National Native Title Tribunal

Registration test decision

Application name	Western Kangoulu
Name of applicant	Priscilla Broome, Hedley Henningsen, Richard Broome, Jonathon Malone
State/territory/region	Queensland
NNTT file no.	QC2013/002
Federal Court of Australia file no.	QUD229/13
Date application made	9 May 2013
Date of decision	**13 June 2013**
Name of delegate	Heidi Evans

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

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

Date of reasons: 17 June 2013

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Heidi Evans

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 12 October 2012 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Western Kangoulu claimant application to the Native Title Registrar (the Registrar) on 9 May 2013 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 9 May 2013 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

I note that the application is affected by two s. 29 notices, ML70481 and EPC2093, both of which have a notification date of 13 February 2013. It is my understanding, therefore, that I am to use my best endeavours to apply the conditions of the registration test to the application by 13 June 2013 to ensure that the applicant's rights in relation to those future acts notified are preserved – see s. 29(4) and s. 30(1)(a).

Registration test

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

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

Information considered when making the decision

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

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

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

The information and documents that I have considered in reaching my decision are listed below:

- QC2013/002 – Western Kangoulu People – QUD299/2013 native title determination application;
- additional material provided by the applicant by email on 21 May 2013 comprising a fully referenced version of Attachment F/M, and four affidavits sworn by members of the native title claim group;
- geospatial assessment and overlap analysis dated 15 May 2013 (GeoTrack: 2013/0809)
- letters dated 9 May 2013 from the case manager to the State of Queensland (the State) and the relevant representative body, Queensland South Native Title Services (QSNTS), pursuant to s. 66(2) and s. 66(2A);
- letter to the applicant dated 22 May 2013 advising that copies of additional material were to be provided to the State, subject to the State's agreement to confidentiality conditions being imposed by the Registrar's delegate on the use of that material;
- letter to the State dated 22 May 2013, attaching a confidentiality agreement regarding the use of additional material to be provided;
- email from the State dated 23 May 2013 returning the unsigned confidentiality agreement and advising that the State did not wish to view or comment on the material.

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

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

Procedural fairness steps

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

On 9 May 2013, the case manager wrote to the State in accordance with s. 66(2), providing the State with a copy of the application, and an opportunity to comment, to be received by 23 May 2013. No comments were received within that time.

Also on 9 May 2013, the case manager wrote to the relevant representative body for the application area, being Queensland South Native Title Services (QSNTS), and in accordance with s. 66(2A), provided a copy of the application.

On 21 May 2013, by email, the applicant submitted additional material directly to the Registrar for the purposes of the Registrar's consideration of the claim against the conditions of the registration test. On 22 May 2013, by letter sent by email, I caused the case manager to inform the State that the additional material had been received, and provide the State with a confidentiality agreement regarding their use of the material to be provided. The case manager also wrote to the applicant, informing the applicant that the additional material was to be provided to the State, subject to certain confidentiality conditions imposed by the Tribunal.

On 23 May 2013 the State emailed the case manager, returning the confidentiality agreement unsigned. In that correspondence the State confirmed that they did not wish to view the additional material or make comments in relation to it.

Procedural and other conditions: s. 190C

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

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

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

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

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

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

Native title claim group: s. 61(1)

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

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

In my consideration of the description of the native title claim group at s. 61(1), my understanding is that it is only where that description reveals, on the face of the application, that not all the persons in the native title claim group are included, or that the description is in fact of

a subgroup of the native title claim group, that the requirement of s. 190C(2) will not be met – *Doepel* at [36]. It is not my role, however, to consider whether the native title claim group described is in fact the correct group – *Doepel* at [37].

The native title claim group is described in Schedule A of the application. There is nothing within that description, in my view, that suggests or indicates that that description excludes persons of the group, or that the group is only a subgroup of the actual native title claim group.

For that reason, I am satisfied that the requirement of s. 61(1) for the purposes of s. 190C(2) is met.

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 application states the names of those persons who jointly comprise the applicant immediately above Part A of the Form 1. The address for service of the applicant is provided in Part B.

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).

It is my understanding of the task at s. 61(4) for the purposes of s. 190C(2), that I am merely to consider whether the information prescribed by s. 61(4) regarding the persons in the native title claim group is contained in the application. There is nothing that requires me or permits me to turn my mind to the correctness of this information, or whether the description is sufficiently clear – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]; *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

A description of the native title claim group, in accordance with subsection (b) of s. 61(4), appears at Schedule A of the application.

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

The application is accompanied by four affidavits, one sworn by each of the applicant persons. Each affidavit is signed by the deponent, dated, and has been competently witnessed. The affidavits all contain a statement by the deponent that they are a member of the native title claim group by descent from one of the apical ancestors named in Schedule A.

The affidavits all comprise the same ten paragraphs, and it is my view that these paragraphs contain the requisite statements set out at subsections (i) to (v) of s. 62(1)(a).

I note that there is no statement within the affidavit that accords with the wording of subsection (ii) of s. 62(1)(a), however, it is my view that paragraph [3] of the affidavit is intended to provide the relevant statement. Paragraph [3] is a statement by the deponent that: 'I believe that none of the area covered by the application is also covered by an entry in the Native Title Register'.

Noting that an entry in the National Native Title Register is a statutory record of an approved determination of native title, I am satisfied that paragraph [3] has the same meaning and effect as the statement contained at subsection (ii) of s. 62(1)(a), and is sufficient in meeting the requirements of the condition.

On that basis, I consider that the application is accompanied by the requisite affidavits and meets the requirements of s. 62(1)(a) for the purposes of s. 190C(2).

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

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

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

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

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

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

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

A written description of the area covered by the application is contained within Attachment B to Schedule B. Those areas falling within the external boundary that are not covered by the application are set out in 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).

A map showing the external boundaries of the area covered by the application appears at Attachment C to Schedule C of the application.

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 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. 62(2)(d).

Schedule E of the application contains a description of the native title rights and interests claimed in relation to the area covered by the application.

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

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

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

Schedule F contains information pertaining to a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and refers to Attachment F/M as containing further information of this nature.

Activities: s. 62(2)(f)

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

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

The activities currently undertaken by members of the Western Kangoulu People on the lands and waters of the claim area are listed at Schedule G.

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

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

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

Details of other applications of which the applicant is aware appear at Schedule H. That Schedule states that the applicant is aware that the QC2012/018 — Bidjara People #7 — QUD644/2012 overlaps the current 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 of the application provides that the applicant is not aware of any notices given in accordance with s. 24MD(6B)(c) relating to any part of the application area.

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

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

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

Details of notices given under s. 29 of which the applicant is aware appear at Schedule I of the application. Schedule I provides that two such notices, being ML70481 and EPC2093, were notified on 13 February 2013.

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

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

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

In my assessment of the application at s. 190C(3), I note that it is only where another application meets all three of the criteria in subsections (a) to (c), that the requirement for me to be satisfied that there are no common claimants between that application and the current application is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC* at [9]).

Turning my mind to the requirements of subsection (a), namely whether there is another application that covers the whole or part of the application area, I note that Schedule H provides that the applicant is aware of an overlap between the current application and the QC2012/018 —

Bidjara People #7 — QUD644/2012. The geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services division and dated 15 May 2013 (GeoTrack: 2013/0809) confirms this overlap, and provides that the current application falls entirely within the external boundary of the area covered by the Bidjara People #7 application. Consequently, subsection (a) is satisfied.

Regarding the requirement of subsection (b) of s. 190C(3), it is only where the Bidjara People #7 application was on the Register of Native Title Claims (the Register) at the time when the current application was made that the condition will be satisfied. The geospatial assessment provides that the Bidjara People #7 application was accepted for registration on 24 January 2013. It is this date, therefore, that an entry for the application would have appeared on the Register.

The current application was made on 9 May 2013. It is my understanding, therefore, that the Bidjara People #7 application appeared on the Register at the time at which the current application was made, and that the requirement of subsection (b) is met.

Subsection (c) of s. 190C(3) requires that the Bidjara People #7 application has not been removed from the Register as a result of its consideration for registration under s. 190A. I note that the relevant time at which I am to consider whether the application has been removed from the Register is at the time of applying the conditions of the registration test to the current application – *Strickland FC* at [53] to [56]. From a search of the Register, I have confirmed that the Bidjara People #7 application remains on the Register at the present time of this decision. Consequently, subsection (c) is satisfied.

Noting that all three subconditions of s. 190C(3) have been satisfied and therefore, that the Bidjara People #7 application meets the definition within that provision of a 'previous application', I now turn to consider whether there are in fact common members between the native title claim groups for each of the applications.

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

> The group of persons claiming to hold the common or group rights comprising the native title is the Western Kangoulu People.
>
> A person is a Western Kangoulu person if and only if the other Western Kangoulu People recognise that he or she is biologically descended from a person who they recognise as a Western Kangoulu ancestor, including the following deceased persons:
>
> - Polly aka Polly Brown aka Polly McAvoy;
> - John 'Jack' Bradley;
> - Hanny of Emerald;
> - Nannie, mother of Nelly Roberts; and
> - Annie/Nanny Duggan and Ned Duggan

The claim group description for the Bidjara People #7 application is expressed in the following terms:

> The native title claim group on whose behalf the claim is made is the Bidjara People. The Bidjara People being the descendants of: [list of 40 named persons or named couples].
>
> Being the apical ancestors of the Bidjara People.

I have turned my mind to the list of 40 named individuals and couples comprising the apical ancestors for the Bidjara People #7 application, and find that none of those names also appear within the claim group description for the current application. I note that there are no common first names or surnames between the two lists of apical ancestors for each of the applications.

On that basis, I have formed the view that I am satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application.

The application meets the requirements of s. 190C(3).

Subsection 190C(4) Authorisation/certification

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

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

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

In *Doepel*, Mansfield J discussed the requirements of each of the alternative limbs of s. 190C(4) in the following way:

> Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar...The contrast between the requirements of subs (4)(a) and (4)(b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group – at [78].

Schedule R provides that the application has been certified, and that the certification appears at Attachment R to Schedule R. Consequently, it is the requirements of s. 190C(4)(a) to which I must turn my mind in my consideration of the application at this condition of the registration test.

