starting point, as it 'is impossible to identify a system of laws and customs as such without identifying the society which recognizes and adheres to those laws and customs'—at [36];
- there must be some link between the claim group and the claim area, including the identification of a link between the apical ancestors (if used to define the claim group) and the relevant society from which the claim group asserts that it has derived its native title rights and interests—at [40].

I have also considered what was said by Dowsett J at [29] of *Gudjala 2009* that the Registrar must 'be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof.' It would not, according to Dowsett J, be sufficient for an applicant to simply assert that the claim group's laws and customs are traditional because they derive from a pre-sovereignty society of which they are descendant. That would merely be a restatement of the claim without any factual basis; 'there must at least be an outline of the facts upon which the applicant relies'.

It is my view that the starting point for an applicant seeking to address subparagraph 190B(5)(b) is to identify the relevant society operating in the region occupied by the application area at the time of sovereignty or, at the very least, the time of contact/settlement.[9] Once identified, the factual basis must address the existence of traditional laws and customs with a normative content that are derived from that society/normative system and which have had a substantively uninterrupted operation since sovereignty in relation to the area covered by the application.

The asserted factual basis in relation to the 'traditional law and custom' requirements of 190B(5)(b), in summary, revolves around the following facts and materials:

- The members of the native title claim group are recognised under the laws and customs of the BWW Peoples as the owners of the area covered by the application.
- The BWW Peoples maintain a system of laws and customs which has existed from prior to sovereignty to the present day even though those laws and customs have undergone some change and adaptation since white settlement. These laws and customs are demonstrated on a

[9] As was discussed by the Full Court at [96] of *Gudjala 2009*.

daily basis in the lives, activities, ceremonies, rituals and practices of members of the claim group.[10]

- The connection report referred to above expresses the opinion that the native title claim group are part of a society that is based on past practice and belief which has survived notwithstanding the changes wrought since European settlement over the last 150 years and which there exist traditional laws and customs.

The five statements within Attachment F of the application and those provided to me by QSNTS on 22 March 2013, speak to the general facts asserted in the above points in a compelling and cogent way. I agree with the QSNTS submission that, when I consider the material as a whole, the following matters are addressed, which in my view all support the sufficiency of the factual basis for the assertion that there exist traditional laws and customs which give rise to the claim to native title rights and interests:

- a sufficiently broad spectrum of the current members of the native title claim group are shown to have an enduring association with the application area as a whole, which dates back to the earliest days of settlement of the region, including the apical ancestors;
- these persons are the descendants of the BWW Peoples, who, it is asserted existed in relation to the application area at the time of sovereignty;
- the members of the native title claim group who have provided statements which speak compellingly and cogently of the observance of traditional laws and customs which govern the exercise of native title rights and interests in the application area which has been passed to them over the generations and which they are now passing on to new members of the native title claim group.

Having regard to the information within the application and that provided separately by the applicant, I am satisfied that the factual basis provided to support the assertion that their 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 interests.

Continued to hold the native title—s. 190B(5)(c)

For the reasons that follow, I am **satisfied** that the factual basis on which it is asserted that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs is sufficient to support that assertion.

I understand that the reference in s. 190B(5)(c) to 'those traditional laws and customs' is a reference to the traditional laws and customs asserted to be acknowledged and observed by the native title claim group, for which a factual basis is provided under s. 190B(5)(b). As I have explained, I am not satisfied that the factual basis for the assertion of subparagraph (b) is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claim to native title rights and interests.

Gudjala 2007 indicates that this particular assertion may require the following kinds of information:

[10] For the information in these two dot points, see [4] to [6] of Attachment F.

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* at [96] agreed that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

The asserted factual basis in relation to the 'continuity' requirements of 190B(5)(c), in summary, revolves around the following facts and materials:

- From prior to sovereignty until the present day, the native title claim group and their ancestors have continuously occupied, been present on, used and enjoyed the application area in accordance with the laws acknowledged by and the customs observed by the BWW Peoples.
- The rights which accrue to the native title claim group under the traditional laws and customs that they observe as between each other and as between other Aboriginal people have their source in a pre-contact normative system of laws and customs and include rights to own, possess, occupy, use and enjoy (including to hunt and gather), make decisions and control access, to share and exchange resources, to maintain and protect important places, to speak for country, to conduct ceremonies, to access the area.
- The continued holding of the native title in accordance with the traditional laws and customs acknowledged and observed by the native title claim group is given expression and illustrated by the witness statements provided within the application.[11]

The statements I have read describe longstanding relations amongst various ancestral lines and their descendants which have given rise to rights to speak for areas covered by the application. There is evidence of being born on, working on pastoral stations within their country and/or living on country, which has enabled or facilitated the observance of the traditional laws and customs of their forebears. There is detailed evidence of the performance of ritual around speaking for country and the passing of inter-generational knowledge to ensure ongoing observance of traditional laws and customs surrounding this.