In light of the above case law authority, it is my understanding that the task at s. 190C(4)(a) is restricted to an examination of two factors:

i) whether there is an appropriate representative body able to certify the application; and

ii) whether the certificate accompanying the application meets the requirements of a valid certification set out in s. 203BE(4).

The certification at Attachment R has been provided by QSNTS, and is signed by the CEO on behalf of the representative body. The geospatial assessment confirms that the application area falls entirely within the area for which QSNTS carries out the functions of a representative body.

The certification sets out a number of statements by the CEO of QSNTS, including that QSNTS is a body funded pursuant to s. 203FE(1) for the purpose of performing the functions of a representative body, and that as a duly appointed executive officer of QSNTS, he has been 'delegated the function given to QSNTS under the Act to certify' the application.

In satisfying myself that QSNTS is an appropriate representative body able to certify the application, I have also had regard to the information available on the Tribunal's website, including information relating to each of the various representative bodies spread across different regions of Australia. That information confirms that while there is no recognised Aboriginal/Torres Strait Islander representative body for the area of southern and western Queensland, QSNTS is funded to perform the functions of a representative body for that region.

It is my view that there is nothing before me that indicates or suggests that the functions of a representative body which QSNTS is funded to carry out pursuant to s. 203FE(1), do not include certification. The fact that the certificate is signed by the CEO of QSNTS, in my view, indicates that he testifies in that role to the truth of the statements contained in the certificate, including that QSNTS has been charged with the function of certification under the Act.

Consequently, I am satisfied that QSNTS is an appropriate representative body able to certify the application.

Regarding whether the certification complies with the requirements of a valid certification, s. 203BE(4) provides that:

> (4) A certification of an application for a determination of native title by a representative body must:
>
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
>
> (b) briefly set out the body's reasons for being of that opinion; and
>
> (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

Paragraphs [2] and [3] of the certificate, in my view, provide a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met, namely that all of the persons in the native title claim group have authorised the applicant to make the application, and that all reasonable efforts have been made to ensure that the application describes all of the persons within the native title claim group.

Following those statements, paragraph [4] of the certificate sets out various information relating to the authorisation of the application. This includes that QSNTS convened the authorisation meeting upon instruction, that the meeting was widely notified, both publicly and personally, and that the process of the meeting and the way in which it was conducted was diligently recorded by QSNTS. Paragraph [4] concludes that 'having regard to the steps and processes followed up to and in the authorisation meeting' that it is of the opinion stated regarding the requirements of s. 203BE(2)(a) and (b).

Having considered the information contained in the certificate, I am satisfied that it 'briefly' provides the reasons for which QSNTS hold the stated opinion regarding the authorisation of the applicant to make the application by the persons in the native title claim group (see s. 203BE(2)(a)).

I note that the certificate does not speak in specific terms to the requirements of s. 203BE(2)(b), that is, ensuring that the application describes or otherwise identifies all of the persons in the native title claim group. Despite this, however, I have understood the certificate as asserting that this requirement has been met by QSNTS from a number of statements provided. The statement regarding the process of extensive public notification undertaken by QSNTS indicates that this process was a way by which people identifying as Western Kangoulu were advised of the fact that a claim was being proposed on their behalf, and inviting them to come forward and be recognised as members of that native title claim group. Similarly, the statements regarding the fact that QSNTS convened the meeting 'upon instructions', indicates that there was already some certainty surrounding a group of persons who were seeking to file a native title determination application. Further to this, the statement pertaining to the personal notification process indicates that QSNTS already held a list of names and contact details for persons identifying as Western Kangoulu. I have inferred that it is likely that these persons were identified through a process involving anthropological expertise and research. In light of this information, I am satisfied that the certificate briefly sets out the reasons for which QSNTS was of the opinion stated in paragraph [3], 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.

Subsection (c) of s. 203BE(4) requires that the representative body briefly set out what it has done to meet the requirements of s. 203BE(3). Subsection (3) requires that where there are other applications overlapping the current application of which the representative body is aware, it must make all reasonable efforts to achieve agreement between the overlapping claimants and minimise the number of overlapping applications. Following this requirement, subsection (3) provides, however, that 'a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body'.

The certificate does not speak to the requirements of subsection (c), nor to s. 203BE(3). Having regards to the fact that QSNTS legally represent the applicant, and that Schedule H of the application provides that the current application overlaps the area covered by the Bidjara People #7 application, it is my understanding that QSNTS is aware of the overlap between the two applications.

The failure of the certificate to speak to the requirement in subsection (c) of s. 203BE(4) does not provide any clarification regarding whether the representative body has, in fact, taken any action in assisting the parties to reach agreement in relation to the overlapping area. In my view,

however, noting the wording of the latter part of subsection (3) reproduced above, even where QSNTS has not made any efforts to address or minimise the overlapping applications, the certification of the application is not invalidated. Subsequently, it may be the case that the certificate does not speak to the requirements of subsection (3) due to the fact that there is no relevant information to provide. On this basis, it is my view that the failure of the certificate to speak to the requirements of s. 203BE(4)(c) does not render the certificate invalid.

Noting my satisfaction above that the certificate meets the remaining requirements of s. 203BE(4), I have formed the view that the certificate complies with the requirements of a valid certification, is provided by an appropriate representative body able to certify, and consequently, that the condition of s. 190C(4)(a) is satisfied.

The application meets the requirements of s. 190C(4)(a).

Merit conditions: s. 190B

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

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

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

In considering the application against the condition at s. 190B(2), I note that the wording of that condition directs me to the information contained within the application for the purposes of ss. 62(2)(a) and (b), being a written description of the external boundaries of the application area, including a description of those areas within that boundary not covered by the application, and a map showing the external boundary described.

A written description of the external boundaries of the application area appears at Attachment B to Schedule B. Attachment B is titled 'Western Kangoulu – External Boundary' and contains a metes and bounds description of the application area referencing centrelines and banks of rivers, native title determination boundaries and coordinate points (referencing Geocentric Datum of Australia 1994 (GDA94)). The description has been prepared by the Tribunal's Geospatial Services and is dated 30 April 2013.

The description specifically excludes the areas covered by the following native title determination applications:

- QUD216/08 – Bidjara People (QC2008/005);
- QUD85/04 – Wangan and Jagalingou People (QC2004/006);
- QUD400/12 – Gaangalu Nation (QC2012/009);
- QUD421/12 – Kanolu People #2 (QC2012/012);
- QUD245/11 – Brown River People (QC2011/004).

In addition to this, further specified areas falling within the external boundaries of the application area that are not covered by the application appear in the form of general exclusion clauses at Schedule B.

An A3 map of the external boundary of the application area appears at Attachment C to Schedule C of the application. The map is entitled 'Native Title Determination Application - Western Kangoulu' and has been prepared by the Tribunal's Geospatial Services, dated 30 April 2013. It includes:

- the application area depicted as a bold dark blue outline with stippled shading;
- roads, rivers, railways and labelled towns, homesteads and mines provided as a topographic image by Geoscience Australia (2008);
- scalebar, northpoint, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

The geospatial assessment and overlap analysis (geospatial assessment) dated 15 May 2013 (GeoTrack: 2013/0809) confirms that the map and description are consistent and identify the application area with reasonable certainty. Upon consideration of the information before me, I have formed the view that I agree with the geospatial assessment, and that the information contained within the application is sufficient to allow me to be satisfied that the claim to native title rights and interests is in relation to particular land and waters.

Regarding the use of general exclusion clauses to describe those areas within the external boundary of the application area that are not covered by the application, it is my view that the case law confirms that such an approach is acceptable for the purposes of s. 190B(2) – see *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55]; *Western Australia v Strickland* [2000] FCA 652 at [23] to [26]. The applicant is not required to possess knowledge enabling them to describe the actual land and waters to be excluded from the application area – *Strickland* at [55].

Consequently, I am satisfied that the application meets the requirements of s. 190B(2), and that the information and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

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).

It is my understanding of the task at s. 190B(3) that the requirements of the condition are to be met by the information contained within the application, that is, information pertaining to those persons within the native title claim group in a form prescribed by either subsection (a) or subsection (b) – *Doepel* at [16].

The decision in *Doepel* gives some guidance as to the nature of the Registrar's task at s. 190B(3). Mansfield J held that 'the focus is whether the application enables the reliable identification of the persons in the native title claim group' – at [51]. Further to this, His Honour found that 'its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the group can be ascertained' – at [37]. This particular finding was confirmed by Keifel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198, and by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) – at [33].

A description of the native title claim group, pursuant to s. 190B(3)(b), appears at Schedule A of the application. That description appears in my reasons above at s. 190C(3).

It is my understanding of that description that it provides two criteria or 'rules' by which group membership is defined, and by which persons within the group can be ascertained. The first

criterion is that 'the other Western Kangoulu People' recognise the person as being biologically descended from a Western Kangoulu ancestor. The second is that the person from whom the group member asserts their descent must be someone who 'the other Western Kangoulu People' recognise as a Western Kangoulu ancestor. Five persons are named as recognised Western Kangoulu apical ancestors.

I understand the first criterion to operate on the basis of group recognition of biological descent. In my view, group recognition is a subjective test, and of itself is unable to provide the sufficient clarity required of the description. The problematic nature of group recognition lies in the fact that at any point in time, group members are able to express their view as to the inclusion or exclusion of an individual to the group, based purely on their personal opinion or belief without reference to any external or objective conditions. In my view, this kind of criterion of itself would not provide sufficient clarity to ascertain members of the native title claim group.

Biological descent from named apical ancestors does, however, in my view, provide an external reference point by which any uncertainty produced by group recognition can be rectified. I consider that it is this external reference point that is able to act as a determinant of the known claim group, that is, those persons required to recognise the descent of any further individual from a Western Kangoulu ancestor.

In the case of *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) the Court dealt with a claim group description involving the application of 'three rules' in ascertaining whether any one person fell within the group. In that case, Carr J stated (at [67]):

> The question is whether the application of the Three Rules describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group. In my view it does. The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult... It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently... The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at [124].

In light of my view above regarding biological descent as an objective and external reference point, I am therefore prepared to accept that it would be possible to conduct a factual inquiry into whether a person's descent from a Western Kangoulu ancestor is recognised by the known claim group. By approaching and making an inquiry of every person descended from those named apical ancestors (that is, 'the other Western Kangoulu People'), I consider that it would be possible to determine whether another individual's descent was recognised by the group. The named apical ancestors and the rule of biological descent provide a starting point to the necessary factual inquiry. While I accept that such an inquiry may be cumbersome and lengthy, I am of the view that this alone is not fatal to the description being found sufficient for the purposes of s. 190B(3)(b).

The second criterion is that the person from whom an individual claims descent must be a person whom 'the other Western Kangoulu People' recognise as a Western Kangoulu ancestor. Five ancestors are named. I note that the use of the word 'including' prior to the list of named ancestors suggests that the list is not exhaustive, and that there may be other persons who are not included within that list whom the Western Kangoulu people may consider to be relevant Western Kangoulu ancestors. In this way, membership of the group itself would also be non-exhaustive, and consequently uncertain. The issue for me, therefore, is whether a description that may not exhaustively identify its ancestral lines is sufficiently clear for the purposes of s. 190B(3)(b).

The factual basis material in Attachment F adds further insight into the laws and customs surrounding group membership, and the basis upon which membership is determined. I have extracted relevant parts of that material below:

> The Western Kangoulu group comprises the descendants of Aboriginal persons who are recognised by the group as having being [*sic*] ancestors for the Western Kangoulu people. These 'apical ancestors' were born on or firmly associated with the Application Area around the time of practical sovereignty (1845-46) and several decades after.
>
> The members of the group have been recruited by way of cognatic descent from these apical ancestors, and are accepted as Western Kangoulu by other members of the group because of their recognised descent from one of the apical ancestors.
>
> While the Western Kangoulu recognise that they share a common system of laws and customs, beliefs and practices, with their neighbours (as described in paragraph 7), they assert that under the system of laws and customs for that broader region only the Western Kangoulu People enjoy rights and interests in the Application Area. Specifically, the rights and interests of the members of the claim group arise from their descent from an Aboriginal forbear with rights and interests in the Application Area...
>
> Members of the Western Kangoulu people assert that, under traditional law and custom, particular families of descent groups are responsible for the primary duties of speaking for and caring for country in localised sub-sections of the territory of the Application Area. The external boundary of the Application Area is therefore defined by the aggregation of the territorial domains of all families and descent groups who identify as Western Kangoulu and in turn affirmed as such by other members of the claim group – at [13], [14], [17] and [21].

From this information, it is my understanding that the ancestors named in Schedule A are persons who are understood and recognised by persons in the group as having possessed rights and interests in the particular land and waters of the application area, through being born on and occupying that area, at around the time of early European contact. I also understand certain apical persons and their families to be recognised by the group as being associated with, and having rights and interests in, specific areas within the application area. The information asserts these conditions surrounding persons who are members of the group to be part of the laws and customs of the broader region within which the application area is situated. I have inferred, therefore, that neighbouring groups also accept the Western Kangoulu people as being persons with rights and interests in the particular land and waters of the application area by way of their descent from those persons occupying the area at the time of early European settlement.

Noting that five persons are specifically named as apical ancestors, I consider that it is reasonable to infer that at this point in time, it is only those five persons who are *known* as recognised ancestors. There is no information before me which suggests otherwise. In line with the information set out above, I understand those persons to be persons who, according to the laws and customs of the Western Kangoulu (and neighbouring groups), are recognised as being born on and having occupied the application area around the time of early European settlement, and who are therefore accepted as having held rights and interests in that area.

I accept that after a native title determination application is filed, over time, further anthropological research may result in the addition of other apical ancestors to the claim group description, and the subsequent amendment of the application. I do not consider that the insertion of the word 'including' prior to the list of apical ancestors in Schedule A is for any other reason than to allow for the changing nature of claim group descriptions that can be amended over time as further and ongoing research confirms the makeup of a claim group. Notwithstanding this, it is my view that in conducting an inquiry of every member of the known claim group (namely the descendants of the named apical ancestors), it would be possible to ascertain whether any particular person is recognised by 'the other Western Kangoulu People' as a Western Kangoulu ancestor.

In forming this view, I refer to *Gudjala 2007*, where Dowsett J held that s. 190B(3) 'requires only that the members of the claim group be identified, not that there be any cogent explanation of the basis upon which they qualify for such identification' – at [33].

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 (*Ward*), Carr J held that the task of the Registrar's delegate at s. 190B(3)(b) was a matter that 'is largely one of degree with a substantial factual element' – at [27]. I am of the view that the first criterion discussed above, being group recognition and biological descent, prevents the rules of group membership operating in a way that lacks certainty, and allows for the reliable identification of the persons in the group. In providing the names of recognised Western Kangoulu ancestors at this point in time, I consider that the description contains the requisite objective or factual element that allows a starting point for the necessary inquiry regarding whether any particular person is a member of the group. Consequently, I am satisfied of the sufficient clarity of the description for the purposes of s. 190B(3)(b).

The application meets the requirements 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).

Noting the wording of s. 190B(4) and that it directs my attention to the information contained in the application as required by s. 62(2)(d), it is my view that the requirements of the condition are

to be met by what is found in the application – *Doepel* at [16]. As to the nature of a description able to meet those requirements, it is my view that the 'test of identifiability' requires that the rights and interests described are 'understandable and have meaning' – *Doepel* at [99]. It is also my view that the task at this condition requires me to have regard to s. 223(1), in considering whether those rights and interests claimed can be understood as 'native title rights and interests'. I do not, however, undertake an individual assessment of each of those rights and interests against the requirements of s. 223(1), as I consider that to be the task at the later merit condition of s. 190B(6).

In focusing on the entirety of the description contained in the application, Mansfield J in *Doepel* found that the task at s. 190B(4) was 'a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed', and that 'it was open to the Registrar to read the contents of Schedule E together, so that properly understood there was no inherent or explicit contradiction' – at [123].

A description of the native title rights and interests subject of the claim appears at Schedule E of the application. That description contains a list of ten individual rights and interests, some of which are expressed in a way which qualifies or limits their operation in certain regards. Having turned my mind to that list, and to the entirety of the description, I am satisfied that that description is clear and that the rights and interests claimed can be understood as native title rights and interests, such that they are able to be readily identified. There is nothing, in my view, indicating or evidencing any inherent or explicit contradiction within that description that prevents the application satisfying the condition.

The application meets the requirements of s. 190B(4).

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

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

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

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

The task at s. 190B(5)

In undertaking the task at s. 190B(5), I am of the view that there is a correlation that exists between the requirements of s. 62(2)(e) and s. 190B(5), such that an application and accompanying

affidavit/s which 'fully and comprehensively' addresses all the matters in s. 62 could provide sufficient information to enable the Registrar to be satisfied of all the matters referred to in s. 190B' – *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [90]. I note, however, that I am not restricted to the information contained within the application in reaching the required level of satisfaction at s. 190B(5) – *Doepel* at [16].

The case of *Doepel* provides some guidance on the role of the Registrar's delegate at s. 190B(5). Mansfield J held that the delegate is to determine 'whether the asserted facts can support the claimed conclusions' and that the role is 'not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence' – at [17].

I am of the view, therefore, that the nature of the information required to satisfy the condition at s. 190B(5) must be in 'sufficient detail to enable a genuine assessment', and be 'more than assertions at a high level of generality' – *Gudjala FC* at [92]. With this requirement for a genuine assessment in mind, I am of the view that the factual basis material must have relevance to the particular native title claimed, by the particular native title claim group, over the particular land and waters of the application area – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [39].

The applicant's factual basis material consists primarily of Attachment F/M to Schedule F, a fully referenced and untitled report addressing the three assertions at subsections (a), (b) and (c) of s. 190B(5), and four affidavits sworn by claim group members. These affidavits were supplied by the applicant directly to the Registrar for the purposes of applying the conditions of the registration test by email on 21 May 2013.

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

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

The assertion described at s. 190B(5)(a) is one that has been understood by the courts as requiring factual basis material with a certain level of geographical particularity – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]. That is, where the material is unable to demonstrate an association between the claim group and its predecessors and the entire area claimed, it is likely to be found insufficient to satisfy the condition – *Martin* at [26]. The comments made by French J in *Martin* indicate that the material should speak to the type of association, be it physical or spiritual, asserted by the clamaints – at [26].

The requirements of the factual basis material at s. 190B(5)(a) were also addressed by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), where His Honour found that the following types of information may be necessary:

- that the claim group as a whole presently has an association with the area, although there is no requirement that all members have such an association at all times;
- 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].

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

I have set out below in summary, the information contained within the factual basis material that I consider speaks to the assertion at s. 190B(5)(a):

- all of the named apical ancestors were born at places within or in close proximity to, the application area – Attachment F/M at [15];
- the apical ancestors from whom the contemporary Western Kangoulu claim group are descended were part of a distinct landholding group within a wider regional society sharing common spiritual beliefs and laws and customs – at [7] to [9];
- in accordance with those laws and customs, only the Western Kangoulu possess rights and interests in the application area, and these rights and interests derive from claimant's descent from the Aboriginal persons occupying the application area and exercising rights and interests in relation to the application area prior to or at sovereignty – at [17];
- while many claimants and their predecessors were removed from their traditional country to missions such as Woorabinda, Cherbourg and Palm Island, these persons continued to learn about their traditional country while living at the missions, and having left the missions, took opportunities to return to places within the application area – at [18];
- many families were not removed to the missions and maintained an on-going physical connection with the application area – at [18];
- claimants today understand that the landscape of the application area is inhabited by the spirits of their ancestors and by other spiritual beings – at [24];
- claimants continue to visit the application area on a regular basis for various traditional purposes – at [19].

In addition to the above, I have mapped those locations referred to within the entirety of the material before me and find that the majority of the placenames mentioned fall within, or in close proximity to, the application area, except for the missions spoken of by claimants at Cherbourg and Palm Island, where some of those persons and their predecessors were removed to.