In addition to the five statements within the application, I have considered the additional evidentiary statements provided with the QSNTS submission. I agree that the material overall illustrates the facts asserted in Attachment F and paints an eloquent and cogent picture of the inter-generational transmission of and continuation of the observance of traditional laws and customs giving rise to the claimed native title rights and interests in relation to the area of land and waters covered by the application. In my view, the information in these statements comprehensively identifies a normative system that has endured since sovereignty as a result of the continued observance of traditional laws and customs which has its roots and currency in their relationship to the area covered by the application. The affidavits reviewed by me provide

11 See [7] and [8] of Attachment F.

ample detail relating to how the native title claim group have continued to observe and acknowledge the traditional laws and customs of this normative system.

Having regard to all of these materials, I am of the view that there is a sufficient factual basis for the assertion that the native title claim group has continued to hold the claimed native title in accordance with the traditional laws and customs acknowledged and observed by them.

To conclude, the application satisfies the condition of s. 190B(5) overall because the factual basis provided is sufficient to support each particular assertion in subparagraphs (a) to (c) 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 **satisfies** the condition of s. 190B(6).

As appears from the reasons below, I consider that, prima facie, all of the claimed native title rights and interests can be established prima facie and this therefore satisfies the requirements of the condition of s. 190B(6).

Mansfield J discussed the nature of the Registrar's task in relation to s. 190B(6) in the following passages from *NT v Doepel*:

> Section 190B(5), (6) and (7) clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s 190A(3) may be relevant. Even so, it is noteworthy that s 190B(6) requires the Registrar to consider whether 'prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle. Indeed it may be that the Registrar, upon being satisfied that some of the native title rights and interests claimed can, prima facie, be established, might not apply that evidentiary test to each of the claimed native title rights and interests—at [16].

His Honour also commented in *NT v Doepel* that s. 190B(6):

- requires 'some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration'—at [18].
- is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—at [135]
- involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—at [126], [127] and [132].

The applicant has provided a series of analytical tables attached to the witness statements to assist my consideration of the requirements of this section. I turn to an examination of each of the claimed native title rights and interests from schedule E of the application. I note here that where rights are of a similar nature or rely on similar material, I have grouped them together.

1. Over areas where a claim to exclusive possession can be recognised (such as where there has been no prior extinguishment of native title or where s.238, including where ss 47, 47A or 47B apply) the Balarnu, Waluwarra and Wangkayujuru Peoples claim the right to possess, occupy, use and enjoy the land and waters of the application area against the whole world, pursuant to the traditional laws and customs of the claim group.

Established:

In *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*), the majority considered that the 'expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' and conveys 'the assertion of rights of control over the land'—at [89] and [93].

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

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

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

[It is also] important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.

I am of the view that there is material which supports the existence of this right in the statements I have considered both from within the application and provided to me separately as part of the QSNTS submission. As an example, I refer to the following:
[Claimant 1 – Name Deleted]'s statement in attachment F of the application:

- 'People come to me for permission and ask me if they can go around my area here. I can tell them so they know the way to go for kangaroo if they are men but they don't go down the river side where it is for the women' – [7].
- 'People who go to that Georgina River Walgra area now – they know it is my country and they know I am boss for it. Down Walgra that is the hunting ground. That is where my father's country was and that is why they called him "Walgra George"' – [11].

- 'If I am worried about what people are doing I will go and explain things – I would tell them the right way to do things. Out on the plains – that Thorner plain is the right place. If people go to the wrong spot they will get sick. If they didn't ask permission to go there they will get sick and its [sic] their own fault. Sometimes they will come and apologise to me that they went somewhere without my permission' – [23].
- 'People have the right to hunt if they ask my permission. They can't just go in and hunt kangaroo. The men come in and ask me and say "we are going in and hunting kangaroo" and I usually say "yes alright" as long as they ask. And they will bring me kangaroo back and share what they have caught with me. There are some people who I would not give permission to because they just chase them down and kill them and leave them there. That is wasting meat and I won't give them permission. I get told about them doing the wrong thing and I get up on them for doing the wrong thing'– [24] & [25].