There are also numerous statements made by claimants in their affidavits that speak to the association they and their predcessors have, or have had, with the application area. Examples of these statements include the following:

> Back in the 1990s, I attended an Ghangolou Elders trip back to Ghangolou (Western Kangoulu) country arranged by ***[name removed]***. We went to look at a mine site. I went on that trip with my brother ***[name removed]***. We were all given khaki t-shirts with Ghangalou on them from the mining company.
>
> Since then, I have travelled to Western Kangoulu for native title meetings. I've been to about three such meetings at Emerald. The latest one was just last year in about August 2012 at Emerald so that Kangoulu people could discuss the Bidjara claim that was lodged over our country... – affidavit of ***[name removed]*** at [33] to [34].

And also:

> I remember from when I was young, my Grannies, including my ***[name removed]***, talked about smoking to remove bad spirits. My Grannies taught me to use sandalwood leaves, which are from trees that grow on Kangoulu country. The smoking was used for kids who were playing up, to get rid of any spirits – especially to get them [the spirits] out of the house. I was taught that the smoke draws the spirits out. I was a little girl but I remember that – affidavit of ***[name removed]*** at [20].

And also:

> I loved going out on country, I feel comfortable there and would live on my traditional country if I could.
>
> On 4 May 2013, at the authorisation for the Western Kangoulu claim group, I did a welcome to country for Emerald because that is where my tradition connection lies – affidavit of ***[name removed]*** at [22] and [24].

And also:

> I remember there used to be huts at Emerald on the banks of the Nagoa River, where the big new service station is now. The Aboriginal people living at Emerald built huts there up from the Nagoa River. I was told there were a lot of old people who camped further down the river at the bottom of the bridge in the old days.
>
> When I was young, we fished on the Nogoa River at Emerald. If you went right up the river you could get Black bream and perch. I knew even then it was my grandmother's country. We weren't afraid to go fishing or hunting; I didn't have to ask because I was told by my elders that it was my ancestors' country and I therefore had a right to hunt and fish there – affidavit of ***[name removed]*** at [15] to [16].

And also:

> Back in those days, I had to learn to hunt. We had to get bush tucker to supplement our diet. Nowadays, I take the kids out hunting. I told my kids that Kangoulu country is their country, through ***[name removed]***. I passed this information onto them – affidavit of ***[name removed]*** at [27].

And finally:

> I was the youngest man on those railway gangs, and the others were the old Aboriginal men from around Emerald, Boguntungan and Caren Siding and the surrounding country. This is where I first learned about my traditional country – the old men told me it was my country and I accepted it because they were my elders – affidavit of ***[name removed]*** at [8].

My consideration – s. 190B(5)(a)

Having turned my mind to the factual basis material before me, I have formed the view that I am satisfied that it is sufficient to support an assertion that the native title claim group have, and their predecessors had, an association with the land and waters of the application area. My reasons for being of this view are set out below.

Firstly, noting that the majority of those locations referred to throughout the material fall within or in close proximity to the application area, and that there are numerous locations spread across the application area that are spoken of, I am of the view that the material speaks to an association with the entire area claimed, and that the material can be considered to be geographically particular to the land and waters of the application area.

Secondly, I consider that the material speaks to a present association of the whole group with the area. This in my view, is evidenced in the information asserting that some claimants continue to live on or in close proximity to the application area, and the information regarding the regular visits made by claimants back to the application area for traditional purposes. Statements by claimants above suggest such purposes include meetings of the claim group, cultural heritage surveys and discussions with mining companies in the area, teaching younger generations about their traditional country, and fishing and hunting on the application area.

Thirdly, the nature of the information in the factual basis material, in my view, suggests both a physical and spiritual association held by the claimants and their predecessors with the area. An assertion of a physical association I have discussed above, and discuss further below. A spiritual association is seen, in my view, in the way that the claimants understand the landscape of the application area as being inhabited by the spirits of their ancestors, and the particular obligations this places on them to care for and protect that country from harm. Similarly, claimants feel safe and at home on the application area as they are in the presence of those ancestor spirits and can seek their protection while there.

Finally, it is my view that the material is sufficient to support an assertion of an association between the predecessors of the whole group and the area over the period since sovereignty. The material asserts that while the assertion of British sovereignty in Australia occurred in 1788, the date of the first European explorer in the region of the application area was in 1845 to 1846. It is further asserted that sustained European occupation of the area did not occur for another ten years, at around 1855 to 1856.

The birth dates of the apical ancestors, being those persons who define the claim group, and who are asserted as having possessed rights and interests in the application as a distinct landholding group within a wider cultural society, where those dates are known, all occur between 1860 and 1888. The material specifically asserts that these apical persons 'were born on or firmly associated with the Application Area around the time of practical sovereignty and several decades after' – at [13]. In addition to this, early historical and ethnographic literature is referred to as identifying those Aboriginal persons occupying the area as Kangoulu (with some variations in spelling). It is therefore my view that the material speaks to an association between the apical ancestors and the area at the time of sovereignty.

Regarding an association of the descendants of those persons and the area, the material asserts that the majority of descendants of some of the apical ancestors continued to occupy the area and still live there today – see Attachment F/M at [12]. In addition to this, claimants speak in detail of their parents and grandparents living at various locations within the application area, and working at pastoral stations and in the rail industry across the application area. The claimants' knowledge of the 'old people's' lifestyles and habits on the land and waters of the application

area are asserted as having been passed down to them by their predecessors and elders. Even where certain Western Kangoulu families were moved to missions outside of the application area, knowledge of culture and traditional laws and customs in relation to the application area are asserted as being passed onto claimants by their parents and grandparents. After leaving the missions, the material asserts that both the claimants and their predecessors sought to return to their traditional country – see for example affidavit of ***[name removed]*** at [11] to [16].

On the basis of this information, I consider that the material is sufficient to support an assertion of an on-going association between the predecessors of the whole group and the area over the period since sovereignty.

I have consequently formed the view that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

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

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

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

The requirement of which I am to be satisfied at s. 190B(5)(b) is that the factual basis is sufficient to support the assertion 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. Noting the reference to 'native title rights and interests' within that assertion, it is my view that the task at this condition of the registration test needs to be undertaken in light of the definition of that term in s. 223(1).

The similarities between the terminology within that definition, and the assertion at s. 190B(5)(b), I consider to require me to turn my mind to the leading authority in relation to s. 223(1), being the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*). The High Court held that the meaning of the word 'traditional', in reference to the laws and customs of a native title claim group, comprised two elements. Firstly, that the origins of those laws and customs was to be found in the normative rules of the relevant Aboriginal or Torres Strait Islander society existing before sovereignty, and secondly, that the system under which the rights and interests are possessed is one that has had a continuous existence and vitality since sovereignty – *Yorta Yorta* at [46] and [47].

Since this time, the decisions of Dowsett J in *Gudjala 2007* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) have given further considerable guidance regarding the assertion at s. 190B(5)(b). His Honour found that the nature of the factual basis material required to answer the condition may include the following:

- 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 – *Gudjala 2007* 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 – *Gudjala 2007* at [65];

- an explanation of the link between the claim group described in the application and the area covered by the application – *Gudjala 2007* at [66];
- where descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some connection between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived – *Gudjala 2009* at [40];
- an explanation of the way in which the laws and customs of the claim group can be said to be traditional, beyond a mere assertion that they are – *Gudjala 2009* at [52], [55], [69] and [72].

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

I have set out below the factual basis material before me that I consider relevant to the assertion at s. 190B(5)(b).

Attachment F contains various information pertaining to the nature of the society asserted by the material as being the relevant society at European settlement acknowledging and observing laws and customs in relation to the application area, from whose laws and customs those of the Western Kangoulu people are derived. This information includes that:

- the first explorer to the region within which the application area is situated was Ludwig Leichardt in 1845 to 1846 – at [4];
- sustained European settlement in the area occurred approximately ten years following, in approximately 1855 to 1856 – at [4];
- the Aboriginal persons associated with the land and waters of the application area were part of a broader regional society, however comprised a localised constituent group within that society, who confined their territorial interests to the application area – at [6];
- the name 'Western Kangoulu' has been adopted by the contemporary members of that group to distinguish their localised interests from those of their regional neighbouring groups – at [6];
- this regional society was situated within the cultural bloc referred to by linguists as the Maric cultural bloc – at [7];
- the neighbouring groups with whom the Western Kangoulu share strong cultural and social ties, and with whom they share some common spiritual beliefs, religious institutions, social organisation and classificatory kinship systems, include the Jagalingu, Wangan, Karingbal, Kanolu, Wadja and Gangalu – at [7];
- despite the fact that many social institutions, including laws and customs, were shared amongst the neighbouring groups, the Western Kangoulu see themselves and their laws and customs as unique and distinct to the native title claim group, and as giving rise to rights and interests in the particular land and waters of the application area – at [8];
- under the system of laws and customs for the wider region, the claim group assert that only the Western Kangoulu enjoy rights and interests in the application area – at [9];
- the application area is defined by natural geographic features which inform the Western Kangoulu people's understanding of their land – at [10];
- Curr in 1887 identified the presence of a distinct Aboriginal landholding group in the application area – at [11];

- early ethnographic records from the application area, for example those by Tennant-Kelly in 1934 and by Tindale in 1940, identify the Aboriginal group occupying the area by a range of similar sounding names, including 'Kangalu' and 'Khungalu' – at [11];
- the claim group is comprised of the descendants of Aboriginal persons recognised by the group as being the ancestors for the Western Kangoulu People – at [13];
- those recognised ancestors are accepted as being born on or associated with the application area around the time of first European contact (1845 to 1846) and several decades after – at [13];
- early historical records, such as Curr in 1887, show that the Western Kangoulu people occupying the application area extracted food and a range of natural resources essential to their sustenance and the conduct of daily and ceremonial life – at [39].

Regarding the system of traditional laws and customs acknowledged and observed by the native title claim group, Attachment F provides the following:

- Western Kangoulu traditional law and custom has been passed down by traditional teaching through the generations preceding the present generations of persons comprising the claim group – at [20];
- under traditional law and custom, particular families or descent groups are responsible for and carry rights and interests in relation to localised subsections of the application area. The external boundary of the application area is therefore defined by the aggregation of the territorial domains of all families and descent groups who identify as Western Kangoulu – at [21];
- Western Kangoulu people have a strong belief in the spiritual aspect of their country, and in order to manage this sometimes dangerous spirituality, certain customary rules mandating social behaviour must be adhered to – at [22];
- these customary rules include avoidance of certain places, a prohibition on the removal of objects from country and a need to speak with the spirits of the country so that they might be appeased or placated – at [25];
- claimants understand their country as being occupied by the spirits of their ancestors and other spiritual beings, resulting in a strong respect for country, and a sense of responsibility for the land, including a sense of responsibility to claimants' ancestral and creator spirits – at [24];
- Western Kangoulu people assert that only they can speak for the land and waters of the application area, and assert that the rights and interests held by the group in relation to the area include a right to be consulted about matters affecting that country – at [30];
- the authority to speak for country arises also out of the Western Kangoulu people's possession of geographic and cultural knowledge transmitted to them by their Aboriginal predecessors originating in the pre-sovereignty society – at [31];
- the transmission and inheritance of country and rights and interests in that country is gained in accordance with the rules of group membership – at [34];
- claimants possess a strong knowledge of their traditional country, and the associated rights to use and enjoy the resources of that country, which has been taught to them by their parents and grandparents – at [41] and [42];

- under their traditional laws and customs Western Kangoulu people have the right to take and bury their deceased relatives on country – at [43];
- customs of Aboriginal persons at Cherbourg settlement, many of whom were from the application area, involved the naming of persons in accordance with their spiritual or home country – at [44];
- one Western Kangoulu apical ancestor shared detailed information regarding the burial practices and funeral rites of his people with an anthropologist at Cherbourg in the 1930s – at [44];
- smoking ceremonies, carried out as a cleansing ritual following death, is a continuation of traditional practice and was observed by Tennant-Kelly at Cherbourg in 1934 – at [46];
- caring for country is an essential element of the traditional laws and customs of the group, manifested in rules passed down to younger generations such as not taking more than one needs when gathering resources – at [50];
- Western Kangoulu laws and customs, in being based on a strong understanding of the spiritual presences within the landscape, involve practices of speaking to the Western Kangoulu ancestor spirits, or 'old people', acknowledging their presence and respecting them – at [49];
- the contemporary manifestation of the responsibility of Western Kangoulu people to care for their country is seen in the active involvement of many claimants in cultural heritage surveys and protection on country, through the Lumburra Bimbi corporation – at [52].

The affidavits sworn by claim group members submitted by the applicant as additional material, similarly include statements by those persons giving insight into and details regarding the laws and customs of the group. Many of the claimants explain that they and their families were removed to the missions at Woorabinda, Palm Island, and Cherbourg, but that this fact did not prevent them from learning about and practising their traditional laws and customs with other Western Kangoulu families. For example, one claimant states:

> On Palm Island, the families' houses were in clusters according to what country you were from... There were some traditional people, usually elders that wanted to stay together in their own camps. The elders would tell you which camp you should live at... I remember from when I was about six or seven years old that the people in each camp would speak their own languages in those camps. They could understand each other because they were from the same country... –
>
> When I was about six or seven years old, living at Top End [on Palm Island] ***[name removed]*** told me that my totem (nguri) is kangaroo on my Dad's side and that I could not eat kangaroo. I can eat wallaby, but not kangaroo. Granny told me that on my mother's side I am freshwater eel. Granny explained to me that if a pregnant woman were to eat their totem it would affect their unborn child. I wouldn't even think of eating my own totem because it was against our traditional law and something bad would happen. I was told this by my Elders.
>
> I remember when we were living at Top Camp, Dad used to talk about places that he had travelled to. He travelled around just like his father did. I remember him telling me that he had travelled everywhere. He spoke about Nebo, saying that's his country. He also used to talk about Clermont, and said that's his people's country as well - affidavit of ***[name removed]*** at [8], [9], [19] and [20].

And also the following statement:

> As kids we were told many things about our culture. Some things were to do with creation and the *Mundaggadda* (Rainbow Serpent). For example, we were not allowed to go to the waterholes where the *Mundagadda* lived. There were certain people (clever men) who we had to avoid. We weren't allowed to sweep after dark because that is what they do when someone has died, during a funeral – affidavit of ***[name removed]*** at [7].

Claimants were also passed knowledge of their traditional country from their parents and grandparents whilst on that country. As one claimant provides:

> In about 1975–77 I took ***[name removed]*** up through Western Kangoulu country, up to Clermont where she was born. I remember her telling me that she grew up in that country, south of Peak Downs Range, until she was taken to Cherbourg when she was nine years old. She told me that Peak Downs Range was the border of our country.
>
> On that same trip, ***[name removed]*** also told me about the bottle trees, which are all around Western Kangoulu country. She told me that bottle trees were significant for our people because they use the fibres to make string, and it was a source of water. She learned this from her parents and passed this information onto me – affidavit of ***[name removed]*** at [18] and [19].

Claimants speak of the way in which they continue to pass on knowledge of their country to their children and grandchildren, in the same way that their predecessors taught them. One claimant states:

> When I was at Emerald, I told my kids that this is my Dad's country and my grandmother's country. I told them it was Ghangolou country. I said that I would go back one day to show all the grandchildren – affidavit of ***[name removed]*** at [32].

And another claimant states:

> These are Kangoulu laws and customs, and I still observe these things and teach my kids and grandkids about these laws – affidavit of ***[name removed]*** at [10].

Each of the claimants provide statements regarding their knowledge of their families' descent from a particular Western Kangoulu ancestor, and the predecessors through whom they identify as Western Kangoulu. The following statement is an example:

> My mother (Mum) was ***[name removed]*** who was a Western Kangoulu (aka 'Kangoulu') woman, born at Cherbourg in 1931. I am a member of the Western Kangoulu claim group through my descent from Polly McAvoy who is my Great Grandmother on Mum's side. Mum's parents were ***[name removed]*** and ***[name removed]*** who was Polly's daughter. I never knew ***[name removed]*** because she passed away when Mum was only about 8 – 10 years old. Mum and her sisters, ***[name removed]*** and ***[name removed]*** were raised by Nan's sister ***[name removed]*** – affidavit of ***[name removed]*** at [2] and [3].

There are a number of statements made by claimants pertaining to their knowledge of the way in which their predecessors occupied, and acknowledged and observed laws and customs in relation to, the application area. The following statement is an example of this:

> I remember there used to be huts at Emerald on the banks of the Nogoa River, where the big new service station is now. The Aboriginal People living at Emerald built huts there up from the Nogoa

> River. I was told there were a lot of old people who camped further down the river at the bottom of the bridge in the old days – affidavit of ***[name removed]*** at [15].

Claimants' strong spiritual understanding of the landscape of the application area is illustrated in statements such as the following:

> I was taught by my mother and grannies and uncles if you were scared; don't be afraid, because you just talk to the spirits. You tell them I'm so-and-so's granddaughter and you'll be fine. I was told, don't be scared of the ghosts. When you talk to the spirits, the fear goes away, because you know that's your old people.
>
> I would be scared if I walked on someone else's country, unless I had permission, or was invited by the owners of that place. Even moving something from that country is not allowed under our traditional law and custom. I was taught this by my elders.
>
> If I know someone is not Kangoulu, I tell them not to take things off our country. If they did, they would get sick. That is what I was taught by my elders, and I have always believed that. I'm a very strong believer in spirits, and the 'old people' – affidavit of ***[name removed]*** at [21], [22] and [24].

Information contained in the affidavits indicates that many claimants are actively engaged in cultural heritage protection activities and surveys, and that this involvement stems from an inherent responsibility they feel to care for their country and ensure their ancestors' land is respected and does not come to harm. The following statement is an example:

> I did cultural heritage walks for Kangoulu people at various mine sites including Rio Tinto (near Emerald). We found artefacts everywhere. Each time, we did two weeks on and two weeks off, so we spent a lot of time out there walking on Kangoulu country. ***[name removed]*** (a Western Kangoulu man and descendant of Hanny of Emerald) chose me because he knew I was a traditional person for Western Kangoulu country.
>
> We got taught what to look for by ***[name removed]*** because he was the walks manager. Hedley said 'Royce, you've got every right to pick up artefacts and stuff'. He knew I was right for there.
>
> I came back from those walks and taught my daughter ***[name removed]***and now she does the cultural heritage walks - affidavit of ***[name removed]*** at [16], [17] and [21].

My consideration – s. 190B(5)(b)

Regarding the existence at the time of European settlement of a society of people living according to a system of identifiable laws and customs, it is my view that the factual basis contains certain information pertaining to the nature of that society. The material asserts European settlement to have taken place in the 1850s to 1860s. Historical records by Curr in 1887 referred to within Attachment F, observed the presence within the area of a distinct landholding group of Aboriginal persons occupying the area, while later ethnographic research (in 1934 and 1940) is asserted as having identified this group as Kangoulu (with some variations in spelling). Western Kangoulu is stated as being a name adopted by the contemporary descendants of the society at European settlement to distinguish their localised territorial interests.

While the material asserts that the nature of the society at European settlement was that laws and customs were shared amongst a wider regional society, it is clearly stated that the Western Kangoulu understand themselves to be the only persons with territorial interests in the land and waters of the application area, and that as a result of this, they see their system of laws and customs as distinct to their identity as Western Kangoulu. In accordance with those distinct laws and customs asserted, I understand that only the Western Kangoulu exercise and enjoy rights and interests in the area.

The way in which membership of the claim group has been described, in my view, similarly reflects the assertion within the material of the Western Kangoulu as a distinct group with their own unique laws and customs that give rise to rights and interests in the particular lands and waters of the application area. I note that it is only those persons recognised by the group as being biologically descended from a recognised Western Kangoulu ancestor who are able to claim rights and interests in the application area. That is, I understand that the laws and customs of the group prescribe the enjoyment of rights and interests in the area that arise only by way of a person's descent from the named ancestors asserted as the traditional 'owners' for that area, who occupied that area, at around the time of European settlement.

From this, I infer that the persons recognised as Western Kangoulu ancestors largely comprised that distinct landholding group, and were the persons who, according to the laws and customs of the broader regional society, held exclusive territorial interests in the application area.