[Claimant 3 – Name Deleted]'s statement in Attachment F:

- 'People would come to see [our Granny] in our camp and she would say "what skin you". They would sing out from a long way and say who they were. They would come closer singing out and then they would sit down and talk about skin – sometimes for a couple of days. When she knew who they were and what skin group, they could then stay around – [32].

2. Over areas where a claim to exclusive possession cannot be recognised, the following rights and interests are claimed:
    (a) the right to access the application area
    (b) the right to camp on the application area
    (c) the right to erect shelters on the application area
    (d) the right to live on the application area
    (e) the right to move about on the application area
    (f) the right to hold meetings on the application area
    (g) the right to hunt on the application area
    (h) the right to fish on the application area
    (i) the right to cook on the application area
    (j) the right to have access to and use the natural water resources of the application area

Established:

I am of the view that the following material from Attachment F of the application establishes these rights on a prima facie basis:

- **[Applicant 1 – Name Deleted]**'s statement at [8] and [11]

'I go through the application area to go camping and hunting around Urandangie and Moonah Creek. I often put a mattress down at **[Claimant 1 – Name Deleted]**'s place and spend time with her.'

'When we go hunting we camp out in the claim area especially along the River where you can through [sic] a line out and have fresh fish for breakfast. We cook what we have caught in the camp area. If any of the old people like **[Claimant 1 – Name Deleted]** are with us they get what we caught first.'

- **[Claimant 1 – Name Deleted]**'s statement at [5], [12], [17]–[19], [22], [24]

'In my country only the men are allowed to get the kangaroo and emu and turkey. They get those and rabbit and porcupine and they cook it up. The men eat snakes too. Women can catch snakes but they don't eat them. I and the other women can catch goannas as well.'

'I continue to go on the area that I talk for and have gone to that area all through my life. When my son comes to visit me he takes me back to that area – where we cut sugar bag and take budgerigar.'

'A good camp has wind breaks and you make a bough shed in plain country to keep the sun off. Keeping the sun off is the main protection you need. In the wet we would make a humpy with sticks over and bushes – maybe a bit of calico. The rain comes when it is quite warm so it is not too bad in camp during the wet. These days when we are hunting we just set up camp for the night and come back the next day with what we caught.'

'Last week I took a nephew hunting to show him how to look for goanna tracks and tell which way he went from looking at his tracks…When you find his hole you dig him out using your yam stick or these days we use a crow bar. The plain goannas don't fight much they give up so easy. Some are big- they used to be bigger. You grab his tail and pull him out and hit him on the head.'

'I continue to live in the application area by living here at Urandangie during the year. I moved between here, Lake Nash and Mt Isa. Many members of my family and the family of my brother who has passed away live at Urandangie and hunt and fish around here.'

'People have the right to hunt if they ask my permission. They can't just go in and hunt kangaroo.'

- **[Claimant 2 – Name Deleted]**'s statement at [5], [7], [8]–[11]

'I go through the application area to go hunting around Urandangie and Moonah Creek ... [and]
'[w]hen we go hunting we camp out in the area.'
'We take a big mob of young men out to hunt and we teach them how to hunt. They learn what they have to get. They understand the rule to leave the food at **[Claimant 1 – Name Deleted]**'s place – leave some of that kangaroo. When we are out there we tell them the stories about that country and where they can get emu and kangaroo and sugar bag. They like to get out there with us – especially when they are hungry. We use a .22 rifle or a magnum which is good for roos. Men do not take the plants we do hunting. We use a crow bar for the plains goanna and dogs for the river goanna a *prenty*. He is more fierce that the plain goanna. He has teeth like razors and can bite you. Sometimes you shoot him but the sand goanna you can knock on the head. **[Claimant 5 – Name Deleted]** has the story for the *prenty* down there towards Roxborough and the mountain that is down there.'

(k) <u>the right to gather and use the natural products of the application area (including: food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs</u>

(s) <u>the right to take and use, share and exchange the traditional resources of the application area</u>

Established:

- **[Claimant 1 – Name Deleted]**'s statement at [4], [9], [27]

'In my country the things I can do without asking anyone else for permission are things like hunting for grubs and wild potatoes and things like the little weeds that look a bit like carrots.

We hunt for mungaroos which are like a little onion and tahloowoo which has a leaf like a carrot leaf.'
'We used to get the bush honey when we did not have tea leaves and sugar. The old people would cut the tree and leave it and the women would collect the honey and put it in a billy can and drink it like a cordial.'
'I still use plants, animals, ochres and resins for medicine in a traditional way taught to me mostly by my **[Claimant 6 – Name Deleted]**. You put eucalyptus in emu oil and goanna oil – it is very good for medicine. I use ochre and grind him up and put in with the fat to make bush medicine. It is good for dry and cracked skin or if you have a cold or flu you rub your chest and back.'