Consequently, I am of the view that the material establishes the requisite connection between the named ancestors and the society existing at European settlement. Noting that European settlement is asserted as occurring in the 1850s to 1860s, and that the birth dates of the named ancestors asserted all fall between 1860 and 1888, I accept, therefore, the connection stated within Attachment F, that the named ancestors are persons who comprised, or were born into, the Western Kangoulu people at around the time of European settlement or shortly after.

I note that there is little information pertaining to the laws and customs acknowledged and observed by the particular society asserted as being the relevant society at European settlement. Early historical records referred to do, however, provide that in accordance with those laws and customs, the Western Kangoulu ancestral persons used and enjoyed the natural resources of the area for various food and ceremonial purposes, that certain funeral and smoking practices were observed, that the Western Kangoulu persons interacted with neighbouring groups for social and cultural purposes, and that despite the removal of some ancestral persons and their families to the missions at Woorabinda, Cherbourg and Palm Island, knowledge of the group's laws and customs continued to be relayed through traditional teaching methods.

While those records do not date back as early as European settlement (the earliest record is 1887), I note that the records referred to include information shared with researchers by particular named ancestors – see Attachment F at [44]. In my view, this information is sufficient in giving at least a 'snapshot' of an asserted system of laws and customs acknowledged and observed by the persons comprising the Western Kangoulu people at European settlement.

As evidenced in the excerpted statements from claimants' affidavits above, claimants possess clear knowledge of the content of, and details regarding, the Western Kangoulu laws and customs currently acknowledged and observed by the group, and asserted as having been passed down to the claimants by their predecessors. From this material I understand that laws and customs include traditional methods of teaching involving elders passing on cultural knowledge and information verbally to younger generations, observance of restrictions relating to totems, observance of practices surrounding death and funerals, observance of specific behaviours and customs in relation to ancestor spirits whilst on country, activities ensuring care for and protection of country, and observance of rules surrounding the use of natural resources taken from country.

As to whether those laws and customs can be said to be 'traditional', that is, laws and customs having their origin in the laws and customs of a pre-sovereignty society, in my view, the material is sufficient to allow me to infer that the laws and customs asserted are such traditional laws and customs. As noted in the extracts and summaries of the factual basis material above, claimants possess a clear understanding of their lines of descent from a particular recognised Western Kangoulu ancestor. In addition to this, many claimants have a clear memory regarding the particular predecessors who passed them traditional knowledge and who were of two or three generations preceding. For example, Attachment F provides that many claimants remember ***[name removed]***, daughter of Hanny of Emerald (a named ancestor), who was a 'teacher of traditional law and custom to many of the current Western Kangoulu Elders' – at [38]. ***[name removed]*** is asserted as having lived to nearly 100 years of age.

In my view, with reference to the excerpts above, the material clearly supports and evidences a traditional method of teaching whereby Western Kangoulu law and custom was passed down through the generations preceding that of the claimants, and which today, continues to be passed onto younger claimants. In having material before me pertaining to the clear family history and descent lines of almost all of the named Western Kangoulu ancestors, including details regarding the ways in which those descendants shared their knowledge of Western Kangoulu laws and customs (both whilst living on the missions and during time spent on the application area), it is my view that those laws and customs asserted by the claimants as being acknowledged and observed today, are the same laws and customs that were acknowledged and observed by the Western Kangoulu named ancestors, or society, at European settlement.

This inference is further supported, in my view, by the claimants' strong and active understanding of the spirituality inherent in the landscape of the application area, including the presence of the spirits of the Western Kangoulu ancestors in that landscape. The material clearly demonstrates that the belief that such spirits inhabit the area dictates a wide range of customary behaviours, including talking to and engaging with spirits whilst on country, protecting the country from harm, using natural resources in a sustainable manner, and instructing non-Western Kangoulu people in the appropriate behaviour to be observed whilst on country.

Noting that it is the presence of the ancestor spirits within the landscape that motivates these behaviours, I am of the view that the system of Western Kangoulu traditional laws and customs asserted as being upheld by the claimants' predecessors (including back to European settlement) and upheld by the claimants today, is founded upon spiritual connections with the landscape and

the group's ancestors, such that the laws and customs have been maintained and unaltered since those ancestors physically occupied the area.

In light of the above discussion, therefore, I have formed the view that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group giving rise to the claim to native title. I consider that the nature of the material is such that it provides a relatively continuous history of the Western Kangoulu people and their observance of those laws and customs, including the way in which that information was transmitted to younger generations, back to the asserted society at European settlement of which the named ancestors were members.

Further, I do not consider that the material reveals that there was any major interruption to the transmission of, and practice of, those laws and customs in relation to the application area resulting from the removal of certain claimants and their predecessors to the missions at Woorabinda, Cherbourg and Palm Island. In my view, the material sufficiently addresses and asserts the way in claimants maintained their knowledge and practice of their culture despite being temporarily relocated outside the application area.

While there is no information pertaining to a *pre-sovereignty* society, I consider that the factual basis regarding the Western Kangoulu society and its acknowledgment and observance of particular laws and customs from European settlement onwards, is sufficiently detailed for me to infer that that society and its laws and customs prior to the assertion of British sovereignty in 1788 was largely unaffected by that particular event.

I consider, therefore, that the factual basis is sufficient to support the assertion at s. 190B(5)(b) and meets the requirements of that condition.

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

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

It is my understanding of the assertion at s. 190B(5)(c) that it is 'plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5)' – see *Martin* at [29]. Consequently, where I have not been able to be satisfied of the factual basis in support of the assertion at s. 190B(5)(b), it follows that I will not be able to be satisfied of the factual basis for the purposes of s. 190B(5)(c).

I am of the general view that the task at this condition of the registration test can be equated with the second element of the meaning attributed to the term 'traditional laws and customs' by the High Court in *Yorta Yorta*, namely that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way - see *Yorta Yorta* at [47] and [87].

As noted in my reasons above at s. 190B(5)(b), I am satisfied that the factual basis is sufficient in supporting an asserted system of laws and customs acknowledged and observed by the native title claim group, and passed down to them through a number of preceding generations back to the ancestors named at Schedule A, being those persons comprising a relevant 'society' at

European settlement. In reaching this level of satisfaction above, I note that I have considered the material pertaining to the removal of certain Western Kangoulu families to the missions at Cherbourg, Woorabinda and Palm Island, and the effect of that removal on the transmission to the claimants of Western Kangoulu laws and customs, and Western Kangoulu culture, to the maintenance of that culture.

As indicated in my reasons above, I do not consider that the impacts of this historical event were of any such measure that prevented or interrupted the continual acknowledgement and observance of traditional laws and customs by the native title claim group. There is various information within the factual basis that leads me to this conclusion, and this is discussed in my reasons above regarding the traditional nature of the laws and customs asserted by the group. A further example of such information, in my view, includes information pertaining to the active involvement and participation of a number of claimants in activities that seek to protect their traditional country in accordance with their laws and customs. The fact that these cultural heritage activities are coordinated by a corporation established by the claimants in 2011, the Lumburra Bimbi Corporation, in my view, indicates that the system of Western Kangoulu traditional law and custom is one that claimants and their predecessors have upheld and maintained, including through establishing formalised institutions and structures for that purpose.

For these reasons, I have formed the view that the system of Western Kangoulu traditional laws and customs is one that has 'had a continuous existence and vitality' – *Yorta Yorta* at [47]. I consider 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 those traditional laws and customs.

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

Subsection 190B(6)
Prima facie case

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

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

With reference to the wording of the condition, I understand that it is not a requirement at s. 190B(6) that *all* of the native title rights and interests claimed are able to be, prima facie, established. I note, however, that it is only those rights and interests that I consider can be, prima facie, established, that will be included in an entry for the application on the Register of Native Title Claims (the Register) where the application meets all of the conditions of the registration test.

The appropriate meaning to be applied to the term 'prima facie' was held by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* (1996) CLR 595 to be the ordinary meaning, being 'at first sight; on the face of it; as appears at first sight without any investigation' – at [615] to [616]. This approach was approved by Mansfield J in relation to the test at s. 190B(6) in *Doepel* –

at [134]. Further to this, His Honour held that '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].

Following from Mansfield J's findings in *Doepel* (including at [132]), I am of the view that in undertaking the task at s. 190B(6), I am to consider whether there is information before me that speaks to each of the individual rights and interests claimed, such that on the face of that information, I can be satisfied that the right is, prima facie, established.

Noting that it is *native title* rights and interests that are the particular focus of the task at s. 190B(6), I am also of the view that the rights and interests claimed must be shown to satisfy the requirements of the definition of 'native title rights and interests' at s. 223(1). That is, the rights and interests must be shown to be possessed under the traditional laws and customs acknowledged and observed by the group, to be held in relation to the land and waters of the application area, and to be recognised by the common law and not extinguished over the whole of the application area.

I have, therefore, turned to consider the material before me pertaining to each of the individual rights and interests claimed, below.

The right to access, be present on, move about on and travel over the application area

It is clear from the material that the claim group assert territorial interests in the particular land and waters of the application area. Attachment F provides that in accordance with the laws and customs of the wider region, only the Western Kangoulu possess such territorial rights in the application area – at [8] and [9]. Consistent with this assertion, various statements by claimants within the additional material provided indicate that the claimants and their predecessors have freely accessed and travelled throughout the application area, including for work, holiday trips and for fishing and hunting. Examples of such statements are as follows:

> I remember when we were living at Top Camp, Dad used to talk about places that he had travelled to. He travelled around just like his father did. I remember him telling me that he had travelled everywhere. He spoke about Nebo, saying that's his country. He also used to talk about Clermont, and said that's his people's country as well. Dad worked all over, in places such as Comet Station, Bogantangun siding, Emerald and Clermont... – affidavit of ***[name removed]*** at [20].

And also:

> When I was at Emerald, I told my kids that this is my Dad's and my grandmother's country. I told them it was Ghangolou country. I said that I would go back one day to show all the grandchildren – affidavit of ***[name removed]*** at [32].

And also:

> Mum used to tell us that our people came from around Clermont and Emerald. She told us that ***[name removed]*** was born at Capella.
>
> I have visited Emerald on many occasions throughout my life, including when I was young – affidavit of ***[name removed]*** at [11] and [14].