(l) the right to conduct ceremony on the application area
(m) the right to participate in cultural activities on the application area
(n) the right to maintain and protect places of importance under traditional laws, customs and practices on the application area
(r) the right to transmit the cultural heritage of the native title claim group including the knowledge of particular sites

Established:

- **[Applicant 1 – Name Deleted]**'s statement at [13]

'When I used to take my kids – who are all grown up now and the young fellas who come with me and **[Claimant 2 – Name Deleted]** – we tell them the stories about that country – about the River and about the trees – if it is a fish tree that has a dreaming story as part of it. I tell them those things so they know the right way to be on that place. When they go around hunting or fishing they check with me that they are allowed to go there.

- **[Claimant 1 – Name Deleted]**'s statement at [28], [33]–[34]

'We used to have our ceremonies this side with women's dancing and men's corroboree-they were free-anyone could go to those – men women and kids. On the Territory side they are more strict and some can go and some can't. But you can't just have any body brought here it has to be the right people for the place you have a ceremony or someone will get sick.'
'We still look after our country and its important places and we still tell the stories of this country. I pass on my knowledge to those who are prepared to learn it in the proper way. I do not just give it to anyone but only the ones who are right to teach it to.'

- **[Claimant 2 – Name Deleted]**' statement at [13]

'The old people used to do the ceremonies for pelican and brolga and paint up and dance on Headingly and along the River. Things have changed a bit since then and some of the dancing grounds are covered up with grass and trees but some of our old people ... remember where the women's places are and where the men's places area down there.'

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

Established:

- **[Claimant 1 – Name Deleted]** at [30]:

'When my dad died – he died in hospital but they brought his body back to Walgra and buried him there where he belonged. Old people always used to be buried in the ground. We put him in the dancing ground where they had made him a man. A big mob came with us then.'

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

Established:

I note that there are differing views as to whether a 'right to speak authoritatively' about country can be established in areas such as that identified before me, i.e. 'where a claim to exclusive possession cannot be recognised.'

In *Neowarra v State of Western Australia* [2003] FCA 1402 (8 December 2003), Sundberg J was of the view that 'the right to speak for country involves a claim to ownership' and could only be recognised in relation to areas of exclusive native title rights and interests. I note also the view of French J (as he was then known) in *Sampi v State of Western Australia* [2005] FCA 777 (10 June 2005) at [1072] that the 'right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation'.

The Full Federal Court (Black CJ, Moore and Hely JJ) in *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 determined the existence of a 'right to speak for the determination area' in areas of where no exclusive possession could be established.

Most recently the right has been recognised to a limited extent in a consent determination of non-exclusive rights in *Witjira Native Title Determinations SA [2008]**[12]

> 'rights to use, occupy and enjoy (in accordance with the Native Title Holders' traditional laws and customs) the land and waters of the Determination Area being:
> (l) the right to speak for and make decisions in relation to the Determination Area about the use and enjoyment of the Determination Area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the Native Title Holders....' [para 9 (l)].

I note however that the cases recognising a right to speak over 'non-exclusive' areas were consent determinations, such that the issue may not have been fulsomely argued.

I have decided to allow this right because:

- it has been allowed in some cases which would indicate that if supported on the facts it can be prima facie established;
- it seems that the law around its operation is still being developed;
- the right before me seems to be sufficiently qualified in the sense that it is only claimed 'among other Aboriginal People in accordance with traditional laws and customs', so it is clearly not being sought against the whole world;
- there is ample evidence within the material that the native title claim group operate within a complex web of relationships with their Aboriginal neighbours, whereby the right to speak about country, including the seeking of permission to enter country, the giving of such permission on terms relating to what can be done there, such as hunting, is

[12] Three separate consent determinations: Eringa Part A, Wangkangurru/Yarluyandi Part A and Irwanyere Mt Dare were made simultaneously over the Witjiria National Park recognising identical non-exclusive rights and interests of the native title holders of the relevant applications.

a fundamental part of these relationships and is based on their world view that they are the ones who must speak for and give these permissions.
- The materials I have viewed are replete with examples about how this operates in a traditional way.
- See for instance the statement by **[Claimant 1 – Name Deleted]** at [24]–[25]:
    - 'People have the right to hunt if they ask my permission. They can't just go in and hunt kangaroo.'
    - '…There are some people who I would not give permission to because they just chase them down and kill them and leave them there. That is wasting meat and I won't give them permission. I get told about them doing the wrong thing and I get up on them for doing the wrong thing.'
- I have also formed the view that **[Claimant 4 – Name Deleted]** addresses the exercise of these rights and interests in relation to the application area as against other groups or communities at [1], [11]–[12], [23], [25] and [26] of his statement in Attachment F of the application.