In my view, information of this nature indicates that the claimants have a real perception of the application area as being their country and that this is knowledge that their predecessors have passed down to them through traditional methods of teaching. Consequently, I am of the view

that claimants accept and understand that they are able to and have the right to traverse the area and spend time on it in accordance with their laws and customs. In light of this, I am satisfied that the right is shown to be possessed pursuant to the traditional laws and customs of the group, and consider that it can be, prima facie, established.

The right to camp on the application area and for that purpose, erect temporary shelters on the application area

The information before me speaks both to the exercise of such a right by the claimants today, and the way in which the claimants' predecessors exercised the right. This information, in my view, indicates that the right to camp necessarily entails a right to erect temporary structures for the purposes of camping. The following statements are examples:

> I remember there used to be huts at Emerald on the banks of the Nogoa River, where the big new service station is now. The Aboriginal People living at Emerald built huts there up from the Nogoa River. I was told there were a lot of old people who camped further down the river at the bottom of the bridge in the old days – affidavit of ***[name removed]*** at [15].

And also:

> On the way back, we camped at Emerald on the river, under the railway bridge. I remember that it was bitterly cold. Again, there were no beds, so we camped out right on the ground. The kids slept in the back of the car, but my partner and I slept out around the fire. We made a fire to cook on, and caught some yellowbellies for dinner from the river and cooked them up. We had money to stay in the motel, but we wanted to fish... – affidavit of ***[name removed]*** at [30].

The fact that claimants today possess knowledge of the way in which their predecessors exercised a right to camp, in my view, suggests that knowledge of the right was passed to the claimants in accordance with the system of Western Kangoulu laws and customs discussed in my reasons above at s. 190B(5)(b). There is also an indication from the statements, in my view, that the claimants believe they have the right to camp on the application area by way of their inheriting the territorial rights referred to above and asserted within the material.

In this way, I consider that the right to camp on the application area and for that purpose erect temporary shelters on the application area is, prima facie, established.

The right to take, including by hunting and gathering, and use traditional natural resources from the application area for personal, domestic and non-commercial communal purposes

Despite the fact a number of Western Kangoulu families were removed from the application area to missions throughout Queensland, the material contains statements indicating claimants' use of natural resources from the application area, and ways in which claimants were taught methods and techniques regarding the use of those resources by their predecessors. The following statements are examples:

> I was taught by ***[name removed]*** and my uncles about gumbi gumbi for healing. The gumbi gumbi was used to heal you inside and was used outside [on the skin] to wash sores – affidavit of ***[name removed]*** at [18].

And also:

> I learned to hunt from a young age in and around Woorabinda. I learned a lot from my brother ***[name removed]***, such as how to clean a kangaroo or a porcupine in the traditional way. I also

> learnt how to skin them from my uncles, such as ***[name removed]***. They taught me to start from the tail and cut around. They told me that was the traditional way.
>
> When I worked on the railways out on Western Kangoulu country, I did a lot of hunting and fishing on my days off. ***[name removed]***, who was out there with me, told me that it was alright for me to hunt and fish on that country around Emerald. He told me that I had the right to do that there because I had a traditional connection to that country – affidavit of ***[name removed]*** at [25] and [28].

In my view, statements such as these support the existence of the right claimed, and that it is one held in accordance with the traditional laws and customs of the group, having been passed down to the claimants by their predecessors. On that basis, I consider that the right to take, including by hunting and gathering, and use traditional natural resources of the application area is, prima facie, established. Noting that the use claimed does not extend beyond a purpose that is for personal, domestic and non-commercial, communal purposes, I consider that the right is able to be recognised by the common law.

The right to assemble and conduct religious and spiritual activities and ceremonies on the application area

From the material before me, I consider that there is evidence of the way in which claimants exercise this right today. The following statement is an example:

> Last NAIDOC [National Aborigines and Islanders Day Observance Committee] Week, I took a group of Aboriginal people out from Emerald to a property called Fairhills. The Lumburra Bimbi Corporation, which I am the Chairperson of, had done a cultural heritage protection project out there, during which we found stone arrangements. We fenced off the stone arrangements. We took a group of people out there – all painted up – and did a corroboree. We also fixed up some of the stones that had been moved by cattle, to put them back in their proper place – affidavit of ***[name removed]*** at [17].

In the same way, I consider that certain statements indicate that the claimants' predecessors also carried out such ceremonies and religious activities on the application area. The following statement is an example:

> I remember from when I was young, my Grannies, including ***[name removed]***, talked about smoking to remove bad spirits. My Grannies taught me to use sandalwood leaves, which are from trees that grow on Kangoulu country. The smoking was used for kids who were playing up, to get rid of any spirits – especially to get them [the spirits] out of the house. I was taught that the smoke draws the spirits out. I was a little girl but I remember that – affidavit of ***[name removed]*** at [20].

I note that the latter statement indicates that such practices have been passed down to the claimants today, in accordance with the transmission of Western Kangoulu traditional law and custom. In my view, this material is sufficient to allow me to consider that 'on the face of it', the right is held pursuant to the laws and customs of the group and, therefore, that it is, prima facie established.

The right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas, by lawful means, from physical harm

There are a number of statements made by claimants within the affidavit material indicating that they feel a certain obligation placed upon them to care for their country, and that this obligation is inherently connected to the territorial rights and interests they enjoy in the area. As discussed in more detail in my reasons at s. 190B(5)(b) above, such rights and interests are asserted to arise by

way of the descent of the Western Kangoulu people from certain ancestors who occupied and inhabited the area at the time of European settlement. The material further provides that caring for country is premised on a belief held by the Western Kangoulu that those ancestor persons continue to inhabit the land and waters of the application area in spirit form.

The following statement, in my view, is an example of this belief in practice, and indicates that the belief and the associated behaviours have been passed down to the claimants in accordance with traditional methods of teaching:

> If I know someone is not Kangoulu, I tell them not to take things off our country. If they did, they would get sick. That is what I was taught by my elders, and I have always believed that. I'm a very strong believer in spirits, and the 'old people' – affidavit of ***[name removed]*** at [24].

Regarding material pertaining to ways in which claimants currently exercise this right, I consider the following statement to be an example:

> I was on those [cultural heritage] committees because I was concerned to ensure that our Aboriginal cultural heritage, including artefacts and significant sites were protected and maintained. I still serve on a committee that oversees an agreement with Enshan mine, which is 40 kilometres east of Emerald, and within Western Kangoulu country – affidavit of ***[name removed]*** at [22].

In my view, this material is sufficient to allow me to consider that the right is, prima facie, established, and that it is a right possessed pursuant to the traditional laws and customs of the Western Kangoulu people.

The right to teach on the application area the physical and spiritual attributes of the application area

It is my understanding of the statements within the affidavits provided, that the claimants have a relatively strong knowledge of their country and the locations with which their family and their family's predecessors are associated. Claimants also share their knowledge of certain features of the landscape and environment of the application area, and the way in which their parents and grandparents passed this knowledge onto them. One claimant states:

> In about 1975-77 I took ***[name removed]*** up through Western Kangoulu country, up to Clermont where she was born. I remember her telling me that she grew up in that country, south of the Peak Downs Range, until she was taken to Cherbourg when she was nine years old. She told me that the Peak Downs Range was the border of our country.
>
> On that same trip, ***[name removed]*** told me about the bottle trees, which are all around Western Kangoulu country. She told me that bottle trees were significant for our people because they use the fibres to make string, and it was a source of water. She learned this from her parents and passed this information onto me – affidavit of ***[name removed]*** at [18] and [19].

In addition to this, there are a number of statements indicating that the claimants continue to teach their own children and grandchildren these aspects of their country, whilst out on country. The following statement I consider to be an example:

> Back in those days I had to learn to hunt. We had to get bush tucker to supplement our diet. Nowadays I take the kids out hunting. I told my kids that Kangoulu country is their country, through ***[name removed]***. I passed this information onto them – affidavit of ***[name removed]*** at [27].

Further statements indicate that knowledge of the application area passed onto the claimants includes spiritual knowledge of the landscape and its creation. It is my view that the material

demonstrates this knowledge passed to the claimants and passed on by them, to be in accordance with Western Kangoulu traditional law and custom. I consider, therefore, that the right to teach on the application area the physical and spiritual attributes of the application area is, prima facie, established.

The right to light fires on the application area for traditional purposes and in accordance with traditional law and custom

Statements made by claimants indicate that fire is used by the group for a number of purposes, including cooking and smoking ceremonies. The following statement is an example:

> When we camped at Emerald, we would use water from the Nogoa River for cooking, washing and drinking. We would light fires if we needed to cook things such as porcupine, but only in winter time when they are fat – affidavit of ***[name removed]*** at [17].

Claimants speak of lighting fires while camping on country today, and the way in which they exercised the right while camping as children with their parents and grandparents. I accept, therefore, that the right asserted by the claimants to light fires on their country is knowledge that was passed to them by their predecessors in accordance with Western Kangoulu traditional law and custom.

Noting that I consider that the right to camp is, prima facie, established, I accept that a right to light fires for cooking purposes and warmth naturally flows from the former right. In my discussion of that right above, I was satisfied that the material supported the right as being one held in accordance with the traditional laws and customs of the group. I have formed the same view here, and consider that the right to light fires on the application area is, prima facie, established.

The right to be buried on the application area in accordance with traditional law and custom

While the statements made by claimants in their affidavits do not directly speak to a right to be buried on the application area, Attachment F asserts that such a right exists, and that it is held by the claimants pursuant to the traditional laws and customs of the Western Kangoulu people – at [27]. Attachment F provides the following information:

> In the 1930s Tennant-Kelly recorded of the Aboriginal groups at Cherbourg Settlement (many of whom were from the region of the Application Area), that individuals were given three different names at birth, and one of these was known as the *yamba* name. *Yamba* (alt. *Yumba*), signifies 'homeland or country', 'camp', 'old tribal home', or 'spirit home'. Tennant-Kelly recorded that the *yamba* name of an individual indicated the spirit home of that person, and that upon death, the spirit of the person will return to this place. "Old people on the settlement many miles from their own country grieved to get back to their own tribal territory before they died in order to ensure their spirit's safe return home". One informant of Tennant-Kelly, John "Jack" Bradley (a Western Kangoulu apical ancestor) provided detailed information on the burial practices and funerary rites of his people and was described by her as an "...obvious leader of thought on topics such as these – at [44].

In this way, I consider that the material contains information indicating that such a right exists, and that it was held by the claimants' predecessors, including one of the Western Kangoulu ancestors, John 'Jack' Bradley. In addition to this, statements made by claimants speak of various laws and customs surrounding burial practices. The following statement is an example:

> We weren't allowed to throw dirt onto graves. I remember at ***[name removed]***'s funeral, ***[name removed]*** (a friend of ***[name removed]***'s saying it would be an insult to throw dirt into his grave.
>
> These are Kangoulu laws and customs, and I still observe these things and teach my kids and grandkids about these laws – affidavit of ***[name removed]*** at [9] and [10].

Similarly, there are statements within the affidavits that indicate a spiritual connection held by the claimants with their traditional country, and that this is based on the understanding that the spirits of the Western Kangoulu ancestors inhabit and are present within that country. The following statements are, in my view, examples:

> I was taught by my mother and grannies and uncles if you were scared; don't be afraid, because you just talk to the spirits. You tell them I'm so-and-so's granddaughter and you'll be fine. I was told, don't be scared of the ghosts. When you talk to the spirits, the fear goes away, because you know that's your old people – affidavit of ***[name removed]*** at [21].

And also:

> I loved going out on country, I feel comfortable there and would live on my traditional country if I could – affidavit of ***[name removed]*** at [22].

On this basis, I consider that these laws and customs surrounding death and burials, passed down by the claimants' predecessors to them, are understood by the claimants as including, or giving rise to, the right to be buried on the application area, as communicated to Tennant-Kelly in the 1930s. Flowing from this, it is my view that the material supports the right as being one in accordance with Western Kangoulu traditional laws and customs and that it can be, prima facie, established.

The right to hunt, fish, travel in or on, and gather from, the water for personal, domestic and non-commercial communal purposes

There are a number of statements made by claimants pertaining to a right to fish. The right is asserted as being one exercised by the claimants' predecessors and elders, and one that was passed onto them in accordance with the group's traditional laws and customs. I consider the following statement to illustrate this:

> When I was young, we fished on the Nogoa River at Emerald. If you went right up the river you could get Black bream and perch. I knew even then it was my grandmother's country. We weren't afraid to go fishing or hunting; I didn't have to ask because I was told by my elders that it was my ancestors' country and I therefore had a right to hunt and fish there – affidavit of ***[name removed]*** at [16].

In the same way, certain statements speak to the way in which claimants today continue to exercise a right to fish on the application area. The following statement is, in my view, an example of this:

> More recently, I've been out fishing at Lake Maraboon, which is just south of Emerald. Lake Maraboon is a big area. All the water there runs into the Nogoa River. That was a couple of years ago. I've also been fishing on the Nogoa River. I have the right to fish in those places because I am a Western Kangoulu person – affidavit of ***[name removed]*** at [16].

From this information, I consider that the right is shown to be one that is held pursuant to the traditional laws and customs of the Western Kangoulu, and that it is, prima facie, established.

The right to take and use the water for personal, domestic and non-commercial communal purposes

Consistently with a belief that the application area is their traditional country, claimants' statements indicate that they understand that the rights and interests they have inherited in that land, by way of their descent from the Western Kangoulu ancestors, includes a right to take and use water from the area for certain non-commercial purposes. I consider that the following statement is an example of this:

> When out on Kangoulu country, during my time working on the rails, I lit fires when I camped and used the water for drinking, cooking and washing. I didn't have to ask permission from anyone because those old men I worked with had already told me it was my country. I felt really comfortable there – affidavit of ***[name removed]*** at [29].

Statements suggest that claimants today access water resources while camping for cooking, drinking and washing purposes, and that use of these resources in this way was taught to claimants by their predecessors. From this, it is my view that the material asserts that claimants understand the right to be in accordance with Western Kangoulu traditional laws and customs.

I consider, therefore, that the right can be understood as a native title right or interest, and that it is, prima facie, established.

Subsection 190B(7)
Traditional physical connection

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

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

In *Doepel*, Mansfield J described the nature of the task of the Registrar's delegate at this condition of the test in the following way:

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

From this case law authority, it is my understanding that the application must contain information that speaks in a direct manner to the 'traditional physical connection' of at least one member of the group with some part of the claim area.

Regarding the nature of the connection of that claim group member asserted by the material, in my view, the use of the word 'traditional' requires that the connection is to be understood in light of the meaning given to that term by the High Court in *Yorta Yorta*. That is, the connection must be shown to be one that is in accordance with the laws and customs of the group which has its origins in the society that existed at sovereignty, or European settlement – see *Yorta Yorta* at [46]. This approach was supported by Dowsett J in *Gudjala 2007* – at [89].

It is also my understanding of the decision in *Yorta Yorta*, that the relevant connection may necessarily entail an actual presence on the land – at [184]. The explanatory memorandum to the Native Title Amendment Bill further indicates that the connection in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access' – at [29.19].

Noting the focus of the task outlined in *Doepel* above, in my reasons below I have turned my attention to the factual basis material relevant to one claim group member, being ***[name removed]***, and the traditional physical connection held by ***[name removed]*** with a part of the application area. In considering the information provided by ***[name removed]*** in his affidavit, I am of the view, with reference to the statements made in the s. 62(1)(a) affidavits accompanying the application, that I can accept that information as true.

In his affidavit, ***[name removed]*** states that he is a member of the claim group through his descent from Western Kangoulu ancestor John 'Jack' Bradley (his great grandfather on his father's side), and that he is approximately 60 years in age.

There are a number of statements within ***[name removed]***'s affidavit, in my view, that speak to the physical connection he has previously had, and continues to have, with parts of the application area. The following statements I consider to speak to the previous connection ***[name removed]*** had with parts of the application area:

> ...I then ran away at 16 and lied about my age when I joined the railway up in Emerald... I was the youngest man on those railway gangs, and the others were the old Aboriginal men from around Emerald, Boguntungan and Caren Siding and the surrounding country. This is where I first learned about my traditional country – the old men told me it was my country, and I accepted it because they were my elders.
>
> When I was at Yamboyna Siding, there was one old Aboriginal 'witch doctor' – a clever man named ***[name removed]*** who came from Springsure – who told me it was my traditional country around Emerald. ***[name removed]*** was there too, and he told me the same thing, that my traditional country was around Emerald.
>
> When I worked on the rails, I camped at Rubyvale, Emerald and Clermont and at Yamboyna and Caren sidings – at [7] to [10].

Statements regarding the present or recent connection ***[name removed]*** has had with the area include the following:

> I did lots of Aboriginal cultural heritage protection walks around Emerald country from the time ***[name removed]*** and ***[name removed]*** brought me into the first claim.
>
> I did cultural heritage walks for Kangoulu people at various mine sites including Rio Tinto (near Emerald). We found artefacts everywhere. Each time, we did two weeks on and two weeks off, so we spent a lot of time out there walking on Kangoulu country. ***[name removed]*** (a Western Kangoulu man and descendant of Hanny of Emerald) chose me because he knew I was a traditional person for Western Kangoulu country.

> One time on a walk I wasn't finding any artefacts, so I called out loud to the ancestors to help me. I called out 'come on grandfather, show me some artefacts', and then a whirly wind came up, spun around me and then stopped in one place – everyone saw it, not just me – and where it stopped was a heap of artefacts right there. That was amazing to me, because the old people anserwed my call and wanted me to find them – affidavit of ***[name removed]*** at [15], [16] and [19].

From statements such as these, I understand that previously, as he was growing up, ***[name removed]*** spent considerable time across a number of locations within the application area, working on the railways, and camping with his elders, during which time he was passed knowledge of his traditional country and Western Kangoulu traditional laws and customs. Since this time, the statements indicate that he has been actively involved in cultural heritage protection activities on the application area, and which have again involved him spending considerable time on that area. With reference to the aspects of Western Kangoulu traditional laws and customs discussed in my reasons above at s. 190B(5)(b), the way in which ***[name removed]*** has engaged with ancestor spirits within the landscape, and the way in which he has sought to protect those spirits and the country itself, indicates, in my view, that the physical connection ***[name removed]*** has with the application area, is one in accordance with the traditional laws and customs of the group.

Consequently, I am satisfied that at least one member of the claim group currently has, or previously had, a traditional physical connection with some part of the application area.

The application meets the requirements of s. 190B(7).

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
>
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If :
> (a) a previous exclusive possession act (see s. 23B) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;
> a claimant application must not be made that covers any of the area.
> (3) If:
> (a) a previous non-exclusive possession act (see s. 23F) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The geospatial assessment provides that there are no determinations of native title falling within the external boundary of the application as at the date of the assessment, 15 May 2013. I have since referred to the Tribunal's iSpatial database and confirmed that as at the date of this decision, there is no change to this situation.

Reasons for s. 61A(2)

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

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

Schedule B of the application sets out, through the use of general exclusion clauses, those areas falling within the external boundary of the application area that are not covered by the application. Paragraph [1] of that Schedule adopts the wording of s. 23, defining a 'previous exclusive possession act', in providing that areas covered by such acts/interests are excluded from the application area. In this way, I am satisfied that the application area does not include any area which is covered by a previous exclusive possession act.

Reasons for s. 61A(3)

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

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

Paragraph [3] of Schedule B provides that exclusive possession is not claimed over areas that are subject to previous non-exclusive possession acts done by the Commonwealth or the State of Queensland.

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

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

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

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

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

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

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

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

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

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

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

Schedule P provides that the application does not include a claim to any offshore place.

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

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

There is nothing within the application or before me that suggests the native title rights and interests have been otherwise extinguished.

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Western Kangoulu People**
NNTT file no.	**QC2013/002**
Federal Court of Australia file no.	**QUD229/2013**
Date of registration test decision	**13 June 2013**

Section 190C conditions

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

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

Section 190B conditions

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

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*]