(q) the right to make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders

Established:

The ability to claim a right to ' make decisions about use and enjoyment' over 'non-exclusive' areas is uncertain since the Full Federal Court's decision in *Northern Territory v Alyawarr* (2005), which disallowed the right. However, it has subsequently been included in a number of consent determinations.[13] In some cases it is limited to other Aboriginal people who recognise themselves as governed by traditional law and custom.

I have decided to allow this right because:
- it has been allowed in some cases which would indicate that if supported on the facts it can be prima facie established;
- it seems that the law around its operation is still being developed;
- the right before me seems to be sufficiently qualified in the sense that it is only claimed 'among other Aboriginal People in accordance with traditional laws and customs', so it is clearly not being sought against the whole world;
- there is ample evidence within the material that the native title claim group operate within a complex web of relationships with their Aboriginal neighbours, whereby the right to make these decisions, including the seeking of permission to enter country, the giving of such permission on terms relating to what can be done there, such as hunting, is a fundamental part of these relationships and is based on their world view that they are the ones who must speak for and give these permissions.
- The materials I have viewed are replete with examples about how this operates in a traditional way.
- See for instance the statement by **[Claimant 1 – Name Deleted]** at [24]–[25]:

13 See, for example, *Witjira Native Title Determinations SA* [2008].

- ‘People have the right to hunt if they ask my permission. They can’t just go in and hunt kangaroo.’
- ‘…There are some people who I would not give permission to because they just chase them down and kill them and leave them there. That is wasting meat and I won’t give them permission. I get told about them doing the wrong thing and I get up on them for doing the wrong thing.’

- I have also formed the view that **[Claimant 4 – Name Deleted]** addresses the exercise of these rights and interests in relation to the application area as against other groups or communities at [1], [11]–[12], [23], [25] and [26] of his statement in Attachment F of the application.

Subsection 190B(7)
Traditional physical connection

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

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

Mansfield J had this to say in *NT v Doepel* about the task at s. 190B(7):

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

I understand that the phrase ‘traditional physical connection’ means a physical connection in accordance with the particular ‘traditional’ laws and customs relevant to the claim group, as was discussed in *Yorta Yorta*. I note also that [29.19] of the explanatory memorandum to the *Native Title Amendment Act 1998* indicates that parliament intended that the connection described in s. 190B(7) ‘must amount to more than a transitory access or intermittent non-native title access’.

I am of the view that the five persons who have provided statements within the application (**[Claimant 1 – Name Deleted]**, **[Claimant 2 – Name Deleted]**, **[Applicant 1 – Name Deleted]**, **[Claimant 3 – Name Deleted]** and **[Claimant 4 – Name Deleted]**) are all members of the native title claim group who currently have or previously had a traditional physical connection with the

area covered by the application. The application and additional documentary evidence provided by QSNTS is replete with examples of a long-standing and enduring connection with the area covered by the application which appears to be grounded in the traditional laws and customs of the BWW Peoples.

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.

The application **satisfies** the condition of s. 190B(8).

No approved determination of native title: 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.

The application meets the requirement under s. 61A(1). There are no approved determinations of native title over the application area.

No previous exclusive possession acts (PEPAs): s. 61A(2):

Under s. 61A(2), the application must not cover any area in relation to which:

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

Under s. 61A(4), s. 61A(2) does not apply if:

(a) the only previous 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 47B, as the case may be, applies to it.

The application meets the requirement under s. 61A(2), as limited by s. 61A(4). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area: see statements to this effect in Schedule B.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): s. 61A(3):

Under s. 61A(3), the 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) 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.

The application meets the requirement under s. 61A(3), as limited by s. 61A(4). Schedule E is clearly drafted such that any claim of exclusive possession, occupation, use and enjoyment is only made over areas where there has been no extinguishment or where any extinguishment is to be disregarded because of ss. 47, 47A or 47B (refer to my reasons for s. 190B(4) above).

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).

In my view, the claim satisfies this condition for the following reasons:

- Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown, thus meeting s. 190B(9)(a).
- The area covered by the claim is located well inland and does not extend to offshore places, thus meeting s. 190B(9)(b).
- The application does not disclose, nor is there any information before me to indicate, that the claimed native title rights and interests have been otherwise extinguished, thus meeting s. 190B(9)(c).

[end of reasons]